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

FILED

November 20, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

TERRY HAMBRICK,	)	UNICOI CHANCERY
	)	
Plaintiff/Appellant	)	NO. 03S01-9603--CH-00030
	)	
v.	)	HON. THOMAS J. SEELEY, JR.
	)	JUDGE
VECELLIO & GROGAN, INC.,	)	
	)	
Defendant/Appellee	)	

For the Appellant:

Steven C. Rose
WEST & ROSE
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For the Appellee:

Howell H. Sherrod, Jr.
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M E M O R A N D U M O P I N I O N

Members of Panel:

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

MODIFIED

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 drove a heavy truck for the defendant's construction firm. When asked to tell the Court "what happened when you got hurt," he replied:

> Well I was backing up to get loaded and the loader operator picked one, a big old rock up and he went to put it in the bed of the truck and when he did, he started to let it down and the rock just come out all at once. And when it did, it just rattled, you know, just shook the truck around and around.

The accident occurred August 4, 1993. He was seen by Dr. Judson McGowan, an orthopedic specialist, on August 10, 1993, complaining of neck and thoracic spine pain. His condition was diagnosed as acute cervical lumbar strain which was treated conservatively over many months involving sophisticated testing procedures and referrals to specialists in other disciplines, some of whom believed the plaintiff had a psychological overlay with magnification of symptoms. Dr. McGowan testified that "this patient is heading toward the road of a chronic pain syndrome," that he had a five to ten percent impairment, and that he was able to return to lighter work.

Dr. Stephen Kimbrough, a neurologist, saw the plaintiff on February 9, 1993, for the evaluation of neck and arm pain. He found no nerve involvement and little or no pathology. He believed that the plaintiff had some pain but "felt that it was somewhat exaggerated and there was some overlay to the pain as well." Like Dr. McGowan, he thought the plaintiff was likely a candidate for chronic pain syndrome, and that he exaggerated his symptomatology. He expressed no opinion about impairment, but felt that he could return to work.

Dr. Paul Brown, a specialist in internal medicine and cardiology, testified that he had treated the plaintiff for a number of years for various illnesses, one of which was hypertension which he attributed in part to pain, but he declined to reference the hypertension to the accident and expressed no opinion about impairment.

Dr. Marcus Cooper, a psychologist,[1] testified that the plaintiff had some pain and was showing signs of depression, but nothing major. He said the plaintiff had a low energy level, hedonism (avoidance of pain), lack of sexual interest, withdrawal and social isolation. He expressed no opinion about impairment.

Dr. Susan Taub, also a psychologist, testified that she saw the plaintiff in October 1994, when he weighed 300 pounds, and "found him to be depressed."

Dr. Richard Coyle, a psychiatrist, saw the plaintiff on one occasion for evaluation purposes. His diagnosis was somatoform pain disorder, meaning that he has complaints of pain in everything he does. Dr. Coyle testified that "if you're making a guess the idea of marked impairment is probably on the order of 75 percent."[2] He agreed that the prospect of a monetary payment would affect recovery and that the plaintiff would "likely have no work impairment if he were actively working."

Officials of the defendant testified that a certified letter was mailed to the plaintiff offering him continued employment as a signalman which required little effort, at the same wage he was previously earning. This fact is not controverted.

The expert testimony in this case covers 260 pages and involves six experts, some of whose testimony is redundant and speculative. Dr. Norman Hankins testified that the plaintiff had no transferrable skills and no reasonable employment opportunities. In his opinion the plaintiff was 100 percent vocationally disabled. We tend to discount this testimony because it runs counter to preponderant proof. Another vocational expert, Dr. Colvin, opined that the plaintiff was 25 percent occupationally disabled.

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[1]Dr. Cooper, the psychologist, saw the plaintiff on March 31, 1994, on a referral from Dr. McGowan. He specializes in the treatment of patients who complain of pain. He testified that the plaintiff had no psychological restrictions on employment nor any long-term psychotic problems. Following the initial visit, the plaintiff returned to commence a prescribed course of treatment and "walked out" after fifteen minutes.

[2]Dr. Coyle testified that the current edition of the Guidelines made no provision for a percentage rating of impairment for psychiatric problems. His assessment of the plaintiff's impairment "according to the military" was 75 percent, attributable to major depression. Whether the military standard is recognized as acceptable in the civilian community was not inquired into. TENN. CODE ANN. § 50-6-241(a)(1). Dr. Coyle conceded that he might change his opinion if it developed that the plaintiff was, in fact, engaged in work or activities that he testified he was unable to do. The plaintiff was videotaped working on his car on June 28, 1995.

The trial judge found, *inter alia,* that the "plaintiff's motivation to work and to rehabilitate himself is close to non-existent;" that he "does nothing but watch television and sit on the porch and sleep;" that "he could have done the signalman's job" which his employer offered him, and that he has a permanent partial disability of 85 percent to his whole body.[3]

The defendant appeals, questioning whether the evidence generally supports a finding of 85 percent permanent partial disability, and whether the maximum award is two and one-half times the medical rating since the employer offered to return the plaintiff to employment at a wage equal to or greater than the wage he was receiving prior to injury.

Our review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(3)(2). *Stone v. City of McMinnville,* 896 S.W.2d 584 (Tenn. 1991). This Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies when the medical testimony is presented by deposition. *Landers v. Fireman's Fund Ins. Co.,* 775 S.W.2d 355 (Tenn. 1989.) We are required to weigh in more depth the factual findings and conclusions of trial judges in workers' compensation cases. *Humphrey v. David Witherspoon, Inc.,* 734 S.W.2d 315 (Tenn. 1987).

The treating physician recommended that the plaintiff return to work. Dr. McGowan testified: "To put it quite frank, I think he was maybe happy to go on the porch. However, literally going and sitting on the porch with the kind of condition he has will tend to dramatically exacerbate the patient's symptoms. In other words, sitting and taking it easy will not make this man better. In fact, it will make his symptoms worse." The plaintiff was offered lighter work at the same wage; the trial court found that the plaintiff "could have done the signalman's job" and "I think there are other jobs that he

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[3]The plaintiff presents as an issue whether the Court should have found him to be totally and permanently vocationally disabled as contrasted to a finding of 85 percent permanent partial disability. The award was principally based on the plaintiff's mental state. The defendant concedes the occurrence of the accident, but denies that the plaintiff is disabled to the extent alleged.

can do." These stark findings, fully supported, essentially foreclose the issue, in our judgment, especially when superimposed upon the trial court's finding that "the plaintiff's motivation to work and to rehabilitate himself is close to non-existent."

We have held in a number of cases that the disability multiplier caps provided by TENN. CODE ANN. § 50-6-241 should be applied where the injured employee was offered a different position at the same wage but unreasonably refused to work.[4]

It is abundantly clear in this record that, as the trial judge plainly found, the plaintiff was able to but was not motivated to work. His refusal to do so was manifestly unreasonable, and under TENN. CODE ANN. §59-6-241(a)(1) his disability must be limited to two and one-half times the medical impairment rating of ten percent. We find the evidence preponderates against the judgment as entered and in favor of a finding of 25 percent permanent partial disability.

The judgment is accordingly modified, with costs to the appellee.

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William H. Inman, Senior Judge

CONCUR:

_____
E. Riley Anderson, Chief Justice

_____
John K. Byers, Senior Judge

[4]See, *Wheatly v. Camden Casting Center,* 1995 WL 572077, No. 02S01-9503-CV-00025; *Newton v. Scott Health Care Center,* 1995 WL 746637, No. 01S01-9502-CV-00025; *Brown v. Campbell County Board of Education,* 1995 WL 765041, No. 03S01-9412-CH-00121; *Bailey v. Krueger Ringier, Inc.,* 1995 WL 572056, No. 20S01-9409-CH-00061.

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

TERRY HAMBRICK	)	UNICOI CHANCERY
	)	
Plaintiff-Appellant,	)	No. 5723
	)	
	)	No. 03S01-9603-CH-00030
vs.	)	
	)	Hon. Thomas J. Seeley, Jr.
	)	Chancellor
	)	
VECELLIO & GROGAN, INC.	)	
	)	
Defendant-Appellee.	)	MODIFIED

JUDGMENT ORDER

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; andIt 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 defendant/appellee, Vecellio & Grogan, Inc., for which execution may issue if necessary.

11/20/96