IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, JULY 1996 SESSION

BILLY GIBSON, Plaintiff/Appellee v. AETNA CASUALTY AND SURETY CO. and WOLF TREE EXPERTS, INC., Defendants/Appellants	)	SEVIER CIRCUIT HON. BEN W. HOOPER, II, CIRCUIT JUDGE NO. 03S01-9602-CV -00012

For the Appellants:

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For the Appellee:

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M E M O R A N D U M O P I N I O N

Members of Panel:

Penny J. White, Justice
Roger E. Thayer, Special Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED. **THAYER, Special 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.

Plaintiff, Billy Gibson, was awarded 100 percent permanent disability benefits by the Circuit Court of Sevier County as a result of an accident on June 24, 1991, when he fell backward from a truck to the ground injuring his back. Defendants, Wolf Tree Experts, Inc. and The Aetna Casualty and Surety Company, have appealed insisting the evidence preponderates against the finding of total disability.

Plaintiff is 40 years of age with a third grade education; he cannot read or write and was employed as a tree trimmer by defendant employer for almost twenty years; he had back surgery (ruptured disc) in 1978 but recovered sufficiently to work full time without any real problems; his injury as a result of the June 1991 accident resulted in another ruptured disc and this surgery did not appear to be successful; another surgical procedure was performed to remove bone fragments; he told the trial court he was not able to return to work as a tree trimmer or do any other type work on a regular basis; he admitted he had worked at what he called “piddling jobs” and said he was usually on the heating pad for several days after activity of this nature; his complaints of pain continued up to the date of the trial.

Plaintiff’s treating physician and surgeon was Dr. Archer W. Bishop, Jr., who testified by deposition. Dr. Bishop testified plaintiff continued to complain of pain during his entire treatment period, including the numerous visits after the last surgical procedure. He said at one point another surgery was contemplated but was not performed because he felt the chance of improvement was small. He gave plaintiff a 12 percent medical impairment and said he should avoid repetitive bending, stooping and heavy lifting of more than forty pounds.

Craig R. Colvin, a disability management consultant, testified by

deposition and was of the opinion that plaintiff was 100 percent vocationally disabled.

Defendants contend plaintiff is not totally disabled because he admitted he had done some work and because the testimony of defense witness Jeffrey Lewis Fowler showed he was able to do some work. Witness Fowler, an investigator for the insurance company, observed plaintiff working on about April 6, 1993, while clearing brush from premises co-owned by the witness. Fowler had requested an individual to approach plaintiff with this job opportunity, and the witness remained inside the chalet while the work was being done. A video tape was made of this observation and is in evidence. The evidence on the video showed plaintiff working with another individual in clearing brush; using a chain saw to cut small trees and limbs; and putting wood in the back of a pickup truck and unloading same. This work activity was over a five-hour period.

The review of the case is *de novo* accompanied by a presumption of the correctness of the findings of fact unless we find the preponderance is otherwise. TENN. CODE ANN. § 50-6-225(e)(2).

Where the trial court has seen and heard witnesses and issues of credibility and the weight of oral testimony are involved, the trial court is in a better position to judge credibility and weigh evidence and considerable deference must be accorded to those circumstances. *Landers v. Fireman's Fund., Inc.,* 775 S.W.2d 355, 356 (Tenn. 1989). On the other hand, where evidence is introduced by deposition, the appellate court is in as good a position as the trial court in reviewing and weighing testimony. *Id.*

In order to qualify for total disability under our Workers' Compensation Law, the injury must totally incapacitate the employee from working at an occupation which brings him an income. TENN. CODE ANN. § 50-6-207(4)(B).

In deciding whether an employee is totally disabled under this definition, the courts must consider many factors such as the employee's age, education, work experience, local job opportunities, etc., and this is to be examined in relation to the open labor market and not whether the employee is able to return

and perform the job held at the time of the injury. *Orman v. Williams-Sonoma, Inc.,* 803 S.W.2d 672, 678 (Tenn. 1991); *Clark v. National Union Fire Ins. Co.,* 774 S.W.2d 586, 588 (Tenn. 1989).

The mere fact the employee has engaged in work activity may or may not preclude a finding of total, permanent disability. *See Prost v. City of Clarksville,* 688 S.W.2d 425 (Tenn. 1985) and *American Lava Corp. v. Savena,* 493 S.W.2d 77 (Tenn. 1973) for cases finding a total disability award was not supported by sufficient evidence where the employee had returned to work. However, there are other cases where total disability awards were upheld despite some work activity on the part of the employee. See *Skipper v. Great Cent. Ins. Co.,* 474 S.W.2d 420 (Tenn. 1971) and *Tennlite, Inc., v. Lassiter,* 561 S.W.2d 157 (Tenn. 1978).

These cases are not in conflict but represent different holdings under different factual situations. Thus, evidence of re-employment or work activity is a fact which must be closely examined and weighed in with all of the other factors in determining the extent of permanent disability.

Defendants insist the facts and holding of the *Prost* case should preclude an award of total disability in the present case. We disagree and find plaintiff's medical condition to be much different than plaintiff Prost. Having made a close review of the record, we cannot say the evidence preponderates against the finding of total disability.

The judgment of the trial court is affirmed with the costs of the appeal taxed to Defendants and their surety.

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Roger E. Thayer, Special Judge

CONCUR:

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Penny J. White, Justice

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Joe C. Loser, Jr., Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

BILLY GIBSON, Plaintiff-Appellee, vs. AETNA CASUALTY AND SURETY CO. and WOLF TREE EXPERTS, INC. Defendant-Appellants.	)	SEVIER CIRCUIT No. 92,717 No. 03S01-9602-CV-0012 Hon. Ben Hooper, II, Judge AFFIRMED

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referralto 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 it, 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 on appeal are taxed to the defendants /appellants, and sureties Hodges, Doughty & Carson, for which execution may issue if necessary.

10/16/96