

**IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(October 9, 1995 Session)**

CHARLES E. CAREY,)	
)	
Plaintiff-Appellant,)	MADISON CHANCERY
)	
V.)	Hon. Joe C. Morris,
)	Chancellor
)	
CAROLINA FREIGHT CARRIERS)	No. 02S01-9506-CH-00050
CORPORATION,)	
)	
Defendant-Appellee.)	

FILED

September 9, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

For Appellant:

For Appellee:

James T. Ryal, Jr.
Adams, Ryal & Flippin, P.C.
Humboldt, TN

William F. Kendall, III
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MEMORANDUM OPINION

Members of Panel:

_____ Lyle Reid, Associate Justice, Supreme Court
Joe C. Loser, Jr., Special Judge
Janice M. Holder, Special Judge

AFFIRMED AS MODIFIED

Holder, Judge

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court pursuant to Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law.

In its appeal, the employer contends that the evidence does not support the trial court's award of seventy percent (70%) to the lower extremity and that the trial court erred in computing the employee's average weekly wage at \$273.00 instead of \$220.21 per week. The panel concludes that the evidence preponderates against the trial court's assessment of permanent disability and modifies the award to thirty-five percent (35%) to the lower extremity. Properly computed, the employee's average weekly wage is \$220.21 per week.

Charles E. Carey ("Carey") was injured on December 27, 1991, when a bank vault weighing five hundred pounds fell off a fork lift and struck the front part of his left thigh. He was initially treated by Dr. R. Michael Cobb, an orthopedic surgeon, who suspected a torn ligament in Carey's knee. Dr. Cobb later concluded, however, that the ligament was not torn and that surgery was not needed. In February, 1992, Carey began to complain of numbness in his toes, although Dr. Cobb was unable to find any indication of injury to the sciatic nerve, which provides feeling to the toes. Carey was given a note to return to work on March 10, 1992.

Upon examination on March 16, 1992, Carey's range of motion was excellent and his strength appeared to be normal. He advised Dr. Cobb that he was having no problem at work. A nerve conduction study, performed as a result of the complaints of toe numbness, showed no sign of injury to the sciatic nerve. Carey was given no permanent physical anatomical impairment and was discharged from Dr. Cobb's care on March 16, 1992.

When he returned to work in March, Carey performed the same duties that

he had performed before the injury, including deliveries, pick-ups and dock loading for outbound truck rigs. His supervisors reported good performance. Carey did not miss any additional work and Carey retired in May 1993 for the purpose of maintaining health insurance benefits.

Carey was seen by Dr. Joseph Boals for an evaluation on October 5, 1993. Dr. Boals diagnosed residuals from a crushing injury and laxity of the left ankle. An anatomical impairment rating of fifteen percent (15%) to the left lower extremity was given, with Dr. Boals finding that one percent (1%) of the rating was probably due to some degree of overlay.

Carey was asked to return to Dr. Cobb in light of Dr. Boals' findings. Dr. Cobb found no laxity in the ankle and Carey made no complaints to him of any ankle problems or pain. Measurements of the circumference of both thighs and calves were equal. With respect to Carey's complaint that his toes were paralyzed, Dr. Cobb reflected in his office notes that he was "certain that Mr. Carey is faking by the observations made confirming that he did have function of his toe and ankle extensors when in fact he said he could not extend them." A claim of paralysis, according to Dr. Cobb, was inconsistent with the nature of the injury received. Dr. Cobb's assessment of permanent impairment was again zero percent (0%).

Carey is 59 years old with a sixth grade education and a GED. His experience included two years of service in the Army, where he received training in communications, two years of insurance sales, and general farm work. The majority of his experience, however, totaling approximately twenty-five (25) years, was in the trucking industry. His duties as a truck driver included making pickups and deliveries and working the loading docks. At the time of his injury, he was working for both the defendant and another trucking company on a part-time basis. As a part-time employee for Carolina, he worked between two (2) and

five (5) days a week at an hourly rate of \$13.55.

Much of the testimony at trial concerned Carey's employment status at the time of the injury. He contended that he had recently begun working as a "probationary" employee and had been promised by his supervisor that if the thirty (30) day probationary period were successfully completed, he would be hired as a full-time employee. The defendant contended that Carey was at all times a casual, or part-time, employee and denied that any promises were made concerning full-time employment.

The trial court awarded benefits based on an average weekly wage of \$273.00 per week, based on his hourly rate multiplied by a forty (40) hour work week, and found him to have a seventy percent (70%) vocational disability.

VOCATIONAL DISABILITY RATING

Our scope of review of findings of fact by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225 (e)(2). "This standard differs from that previously provided and requires this Court to weigh in more depth factual findings and conclusions of trial judges in workers' compensation cases." Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987).

Where the trial judge has seen and heard witnesses, the trial judge is given considerable deference on matters of credibility and the weight of oral testimony on review. Id. This panel, however, is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies when the medical testimony is presented by deposition as it was in this case. Henson v. City of Lawrenceburg, 851 S.W.2d 809, 812 (Tenn. 1993).

Dr. Boals examined Carey on only one occasion. A portion of his

assessment of permanent partial disability acknowledged possible overlay. Dr. Cobb treated and evaluated Carey both before and after Dr. Boals' assessment and found that Carey's subjective complaints could not be supported.

Weighing Dr. Cobb's testimony against that of Dr. Boals, this panel is persuaded that insufficient weight was given by the trial court to the testimony of Dr. Cobb and finds that the evidence preponderates against the trial court's assessment of seventy percent (70%) permanent partial disability. Considering all of the relevant facts and circumstances in this case, this panel finds that a preponderance of the evidence supports a finding that Mr. Carey sustained a thirty-five percent (35%) permanent disability to the left lower extremity.

The finding of permanent disability by the trial court is accordingly modified.

AVERAGE WEEKLY WAGE

Tenn. Code Ann. § 50-6-102 provides as follows:

(a)(1) (A) "Average weekly wages" means the earnings of the injured employee in the employment in which the injured employee was working at the time of the injury during the period of fifty-two (52) weeks immediately preceding the date of the injury divided by fifty-two (52); * * *

(B) Where the employment prior to the injury extended over a period of less than fifty-two (52) weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, that results just and fair to both parties will thereby be obtained;

Carey lost his previous employment in 1991 and was injured while in the employ of the defendant in 1991. He worked less than fifty-two (52) weeks immediately preceding the date of the injury. It is not disputed that if Carey's actual earnings were divided by the number of weeks that he actually worked, his

average weekly wage would be \$220.21, not \$273.00.

The average weekly wage of a worker must be determined by past earnings and not by what the worker may earn in the future. Armstrong v. Spears, 393 S.W.2d 729, 733 (Tenn. 1965). What a person would work if allowed or if "he had felt like it" is not considered in determining the actual average weekly wage of an employee. McKinney v. Feldspar Corp., 612 S.W.2d 157, 160 (Tenn. 1981).

Even if we were to resolve the issue of probationary status in favor of the claimant, it would be insufficient to support the trial judge's computation of the average weekly wage. If, as the statute states, the average weekly wage must be computed by using actual earnings, a promise alone of additional hours cannot be used to increase the average weekly wage. Moreover, the promise itself was conditional. In the words of Carey, only if he worked thirty (30) days and didn't have "any problems and no accidents or anything" would he go on regular status.

The claimant contends that this construction of the statute does not provide results that are "just and fair to both parties" as required by the statute. Nothing in the record suggests that fairness is not achieved under the facts in this case by dividing Carey's actual earnings by the number of weeks that he worked. The judgment of the trial court is modified accordingly and the case is remanded for such further proceedings as may be needed to enforce the judgment as modified, as well as for the collection of costs. Costs on appeal are taxed to the plaintiff-appellee.

Janice M. Holder, Judge

CONCUR:

Lyle Reid, Associate Justice

Joe C. Loser, Jr., Special Judge