IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(March 20, 1997 Session)

KAY E. BLACKWOOD, JR.,	)	CLAY CIRCUIT
	)	
Plaintiff-Appellee,	)	Hon. John A. Turnbull,
	)	Judge.
v.	)	
	)	No. 01S01-9609-CV-00190
THE BERKLINE CORPORATION and CONTINENTAL CASUALTY CORPORATION,	)	
	)	
Defendants-Appellants.	)	

For Appellants:	For Appellee:
Mark C. Travis Cookeville, Tennessee	Frank D. Farrar William Joseph Butler Lafayette, Tennessee

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

Members of Panel:

Adolpho A. Birch, Jr., Chief Justice, Supreme Court
John K. Byers, Senior Judge
Joe C. Loser, Jr., Special Judge

MODIFIED

Loser, 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. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The appellants contend (1) the award of permanent partial disability benefits is excessive, (2) it was error for the trial judge to become a witness in the case and (3) the trial judge abused his discretion by commuting permanent partial benefits to a lump sum. As discussed below, the panel has concluded the award of permanent partial disability benefits should be modified and, as modified, paid in a lump sum, and the evidential remarks of the trial judge were harmless in light of our modification.

The claimant, Kay Eugene Blackwood, Jr., is thirty-nine years old with a high school education and vocational training as an automobile mechanic and some college training as a minister of the gospel. He gradually developed bilateral carpal tunnel syndrome from the repetitive use of his hands at work for employer, Berkline. The employer referred him to Dr. James B. Talmage.

The doctor diagnosed bilateral carpal tunnel syndrome and prescribed braces for both wrists. He restricted the claimant from repetitive work with his right hand and recommended wearing the braces while sleeping. The claimant was totally disabled for several weeks. The doctor assigned zero percent permanent impairment, but acknowledged some loss of grip strength and conceded that, on the basis of lost grip strength, the AMA Guidelines provided twenty percent permanent impairment to the right arm and ten percent to the left, using a method the doctor considered inappropriate. Dr. Talmage did not concede the loss of grip strength was permanent.

Dr. Randy Gaw, a neurologist, diagnosed mild right carpal tunnel syndrome but found no evidence of "left median nerve mononeuropathy" or "generalized neuropathic or myopathic process involving the upper extremities." The claimant returned to work for the employer. Dr. S. M. Smith, who did not treat the claimant but evaluated him, diagnosed moderate carpal tunnel syndrome on the right and mild carpal tunnel syndrome on the left. He assigned twenty percent permanent impairment to the right hand and ten percent to the left.

The trial court awarded, among other things, permanent partial disability benefits based on fifty percent to each arm, commuted to a lump sum. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 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). The panel is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge.

(1)

Once the causation and permanency of an injury have been established by expert testimony, many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomical impairment, may be considered for the purpose of evaluating the extent of a claimant's permanent disability. Tenn. Code Ann. section 50-6-241(a)(2). From a consideration of the pertinent factors established in this record, and in light of the fact that only one of the three doctors who saw the claimant assigned any permanency, we are persuaded the evidence preponderates against an award based on fifty percent permanent impairment to each arm and in favor of one based on twenty percent to both arms. The judgment is modified accordingly.

(2)

At the conclusion of the trial, the trial judge announced his findings, including the following:

> "Parenthetically and by way of explanation, I have noted in the past after reading probably 100 or 125 depositions given by Dr. Talmage and having had him testify in person in front of me on 10 or 12 occasions over the last several years, that when Dr. Talmage is the regular employer's physician, he tends to give much less credit to subjective symptoms reported to him by an employee than he does if the employee is referred to him by the plaintiff's lawyer or some other -- in some other manner.
>
> "....
>
> "I note that it's impossible for the Court to remove from it's mind the many, many, many times that Dr. Talmage has testified either by deposition or personally in front of me, and my evaluation of his testimony is, at least, partially based in all candor upon previous judgments of credibility and weight of testimony that I have been required to make as a judge of his testimony.
>
> "If this court is not permitted to utilize that knowledge of doctor's testimony based upon previous experience of the judge with the doctor, then we might as well throw out judges and use computers, because I'm a human being and I can't take from my bank of memory those factors that have been noted in the past

based upon previous testimony that I have mentioned in this opinion.

"Considering all these factors and weighing them, the Court finds...."

While we respect and appreciate the trial judge's candor, we must acknowledge also that it is inappropriate and, generally, reversible error, for a fact finder, to base a decision on observations outside the particular judicial proceeding. Jurors are regularly instructed not to visit the scenes of accidents and crimes in order that their verdict will not be improperly influenced. The same principle applies to judges as fact finders, who must disregard any personal knowledge they possess about the facts of the case or, if they cannot do so, allow another judge to conduct the trial. We are aware of no rule of evidence authorizing a judge to take judicial notice of a witness's lack of credibility. As noted by our Supreme Court in Vaughn v. Shelby Williams of Tenn., Inc., 813 S.W.2d 132 (Tenn. 1991):

.... Rule 605 of the Tennessee Rules of Evidence[1] prohibits a judge presiding over a trial from serving as a witness, and for good reason. Perhaps the most obvious one is that the system of justice does not appear to be impartial if the judge charged with the duty of adjudicating the litigation also acts as a source of evidence. (citation omitted). Additionally, when the trial judge becomes a source of information, the parties may not be willing to cross-examine vigorously the judge whose goodwill is perceived to be important in the case. Worse yet, the parties may not even get the opportunity to cross examine the judge to begin with....

Nevertheless, so that the injured worker will not be unduly further delayed in receiving his benefits, we have chosen to review the record de novo without any presumption of correctness, thereby rendering the error harmless. Hopefully, we have cured, not compounded, the error. If we are not so authorized, the alternative is to remand for trial before another judge.

Because the passage of time has rendered the third issue moot, we have pretermitted it. Costs on appeal are taxed to the plaintiff-appellee.

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[1] "The judge or chancellor presiding at the trial may not testify in that trial. No objection need be made in order to preserve the point." Rule 605, Tennessee Rules of Evidence.

Joe C. Loser, Jr., Judge

CONCUR:

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Adolpho A. Birch, Jr., Chief Justice

_____

John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED

May 21, 1997

Cecil W. Crowson
Appellate Court Clerk

KAY E. BLACKWOOD, JR.,	}	*CLAY CIRCUIT*
	}	*No. 1353 Below*
Plaintiff/Appellee	}	
	}	*Hon. John A. Turnbull,*
vs.	}	*Judge*
	}	
THE BERKLINE CORPORATION	}	
and CONTINENTAL CASUALTY	}	
CORPORATION,	}	*No. 01S01-9609-CV-00190*
	}	
Defendants/Appellants.	}	*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 by Plaintiff/Appellee for which execution may issue if necessary.

IT IS SO ORDERED on May 21, 1997.

PER CURIAM