

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION PANEL
AT KNOXVILLE

FILED
December 19, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

JOHNNY OWNBY,)
)
Plaintiff/Appellee)
)
v.)
)
NATIONAL AMERICAN INSURANCE)
COMPANY,)
)
Defendant/Appellant)

SEVIER CIRCUIT
Hon. Rex Henry Ogle,
Judge
NO. 03S01-9604-CV-00037
(No. 95-183 Below)

For the Appellant:

Rockforde D. King
Egerton, McAfee, Armistead
& Davis, P.C.
500 First American Ctr.
507 S. Gay St.
Knoxville, TN 37901

For the Appellee:

Robert L. Ogle, Jr.
Ogle & Wallace, P.C.
121 Court Ave.
Sevierville, TN 37862

MEMORANDUM OPINION

Members of Panel:

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

**AFFIRMED AS MODIFIED
AND REMANDED**

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 trial court awarded plaintiff 48% permanent partial disability to the body as a whole at a compensation rate of \$266.66 per week. Defendant challenges the amount of disability awarded, the compensation rate applied and certain discretionary costs awarded.

Plaintiff, 37, graduated from high school. Most of his work experience has been in heavy construction labor. He testified that he injured his lower back on July 4, 1994, while digging up an asphalt driveway and loading the asphalt chunks onto a truck for defendant's insured. He worked on light duty until October but has not worked since October. 1994.

Plaintiff was treated by Alan L. Whiton, M.D., an orthopedist, who testified in this case by deposition. He opined that plaintiff had a disruption or internal cracking of L4-L5 based upon the results of a discogram. He assigned plaintiff a five percent permanent impairment rating to the body as a whole according to the AMA Guides.

George B. Brooks, D.O., a family practitioner, examined the plaintiff at the request of his attorney. He diagnosed degenerative disc disease with radiculopathy at L4-5 by history. He assigned a ten percent impairment rating according to the American Orthopedic Academy guidelines. He testified that he would not disagree with Dr. Whiton's five percent impairment rating but that he also considered that plaintiff had over six months of subjective complaints of pain. He further testified that some portion of his impairment rating was attributable to degenerative changes that predated plaintiff's work-related injury, but he could not apportion it.

Fred A. Killefer, M.D., neurosurgeon, examined plaintiff at the request of the defendant. He found no objective signs of a permanent injury and opined that plaintiff had a normal spine with subjective complaints of pain. He further opined

that plaintiff was overweight and deconditioned and that an appropriate conditioning regime might help him. He opined that plaintiff had no permanent impairment.

The trial judge based his assignment of plaintiff's workers' compensation rate upon plaintiff's testimony that he made \$10.00 per hour and generally worked 40 hours per week. Both parties stipulated to the admissibility of an affidavit of Sherry Haney-Brandow, workers' compensation claims adjuster at National American Insurance Company. She testified that plaintiff's average weekly wage was \$334.14 and attached a schedule of plaintiff's wages from August 19, 1993 to July 4, 1994.

The trial judge awarded plaintiff the following discretionary costs:

Dr. Wade Penny	\$ 10.00
Brown & Wingo Court Reporter	59.40
Velda Seagle, Court Reporter	95.75
Alan Whiton, M.D. (Deposition)	250.00
George Brooks, M.D. (Deposition)	500.00
Velda Seagle, Court Reporter	120.00
Donna M. Winn, M.D.	421.00
Prescriptions	302.75
Brown & Wingo Court Reporter	20.25

Total	\$ 1,779.15

Our review is *de novo* on the record, accompanied by the presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

We have reviewed the evidence in this case, including the transcript of the proceedings and the medical depositions, and we cannot find that the evidence preponderates against the trial court's award of 48% permanent partial disability to the body as a whole.

We find the evidence does preponderate against the trial court's finding that the appropriate workers' compensation rate is \$266.66 per week. The plaintiff's testimony as to his average weekly wage is too uncertain and nonspecific to be the basis for setting his workers' compensation rate. The affidavit presented by the defendant is more specific and certain. We find the evidence preponderates in favor of a workers' compensation rate of \$222.76 per week, which is 66% of

plaintiff's average weekly wage of \$334.14. See T.C.A. § 50-6-207(3). We, therefore, modify the judgment to reflect a workers' compensation rate of \$222.76 per week.

As to the discretionary costs, the transcript clearly reflects the parties' agreement that the payments to Dr. Penny, Dr. Winn and for prescription medication are medical costs and therefore payable by the defendant as medical expenses. The remainder of the discretionary costs were appropriately awarded to plaintiff.

The judgment is affirmed as modified, and the case is remanded for assessment of costs on appeal, which are taxed to defendant/appellant, and any other appropriate orders.

John K. Byers, Senior Judge

CONCUR:

E. Riley Anderson, Justice

William H. Inman, Senior Judge

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JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Worker' Compensation 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 act 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/appellant, National American Insurance Company and surety, Rockforde D. King, for which execution may issue if necessary.

12/19/96