IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(August 29, 1997 Session)

EDWARD DOUGLAS ATKINS,	)	MONTGOMERY CIRCUIT
	)	
Plaintiff-Appellee,	)	Hon. James E. Walton,
	)	Judge.
v.	)	
	)	No. 01S01-9703-CV-00047
ARGONAUT INSURANCE COMPANY,	)	
	)	
Defendant-Appellant.	)	

For Appellant:

Stephen K. Heard
Stewart, Estes & Donnell
Nashville, Tennessee

For Appellee:

William L. Underhill
Madison, Tennessee

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

Members of Panel:

Frank F. Drowota, III, Associate Justice, Supreme Court
William H. Inman, Senior Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED AS MODIFIED

Loser, Judge

MEMORANDUM 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. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. At the trial, the only issue was the extent of the claimant's permanent partial disability. In this appeal, the employer's insurer, Argonaut, contends the trial judge (1) erred in accepting the opinion testimony of an examining physician over that of the treating physician and (2) erred in using a multiplier of 4.9 times the medical impairment to determine the claimant's permanent partial disability. As discussed below, the panel has found no reversible error but concluded the award of permanent partial disability benefits should be modified.

The employee or claimant, Atkins, is forty-four years old with a college degree in social science work. He has worked as an instructor and hearing officer with the state of Tennessee, as a supervisor with the United States Department of Commerce, as a machine operator and as a forklift operator.

On April 18, 1994, Atkins stepped off a forklift and fell, injuring his back and bruising his right side from his shoulder to his foot. He was referred to Dr. David McCord, who performed disc surgery at L4-5 on May 23, 1994. When the claimant's condition did not improve, the doctor performed fusion surgery. At the time of the trial on August 31, 1996, the fusion had not healed and the claimant had not been released by Dr. McCord to return to work. The doctor assessed the claimant's permanent impairment at fifteen percent to the whole body.

At the claimant's request, Dr. David W. Gaw conducted a physical examination of the claimant and assessed his permanent impairment at eighteen percent to the whole body. At the insurer's request, Dr. Michael James McNamara conducted a physical examination and assessed his permanent impairment at ten percent to the whole body.

From the testimony of the claimant, which the trial judge found to be credible, and the other evidence, the trial judge found the opinion testimony of Dr. Gaw to be "the most convincing." He then multiplied the eighteen percent impairment by 4.9, after stating, "I agree with counsel that the multipliers 5 and 6 are out," and awarded permanent partial disability benefits based on 88.2% to the body as a whole.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2). This tribunal is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert

v. Government of Sumner County, 908 S.W.2d 921 (Tenn. 1995). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987).

For injuries occurring on or after August 1, 1992, where an injured worker is entitled to receive permanent partial disability benefits to the body as a whole, and the pre-injury employer does not return the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is six times the medical impairment rating. Tenn. Code Ann. section 50-6-241(b). If a court awards a multiplier of five or greater, then the court must make specific findings of fact detailing the reasons for its award, considering all relevant factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities and capacity to work at types of employment available in claimant's disabled condition. Tenn. Code Ann. section 50-6-241(c).

The trial judge's decision to accept the impairment rating of Dr. Gaw was based in part on his finding the claimant and his corroborating witnesses to be credible. Indeed, Dr. Gaw's opinion was based in part on the claimant's medical history. We have read the testimony of those witnesses and, while we have not had the opportunity to observe their manner and demeanor, find no reason to distrust their testimony. The trial court's acceptance of Dr. Gaw's opinion over the others is consequently affirmed.

By using a multiplier of 4.9, the trial court avoided the requirement of subsection 50-6-241(c) for detailed findings of fact, although the multiplier he used is only .1% below 5. While it is apparent that the claimant is severely injured, we are persuaded the proper multiplier in this case is 4 and that the evidence preponderates against an award based on 88.2% to the body as a whole and in favor of one based on 72% to the body as a whole. The judgment is modified accordingly.

As modified, the judgment of the trial court is affirmed. Costs on appeal are taxed to the parties, one-half each.

_____

Joe C. Loser, Jr., Special Judge

CONCUR:

_____

Frank F. Drowota, III, Associate Justice

_____

William H. Inman, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED

October 31, 1997

Cecil W. Crowson
Appellate Court Clerk

EDWARD DOUGLAS ATKINS,	}	*MONTGOMERY CIRCUIT*
	}	*No. C10-392 Below*
Plaintiff/Appellee	}	
	}	*Hon. James E. Walton,*
vs.	}	*Judge*
	}	
ARGONAUT INSURANCE CO.,	}	*No. 01S01-9703-CV-00047*
	}	
Defendant/Appellant	}	*AFFIRMED AS MODIFIED.*

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 are taxed one-half to each party, for which execution may issue if necessary.

IT IS SO ORDERED on October 31, 1997.

PER CURIAM