IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE JANUARY 1997 SESSION

THOMAS HICKMAN,	)	GILES CIRCUIT
	)	
Plaintiff/Appellant	)	NO. 01S01-9606-CV-00117
	)	
v.	)	HON. JIM T. HAMILTON,
	)	JUDGE
LIBERTY MUTUAL INSURANCE COMPANY,	)	
	)	
Defendant/Appellee	)	

For the Appellant:

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For the Appellee:

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M E M O R A N D U M O P I N I O N

Members of Panel:

Frank F. Drowota, III, Justice
John K. Byers, Senior Judge
William H. Inman, Senior Judge

AFFIRMED 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.

Plaintiff injured his back on April 29, 1994 while repairing a forklift truck for the employer, Richland, Incorporated. The trial judge awarded him 12-1/2 percent permanent partial disability. He appeals, asserting that the amount of disability should not have been based on the medical report of the first treating physician and that the two and one-half multiplier cap in TENN. CODE ANN. § 50-6-241 should not have been applied under the facts of this case.

We affirm the judgment of the trial court.

Plaintiff sustained injury to his back on April 29, 1994 while lifting a cylinder head from a forklift truck. Medical records of Dr. Vaughan Allen, designated as Exhibit 1 to the Deposition of Dr. Earl M. Jeffres, indicate that plaintiff was first treated by Dr. Charles D. Haney, who prescribed medications and rest. When plaintiff did not improve, he was referred by the employer to Dr. Allen. In May of 1995 he was sent by his attorney to Dr. Earl M. Jeffres.

The plaintiff first raises the issue that:

> "The trial court erred in basing its decision on the written report of a non-testifying physician [Dr. Allen] and rejecting the testimony of the only medical expert [Dr. Jeffres]."

Dr. Allen's treatment records of May 24, 1994 and May 27, 1994 revealed that plaintiff had a loss of range of motion of his low back, muscle spasm and a straight leg raise test that was positive for lumbar injury. X-ray revealed a central disc protrusion. Plaintiff was taken off work and placed on physical therapy for four weeks.

On June 28, 1994, plaintiff returned to Dr. Allen, stating that he was "better but not well." He told Dr. Allen that there was "absolutely no light duty and that he works at very heavy machines . . . " In light of this assertion by the patient, Dr. Allen advised him to continue the chronic exercise program and return for a re-check in two months. Allen further opined that "Certainly, if there is light duty he could start

doing that, at this point."

Plaintiff returned to see Dr. Allen on August 30, 1994, "doing as well as could be expected." He was placed in a work hardening program and a functional capacity test was ordered. Dr. Allen planned to release plaintiff to return to work as soon as this has been completed.

Plaintiff saw Dr. Allen on October 7, 1994 after completing the work hardening program. Allen opined that it was "not feasible" for him to return to heavy activity at work. He limited plaintiff to lifting up to 50 pounds. Further, he opined plaintiff could bend and twist without difficulty "as long as it's not on an absolutely continuous basis." He assessed 5 percent anatomic impairment and recommended that plaintiff stay on a chronic exercise program. He opined plaintiff could return to work with the above limitations.

In response to an inquiry by plaintiff's counsel, Dr. Allen wrote on December 30, 1994 that "Certainly Mr. Hickman cannot do heavy mechanical work, and, unfortunately, a good deal of his work would require this. I know of nothing that we can do to change this, and if, indeed, he states that he is limited and cannot do this work secondary to pain I would certainly have to respect this."

On May 18, 1995, plaintiff saw Dr. Earl M. Jeffres at his attorney's request. Dr. Jeffres is an orthopedic surgeon licensed to practice in Tennessee and on the staff of Lincoln Regional Hospital in Fayetteville. He formerly practiced medicine in Florence, Alabama, but lost his privileges there.

Dr. Jeffres testified by deposition that he examined plaintiff and diagnosed lumbosacral back strain with chronic symptoms and herniated nucleus pulposus of the fifth lumbar paravertebral disc, associated with bulging of the annulus fibrosis and with this bulging impinging upon the neural canal. He opined that plaintiff has a 24 percent impairment to the whole person using the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition. Further, plaintiff would have work restrictions including "no lifting while bending, no twisting while lifting, as in turning from side to side, no working with outstretched upper extremities as this put additional stress on his spine. He is not able to consistently stand, sit or lie down."

Dr. Jeffres further testified that he saw plaintiff on June 8 and December 9, 1995, although there is no evidence as to whether this was for treatment or further evaluation.

The trial court found that the deposition testimony of Dr. Jeffres was not credible and relied on the medical records of Dr. Vaughan Allen, who assessed five percent medical impairment.

Plaintiff first argues that Dr. Allen's treatment records are not properly in evidence. When Dr. Jeffres was deposed by plaintiff, he was holding in his hand the medical records of Dr. Allen, upon which he relied in performing his independent evaluation. On cross-examination, counsel for Defendant stated, "I have made a copy of those, and I would like to make those Exhibit 1 [to Jeffres' deposition]." Plaintiff replied, "no objection."

RULE 103(A), TENNESSEE RULES OF EVIDENCE provides:

> (a) Effect of Erroneous Ruling. - Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) Objection. - In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection if the specific ground was not apparent from the contest;

Failing to make a timely, specific objection in the trial court prevents a litigant from challenging the introduction of inadmissible evidence for the first time on appeal. *Adams v. Manis,* 859 S.W.2d 323 (Tenn. Ct. App. 1993). Moreover, plaintiff agreed to the admission of Dr. Allen's medical records at trial. As defendant points out, it is disingenuous for plaintiff to now argue that the Court should not have taken into account Dr. Allen's medical notes when the plaintiff himself relied upon those notes at trial as did his expert in his independent medical examination. Under the circumstances, we conclude that introduction of the records at trial was not error.

Plaintiff next argues that Dr. Allen's records should be accorded less evidentiary weight than Dr. Jeffres' deposition because Allen's records do not state whether the opinions expressed are based on the A.M.A. Guides, as required by TENN. CODE ANN. § 50-6-204(d)(3), whereas Dr. Jeffres testified that his opinion was based on the A.M.A. Guides. However, use of one of the two guides named in

subdivision (d)(3) is unnecessary, although preferable, where causation and permanency have been established by expert testimony, because the issue then becomes the extent of vocational disability, not anatomical disability. *Lyle v. Exxon Corp.,* 746 S.W.2d 694 (Tenn. 1988); *Davenport v. Taylor Feed Mill,* 784 S.W.2d 923 (Tenn. 1990).

We have carefully reviewed the medical records of Dr. Allen and the deposition of Dr. Jeffres and agree with the trial court that Dr. Jeffres' testimony is not credible. Accordingly, we find the trial court did not err in granting greater weight to Dr. Allen's opinions, which are the only credible medical evidence in the record.

Plaintiff next raises the issue that:

> "The trial court erred in limiting the award of compensation to two and one-half times the plaintiff's impairment rating rather than six times the plaintiff's impairment rating."

TENN. CODE ANN. §50-6-241(a)(1) provides:

> For injuries arising on or after August 1, 1992, in cases where an injured employee is eligible to receive any permanent partial disability benefits . . . and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is two and one-half times the medical rating . . .

Where an employee unreasonably refuses to return to work, disability is limited to two and one-half times the medical impairment rating. *Newton v. Scott Health Care Ctr.,* 914 S.W.2d 884 (Tenn. 1995). But where an employee is not able to return to work on account of . . . injuries, refusal to return is not unreasonable. *Brown v. Campbell County Bd. of Education,* 915 S.W.2d 407 (Tenn. 1995).

Plaintiff testified that he attempted to return to work when authorized to do so by his then-treating physician, Dr. Allen, and that he worked each day until his pain was unbearable, causing him to leave work before the end of the work day. His supervisor, Tommy Beech, testified that he welcomed plaintiff back to work and told him to make sure that he stayed within his limitations as Dr. Allen instructed. He told plaintiff to get help from other employees if he were faced with lifting objects that would be too heavy to be within his medical restrictions (but plaintiff testified there was seldom anyone around to help him). Beech testified that he offered plaintiff a

job as maintenance mechanic and a supervisory job in the welding department, both of which were within the medical restrictions, but plaintiff refused both jobs.

The trial court found plaintiff's refusal to return to work to be unreasonable. In reaching this conclusion, the court considered the demeanor and credibility of the witnesses including the restrictions imposed by Dr. Vaughan Allen together with the functional capacity evaluation and made the specific finding that the testimony of Mr. Tommy Beech was more credible than that of the plaintiff. Therefore, the court limited plaintiff's recovery to two and one-half times the five percent medical impairment assessed by Dr. Allen or twelve and one-half percent permanent partial disability.

Our review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(3)(2). *Stone v. City of McMinnville,* 896 S.W.2d 584 (Tenn. 1991). However, where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. *See Humphrey v. David Witherspoon, Inc.,* 734 S.W.2d 315 (Tenn. 1987). We have reviewed the evidence and find that the preponderance supports the judgment of the trial court.

We affirm the judgment of the trial court and remand for assessment of costs of appeal, which are taxed to appellant.

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John K. Byers, Senior Judge

CONCUR:

_____
Frank F. Drowota, III, Justice

_____
William H. Inman, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED

March 24, 1997

Cecil W. Crowson
Appellate Court Clerk

THOMAS HICKMAN,	}	*GILES CIRCUIT*
	}	*No. 9478 Below*
Plaintiff/Appellant	}	
	}	*Hon. Jim T. Hamilton,*
vs.	}	*Judge*
	}	
LIBERTY MUTUAL INSURANCE	}	*No. 01S01-9606-CV-00117*
	}	
Defendant/Appellee	}	*AFFIRMED AND REMANDED.*

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 by Plaintiff/Appellant and Surety for which execution may issue if necessary.

IT IS SO ORDERED on March 24, 1997.

PER CURIAM