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

FILED

May 28, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

[illegible],

Plaintiff-appellee

v.

[illegible],

Defendant-appellant

[illegible]

[illegible]

[illegible]

[illegible]

For the Appellant:

[illegible]

For the Appellees:

[illegible]

MEMORANDUM OPINION

Members of Panel:

[illegible], Justice
[illegible], Senior Judge
[illegible], Special Judge

AFFIRMED **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 findings of fact and conclusions of law.

The trial court found the plaintiff had sustained a 15% permanent partial disability as a result of an industrial injury.

The defendant raises these issues on appeal:

> I. Did the trial court err in awarding the plaintiff total disability benefits from the alleged date of the injury until February 1, 1996, the day of trial, when a licensed physician testified the employee reached a maximum medical improvement and expressed an opinion regarding permanent impairment prior to December 1, 1994?
>
> II. Under the local rules of court specifically designed to encourage the listing of impeachment evidence on witness and exhibit lists, did the trial court err by excluding impeachment evidence and testimony because it was not disclosed on the defendant's witness and exhibit list?

The plaintiff testified he received a head injury on July 15, 1994 while using a jack hammer while working for the defendant. The plaintiff and his wife were the only witnesses to testify at trial on his behalf.

The plaintiff offered the deposition of Dr. Sherry Tabor and offered one Dr. Harbins, M.D., a specialist in occupational disability. Dr. Tabor found the plaintiff had sustained a 15% permanent impairment to the body as a result of the injury he received on July 15, 1994. Dr. Harbins found the plaintiff was disabled from performing 75% of the jobs available to him.

Dr. Hall McQuain's deposition was introduced by the defendant. Dr. McQuain found the plaintiff had sustained a five percent permanent medical impairment to his lower back from the injury. Dr. McQuain further found the plaintiff suffered an additional impairment to the body as a whole. He measured this as a 15% whole body impairment resulting from the injury and injuries to the plaintiff's upper extremities. However, the plaintiff did not make a claim for benefits for these injuries.

In addition to Dr. McQuain, the defendant called three witnesses to contradict the plaintiff's claim he was injured while operating a jack hammer at work. The trial judge, without notice to us, accepted the testimony of the plaintiff and found he sustained a work-related injury.

The trial judge allowed recovery of permanent total disability benefits from the date of the injury, July 15, 1994, until the date of trial, February 1, 1996.

Permanent total disability is payable from the date of injury until the injured

employee returns to work or reaches a point of medical improvement. *Prince v. Sentry Ins. Co.*, [illegible] (Tenn. 1995). Dr. Fisher notified the plaintiff reached maximum medical improvement December, 1994. The trial judge was in error in allowing temporary total disability benefits beyond that date. We therefore modify that portion of the judgment which gives the temporary total disability benefits for from July 15, 1994 until February 1, 1995 and fix the payment of temporary total disability benefits to be from July 15, 1994 until December, 1994.

The defendant asks us to hold that the trial court was in error for allowing into evidence a videotape which shows the plaintiff engaged in activity which, they assert, is inconsistent with the plaintiff's claim of injury.

The defendant does not contest in this appeal the fact that the plaintiff was injured as a result of a work-related accident. The most the defendant asks is for a new trial so that the trial judge would consider this evidence. The least that the defendant asks is that we reduce the award on the basis of the videotape.

The medical evidence shows the plaintiff sustained a permanent medical impairment rating of 5% and 17%. The plaintiff filed no cross-appeal for the defendant, and there is no showing that the minimum multiplier should not apply in this case. Based on this, the trial judge could have awarded an award recovery for occupational disability in the hundred-and-[illegible] to a maximum of [illegible]. Considering this and the evidence in the record, we see no need to delve into whether the ruling of the trial judge in excluding this evidence because the defendant failed to disclose it prior to trial as required by a local rule of court is erroneous or not. In any event, the error, if any, was clearly harmless. Further, it appears to us that the defendant's assertion that the evidence is admissible rebuttal on the theory that it is inconsistent impeachment evidence is not well-taken. *See Pettus v. Hurst*, [illegible] (Tenn. Ct. App. [illegible]).

The costs of the appeal are taxed to the defendant.

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John K. Byers, Senior Judge

[illegible]:

_____
[illegible], Justice

_____
[illegible], Special Judge

IN THE SUPREME COURT OF TENNESSEE
AT [illegible]

[illegible]	[illegible]
Appellee,	
v.	[illegible], Chancellor
[illegible], [illegible],	[illegible]
Appellant.	**)**

[illegible]

This case is before the Court upon a notice of appeal pursuant to Tenn. Code Ann. § 50-6-113(e)(3)(B), the entire record, including the order of remand to the Special Workers' Compensation Appeals Board, and the Board's Recommended Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

However, it appears to the Court that the motion for new trial is not well-taken and should be denied; 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 on appeal are assessed to the appellant.

IT IS SO ORDERED this .... day of ....., 1997.

BY COURT

Robinson, J. - Not participating.