

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

November 22, 2002 Session

ELIZABETH A. MCBROOM v. OWENS-CORNING CORP.

**Direct Appeal from the Chancery Court for Madison County
No. 57613 Joe C. Morris, Chancellor**

No. W2002-01146-SC-WCM-CV - Mailed December 31, 2002; Filed March 18, 2003

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 questions the trial court's findings with respect to causation, permanency and extent of disability. As discussed below, the panel has concluded the evidence fails to preponderate against the trial court's findings.

Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) 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 JOHN K. BYERS, SR. J., joined.

W. Stephen Gardner and Robert Joseph Leibovich, Memphis, Tennessee, for the appellant, Owens-Corning Corp.

Scott G. Kirk, Jackson, Tennessee, for the appellee, Elizabeth A. McBroom

MEMORANDUM OPINION

The employee or claimant, Ms. McBroom, initiated this civil action to recover workers' compensation benefits for a gradual injury to both arms. At the conclusion of the trial on October 17, 2001, the trial court awarded, among other things, permanent partial disability benefits based on 25 percent to both arms. The employer has appealed.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2002 Supp.). The reviewing court is required to conduct an

independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. 1995). The standard governing appellate review of findings of fact by a trial court requires the Special Workers' Compensation Appeals Panel to examine in depth a trial court's factual findings and conclusions. GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001). 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. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 177 (Tenn. 1999). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 61 (Tenn. 2001). The extent of an injured worker's vocational disability is a question of fact. Seals v. England/Corsair Upholstery Mfg., 984 S.W.2d 912, 915 (Tenn. 1999). Where the medical testimony in a workers' compensation case is presented by deposition, the reviewing court may make an independent assessment of the medical proof to determine where the preponderance of the proof lies. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 367 (Tenn. 1998).

The claimant is approximately 26 years old with a high school education and experience as a production worker and cashier. She began working with the employer, Owens-Corning, in February 1998. Her duties required repetitive use of her hands. She gradually developed bilateral carpal tunnel syndrome. The condition was diagnosed on October 2, 2000 by Dr. Joseph C. Boals, who attributed the injury to her work and assigned permanent impairment ratings of 10 percent to each arm.

Under the Tennessee Workers' Compensation Act, the right of an employee who suffers a work-related injury to recover compensation benefits from his employer is governed by the statutes in effect at the time of the injury. Id at 368. Such statutes are part of the contract of employment and the rights and responsibilities of such injured employee and her employer can only be ascertained from a consideration of those statutes as construed by the courts. Hudnall v. S. & W. Constr. Co. of Tenn., Inc., 60 Tenn. App. 743, 751, 451 S.W.2d 858, 862 (1969). Injuries by accident arising out of and in the course of employment which cause either disablement or death of the employee are compensable. Tenn. Code Ann. § 50-6-103(a). An injury is compensable, even though the claimant may have been suffering from a serious pre-existing condition or disability, if a work-connected accident can be fairly said to be a contributing cause of such injury. An employer takes an employee as she is and assumes the risk of having a weakened condition aggravated by an injury which might not affect a normal person. Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993).

An accidental injury arises out of one's employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001). In order to establish that an injury was one arising out of the

employment, the cause of the death or injury must be proved; and if the claim is for permanent disability benefits, permanency must be proved. Hill v. Royal Ins. Co., 937 S.W.2d 873, 876-7 (Tenn. 1996). In all but the most obvious cases, causation and permanency may only be established through expert medical testimony, Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (1991), but an injured employee is competent to testify as to her own assessment of her physical condition and such testimony should not be disregarded. Walker v. Saturn Corp., 986 S.W.2d 204, 208 (Tenn. 1998).

The appellant contends the opinion of Dr. Boals is unreliable because he relied on the history provided by the claimant, whom, it contends, is unworthy of belief. The trial court implicitly found otherwise.

The appellant further contends the award is excessive. Once the causation and permanency of an injury have been established by expert testimony, the trial judge may consider many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomic impairment, for the purpose of evaluating the extent of a claimant's permanent disability. McCaleb v. Saturn Corp., 910 S.W.2d 412, 416 (Tenn. 1995). The opinion of a qualified expert with respect to a claimant's clinical or physical impairment is a factor which the court will consider along with all other relevant facts and circumstances, but it is for the court to determine the percentage of the claimant's industrial disability. Miles v. Liberty Mut. Ins. Co., 795 S.W.2d 665, 666 (Tenn. 1990).

Giving due deference to the findings of the trial court and from our independent examination of the record, we are unable to say the evidence preponderates against those findings. The judgment is therefore affirmed. Costs are taxed to the appellant.

JOE C. LOSER, JR.

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JUDGMENT

This case is before the Court upon Owens-Corning Corporation's motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well-taken and should be DENIED; 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 will be assessed to Owens-Corning Corporation for which execution may issue if necessary.

PER CURIAM

Holder, J., not participating