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

FILED

March 25, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

BOBBY RIDDICK,	)	MADISON CIRCUIT
	)	
Plaintiff/Appellee	)	NO. 02S01-9703-CV-00016
	)	
v.	)	HON. FRANKLIN MURCHISON, JUDGE
	)	
JACKSON METAL SERVICES, INC.,	)	
	)	
Defendant/Appellant	)	

For the Appellant:

Glassman, Jeter, Edwards & Wade, P.C.
Carl Wyatt
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For the Appellee:

Lisa June Cox
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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 Janice Holder
Senior Judge John K. Byers
Judge Robert L. Childers

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 trial judge found the plaintiff had suffered a 25 percent permanent partial disability to his left foot. The defendant says the evidence preponderates against a finding the plaintiff had suffered any permanent impairment.

We affirm the judgment of the trial court.

On May 25, 1995, a steel beam fell upon the plaintiff's foot, causing a fracture of the foot.

The medical testimony in this case is not extensive. Dr. Larry David Johnson, an orthopedic surgeon, was the treating physician. Dr. Johnson diagnosed the injury as a non-displaced fracture of the first metatarsal bone of the [left] foot. Dr. Johnson saw the plaintiff on May 23, 1995 for the initial exam and on four occasions after that. He testified the plaintiff recovered from the injury in due course. Dr. Johnson released the plaintiff to work on July 5, 1995 and found he had reached maximum medical recovery at that time. Dr. Johnson examined the plaintiff on August 16, 1995 and found the fracture had healed. Dr. Johnson found the plaintiff suffered no permanent impairment from the injury.

Dr. Robert J. Barnett, an orthopedic surgeon, examined the plaintiff in June 1996. Dr. Barnett found that the plaintiff was continuing to have pain in his foot, that he has to walk on the outside of his foot, and that he had some swelling in his left foot. Dr. Barnett's testimony, when read in context of the injury in question, is that the plaintiff sustained a 14 percent permanent partial impairment to his left foot.

The defendant asks that Dr. Barnett's testimony be depreciated because his notes showed the injury occurred May 22, 1994 rather than May 22, 1995. When the defendant asked Dr. Barnett if the injury occurred in 1995 rather than 1994 "then we'd be talking a little different situation, wouldn't we," Dr. Barnett answered "could be." The "could be" was never explored beyond this. Dr. Barnett testified subsequently that the differences in dates would not change any opinion he gave.

The plaintiff, who was 45 years of age at the time of the injury, has a high school diploma and one year or less of college education. His skills are primarily that of a production-type worker. At the time of the trial, the plaintiff was working at Maytag Appliance Company wiring washers.

The plaintiff testified his foot would swell and hurt if he stood all day. He testified because of the pain he had to walk on the side of his foot and this caused his back to hurt. The plaintiff said he was able to work at Maytag because he sat down most of the day.

We review this case *de novo* upon the record with a presumption of the correctness of the trial judge's ruling, Tenn. Code Ann. § 50-6-225(e)(2), and we weigh the evidence in depth to determine where the preponderance of the evidence lies. *Cooper v. Insurance Co. of North America,* 884 S.W.2d 446 (Tenn. 1994).

The only issue in this case is whether the plaintiff is entitled to recover for any permanent impairment.

It seems to us the case of *Thomas v. Aetna Life & Casualty Co. et al,* 812 S.W.2d 278 (Tenn. 1991) resolves the issue in this case. In *Thomas,* the court said: "When faced, as here, with conflicting medical testimony on these issues, 'it is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation.'" *Id.* at 283.

Further, the trial judge may accept the opinion of one or more experts over the other or others when there is a difference in their opinions. *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804 (Tenn. 1990).

The defendant correctly points out that this court may evaluate the credibility of witnesses who testify by deposition as can the trial court. *Henson v. City of Lawrenceburg,* 851 S.W.2d 809 (Tenn. 1993). However, we are of the opinion the exercise of reweighing of evidence should be done with caution, and the credibility of a deponent should not be rejected unless there is some clear showing the testimony is not based upon existing facts in the record or where the testimony is patently not believable.

Further, the defendant says the Supreme Court has held that in certain circumstances the testimony of the treating physician should be given more weight

than the testimony of an examining physician. We do not regard that view to compel the trial court to give that degree of weight in all cases but that it merely says the trial judge may do so.

The trial judge saw and heard the plaintiff testify, he weighed his credibility and that of the medical evidence. We cannot say the evidence preponderates against the judgment in this case.

The judgment of the trial court is affirmed and the cost of this appeal is taxed to the defendant.

_____
John K. Byers, Senior Judge

CONCUR:

_____
Janice Holder, Justice

_____
Robert L. Childers, Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

BOBBY RIDDICK,	)	MADISON CIRCUIT
	)	NO. C-95-285
Plaintiff/Appellee,	)	
	)	Hon. Franklin Murchison,
vs.	)	Judge
	)	
JACKSON METAL SERVICES, INC.,	)	NO. 02S01-9703-CV-00016
	)	
Defendant/Appellant.	)	AFFIRMED.

FILED

March 25, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

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 25th day of March, 1998.

PER CURIAM

(Holder, J., not participating)