

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 23, 2003 Session

PERMANENT GENERAL INSURANCE v. HOWARD E. RAYMER

**Direct Appeal from the Chancery Court for Davidson County
No. 01-2296-III Ellen Hobbs Lyle, Chancellor**

**No. M2002-03042-WC-R3-CV - Mailed - September 23, 2003
Filed - October 23, 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 appellant questions the trial court's findings that the employee's hernias were work related and the extent of his vocational disability. The appellant further contends the trial court erred in not reducing the lump sum award to its present value. As discussed below, the panel has concluded (1) the evidence fails to preponderate against the trial court's findings of fact and (2) Tenn. Code Ann. § 50-6-229(a) prohibits the reduction of a lump sum award to its present value.

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 FRANK F. DROWOTA III, C. J., and FRANK G. CLEMENT, JR., SP. J., joined.

D. Brett Burrow and Gordon C. Aulgur, Brewer, Krause & Brooks, Nashville, Tennessee, for the appellant, Permanent General Insurance

Sean McMinn and Marcia McShane Watson, Law office of Donald D. Zuccarello, Nashville, Tennessee, for the appellee, Howard E. Raymer

MEMORANDUM OPINION

The employer, Permanent General Insurance, initiated this civil action against the employee or claimant, Mr. Raymer, seeking a declaration of its rights and liabilities for three hernias suffered by him. The trial court awarded, among other things, permanent partial disability benefits based on 25 percent to the body as a whole, payable in a lump sum. Permanent General 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). This tribunal is not bound by the trial court's findings but instead conducts an independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). 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 59 years old with an eleventh grade education and a history of working at jobs requiring manual labor. On April 25, 2000, he reported to the employer that he experienced a stinging and burning sensation in his abdomen and groin after lifting a number of mail trays. After a preliminary diagnosis of both an umbilical and inguinal hernia, he was referred to Dr. Albert Spaw for surgery. Surgery was performed on May 19, 2000. Dr. Spaw found and repaired the umbilical hernia but reported finding only weakness in the groin area. The claimant returned to work later the same month.

On July 5, 2000, the claimant revisited Dr. Spaw, again complaining of groin pain. On this occasion, the doctor diagnosed bilateral inguinal hernias, which he repaired on August 7, 2000. The doctor released the claimant on October 2, 2000, but the claimant did not return to work. At the time, he had a stomach tumor, which Dr. Spaw removed in January 2001. He was terminated by the employer on June 16, 2001.

The record contains conflicting medical testimony relative to both causation and extent of the claimant's permanent medical impairment. Dr. Spaw, who found no inguinal hernia following the work related accident, estimated the claimant's permanent impairment at zero percent, without consulting approved guidelines. The doctor later opined, however, that both inguinal hernias had been present for several months. An examining physician, Dr. Fishbein, opined that the inguinal hernias must have occurred gradually and estimated the claimant's permanent impairment to be 9 percent for the three hernias, using approved guidelines.

The Tennessee Workers' Compensation Act deals specifically with claims for compensation benefits for hernia or rupture. In such cases, the claimant must be able to satisfactorily show there was an injury resulting in a hernia or rupture; the hernia or rupture appeared suddenly and was accompanied by pain; the hernia or rupture did not exist prior to the accident for which compensation is claimed; and that it immediately followed the accident. Tenn. Code Ann. § 50-6-212. It has been held that a hernia is "immediate" if it appears so soon after the injury that it would not be possible to attribute it to any other cause. Floyd v. Travelers Ins. Co., 225 Tenn. 38, 463 S.W.2d 407 (1970); Etter v. Blue Diamond Coal Co., 187 Tenn. 407, 215 S.W.2d 803 (1948).

Unless admitted by the employer, the employee or claimant has the burden of proving, by competent evidence, every essential element of his claim. Oster v. Yates, 845 S.W.2d 215, 217 (Tenn. 1992). The claimant must prove that he is an employee, that he suffered an injury by accident, and that such injury by accident arose out of and in the course of his employment by the

employer. Anderson v. Save-A-Lot, Ltd., 989 S.W.2d 277, 279 (Tenn. 1999).

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 (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 his own assessment of his physical condition and such testimony should not be disregarded. Walker v. Saturn Corp., 986 S.W.2d 204, 208 (Tenn. 1998). While expert testimony may be used to establish vocational disability, it is not required; because vocational disability can be established by lay testimony. Perkins v. Enterprise Truck Lines, Inc., 896 S.W.2d 123, 127 (Tenn. 1995).

When the medical testimony differs, the trial court must choose which view to believe. In doing so, the court 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. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). Moreover, it is within the discretion of the trial court to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-7 (Tenn. 1983). Any reasonable doubt concerning the cause of the injury should be resolved in favor of the employee. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 168 (Tenn. 2002).

In a workers' compensation case, a trial judge may properly predicate an award on medical testimony to the effect that a given incident "could be" the cause of a claimant's injury, when, from other evidence, it may reasonably be inferred that the incident was in fact the cause of the injury, GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001), but an award may not be based on conjecture or speculation. Reeser v. Yellow Freight System, Inc., 938 S.W.2d 690 (Tenn. 1997). Absolute certainty on the part of a medical expert is not necessary to support a workers' compensation award, for expert opinion must always be more or less uncertain and speculative. McCaleb v. Saturn Corp., 910 S.W.2d 412, 414-15 (Tenn. 1995). In this case, the medical proof of causation is sufficient to establish that there was an injury resulting in a hernia, fulfilling the first requirement of Tenn. Code Ann. § 50-6-212.

It is undisputed that the umbilical hernia is compensable. The trial court concluded, based on lay and medical proof, that the other hernias probably occurred at the same time and place. It is a reasonable inference. The preponderance of the evidence is not otherwise.

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. Tenn. Code Ann. § 50-6-241(b). Because the employee did not make a meaningful return to work, the cap contained in Tenn.

Code Ann. § 50-6-241(a) is not applicable. See Newton v. Scott Health Care Center, 914 S.W.2d 884 (Tenn. 1995). From a consideration of the relevant factors, to the extent they were proved, we cannot say the evidence preponderates against the trial court's award based on 25 percent permanent partial disability to the body as a whole.

Permanent disability benefits that are payable periodically may be commuted to one or more lump sum payment(s) on motion of any party subject to the approval of the circuit, chancery or criminal court. Lump sum payments shall, in the aggregate, amount to a sum of all future installments of compensation. Tenn. Code Ann. § 50-6-229(a). We are aware of no rule or authority which would require - or even permit - a trial court to reduce a lump sum award to its present value. We deem the plain language of the statute to be mandatory.

For those reasons, the judgment of the trial court is affirmed. Costs 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 will be paid by the Appellant, Permanent General Insurance, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM