IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(May 23, 1997 Session)

DENNIS HODGE,

Plaintiff/Appellee,

VS.

NO. 02S01-9611-CV-00098

M.S. CARRIERS, INC.,

SHELBY COUNTY LAW
JUDGE ROBERT L. CHILDERS

Defendant/Appellant.

FOR APPELLANT:
David M. Rudolph
Memphis, Tennessee

FOR APPELLEE:
Charles A. Sevier
Memphis, Tennessee

MEMORANDUM OPINION
Mailed November _____, 1997

Members of Panel:

Janice M. Holder, Associate Justice, Supreme Court
Robert A. Lanier, Special Judge
Don R. Ash, Special Judge

AFFIRMED

Ash, Special Judge

MEMORANDUM OPINION

This worker's 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) (1996 Supp.) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the employer, M. S. Carriers, Inc., contends: (1) that Mr. Hodge, the Plaintiff did not meet his burden of proving by a preponderance of medical evidence that he had any permanent disability to his lower back because of the alleged work accidents; (2) that the trial court erred in applying a multiple of four times plaintiff's anatomical impairment rating, given plaintiff's age, extensive vocational history and current employment.

STANDARD OF REVIEW

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. § 50-6-225(e)(2) (1996 Supp.). This tribunal is required to conduct an independent examination of the record to decide where the preponderance of the evidence lies. Wingert v. Govemment of Sumner County, 908 S.W.2d 921 (Tenn. 1995).

FACTS

The claimant, Mr. Dennis Hodge, was forty-one years old at the time of trial. His educational background consists of a GED and two years of junior college. Mr. Hodge's work history consisted of serving in the armed forces, working as a salesman, working for a railroad and driving commercial vehicles. He is currently employed as a recruiter for a commercial truck driving school. Mr. Hodge injured his neck and back on December 7, 1993, while working for M. S. Carriers. Mr. Hodge attempted to return to work. He reinjured himself, however, aggravating the preexisting injury of December 7, 1993. Prior to these incidents, Mr. Hodge had no difficulty with his neck and back.

Mr. Hodge was examined by Dr. K. L. Vandervoort who treated him conservatively. Initially, Dr. Vandervoort gave Mr. Hodge a 7% impairment rating to the body as a whole. Dr. Vandervoort opined that Mr. Hodge had reached maximum medical improvement and imposed permanent work restrictions of lifting a maximum of 25 pounds overhead, 40 pounds lifting from the floor to waist, and limited him to push-pull of 50 pounds. Later, Dr. Vandervoort assessed 2% of the 7% impairment rating to the alleged work injury and 5% to Mr. Hodge's preexisting torticollis condition, which he sustained when he was severely burned as a child. Dr.

Vandervoort further opined that Mr. Hodge did not have any anatomical impairment to his lower back from the alleged work injury, although he noted Mr. Hodge had limited motion in his cervical spine.

Next, Mr. Hodge saw Dr. Paul Williams for an independent medical examination where he conducted an MRI and took X-rays of Mr. Hodge's back. Dr. Williams noted no remarkable outstanding abnormalities, but he did observe that Mr. Hodge suffered from muscle spasms and persistent limitations of motion in his lower back. Dr. Williams assessed a 3% permanent anatomical impairment to Mr. Hodge's body as a whole for his lumbar spine and a 3% permanent anatomical impairment to Mr. Hodge's body as a whole for his cervical spine.

FINDING OF DISABILITY

Appellant contends that Plaintiff failed to prove by a preponderance of medical evidence that he had any permanent disability to his lower back as a result of the alleged work accidents. In the instant case, there exists disparity in the medical opinions of the doctors. Therefore, this panel must decide whether the the evidence preponderates against the trial judge's decision to choose Dr. Williams' opinion over Dr. Vandervoort's opinion.

When the trial judge has an opportunity to hear the witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must be accorded to those circumstances. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315, 315 (Tenn. 1987). All of the proof in this case was taken by deposition or was documentary. Accordingly, all impressions of weight and credibility must be drawn from the contents thereof, and not from the appearance of witnesses on oral testimony at trial. Landers v. Fireman's Fund Ins. Co., 775 S.W.2d 355, 356 (Tenn. 1989). Moreover, while causation and permanency of an injury must be proved by expert medical testimony, such testimony must be considered in conjunction with the lay testimony of the employee as to how the injury occurred and the employee's subsequent condition. Smith v. Empire Pencil Co., 781 S.W.2d 833, 835 (Tenn. 1989).

In the instant case, the Plaintiff testified that he had no disability prior to the accident. The testimony is supported by the record showing Mr. Hodge passed the employer's physical examination prior to receiving employment. Moreover, the treating physician, Dr. Vandervoort, opined in his first visit with Plaintiff that Mr. Hodge's injuries were work related. However, it was not until Dr. Vandervoort's depositions that he changed the value of the impairment rating

he gave to Mr. Hodge. Dr. Vandervoort separated 5% of the original 7% impairment rating to Plaintiff's preexisting condition, leaving only 2% causally related to the on-the-job injury. Nevertheless, Dr. Vandervoort opined that Plaintiff's injury was compensable, though the impairment rating he gave was less than Dr. Williams' opinion of 3% to the body as a whole for the cervical spine condition and 3% to the body as a whole for the lumbar spine condition.

The trial court found Mr. Hodge and Dr. Vandervoort to be a credible witnesses. The court, however, found Dr. Vandervoort to be confused, based upon his written medical records and his testimony at deposition. Due to the conflict in Dr. Vandervoort's testimony and the written medical records available, the trial judge was entitled to give Dr. Williams' testimony greater weight in finding the Plaintiff had a disability of 6% to the body as a whole. Therefore, the evidence does not preponderate against the trial judge's finding that the Plaintiff's injury was compensable and the impairment rating was not excessive.

APPLICATION OF MULTIPLIER

Appellant contends that the Trial Court erred in applying a multiple of four (4) times plaintiff's anatomical impairment rating, given plaintiff's age, extensive vocational history and current employment.

The trial court is justified in the consideration of factors such as age, job skills, education, training, and the like, in addition to anatomical impairment. Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990). The factors this Court is to consider in determining the amount of disability are the claimant's age (Jackson v. Greyhound Lines, Inc., 734 S.W.2d 617, 621 (Tenn. 1987)); his job skills, education, training, and length of disability (Employers Ins. v. Heath, 536 S.W.2d 341, 342-43 (Tenn. 1977)); job opportunities in the marketplace (Hinson v. Walmart, 654 S.W.2d 675, 677 (Tenn. 1983)); whether the claimant has returned to work (Corcoran v. Foster Auto GMC, 746 S.W.2d 452, 459 (Tenn. 1987)); the claimant's own assessment of his or her physical condition and resulting disability (Corcoran, 746 S.W.2d at 458); and whether despite returning to work, whether the claimant's ability to earn wages in any form of employment (that would have been available to him in an uninjured condition) is diminished by an injury (Prost v. City of Clarksville, 688 S.W.2d 425, 427 (Tenn. 1984)).

In the instant case, Mr. Hodge is a 41-year-old man with a G.E.D. and two years of junior college. Mr. Hodge's limited educational background provides no specialized training that could be transferred to a less manual labor orientated field of employment. Mr. Hodge has

worked as a serviceman in the army, boiler fireman, switchman/trainman and repairman for a railroad, insurance salesperson, long distance salesperson, car salesperson, meat processor, truck driver, and as a recruiter for a commercial driving school. Mr. Hodge's only specialized training is that of a truck driver. However, his medical restrictions limit his capacity to operate a truck. Therefore, Mr. Hodge's ability to find employment in the open labor market, in view of his age, education, physical condition, work restrictions, and skills is impaired by his injury.

Based on the proof, this Court finds that the multiplier of four times Mr. Hodge's impairment rating is appropriate. Therefore, the evidence does not preponderate against the trial judge's finding of 24 % to the body as a whole.

The judgment of the trial court is accordingly affirmed. Costs on appeal are taxed to the defendant-appellant.

_____
Don R. Ash, Special Judge

CONCUR:

_____
Robert Lanier, Special Judge

_____
Janice M. Holder, Associate Justice

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

DENNIS HODGE,	)	SHELBY CIRCUIT
	)	NO. 64526 T.D.
Plaintiff/Appellee,	)	
	)	Hon. Robert L. Childers,
vs.	)	Judge
	)	
M. S. CARRIERS, INC.,	)	NO. 02S01-9611-CV-00098
	)	
Defendant/Appellant.	)	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 Appellant, and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 8th day of December, 1997.

PER CURIAM

(Holder, J., not participating)