IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE APRIL 1997 SESSION

SSI SERVICES, INC.,	)	COFFEE CIRCUIT
	)	
Plaintiff/Appellee	)	NO. 01S01-9609-CV-00191
	)	
v.	)	HON. GERALD L. EWELL, SR.,
	)	JUDGE
HOWARD L. BAKER,	)	
	)	
Defendant/Appellant	)	

For the Appellant:

H. Thomas Parsons
Parsons, Nichols & Johnson
101 West Main Street
Manchester, TN 37355

For the Appellee:

Gary S. Napolitan
D. Scott Bennett
Leitner, Williams, Dooley & Napolitan
Third Floor, Pioneer Building
Chattanooga, TN 37402

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

Members of Panel:

Justice Lyle Reid
Senior Judge William H. Inman
Special Judge William S. Russell

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.

This action began as one for a declaratory judgment under the workers' compensation laws that the accident suffered by the employee ("hereafter, plaintiff") resulted in minimal impairment only. The plaintiff counterclaimed, alleging that he sustained a job-related rotator cuff tear of his left shoulder with a biceps tendon tear requiring surgical repair on May 20, 1993, and that he aggravated the condition in the Spring of 1994 when further surgery was required.

The plaintiff is 59 years old, employed as a painter, with an excellent work ethic. It is not controverted that he suffered the injury as alleged. He returned to full, uninterrupted employment in December, 1994 with restrictions. The trial court found that the plaintiff had sustained a 13 percent permanent partial disability to his whole body, and that the "cap embodied in the 1992 Amendment should apply since the plaintiff has returned to meaningful work activities." The plaintiff appeals, insisting (1) that the award of 13 percent permanent partial disability to the whole body is "contrary to the evidence and the law," and (2) that the plaintiff is "entitled to more than 13 percent permanent partial vocational impairment to the body as a whole."

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(e)(2). *Stone v. City of McMinnville,* 896 S.W.2d 584 (Tenn. 1991).

Where the medical testimony is presented by deposition, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. INA,* 884 S.W.2d 446 (Tenn. 1994).

Dr. Richard Bagby, Jr., a board-certified orthopedic surgeon, testified that the plaintiff suffered a complete rotator cuff tear in April 1993 which was surgically corrected on May 20, 1993. The plaintiff returned to work, as a painter, on September 7, 1993. In February, 1994, he began experiencing increased pain attributable to overhead reaching. Injections provided some relief, but the pain persisted with signs of inflammation. In June, 1994, Dr. Bagby did an MRI which

revealed a new, complete rotator cuff tear caused by reaching overhead to paint. Surgery was performed on August 15, 1994 to repair the rotator cuff. Dr. Bagby testified:

> " . . . it couldn't be repaired completely because it was such extensive tearing and so much retraction that the edges could not be brought back to their original surface completely . . . "

Because fluid continued to exude from the wound, another surgery was performed the next day to repair the outer skin and fascia. The plaintiff continued to complain of pain for several months, and at times exhibited a recurrence of fluid in the shoulder. In May, 1994, the plaintiff was permitted to return to work, but was restricted to a lifting limitation of ten pounds not above chest level and a height limitation of six feet on a ladder. He testified that the plaintiff retained an 18 percent permanent impairment of his left arm, which he extrapolated to 11 percent to the whole body.

Dr. Jeffrey P. Lawrence, a board-certified orthopedic specialist, first examined the plaintiff on July 26, 1994. He confirmed the rotator cuff injury, and saw him an additional four times, chiefly at the behest of the employer, with, as we deduce, the eager cooperation of the plaintiff. He opined that the plaintiff had a 22 percent impairment to his left arm, which he extrapolated to 13 percent permanent partial disability to his whole body. He also imposed lifting restrictions.

Lay testimony was directed to the inhibiting nature of the restrictions. For instance, the plaintiff's supervisor testified that because of the restrictions placed on him the plaintiff would not be able to perform 75 percent of a painter's normal job. There was little countervailing testimony that the plaintiff would have to endure the work restrictions.

This case is controlled by Tenn. Code Ann. § 50-6-241, since the injury occurred after August 1, 1992. Accordingly, since the plaintiff was returned to work in a meaningful way, for a wage equal to or greater than before his injury, the maximum award he may receive is 2.5 times the medical impairment rating.[1] In making determinations, the Court is required to consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training,

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[1]Applicable, however, to injuries to the body as a whole and not to scheduled members. *Atchley v. Life Care Ctr.,* 906 S.W.2d 428 (Tenn. 1995).

local job opportunities and capacity to work at types of employment available in claimant's disabled condition. TENN. CODE ANN. § 50-6-241(a)(1).

We accord to the experienced trial judge all deference, but in light of all of the factors that must be considered, especially when superimposed upon a worker who is genuinely injured, has clearly not exaggerated his condition, and whose credibility is not reproached in any way, we conclude that the preponderant proof requires an upward modification of the award. We note these factors:

> The plaintiff is 59 years old. He has an 8th grade education. He is limited to essentially menial work, and we do not denigrate the skill required of a painter. As already stated, his injury is real, his discomfort is genuine, his disability and limitations are not seriously controverted. He realistically cannot perform many requisites of his job; it may be remarkable that owing to his grit, on the one hand, and the benevolence and support of his employer, on the other, the plaintiff is working at all. There is little doubt that much of the labor market is closed to him.

From all of which we find that the award should be modified to find that the plaintiff has a permanent partial disability to his body as a whole of 32.5 percent. *See, Henson v. City of Lawrenceburg,* 851 S.W.2d 809 (Tenn. 1993); *Worthington v. Modine Mfg.,* 798 S.W.2d 232 (Tenn. 1990).

The complaint was filed June 14, 1994. The award should be paid in a lump sum. TENN. CODE ANN. § 50-6-229(a); *Perdue v. Green Branch Mining Co.,* 837 S.W.2d 56 (Tenn. 1992).

The judgment of the trial court is affirmed, as modified, and remanded, with costs assessed to the appellee.

_____
William H. Inman, Senior Judge

CONCUR:

_____
Lyle Reid, Justice

_____
William S. Russell, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED

June 24, 1997

Cecil W. Crowson
Appellate Court Clerk

SSI SERVICES, INC.,	}	*COFFEE CIRCUIT*
	}	*No. 26627 Below*
Plaintiff/Appellee	}	
	}	*Hon. Gerald L. Ewell, Sr.,*
vs.	}	*Judge*
	}	
HOWARD L. BAKER,	}	*No. 01S01-9609-CV-00191*
	}	
Defendant/Appellant	}	*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 June 24, 1997.

PER CURIAM