

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

FILED

March 3, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

JOHN W. GRAY, III,)	
)	
Plaintiff/Appellee)	SHELBY CHANCERY
)	
v.)	NO. 02S01-9706-CH-00054
)	
GRAY AND WILLIAMS, INC. and)	HON. NEAL SMALL,
THE ST. PAUL,)	CHANCELLOR
)	
Defendants/Appellants)	

For the Appellants:

Betty Ann Milligan
80 Monroe Avenue, Suite 500
Memphis, TN 38103

For the Appellee:

James D. Causey
David S. Walker
100 North Main Building, Suite 2400
Memphis, TN 38103

MEMORANDUM OPINION

Members of Panel:

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

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.

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. Tenn. Code Ann. § 50-6-225(e)(2). *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995).

The trial judge awarded the plaintiff 60 percent permanent partial disability.

The defendants say the evidence presented at trial preponderates against the trial court's award of 60 percent permanent partial disability to the plaintiff's body as a whole as a result of his work related accident.

We affirm the judgment of the trial court.

FACTS

The plaintiff, age 43 at the time of trial, graduated from high school and attended Memphis State University for one semester. From age eight or ten, the plaintiff worked at John Gray & Son Market, his father's grocery store. His only other work experience was one summer of construction work.

In 1990, the plaintiff purchased a 51 percent equity interest in the Market from his father, and the other 49 percent interest was purchased by Michael Williams. The plaintiff and Williams operated the grocery store under the name Gray and Williams, Inc.

The plaintiff testified that he worked in the Market as a butcher, cooking and cutting meat all day long from 4:00 a.m. until 8:00 or 10:00 p.m. In this capacity, the plaintiff constantly lifted boxes of meat which weighed an average of 100 pounds. The plaintiff further testified that he sacked groceries, cleaned up, did a lot of restaurant business, and generally did everything but the books for the Market.

On March 7, 1995, the plaintiff injured his back when he went into the meat cooler and reached down to pick up some ribeyes. The plaintiff testified that he could not reach back up and that it felt like he pulled something in his back. The

plaintiff testified that he had no back problems or physical limitations prior to this injury.

As a result of this injury, the plaintiff saw a series of doctors and eventually underwent surgery for a herniated disc in May 1995. Prior to surgery, the plaintiff stated that he could not get out of bed. After surgery, the plaintiff testified that he felt better, but he said he was unable to complete a rehabilitation program due to the severe pain and nausea he experienced and because the exercises aggravated his back problems. The plaintiff still suffers from pain in his neck, back, and legs.

The plaintiff testified that he was not able to return to work at the Market due to the heavy lifting and constant bending he was required to do as a butcher. Before his back surgery in May 1995 and pursuant to a clause in the Partnership Agreement, the plaintiff sold his interest in the Market to Williams, who did not pay the plaintiff any money for the interest but instead assumed all of the liabilities. Williams testified that the plaintiff was not able to return to the Market doing the job he was doing before the injury. Although Williams testified that the plaintiff could have continued to work at the Market if they "juggled some things around to make it work," Williams also stated that the Market could not afford the plaintiff's salary if he only worked as a clerk.

The plaintiff, his wife, his father, and Williams all testified that he would still be working at the Market if he had not suffered a back injury. Since selling his interest in the Market, the plaintiff testified that he has experienced financial difficulties and has declared bankruptcy. When the plaintiff worked at the Market, his take home pay was \$800.00 per week; now the plaintiff earns \$6.00 per hour as a security guard and \$5.00 per hour as a telemarketer. The plaintiff testified that he would like to be a minister and that he earned some income from ministry in 1995.

EXPERT TESTIMONY

_____ Dr. Downen Snyder, a board certified neurological surgeon, testified by deposition. Dr. Snyder examined the plaintiff on May 4, 1995 for complaints of back, hip, and leg pain. Dr. Snyder testified that the plaintiff underwent a lumbar laminectomy for disc herniation. Dr. Snyder saw the plaintiff during his recovery period and stated that he reached maximum medical improvement on September 18, 1995. Dr. Snyder encouraged the plaintiff to continue back exercises and avoid

repetitive bending, twisting, and lifting, but Dr. Snyder said that he never told the plaintiff that he could not return to work in the grocery store business. Dr. Snyder opined that the plaintiff sustained an anatomical impairment of ten percent to the body as a whole according to the *AMA Guides*.

ANALYSIS

In this case, as in all workers' compensation cases, the claimant's own assessment of his physical condition and resulting disabilities is competent testimony and cannot be disregarded. *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972). The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990).

The defendants say the plaintiff should be limited to 2.5 times the medical impairment rating, as established by Tenn. Code Ann. § 50-6-241(a)(1), because there is no showing that the plaintiff could not have returned to work at the grocery store.

The evidence in this case does not preponderate in favor of such a finding. We find the evidence supports the judgment of the trial court and we affirm the judgment.

The costs of this appeal are taxed to the defendants.

John K. Byers, Senior Judge

CONCUR:

Janice Holder, Justice

William H. Inman, Senior Judge

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AT JACKSON

JOHN W. GRAY, III,)	SHELBY CHANCERY
)	NO. 107278-1 R.D.
Plaintiff/Appellee,)	
)	Hon. Neal Small,
vs.)	Chancellor
)	
GRAY AND WILLIAMS, INC. and)	NO. 02S01-9706-CH-00054
THE ST. PAUL,)	
)	
Defendants/Appellants.)	AFFIRMED.

<p>FILED</p> <p>March 3, 1998</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>
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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 Appellants, and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 3rd day of March, 1998.

PER CURIAM

(Holder, J., not participating)

