IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE APRIL 1997 SESSION

FILED

July 14, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

SAMMY McMAHAN,	)	COCKE CIRCUIT
	)	
Plaintiff/Appellant	)	NO. 03S01-9607-CV-00080
	)	
v.	)	HON. WILLIAM R. HOLT, JR.,
	)	CHANCELLOR
CITY OF NEWPORT and SECOND	)	
INJURY FUND FOR THE STATE OF	)	
TENNESSEE, DIRECTOR,	)	
DINA TOBIN,	)	
	)	
Defendants/Appellees	)	

For the Appellant:	**For the Appellee-- City of Newport:**	**For the Appellee-- Second Injury Fund:**
Fred L. Allen P.O. Box 1608 Franklin, TN 37065-1608	Pamela L. Reeves Watson, Hollow & Reeves 800 S. Gay St., Ste. 1700 P.O. Box 131 Knoxville, TN 37901-0131	Charles W. Burson Attorney General Dianne Stamey Dycus Cordell Hull Bldg., 2nd Floor 426 Fifth Ave. N. Nashville, TN 37243-0499

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

Members of Panel:

E. Riley Anderson, Justice
John K. Byers, Senior Judge
Roger E. Thayer, 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 of findings of fact and conclusions of law.

The trial judge found that the plaintiff had sustained a ten percent permanent partial disability as a result of a work-related accident, although he did not have any additional assigned medical impairment. Plaintiff appeals, challenging the trial court's findings that plaintiff was not assigned an additional medical impairment rating and that plaintiff had a ten percent permanent partial disability. He also argues that the trial court should have reconsidered plaintiff's permanent partial disability award from his first injury.

We affirm the trial court's judgment.

Plaintiff, 45, has an eighth-grade education. He served with the Marines in Vietnam, has worked as a welder and has worked in maintenance. In 1983, he began working for the city of Newport, performing mostly maintenance tasks. He injured his back on October 8, 1992, for which surgery was performed; he returned to work after this surgery. He was awarded 40% permanent partial disability benefits for this injury. The trial court in that case found that plaintiff had a 15% medical impairment rating based on the testimony of Dr. Alan Whiton, plaintiff's treating orthopedic surgeon, that plaintiff's impairment could be as high as 15%.

Plaintiff re-injured his back on July 12, 1994, when a power saw jerked while he was trimming trees. A surgical fusion was performed on plaintiff in October 1994. He did not return to work, although he was offered a position which would involve supervising prison inmates who were picking up litter. His supervisor, Tim Dockery, testified that this position was still available for plaintiff, although he admitted it had not yet been funded by the city council. Plaintiff testified that he experiences continuous pain in his back and down his right leg and that he does not believe that he can work. He also testified that Mr. Dockery told him he would be moved back into full duty after a few months; however, Mr. Dockery testified that he did not say this and that the position was intended to be permanent.

Plaintiff testified that he is no longer able to work on his cars, mow his yard and fish, which he could do before his second injury. He elaborated that he has tried doing these things, but he always "pays" for it later with increased pain. On cross-examination, he admitted that he had testified in the prior trial that he could no longer perform mechanic work on his cars and that he had problems fishing after the first injury. A friend of the plaintiff and his son testified that they have noticed a difference in plaintiff since the second injury. The friend testified that the plaintiff has only fished with him two times since his second injury, and the son testified that he now takes care of the plaintiff's lawn. The plaintiff's wife testified that plaintiff no longer works in the yard or around the house or on his cars nor does he fish. However, she admitted that she had testified at the prior trial that he did not do those things after the first injury either.

Dr. Whiton testified that the plaintiff had a ten percent impairment rating from his first injury, and that his second injury resulted in an additional five percent impairment. He testified that his prior testimony that plaintiff could have an impairment rating as high as 15% was based on the possibility that the plaintiff would require a fusion surgery, which was eventually performed following the plaintiff's second injury.

Dr. Whiton further testified that the fusion surgery became necessary because of plaintiff's increased pain due to the development of a crack in the ligaments of the L5-S1 disk. He related this crack to plaintiff's described history of a jerk from a power saw. On cross examination, he opined that such a crack would not necessarily be the result of a traumatic event but it was the type of injury that required some sort of pressure upon the disk and that it would not occur spontaneously.

After plaintiff's first surgery, Dr. Whiton restricted him from lifting more than 50 pounds maximally and 25 pounds repetitively, as well as from stooping or bending or maintaining a single posture for a prolonged period. After the second surgery, he maintained all of the restrictions, but he substantially reduced the amount of weight the plaintiff could lift, to 15 pounds maximally and 12 pounds repetitively.

Our review of the trial court's findings of fact is *de novo*, accompanied by the presumption that the trial court's findings are correct unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

We cannot find the evidence preponderates against the trial court's ruling that plaintiff has not been assigned an additional impairment rating. Nevertheless, due to the increase in restrictions, the trial court found that the plaintiff retains an additional ten percent permanent partial disability. We do not find the evidence preponderates against the trial court's finding. The defendant, City of Newport, points out that the plaintiff never requested the trial court to re-consider the first award, and the record does not reveal any such request; therefore, we find a reconsideration was not an issue in this case.

We affirm the trial court's judgment at the cost of the appellant.

_____
John K. Byers, Senior Judge

CONCUR:

_____
E. Riley Anderson, Justice

_____
Roger E. Thayer, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

SAMMY McMAHAN	)	Cocke Circuit
	)	No. 22,993
Plaintiff/Appellant,	)	
vs.	)	Hon. William R. Holt, Jr.
	)	Chancellor
CITY OF NEWPORT and SECOND INJURY FUND FOR THE STATE OF TENNESSEE, DIRECTOR, DINA TOBIN,	)	
	)	03S01-9607-CV-00080
Defendants/Appellees	)	
	)	

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation 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 on appeal are taxed to the plaintiff/appellant and surety, Fred L. Allen, for which execution may issue if necessary.

07/14/97

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 will be paid by the plaintiff-appellant and sureties, for which execution may issue if necessary.

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

PER CURIAM

Anderson, J. - Not Participating

al to the Special Worker' Compensation 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 act 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 taxed to the plaintiff-appellant, Vernon Harris and Gilbert and Faulkner. surety, for which execution may issue if necessary.

06/03//97

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 taxed to the defendant/appellant, Baptist Hospital of East Tennessees and Barry K. Maxwell, surety, for which execution may issue if necessary.

07/11/97

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 will be paid by the plaintiff-appellant and sureties, for which execution may issue if necessary.

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

PER CURIAM

Anderson, J. - Not Participating

al to the Special Worker' Compensation 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 act 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 taxed to the plaintiff-appellant, Vernon Harris and Gilbert and Faulkner. surety, for which execution may issue if necessary.

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