

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

FILED

November 25, 1996

Cecil W. Crowson
Appellate Court Clerk

WILLIAM O. WORLEY, JR.,)
)
Plaintiff/Appellee,)
)
v.)
)
TECUMSEH PRODUCTS COMPANY,)
)
Defendant/Appellant.)

SEQUATCHIE CIRCUIT

NO. 01S01-9509-CV-00160
(No. Below 6411)

HON. BUDDY D. PERRY,
JUDGE

For the Appellant:

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For the Appellee:

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MEMORANDUM OPINION

Members of Panel:

Justice Frank F. Drowota, III
Senior Judge John K. Byers
Special Judge Robert L. Childers

AFFIRMED as MODIFIED AND REMANDED.

CHILDERS, 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.

In this case, the trial court awarded 45% permanent partial disability to the right arm. Defendant contends that the evidence does not support the percentage of disability awarded and requests that this court reduce and amend the judgment of the trial court accordingly. The Defendant also contends that the trial court erred in accrediting the testimony of Plaintiff's expert witness over the testimony of the treating physician. The final issue is whether the trial court erred in awarding discretionary costs for the deposition of Plaintiff's expert medical witness. The Defendant also raises the issue of whether the trial court erred in awarding a lump sum. As the benefits have now accrued, this issue is moot.

On June 19, 1992, Plaintiff injured his right arm and wrist while working on a machine. Plaintiff is 48 years old and has a high school education. His work experience consists of working in the parts department, as a mechanic, as a tool and die worker, on a surveying crew, as a fire fighter, as a guard, and as a water pipeline repairer. Each of these jobs required heavy manual labor and the use of Plaintiff's arms and hands. Plaintiff had been employed at Tecumseh for approximately a year and a half when he sustained the injury.

Dr. L. L. Carter, Jr. treated the Plaintiff after he was injured. Dr. Carter first examined Plaintiff on July 7, 1992. Dr. Carter testified, by deposition, that the nerve conduction tests showed elbow nerve and wrist nerve damage. Initially, Dr. Carter treated this condition conservatively, with a wrist splint, with no improvement. On August 31, 1992, Dr. Carter performed ulnar nerve decompression and submuscular transposition. At the same time, carpal tunnel release in the right hand and a nerve graft to the neuroma on the right wrist were performed. Three days later, Plaintiff was told to return to light work. Plaintiff was returned to regular work on December 15, 1992.

Dr. Carter did not see Plaintiff again until January 8, 1993, at the request of

Plaintiff's employer. At that time, Dr. Carter informed Plaintiff that he could return to work with no restrictions.

Dr. Carter saw Plaintiff again in April 1993 at which time he learned that another physician, Dr. Karen Shepherd, had restricted Plaintiff from working due to delayed stress syndrome. Dr. Carter assumed that this delayed stress syndrome was related to the death of Plaintiff's wife. Plaintiff continued to complain of pain, which Dr. Carter opined was not credibly related to the prior surgery.

An impairment rating test was performed on May 17, 1993 at Chattanooga Rehabilitation Center. The results of the test indicated a possible lack of maximum effort and elicited AMA Guides impairment rating of 8% to the body as a whole. Plaintiff was retested and was given an impairment rating of 3%.

Dr. C. Sanford Carlson, Jr. saw Plaintiff on October 26, 1993, for a second opinion as requested by Plaintiff's attorney. Dr. Carlson opined that a natural consequence of the surgery performed by Dr. Carter is weakness of grip and that in fact Plaintiff had suffered from that consequence of the surgery. Plaintiff made good effort on the dynamometer testing and revealed 33% loss of grip strength. Dr. Carlson assessed 15-17% impairment of the right upper extremity by AMA Guides. Dr. Carlson's assessment was based primarily on the three surgical procedures that Plaintiff had undergone, the fact that the muscles that controlled grip strength were affected by the surgery and the EMG results. Dr. Carlson restricted Plaintiff's activities, including limiting any extensive repetitive gripping and squeezing, pushing and pulling, and using vibratory tools on the assembly line.

After considering all of the proof presented at trial, the trial court awarded 45% permanent, partial industrial impairment to the right arm.

When the opinions of medical experts differ in a workers' compensation case, the trial court has absolute discretion to accept the opinion of one medical expert over another. *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804 (Tenn. 1990). The fact that one of the medical experts was a treating physician while the other was Plaintiff's expert medical witness is one of the factors that can be considered by the court in accepting one opinion over the other. *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541 (Tenn.

1992).

In determining whether there has been a decrease in the employee's capacity to earn wages in any line of work available to the employee and assigning permanent partial disability, the trial court should consider both expert and lay testimony, as well as the employee's age, education, skills, training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition. *Orman v. Williams-Sonoma, Inc.*, 803 S.W.2d 672, 678 (Tenn. 1991). Our review is *de novo* on the record accompanied by a presumption that the findings of fact made by the trial court are correct unless the evidence preponderates otherwise. TENN. CODE ANN. § 50-6-225(e). The record being unclear as to what factors the trial judge considered in assessing 45% disability to the right arm, we find that the evidence does not preponderate against such a finding.

The Defendant also challenges the trial court's award of discretionary costs in the amount of \$600.00 for Plaintiff's medical expert's fee and \$142.00 for the expenses of the court reporter to take the deposition of Plaintiff's medical expert. As to the Plaintiff's medical expert's fee, the fees charged to the Plaintiff by the physician "shall, unless the interests of justice require otherwise, be considered a part of the costs of the case, to be charged against the employer when the employee is the prevailing party." TENN. CODE ANN. § 50-6-226(c)(1). We do not believe that this is a case where the interests of justice require deviation from the general rule. As to the court reporter expenses, Plaintiff concedes that the proper means of recovering this would have been to file a Motion for Discretionary Costs pursuant to Tennessee Rule of Civil Procedure 54. No such motion was filed. As such, the discretionary costs are modified by \$142.00.

We find that the evidence in the record does not preponderate against the trial court's finding that the plaintiff suffered a 45% permanent partial disability to the right arm. Therefore, the judgment of the trial court is affirmed. Costs are assessed to Defendants/Appellants. We remand the case to the trial court for the entry of any order necessary to carry out this judgment.

Robert L. Childers, Special Judge

CONCUR:

Frank F. Drowota, III, Justice

John K. Byers, Senior Judge

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AT NASHVILLE

WILLIAM O. WORLEY, JR.,)	SEQUATCHIE CIRCUIT
)	NO. 6411
Plaintiff/Appellee,)	
)	Hon. Buddy D. Perry
V.)	Judge
)	
TECUMSEH PRODUCTS COMPANY,)	S.Ct. No. 01-S-01-9509-CV-00160
)	
Defendant/Appellant.)	Affirmed as Modified and Remanded

<p>FILED</p> <p>November 25, 1996</p> <p>Cecil W. Crowson Appellate Court Clerk</p>

JUDGMENT ORDER

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals 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 motion for review is not well-taken and should be denied; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Cost will be paid by Defendant/Appellant, and their surety, for which execution may issue if necessary.

It is so ordered this 25th day of November, 1996.

PER CURIAM