

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
July 18, 2005 Session

**BUILDING MATERIALS CORPORATION d/b/a GAF MATERIALS
CORPORATION v. LEONARD COLEMAN**

**Direct Appeal from the Davidson County Chancery Court
No. 02-1657-II Carol L. McCoy, Chancellor**

**No. M2004-01829-WC-R3-CV - Mailed - October 27, 2005
Filed - November 28, 2005**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeal 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. The employee sustained injuries to his left shoulder while working for the employer. The trial court: (1) held that the injury was compensable; (2) awarded a 45 percent vocational disability; (3) awarded the employee 45 weeks of temporary total disability benefits; (4) held that the employer denied the claim in bad faith; and (5) awarded a bad faith penalty of 25 percent of the temporary total disability award plus 25 percent of the permanent partial disability award. We affirm the trial court's finding that the injury was compensable. We affirm the award of 45 percent to the arm. We modify the award of 45 weeks of temporary total disability to 16 weeks. We vacate the penalty for partial permanent benefits, but affirm the penalty for temporary total benefits, as modified.

**Tenn. Code Ann. § 50-6-255(e)(3) Appeal as of Right; Judgment of the Circuit Court
Vacated in Part; Affirmed as Modified**

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J. and DONALD P. HARRIS, SR. J., joined

Brian A. Lapps, Nashville, Tennessee, for the appellant, Building Materials Corporation d/b/a/ GAF Materials Corporation.

Ann Buntin Steiner, Nashville, Tennessee, for the appellee, Leonard Uriah Coleman.

MEMORANDUM OPINION

The employee filed this action seeking benefits for shoulder injuries. At the time of trial, he was forty-eight years old with a ninth grade education. In May of 2001, he experienced a sharp pain in his left shoulder while raising his left arm to pull fiberglass.

He was first referred to and treated by Dr. Miller, who prescribed pain medications, two weeks of physical therapy, and one to two weeks of light work duty. Following this treatment, he returned to his regular duties. The pain continued, and one year after his initial care, he sought treatment from Dr. J. W. Thomas Byrd who assessed the employee's condition and ordered an MRI of his left shoulder, which was performed on May 9, 2002.

In May of 2002, hot fiberglass spilled onto the employee's sleeve, causing him to jerk his arm, which resulted in an increase in his shoulder pain. On May 15, 2002, he saw Dr. Byrd, who limited the use of his arm.

On June 1, 2, and 3, 2002, an individual hired by the employer videotaped the employee lifting wooden slats into the back of his truck and removing a saw from his truck with both arms. This occurred shortly after the employee had sworn he could lift nothing with his left arm.

On June 25, 2002, the employee met with Dr. Byrd to discuss and schedule surgery. That same day, his claim was denied by the insurance adjuster who handled his claim. The adjuster had previously asked Dr. Byrd whether the employee's videotaped activities could have contributed to his injury. However, Dr. Byrd's response was not received until July of 2002, after the claim had already been denied. Dr. Byrd stated that he believed the employee's videotaped activities could have contributed to the employee's condition. The employer also interviewed the employee who stated that he was unable to lift groceries with his left arm. This interview was also conducted after the claim had been denied.

On November 18, 2002, the employee was terminated for alleged dishonesty. He had continued to work in a restricted capacity from the time medical restrictions were placed upon him until the date of his termination. Three of the treating physicians, Dr. Byrd, Dr. David Gaw, and Dr. J. Michael Kioschos, gave depositions concerning the employee's condition. All three testified that his workplace activities caused his injury or his symptoms. Dr. Kioschos performed surgery on the employee's left shoulder on April 23, 2003, and on August 1, 2003 determined that he had reached maximum medical improvement. Subsequently, Dr. Gaw assigned the employee a 10 percent impairment rating to the body as a whole or a 17 percent impairment rating to his upper extremity.

A judgment was entered which provided: (1) the employee sustained a compensable injury; (2) the employee's arm had a vocational disability rating of 45 percent; (3) the employee was awarded 45 weeks of total temporary disability benefits; (4) the employer denied the claim in bad faith; and (5) the employee was awarded a bad faith penalty of 25 percent of *both the temporary total disability and the permanent partial disability awards*. The employer appeals and presents for review all of the trial court's findings.

Discussion

We review the case *de novo* with the presumption that the factual findings are correct unless the evidence otherwise preponderates. Tenn. Code Ann. § 50-6-225(e)(2); Rule 13(d) Tenn. R. App. P. We are required to weigh in more depth the factual findings of the trial court and examine each finding independently to determine where the preponderance of the evidence lies. *Guess v. Sharp Mfg. Co. of Am.*, 114 S.W.3d 480, 484 (Tenn. 2003).

The first issue is whether the employee's injury is compensable. Under Tennessee workers' compensation law, injuries by accident arising out of and in the course of employment are compensable. Tenn. Code Ann. § 50-6-103(a); *McCurry v. Container Corp. of America*, 982 S.W.2d 841, 843 (Tenn. 1998). Our Supreme Court has consistently held that "an award of benefits may properly be based upon medical testimony to the effect that the employment could or might have been the cause of the worker's injury when, from other evidence, it can reasonably be inferred that the employment was the cause of the injury." *Hill v. Eagle Bend Mfg. Inc.*, 942 S.W.2d 483, 487 (Tenn. 1997).

The employee's injuries are compensable because they arose out of and in the course of his employment. He testified that he first felt the sharp pain in his left shoulder while raising his left arm to pull fiberglass in May of 2001 and that the pain returned in May of 2002 when hot fiberglass spilled onto his sleeve, causing him to jerk his arm. Although the employer argues that the employee was not credible, the trial court found otherwise and considerable deference must be accorded to the trial court's findings on issues related to credibility of witnesses. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997).

In addition to the employee's testimony that the injury was work-related, all three physicians testified that the employee's injury was likely caused by his job duties. Dr. Byrd, an orthopedic surgeon who treated the employee, testified that his shoulder condition resulted from an injury at work. Dr. Gaw, a physician who also specializes in orthopedics, determined that he needed surgery due to his work activities. Furthermore, Dr. Kioschos, the orthopedic surgeon who eventually performed surgery on the employee, testified that the injury was work-related. Given this testimony, we find that the evidence does not preponderate against the trial court's finding that the employee's injury was compensable.

The second issue is whether the trial court erred in awarding 45 percent vocational disability to the employee's arm. The extent of vocational disability is a question of fact for the trial court to determine from all of the evidence. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 458 (Tenn. 1988). In determining vocational disability, the inquiry is whether the employee's earning capacity in the open labor market has been diminished due to the injury. *Id.* at 459. In making this determination, we consider "many pertinent factors, including job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to the anatomical disability testified to by medical experts." *Clark v. Nat'l Union Fire Ins. Co.*, 774 S.W.2d 586, 588 (Tenn. 1989). The fact that an injured employee is re-employed after the injury is relevant in determining vocational disability but is only one of many factors that should be considered. *Id.* at 589. Moreover, vocational disability exists despite an employee's return to employment "if the employee's ability

to earn wages in any form of employment that would have been available to him in an uninjured condition is diminished by an injury.” *Id.* at 589.

The award of benefits for 45 percent to the left arm was based on the testimony of Dr. Gaw, who assigned the employee a 10 percent impairment rating to the body as a whole or a 17 percent impairment rating to the left arm. Although the trial court’s vocational impairment rating was significantly higher than the medical rating assigned by Dr. Gaw, the employee testified at trial that he still experiences pain when lifting his shoulder. Furthermore, we note there was little evidence at trial showing that the employee had additional education that would enable him to work in a different environment. He was forty-eight years old at the time of trial and has worked in the same capacity for the same company for approximately twelve years. His capacity to work in an industrial setting has decreased due to the pain he experiences when lifting his left shoulder. We therefore find that his earning capacity in the open market has been significantly diminished and affirm the trial court’s vocational impairment rating.

The third issue is whether the trial court’s award of 45 weeks of temporary total disability benefits was excessive. Temporary total disability refers to the injured employees’ condition while disabled to work because of his injury and until he recovers as far as the nature of his injury permits. Benefits for temporary total disability are payable until the injured employee is able to return to work or, if he does not return to work, until he reaches MMI, at which time his entitlement to such benefits terminates. *Prince v. Sentry Ins. Co.*, 908 S.W.2d 937, 939 (Tenn. 1995); *Fagg v. Hutch Mfg. Co.*, 755 S.W.2d 446, 452 (Tenn. 1988).

Three dates direct our analysis. First, he was terminated by the employer on November 18, 2002. Although the employee was on light duty until the date of his termination, he was working. Second, he underwent surgery on April 23, 2003. Third, his MMI was August 1, 2003. The trial court awarded the employee Temporary total disability benefits from the date of his termination until the date he was placed at MMI. The trial court found that Mr. Coleman was wrongfully terminated on November 18, 2002, and awarded him temporary total disability benefits from that date until August 1, 2003 when he reached MMI. This rationale does not support an award of temporary total disability benefits. Mr. Coleman was able to work - he was working - and the employer discharged him for purported fraud. Whether the discharge was wrongful or not was not within the purview of the trial court - it was not a judicable issue - and could not form the basis for punitive sanctions in a workers’ compensation case. The employer argues that, at best, Mr. Coleman is entitled to temporary total disability benefits from April 3, 2003 - the date of his surgery - to August 1, 2003, when he reached MMI. We agree. The judgment is modified accordingly.

The fourth issue is whether the trial court erred in finding that the employer denied the employee’s claim in bad faith. Although there is no comprehensive definition of bad faith in Tennessee, several cases guide our inquiry, one being *Southern Fire and Casualty Co. v. Norris*, 250 S.W.2d 785 (Tenn. Ct. App. 1952) which provides that an insured is owed the ordinary care and diligence of the insurer in investigating the case, and the manner in which the insurer investigates the case “has an important bearing upon the question of bad faith in refusing or failing to settle the claim.” *Id.* at 790-91. Thus, a negligent action by the insurer that falls short of this standard can evidence bad faith. *Id.* at 791. This case further stands for the proposition that an insurer’s mistaken

judgment is not bad faith if it was made honestly and investigated with ordinary care and diligence, but an insurer's departure from the standard of ordinary care in the investigation and settlement of claims can result in liability for bad faith. *Aycock Hosiery Mills v. Maryland Casualty Co.*, 11 S.W.2d 889, 892 (Tenn. 1928).

It was formerly provided by statute that "any employer or such employer's insurance carrier who fails to pay compensation as herein provided shall suffer a penalty of six percent (6%) on any unpaid installment." Tenn. Code Ann. § 50-6-205(b)(3). This statute was interpreted in *Mayer v. Genesco*, 510 S.W.2d 855 (Tenn. 1974), in which the Supreme Court found that a bad faith penalty should not be assessed to a party who had denied a payment if "such failure to pay was in good faith, or based on a reasonable judgment or doubt. *Id.* at 882. This provision was also considered in *Fagg*, where the Court found there was an "obvious demonstration of bad faith" when an employer "arbitrarily" discontinued workers' compensation payments. 755 S.W.2d at 458. Finally, in *Hale v. Commercial Union Assurance Cos.*, 637 S.W.2d 865 (Tenn. 1982), this Court opined that bad faith is akin to fraud or wrongfulness. *Id.* at 869. But this statute was superseded by a 2004 amendment which imposes a penalty of 25 percent on unpaid *temporary total benefits only*.

The insurance adjuster who denied the employee's claim testified that she did so because the employee's videotaped acts of lifting wooden slats and a saw were inconsistent with the employee's statement during deposition that he could not lift a bag of groceries. She testified that she also relied on Dr. Byrd's July 2002 response that the videotaped activities surpassed the medical restrictions placed on the employee. We find that these justifications are disingenuous, for the reasons following.

First, the claim was denied on June 25, 2002. Dr. Byrd's opinion that the employee was not adhering to his medical restrictions was not received until July of 2002. The statement from the employee that he could not lift groceries was made in a deposition in July of 2002. Thus, at the time the claim was denied, the employer did not possess the very information it asserted at trial in attempting to justify its decision to deny the employee's claim. *The events that purportedly explained the denial of this claim did not exist at the time the claim was denied.* The employer thus failed to offer any valid reason for denying the claim at the time of the actual denial.

To deny an insurance claim without a factual basis for doing so and to subsequently misrepresent the reasons for the denial is bad faith. This action is a departure from the ordinary care and diligence that our case law holds is required of an insurer when handling an insured's claim. *See Southern Fire and Casualty Co. v. Norris*, 250 S.W.2d 785 (Tenn. Ct. App. 1952). The denial here reaches beyond an honest but mistaken judgment; it represents an unfounded and arbitrary decision made without a full investigation. Indeed, *the insurance adjuster testified that she never watched the videotape that allegedly showed the employee violating his medical restrictions and that she did not have the employee's deposition at the time when the claim was denied.* The employer did not demonstrate that any investigation had been done before denying the claim.

We emphasize that had the justifications that the employer offered for denying the claim existed at the time the claim was denied, a finding of bad faith would not have been warranted. In

that hypothetical scenario, the employer would have adequately investigated the merit of the employee's claims and based its decision to deny the claim on reasonable facts. However, the reality of this case is that there is no evidence of any material investigation prior to the date the claim was denied. That, coupled with the fact that the employer offered only temporal impossibilities to justify the denial of the claim, leads us to find that there was a bad faith failure to pay temporary total benefits. We affirm the trial court's finding of bad faith which justifies the penalty of 25 percent on the temporary total benefits as modified.

Two statutes, Tenn. Code Ann. §§ 50-6-205(b)(3), and 50-6-225(j), provide for the imposition of a penalty of 25 percent on the dollar amount awarded for temporary total disability in the event the failure to pay such benefits was occasioned by bad faith.

Neither statute authorizes a penalty for failure to pay benefits for permanent partial disability, and the assessment of a penalty for failure to pay permanent partial benefits is vacated.

As modified, the judgment is affirmed, with costs assessed to the parties equally.

WILLIAM H. INMAN, SENIOR JUDGE

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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 appeals 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 assessed to the parties equally, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM