

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT KNOXVILLE  
(April 27, 2000 Session)

**THEODORE DAVIS v. U. S. COAL INC.**

**Direct Appeal from the Chancery Court for Scott County  
No. 8088 Billy Joe White, Chancellor**

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**No. E1999-01297-WC-R3-CV - Mailed - August 2, 2000  
Filed: September 12, 2000**

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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 appellant-employer appealed the trial court's ruling awarding appellee-employee 32% permanent partial disability to the body as a whole. Appellant argues the trial court was in error in accepting certain medical testimony when the doctor failed to follow AMA Guides in conducting examination and evaluation of employee. Judgment of the trial court is affirmed.

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

THAYER, SP. J., delivered the opinion of the court, in which ANDERSON, C. J., and BYERS, SR. J., joined.

Linda J. Hamilton Mowles, of Knoxville, Tennessee, for the Appellant, U. S. Coal, Inc.

Charles B. Sexton, of Oneida, Tennessee, for the Appellee, Theodore Davis.

**OPINION**

**Facts**

The trial court awarded the employee, Theodore Davis, 32% permanent partial disability benefits to the body as a whole as a result of a work-related accident. The employer, U. S. Coal, Inc., has appealed.

The employee was 53 years of age and had an 8<sup>th</sup> grade education. He has no vocational training and most of his work experience has been in the coal or construction industry. He also has

some experience as a school bus driver.

On February 20, 1997, he was employed as a truck driver and was injured while working with a shovel removing waste from a pit. He was off work two days and then continued working until June 1997 when a doctor excused him from work for about one month. He then worked until January 1998 when a general layoff occurred affecting several workers including employee Davis. Since the layoff, he has not worked anywhere and contends he is not able to work at jobs he is qualified for.

He has been treated conservatively with medicine and recommendations for therapy. He told the trial court he was still having low back pain which went down his left leg into his heel. He has been seen by numerous doctors and all of the expert medical evidence by deposition was from doctors who performed independent medical examinations.

Dr. William E. Kennedy, an orthopedic surgeon, testified by deposition and first saw the employee during September 1998; he viewed numerous records of various doctors, examined results from different tests, and after conducting a physical examination concluded that he had degenerative disc disease with probable nerve root irritation L5 on the left; that the work-related incident caused and injury to his pre-existing condition which resulted in a 13% medical impairment; and he recommended restrictions of not lifting over twenty-five pounds occasionally or seven pounds frequently and he should avoid repeated bending, stooping or squatting activities.

Dr. J. Samuel Marcy, an orthopedic surgeon, testified by deposition and stated he first saw the employee during October 1997; he was of the opinion he had a chronic lumbar strain; that initially, he felt he should not lift over fifty pounds occasionally or over twenty-five pounds frequently and should avoid repetitive bending. He said that upon seeing him at a later date and observing heavy calluses on his hands with grease or engine oil stains, this was inconsistent with his testimony he was not able to do any work; and that he changed his initial opinion about restrictions and said he could do almost any type of work except heavy stressful activities. He also stated he was of the opinion he had recovered from the back strain and had no medical impairment.

Dr. Gilbert L. Hyde, an orthopedic surgeon, testified by deposition and gave a 5% medical impairment as a result of the back strain which he said was near an old compression fracture. He recommended restrictions of not lifting over forty pounds occasionally and twenty pounds frequently.

The trial court also heard the deposition testimony of Dr. Norman E. Hankins, a vocational rehabilitation witness, who fixed the employee's vocational disability between 35% - 65% depending on which medical restrictions would apply. Defense witness Arthur Klar, also a vocational specialist, gave oral testimony and testified he did not give vocational disability ratings but that there were numerous jobs that the employee could perform.

In resolving the conflicting evidence, the Chancellor specifically found that Dr. Kennedy's testimony was to be given more weight than the testimony of Dr. Marcy and that although the

employee probably did not have a meaningful return to work, the court was of the opinion that an award of 32% disability, which was approximately two and one-half times medical impairment, was reasonable under the proof.

### **Issue on Appeal**

The only issue on appeal is whether the evidence preponderates against the trial court's award of 32% disability to the body as a whole.

### **Standard of Review**

The review of the issue is *de novo* accompanied by a presumption of the correctness of the findings of the trial court unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The trial court is primarily charged with the duty to resolve conflicts in the evidence and that decision will not be overturned on appeal unless the appellate court concludes the evidence preponderates against the decision made.

### **Analysis**

The employer argues the trial court was in error in giving Dr. Kennedy's testimony more or greater weight than the testimony of Dr. Marcy who found no impairment. In this connection, it is insisted that Dr. Kennedy failed to use an inclinometer as recommended by the AMA Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup> Edition, to measure the employee's spine motion.

Several pages of the AMA Guides were admitted into evidence and it is therein stated that an inclinometer is a small device used by carpenters and mechanics to measure angles and the device is sometimes referred to as "angle finders". It was also stated that an inclinometer works like a plumb bob.

Dr. Kennedy testified that he did not use an inclinometer because it could have "skewed the percentages too high and I could not, in good conscience, use that system" in this case; that the AMA Guides are merely "guides" and that he determined the range of spine motion by observing the employee during his examination tests.

We must note that Dr. Marcy did not indicate that he used an inclinometer as a part of his examination and that Dr. Hyde was the only doctor who stated he used this procedure. Dr. Hyde also found permanent impairment and admitted this procedure was merely a "guide" for physicians in conducting examinations of this nature.

The Chancellor was also of the opinion that Dr. Marcy was a little too quick to assume that the employee had been working due to heavy calluses on the employee's hands which the Chancellor did not observe in his examination of same and that the doctor was probably not aware of the stains that could develop on hands of a person who had worked in the coal industry over a period of time.

We do not agree with the argument that the testimony of Dr. Kennedy was incompetent evidence. As a general rule, the decision of whether to admit expert testimony into evidence rests within the sound discretion of the trial judge. *Shelby County v. Barden*, 527 S.W.2d 124, 131 (Tenn. 1975). While Tenn. Code Ann. § 50-6-204 does require physicians to utilize the AMA Guides to the Evaluation of Permanent Impairment or the Manual for Orthopedic Surgeons in Evaluating Permanent Impairment, a physician must determine the best approach to reach a fair rating under the guidelines when several different methods are recommended to determine impairment.

### **Conclusion**

During the trial and appeal of this case, the appellant employer has argued the employee exaggerated his physical condition. We are of the opinion that Dr. Kennedy took this into consideration in determining assessment of impairment. Likewise, the trial judge fixed an award of disability that did not exceed two and one-half times medical impairment even though the return to work did not appear to be meaningful.

The evidence does not preponderate against the findings of the trial court. The judgment is affirmed and costs of the appeal are taxed to the appellant-employer.

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ROGER E. THAYER, SPECIAL JUDGE

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**JUDGMENT**

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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgement of the Court.

Costs on appeal are taxed to the appellant, U. S. Coal, Inc. and Lewis, King, Krieg, Waldrop Nine and Catron, surety, for which execution may issue if necessary.

09/12/00