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

KAY E. BLACKWOOD, JR.,	)	CLAY CIRCUIT
	)	
Plaintiff/Appellee	)	NO. 01S01-9705-CV-00106
	)	
v.	)	HON. JOHN MADDUX,
	)	JUDGE
MASCO, INC.	)	
d/b/a THE BERKLINE CORPORATION,	)	
	)	
Defendant/Appellant	)	

For the Appellant:

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For the Appellee:

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

Members of Panel:

Justice Adolpho A. Birch, Jr.
Senior Judge John K. Byers
Special Judge Hamilton V. Gayden, Jr.

AFFIRMED

BYERS, Senior Judge

OPINION

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 injured his back on June 3, 1995 while in the course of his employment with the defendant. The trial judge found the plaintiff had sustained a 55 percent vocational impairment to the body as a whole.

The defendant says the medical evidence submitted at trial was insufficient to show the plaintiff sustained a permanent injury and further says the award was excessive even if the plaintiff sustained permanent injury.

The judgment of the trial judge is affirmed.

Because there is no contest about the accident which injured the plaintiff, we need not discuss the facts thereof.

MEDICAL EVIDENCE

The only medical evidence in this case was the testimony of Dr. S. M. Smith, an orthopaedic surgeon. Dr. Smith first saw the plaintiff on August 31, 1995. He testified concerning his examination of the plaintiff and detailed specific findings, not necessary to set out, concerning the injury. When asked his opinion about the plaintiff's injury on the date of August 31, 1995, Dr. Smith said:

> I felt that he needed an MRI of his lumbar spine, along with an EMG and a nerve conduction study of both lower extremities to fully evaluate the back problem. I also felt that he may need a course of physical activity and possible surgical intervention based upon the findings of the MRI. And at that time, I didn't think I could give him an impairment rating, because his condition had not been fully evaluated.[1]

Dr. Smith saw the plaintiff on April 30, 1996 and again examined him. When asked about his condition at that time, Dr. Smith said:

> He continues to have problems with his back. His examination was completely unchanged. And I told him that since we cannot get any studies done, that I would go ahead and rate him based on the physical findings that he has now. And he has enough physical findings to make me think that he has nerve root impingement in the lumbar region. I think that he deserves an MRI to help better elucidate this problem. I would not feel comfortable sending him to PT without an MRI, because if he does have a ruptured disc, then this could make his condition worse.

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[1] The defendant would not pay for an MRI or EMG because they did not recognize the plaintiff's injury as compensable. The plaintiff could not afford the cost of the tests.

> I told him that I would rate him with the speculation that further studies and surgical intervention or physical therapy could possibly decrease the impairment rating. Based upon his physical examination, he has significant signs of radiculopathy, which places him in DRE Lumbosacral Category III, Radiculopathy, of the 4th Edition of the AMA Guides to the Evaluation of Permanent Impairment.

Dr. Smith found the plaintiff had suffered a whole body medical impairment of 10% which was caused by the injury of June 3, 1995. Dr. Smith testified that his opinions were based upon a reasonable degree of medical certainty.

The defendant's main claim that the medical evidence is insufficient is because Dr. Smith testified if the MRI and EMG showed no disc problem then physical therapy would decrease the impairment of the plaintiff. Dr. Smith testified it would be speculative to say how much the disability would decrease. He said the impairment might or might not decrease as a result of further treatment.

The defendant contends the finding of permanency by Dr. Smith is so far speculative to be insufficient to base an award upon. The defendant relies upon the case of *Singleton v. Procon Products,* 788 S.W.2d 809 (Tenn. 1990) and cases therein in support of their argument.

In *Singleton*, the doctor testified that it was possible the plaintiff's disability was permanent. And a fair reading of the cases cited in *Singleton* reveals the degree of medical certainty of the permanency of injury to the plaintiff was speculative at best.

In the case before us, the testimony by Dr. Smith is not that the plaintiff's disability is possibly permanent. Dr. Smith's testimony is that the disability is permanent. The speculation on the course of the disability is whether it will lessen. Dr. Smith says it is possible it will but gives no more than a 50/50 chance that the disability will decrease with further treatment.

Based upon this, we find the medical evidence is sufficient to support the trial judge's finding that the plaintiff has suffered a permanent vocational disability.

EXTENT OF DISABILITY

The plaintiff in this case was 40 years of age at the time of trial, he had completed 12 years of school and 2 years of vocational training to be a mechanic. The plaintiff's work history was that of a skilled worker. The plaintiff testified about the debilitating effect of his injury upon his ability to perform work for which he was suited by training and experience.

Dr. Smith restricted the plaintiff from repetitive bending or twisting, from lifting more than 25-30 pounds, from heavy pushing or pulling, and from working in an environment where there would be extreme temperature changes.

In determining the extent of the vocational disability of an employee, the trial court can consider the employee's assessment of the extent of the disability along with the medical evidence. *Orman v. Williams Sonoma, Inc.,* 803 S.W.2d 672 (Tenn. 1991).

We find the evidence does not preponderate against the finding that the plaintiff suffered a 55 percent vocational impairment.

During the pendency of this appeal, the defendant filed a Motion to Consider Post-Judgment Facts. The defendant asks us to consider facts which suggest that the plaintiff was suffering from testicular pain and not back pain at the time of trial. We will not consider such post-judgment facts. These facts are related to the merits of the plaintiff's impairment, an issue which the trial judge decided in the plaintiff's favor. Post-judgment facts are not to be considered on issues which were in dispute at trial. *See* Tenn. R. App. P. 14, *Duncan v. Duncan,* 672 S.W.2d 765 (Tenn. 1994). The defendant's motion is overruled.

The cost of this appeal is taxed to the defendant.

_____
John K. Byers, Senior Judge

CONCUR:

_____
Adolpho A. Birch, Justice

_____
Hamilton V. Gayden, Jr., Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED

January 26, 1998

Cecil W. Crowson
Appellate Court Clerk

KAY BLACKWOOD,	}	*CLAY CIRCUIT*
	}	*No. 1373 Below*
Plaintiff/Appellee	}	
	}	*Hon. John J. Maddux, Jr.,*
vs.	}	*Chancellor*
	}	
MASCO, INC., d/b/a THE BERKLINE CORPORATION,	}	
	}	*No. 01S01-9705-CV-00106*
	}	
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 Defendant/Appellant and Surety, for which execution may issue if necessary.

IT IS SO ORDERED on January 26, 1998.

PER CURIAM