IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE MAY 1996 SESSION

NATIONAL HEALTHCORP, L.P.,	)	
	)	RUTHERFORD CIRCUIT
Plaintiff/Appellee	)	
	)	NO. 01S01-9510-CV-00187
v.	)	
	)	Hon. Robert E. Corlew
JAMES PUCKETT,	)	
	)	
Defendant/Appellant	)	

For the Appellant:

D. Russell Thomas
218 West Main Street
Suite One
Murfreesboro, TN 37130

For the Appellee:

John R. Rucker, Jr.
14 Public Square, North
Murfreesboro, TN 37130

MEMORANDUM OPINION

Members of Panel:

Justice Adolpho A. Birch, Jr.
Senior Judge John K. Byers
Special Judge William S. Russell

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.

The employer filed this complaint asking the trial court to determine whether the employee sustained any permanent partial disability as a result of an incident at work in which he was in an elevator which fell or sped downward for ten floors.

The trial court found that plaintiff sustained a work-related injury resulting in temporary disability but failed to meet his burden of proving permanent impairment and therefore was not entitled to permanent partial disability benefits. The court found that certain court-ordered temporary total disability benefits had been paid beyond the employee's period of temporary disability, and ordered the employee to reimburse the employer $3,826.32 for this overpayment. Further, the court ordered the employer to pay medical expenses for authorized physicians and the employee to pay medical expenses for treatment he secured on his own. An issue raised on briefs as to the characterization of benefits so as to affect Social Security payments was withdrawn by employee's counsel at oral argument and will not be discussed herein.

We affirm the judgment of the trial court.

The employee worked for this employer from 1990 until February 1992, when he was involved in an on-the-job accident. On February 19, 1992, while he was in a company elevator, the elevator "fell" or traveled too quickly from the fourteenth to the fourth floor. The employee was tossed about inside the elevator, wrenching his shoulder and neck.

The employee was treated by various physicians, some of whom were approved by the employer and some of whom he saw on his own.

Dr. Richard Rogers, an orthopedic surgeon, found degenerative changes in plaintiff's cervical spine not caused by trauma. Dr. Arthur Cushman, neurosurgeon provided a second surgical opinion at the court's order and found no permanent impairment.

The employee consulted Dr. Richard Fishbein, orthopedic surgeon, and Dr. Melvin Law, orthopedic surgeon, on his own. Dr. Fishbein found a significant entrapment of the spinal cord at C5-6 possibly due to a combination of bone spur and a disc compromising the cord. He assigned the employee a ten to twelve percent permanent impairment and restricted him from repetitive lifting of more than twenty pounds and repetitive work above the shoulder. Dr. Law diagnosed a left-side herniated disc at C5-6 and assigned three percent impairment for the lower back and fifteen percent impairment for the cervical spine, for a total impairment of eighteen percent to the body as a whole. The trial court carefully considered and weighed this evidence, accepting the testimony of Dr. Rogers and Dr. Cushman that the employee had no permanent disability over the contrary opinions of Drs. Fishbein and Law.

The employee went to Dr. Michael McElroy, Ph.D., psychologist, on his own. Dr. McElroy opined plaintiff was experiencing a major depressive episode resulting from his loss of physical ability. He referred the employee to psychiatrist Dr. Narcisco Gaboy, for anti-depressant medication and medical maintenance. Dr. Gaboy also thought plaintiff had a marked impairment as a result of major depression and assessed 75 percent permanent impairment for this psychiatric condition. Dr. Murphy Thomas, Ph.D., psychologist, saw the employee at the employer's request to evaluate his mental status. Dr. Thomas administered the Minnesota Multiphasic Personality Inventory and, based on this test, opined plaintiff was exaggerating his symptoms of depression and was consciously malingering. The court found that the testimony of Dr. Thomas more credible than that of Dr. McElroy and Dr. Gaboy and declined to award permanent impairment based on alleged mental disability.

After weighing the medical evidence thusly, the trial court concluded that there was insufficient evidence that plaintiff had sustained any permanent anatomical impairment. Further, the court observed that the testimony of virtually all of the medical professionals was that the employee had in some manner exaggerated his symptoms or was malingering. Considering all of this, the trial court

held that the employee had not proved any permanent impairment and entered judgment in favor of the employer on that issue.

Our review is *de novo* on the record accompanied by 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).

There must be medical evidence to show an impairment exists, unless the impairment is obvious, to support an award of permanent disability. *Johnson v. Midwesco, Inc.,* 801 S.W.2d 804 (Tenn. 1990). The trial Judge may, when there is a difference in opinion between the experts, accept the opinion of one or more over the opinion of another or others. *Johnson, supra.* However, when the medical testimony is presented by deposition this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *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). We have reviewed the depositions and medical records in evidence and find that the trial court's accrediting of the records and testimony of treating Drs. Rogers and Cushman over those of doctors the employee contacted on his own (Dr. Fishbein and Dr. Law) to be supported by the evidence. Further, we agree with the trial judge that the assessment of Dr. Murphy Thomas, psychologist, that the employee was exaggerating his symptoms and consciously malingering is credible. From all of the above, we concur with the trial judge that the evidence does not support a finding of permanent mental disability.

During the long course of this litigation, an order was entered requiring the employer to resume payments of temporary total disability. Based on the medical evidence admitted at trial, the court found that the employer had been required to pay temporary total benefits beyond the employee's actual period of disability in the amount of $3,826.32. The trial court ordered the employee to reimburse this sum to the employer. The evidence shows that plaintiff reached maximum medical improvement and returned to work on March 10, 1992. The trial court did not err in requiring the employee to reimburse overpayment of any permanent partial disability benefits after March 10, 1992, and we affirm on this issue.

Although the parties briefed the issue of social security offset in any award of benefits, the employee withdrew this issue at oral argument based on Judicial Ethics Committee Opinion 95-10, and therefore we will not address it.

The decision of the trial court is affirmed in all respects at the costs of the appellant and the case is remanded.

John K. Byers, Senior Judge

CONCUR:

Adolpho A. Birch, Jr., Justice

William S. Russell, Special Judge