

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
Special Workers' Compensation Appeals Panel
June 10, 2005 session

THOMAS GARY WESTON, III v. WASTE MANAGEMENT, INC.

**Direct Appeal from the Chancery Court
of Rutherford County
No. 01-2828WC, Honorable Robert E. Corlew, III, Judge**

**No. M2004-01036-WC-R3-CV - Mailed: August 2, 2005
Filed - October 13, 2005**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusion of law. The employee appeals the trial court's finding of no permanent disability. We conclude that the judgment of the trial court should be affirmed.

Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right; Judgment of the Chancery Court Affirmed.

TURNBULL, SP. J. Delivered the opinion of the court, in which Drowota, C.J., and Daniel, SR. J. joined.

Jerry Scott and Chad Allen Massey, Scott & Associates, Murfreesboro, TN, for the appellant, Thomas Gary Weston, III.

Elaine M. Youngblood, Ortale, Kelley, Herbert & Crawford, Nashville, TN, for the appellee, Waste Management, Inc.

MEMORANDUM OPINION

FACTS

The employee-appellant, Thomas Gary Weston, was working as a roll-off driver for the defendant-appellee, Waste Management, when a work-related accident occurred on June 28, 2000. Mr. Weston's job entailed driving an elongated straight bed truck to pick up and transport large steel boxes of solid waste. When the accident happened, he was climbing down the left side of the truck after securing a tarpaulin. He fell eight to ten feet and landed horizontally in a ditch. Over the next several hours, Mr. Weston experienced increasing back, neck, and head pain. He eventually went to the emergency room the morning after the accident. His x-rays and CT scan were normal. The emergency room doctor prescribed pain medication and muscle relaxers and instructed him to follow up with a physician. Mr. Weston returned to work after missing a day.

Mr. Weston's family physician and chiropractor, Dr. Allen Polk, treated him through July 24, 2000, and released him to work with no restrictions, stating that Mr. Weston had "no permanent injury or disability." Mr. Weston worked for the next six months and did not report any problems to Waste Management during that period, although he testified that he had back pain that was aggravated by the rough movement of the roll-off truck. In January 2001, he complained to Waste Management for the first time since he was released by Dr. Polk. A safety manager at Waste Management sent Mr. Weston to Baptist Health Care because of his complaints of headaches, neck and back pain. Baptist Health Care prescribed two to three weeks of physical therapy and gave him pain medication which prevented him from working for a few days. Waste Management then required that Mr. Weston be evaluated by another doctor before allowing him to work again.

In March of 2001, Dr. John Nichols, a physician recommended by Waste Management, evaluated Mr. Weston. Dr. Nichols prescribed two to three weeks of physical therapy and released Mr. Weston to return to work. Dr. Nichols testified in his deposition that he did not believe that Mr. Weston's pain was a result of the 2000 accident because there had been "pain-free intervals." Dr. Nichols opined that Mr. Weston's pain was the result of being overweight and in poor physical condition.

When Mr. Weston completed physical therapy, he returned to Dr. Nichols in April of 2001. Mr. Weston wrote on his intake form that he was having less pain and greater range of motion. Dr. Nichols testified that Mr. Weston's condition had vastly improved in the three weeks since his previous visit and that he had advised Mr. Weston to continue with physical therapy exercises. When Mr. Weston returned in June, Dr. Nichols determined that he had full range of motion and any pain he was feeling was from failing to do physical therapy exercises. Dr. Nichols determined that Mr. Weston had no permanent physical impairment according to the 5th Edition of the AMA Guides for the Evaluation of Impairment.

A month later in July of 2001, Mr. Weston went for an evaluation to Dr. Thomas O'Brien, a medical doctor recommended by Waste Management. Dr. O'Brien determined that Mr. Weston's symptoms were not attributable to the accident and released him to return to work without restriction. Mr. Weston returned to work but requested a new job assignment because the movement of the truck irritated his back. Waste Management denied his request. Mr. Weston's attendance at work became more and more sporadic. After two letters from Waste Management requesting that he return to work full time, his employment was terminated.

After leaving Waste Management, Mr. Weston found lower-paying jobs and eventually moved to Florida. In August of 2002, Mr. Weston began seeing Dr. Jason Orlando, a Florida chiropractor. After x-rays and diagnostic testing, Dr. Orlando determined that Mr. Weston's cervical vertebrae C2 through C3 were rotated to the right and were causing muscle spasm. Dr. Orlando placed a twenty pound lifting restriction on Mr. Weston. Dr. Orlando also sent Mr. Weston to Wise Diagnostic Solutions ("Wise Diagnostic") for additional evaluations. Thomas Elliot, a rehabilitation and vocational expert at Wise Diagnostic, used Dr. Orlando's observations along with his own testing to diagnose Mr. Weston with twenty-one (21%) percent to the body as a whole anatomical impairment rating and a vocational disability rating of fifty-five (55%) percent. Dr. Orlando then reduced the anatomical impairment rating as it related to the accident at Waste Management to thirteen (13%) percent impairment because of other factors such as Mr. Weston's excess weight. At the time of trial, Mr. Weston complained of continued dull back pain that had improved since he started regularly using an exercise machine.

The trial judge accepted as more persuasive the impairment ratings of Drs. Polk,

Nichols, and O'Brien, finding no permanent disability. It is from this judgment that Mr. Weston appeals.

SCOPE OF REVIEW

On appeal, we are to review the record anew, with the presumption that the factual findings of the trial court are correct unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2002). Where the trial court has seen and heard the witnesses, the trial court's determination of issues of credibility and the weight to be given to oral testimony must be accorded considerable deference on review because the trial court had the opportunity to observe the demeanor of the witness. Long v. Tri-Con Indus., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999); McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. 1995). The trial court's findings with respect to credibility may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Richards v. Liberty Mutual Ins. Co., 70 S.W.3d 729, 733-34 (Tenn. 2002). Where, as here, the medical testimony is presented by deposition or other written evidence, the reviewing court may make an independent assessment of that written evidence to determine where the preponderance of the evidence lies. See Cooper v. Ins. Co. of N. Am., 884 S.W.2d 446, 451 (Tenn. 1994).

ANALYSIS

Mr. Weston argues that the trial court erred in finding that he suffered no permanent disability as a result of his accident at Waste Management. He asserts that the testimony of Dr. Orlando and Mr. Elliot, as well as Mr. Weston's own oral testimony, preponderate against that of Drs. Polk, Nichols, and O'Brien. Mr. Weston urges this Panel to apply Long, which states that a court may "properly predicate an award in favor of an employee based on medical evidence that an incident 'could be' the cause of the injury, where the trial judge has also heard lay testimony from which it reasonably inferred that the incident was in fact the cause of the injury." 996 S.W.2d at 177.

Where the trial court makes a determination based on live witness testimony, especially when issues of credibility and weight of oral testimony are involved, we must give great deference to that finding on review. Humphry v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987).

The trial court believed Mr. Weston's testimony that he initially experienced pain because of the accident, but determined that Mr. Weston's oral testimony and the depositions of Dr. Orlando and Mr. Elliot were less persuasive than the depositions of the three doctors who saw him in the two years after the accident. After reviewing the record de novo, we can find no reason to disagree with the trial court's findings

Mr. Weston worked for six months after the accident without complaining to Waste Management about experiencing any pain. When he went to the emergency room on the day after the accident, his x-rays and CT scan were normal. An emergency room doctor, Mr. Weston's own family physician, and two additional physicians from Waste Management panels treated and released Mr. Weston with no restrictions and no permanent disability. It was not until more than two years after the accident that Dr. Orlando treated Mr. Weston and determined that he suffered a thirteen (13%) percent impairment rating and had a permanent disability. From a review of the entire record, we find that the evidence does not preponderate against the finding of no disability.

CONCLUSION

For the reasons set out above, we affirm the judgment of no permanent disability. Costs are assessed against the appellant, Mr. Weston.

John A. Turnbull, Special Judge

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Thomas Gary Weston, III, 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Thomas Gary Weston, III, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM