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

FILED

May 8, 1998

Cecil W. Crowson
Appellate Court Clerk

JAMES ERNEST BIGGS,	)	DAVIDSON CHANCERY
	)	
Plaintiff/Appellant	)	NO. 01S01-9711-CH-00239
	)	
	)	HON. IRVIN H. KILCREASE,
JONES STONE COMPANY, INC.,	)	CHANCELLOR
	)	
Defendant/Appellee	)	

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 Janice M. Holder
Senior Judge William H. Inman
Special Judge William S. Russell

AFFIRMED INMAN, 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 employee was awarded benefits for a 30 percent permanent partial disability to his whole body. He appeals, claiming that his anatomical impairment is ten percent, which should be extrapolated to total and permanent disability. The thrust of his argument is directed to the weight to be given to the expert testimony.

The employer admitted that the employee suffered a compensable back injury on September 8, 1995. The issues at trial were limited to the extent of physical impairment and residual vocational disability. The Chancellor found the plaintiff had a five percent impairment. He applied a multiplier of six, T.C.A. § 50-6-241, resulting in a finding of 30 percent permanent partial disability to his whole body.

The treating physician was Dr. Stanley G. Hopp, an orthopedic specialist, who testified that the plaintiff's radicular pain was emanating from the right L-5 nerve root. He performed surgery on February 23, 1996 and removed the offending spurs. Recovery was hampered because of diabetes, but with the passage of time the plaintiff was able to work, with lifting restrictions.

Dr. David Gaw, orthopedic specialist, examined the plaintiff for purposes of evaluation. He testified that in his view the plaintiff had a ten percent impairment based on DRE Category III of the *Guidelines,* which he interpreted as requiring this rating because "anybody that has a radiculopathy that's proven by tests and has surgery, that throws them into Category III." He conceded that he found no symptoms of nerve damage, that the plaintiff was in no distress or pain, that he was taking no medications, had no back spasm, no atrophy or weakness in his legs and had good movement.

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 plaintiff argues that the testimony of Dr. Gaw is superior to that of Dr. Hopp because the latter testified he found no objective indications of radiculopathy although his office notes were to the contrary. The record reveals that one pre-surgery note indicates L-5 radiculopathy, but Dr. Hopp then performed surgery and saw the plaintiff five more times with no verifiable indications of radiculopathy. Each physician's testimony is clear, concise, and straightforward, and we are not persuaded that the testimony of an evaluating physician should be accorded greater weight than that of the treating physician. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 627 (Tenn. 1991) is instructive.

The plaintiff correctly argues that an assessment of vocational disability is based on the employee's ability to compete for jobs in an open market in a disabled condition by taking all relevant factor into account. *See, Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452 (Tenn. 1988).

If the maximum disability award prescribed by T.C.A. § 50-6-241(b), with the multipliers, is to be exceeded, the plaintiff must prove by clear and convincing evidence at least three of the following four criteria:

> (1) He lacks a high school diploma or GED or cannot read or write on a grade eight level;
>
> (2) He is age 55 or older;
>
> (3) He has no reasonably transferable job skills from prior vocational background and training, and

(4) He has no reasonable employment opportunities available locally considering his present medical condition.

The Chancellor found that the plaintiff proved only that he was unable to read, and that the testimony of Ms. Barbara Stout, a Vocational Rehabilitation Specialist with Goodwill Industries, was more credible than the testimony of Dr. Julian Naldosky, also a specialist in the field of rehabilitation, because he testified that the plaintiff was either 63 percent, 90 percent or 100 percent disabled, as he interpreted the testimony of Dr. Hopp. Ms. Stout testified that the plaintiff had transferable job skills, with ample job opportunities in the Nashville market.

The evidence does not preponderate against the findings of the Chancellor and the judgment is affirmed at the costs of the appellant.

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William H. Inman, Senior Judge

CONCUR:

_____

Janice M. Holder, Justice

_____

William S. Russell, Special Judge

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JAMES ERNEST BIGGS,	}	*DAVIDSON CHANCERY*
	}	*No. 96-849-I Below*
Plaintiff/Appellant	}	
	}	*Hon. Irvin Kilcrease, Jr.,*
vs.	}	*Chancellor*
	}	
JONES STONE COMPANY, INC.,	}	*No. 01S01-9711-CH-00239*
	}	
Defendant/Appellee	}	*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 Plaintiff/Appellant and Surety, for which execution may issue if necessary.

IT IS SO ORDERED on May 8, 1998.

PER CURIAM