IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE

FILED

September 12, 1997

Cecil W. Crowson
Appellate Court Clerk

CHARLES H. SMITH, Plaintiff/Appellant	)	No. 01S01-9610-CH-00207 (No. 95-1625-II below)
v.	)	DAVIDSON CHANCERY, PART II
KINETIC CONCEPTS, INC., Defendant/Appellee	)	HON. ELLEN HOBBS LYLE, CHANCELLOR

FOR THE APPELLANT:

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MEMORANDUM OPINION

MEMBERS OF PANEL:

LYLE REID, ASSOCIATE JUSTICE, SUPREME COURT
WILLIAM H. INMAN, SENIOR JUDGE
WILLIAM S. RUSSELL, RETIRED JUDGE

AFFIRMED RUSSELL, SP. J.

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated Section 50-6-225 (e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

We have carefully reviewed and weighed all of the evidence presented to the chancellor. The employee appellant contends that he is owed temporary total and temporary partial benefits denied by the trial judge, and that the award of 24% permanent partial disability to the body as a whole is too low.

Our review is de novo upon the record of the trial court, accompanied by a presumption of the correctness of that court's findings of fact, unless the preponderance of the evidence is otherwise. Tennessee Code Annotated Section 50-6-225 (e)(2).

We note that the chancellor made and filed a detailed finding of facts, all of which are supported by the preponderance of the evidence; and that the relevant law has been correctly applied to the facts. Therefore, the judgment of the trial court is affirmed.

The plaintiff sustained a work related back injury on August

5, 1994. He is 35 years old, received his GED in 1987, and had a prior work history involving both manual labor and clerical work. He possessed skills in the fields of advanced electronics, physics and more than basic math skills.

When injured his work venue was the Vanderbilt University Medical Center. He injured his back while attempting to move an obese patient. He was off work for two weeks, attempted to return to work, and determined that he was still unable to do the work.

On September 6, 1994, a month after his back was injured, he chose to go to work for Lesher Fire Protection as a salesman. His duties involved driving around in a truck inspecting and servicing fire extinguishers. His initial pay rate was $350.00 per week during training; and thereafter, $200.00 per week plus commissions.

On September 12, 1994, he was offered his position with the defendant company provided that he obtained a release from his doctor documenting that he was able to return to work. At this time he was already working for Lesher Fire Protection without any physician documented restrictions. He was fired by Lesher on October 17, 1994, and the stated reason was "he was not mature enough to perform his job".

On December 19, 1994, the employee was evaluated by Dr. M. Robert Weiss, M.D. Dr. Weiss opined that the plaintiff should avoid lifting more that 75 pounds on a repetitive basis, and should avoid repetitive bending or stooping or maintenance of a single posture for a prolonged period of time.

In January of 1995 the employer offered the plaintiff a job with lighter duties, but he refused it because he did not believe that he would be able to do it. He never tried to perform the offered job, or pointed out to the employer what it was that he could not do. Plaintiff simply stated that there was nothing at the defendant's operation that he could do, and did not cite any physician's restriction to support that position. He was terminated on February 16, 1995, because he had not returned to work.

Medical evidence was that the plaintiff sustained a lumbar disc herniation at L4-5. Dr. David Gaw, M.D., assigned restrictions to avoid lifting more than 50 to 60 pounds occasionally or 25 pounds frequently, and opined that he had a 10% permanent partial anatomical impairment to the body as a whole.

Dr. M. Robert Weiss, M.D., characterized plaintiff's back injury as a small disc herniation at L4-5. He found no true radicular symptoms. He assigned a 7% permanent partial impairment to the body as a whole.

The trial court considered the plaintiff's impairment ratings, present employment at a lower paying job, his skills and abilities to hold available jobs, and judged his vocational disability at 24% to the body as a whole. We hold that this judgment is supported by a preponderance of the evidence and is in accordance with the guidelines for making such judgments, Hinson v. Wal-Mart Stores, Inc., 654 S.W. 2d 675 (Tenn. 1983).

With respect to temporary total benefits, the plaintiff had

been paid $5,955.60 at the rate of $294.40 a week. The court held that plaintiff was not entitled to temporary total disability benefits for the time period from September 6, 1994 through October 17, 1994, because he was working for Lesher Fire Protection during that time; and that the commencement of his work with Lesher established the date that he was able to return to work and all temporary total disability benefits thereafter were not owed. The employer was given a credit for those overpayments.

During the period from August 5, 1994, through September 1, 1994, the employer paid the plaintiff his full regular pay. The trial court held that this satisfied the obligation of the employer, because to award temporary total disability payments for that time would trigger the result "only to have that award taken back by the employer as an overpayment" and was a useless act. Plaintiff contends on appeal that the full wage payments were taken back by withholding plaintiff's accrued vacation and leave time. There is no proof concerning the actual offset, if any, which took place; only plaintiff's statement "they also, through vacation times and any amount of time I had piled up, they took their money back from whatever was there * * * ". This does not definitively establish the actual offset, if any. The trial judge did not err in disallowing compensation for the period of time for which the employee was fully paid.

The employee insists that he is entitled to temporary partial disability benefits for the time that he worked for Lesher Fire Protection and thereafter, because his rate of pay was less than with the defendant during his time with Lesher and that he had not reached maximum medical improvement thereafter. The flaw in this

contention is that the trial court held, under the evidence, that the plaintiff was working for Lesher without any restrictions and that he had reached maximum medical improvement at that time. That finding negates subsequent eligibility for temporary partial disability compensation. The factual finding of the trial court regarding when the plaintiff reached maximum medical improvement is supported by the evidence. Certainly he never fully recovered, and that is the basis for the 24% permanent partial industrial disability to the body as a whole. The trial court logically concluded that when he started working for Lesher full-time without restrictions that he had reached maximum medical improvement. He was not on light duty.

For the reasons stated, we affirm the judgment of the trial court. Costs on appeal are assessed to the appellant.

WILLIAM S. RUSSELL, SPECIAL JUDGE

CONCUR:

LYLE REID, ASSOCIATE JUSTICE

WILLIAM H. INMAN, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

CHARLES H. SMITH,	}	DAVIDSON CHANCERY
	}	No. 95-1625-II Below
Plaintiff/Appellant	}	
	}	Hon. Ellen Hobbs Lyle,
vs.	}	Chancellor
	}	
KINETIC CONCEPTS, INC.,	}	No. 01S01-9610-CH-00207
	}	
Defendant/Appellee	}	AFFIRMED.

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/Appellant and Surety, for which execution may issue if necessary.

IT IS SO ORDERED on September 12, 1997.

PER CURIAM