

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

**FILED**

May 16, 1997

Cecil W. Crowson  
Appellate Court Clerk

|                              |   |                         |
|------------------------------|---|-------------------------|
| EARL EVANS BARRETT,          | ) |                         |
|                              | ) | WILSON CHANCERY         |
| Plaintiff/Appellee           | ) |                         |
|                              | ) | NO. 01S01-9608-CH-00158 |
| v.                           | ) |                         |
|                              | ) | HON. CHARLES K. SMITH,  |
| CITY OF LEBANON and TML RISK | ) | CHANCELLOR              |
| MANAGEMENT POOL, INC.,       | ) |                         |
|                              | ) |                         |
| Defendants/Appellants        | ) |                         |

**For the Appellants:**

J. Russell Farrar  
Christina Douglas  
Farrar & Bates  
211 Seventh St. N., Ste. 320  
Nashville, TN 37219

**For the Appellee:**

Hugh Green  
100 Public Sq.  
Lebanon, TN 37087

**MEMORANDUM OPINION**

**Members of Panel:**

Frank F. Drowota, III, Justice  
William H. Inman, Senior Judge  
William S. Russell, Special Judge

MODIFIED

INMAN, 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 plaintiff is a 40-year-old man whose work experience has essentially been limited to manual labor. On August 2, 1994, during the course and scope of his employment by the City of Lebanon and while using a jackhammer, he sprained a neck muscle while attempting to dislodge the implement.

He returned to light duty on February 6, 1995 and full duty on March 2, 1995. The issue is whether the evidence preponderates against the judgment of the trial court that the plaintiff retained a 12.5% permanent partial disability to his body as a whole as a result of the cervical strain. Our review is *de novo* on the record with the presumption of the correctness of the judgment unless the evidence otherwise preponderates. T.C.A. § 50-6-225(e)(2) and TENN. R. CIV. P. 13(d).

The treating physician was Dr. W. Garrison Strickland, board-certified in psychiatry and neurology. His examination and testing revealed mild degenerative changes in the cervical spine. He testified that the results of a functional capacity evaluation were inconsistent, meaning that the plaintiff's efforts were not always sincere. Dr. Strickland declined to state an opinion as to whether the plaintiff had any impairment because there were no objective findings and the functional capacity evaluation was inconsistent.

The plaintiff was referred to Dr. Jack Fishbein, an orthopedic surgeon, by his attorney. He saw the plaintiff only on one occasion and testified that he found muscle tightness and limited range of motion with pain radiating from the right shoulder. He assessed 5% impairment to the body as a whole.

The trial judge found the testimony of Dr. Fishbein to be more credible than the testimony of Dr. Strickland, who, as stated, declined to state an opinion because he found no objective symptoms and does not give impairment ratings if the functional capacity evaluation is inconsistent.

It is well-settled that an appellate court is as well situated to gauge the weight and worth of expert deposition testimony as the trial judge. *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355 (Tenn. 1989). The testimony of Dr. Strickland is somewhat unusual but the import of it bespeaks a cautious, careful approach commendably calculated to avoid any semblance of advocacy, on the one hand, or an overly disapprobative view of symptom magnification on the other. He was the treating physician and thus professionally and personally is acquainted with the plaintiff.

We find the evidence preponderates in favor of a finding of five (5%) percent permanent partial disability to the whole body, and the judgment is accordingly modified. Costs are assessed evenly.

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William H. Inman, Senior Judge

CONCUR:

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Frank F. Drowota, III, Justice

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William S. Russell, Special Judge

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EARL EVANS BARRETT,  
Plaintiff/Appellee

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WILSON CHANCERY  
No. 9802 Below  
Hon. Charles Smith,  
Chancellor

vs.

CITY OF LEBANON and TML RISK  
MANAGEMENT POOL, INC.,

Defendants/Appellants

No. 01S01-9608-CH-00158  
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 evenly; one-half by Plaintiff/Appellee and one-half by Defendant/Appellant and Surety, for which execution may issue if necessary.*

*IT IS SO ORDERED on May 16, 1997.*

PER CURIAM