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

FILED

July 6, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

CECIL L. HANNER, SR.,	)	
	)	
Plaintiff/Appellee	)	HAMILTON CHANCERY
	)	
v.	)	NO. 03S01-9709-CH-00118
	)	
RUAN TRANSPORTATION CORPORATION,	)	HON. HOWELL N. PEOPLES, CHANCELLOR
	)	
Defendant/Appellant	)	

For the Appellant:

Wesley R. Kliner, Jr.
Jeffrey P. Boyd
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P.O. Box 23583
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For the Appellee:

Pamela R. O'Dwyer
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19 Patten Parkway
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M E M O R A N D U M O P I N I O N

Members of Panel:

Special Judge Charles D. Susano, Jr.
Senior Judge John K. Byers
Special Judge Joe C. Loser, Jr.

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 found the plaintiff was 100 percent disabled and awarded judgment for 400 weeks at $355.97 per week. The trial judge fixed the time for temporary disability from November 1, 1994 through March 2, 1995, plus he awarded an additional eight weeks of temporary total disability beyond this period.

The defendant says the trial court erred in awarding 100 percent temporary total disability and in fixing the time of temporary disability.

The plaintiff is 47 years old with a high school education. His employment history includes working for McDonald's as a night manager after high school and working part-time for his brother as a carpenter. The plaintiff has worked most of his adult life as a truck driver.

On August 22, 1993, the plaintiff was involved in a single vehicle tractor trailer truck accident in which his truck fell 230 feet down the side of Monteagle Mountain and burned. He escaped and climbed back up to the road, where he was found unconscious. The emergency room examination showed a shoulder injury, possible closed head injury, and a headache. The plaintiff was hospitalized.

The plaintiff testified he had seizures at home after the accident. A co-worker, Walter H. Zorn, testified he visited the plaintiff at home and saw him have a seizure. Another co-worker, Elroy Bailey, testified he saw a marked change in the plaintiff after the injury, such as headaches, no energy, and a "spirit broken."

The defendant can no longer hire the plaintiff because he is restricted against driving. The plaintiff attempted to work by contracting to remodel two homes, but the jobs were never completed. The plaintiff and his brother, who owns a construction company, testified he cannot do the work.

_____Dr. Bruce Kaplan, a neurologist and the treating physician, saw the plaintiff 17 times. Dr. Kaplan's initial impression was concussive vascular headaches. In order to rule out seizure disorder, CAT scans were done on August 22 and 30, 1993. The results from these CAT scans were normal. The plaintiff reported loss of consciousness on December 14, 1993. Dr. Kaplan prescribed Dilantin to control seizure activity. On October 12, 1994, Dr. Kaplan assessed a zero percent permanent partial disability for brain injury.

The plaintiff reported another seizure in November 1994. On February 17, 1995, another EEG showed abnormal bifrontal spikes. Current medications used by the plaintiff are Dilantin, Prozac, Ambien, Midrin, Imitrex, and Naproxen. On March 2, 1995, Dr. Kaplan reset the amount of permanent partial disability at 29 percent to the body as a whole based upon the abnormal EEG. Dr. Kaplan opined the plaintiff could not continue to drive trucks nor do some construction work, such as working on roofs.

_____Dr. Robert J. Barth is a neuropsychologist who administered at least 14 tests to the plaintiff at Dr. Kaplan's request. Dr. Barth found some signs of exaggeration of symptoms or malingering (later, this opinion was changed to "merely placing too much emphasis on his difficulties"). There were no demonstrated judgment difficulties; there was no decline in grooming, which would be expected with a neurological injury; and there was no significant neurological deterioration. The plaintiff showed intellectual potential of low average to average, which is probably the same as prior to the accident since the plaintiff took special education classes in school. Dr. Barth opined the plaintiff had no significant disability from potential brain injury.

_____Dr. Charles P. Hughes, the defendant's independent medical examiner, diagnosed the plaintiff with mild post-concussive headaches, which were essentially resolved, with possible seizures. Dr. Hughes assessed a nine percent permanent partial disability for headaches and a zero percent permanent partial disability for

possible seizures. Dr. Hughes placed no physical limitations on the plaintiff's activities, but he deferred to Dr. Kaplan on the issue of whether the plaintiff should drive a truck.

On the issue of whether the evidence supports the judgment of the trial court, the answer lies within the testimony of Dr. Kaplan, who fixed the plaintiff's medical impairment at 29 percent, and the testimony of Dr. Hughes, who fixed the plaintiff's medical impairment at nine percent.

The trial judge may accept the medical opinions of one expert witness over others who testify in a case. *Kellerman v. Food Lion, Inc.,* 929 S.W.2d 333, 335 (Tenn. 1996). The trial judge accepted the testimony of Dr. Kaplan, the treating physician, over the testimony of Dr. Hughes, the defendant's evaluating physician.

The record shows, and the trial judge found, that Dr. Hughes was mistaken as to the facts of the accident and the symptoms exhibited by the plaintiff. Based upon this, the trial judge found the testimony of Dr. Hughes was not entitled to great weight.

The dispute over the time when the plaintiff reached maximum medical recovery arises out of a letter from Dr. Kaplan which had fixed the date at November 18, 1994. Dr. Kaplan testified subsequently that the November date was in error and that the plaintiff reached maximum medical improvement on March 2, 1995.

We find the evidence does not preponderate against the findings of the trial judge and we affirm the judgment of the trial court.

We tax the cost of this appeal to the defendant.

_____
John K. Byers, Senior Judge

CONCUR:

_____
Charles D. Susano, Jr., Special Judge

_____
Joe C. Loser, Jr., Special Judge

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CECIL L. HANNER, SR.	)	HAMILTON CHANCERY
	)	No. 95-411
Plaintiff-Appellee,	)	
	)	
	)	No. 03S01-9709-CH-00118
v.	)	
	)	
	)	
	)	Hon. Howell N. Peoples
RUAN TRANSPORTATION . CORPORATION.	)	Chancellor
	)	
	)	
Defendant-Appellant.	)	

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 facts and conclusions of law are adopted and affirmed, and the decision of the Panel is made the Judgment of the Court.

Costs on appeal are taxed to the defendant-appellant, Ruan Transportation Corporation and sureties, Strang, Fletcher, Carriger, Walker, Hodge & Smith for which execution may issue if necessary.

07/06/98

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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 act and conclusions of law are adopted and affirmed, and the decision of the Panel is made the Judgment of the Court.

Costs on appeal are taxed to the plaintiff-appellant, Vernon Harris and Gilbert and Faulkner. surety, for which execution may issue if necessary.

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