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

FILED

March 3, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

BRUCE O. TIBBS, JR.,	)	
	)	
Plaintiff/Appellee	)	GIBSON CHANCERY
	)	
v.	)	NO. 02S01-9706-CH-00057
	)	
CITY OF HUMBOLDT, TENNESSEE,	)	HON. GEORGE R. ELLIS,
	)	CHANCELLOR
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 ON

Members of Panel:

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

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.

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 findings, 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 application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial court in a workers' compensation case. *See Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452, 456 (Tenn. 1988).

The trial judge awarded the plaintiff 33 percent vocational impairment for injuries occurring on October 27, 1995.

We affirm the judgment.

The plaintiff was employed as an officer with the defendant. The plaintiff finished nine years of formal education and subsequently obtained a G.E.D. He was trained and worked as a machine mechanic prior to becoming employed as an officer with the defendant. At the time of trial, the plaintiff was 33 years of age.

Prior Injury

On October 9, 1994, the plaintiff injured his back in the course of his employment with the defendant. In February 1995, a lumbar laminectomy at L5-S1 was performed. The treating physician, Dr. John W. Neblett, concluded the plaintiff had reached maximum medical improvement from this injury on June 14, 1995 and found the plaintiff suffered a ten percent permanent medical impairment to the body as a whole. The plaintiff was released with restrictions of not repeatedly lifting more than 20 pounds at a time nor ever lifting as much as 40 pounds at a time and that he should not sit more than one hour at a time whether standing or walking.

On July 18, 1995, the plaintiff returned to Dr. Neblett and reported he had significantly improved. Dr. Neblett, upon the request of the plaintiff and upon the

plaintiff's subjective ability to work without restrictions, removed the restrictions even though there was no anatomical change in the plaintiff's condition.

The plaintiff and defendant settled all compensation claims concerning this injury.

Current Injury

On October 27, 1995 the defendant was injured in the course of taking a man into custody. The injury was to his right knee and again to his back at the L5-S1 level.

The plaintiff was treated by Dr. Neblett again for the back injury. After testing, Dr. Neblett found the plaintiff had suffered a recurrent disc herniation at the L5-S1 level of his back. After some time, the plaintiff and Dr. Neblett decided to do surgery again; this was done on February 5, 1996 and involved further removal of the disc and other tissue as required at the L5-S1 level.

On April 3, 1996, Dr. Neblett fitted the plaintiff for a TENS unit. On May 6, 1996, Dr. Neblett released the plaintiff to return to work but recommended that he not be returned to the duties of a patrolman.

Dr. Neblett was of the opinion the plaintiff was 12 percent permanently, partially impaired at the time of his release. This was divided as ten percent as a result of the previous injury and two percent as a result of the second injury. Dr. Neblett based his impairment rating upon the *AMA Guides.* Dr. Neblett agreed that according to the *Orthopedic Guidelines* for evaluating injury the plaintiff had a 20 percent impairment, ten percent for the first injury and ten percent for the second injury. Dr. Neblett does not use the *Orthopedic Guidelines* and was not favorable of them.

Dr. James T. Craig, orthopedic surgeon, treated the plaintiff's knee injury and found he had suffered a torn cartilage in his knee. Dr. Craig removed the torn cartilage on December 26, 1995. On February 28, 1996, Dr. Craig released the plaintiff and found he had a two percent permanent medical impairment to the right leg. Dr. Craig testified there was some residual crepitation (popping reverse) on movement in the knee but that this would clear in time.

On November 26, 1996, Dr. Robert J. Barnett, an orthopedic surgeon, examined the plaintiff for the purpose of evaluation. Dr. Barnett used the Orthopedic Evaluation Charts and found the plaintifff had a 20 percent permanent medical impairment to his back as a result of the injuries. He apportioned eight percent to the first injury and 12 percent to the second injury -- this is consistent with Dr. Neblett's reading of the *Orthopedic Guidelines.*

Dr. Barnett found the plaintiff had sustained a seven percent permanent impairment to the right knee as a result of the injury. This was based upon the residual crepitation being present when he examined the plaintiff.

Plaintiff's Testimony

The plaintiff testified that he was able to return to his normal duties after the first injury. He testified he was assigned to work as a dispatcher after the second injury but was unable to do the work because it required long periods of sitting. The plaintiff was assigned to walking patrol duties but was unable to do the work because of the walking. The plaintiff was finally assigned to work in the K-9 section handling a dog. He testified he was able to perform this work. The plaintiff was doing this work at the time of trial.

Conclusions of Law

The trial judge had the testimony of three physicians and the testimony of the plaintiff upon which to base a decision. 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). 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 trial court has the discretion to accept the opinion of one medical expert over another medical expert. *Johnson v. Midwesco, Inc.,* 801 S.W.2d 804, 806 (Tenn. 1990).

The amount of the award in this case is limited, as the parties agree, to 2.5 times the medical impairment rating as set out in Tenn. Code Ann. § 50-6-241.

Clearly, the trial judge accepted the testimony of Dr. Barnett on the extent of the injury. Otherwise, the recovery would be limited to 7.5 percent to the body as a whole based upon Dr. Neblett's finding the plaintiff retained a two percent permanent medical impairment to the body as a whole and the finding of Dr. Craig that the plaintiff retained a two percent permanent medical impairment to the right leg. The 7.5 percent is secured by the doctor's calculation by relating the two percent impairment to the right leg to a whole body impairment of one percent and then multiplying the total impairment found by Dr. Neblett and Dr. Craig's three percent.

Dr. Barnett found the plaintiff had suffered a 12 percent permanent whole body disabilty to his back and a seven percent permanent medical impairment to his right leg. When the seven percent impairment to the leg is rated as a 3 ½ percent whole body impairment, the finding by Dr. Barnett amounts to a 15 ½ percent whole body impairment.

The finding of the trial judge is within 2.5 times the medical impairment rating found by Dr. Barnett. Upon the record, we are unable to say the evidence preponderates against the finding of the trial judge and we affirm the judgment.

_____
John K. Byers, Senior Judge

CONCUR:

_____
Janice Holder, Justice

_____
William H. Inman, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

BRUCE O. TIBBS, JR.,	)	GIBSON CHANCERY
	)	NO. H-3673
Plaintiff/Appellee,	)	
	)	Hon. George R. Ellis,
vs.	)	Chancellor
	)	
CITY OF HUMBOLDT, TENNESSEE,	)	NO. 02S01-9706-CH-00057
	)	
Defendant/Appellant.	)	AFFIRMED.

FILED

March 3, 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 3rd day of March, 1998.

PER CURIAM

(Holder, J., not participating)