

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

FILED

December 3, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

GREGORY A. HARBIN,)	KNOX CIRCUIT
)	
Plaintiff/Appellant)	NO. 03S01-9703-CV-00026
)	
v.)	HON. DALE C. WORKMAN,
)	CHANCELLOR
ST. MARY'S MEDICAL CENTER, INC.,)	
)	
Defendant/Appellee)	
)	

For the Appellant:

P. Richard Talley
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For the Appellee:

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MEMORANDUM OPINION

Members of Panel:

Justice Adolpho A. Birch, Jr.
Senior Judge John K. Byers
Special Judge Irvin H. Kilcrease, Jr.

REVERSED AND REMANDED

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 plaintiff was employed by the defendant as a security guard. On July 8, 1993, he was struck by a vehicle in the defendant's garage. There is no dispute that the plaintiff was involved in an accident in the course of his employment. The only dispute is whether the plaintiff failed to show by a preponderance of the evidence that he suffered any permanent disability as a result of the accident.

The trial court held the plaintiff did not prove any permanent disability by a preponderance of the evidence as a result of the accident. We reverse the decision of the trial court.

The pertinent testimony in the case was the oral testimony of the plaintiff, and the deposition testimony of Dr. Dennis Coughlin¹, an orthopedic surgeon; Dr. Gilbert L. Hyde, an orthopedic surgeon; and Joseph Scott Brown², a chiropractor.

The plaintiff, thirty years old at the time of the case, testified he continued to have pain as a result of the injuries he received in the accident. He testified concerning many things he is unable to do because of the pain and stiffness associated with the injuries. He is, however, employed as a security officer with another firm.

Dr. Hyde, the plaintiff's witness, saw the plaintiff for purpose of evaluation. He found the plaintiff to have muscle spasms in the low back and other manifestations of injury. Dr. Hyde was of the opinion the plaintiff retained a 5% permanent medical impairment and was of the opinion the impairment was related to the on job injury with the defendant.

Dr. Coughlin, the defendant's witness, saw the plaintiff on two occasions -- once for examination and ordering of tests and once to report the results of the tests to him. Dr. Coughlin found degenerative disease of the L4 and L5 vertebrae. The

¹ The medical records of Dr. David Fardon were introduced through the Coughlin deposition. Dr. Fardon found no permanent impairment.

² The trial judge found the testimony of the chiropractor to be unreliable. We agree with that assessment and will not consider the testimony in the record.

essence of the testimony in relation to the accident is best illustrated by the following exchange:

Q: So, are you telling the ladies and gentlemen of the Jury [sic], Doctor, that you do not relate the problems that he has to the car accident of July 8, 1993, or you do?

A: No. What I'm saying is I cannot state with any reasonable degree of medical certainty that his complaints of back pain were due to the automobile accident; and, on the other hand, I cannot state in a reasonable degree of medical certainty that there was no relationship there.

Dr. Coughlin found the plaintiff had a 5% permanent medical impairment.

We review the findings of fact by the trial judge *de novo* upon the record with the presumption the finding is correct. TENN. CODE ANN. § 50-6-225(e); *Lock v. National Union Fire Ins. Co.*, 809 S.W.2d 483 (Tenn. 1991).

The defendant says the trial judge should give more weight to the testimony of treating physicians than is given to the testimony of evaluating physicians, and relies upon *Crossno v. Publix Shirt Factory*, 814 S.W.2d 730 (Tenn. 1991). We do not read *Crossno* to require the trial judge to weigh the testimony of treating physicians more heavily than the testimony of evaluating physicians. We believe *Crossno* holds the trial judge may do so without compulsion to do so. Beyond this, we do not read *Crossno* as changing the holding in *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355 (Tenn. 1989), which allows the appellate court to draw its own impression of the weight of evidence presented by deposition.

Dr. Coughlin can hardly be considered more than an evaluating physician in the case based upon the limited time he saw the plaintiff as we have above set out. Dr. Fardon did not testify and his contribution to the case exists because Dr. Coughlin relied upon his notes and they were introduced through Dr. Coughlin. Although we do not totally discount them, we recognize Dr. Fardon's opinion is not tested by the normal confrontation process of either live or deposition testimony.

The sum of the medical proof in the record is that Dr. Coughlin says he cannot find the plaintiff's 5% impairment is or is not connected to the accident. Dr. Hyde says it is.

The general and accepted rule is that in case of doubt all reasonable doubt shall be resolved in favor of the employee. *Hall v. Auburntown Industries, Inc.*, 684 S.W.2d 614 (Tenn. 1985). We find the evidence preponderates against the finding of the trial judge and in favor of the plaintiff.

Based upon the evidence in the case, we find the plaintiff has sustained a 15% permanent vocational impairment to the body as a whole. We fix that award as our judgment in this case.³

This case is remanded to the trial court for the entry of such orders as are required to carry out the judgment.

John K. Byers, Senior Judge

CONCUR:

Adolpho A. Birch, Jr., Justice

Irvin H. Kilcrease, Jr., Special Judge

³ There were no temporary total benefits due the plaintiff and all previous medical bills back to when he was entitled have been paid.

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

GREGORY A. HARBIN,)	Knox Circuit
)	No. I-391-94
Plaintiff-Appellee,)	
)	Hon. Dale C. Workman
v.)	
)	NO. 03S01-9703-CV-00026
ST. MARY'S MEDICAL CENTER, INC.,)	
)	
Defendant-Appellant.)	REVERSED AND REMANDED

JUDGMENT ORDER

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 well-taken and it is hereby ordered that the motion is granted for the purpose of modifying the Panel's award of 15% permanent partial disability to the body as a whole to 12.5% permanent partial disability to the body as a whole pursuant to Tenn. Code Ann. § 50-6-241(a)(2).

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, as modified, and the decision of the Panel is made the judgment of the Court.

Costs are taxed to the defendant-appellant, for which execution may issue if necessary.

It is so ordered this 3 day of Dec, 1997.

PER CURIAM

Birch, J., not participating

