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

FILED

May 1, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

CLIFFORD E. WELLS, Plaintiff/Appellee v. JEFFERSON CITY ZINC, INC. Defendant/Appellant and SUE ANN HEAD, Director, Tennessee Department of Labor, Division of Workers' Compensation, Defendant/Appellee	)	JEFFERSON CIRCUIT Hon. Ben Hooper, Judge NO. 03S01-9509-CV-00100 (No. 12,507 Below)

For the Appellant:	**For the Appellee-- Second Injury Fund:**	**For the Appellee-- Clifford E. Wells:**
A. Benjamin Strand, Jr. Rebecca D. Slone Strand & Goddard P.O. Box 219 Dandridge, TN 37725	Charles W. Burson Attorney General & Reporter Sandra E. Keith Assistant Attorney General 1510 Parkway Towers 404 James Robertson Pkwy. Nashville, TN 37243-0499	James M. Davis 214 N. Jackson St. Morristown, TN 37814

MEMORANDUM OPINION

Members of Panel:

Chief Justice E. Riley Anderson
Senior Judge John K. Byers
Special Judge Roger E. Thayer

AFFIRMED
AS MODIFIED

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 appeals the trial court's finding that the plaintiff is 100% permanently and totally disabled, its apportionment of 70% of the liability to the employer and 30% to the Second Injury Fund and its commutation of the award to a lump sum.

We modify the judgment to void the commutation of the award to a lump sum payment. As modified, we affirm the judgment.

The plaintiff, 51 at the time of trial, has a ninth-grade education. His past work experience includes farming, paint spray mixing and operating and supervision of same, millwrighting, construction and working in the defendant's mines.

He began working for the defendant in 1977. He suffered a back injury, possibly in the course and scope of his employment with the defendant-employer, in 1978. A lumbar laminectomy was performed in 1985 as a result of that injury. No workers' compensation claim was ever filed, and the employer did not pay any medical expenses. Plaintiff re-injured his back on February 21, 1992, while moving a pump in the course of his employment. He was laid off by the employer in June 1994, never having returned to work.

Dr. John Bell, an orthopaedic surgeon, treated the plaintiff after his 1992 injury. He had also performed the plaintiff's 1985 surgery, after which he had assigned the plaintiff a 15% permanent impairment. He assigned the plaintiff a five percent impairment rating for the 1992 injury under the most recent edition of the A.M.A. Guides. He restricted the plaintiff from lifting more than 35 pounds occasionally, 20 pounds frequently, climbing and kneeling, bouncing, crouching or crawling more than occasionally. He had apparently informed the plaintiff of similar

restrictions following the 1985 surgery but had assigned no official restrictions due to concerns that the plaintiff would not be able to return to work. He opined that the plaintiff's prognosis following the 1992 injury was poor.

The plaintiff's attorney referred the plaintiff to Dr. Russell McKnight, a psychiatrist. Dr. McKnight diagnosed the plaintiff as suffering from depression not otherwise specified and anxiety/depressive syndrome with insomnia secondary to pain. He assigned the plaintiff a 25% impairment rating and opined that the plaintiff was not capable of working with the public or dealing with work stressors or a rigid schedule. He opined that the plaintiff was not malingering.

The employer referred the plaintiff to an independent medical evaluation by Dr. Marshall Hogan, another psychiatrist. Dr. Hogan's findings were consistent with that of Dr. McKnight.

The employer also had a spinoscopy performed upon the plaintiff. Dr. McIlwain reviewed the spinoscopy and found the plaintiff to be moderately limited with his limitations due mostly to the lumbar fusion and muscular deconditioning. He did not examine the plaintiff.

Dr. Norman Hankins, a vocational rehabilitation counselor, evaluated the plaintiff at the request of the plaintiff's attorney. He opined that the plaintiff was 100% permanently and totally disabled from the second injury alone. He further opined that, if the plaintiff's mental disability could be cured or controlled, he would be highly, although not totally, disabled.

The plaintiff, his brother, a co-worker and a friend testified at trial to the second accident and the drastic decrease in the plaintiff's ability to work, perform chores and pursue his hobbies following the second injury. The plaintiff testified that he cannot stand, walk or sit for extended periods of time without frequent breaks.

Our review is de novo, accompanied by a presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise. TENN. CODE ANN. § 50-6-225(e)(2). Where the trial court has seen and heard witnesses,

especially where credibility or weight of oral testimony is at issue, we must afford his findings considerable deference. *Landers v. Fireman's Ins. Co.*, 775 S.W.2d 355 (Tenn. 1989). We may make our own independent evaluation of documentary evidence, such as the depositions of the physicians and Dr. Hankins in this case. *Id.*

The employer raises several issues in challenging the trial court's finding of 100% permanent and total disability. It challenges the trial court's finding that the plaintiff is credible, the trial court's inclusion of out-of-court observation of the plaintiff in reaching his judgment and the standard used by the trial court in finding the plaintiff to be so disabled. The plaintiff further contends that the evidence preponderates against a finding of 100% permanent and total disability.

As stated above, we defer greatly to the trial court where the credibility of a witness who testified live at trial is questioned. The trial court carefully considered the documentary evidence presented by the employer and the trial testimony and found the plaintiff to be credible. We find the evidence does not preponderate against the trial court's finding. The employer also presented arguments based on evidence produced by an investigator who followed the plaintiff and taped his activities after the trial in this case. The employer filed a motion for new trial based on this "newly discovered" evidence, which the trial court properly denied. The employer could have easily gathered evidence of the plaintiff's activities prior to the trial.

The employer points to the memorandum opinion of the trial court as containing reversible errors. The trial judge stated that he had observed the plaintiff's gait after the plaintiff had left the courtroom. Although this is not admissible evidence, we do not find that it, in conjunction with the remaining evidence, preponderates against the trial court's judgment.

The employer also argues that the trial judge used the wrong standard in reaching its final judgment, namely his finding that the plaintiff could not work eight

hours a day for five days a week. In the context of the opinion, this statement clearly represents a permissible factor to be considered in reaching an award. The trial judge considered the plaintiff's ability to work within a schedule in conjunction with the plaintiff's age, education, skills, medical impairment and other factors in determining vocational impairment.

We find that the evidence does not preponderate against the trial court's judgment that the plaintiff is 100% permanently and totally disabled.

We also find that the evidence does not preponderate against the trial court's apportionment of liability. Dr. Hankins opined that the plaintiff is 100% permanently and totally disabled by the second injury alone and highly disabled without any consideration of the mental disability. Although Dr. Hankins also opined that the plaintiff was 55% to 65% vocationally disabled from his first injury/surgery, the trial court pointed out that the plaintiff worked for close to seven years in the mines following the surgery without any serious difficulties. Further, the testimony of the plaintiff and his various witnesses indicates that there has been a sharp decline in his physical abilities after the second accident.

We find that the trial court abused its discretion in commuting the award to a lump sum payment. The plaintiff has no outstanding debts. He does not have a demonstrated need for housing, as he lives with his parents and owns his own home free of mortgage besides. He did not indicate any specific plan for rehabilitation for which he might need a lump sum payment. Furthermore, no proof was offered that he has any other periodic income to support him. We, therefore, modify the judgment as to its requirement that the award be paid in a lump sum rather than in periodic weekly installments.

We modify the judgment by not allowing payment of the award in a lump sum and affirm the judgment as modified. Costs are assessed to the defendant, Jefferson City, Zinc, Inc.

John K. Byers, Senior Judge

CONCUR:

E. Riley Anderson, Chief Justice

Roger E. Thayer, Special Judge