

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 filed this lawsuit alleging that he has suffered permanent partial disability as a result of an accident in the course and scope of his employment with the Defendant. The matter was heard by the trial court on May 10, 1993. The court awarded plaintiff 25% permanent partial impairment to the body as a whole. The trial court also awarded benefits paid in a lump sum.

Within 30 days from the judgment of the trial court the plaintiff filed a motion to alter or amend the judgment; the substance of plaintiff's motion to alter and amend was that the court should have awarded a greater percentage of permanent partial impairment based on the proof. Later, in 1995 the motion to amend and alter the judgment was amended to contain allegations of newly discovered evidence; this new allegation was based on alleged new discovery of a cervical problem, a slipped disc; plaintiff alleged that this new injury related back to the original lumbar back injury. The trial Judge heard the motion to amend and the later filed amended motion alleging newly discovered evidence. The motion was denied in October, 1996. The court ruled that T.C.A. § 50-6-231 provides that lump sum payments are final and dismissed plaintiff's motion.

This appeal presents two issues: (1) Whether the court erred in awarding 25% permanent partial disability, and (2) Whether the court erred in not granting plaintiff's motion for a hearing based upon newly discovered evidence.

The panel affirms the trial court on both issues. However, the Panel remands the question of whether the newly discovered cervical disc problem, that led to a subsequent cervical surgery which is the focal point of the motion to alter and to amend, relates back to the original lumbar back injury which, in turn, would render the defendant liable for medical expenses.

The proof discloses that Mr. Smith, the plaintiff, at the time of the trial was 51 years old, and possessed a high school education. He has a variety of job skills including previous employment as a carpenter, employment with a termite company, electrical and other diverse jobs. At the

time of the injury involved in this lawsuit he was employed with Maremont having worked there from June, 1967 to October, 1988. The plaintiff has been unemployed since 1988.

In December 1987, the plaintiff injured his back while lifting a basket of tubes. Plaintiff continued to work at Maremont but ultimately had to quit because he could no longer do his job.

The record establishes that the plaintiff has undergone multiple surgeries. The first surgery was in October 1988; this back surgery involved the L-5. After this surgery plaintiff attempted to return to work on two different occasions but was refused by the employer, Maremont due to continuing problems with his back. Plaintiff subsequently underwent a second operation in August 1990, a fusion of the L.-5, L5-S1 vertebrae. Screws used to fuse the vertebrae were rejected by the plaintiff's body and a third operation was performed to remove the screws. At this point, showing no improvement, plaintiff was referred to Dr. David McCord.

Dr. McCord performed another surgery, the fourth, involving a fusion of L.-S1. Dr. McCord gave two depositions in this case, one deposition was given for the original hearing in 1993 and a second relevant to the motion to alter and amend, based on the allegation of newly discovered evidence heard in 1996.

In the first deposition, Dr. McCord opined the fourth surgery was successful. Plaintiff, however, was not released to return to work until Dr. McCord received a final assessment and evaluation from Theracare Rehab Center.

In turn, experts at Theracare Rehab opined the plaintiff was not giving his maximum effort due to symptom magnification.

Based on the report of the Rehab center and his own evaluation of the case, Dr. McCord released the plaintiff with a 30 lb. weight lifting limitation and gave him an 11% impairment to the body as a whole.

The court awarded 25% permanent partial disability after the May 1993 trial.

The plaintiff contends the proof did not justify the low award of 25% and that it should have

been much higher.

The panel addresses the first issue of whether the court erred in awarding 25% permanent

partial impairment.

Defendant contends the record is replete with contradictions relating to plaintiff's credibility in general. As an example, the plaintiff testified that the professionals at the Therecare Rehab Clinic simply lied about the findings he was magnifying his symptoms, was not making his best effort, evidenced pathological irrelevance and other contra findings.

At one point during the trial the plaintiff having testified that he could no longer do many of the things he did before, such as coaching athletic teams; the plaintiff was confronted with a local newspaper photo depicting plaintiff as a coach of an adult league softball team-plaintiff and he, the plaintiff, then maintained it was the only time he did this activity after the injury. There are several other examples of questionable testimony, exaggeration, hyperbole, and contradictions by the plaintiff.

“Findings of a Trial Court based upon determination of credibility are entitled to great weight, and a judgment based upon such findings will not be reversed unless the record contains clear, concrete, and convincing evidence...” Galbreath v. Harris, 811 SW2nd 88 (Tenn. App. 1990). Based on the entire record the panel is of the opinion the trial judge did not commit error in awarding 25% permanent partial impairment.

Turning to the second issue: Whether the trial court erred in not granting a hearing for newly discovered evidence. The trial court denied plaintiff's motion for the newly discovered evidence based on T.C.A. § 50-6-231 which reads in part: “All amounts paid by employer and received by the employee or the employee's dependents, by lump sum payments, shall be final....” Plaintiff maintains that the amended motion to alter and amend, alleging newly discovered evidence, was timely filed as the previously filed motion to alter or amend was timely filed within 30 days from the original judgment.

The panel does not address this issue as it affirms the trial judge on another ground: The

evidence of the subsequent cervical problem was reasonably available prior to the original hearing.

The motion to alter and to amend, and the amendment to it, languished in the trial court for an

inordinate period of time. Meanwhile, Dr. McCord's second deposition was taken in July, 1996. In that deposition Dr. McCord testified that he first opined that the problems with plaintiff's neck was degenerative in nature; however, a later consultation with a neurologist, Dr. John Camp, and an additional review of diagnostic studies indicated that plaintiff had a ruptured disc at C5-6.

Dr. McCord also testified in his deposition that the neck (cervical) problem was present in 1989, referring to another physician's record, a Dr. Wilborn, which documented a small disc protrusion at C.-6.

After the original 1993 hearing, another surgery was performed to remove the cervical disc and fuse the spine. This latter operation was successful.

After the cervical surgery, Dr. McCord assessed an additional 9% impairment to the body as a whole, in addition to the previously assessed 11% for the back impairment. Dr. McCord testified that the cervical neck injury possibly related back to the original lumbar injury.

Defendant argues that the neck problem, even if connected to the original injury, was not newly discovered evidence. The panel agrees with the defendant on this issue.

If a party omits to prove evidence with ordinary diligence in the first trial, a motion for a new trial for the purpose of introducing such testimony shall be denied Seay v. City of Knoxville, 654 SW2nd 397 (Ct.App. 1983).

The other side of this argument, however, is highlighted by the defendant's contention that he cervical injury was known before the May 1993 trial. The question of whether the slipped disc from the cervical injury was related to the original lumbar injury was not answered by the court below. Thus, the panel remands the question of continuing medical coverage of the cervical injury and the included issue of causation to the trial court for further determination on the

5
merits. However, the original adjudication of 25% permanent partial disability is affirmed, distinguished from continuing medical expenses if proved to be casually related.

CONCUR:

Adolpho A. Birch, Justice

John Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED

January 30, 1998

Cecil W. Crowson
Appellate Court Clerk

NATHAN WAYNE SMITH,

Plaintiff/Appellant

} GILES CIRCUIT
}
} No. 3082 Below

vs.

} Hon. Jim Hamilton,
} Judge

MAREMONT CORPORATION,

Defendant/Appellee

} No. 01S01-9703-CV-00077
}
} AFFIRMED IN PART, REMANDED
} IN PART.

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 Plaintiff/Appellant, Nathan Wayne Smith, and Surety, for which execution may issue if necessary.

IT IS SO ORDERED on January 30, 1998.

PER CURIAM