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

RONNIE SETTLES,	)	
	)	
Plaintiff/Appellee,	)	**HARDIN COUNTY**
	)	
VS.	)	**HON. C. CREED McGINLEY**
	)	**JUDGE**
SHARPS MILL FOREST PRODUCTS	)	
INC. and OLD REPUBLIC INSURANCE	)	**No. 02S01-9607-CV-00069**
COMPANY,	)	
	)	
Defendants/Appellants.	)	

FILED

February 21, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

FOR APPELLANTS:
Christopher V. Sockwell
P. O. Box 357
Lawrenceburg, TN 38464

Bennett L. Pugh
1700 Financial Center
505 N. 20th Street
Birmingham, AL 35203-2607

FOR APPELLEE:
Steve Beal
22 Monroe Street
Lexington, TN 38351

MEMORANDUM OPINION

MEMBERS OF PANEL:

LYLE REID, JUSTICE
JOE C. LOSER, JR., SPECIAL JUDGE
CORNELIA A. CLARK, SPECIAL JUDGE

AFFIRMED AS MODIFIED **CLARK, SPECIAL JUDGE**

This worker's compensation appeal has been referred to the special worker's 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 the plaintiff a permanent partial disability of ten (10%) percent to the body as a whole and found his proper compensation rate to be $366.68. Defendants have appealed, alleging that plaintiff did not prove that his facial disfigurement materially affected his employability, and that the trial court erred in setting the compensation rate at $366.68.

On May 4, 1994, plaintiff was employed by Sharps Mill Forest Products ("Sharps Mill") as a logger. On that day he was injured when a chain saw struck him in the face, causing severe lacerations and bleeding. Plaintiff has undergone several surgeries to repair the injuries to his facial area.

Dr. John R. Werther, plaintiff's treating physician, gave him a fifteen (15%) percent impairment to the body as a whole for his facial scar and residual nasal deformity, and a three (3%) percent impairment to the body as a whole for residual facial numbness. The only restriction imposed by Dr. Werther was the avoidance of recurrent injury. In March 1995 Dr. Stephen Pratt, a board certified plastic surgeon, examined plaintiff. His opinion was that plaintiff had a Class I scar, translating to a permanent impairment between zero (0%) percent to nine (9%) percent to the body as a whole. Functionally, Dr. Pratt found that the plaintiff would not have any limitations or restrictions in the work place. Dr. Pratt also found that plaintiff was well adjusted to his injury and that he never reported any psychological problems to him.

Appellate review 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. Tenn. Code Ann. §50-6-225(e)(2). This tribunal is required to conduct an independent examination of the record to

determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921 (Tenn. 1995).

I. Disfigurement

Defendants do not contest the serious nature of the injuries sustained in the on-the-job accident. The only issue raised in this regard is how the plaintiff's disfigurement relates to his employability.

Plaintiff does not have any trouble with reading, writing, arithmetical calculations, or other basic skills. He was an A and B student in high school and has his G.E.D. He testified that he would not have any trouble going back to college, and that he picks up new job skills quickly. Since being released from his doctor's care in May 1995 he has obtained work with Premier Construction doing pipe fabricating and pipe fitting. He also runs a blow torch and a pipe threading machine while working on the construction site. During the course of this employment he has never worked less than forty-five (45) or fifty (50) hours per week. He is still able to work heavy machinery, including all types of machinery associated with logging. He also has the skill to drive trucks and feels that he could still perform that job. Plaintiff is able to do carpentry work and bills for such work at $12.00 per hour. He also works on automobiles and engines. Plaintiff further testified that while performing the logging jobs, the only people he dealt with were other loggers in the woods.

T.C.A. §50-6-207(3)(E) provides in pertinent part as follows:

> For serious disfigurement to the head, face or hands, not resulting from the loss of a member or other injury specifically compensated, so altering the personal appearance of the injured employee as to materially affect such injured employee's employability in the employment in which such injured employee was injured or other employment for which such injured employee is then qualified, sixty-six and two-thirds percent (66-2/3%) of the average weekly wages for such period as the court may determine not exceeding two hundred weeks.

When benefits are sought under the disfigurement statute, the burden is on the employee to prove that (1) a serious disfigurement has been sustained, (2) the disfigurement materially affects the employment, (3) the condition is permanent, and (4) a work-related injury caused the disfigurement. Wilkes v. Resource Authority of Sumner County, 932 S.W.2d 458 (Tenn. 1996).

During oral argument counsel for defendants acknowledged that his position as to disfigurement may have been eroded by the recent holding of the Supreme Court in Wilkes. We agree. In this case there is no dispute about the serious nature of the injury or that it was work-related. While the employee retains no physical dysfunction from the scar, Dr. Werther also testified that he retains a permanent impairment of three (3%) percent to the whole body based on continuing problems with his sinuses and residual facial numbness. Therefore, the employee has sustained his burden of proving that the disfigurement materially affects his employment and that the condition is permanent. The evidence fails to preponderate against the finding of the trial judge that plaintiff sustained a ten (10%) percent permanent partial disability to the body as a whole.

II. Compensation Rate

Defendants next contend that the trial court erred in setting plaintiff's compensation rate at $366.68. Although plaintiff initially asserted this as the correct rate, counsel conceded during oral argument that the rate was not supported by the proof in the case. Both parties were requested to do their own calculations and provide them to the court, and they have now done so.

T.C.A. §50-6-102(a)(1) provides in pertinent part as follows:

> (A) "Average weekly wages" means the earnings of the injured employee in the employment in which the injured employee was working at the time of the injury during the period of fifty-two (52)

> weeks immediately preceding the date of the injury divided by fifty-two (52); . . . .
>
> (B) Where the employment prior to the injury extended over a period of less than fifty-two (52) weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, that results just and fair to both parties will thereby be obtained;
>
> (C) Where by reason of the shortness of the time during which the employee has been in the employment of the employee's employer, it is impracticable to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the first fifty-two (52) weeks prior to the injury or death was being earned by a person in the same grade, employed at the same work by the same employer, and if there is no such person so employed, by a person in the same grade employed in the same class of employment in the same district; . . .

The documents submitted by the employer show that for the first few weeks of his employment, plaintiff worked as an hourly employee and earned a total of $1,750.91.[1] He eventually was placed in a different job and began being compensated based on tonnage. During the next nineteen (19) weeks he earned $8,108.41. The trial court apparently disregarded two weeks during February 1994 based on testimony that an ice storm prevented crews from working. The trial court appeared to subtract these nine (9) weeks of wages, dividing the remaining gross wages to reach a weekly amount. However, that computation still does not result in a rate of $366.68. The evidence preponderates against the trial court's findings in this regard.

This court finds that in making the wage calculation, the original seven (7) weeks of employment at an hourly rate should be included. See Russell v. Genesco, Inc., 651 S.W.2d 206 (Tenn. 1983). The week of February 18, 1994, during the ice storm, should be excluded, along with wages earned that week. The

[1]Defendants in their brief correctly assert that plaintiff was employed for twenty-six weeks. Counsel's December 20, 1996 letter refers to five (5) weeks worked on an hourly basis and twenty-four (24) weeks worked in all. All calculations in the letter are based on that number. Plaintiff in his brief referred to six (6) weeks worked on an hourly basis. Counsel's letter of January 2 refers to five (5) weeks worked on an hourly basis. Because of the analysis we have adopted, it is not necessary to resolve this inconsistency. The exhibit itself shows seven (7) weeks worked in 1993 and twenty-six (26) weeks worked altogether. We have used twenty-six (26) weeks in our calculations.

remaining eighteen (18) weeks of employment should be included. We find this method of computation meets the "just and fair" provision of T.C.A. §50-6-102(1)(B). This results in gross earnings of $9,710.53 over a period of twenty-five (25) weeks, or an average weekly wage of $388.42 and a compensation rate of $259.08 per week. We find this figure to be the proper compensation rate for plaintiff in this case.

We therefore affirm the trial court's finding of a ten (10%) percent permanent partial disability to the body as a whole, and modify the judgment of the trial court to reflect a compensation rate of $259.08 per week. As modified, the case is remanded to the Circuit Court for Hardin County for the entry of any orders necessary to carry out this judgment. Costs on appeal are taxed equally to plaintiff and defendant.

_____
CORNELIA A. CLARK, SPECIAL JUDGE

CONCUR:

_____
LYLE REID, JUSTICE

_____
JOE C. LOSER, JR., SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

RONNIE SETTLES,	)	HARDIN CIRCUIT
	)	NO. 2339
Plaintiff/Appellee,	)	
	)	Hon. C. Creed McGinley,
vs.	)	Judge
	)	
SHARPS MILL FOREST PRODUCTS, INC. and OLD REPUBLIC INSURANCE CO.	)	NO. 02S01-9607-CV-00069
	)	
	)	
Defendant/Appellants.	)	AFFIRMED AS MODIFIED.

JUDGMENT ORDER

This case is before the Court upon 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 Memorandum Opinion of the Panel should be accepted and approved; 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.

Costs will be paid equally by Appellant and Appellee, for which execution may issue if necessary.

IT IS SO ORDERED this 21st day of February, 1997.

PER CURIAM

(Reid, J., not participating)