

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

November 27, 2002 Session

KENNY SEARCY v. UNIPRES U.S.A., INC., ET AL.

**Direct Appeal from the Circuit Court for Sumner County
No. 2000C-374 C. L. Rogers, Judge**

**No. M2002-00245-WC-R3-CV - Mailed - December 30, 2002
Filed - January 31, 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 insists (1) the trial court erred in concluding the plaintiff's impairment was the result of his work related injury and (2) the award of permanent partial disability benefits based on 35 percent to the body as a whole is excessive. As discussed below, the panel has concluded the judgment should be affirmed.

Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the Circuit Court Affirmed

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, C. J., and JOHN K. BYERS, SR. J., joined.

M. Clark Spoden and Irene L. Wolfe, Nashville, Tennessee, for the appellant Unipres U.S.A., Inc.

Clinton L. Kelly, Hendersonville, Tennessee, for the appellee, Kenny Searcy

MEMORANDUM OPINION

The employee or claimant, Mr. Searcy, initiated this civil action against the employer, Unipres, to recover workers' compensation benefits for injuries suffered in an alleged work related accident occurring on July 20, 1999. By its late filed answer, the employer admitted liability but questioned the extent of its liability for permanent disability benefits. Following a trial on December 27, 2001, the trial court awarded, among other things, permanent partial disability benefits based on 35 percent to the body as a whole. The employer has appealed.

For injuries occurring on or after July 1, 1985, 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). 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, McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. 1995), 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, 178 (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). Extent of vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (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).

The claimant is a thirty-seven year old skilled worker who worked for the employer for thirteen years. The employer is in the business of stamping and assembling automotive parts for manufacturers of automobiles. He was an athletic man and in apparent good health until he slipped and fell at work on July 20, 1999. After the accident, he continued to work for a while with pain while receiving weekly pain medication from the company doctor. He also visited his favorite chiropractor from time to time for treatment of sore shoulder muscles, unrelated to the accident. On November 11, 1999, he visited another chiropractor, Dr. Tigges, who eventually recommended an orthopedic consultation. The claimant eventually agreed to see an orthopedic surgeon, Dr. Terry. An MRI confirmed a cervical disc herniation. Dr. Terry referred the claimant to another orthopedic surgeon, Dr. O'Brien.

Dr. O'Brien performed corrective surgery, provided follow-up care and estimated the claimant's permanent medical impairment to be 9 percent to the whole body. Dr. O'Brien also attributed the impairment to the slip and fall accident at work. The claimant did not make a meaningful return to work for the employer. He is working for another employer at a greatly reduced wage. He testified that he continued to have disabling pain following the surgery.

The appellant first contends the trial court erred in finding the claimant's disability is work related, arguing that it could have resulted from some other cause because the claimant is an active person. Under the Tennessee Workers' Compensation Law, 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. § 50-6-102(a)(12). 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. Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993). In all but the most obvious cases, causation 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. McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn. 1999). Not every injury by accident which occurs in the course of employment is compensable; it is only compensable if it also arises out of employment, but any reasonable doubt as to whether such an injury arises out of the employment should be resolved in favor of the employee. Reeser v. Yellow Freight System, Inc., 938 S.W.2d 690, 692 (Tenn. 1997). From our independent examination of the record, and giving due deference to the findings of the trial court, we cannot say the evidence preponderates against the finding that the claimant's disability is related to his accident at work.

The appellant next contends the award is excessive. When an injured employee's partial disability is adjudged to be permanent, the employee is entitled to benefits based on a percentage of disability rather than the amount the employee is able to earn in his partially disabled condition. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 458 (Tenn. 1988). 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). 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).

From our independent examination of the record and a consideration of the pertinent factors, to the extent they were established by the evidence, we cannot say the evidence preponderates against the findings of the trial court.

The judgment 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, Unipres U.S.A., Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM