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

FILED

June 20, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

MARTIN ELLISON HUGHES,	)	HAMBLEN CIRCUIT
	)	
Plaintiff/Appellant	)	NO. 03S01-9509--CV-00110
	)	
v.	)	HON. BEN K. WEXLER
	)	JUDGE
PIONEER PLASTICS, INC. and WAUSAU INSURANCE CO.,	)	
	)	
Defendant/Appellee	)	

For the Appellant:

Douglas R. Beier
W. Douglas Collins
P. O. Box 1754
Morristown, TN 37816-1754

For the Appellee:

Donald B. Oakley
434 W. First North Street
P. O. Box 1853
Morristown, TN 37816-1853

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

Members of Panel:

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

AFFIRMED. **BYERS, 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.

Plaintiff injured his lower back lifting a heavy machine part at work on June 21, 1994. The trial court awarded him 50 percent permanent partial disability to the body as a whole and denied plaintiff's request for payment in lump sum.

We affirm the judgment of the trial court.

Plaintiff's injury at work on June 21, 1994 resulted in a herniated disc at L4-L5 which was treated conservatively without improvement. He underwent surgical repair on September 6, 1994 by Dr. Steven A. Sanders. He reached maximum medical improvement on February 5, 1995 and Dr. Sanders assessed 10 percent permanent partial impairment. Plaintiff was limited to lifting no greater than 35 pounds occasionally or 17 pounds frequently or five pounds constantly. He was told not to work at a job requiring constant bending.

Plaintiff underwent independent medical examination by Dr. Gilbert Hyde, orthopedic surgeon, on March 1, 1995. Dr. Hyde also opined that plaintiff had reached maximum medical improvement and assessed 15 percent permanent partial impairment to the body as a whole. He opined the plaintiff should not lift over 25 pounds, not repetitively lift over 10 to 15 pounds, and do no prolonged riding, driving, sitting, bending, twisting or stooping.

Dr. Norman Hankins, vocational specialist, evaluated plaintiff on March 13, 1995. He opined plaintiff is 48 percent to 64 percent vocationally disabled, with the variance owing to the differences in limitations placed on plaintiff by Drs. Sanders and Hyde.

Plaintiff testified that he is in constant pain in his lower back and right leg. He has trouble sleeping due to the pain and cannot put any pressure on his right leg. He cannot drive, and a friend takes him where he needs to go. He does not believe he is able to work.

Our review is *de novo* on the record with a presumption that the findings of

fact of the trial court are correct unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2).

In making determinations, the court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities and capacity to work at types of employment available in claimant's disabled condition. TENN. CODE ANN. § 50-6-241(a)(1).

The trial judge, considering the expert witness' opinions of 10 percent and 15 percent permanent medical impairment, found that the plaintiff had sustained 12-1/2 percent medical impairment. When there is a difference between expert witnesses, the trial judge may accept the opinion of one or more over the opinion of another or others. *Johnson v. Midwesco,* 801 S.W.2d 804 (Tenn. 1990). He then considered plaintiff's work record, educational record, age, medical impairment, work restrictions, vocational assessment and the fact that he has not returned to work. He awarded 50 percent permanent partial vocational disability.

We find that the preponderance of the evidence supports the trial judge's award of 50 percent permanent partial disability to the body as a whole and we affirm on this issue.

Plaintiff contends the trial judge erred in refusing to commute the award to lump sum.

In determining whether to commute an award, the trial court shall consider whether the commutation will be in the best interest of the employee, and such court shall also consider the ability of the employee to wisely manage and control the commuted award irrespective of whether there exist special needs. TENN. CODE ANN. § 50-6-229(a). The purpose of workers' compensation is to provide injured workers with periodic payments which are a substitute for regular wages. *Burris v. Cross Mountain Coal Co.,* 798 S.W.2d 746, 748 (Tenn. 1990). Lump sum payments are an exception to the general purposes of our workers' compensation law, and as such, commutation should occur only in exceptional circumstances, and not at a matter of course. *Henson v. City of Lawrenceburg,* 851 S.W.2d 809 (Tenn. 1993).

Plaintiff testified that he would use a lump sum award to pay off debts and

back child support and to make a down payment on a home. He said he had no regular income at the time of trial.

The trial judge held that, in keeping with the intention of the legislature that disability payments provide regular support for the employee, it would not be in plaintiff's best interest to award a lump sum.

We agree with the trial court that plaintiff's best interest is to have regular monthly income, and we affirm the judgment of the trial court on this issue.

The judgment of the trial court is affirmed in all respects with costs assessed to the appellant and the case is remanded.

_____
John K. Byers, Senior Judge

CONCUR:

_____
E. Riley Anderson, Chief Justice

_____
William H. Inman, Senior Judge