IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT JACKSON

FILED

February 10, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

JESSIE JAMES JONES, JR.	)	
	)	NO. 02S01-9601-CH-00041
Plaintiff-Appellee,	)	
	)	
v.	)	MADISON CHANCERY COURT
	)	NO. 46409
CIGNA INSURANCE COMPANIES	)	
	)	HONORABLE JOE C. MORRIS,
	)	JUDGE
Defendant-Appellant,	)	

FOR APPELLANT:

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FOR APPELLEE:

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MEMORANDUM OPINION

Members of Panel

Lyle Reid, Associate Justice, Supreme Court
F. Lloyd Tatum, Special Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED Tatum, Judge

MEMORANDUM OPINION

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 of findings of fact and conclusions of law.

The plaintiff, Jesse James Jones Jr., underwent compensable lumbar disc herniation and surgery for which he entered into a settlement agreement with his employer for payment of permanent partial disability benefits of 40% to the body as a whole in September, 19, 1992. On May 18, 1992, Plaintiff was injured in a second industrial accident and suffered a second lumbar disc herniation for which he underwent a second laminectomy. The plaintiff recovered a judgment for the second injury against Cigna Insurance Company in which he was awarded further workers' compensation benefits based on the finding that he suffered 55% permanent partial disability to the body as a whole.

On September 20, 1995, Cigna filed a motion for reduction of award pursuant to Tenn. Code Ann. § 56-6-231 seeking a reduction of the permanent disability award for the second injury. The Trial Court denied Cigna's motion for reduction of award and this appeal results. In its only issue, Cigna says that evidence preponderates against the Trial Court's denial of its motion to terminate its obligation for payment of permanent disability benefits as of November 7, 1995.

T.C.A. §50-6-231 provides:

> All amounts paid by employer and received by the employee or the employee's dependents, by lump sum payments, shall be final, but the amount of any award payable periodically for more than six (6) months may be modified as follows:
>
> (1) At any time by agreement of the parties and approval by the court; or
>
> (2) If the parties cannot agree, then at any time after six (6) months from the date of the award an application may be made to the courts by either party, on the ground of increase or decrease of incapacity due solely to the injury. In such cases, the same procedure shall be followed as in § 50-6-225 in case of a disputed claim for compensation.

The defendant relies primarily upon the testimony of a private investigator who made video tapes showing the plaintiff while working as a carpenter in constructing houses and also showing him at or near his residence. The defendant also relies upon the deposition of Dr. Lowell Stonecipher who performed both laminectomies upon the plaintiff.

Mr. B.K. Vanhorn, the private investigator, testified that he observed plaintiff on three separate days in June and September of 1995. He testified that he observed the plaintiff lifting, bending, climbing, kneeling, stooping, reaching, pushing, pulling, lifting scaffolding, walk boards, lifting power tools, and ladders. The witness testified that he observed the plaintiff climb on top of rafters, secure boards and building materials on to the top of the house under construction. The witness saw the plaintiff assist in lifting and removing a golf cart from a small trailer and move a large broken tree trunk.

The witness took a total of eight hours of video footage of his twenty-five to thirty hours of observation. Of this eight hours of video,

the witness edited the tapes to approximately one hour and this one hour of taping was introduced in evidence. We have observed this tape which represents only about 1/24 or 1/30 of the witnesses observation. Much of the activity of the plaintiff does not appear to be strenuous. The activity that was strenuous was continued for a few minutes at a time and was not continuous or repetitive.

Dr. Lowell Stonecipher gave a deposition on March 15, 1993, for use in the trial of this case and gave another deposition on October 27, 1995, for use at the hearing on the motion for reduction of the award. In the 1993 deposition the doctor testified that he performed both surgeries on the plaintiff. He testified in 1993 that the plaintiff could do finishing work or act as a working supervisor but he would not recommend that the plaintiff put up rafters or be a roofer or pour concrete. He was released with instructions do no repeated bending or stooping and placed a lifting limit of fifty pounds on the plaintiff. All of these restrictions were temporary and after six to twelve months, the plaintiff was instructed by the doctor that he could do whatever he liked, if he could keep his activity within his tolerance.

Dr. Stonecipher testified that after viewing the above mentioned tapes he was of the opinion that the plaintiff could perform any type of carpenter work. However, he testified that he saw plaintiff two times in 1995. On May 9, 1995, the plaintiff came to him with the same symptoms that he previously had with his back and right leg. He was complaining of decreased sensation from his knee distally. The doctor at that time felt that he was having significant problems but did not think that he had a "recurrent disc", although at one time he did suspect a small herniated disc. Scar tissue was present and the

plaintiff had decreased sensation in the L5-S1 nerve root, which had been present "all of the time."

In the 1993 deposition, Dr. Stonecipher rated the plaintiff's impairment at 13% to the body as a whole. He testified in his 1995 deposition that his opinion had not changed; that the plaintiff continued to have 13% impairment to the body as a whole.

The plaintiff testified that at the time of his injury in March of 1992 he was working at Hoyt Hayes Construction Company. After the second injury, he discontinued working there because the work was too heavy for him to do. After being out of work for some number of months he worked for John McBride doing residential construction, but had difficulty.

He began working for Eddie Ellis Construction Company, that was owned by a friend of his. Mr. Ellis permitted him to only work 25 to 35 hours per week and permitted him to do lighter work. The plaintiff testified that Mr. Ellis would permit him to have days off when he was having difficulty with his back and leg.

The plaintiff testified that he still had back pain but it was not as bad as when he first resumed work after his second surgery. He testified that he has numbness in his leg "all of the time." While he continues to have stiffness and pain, he has learned to deal with it better. He admitted that the video tapes depicted him and he testified that he played golf from 15 to 20 times during the summer of 1995. He is unable to do anything after getting off from work. His wife testified

that he "does nothing but work." He is irritable when he comes home and does nothing.

His W-2 form for the year 1994, the year before trial, indicated that he had income of $12,117.00 which represent approximately 1,219 hours at $9.50 an hour. Had he worked 40 hours a week for 50 weeks he would have been paid for 2,000 hours work. The hours that he worked was 781 hours less than a person working 40 hours a week for 50 weeks.

Appellate review is *de novo* upon the record of the Trial Court, accompanied by a presumption of correctness of the findings of fact, unless this 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 evidence to determine where the preponderance of the evidence lies. *Wingert vs. Government of Sumner County*, 908 S.W. 2d 921 (Tenn. 1995).

Where the trial judge has seen and heard witnesses, especially if issues and weight to be given oral testimony are involved, on review considerable deference must still be accorded to those circumstances. *Townsend vs. State*, 826 S. W. 2d 434 (Tenn. 1992). However, this tribunal is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. *Seiber vs. Greenbriar Industries, Inc.*, 906 S.W. 2d 444 (Tenn. 1955). The medical proof in this case was by deposition. The other evidence was by oral testimony.

A final decree of judgment in a worker's compensation case is final, as in any other case, unless the party seeking to reopen the case

can prove a situation bringing the case within the terms of Tenn. Code Ann. § 50-6-231. *General Sharers Products Corp. vs. Reese*, 245 S.W. 2d 783 (Tenn. Ct. App. 1951) In order to do this, the party seeking a modification of the original award must show an increase or decrease of incapacity since the final judgment, due solely to the original injury. The statute does not authorize a retrial of the case on the same evidence that was presented in the original trial; there must be a substantial change in the employee's disability resulting from the original injury. *Hartford Hosiery Mills vs. Jernigan*, 149 Tenn. 241, 259 S.W. 546 (1924); *Crane Enamelware Co. vs Datson*, 159 Tenn. 561, 205 S. W. 2d 1049 (1929). The statute does not authorize the reopening of the case to correct errors or mistakes in the original trial. *R.J. Reynolds Tobacco Co. v. Rollins*, 315 S.W. 2d 1 (Tenn. 1958).

The argument and record in this case is centered primarily on the issue of whether the employee is capable of doing full-time carpenter work. It is well settled that this is not determinative in worker's compensation cases. The question for the court is "whether the employee's earning capacity in relation to the open labor market has been diminished by the residual impairment caused by a work related injury and not whether he is able to return and perform the job he held at the time of injury." *Clark v. National Union Fire Ins. Co.*, 774 S.W. 2d 586 (Tenn. 1989).

The employer has not established that the earning capacity of the plaintiff in the open labor market has been materially changed. Dr. Stonecipher adhered to his original opinion that the plaintiff still has a 13% impairment to the body as a whole. The plaintiff is unable to work

full time and his present employer is tolerant with him about the type of work he does. The work that plaintiff had when injured is too heavy for him. He continues to have back pain and leg numbness. The evidence does not preponderate against the judgment of the Trial Court.

It results that the judgment of the Trial Court is affirmed. Costs are adjudged against the defendant/employer.

_____
F. LLOYD TATUM, Special Judge

CONCUR:

_____
LYLE REID, Justice, Supreme Court

_____
JOE C. LOSER, JR. Special Judge

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AT JACKSON

JESSIE JAMES JONES, JR.,	)	MADISON CHANCERY
	)	NO. 46409
Plaintiff/Appellee,	)	
	)	Hon. Joe C. Morris,
vs.	)	Judge
	)	
CIGNA INSURANCE COMPANIES,	)	NO.02S01-9601-CH-00041
	)	
Defendant/Appellant.	)	AFFIRMED.

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 Appellant, and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 10th day of February, 1997

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PER CURIAM

(Reid, J., not participating)