

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON  
March 22, 2010 Session

**JOHN CARTLIDGE v. STATE OF TENNESSEE**

**Direct Appeal from the Tennessee Claims Commission  
No. 2006-061-6688 Nancy Miller-Herron, Commissioner**

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**No. W2009-01677-WC-R3-WC - Mailed July 27, 2010; Filed August 27, 2010**

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Employee suffered a compensable back injury in the course of his employment for the State of Tennessee. The Claims Commission found that he was permanently and totally disabled. On appeal, the State contends that the evidence preponderates against the finding of permanent total disability. We affirm the judgment.<sup>1</sup>

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;  
Judgment of the Tennessee Claims Commission Affirmed**

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, C. J., and D. J. ALISSANDRATOS, SP. J., joined.

Robert E. Cooper, Jr., Attorney General & Reporter; Michael E. Moore, Solicitor General; Dawn Jordan, Assistant Attorney General, for the appellant, State of Tennessee.

Art D. Wells, Jackson, Tennessee, for the appellee, John Cartlidge.

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<sup>1</sup> Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law.

## MEMORANDUM OPINION

### Factual and Procedural Background

John Cartlidge (“Employee”) was a Licensed Practical Nurse (“LPN”) at Arlington Developmental Center. He was injured on May 21, 2006, when he slipped on water in a shower area and fell on his back. The parties stipulated that proper notice of the injury was given to the State of Tennessee. Employee had suffered from lower back pain prior to his work injury and had been followed by his personal physician, Dr. Harvey Barham, for that condition for several years. For the first few months after his work injury, Employee continued to receive treatment from Dr. Barham. A C-32 medical report of Dr. Barham was placed into evidence. In that report, Dr. Barham opined that Employee had sustained a “worsening or advancement of pre-existing arthritis,” as a result of the work injury. He assigned an anatomical impairment of 11% to the body as a whole. He placed a lifting restriction of twenty-five pounds occasionally, ten pounds frequently, upon Employee. He also limited standing, walking, sitting, climbing, balancing, crouching, crawling and twisting.

In September 2006, Employee was referred to Dr. David Pearce, an orthopaedic surgeon. Dr. Pearce testified by deposition. His initial diagnosis was chronic low back pain due to diffuse degenerative disc disease. He ordered an MRI and prescribed physical therapy. The MRI showed degenerative changes throughout the lumbar spine, with possible impingement of the L4 nerve root. Dr. Pearce compared this result with a report of an MRI of the same area performed in 2003 and concluded that no significant change had occurred. He saw Employee a second, and final, time on October 16, 2006. At that time, he considered Employee to be “back to baseline” and so released him from his care. He did not assign any permanent impairment because he understood that Employee had returned to his pre-injury state.

Dr. Richard Fishbein, an orthopaedic surgeon, also testified by deposition. He conducted an IME on May 8, 2007, at the request of Employee’s attorney. He opined that Employee had sustained an aggravation of his pre-existing degenerative arthritis in his lumbar spine. He assigned 6% permanent anatomical impairment to the body as a whole as a result of the work injury, using the Diagnosis Related Estimate (“DRE”) method in the American Medical Association Guides. In the written report of his examination, he opined that Employee was “medically unable to return to work.” During cross-examination, Dr. Fishbein stated that he meant that Employee was unable to return to the type of work he had done at Arlington. However, he testified that Employee was capable of sedentary work.

Employee had been an LPN since 1985, working at nursing homes, a mental hospital, a facility for troubled youth, and Arlington. He had attended school into the tenth grade,

obtained his GED, and eventually completed an LPN program. He also had completed a training program to operate heavy equipment but had never held a job doing so. He testified that he had not worked since May 21, 2006. He had been approved for social security disability and a disability retirement from the Tennessee Consolidated Retirement System (“TCRS”). He further testified that he sold his fishing boat because he had been unable to start the motor since the injury. He was unable to work on cars, which had long been a hobby of his. Walking more than short distances caused him to have pain. He conceded that he had been receiving pain medication, Lortab, to treat back pain prior to May 2006. However, he stated that he now required stronger medication, Oxycontin, to cope with the increase in pain since the injury. Employee performed fewer household chores than before the injury.

The commissioner took the case under advisement and issued a written memorandum decision. She found that Employee was permanently and totally disabled. The State has appealed, contending that the evidence preponderates against the findings of permanent and total disability (“PTD”).

### **Standard of Review**

The standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tennessee Code Annotated section 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness’s demeanor and to hear in-court testimony. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). It is the duty of the trial court to judge the credibility of the witnesses. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996) (“Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact.”). A reviewing court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); *Landers v. Fireman’s Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989). A trial court’s conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. *Ridings v. Ralph M. Parsons Co.*, 914 S.W.2d 79, 80 (Tenn. 1996).

### **Analysis**

The State contends that the evidence preponderates against the finding of permanent and total disability. It compares the facts of this case with several cases in which trial court findings that an employee was not totally disabled were affirmed on appeal, including *Hubble v. Dyer Nursing Home*, 188 S.W.3d 525 (Tenn. 2006) and *Nelson v. Wal-Mart Stores*, 8

S.W.3d 625 (Tenn. 1999), as well as cases in which awards of PTD were reversed on appeal, including *Lloyd v. Travelers Ins. Co.*, No. 03S01-9804-CV-00046, 1999 WL 398078 (Tenn. Workers' Comp. Panel June 17, 1999) and *Hitchcock v. Wausau Ins. Co.*, No. 01S01-9612-CH-00250, 1997 WL 625470 (Tenn. Workers' Comp. Panel Oct. 9, 1997). The State also points to the absence of vocational expert evidence, Employee's level of education, and his relatively skilled work as an LPN as conflicting with the commission's ruling.

In support of the judgment, Employee notes his age (fifty-seven) and his own testimony, supported by that of his wife, about the effects of his injury on his daily activities. He also points to the relatively severe activity limitations placed upon him by Dr. Barham. In addition, he contends that the approval of a disability retirement by TCRS constitutes an admission of total disability by the State. He does not cite any legal authority for the latter assertion, and we explicitly reject it.

Permanent total disability occurs when an injured employee is totally incapacitated "from working at an occupation which brings the employee an income." Tenn. Code Ann. § 50-6-207(4)(B) (2008); *see Hubble*, 188 S.W.3d at 535-36. Viewed in the context of that standard, the evidence in this case shows that Employee was fifty-seven years of age when the trial occurred. He had worked for more than twenty years as an LPN at a variety of institutions. This is a relatively skilled occupation which, nevertheless, requires significant physical exertion to assist patients receiving medical treatment. The restrictions placed upon him after the injury at issue prevent him from resuming that type of work. Moreover, his uncontradicted testimony is that he is limited in many normal activities of daily living as result of pain and also by the need to protect himself from additional injuries to his spine. He takes very potent narcotic pain medication on a daily basis. Taking these factors into consideration, we are simply unable to conclude that the evidence preponderates against the commission's finding that Employee is permanently and totally disabled.

### **Conclusion**

The judgment of the Claims Commission is affirmed. Costs are taxed to the State of Tennessee.

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ALLEN W. WALLACE, SENIOR JUDGE

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**JUDGMENT ORDER**

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 on appeal are taxed to the Appellant, State of Tennessee, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM