

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE

December 15, 2005 Session

**GARY A. PRICE V. TIPTON STEEL ERECTORS, INC., and LEGION
INSURANCE COMPANY**

**Direct Appeal from the Chancery Court for Hamilton County
No. 01-0481, Part I Honorable W. Frank Brown, III, Chancellor, Presiding**

Filed July 7, 2006

No. E2005-00143-WC-R3-CV - Mailed February 16, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals 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 trial court awarded plaintiff thirty (30) weeks of permanent disability for the loss of his right, great toe. On appeal, the employee contends that his injury was not limited to the scheduled member but that he is entitled to an award of permanent, partial vocational disability to the body as a whole. We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court
is Affirmed.**

THOMAS R. FRIERSON, II, SP. J., DELIVERED THE OPINION OF THE COURT, IN WHICH E. RILEY
ANDERSON, JUSTICE, AND ROGER E. THAYER, SP. J., joined.

Herbert A. Thornbury of Chattanooga, Tennessee, for Appellant, Gary A. Price.

L. Hale Hamilton and Neil A. Brunetz, Chattanooga, Tennessee, for Appellees, Tipton Steel
Erectors, Inc. and Legion Insurance Company.

MEMORANDUM OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

The factual circumstances of this case are essentially undisputed. The Plaintiff, Gary
Allen Price, was 52 years of age at the time of trial. By trade, Mr. Price has worked as an iron

worker since February 1977. On or about August 18, 2000, while in the course and scope of his employment with Defendant Tipton Steel Erectors, Inc., Mr. Price was rigging a heavy metal plate and dropped the corner of the plate onto his right, great toe. The work related accident resulted in a crush injury to the great toe.

The Plaintiff was first examined by Dr. Richard Glen Alvarez on August 21, 2000. Dr. Alvarez determined that Mr. Price presented a comminuted fracture of his proximal phalanx of the right great toe. Mr. Price underwent physical therapy without surgical intervention. Mr. Price participated in a functional capacity evaluation on November 22, 2000.

Following a trial on the merits conducted November 12, 2004, the Chancellor concluded, *inter alia*, that Mr. Price had sustained a compensable injury to his right great toe and that Plaintiff's loss of balance was related to his great toe. In determining that Mr. Price's work related injury did not extend beyond the great toe, Plaintiff's award was based upon 30 weeks of disability for the loss of his great toe.

II. STANDARD OF REVIEW

The standard of review in a workers' compensation case 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, T.C.A. 50-6-225(e)(2); Houser v. Bi-Lo, Inc., 36 S.W.3d 68 (2001). We are required to conduct an independent examination of the record to determine where the preponderance of the evidence lies, Wingert v. Government of Sumner Co., 908 S.W.2d 921 (1995). Moreover, we are required by law to examine in depth a trial court's factual findings and conclusions, GAF Building Materials v. George, 47 S.W.3d 430 (2001). "Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances", Orman v. Williams-Sonoma, Inc., 803 S.W.2d 672 (1991).

Where the medical testimony in a workers' compensation case is presented by deposition, we may make an independent assessment of the medical proof to determine where the preponderance of the proof lies, Cooper v. INA, 884 S.W.2d 446 (1994). Conclusions of law are subject to *de novo* review on appeal without any presumption of correctness, Nutt v. Champion International Corp., 980 S.W.2d 365 (1998).

III. ANALYSIS

Tennessee courts recognize the general rule that "permanent, partial disability benefits based on an injury to a 'scheduled member' are exclusively controlled by the schedule established by the General Assembly for that member and may not properly be apportioned to the body as a whole", Thompson v. Leon Russell Enterprises, 834 S.W.2d 927 (1992); Reagan v. Tennessee

Municipal League, 751 S.W.2d 842 (1988). For purposes of this rule, the term "scheduled member" is limited to only those members and combinations thereof, provided for in the statutory framework found at T.C.A. 50-6-207(3)(A)(ii)(a) through (ff)(2002). The great toe is a scheduled member controlled by T.C.A. 50-6-207(3)(A)(ii)(h).

An exception to the rule exists for injuries which extend beyond the scheduled member, Wells v. Sentry Ins. Co., 834 S.W.2d 935 (1992). For those instances, "if an injury to a specific member does not stop with the injury to or loss of that member, but for any reason continues as an injury affecting the body to such extent as to result in permanent or partial total disability, a recovery may be had therefor", Riley v. Aetna Casualty & Surety, 729 S.W.2d 81 (1987), quoting with approval from Claude Henninger Co. v. Bentley, 326 S.W.2d 446 (1959). In such cases, the injury is considered to be general and not confined to the scheduled member, Bentley.

The extent of disability is a question of fact, Armstrong v. Spears, 393 S.W.2d 729 (1965). Dr. Alvarez did not conclude that Mr. Price's injury resulted in an anatomical impairment beyond the scheduled member. In determining that the Plaintiff's difficulty with balance was due to the injury to the great toe, the trial court made the following findings:

In this case Mr. Price's balance problem is due to the injury to the great toe, a scheduled member. The balance problem is not related to the head and does not result in dizziness or vertigo. The imbalance is caused by the inability of the large toe to move and grip. All aspects of the injury (traumatic arthritis and nerve injury) affect the great toe and do not extend beyond the great toe. Therefore, Mr. Price's recovery is confined to the big toe. Mr. Price did not suffer an injury, like some, that produced effects in different parts of the body. Instead, he suffered one injury that affected one scheduled member. To allow recovery for the loss of balance caused by the stiff toe, which was the result of the injury, would be like giving a hand injury for loss of a thumb because the worker lost the ability to grip or hold objects.

Having conducted an independent examination of the record to determine where the preponderance of the evidence lies, this panel concludes that the evidence does preponderate in favor of the trial court's determination that Mr. Price's injury did not extend beyond the scheduled member.

This conclusion is not altered by Dr. Alvarez's opinion that according to the A.M.A. Guides for the evaluation of permanent impairment, Mr. Price's anatomical impairment rating to the scheduled member could be translated into a rating attributable to the body as a whole. The Supreme Court has instructed that "the mere fact that a medical impairment rating to a particular member may translate, for purposes of these guides, into a disability rating to the body as a whole does not alter the rule that if an injury is to a scheduled member only, the statutory schedules must control the disability award", Reagan, *supra*.

Finally, the employee contends that the ratings assigned by Dr. Alvarez have no relevance and are not to be used by the court. Instead, the Plaintiff urges that he should be awarded permanent, partial disability benefits based solely on his balance restrictions. Pursuant to T.C.A. 50-6-204(d)(3)(A), the physician or medical practitioner authorized to provide expert testimony and who has provided medical treatment for an employee shall utilize the applicable edition of the A.M.A.

Guides to the evaluation of permanent impairment or in cases not covered by the A.M.A. Guides an impairment rating "by any appropriate method used and accepted by the medical community".

Although the A.M.A. Guides do not provide anatomical ratings for a great toe as a scheduled member, the legislature has made specific provision for awarding compensation for injuries to or loss of scheduled members, see Murray Ohio Mfg. Co. v. Yarber, 446 S.W.2d 256 (1969). "Where such provision is made it must be assumed by [the Supreme Court] that the legislature was then aware of the concomitant pain, suffering, etc. normally attendant upon impact injury", Yarber, supra. *Ergo*, this panel must assume that the General Assembly has taken into account the natural consequence of imbalance inherent to an injury affecting the great toe. We therefore conclude that Plaintiff is entitled to benefits authorized for an injury to the scheduled member only.

IV. CONCLUSION

The judgment of the trial court is affirmed. Costs of the appeal including all mediation expenses are taxed to the employee and his surety.

Thomas R. Frierson, II, Special Judge

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JUDGMENT

This case is before the Court upon the motion for review filed by Gary A. Price 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 Gary A. Price and his surety, for which execution may issue if necessary.

ANDERSON, J., NOT PARTICIPATING