IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT JACKSON
(August 29, 1996 Session)

CLIFFORD J. KAPP,	)	DECATUR CIRCUIT
	)	
Plaintiff-Appellee,	)	Hon. C. Creed McGinley,
	)	Judge.
v.	)	
	)	No. 02S01-9606-CV-00054
TRANSWAY, INC.,	)	
	)	
Defendant-Appellant.	)	

FILED
January 24, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

For Appellant:

Charles O. McPherson
Leitner, Warner, Moffitt Williams
Dooley & Napolitan
Memphis, Tennessee

For Appellee:

George L. Morrison
Jackson, Tennessee

M E M O R A N D U M   O P I N I O N

Members of Panel:

Lyle Reid, Associate Justice, Supreme Court
F. Lloyd Tatum, Special Judge
Joe C. Loser, Jr., Special Judge

REVERSED

Loser, Judge

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employer contends the evidence preponderates against the trial court's finding that the employee suffered a permanent injury arising out of the employment. As discussed below, the panel has concluded the award of permanent disability benefits should be reversed.

The employee or claimant, Kapp, was employed by the employer, Transway, on September 29, 1994 as a truck driver. On that day, the claimant and a co-worker were unloading a tub from a trailer when the co-worker dropped his end, causing the claimant to fall to the floor.

He received emergency care at a nearby hospital and was released the same day. Since that time, he has seen numerous doctors.

Dr. Michael Smelser, a general practitioner, treated the claimant for pain on three occasions. He performed a neurological examination, which was normal. We find in the record no evidence that Dr. Smelser found any permanent injury or impairment.

Dr. Joseph P. Rowland, a neurosurgeon, saw the claimant three or four times. Dr. Rowland conducted a thorough neurological examination and ordered scientific tests, the results of which were normal.

Dr. Mark S. Harriman, an orthopedic surgeon, was unable to find any objective evidence of injury. He found no evidence of permanent medical impairment.

Dr. Roy Page examined the claimant and found no abnormality. Dr. James H. Owens conducted an extensive examination and found no basis for the claimant's complaint of pain.

The only doctor who found any permanent impairment was Dr. Stephen L. Gipson, a pain management doctor. On the basis of complaints of chronic back pain, this doctor assigned a permanent impairment rating of eleven percent to the whole body. All of the medical evidence was by deposition or written reports. The claimant has not returned to work.

The trial court found the claimant to be one hundred percent permanently disabled and awarded the payment of benefits for four hundred weeks. 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. section 50-6-225(e)(2). This tribunal is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1991).

The party claiming the benefits of the Workers' Compensation Act has the burden of proof to establish his claim by a preponderance of the evidence. An award may not be based on conjecture. Parker v. Ryder Truck Lines, Inc., 591 S.W.2d 755 (Tenn. 1979). Unless admitted by the employer, the employee has the burden of proving every essential element of his claim. Mazanec v. Aetna Ins. Co., 491 S.W.2d 616 (Tenn. 1973). The employee must prove, among other things, that his injury was one arising out of and in the course of employment.

In order to establish that an injury was one arising out of the employment, the cause of the injury must be proved; and if the claim is for permanent disability benefits, permanency must be proved. In all but the most obvious cases, causation and permanency may only be established through expert medical testimony. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452 (Tenn. 1988).

For injuries occurring on or after August 1, 1992, an award of permanent disability benefits may not exceed six times the medical impairment rating unless three of the following conditions are established by clear and convincing evidence on the date the employee reached maximum medical improvement: the employee lacked a high school diploma or general equivalency diploma or could not read or write on a grade eight level; the employee was age 55 or older; the employee had no reasonably transferable job skills from prior background and training; and the employee had no reasonable employment opportunities available locally considering the employee's permanent medical condition. Tenn. Code Ann. sections 50-6-241 and 242. Generally, expert vocational testimony is necessary to establish the third and/or fourth conditions by clear and convincing evidence.

From our independent examination of the evidence, particularly the extensive medical evidence and absence of expert vocational evidence, the panel finds the evidence to preponderate against the finding of the trial court and in favor of a finding that the claimant is not permanently disabled as a result of an injury arising out of the employment.

The judgment of the trial court is accordingly reversed. Costs on

appeal are taxed to the plaintiff-appellee.

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Joe C. Loser, Jr., Judge

CONCUR:

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Lyle Reid, Associate Justice

____

F. Lloyd Tatum, Judge

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

CLIFFORD J. KAPP,) DECATUR CIRCUIT
) No. 2118 T.D. Below
)
Appellee,)
) Hon. C. Creed McGinley,
v.) Judge
)
) No. 02S01-9606-CV-00054
TRANSWAY, INC.,)
)
Appellant.)

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JUDGMENT ORDER

This case is before the Court upon motion for review 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, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well-taken and should be denied; 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 plaintiff-appellee.

IT IS SO ORDERED this ____ day of ______, 1997.

PER CURIAM

Reid, J. - Not participating.