IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 10, 2000 Session

# EARL WAGNER v. THE TENNESSEE COAL COMPANY

**Direct Appeal from the Chancery Court for Claiborne County**
**No. 11,660 John McAfee, Judge**

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**No. E2000-01013-WC-R3-CV - Mailed**

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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 Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court found the plaintiff sustained a ten percent permanent partial medical impairment as a result of a compensable injury and awarded him forty percent whole body vocational disability. The defendant says the evidence does not support the finding that the plaintiff suffered any permanent impairment and further says if he did, the award should have been restricted to two and one-half percent times the medical impairment because the plaintiff had a meaningful return to work. 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.**

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which E. RILEY ANDERSON, C.J. and WILLIAM H. INMAN, SR. J., joined.

Robert W. Knolton, Oak Ridge, Tennessee, for the appellant, The Tennessee Coal Company.

David H. Dunaway, LaFollette, Tennessee, for the appellee, Earl Wagner.

## OPINION

### Plaintiff's Biography

At the time of trial the plaintiff was forty-two years of age; he had an eighth grade education and was married but had no children. The plaintiff's working life had been almost exclusively in coal mines.

## Facts

On March 21, 1997, the plaintiff was riding in an underground train which became somewhat out of control and jumped the tracks. The plaintiff received injuries to his neck and back as a result of this occurrence. He began to experience pain after the accident but remained on the job the rest of the day. He was told by his supervisor to go to his family doctor if he still had pain the following day.

On March 22, the plaintiff went to the Family Medical Center in Harrogate and was seen by Dr. Jerry Lemler.

After the March accident that is the subject of this action, the plaintiff, on July 15, 1997, while working for the defendant, was exposed to paint fumes which he alleged caused damage to his lungs.[1]

## Medical

Dr. Jerry Lemler, a family practitioner and psychiatrist saw the plaintiff at the Family Medical Center. Dr. Lemler had x-rays and an MRI done on the plaintiff's neck and back. The tests showed a mild posterior bulging disc at L3 - L4 and some lesser problems at L4 - L5. Dr. Lemler referred the plaintiff to Dr. Joe B. Ragland, a neurosurgeon, for treatment.

On December 27, 1997, Dr. Lemler again saw the plaintiff and diagnosed him as suffering depression disorder and chronic pain syndrome. Dr. Lemler was of the opinion the plaintiff was fifteen percent permanently impaired to the body as a whole because of this. Dr. Lemler made this assessment after the plaintiff's back injury and his on-the-job exposure to paint fumes.

Dr. Ragland saw the plaintiff on April 3, 1997, and found some bone spurs at L3 - L4 and a minimal "low bulge" at L3 - L4. Dr. Ragland diagnosed cervical and lumbar strain and found soft tissue injury.

Dr. Ragland returned the plaintiff to work on April 18, 1997, with the following restrictions: no bending more than ten times an hour, no lifting of more than twenty-five pounds occasionally and no standing for more than one hour at a time.

Dr. Ragland last saw the plaintiff on August 25, 1997, and released him to work with no restrictions. He found the plaintiff had no permanent impairment.

Dr. Kennedy saw the plaintiff on August 8, 1997, for evaluation at the request of the plaintiff. He found degenerative changes in the plaintiff's back and neck with broad-based disc

[1] It appears a separate workers' compensation lawsuit is pending over this event.

bulging at L3 and L4.

Dr. Kennedy found the plaintiff had suffered an aggravation of a previously existing back condition and placed the plaintiff's medical impairment rating at twenty-two percent to the body as a whole.

Dr. Kennedy was of the opinion the plaintiff should be permanently restricted from repetitive bending, stooping or squatting, heavy lifting and working on rough terrain, etc.

## Return to Work

When Dr. Ragland returned the plaintiff to work with restrictions, the defendant's management placed him in a job which they felt accommodated his restrictions. However, the plaintiff testified he was unable to perform the job because of the pain. He was subsequently transferred to a job which required him to paint a water tank. The plaintiff became ill from paint fumes on July 15, 1997, and did not work after that date because, as the plaintiff testified, he was unable to do any work due to the pain cause by his back injury. The defendant hat the plaintiff quit work because of the exposure to the paint fumes, not because of the back pain. However, the defendant offered no evidence to show that the plaintiff could perform the work assigned to him upon his return to the defendant's employment.

## Discussion

The trial judge in this case specifically did not consider Dr. Lemler's disability evaluation, because it was made after the plaintiff was exposed to the paint fumes.

Neither though did the trial judge accept Dr. Ragland's opinion that the plaintiff suffered no permanent impairment in the case. The trial judge accepted the opinion that the plaintiff sustained a permanent medical impairment as a result of the March 1997 injury. He found the medical impairment to be ten percent to the body as a whole and used a multiplier of four because he found the plaintiff did not have a meaningful return to work.

When there are conflicts in testimony of expert witnesses the trial court has the discretion to accept the opinion of one of the experts over the opinion of others. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333 (Tenn. 1996).

Several cases have indicated that the trial court should give more weight to the opinions of treating physicians than those of evaluating physicians, *See e.g.*, *Crossno v. Publix Shirt Factory*, 814 S.W.2d 730 (Tenn. 1991), however, the trial judge is not required to do so.

This Court may evaluate the credibility and weight of the medical opinions where they are presented on depositions as in this case. *Seiber v. Greenbrier Industries, Inc.*, 906 S.W.2d 444 (Tenn. 1995). We, however, are not inclined to reject the finding of the trial judge on such basis

unless there is something inherent in the deposition testimony which convinces us the opinion expressed is not reliable. We do not find this unreliability to be present in the depositions in this case, and we do not find the trial judge abused his discretion in accepting the opinion of Dr. Kennedy.

The defendant asserts the plaintiff cannot recover for the aggravation of a pre-existing condition because there is no showing the plaintiff's condition was advanced or made worse by the condition. *See e.g., Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483 (Tenn. 1997), citing *Fink v. Caudle*, 856 S.W.2d 952, 958 (Tenn. 1993); *White v. Werthan Indus.*, 824 S.W.2d 158, 159 (Tenn. 1992). It appears to us that advancement and worsening of the condition is self-evident in the case. The plaintiff worked for the defendant for twenty years without difficulty prior to the injury. The unrefuted evidence in this case is that he cannot now do so because of the pain which he suffers from the accident.[2]

On the issue of the application of the two and one-half limit, which the defendant contends should apply, we find no error in the refusal of the trial judge to apply the cap. The only evidence introduced by the defendant was the deposition testimony of Dr. Ragland. The defendant offered no witnesses who worked at its mine to refute the plaintiff's testimony that he was unable to do the work assigned to him because of pain caused by the work.

We find the evidence supports the finding of the trial judge that the plaintiff sustained a permanent medical impairment to the body as a whole and that he did not have a meaningful return to work.

We affirm the judgment of the trial court. The cost of this appeal is taxed to the defendant.

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JOHN K. BYERS, SENIOR JUDGE

[2] So far as this record shows this was not an issue raised and litigated at the trial of this case.

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AT KNOXVILLE, TENNESSEE

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**Claiborne County Chancery Court**
**No. 11,660**

**No. E2000-01013-WC-R3-CV - Filed: January 9, 2001**

**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 Judgment of the Court.

Costs on appeal are taxed to the defendant, The Tennessee Coal Company and Robert W. Knolton, surety, for which execution may issue if necessary.

01/09/01