IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT KNOXVILLE APRIL 1997 SESSION

DAVID PAUL WILBURN,	)	SULLIVAN CHANCERY
	)	
Plaintiff/Appellant	)	NO. 03S01-9611-CH-00111
	)	
v.	)	HON. JOHN S. McLELLAN, III,
	)	CHANCELLOR
JOHN BOYLE & CO., INC., d/b/a AQUAMINE PLASTIC PRODUCTS, INC.,	)	
	)	
Defendant/Appellee	)	

For the Appellant:

Michael E. Large
Large and Associates
511 Alabama St.
Bristol, TN 37620

For the Appellee:

Edward J. Webb
K. Jeff Luethke
Hunter, Smith & Davis
P.O. Box 3740
Kingsport, TN 37664

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

Members of Panel:

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

AFFIRMED **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 below appeals the trial court's dismissal of his complaint, holding that the plaintiff had not met his burden of proving that he had sustained a permanent vocational disability as a result of his work-related accident.

We affirm the trial court's judgment.

The plaintiff offered the testimony of himself, his brother, Bobby Wilburn; his parents, Robert and Ruth Wilburn; and Sondra Brown, the record keeper for Med-One, where plaintiff originally received medical treatment. He also submitted the deposition of plaintiff's treating physician, Dr. Jim Brasfield, and the medical report of an examining physician, Dr. Calvin Johnson, along with other documentary exhibits. The defendant offered the testimony of Brian Looney, who had been plaintiff's supervisor at Aquamine; two co-workers of the plaintiff at Aquamine, Gerald Holmes and Paul Pyle; and Robert Rinehart, the manager of Aquamine at the time of these events, as well as documentary evidence.

Parties disputed whether the date of the accident was September 25 or 29, 1993, but it was eventually stipulated that adequate notice was given. Plaintiff, Mr. Looney and Mr. Pyle were assembling a pallet rack, when the plaintiff's hand was squashed between the pallet rack and the wall. Plaintiff testified that he jerked his hand out, but Mr. Pyle and Mr. Looney both testified that Mr. Looney immediately pulled the rack back, releasing the plaintiff's hand. Plaintiff further testified that he began to feel pain in his shoulder within ten to fifteen minutes after the incident and that he complained to his co-workers about it. However, all of the defendant's witnesses testified that he did not mention any shoulder pain to them until approximately three weeks after the accident.

Plaintiff continued to work very long hours until October 1, 1993, as the defendant was moving from its location in Bristol, Virginia to a new office in Bristol, Tennessee. The accident occurred during the move.

On October 14, 1993, all of the defendant's employees except the office manager, who was on medication for severe heart disease, were required to take a drug test. Mr. Holmes testified that the plaintiff indicated to him that he had a 50-50 shot of failing the test. Mr. Pyle testified that he had witnessed the plaintiff smoking marijuana several times during the month of September. The plaintiff took the day off following the test, which was a Friday; Mr. Looney said the plaintiff told him that he had stayed up all night worrying about the drug test.

On the next Monday, October 18, 1993, the plaintiff asked for approval to get treatment from Med-One, which was granted. On October 25, 1993, when Mr. Rinehart learned that plaintiff was complaining of an injury to his shoulder as well as to his finger, he contacted Med-One and informed them that the defendant would only pay for services for the finger. Plaintiff was referred to Dr. Brasfield and remained off of work until November 9, 1993.

On that date, plaintiff returned to work, at which time Mr. Rinehart informed him that his drug test results had been invalid and asked him to take the drug test again. Mr. Rinehart had received the test results, which indicated that creatinine levels in the sample were low, which might affect the validity of the test. The plaintiff refused to take another drug test. Mr. Rinehart testified that he told the plaintiff he could not work until he successfully underwent another drug test. Plaintiff testified that Mr. Rinehart made him sit at a desk until his doctor's appointment without any explanation of why he was not allowed to work.

On November 15, 1993, plaintiff was released to return to work without restrictions. He testified that he was informed that he had been replaced when he contacted defendant; Mr. Rinehart testified that plaintiff did not return to work and, when he called the plaintiff, the plaintiff told him he had another job. Sometime within the next week, plaintiff began working for Bostic Ford in Lebanon (Virginia?), a former employer.

The testimony revealed that the plaintiff and Mr. Looney and Mr. Pyle have been friends for many years. Further, although Mr. Looney continues to work for the

defendant and has been promoted to manager, the defendant's other witnesses no longer work for it. Mr. Pyle was dismissed because he did not pass the drug test.

Dr. Brasfield testified that he found a mild cervical strain, which appeared to have resolved at his second evaluation. A nerve conduction study revealed abnormalities along the C6 nerve, which he believed supported the plaintiff's complaints of pain in his shoulder. He opined that the plaintiff's shoulder problems were a result of the plaintiff's jerking his hand to free it; he admitted, however, that he was dependent upon plaintiff's credibility in providing a history of the accident. He assigned plaintiff a 3% whole body impairment rating.

Dr. Johnson evaluated the plaintiff and filled out a medical report, in which he assigned the plaintiff an impairment rating of 5% to the left upper extremity and related the impairment to the plaintiff's work-related injury.

Our review is *de novo*, accompanied by the presumption that the trial court's findings of fact are correct unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

The evidence in this case mostly involves the direct testimony of witnesses who appeared live at the hearing. In considering such evidence, we are not in the same position to weigh credibility and weight of testimony as is the trial judge, who alone has seen and heard these witnesses. Therefore, we defer to the trial court's determination of these witnesses' credibility. *See Townsend v. State*, 826 S.W.2d 434, 437 (Tenn. 1992).

The trial judge dismissed the complaint, finding that it was unlikely that the plaintiff should have kept silent about a shoulder injury for so long under strenuous working conditions with people who were longtime friends. He pointed out that Mr. Pyle did not have any motivation to lie about the injury and the circumstances surrounding it.

We find the evidence does not preponderate against the trial judge's findings and, therefore, affirm the trial court's judgment at the cost of the appellant.

_____
John K. Byers, Senior Judge

CONCUR:

_____
E. Riley Anderson, Justice

_____
Roger E. Thayer, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

DAVID PAUL WILBURN, Plaintiff/Appellant, v. JOHN BOYLE & CO., INC., d/b/a AQUAMINE PLASTIC PRODUCTS, INC., Defendant/Appellee.	)))))))))))	SULLIVAN CHANCERY NO. 13-336 (T) HON. JOHN S. McLELLAN III CHANCELLOR S. CT. NO. 03S01-9611-CH-00111 AFFIRMED

JUDGMENT

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 not well taken and should be denied; 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 the Appellant, for which execution may issue if necessary.

It is so ordered this _____ day of October, 1997.

PER CURIAM

Anderson, not participating