

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

January 22, 2001 Session

MURRAY CARTER v. MURRAY, INC.

**Direct Appeal from the Chancery Court for Madison County
No. 55744 Joe C. Morris, Chancellor**

No. W2000-01261-WC-R3-CV - Mailed May 22, 2001; Filed July 3, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the employer contends the award of permanent partial disability benefits based on 35 percent to the arm is excessive and should be reduced to one based on 10 percent to the arm. As discussed below, the panel has concluded the judgment should be affirmed.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court Affirmed.

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and L. TERRY. LAFFERTY, SR. J., joined.

J. Arthur Crews, II and B. Duane Willis, Waldrop & Hall, Jackson, Tennessee, for the appellant, Murray, Inc.

Lewis L. Cobb, Spragins, Barnett, Cobb & Butler, Jackson, Tennessee, for the appellee, Murray Carter.

MEMORANDUM OPINION

The employee, Murray Carter, is 47 years old with a high school education and experience as a production line welder. His job at Murray, Inc., a manufacturer of lawnmowers and snow blowers, requires heavy lifting, clamping, hanging and packing, in addition to welding. He gradually developed pain, numbness and tingling in his right arm. A nerve conduction study revealed severe carpal tunnel syndrome and he was referred to an orthopedic surgeon in Memphis, Dr. John Brophy,

who performed right carpal tunnel release surgery and, after following him for a while, released him with no restrictions and a 4 percent permanent impairment rating.

Dr. Robert Barnett performed an independent medical examination and assigned a permanent impairment rating of 15 percent to the arm, considering loss of grip strength. Mr. Carter continues to work with pain and numbness in the injured arm, because of "sheer determination to provide" for his family.

Upon the above summarized evidence, the trial court awarded, inter alia, permanent partial disability benefits based on 35 percent to the right arm. Appellate review of findings of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). This standard requires this tribunal to conduct an independent examination of the record to determine where the preponderance lies. See Galloway v. Memphis Drum Serv., 822 S.W.2d 584 (Tenn. 1991). Extent of vocational disability is a question of fact. See Story v. Legion Ins. Co., 3 S.W.3d 450 (Tenn. 1999).

The appellant contends the award of permanent partial disability benefits based on 35 percent to the right arm is excessive because the employee is able to work at the same job as before he was hurt, because greater weight should be given to the opinion of the operating surgeon than that of an independent medical examiner and because the testimony of the operating surgeon suggests the employee lacks credibility. The appellee responds that his own testimony and supporting lay evidence were properly considered by the trial court, which must consider all the statutory elements in determining vocational disability, and because the trial judge found him to be a credible witness. Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. See Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173 (Tenn. 1999).

In determining the extent of an injured worker's permanent vocational disability, trial courts are not limited to consideration of the worker's ability to return to his previous employment, but must consider his job skills and training, education, age, extent of anatomic impairment, duration of disability, local job opportunities and his capacity to work at the kinds of employment available to him in his disabled condition. Perkins v. Enterprise Truck Lines, Inc., 896 S.W.2d 123, 127 (Tenn. 1995). Moreover, an employee's own testimony concerning the extent of his disability is competent and must be considered in assessing the extent of permanent disability, in addition to the opinions of expert medical witnesses as to his clinical impairment. Tom Still Transfer Co, Inc. v. Way, 482 S.W.2d 775, 777 (Tenn. 1972).

Additionally, when the medical testimony differs, the trial judge must choose which view to believe. In doing so, he is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the

importance of that information by other experts. See Orman v. Williams Sonoma, Inc., 803 S.W.2d 672 (Tenn. 1991). Moreover, it is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation See. Combustion Engineering, Inc. v. Kennedy, 562 S.W.2d 202 (Tenn. 1978). The trial court did not abuse its discretion by accepting the opinion of an evaluating physician over that of the treating physician.

For the above reasons and because the evidence fails to preponderate against the trial court's finding, the judgment of the Chancery Court for Madison County is affirmed. Costs on appeal are taxed to the appellant.

JOE C. LOSER, JR.

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JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed to the Appellant, Murray, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM