

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

AT JACKSON

<p>FILED</p> <p>March 30, 1998</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>
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GEORGE RANDALL BAILEY,)	WEAKLEY CIRCUIT
)	
Plaintiff/Appellant)	NO. 02S01-9704-CV-00025
)	
v.)	HON. WILLIAM B. ACREE, JR.
)	JUDGE
UNITED STATES FIDELITY AND)	
GUARANTY and INSTITUTIONAL)	
DISTRIBUTORS, INC.,)	
)	
Defendants/Appellants)	

For the Appellant:

Steve Taylor
6263 Poplar Avenue
Suite 601
Memphis, TN 38119

For the Appellee:

Robert B. C. Hale
Suite 1300
50 North Front Street
Memphis, TN 38103

MEMORANDUM OPINION

Members of Panel:

Justice Janice Holder
Senior Judge John K. Byers
Senior Judge William H. Inman

AFFIRMED

INMAN, Senior Judge

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with T.C.A. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The trial judge found the plaintiff to be 15 percent permanently partially disabled on account of “emotional or behavioral symptoms.” The plaintiff appeals, insisting that the preponderance of the evidence requires a greater award. We disagree, and accordingly affirm the judgment.

On March 4, 1996, the plaintiff was injured when struck on the head by falling cartons of pizza dough. A CAT scan revealed no cranial pathology, but owing to his continuing complaints, the plaintiff was extensively treated and examined by Dr. R. A. Tyrer, Dr. Robert Greene, Jr., and Dr. Glenn Barnett, II, neurosurgeons; Dr. Robert Pusakulich, a clinical psychologist; and other experts. The neurologists administered various tests, including an MRI of the brain, MRI of the lumbar spine, MRI of the cervical spine, and an MRI of the head. A host of x-rays, a bone scan and a spinal tap completed the diagnostic testing. These experts found no disability. Dr. Pusakulich believed that the plaintiff was suffering from a “great deal of financial overlay;” so did Dr. Barnett. Dr. Pusakulich also believed the plaintiff demonstrated a remarkable psychogenic overlay, as evidenced by his complaint of double vision that “he saw double with both eyes open and one eye closed,” a neuroanatomical impossibility.

The plaintiff was referred to Dr. Tewfik E. Rizk, of the St. Joseph Hospital Rehabilitation Center, by his attorney. On his initial examination, Dr. Rizk testified that the plaintiff had a slow, slurred speech, memory loss, and was limping on the left side. His diagnosis was post-traumatic closed-head injury syndrome with left-side hemiparesis. He disagreed with the conclusions

of the neurosurgeons and thought that “something is wrong with his [plaintiff’s] brain cells and he’s not walking good.” He opined that the plaintiff has a 40 percent impairment to his whole person.

Dr. Sheena Rose, a clinical psychologist, testified that the plaintiff had no speech impairment, contrary to the opinion of Dr. Rizk.

Finally, the plaintiff was videotaped, which revealed that he walked without limping, but when he realized he was under scrutiny, he began limping on his right leg, as contrasted to a prior limp on his left side, as described by Dr. Rizk.

Our review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2), *Spencer v. Towson Moving and Storage, Inc.*, 922 S.W.2d 508 (Tenn. 1996); *Skinner v. CNA Ins. Co.*, 824 S.W.2d 164 (Tenn. 1992). Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge’s determination. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

The burden is on the plaintiff to prove that he is entitled to workers’ compensation benefits, *Smith v. Empire Pencil Co.*, 781 S.W.2d 833 (Tenn. 1989,) and this burden extends to each and every element of plaintiff’s case, including permanency of disability. *Roark v. Liberty Mutual Insurance Co.*, 793 S.W.2d 932 (Tenn. 1990).

The plaintiff’s credibility was a major issue in this case. Aside from the fact that he was a convicted felon (theft), he apparently set out on a course to deceive, as for instance, he did not tell his psychologist, Dr. Sheena Rose, of his illegal use of prescription medication (Valium) and marijuana.

He testified that since his injury he has always walked with a limp, which clearly was untrue. Other instances abound.

The preponderance of the evidence supports the findings of the trial judge that the plaintiff suffered no permanent *physical* impairment. The opinion of Dr. Rizk is not very weighty, given his reliance upon the representations and misrepresentations of the plaintiff. The impairment of 15 percent for “emotional or behavioral symptoms” is, from the record, fortuitous for the plaintiff, and the evidence does not preponderate in favor of a greater award.

The judgment is affirmed at the costs of the appellant.

William H. Inman, Senior Judge

CONCUR:

Janice Holder, Justice

John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

GEORGE RANDALL BAILEY,) WEAKLEY CIRCUIT
) No. 2845 Below
Appellant,)
) Hon. Willian Acree,
v.) Judge.
)
) No. 02S01-9704-CV-00025
UNITED STATES FIDELITY &)
GUARANTY AND INSTITUTIONAL)
DISTRIBUTORS, INC.,)
)
Appellees.) AFFIRMED.

FILED
March 30, 1998
Cecil Crowson, Jr.
Appellate Court Clerk

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 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 on appeal are assessed to the appellant.

IT IS SO ORDERED this ____ day of March, 1998.

PER CURIAM

Holder, J. - Not participating.