

IN THE SUPREME COURT OF TENNESSEE
WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, SEPTEMBER 1997 SESSION

FILED

December 2, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

THOMAS DELIAS)	GRAINGER CIRCUIT
)	
Plaintiff/Appellee)	
)	
VS.)	Hon. Ben. W. Hooper II,
)	Circuit Judge
PHILIPS CONSUMER ELECTRONICS)	
COMPANY)	
)	
Defendant/Appellant)	NO. 03S01-9704-CV-00047

For the Appellant:

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For the Appellee:

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MEMORANDUM OPINION

Members of Panel:

E. Riley Anderson, Chief Justice
John K. Byers, Senior Judge
Roger E. Thayer, Special Judge

AFFIRMED.

THAYER, Special 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 appeal has resulted from a decision of the trial court to award plaintiff, Thomas Delias, 45% permanent partial disability to the body as a whole. On appeal the defendant, Philips Consumer Electronics Company, contends the 45% award is excessive under the evidence.

Plaintiff does not have a high school education as he only completed the 8th grade. At the time of the trial, he was almost 60 years of age. He was injured on the job during April, 1992, while working as a router operator. He said a jig fixture jumped off of a pin and the router moved causing his left shoulder to be jerked severely. He was seen at the hospital two days later and eventually came under the care of an orthopedic surgeon who treated him for awhile and then discharged him.

Plaintiff testified he did not miss any time from work (he went to school for some period of time) and returned to router operator work but other employees did the heavier router work which involved considerable lifting and/or pushing. He continued the lighter type work and experienced pain while working. He wore a TENS unit about 90% of the time to help counteract the pain.

Sometime later his condition began to get worse and the company referred him to another orthopedic surgeon. Plaintiff told the court he was left handed and upon returning to work, he had to use his right hand as it was difficult to lift anything with his left arm. He said he had stopped working in his garden and could not hunt or fish any longer.

Ethyl Delias, plaintiff's wife, testified she did any lifting that was necessary around their house; that he had stopped working in their garden; he did not hunt or fish any longer and did not mow the yard.

Dr. William T. Youmans, the last surgeon to treat plaintiff, was of the opinion he had a frozen shoulder; that his range of motion was limited; said he had given injections and found plaintiff had a 7% medical impairment to the whole body. He did not recommend surgery at the time since plaintiff was working and earning wages.

Company representative James D. Linebarger testified that other employees were performing the heavier type router work.

The review of the case is de novo accompanied by a presumption of the correctness of the findings of fact unless we find from our review the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

Anatomical disability ratings are only one of many factors to be considered in measuring legal or vocational disability. The real test is whether there had been a decrease in the employee's capacity to earn wages in any line of work available to the employee, age, education, skills, training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition. *Orman v. Williams-Sonoma, Inc.*, 803 S.W.2d 672, 678 (Tenn. 1991).

In determining whether the employee's capacity to earn wages has been decreased, this is to be examined in relation to the open labor market and not whether the employee is able to return and perform the job held at the time of the injury. *Clark v. National Union Fire Ins. Co.*, 774 S.W.2d 586, 588 (Tenn. 1989).

Where the trial court has seen and heard witnesses and issues of credibility and the weight of oral testimony are involved, the trial court is in a better position to judge credibility and weigh evidence and considerable deference must be accorded to those circumstances. *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355 (Tenn. 1989).

In observing and applying these various rules of law to the facts of this case, we cannot say the evidence preponderates against the amount of the disability award. The award very well may be at or near the highest point of a reasonable award under the facts of the case. However, the award is not subject to revision unless the evidence preponderates against it.

The judgment is affirmed. Costs of the appeal are taxed to defendant employer.

Roger E. Thayer, Special Judge

CONCUR:

E. Riley Anderson, Chief Justice

John K. Byers, Senior Judge