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

JOHN PRIMM,	)	MAURY CIRCUIT
	)	
Plaintiff/Appellee	)	HON. JIM T. HAMILTON,
	)	Circuit Judge
v.	)	
	)	
UCAR CARBON COMPANY, INC.,	)	
	)	
Defendant/Appellant	)	NO. 01S01-9511-CV-00204

FILED

June 20, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

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MEMORANDUM OPINION

Members of Panel:

Frank F. Drowota, III, Justice
John K. Byers, Senior Judge
Roger E. Thayer, Special Judge

MODIFIED and 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.

Defendant, UCAR Carbon Company, Inc., has appealed from the action of the trial court in awarding plaintiff, John Primm, 65% permanent partial disability benefits to the body as a whole.

Defendant contends the trial court was in error (1) in awarding 65% disability to the body as a whole, (2) in denying Defendant a set-off for payments of short-term disability insurance benefits and (3) in commuting the award to one lump sum payment.

Plaintiff is 63 years of age and has a 12th grade education. He has followed construction work for many years and had worked for Defendant for 13 years prior to the time in question. During October, 1993, he was injured while using a pry bar to move a heavy metal plate. He said he felt a pinch in his back and shoulder and reported the injury to his employer. He continued to work on and off for different periods of time until his surgical procedures were over. After finally being released by his physician, he told the trial court he could not work at his old job and he elected to retire during March, 1995.

The testimony of Dr. Eslick Daniel, an orthopedic surgeon, was presented by deposition. He indicated he first saw plaintiff on November 3, 1993, when he noted plaintiff had degenerative disc disease of his back and early arthritic changes of his shoulder. His first diagnosis was a shoulder and back strain and he said plaintiff did not indicate his problem was work-related. Upon seeing him a second time, his diagnosis was a rotator cuff strain with some tendinitis. He noted that between the two visits the patient had also seen a hospital emergency room doctor. Dr. Daniel had scheduled a CT Scan but plaintiff declined to take the test as he said the doctor had accused him of "faking" the injury. Dr. Daniel did not recall nor deny this conversation.

Plaintiff decided to see another doctor designated by Defendant. This physician referred him to Dr. Greg Lanford, a neurosurgeon, who examined plaintiff

on March 3, 1994. Dr. Lanford testified by deposition and stated his diagnosis was cervical radiculopathy which was not work-related and after several months of complaints of low back pain and leg pain, he ordered a myelogram and post-myelogram CT on his lumbar and cervical area. This revealed a lumbar ruptured disc at L5-S1 on the left.

Dr. Lanford performed surgery on his back during August, 1994, finding an 8% medical impairment and later performed neck surgery resulting in a 13% medical impairment which he rounded off to 20% total impairment. Restrictions of avoiding heavy lifting, bending and stooping were imposed as a result of the disc surgery.

Dr. Lanford seemed to be somewhat puzzled by the fact plaintiff did not indicate to Dr. Daniel his problem was work-related. However, when told that plaintiff gave a work-related injury history to the emergency room doctor, he testified that plaintiff's history would be consistent with a diagnosis of an aggravation of a pre-existing condition in his neck and back.

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

_____An employer takes an employee as he is and assumes the risk of having a weakened condition aggravated by an injury which might not affect a normal person. Harlan v. McClellan, 572 S.W.2d 641 (Tenn. 1978). The employer takes the employee with all pre-existing conditions, and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability far greater than if he had not had the pre-existing conditions. Rogers v. Shaw, 813 S.W.2d 397 (Tenn. 1991).

The record indicates plaintiff had not had any problems with his neck or back prior to the work incident during October, 1993, and that his physical condition continued to deteriorate until his surgical procedures were over. The trial court resolved the question of causation of injuries in favor of the plaintiff and from our independent review, we cannot say the evidence preponderates against this finding. Also, we do not find the evidence to preponderate against the extent of the award of

disability when considering plaintiff's age, education, impairment of earning capacity, etc.

The second issue deals with Defendant's request for a set-off of short term disability benefits paid to plaintiff from August 16, 1994 through February 28, 1995 for a total sum of $11,132.15. This set-off, if allowed, would be against temporary total disability benefits. The Circuit Judge denied the request construing the statutory language of T.C.A. § 50-6-128 as precluding the set-off. This statute provides:

> "If any employer knowingly, willfully, and intentionally causes a medical or wage loss claim to be paid under health or sickness and accident insurance, when the employer knew that the claim arose out of a compensable work-related injury and should have been submitted under its workers' compensation insurance coverage, then such employer shall be fined five hundred dollars ($500), and the employer may not offset any sickness and accident income benefit paid to the employee against temporary total disability benefit payment liability due to the employee pursuant to the provisions of this chapter."

We find the denial of the set-off by the trial court to be proper but for different reasons. First, the statute does not create a right to a set-off but merely prohibits it under certain circumstances. The right to a set-off of this nature against temporary total disability benefits was most recently addressed in the case of Simpson v. Frontier Community Cr. Union, 810 S.W.2d 147 (Tenn. 1991). In this case a set-off of $18,422.12 was not allowed because the Supreme Court found the disability insurance policy, which was introduced as evidence during the trial, did not contain an explicit set-off clause allowing the payments as credits against temporary total benefits. The opinion went on to state the right to a set-off was a matter of a contractual nature between the parties and would only be recognized where there was an express provision in the policy of insurance.

In the present case, the disability insurance policy was not admitted as evidence and Defendant has failed to show it is entitled to the set-off as a result of policy language explicitly allowing the credits. Thus, we construe T.C.A. § 50-6-128 as precluding the set-off where the right to same exists under the ruling of the Simpson case.

_____Finally, Defendant contends the award of disability should not have been

commuted. We agree with this contention. T.C.A. § 50-6-229 requires the court to consider whether the commutation would be in the best interest of the employee and the ability of the employee to wisely manage and control any commuted award. The only evidence in this regard was plaintiff's testimony that he owned 90 acres of pasture land where he kept 48 head of cattle; that the total payoff of his mortgage was about $52,000.; he was receiving $819. per month in Social Security benefits; that he had received some type of settlement from Union Carbide which was paid in a lump sum; and he and his wife handled their money. These few facts would not support findings as required by the statute. The award should be paid as general law directs and we note that a considerable portion of the award will have accrued by the time this judgment becomes final.

Plaintiff's claim that the appeal of the case is frivolous is without merit.

The judgment of the trial court is modified as indicated and affirmed in all other respects. Costs of the appeal are taxed to Defendant and sureties.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
Frank F. Drowota, III, Justice

_____
John K. Byers, Senior Judge