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

FILED

August 28, 1997

Cecil W. Crowson
Appellate Court Clerk

CARL E. CHURCH,	)	
	)	MAURY CIRCUIT
Plaintiff/Appellee	)	
	)	
v.	)	01S01-9609-CV-00174
	)	
MONSANTO COMPANY,	)	JIM T. HAMILTON,
	)	JUDGE
Defendant/Appellant	)	

For the Appellant:

Patrick A. Ruth
Julia J. Tate
150 Second Ave. N., Ste. 201
Nashville, TN 37201

For the Appellee:

Sonya W. Henderson
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Murfreesboro, TN 37130

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

Members of Panel:

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

AFFIRMED
AS MODIFIED

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 of findings of fact and conclusions of law.

This case was heard on March 15, 1996. The plaintiff alleged that he sustained work injuries on October 29, 1986 (pulmonary injury), January 21, 1986 (carpal tunnel syndrome), and January 6, 1986 (back injury). The trial court found the plaintiff's injuries were compensable and awarded the plaintiff permanent total disability plus medical costs.

Prior to July 1, 1985, the level of review on appeal was whether there was any material evidence to support the findings of a trial court. *Hilton v. Food Lion, Inc.*, 738 S.W.2d 626, 627 (Tenn. 1987). After July 1, 1985, the level of review is *de novo* upon the record with a presumption of the correctness of the trial court's findings of fact unless the preponderance of the evidence is otherwise. *Alley v. Consolidated Coal Co.*, 699 S.W.2d 147, 147-48 (Tenn. 1985). All of the injuries upon which the trial court awarded compensation occurred after July 1, 1985. The standard of review, therefore, is under the preponderance rule set out in the 1985 amendment to the Workers' Compensation Law as elucidated in *Alley, supra.* The standard of review created by the amendment requires us to conduct an independent examination of the record on appeal to determine where the preponderance of the evidence lies. *Galloway v. Memphis Drum Store*, 822 S.W.2d 584, 586 (Tenn. 1991).

The plaintiff commenced working for the defendant on August 27, 1956. At the time of trial, he was 64 years of age. He did not complete high school.

There is little dispute about the accidents the plaintiff suffered with the exception of the injury to the plaintiff's lungs, which the defendant asserts did not occur. However, the medical evidence in this record on The back injury and the carpal tunnel syndrome is furnished by the plaintiff's doctors and the standard form medical report of Dr. Haynes, introduced by the defendant. Dr. Haynes found the plaintiff suffered no permanent orthopedic injury.

On April 7, 1979, the plaintiff was working as a machinist when a metal splinter broke off a chisel and was embedded in his right wrist. The sliver remained in the plaintiff's wrist until 1984. The plaintiff testified that during the time the splinter was in his wrist, he over-used his left hand and that this precipitated the carpal tunnel syndrome in his left wrist. The plaintiff testified his right wrist also was found to have a carpal tunnel syndrome. Dr. Alfred Callahan diagnosed the plaintiff's condition of bilateral carpal tunnel syndrome but would not assign a permanent impairment rating for the condition, although he found the condition to be work-related. This doctor did not rule out a permanent impairment–he raised a general objection to assigning impairment ratings in any case.

Dr. Vaughn Allen, a neurosurgeon, examined the plaintiff on January 8, 1986. He found the plaintiff to be suffering from degenerative disc disease and found the plaintiff had sustained a lumbosacral strain. Dr. Allen placed restrictions of 40 pounds of weight for occasional lifting and 20 to 25 pounds for frequent lifting. Further, Doctor Allen directed the plaintiff to avoid repetitive flexation above the waist. Dr. Allen found the plaintiff had a seven percent whole body impairment.

Dr. Stanley Hopp, orthopedic surgeon, found the plaintiff had an injury to his back and neck; he assigned a five percent medical impairment rating for the back injury and a four percent medical impairment rating for the neck. Dr. Hopp assessed a three percent impairment for the left wrist and a four percent impairment for the right wrist. He found the plaintiff had a 19% whole body impairment as a result of his combined injuries.

Dr. A. Clyde Heflin, a pulmonary specialist and internist, saw the plaintiff in February 1992. Dr. Heflin found the plaintiff suffered from lung obstruction and found the injury caused the plaintiff to sustain a 12% medical impairment rating to the body as a whole.

As we said before, the only significant issue raised was whether the plaintiff suffered an accident which caused him to suffer damage to his lungs.

On October 29, 1986, the plaintiff and two co-workers were assigned to clean out a tank car which had been used to transport phosphorous The plaintiff entered

into the tank car to remove a residue of phosphorous which was left in the car after the bulk of the phosphorous had been pumped out of the car.

The plaintiff wore an oxygen mask to protect himself from the fumes. According to the plaintiff, the oxygen ran out in the tank, and he removed his mask to call out for the two co-workers to lower a ladder so that he could climb from the tank. The plaintiff contended he was seized by a fit of coughing as a result of this and that he subsequently required treatment for his lungs. The two co-workers testified concerning this incident. There was some difference in the telling by the plaintiff and the witnesses, who also gave different testimony on this occurrence. Nevertheless, it is clear the plaintiff was in fact exposed to the phosphorous fumes.

Dr. Clyde Heflin found the plaintiff sustained a 12% whole body impairment as a result of his lung condition. A fair reading of Dr. Heflin's deposition shows he found the inhaling of phosphorous fumes could be the cause of the plaintiff's lung injury.

The defendant introduced into evidence the standard form medical report of Dr. J. Brevard Haynes Jr. Dr. Haynes found the plaintiff suffered no permanent pulmonary injury nor any orthopedic injury related to his work and found him to have zero whole body impairment.

The defendant asks us to repudiate the trial judge's finding that the plaintiff was a credible witness. The trial judge saw and heard the plaintiff testify. We did not. This court is not in a position to re-evaluate the credibility of the testimony of witnesses who appeared before the trial judge.

In *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987), the Court held "where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances."

In the matter of assessing the credibility of witnesses, short of patent absurdities or like circumstances in oral testimony, this court is bound by the finding of the credibility of witnesses made by the trial judge.

We have reviewed the evidence as to the injuries alleged to be suffered by the plaintiff, the evidence as to the extent of these injuries, and the trial court's finding as

to the vocational disability of the plaintiff as a result thereof. We find the evidence does not preponderate against the finding of the trial judge on the issue of whether the plaintiff sustained work-related injuries, and we affirm that portion of the verdict. We do find, however, that the evidence preponderates against a finding that the plaintiff suffered permanent and total vocational disability as a result of these injuries. We find the evidence preponderates in favor of an award of 60% permanent partial impairments, and we fix that as the judgment in this case and award the plaintiff $45,360.00 based upon the rate of compensation applicable to this case.

The trial judge awarded the plaintiff the sum of $6,932.50 for medical expenses, which he found were reasonable and necessary as a result of the plaintiff's injuries. We find there were many medical expenses claimed which were not related to the injuries or, in some instances, to the plaintiff. We find the plaintiff is entitled to recover $1,415.00 in medical expenses based upon the record in this case.

The cots are taxed to the defendant.

_____
John K. Byers, Senior Judge

CONCUR:

_____
Adolpho A. Birch, Jr., Chief Justice

_____
Joe C. Loser, Jr., Special Judge

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

CARL E. CHURCH,	)	Maury Circuit
	)	No. 5042 Below
Plaintiff/Appellee,	)	
	)	NO. 01-S-01-9609-CV-00174
V.	)	
	)	Honorable Jim T. Hamilton,
MONSANTO COMPANY,	)	Judge
	)	
Defendant/Appellant,	)	Affirmed in part; Remanded in part.

FILED
August 28, 1997
Cecil W. Crowson
Appellate Court Clerk

JUDGMENT ORDER

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review 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 are taxed to the defendant.

It is so ordered this 28th day of August, 1997.

PER CURIAM

Birch, J., not participating