

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
(November 30, 2000 Session)

**JAMES R. HYDE v. ALL AMERICAN HOMES, LLC.**

**Direct Appeal from the Circuit Court for Robertson County  
No. 9081 James E. Walton, Circuit Judge**

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**No. M2000-00899-WC-R3-CV - Mailed - February 6, 2001  
Filed - March 9, 2001**

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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 of findings of fact and conclusions of law. The trial court awarded the employee thirty-five percent disability to both arms and ordered the award to be paid in a lump sum. The employer contends the award is excessive and the lump sum is not in the employee's best interest. We affirm.

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

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., and JOE C. LOSER, JR., SP. J., joined.

J. Frank Thomas and Hal W. Wilkins, Leitner, Williams, Dooley & Napolitan, Nashville, Tennessee, for the appellant, All American Homes, LLC.

William L. Underhill, Madison, Tennessee, for the appellee, James R. Hyde.

## MEMORANDUM OPINION AND ORDER

### BACKGROUND FACTS

Mr. James R. Hyde (Hyde), a high school graduate, is currently fifty-three (53) years old. He has an accident-prone work history that includes a partial amputation to his right ring finger, a fractured right wrist, and a strain to his lower back. Additionally, Hyde was diagnosed with carpal tunnel syndrome in 1996. As a result of his 1996 diagnosis, Hyde was assigned a five percent (5%) partial impairment rating to his right arm and an eight percent (8%) partial impairment rating to his left arm. Hyde was also restricted from intensive hand work, using vibrating tools, frequently lifting 10 pounds or more, occasionally lifting 40 pounds or more, and from lifting a maximum of 60 pounds or more. Hyde's prior injuries were covered by worker's compensation.

In April 1998, Hyde began his employment with All American Homes, LLC (All American). He worked in numerous positions there. While working as a "texturer," Hyde began experiencing physical difficulties in performing his assigned tasks. He was transferred to a position as an insulation installer. Apparently, there was not enough insulation to be installed to have Hyde working in that role full time, so after installing the insulation, Hyde proceeded to assist in texturing. When Hyde worked even part time as a texturer or a texturing assistant, his physical difficulties returned. Hyde was terminated for inability to perform his assigned tasks.

Hyde was treated by Dr. Ron Zelle, a neurosurgeon, for numbness and aching in his hands. Dr. Zelle operated on Hyde's right hand which brought some relief to Hyde. An operation was also performed on Hyde's left hand, though the results were not as positive. Dr. Zelle assigned a ten percent (10%) permanent partial impairment rating to both hands. Dr. Zelle also placed what he referred to as "common sense" restrictions on Hyde, in that Hyde may participate in any activity so long as it does not cause Hyde pain.

Hyde also has a history of reporting subjective discomfort greater than that expected to result from his objective physical findings. In 1986, Dr. David S. Jones, Hyde's treating physician for his lower back strain, noted that Hyde's neck pain complaints were inconsistent with the lack of physical trauma in his medical history and that Hyde's demeanor and presentation were out of proportion to the objective physical findings. In a 1998 psychological evaluation, Dr. Pamela Auble found that Hyde was likely to magnify his physical disabilities and that he deals with stress by focusing on his physical incapacities. In 1999, Dr. Zelle described Hyde's complaints of continued pain as "mysterious," "unpredictable," "suspect," and "unusual."

Hyde testified he had used a prior workers' compensation award to make a down payment on his home and that he intended to use any current award to reduce the principal on his mortgage.

The trial court found that Hyde suffered a thirty percent (30%) vocational disability to the right arm and a forty percent (40%) vocational disability to the left. The trial court found that

the injuries combined resulted in a thirty-five percent (35%) vocational disability to both arms and ordered that the award was to be paid in a lump sum.

## STANDARD OF REVIEW

The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. Nelson v. Wal-Mart Stores, Inc., 8 S.W.3d 625, 628 (Tenn. 1999); Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990). Our review of the trial court's finding in this case is *de novo* upon the record, "accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. §50-6-225(e)(2) (1999). We are obliged to review the record on our own to determine where the preponderance of the evidence lies. Ivey v. Trans Global Gas & Oil, 3 S.W.3d 441, 446 (Tenn. 1999); Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 456 (Tenn. 1988). Although deference still must be given to the trial judge when issues of credibility and weight of oral testimony are involved, Seals v. England/Corsair Upholstery Mfg. Co., 984 S.W.2d 912, 915 (Tenn. 1999); Jones v. Hartford Accident & Indem. Co., 811 S.W.2d 516, 521 (Tenn. 1991), this Court is able to make its own independent assessment of the medical proof when the medical testimony is presented by deposition. Landers v. Fireman's Fund Ins. Co., 775 S.W.2d 355, 356 (Tenn. 1989); Henson v. City of Lawrenceburg, 851 S.W.2d 809, 812 (Tenn. 1993).

## DISCUSSION

### A. Vocational disability rating.

The record contains the testimony of Hyde and his wife and the deposition of Dr. Zellem. Dr. Zellem's medical impairment rating of Hyde is uncontested. However, a medical impairment rating does not equal a vocational disability rating. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000). A vocational disability rating incorporates the medical limitations of the employee, as well as the employee's skills and training, education, age, and local job opportunities. Id. Defendant called no witnesses at trial. Therefore, the trial judge was left to base his decision on the evidence presented by Hyde. The issues concerning Hyde's alleged exaggeration of symptoms were raised before the trial judge. The trial judge weighed the credibility of the Hydys during their live testimony. While our review of the record is *de novo*, a trial judge's weighing of the credibility of a live witness is given deference by this court. Seals, 984 S.W.2d at 915. Accordingly, Defendant has not shown that the preponderance of the evidence weighs against the trial court's award of a thirty-five percent (35%) vocational disability to both arms.

### B. Lump Sum Benefits Award.

An award of workers' compensation benefits may be commuted to one or more lump sum payments upon motion of a party subject to the approval of the trial court. Tenn. Code. Ann. §50-6-229(a). The controlling statute, Tenn. Code. Ann. §50-6-229(a) establishes a test based on the best interest of the employee and the ability of the employee to manage the commuted award

wisely. Whether to commute the award is discretionary with the trial court, and we will not alter the trial court's decision absent a showing that the trial court's decision amounted to an abuse of discretion. Edmonds v. Wilson County, 9 S.W.3d 106, 109 (Tenn. 1999). Defendant has not shown that the trial court abused its discretion.

**C. Frivolous appeal penalty.**

Hyde contends he should be awarded frivolous appeal damages because there was no reason for the appeal other than as a delay tactic. We cannot say that the appeal in this case was so devoid of merit as to justify the imposition of a penalty. Therefore, in our discretion we decline to assess appellant with fees and damages for a frivolous appeal.

**CONCLUSION**

The judgment of the trial court is affirmed. Costs are taxed to the appellant and sureties.

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Howell N. Peoples, 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 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 appellant and sureties, for which execution may issue if necessary.

**IT IS SO ORDERED.**

**PER CURIAM**