IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE APRIL 1996 SESSION

HARVEY WAYNE McMAHAN,	)	ANDERSON CIRCUIT
	)	
Plaintiff/Appellee	)	NO. 03S01-9509--CV-00112
	)	
v.	)	HON. JAMES B. SCOTT, JR.
	)	JUDGE
ROYAL INSURANCE COMPANY,	)	
	)	
Defendant/Appellant	)	

For the Appellant:

Frank Q. Vettori
P. O. Box 217
Knoxville, TN 37901-0217

For the Appellee:

Roger Ridenour
P. O. Box 530
Clinton, TN 37717-0530

Members of Panel:

E. Riley Anderson, Chief Justice
John K. Byers, Senior Judge
William H. Inman, Senior Judge

REVERSED and DISMISSED. **INMAN, Senior Judge**

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 plaintiff alleged that he injured his back in an unexplained manner on August 20, 1993 while working for Universal Tire, Inc., that he might not be able to return to his normal occupation, and that any benefits he was awarded should be paid in a lump sum. To these allegations the employer's insurer entered a general denial. Trial resulted in a finding that the medical proof is "not objectively strong with some inference that the plaintiff is exaggerating his limitations." The plaintiff was found to be ten percent permanently partially disabled and was awarded benefits accordingly. The defendant appeals, insisting that the evidence preponderates against the judgment. We agree, and accordingly reverse and dismiss the complaint.

The plaintiff testified that he "pulled my back" while lifting a lawn mower. Three days later he saw his family physician, who referred him to Dr. Fred Killefer, an orthopedic specialist, who prescribed conservative treatment, and advised the plaintiff to return to work.

The plaintiff thereupon sought the services of Dr. Cletus McMahon, also an orthopedic specialist, who saw the plaintiff in on November 8, 1993 and diagnosed a lumbar strain. He testified that he found no objective indications of injury; that his diagnosis of lumbar strain and evaluation of five percent impairment was entirely predicated on subjective complaints; that the plaintiff was exaggerating his pain; that he doubted whether the plaintiff was truthful. Dr. McMahon then said:

> Q: And because you do not know whether he's telling you the truth about the only finding, subjective complaints of pain, it's speculative whether or not he actually has any permanent impairment, isn't that right?
> A: That's true, yes sir.

Dr. Killefer testified that he found no indication of injury and that the plaintiff had no physical impairment.

Appellate review is *de novo* on the record accompanied by the presumption that the judgment is correct unless the evidence otherwise preponderates. TENN. R.

APP. P., RULE 13(d); TENN. CODE ANN. §50-6-225(e)(2). The plaintiff must prove permanent impairment by competent medical evidence in order to be awarded benefits. *Owens Illinois, Inc. v. Lane,* 576 S.W.2d 348 (Tenn. 1978); *Henson v. City of Lawrenceburg,* 851 S.W.2d 809 (Tenn. 1993). The evidence in this case falls far short of meeting that standard. The judgment is therefore reversed and the complaint dismissed at the costs of the appellee.

_____
William H. Inman, Senior Judge

CONCUR:

_____
E. Riley Anderson, Chief Justice

_____
John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

HARVEY WAYNE MCMAHAN,	(	
	(	
Plaintiff-Appellee,	(	
	(	
	(	
	(	Anderson Circuit, No. 93-LA-0394
v.	(	
	(	Hon. James B. Scott, Jr.,
	(	Judge
	(	
	(	S. Ct. No. 03S0l-9509-CV-00112
ROYAL INSURANCE COMPANY,	(	
	(	
Defendant-Appellant.	(	REVERSED AND DISMISSED.

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 will be paid by the plaintiff-appellee, for which execution may issue if necessary.

IT IS SO ORDERED this ___ day of August, 1996.

PER CURIAM

Anderson, J. - Not participating.