

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

FILED
November 25, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

WAYNE E. ADAMS,)
)
Plaintiff/Appellant)
)
v.)
)
PETERBILT OF KNOXVILLE, INC.,)
ITT HARTFORD INSURANCE GROUP,)
and SUE ANN HEAD, DIVISION OF)
WORKERS' COMPENSATION,)
TENNESSEE DEPARTMENT OF)
LABOR, SECOND INJURY FUND,)
)
Defendants/Appellees)

KNOX CIRCUIT
NO. 03S01-9603-CV-00031
HON. WHEELER ROSENBALM,
JUDGE)

For the Appellant
Wayne E. Adams:

Gary S. Dawson
Campbell & Dawson
100 W. Summit Hill Dr.
Knoxville, TN 37902

For the Appellees
Peterbilt of Knoxville, Inc.
& ITT Hartford Ins. Gp.:

R. Franklin Norton
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Knoxville, TN 37901

For the Appellee
Second Injury Fund:

Charles W. Burson
Atty General & Reporter

Sandra E. Keith
Assistant Atty General
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MEMORANDUM OPINION

Members of Panel:

Justice E. Riley Anderson
Senior Judge John K. Byers
Senior Judge William H. Inman

AFFIRMED

BYERS, Senior Judge

OPINION

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 plaintiff brought this suit in which he alleged he was totally and permanently disabled and that he was entitled to medical benefits from his employer and the Second Injury Fund.

The trial judge found the plaintiff had sustained a 60 percent impairment as a result of an on-the-job injury on May 27, 1994. The trial judge dismissed the suit as to the Second Injury Fund because the amount of the disability of the plaintiff from the current injury when combined with previous workers' compensation injuries did not exceed 100 percent permanent total disability.

The plaintiff, in this appeal, says the trial court erred in not finding he was permanently and totally disabled as a result of the May 27, 1994 injury and in not awarding him benefits from the Second Injury Fund.

The judgment of the trial court is affirmed.

The treating physician, Dr. Robert E. Finelli, an orthopedic surgeon, testified the plaintiff had a ruptured disc at the L4-L5 vertebrae. Dr. Finelli did surgery on the plaintiff and treated him until September 20, 1994. Dr. Finelli returned the patient to work and found he had sustained a 10 - 12 percent permanent medical impairment as a result of the injury.

The plaintiff had undergone two previous back surgeries and Dr. Finelli considered these in determining the medical impairment from the last injury. Dr. Finelli was of the opinion that if the plaintiff returned to heavy work he would be at risk for a possible ruptured disc. It was his further opinion that if he did medium work the risk of further back injury was low.

Dr. Gilbert Hyde, an orthopedic surgeon, saw the plaintiff on July 28, 1995 for the purpose of evaluating his disability. Dr. Hyde found the plaintiff to be suffering a 22 percent medical impairment as a result of the injury of May 27, 1994. Dr. Hyde

testified the plaintiff was 40 - 50 percent medically impaired as a result of the May 27, 1994 injury and two previous injuries. Dr. Hyde would place restrictions of limited weight lifting, twisting, stooping, prolonged riding, standing or sitting.

The medical evidence was taken by deposition.

Vocational experts for the plaintiff and defendant testified in person at the hearing of the case. Their testimony varied as to the extent of the plaintiff's vocational disability. The plaintiff's expert testified that the plaintiff was 100 percent vocationally impaired and the defendant's experts testified that there were jobs available which the plaintiff could perform. The plaintiff and her daughter testified also concerning the plaintiff's physical abilities and limitations.

We review the findings of the trial judge *de novo* on the record with a presumption of correctness and will not overturn the findings unless the evidence preponderates against the findings. TENN. CODE ANN. § 50-6-225(e)(2).

In reviewing the findings of the trial judge, we are guided by the rule that the trial judge determines the credibility of the witnesses whom the judge has seen and heard testify at trial, and we cannot substitute our judgment for that of the trial judge in these circumstances. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

We are able to determine the credibility of witnesses who testify by deposition as did the doctors in this case. *Landers v. Firemen's Fund*, 775 S.W.2d 355 (Tenn. 1989). However, we do not lightly disregard the weight given by the trial judge to this type of testimony and are not disposed to hold contrary to the findings of the trial judge in this regard unless there are obvious reasons contained within a deposition which call into question the credibility of the deponent.

The findings of fact by the trial judge in this case raised some concern about the accuracy of some of the testimony of the plaintiff's witnesses. This along with our overall review of the record leads us to conclude the evidence in this case does not preponderate against the judgment of the trial court, and we affirm the judgment.¹

¹ This case was submitted to this panel at the September 16, 1996 session. We withheld action on the case until the Supreme Court rendered an opinion in *Davis v. Jim Reagan, et al* and the companion case of *Rayfield v. Employers Insurance Company of Wausau, et al*. The Supreme Court filed its Opinion in those cases on September 8, 1997. In those cases, the Supreme Court held that a worker need not be found to have a 16.7 percent medical impairment to recover for total disability.

The cost of this appeal is taxed to the plaintiff.

John K. Byers, Senior Judge

CONCUR:

E. Riley Anderson, Justice

William H. Inman, Senior Judge

Therefore, we need not consider the defendant's argument that the plaintiff could not be totally disabled because of the limitations under Tenn. Code Ann. § 50-6-207(4)(a).

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

WAYNE E. ADAMS)	KNOX CIRCUIT
)	No. 3-691-94
Plaintiff/Appellant,)	
)	
vs.)	Hon. Wheller Rosenbalm
)	Judge
)	
PETERBILT OF KNOXVILLE, INC.)	
ITT HARTFORD INSURANCE GROUP)	
and SUE ANN HEAD, DIVISION)	
OF WORKERS' COMPENSATION,)	
TN DEPARTMENT OF LABOR,)	
SECOND INJURY FUND.)	
)	03S01-9603-CV-00031
Defendant/Appellee.)	

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, Wayne E. Adams and surety, Gary S. Dawson, for which execution may issue if necessary.

11/25/97