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

FILED

October 6, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

GLENN M. BERGER,	)	
	)	
Plaintiff/Appellee	)	HAMBLEN CIRCUIT
	)	
v.	)	NO. 03S01-9708-CV-00102
	)	
LEAR SEATING CORPORATION,	)	HON. KINDALL LAWSON,
	)	JUDGE
Defendant/Appellant	)	

For the Appellant:

Jeffrey C. Taylor
Wimberly, Lawson & Seale, PLLC
Liberty Center
929 West First North Street
P.O. Box 1066
Morristown, TN 37816-1066

For the Appellee:

Douglas R. Beier
Evans & Beier, LLP
P.O. Box 1754
Morristown, TN 37816-1754

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).

In this case, the plaintiff brought suit against the defendant, alleging that he was entitled to workers' compensation benefits as a result of back injuries which he suffered during his employment in August 1994 and May 1996. The trial court found that the plaintiff timely notified the defendant of these injuries and determined that these injuries arose out of and in the course and scope of his employment with the defendant. The trial court awarded the plaintiff 100 percent permanent total disability but did not award him certain discretionary costs. The trial court denied the defendant's motion to reduce the judgment by the amount of social security benefits attributable to employer contributions under Tenn. Code Ann. § 50-6-207(4)(A).

The defendant appeals and raises the following issues:

"1. Whether the trial court erred in determining that the plaintiff provided adequate notice of an injury as defined by Tenn. Code Ann. § 50-6-201, 50-6-202?

2. Whether the plaintiff's claim for benefits is barred by the one-year statute of limitations as set forth in Tenn. Code Ann. § 50-6-203?

3. Whether the court erred in its award and assessment of benefits in light of the medical and lay testimony at trial?

4. Whether the trial court erred in awarding permanent total disability?

5. Whether the trial court erred in denying defendant's Motion to Reduce the Judgement [sic] by the amount of social security benefits attributable to employer pursuant to Tenn. Code Ann. § 50-6-207 (4)(A)?"

The plaintiff raises this single issue on appeal:

"1. The trial court erred in failing to award discretionary costs."

We affirm the judgment of the trial court.

FACTS

The plaintiff, age 53 at the time of trial, has a high school education and no additional formal education. In the 1960s, he attended short term courses and obtained certificates in welding, automatic transmission repair, starter and generator repair, and automotive machine shop operation. His employment history includes working as an automobile engine mechanic, as a riveting machine operator, as a centerless grind operator, as a maintenance repairer, and as an automobile parts counter sales person. In 1977, the plaintiff began work for the defendant as a maintenance repairer of production equipment and machinery. In this capacity, he was required to lift 100 pounds or more; frequently bend, crouch, kneel, and climb; and occasionally crawl.

The plaintiff testified that, while working for the defendant in August 1994, he fell three times during the course of one week. On August 2, 1994, he fell back when he slipped off of a ladder and bent his back, but his partner, Mac Foulks, caught him before he hit the floor. On August 4, 1994, his right leg gave out as he stepped from a stool and fell onto a table, hitting his chest and causing him to bleed. The plaintiff testified that these falls caused him some pain in his back but that he felt like he could continue working as long as he did not overdo himself. He did not report either of these falls to the defendant.

Then, on August 5, 1994, the plaintiff was drilling a pipe when the drill caught and jerked him off of a ladder and threw him onto a desk. He said he fell three to four feet and landed on his back. Mr. Foulks was not present when he fell, but the plaintiff testified that he told him about the fall later that day. Mr. Foulks testified that he remembered the three specific incidents in which the plaintiff fell but that he could not say whether they all occurred in the same week. The plaintiff testified that he tried to inform the defendant about the third fall because his back pain was becoming worse. He said that he went to the nurse's station and the personnel department but that nobody was there to tell. Mr. Foulks testified that he saw the plaintiff leave to go report this fall. Deciding to report this fall on Monday when he returned to work, the plaintiff said he left work without informing the defendant about this fall.

The plaintiff testified that when he got home on the evening of August 5, 1994 he developed more pain, experienced numbness in his leg, and had trouble sleeping. The plaintiff's wife testified that her husband told her about the fall when he got home. On Saturday August 6, 1994, the plaintiff went to his family doctor, Dr. Cooze, for low back pain and received a shot for the pain. On Sunday August 7, 1994, he was taken to the emergency room by the rescue squad after he coughed hard and his leg gave out and he fell to the floor. The plaintiff testified that he was in too much pain to get up or walk at that time and that he was hospitalized in Morristown. Dr. Cooze saw him again the next day and referred him to Dr. Sanders in Knoxville. Dr. Ragland, an associate of Dr. Sanders, also saw the plaintiff and shortly thereafter performed two back surgeries on him. The first surgery was performed on August 13, 1994 and the second surgery was performed on August 30, 1994.

In order to be excused from work on August 8, 1994, the plaintiff's wife telephoned the guard at the defendant's plant and told him that her husband fell at work and injured his back and that he was currently in the hospital. She also testified that she obtained a doctor's excuse from Dr. Cooze and that she delivered it to the defendant on August 8, 1994. At that time, the plaintiff's wife obtained some forms in order to make a claim for disability insurance benefits. The plaintiff testified that his wife filled out the claim forms but that he signed them.

The description of the accident on the first claim form read: "Hurt back at work when fell off ladder, but didn't cause much pain until started coughing on 8-7-94. This pain put me on floor and I had to be removed by ambulance to hospital." The first claim form was checked "no" to the question of whether the claim was related to employment with a question mark beside it. The plaintiff's wife said she delivered this claim form, which had been completed by Dr. Cooze, to the defendant around August 22, 1994. She testified that she checked "no" at the direction Jewel Hudgens, who worked in personnel at the defendant's plant and told her over the telephone to check that the accident was not work related until it could be determined otherwise. The plaintiff's wife explained that she added the question mark because she knew that her husband was injured at work. On the other hand, Ms. Hudgens testified from her notes of the telephone conversation that the plaintiff

injured his back at home and that she did not discuss the forms with the plaintiff's wife.

The description of the accident on the second claim form read: "Hurt my back when I fell off ladder, but didn't cause much pain until I started coughing on 8-7-94. This pain put me on the floor and I had to be removed by ambulance to hospital." The second form was checked "yes" to the question of whether the claim was related to employment and was delivered to the defendant by the plaintiff's wife around September 9, 1994 after being completed by Dr. Ragland. She explained that she checked "yes" on this form because she had learned from Dr. Ragland that coughing could not have caused her husband's condition.

The company nurse, Janet Elkins LaFerney, testified for the defendant. After briefly looking at these claim forms, Ms. LaFerney sent them to Aetna Insurance Company, the disability insurer, for payment. However, she stated that the plaintiff did not follow the proper procedure in claiming that his injury was related to work. She explained that even though the claim form stated "hurt back at work" it did not qualify as a work related injury because the plaintiff used a claim form for disability insurance benefits instead of following the procedure for reporting work related injuries.

On October 3, 1994, Aetna sent the plaintiff a letter wherein it refused payment of his claims because they appeared to be work related and recommended that he submit a claim for workers' compensation (the defendant is self-insured for workers' compensation). Later, Aetna issued checks to the plaintiff, but he testified that he never cashed these checks at the advice of his attorney. The plaintiff has not received any workers' compensation benefits from the defendant as a result of these injuries.

The plaintiff returned to work on January 12, 1995 with restrictions from Dr. Ragland that he not lift more than 30 pounds, climb ladders, or crawl. However, the plaintiff testified that he went back to performing his normal work duties within a short time. He testified that he reinjured his back at work on May 8, 1996 while carrying paint cans on a mezzanine. He also testified that he felt something pop in his back on May 20, 1996 while climbing inside a welder at work. He said he immediately informed his supervisor after both of these incidents. Further, the plaintiff testified

that his supervisor told him that he filed these claims with the defendant on the plaintiff's behalf. After the last incident, Dr. Ragland performed a third back surgery on the plaintiff on June 13, 1996. He has not returned to work since May 20, 1996 and has not applied for work anywhere else.

The plaintiff testified that he has a lot of lower back pain and right leg numbness as a result of these injuries and surgeries. He said he always walks with a cane now because his leg gives out. He stated that he cannot sit or stand for long periods and that he lies down a lot. Further, the plaintiff testified that he goes to a health club where he works his biceps, triceps, and his chest and sits in the sauna. He explained that he did these exercises in his therapy and that he uses his arms a lot to get up and down.

In 1992, the plaintiff sustained a work related injury to his back. He did not undergo surgery and he returned to work without restrictions. He testified that he was able to perform his normal work duties until August 1994. He stated that he received workers' compensation benefits for this prior injury and that he was familiar with the policies which must be followed for reporting injuries and receiving workers' compensation benefits.

MEDICAL EVIDENCE

Dr. Derek A. Cooze, the plaintiff's family doctor, testified by deposition. On August 6, 1994, he saw the plaintiff for complaints of cold symptoms and low back pain and stiffness. At that time, the plaintiff was given an intramuscular cortisone injection to relieve his back pain. Dr. Cooze saw the plaintiff again in the hospital on August 7 or 8, 1994, stating that he was complaining of severe back pain, right leg pain, and numbness in his lower back. Dr. Cooze explained that x-rays and an MRI scan of the plaintiff revealed that he had herniated discs at L4-L5 and L5-S1, both of which were impinging on a nerve. He diagnosed the plaintiff with herniated nucleus pulposus and opined that, within a reasonable degree of medical certainty, a coughing episode could not cause this condition. Dr. Cooze further opined that injuries or degenerative changes were more likely than not the cause of the plaintiff's condition. On cross-examination, Dr. Cooze stated that he could not say, within a reasonable degree of medical certainty, the plaintiff's disc injuries were related to a specific incident at work. Dr. Cooze referred the plaintiff to Dr. Sanders.

Dr. Joel B. Ragland, a neurosurgeon, served as the plaintiff's treating surgeon after his partner, Dr. Sanders, saw him but later became unavailable. Testifying by deposition, Dr. Ragland explained that he first saw the plaintiff on August 12, 1994 and reviewed the MRI scan as well as Dr. Sanders' history that the plaintiff twisted his back when he fell off of a ladder, that he had back pain, that he later coughed which worsened his pain, and that he later experienced pain in his right leg. He diagnosed the plaintiff with a two level herniated lumbar disc with right leg radiculopathy and performed a right L4-L5 discectomy on August 13, 1994 on an emergency basis. Dr. Ragland examined the plaintiff again on August 23 and 29, 1994 and found positive signs of a problem with the L5-S1 disc based upon a new MRI scan. On August 30, 1994, Dr. Ragland performed a L5-S1 discectomy and also removed some additional bone at L4-L5.

Dr. Ragland determined that the plaintiff reached maximum medical improvement on January 12, 1995 and released him to return to work with restrictions that he not lift more than 30 pounds, climb ladders, or crawl. Based upon a reasonable degree of medical certainty, he opined that the plaintiff suffered from a 13 percent impairment to the body as a whole according to the *AMA Guides* and that his work injury was the cause of his medical condition and subsequent surgeries. On cross-examination, he stated that it is possible for a cough to rupture a disc but that he finds that possibility to be unlikely.

In a second deposition, Dr. Ragland stated that the plaintiff continued to return with complaints of back, leg, and hip pain through May 1996. He performed a third back surgery on the plaintiff for a new disc fragment on June 13, 1996. As a result of this surgery, Dr. Ragland opined that the plaintiff had an additional one percent impairment but that he could not say the new disc fragment was caused by his work activity. On the issue of disability, he testified as follows: ". . . [the plaintiff] would definitely be at severe limitation due to his condition and I would be somewhat surprised if there would be a job available that would allow him to work. I commented later on that it would be my guess that he would be able to work at the sedentary level at best and I wasn't even sure how he would tolerate that."

Dr. Gilbert L. Hyde, an orthopedic surgeon, testified by deposition. On November 20, 1995, he examined the plaintiff, reviewed his medical records, and

recorded his history of injury and treatment in order to perform an independent medical evaluation. Dr. Hyde opined that the plaintiff's work injury in August 1994 was the cause of his back condition and subsequent surgeries and that he sustained a 20 percent impairment to the body as a whole according to the *AMA Guides*. He saw the plaintiff again on August 16, 1996 and recorded that he suffered two more back injuries at work on May 8 and 20, 1996 and underwent a third back surgery on June 13, 1996. Dr. Hyde opined that the plaintiff's work injuries in May 1996 were the cause of the third back surgery and calculated his total impairment rating at 28 percent to the body as a whole. Further, he determined that the plaintiff should permanently avoid the following: lifting 20 to 25 pounds maximally and 10 to 15 pounds frequently; repetitive bending, twisting, and stooping; and prolonged riding, driving, and sitting. Finally, Dr. Hyde stated that a cough is an unlikely cause of a herniated disc but that it is possible.

Dr. Julian Naldosky, who has a doctor's degree in counselor education with an emphasis in rehabilitation, testified at trial as an expert vocational witness for the plaintiff. The plaintiff was referred to Dr. Naldosky for physical testing, physical capacity testing, and a vocational assessment. In addition to performing these tests, Dr. Naldosky reviewed the plaintiff's medical records and the medical depositions and took a history of his education, employment, and work injuries. Dr. Naldosky expressed this opinion about the plaintiff's vocational disability:

> My opinion based upon all of the information is that Mr. Berger would be capable, would be physically capable, of performing some unskilled, sedentary occupations, primarily sedentary occupations that include jobs such as a speaker assembler, a gasket inspector, a grinding machine operator, a packager of small parts or small products, a stencil cutter, a lock assembler and a bottling line attendant. I think they're pretty consistent with the results of our testing as well as the limitations noted by Dr. Ragland and Dr. Hyde.
>
> Assuming that he can do these jobs he would be -- Mr. Berger would have a vocational disability of about ninety-five percent. That is he would be unable to perform about ninety-five percent of the jobs in the local labor market that he could have performed before sustaining his initial low back injury, having the surgery, sustaining another injury and so on.
>
> However, Mr. Berger has chronic pain that's severe. He has a history of three low back surgeries. He does not have relevant transferable skills. He's fifty-three years of age. Because of all these factors it's very doubtful that he'll be able to obtain and maintain employment in any occupation. . . . I think realistically he's a hundred percent disabled for work.

ANALYSIS

Notice

The first issue presented by the defendant is whether the trial court erred in determining that the plaintiff provided adequate notice of his injury in August 1994. Tenn. Code Ann. § 50-6-201 requires the employee to notify the employer of a work injury within 30 days of its occurrence unless there is a reasonable excuse.

The plaintiff says he complied with this rule by providing both actual notice and written notice within 30 days of his injury at work. He says actual notice occurred when his wife telephoned the guard at the defendant's plant on August 8, 1994 and informed him that he fell at work and injured his back and that he was currently in the hospital. In addition, he says the defendant received actual notice when his wife telephoned Jewel Hudgens and discussed the fact that her husband fell at work and injured his back but that she was not sure how to fill out the claim forms.

As for written notice, the plaintiff says his wife obtained a doctor's excuse from Dr. Cooze and she delivered it to the defendant on August 8, 1994. Furthermore, she obtained some forms in order to make a claim for disability insurance benefits. On the first form, the plaintiff's wife filled out the description of the accident to read: "Hurt back at work when fell off ladder, but didn't cause much pain until started coughing on 8-7-94. This pain put me on floor and I had to be removed by ambulance to hospital." She testified that she delivered this claim form to the defendant around August 22, 1994. This claim form was checked "no" to the question of whether the claim was related to employment with a question mark beside it. She testified that she checked "no" at the direction Ms. Hudgens, who told her over the telephone to check that the accident was not work related until it could be determined otherwise. The plaintiff's wife explained that she added the question mark because she knew that her husband was injured at work.

In response to the plaintiff's assertion of actual notice, the defendant points out that Ms. Hudgens' notes of her telephone conversation with the plaintiff's wife indicate that he injured his back at home and therefore prove that the defendant did not receive notice of a work related injury. Regarding written notice, the defendant argues that even if the first claim form was returned to the defendant by August 22, 1994, "it is insufficient to provide notice of the time, place, cause of the injury so as to enable the defendant to either (1) make an investigation while the facts are

accessible or (2) to provide timely and proper treatment for the plaintiff." *See Aetna Casualty & Surety Co. v. Long,* 569 S.W.2d 444 (Tenn. 1978). The defendant also adds that the plaintiff did not tell his supervisor or the company nurse about any of his three alleged falls during the first week of August 1994 even though he was familiar with the policies which must be followed for reporting injuries and receiving workers' compensation benefits.

First, we note that where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. *See Humphrey v. David Witherspoon, Inc.,* 734 S.W.2d 315 (Tenn. 1987). After a careful examination of the record, we find that the evidence does not preponderate against the decision of the trial court that the plaintiff gave timely notice of his injury at work in August 1994. It is clear that the plaintiff complied with Tenn. Code Ann. § 50-6-201 through (1) his wife's telephone conversation with Ms. Hudgens during which she said her husband fell at work and injured his back and (2) the first claim form which stated "Hurt back at work when fell off ladder" and was delivered to the defendant around August 22, 1994.

Statute Of Limitations

The second issue presented by the defendant is whether the plaintiff's claim for benefits is barred by the applicable statute of limitations. Tenn. Code Ann. § 50-6-203 requires the employee to file a claim for workers' compensation within one year of a work injury.

The defendant contends that the plaintiff's lay and medical proof failed to establish either a new work related injury to his back or an aggravation of his preexisting back condition from 1992 and that therefore his claim for benefits is barred by the statute of limitations. The plaintiff says he presented overwhelming proof that his injuries and subsequent surgeries resulted from his work related fall on August 5, 1994.

We agree with the plaintiff. After carefully reviewing the record, we find the following with respect to the medical evidence: (1) Dr. Cooze opined that a coughing episode could not cause the plaintiff's condition and that injuries or degenerative changes were more likely than not the cause of his condition; (2) Dr. Ragland opined

that the plaintiff's work injury was the cause of his medical condition and subsequent surgeries, stating that it is possible for a cough to rupture a disc but that he finds that possibility to be unlikely; and (3) Dr. Hyde opined that the plaintiff's work injury in August 1994 was the cause of his back condition and subsequent surgeries. Having filed his complaint on November 29, 1994, we find the plaintiff filed suit within one year of his work injury on August 5, 1994.

Causation

The third issue presented by the defendant is whether the trial court erred in its award and assessment of benefits to the plaintiff in light of the medical and lay testimony at trial. Even if the plaintiff met the burden of proving causation, the defendant says the trial court should have based the determination of his vocational disability on the testimony of the treating physician. We disagree with both of these arguments.

In order to be eligible for workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." Tenn. Code Ann. § 50-6-102(a)(5). The phrase 'arising out of' refers to causation. The causation requirement is satisfied if the injury has a rational, causal connection to the work. *Reeser v. Yellow Freight Sys., Inc.,* 938 S.W.2d 690, 692 (Tenn. 1997) (citations omitted).

Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have thus consistently held that an award may properly be based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when there is also lay testimony from which it may be reasonably inferred that the incident was in fact the cause of the injury. *Id.* 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).

Based upon the lay and expert testimony in this case, we find the evidence does not preponderate against the decision of the trial court that the plaintiff is entitled to workers' compensation benefits for the back injuries he sustained during

his employment with the defendant. The plaintiff testified that he fell three times at work during the first week of August 1994, the last of which caused him enough back pain to report it to the defendant, which he tried to do. All of these accidents were verified by the plaintiff's partner, Mac Foulks, and the last fall was also verified by the plaintiff's wife.

In addition, as set forth in greater detail in the section of this opinion dealing with the issue of statute of limitations, it is evident that all three expert witnesses testified that the plaintiff's back condition and surgeries were mostly likely caused by his work injury on August 5, 1994. Finally, we do not agree with the defendant's contention that the trial court was required to base the determination of the plaintiff's vocational disability on the testimony of the treating physician in accordance with *James H. Davis v. Van Liner Ins. Co.,* No. 02S01-9411-CV-00077, Hardin County (Tenn. June 26, 1995). This case merely holds that the trial judge may give more weight to the treating physician's testimony under certain circumstances.

Permanent Total Disability Award

The fourth issue on appeal is whether the trial court erred in awarding the plaintiff permanent total disability. The defendant says the plaintiff should not receive permanent total disability benefits or at the least should only receive a modified award. We disagree.

In addressing this issue, the defendant points out that the Special Workers' Compensation Appeals Panel held that where the employee has a medical impairment rating of less than 16.7 percent, the employee may not be found to be permanently totally disabled within the ambit of Tenn. Code Ann. § 50-6-207(4)(A), but rather his disability must be determined under Tenn. Code Ann. § 50-6-241. *Seiber v. Greenbrier,* 906 S.W.2d 444, 447 (Tenn. 1995). The defendant argues that Dr. Ragland's impairment rating of 14 percent should be followed instead of Dr. Hyde's impairment rating of 28 percent because Dr. Hyde only saw the plaintiff on two occasions and formed an opinion without all of the pertinent facts and medical records. In addition, the defendant points out that Dr. Naldosky said the plaintiff would be capable of performing sedentary work and that the plaintiff admitted that he goes to the health club to lift weights. Therefore, because Dr. Ragland issued an impairment rating of less than 16.7 percent and because the plaintiff can perform

some work and is not "totally disabled," the defendant says the plaintiff is not entitled to permanent total disability benefits.

The Supreme Court specifically overruled that portion of the *Seiber* decision in the case of *Davis v. Reagan,* 951 S.W.2d 766 (Tenn. 1997). The Court in *Davis* held that "§ 50-6-241 is inapplicable to awards of permanent total disability and does not preclude a trial judge from awarding permanent total disability merely because an anatomical impairment rating is less than 16.7 percent." *Id.* at 769.

In accordance with the holding of *Davis,* we do not look to Tenn. Code Ann. 50-6-241 for determining the plaintiff's disability but instead focus on Tenn. Code Ann. 50-6-207(4)(B), which states: "When an injury not otherwise specifically provided for in this chapter, as amended, totally incapacitates the employee from working at an occupation which brings such employee an income, such employee shall be considered 'totally disabled.'"

The question then becomes whether the evidence preponderates against the trial court's finding that the plaintiff is totally disabled. In making this determination, "the extent of disability is a question of fact for the trial court to determine from all of the evidence, including lay and expert testimony." *Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452, 458 (Tenn. 1988). After a careful review of the lay and expert testimony, we find that the evidence does not preponderate against the award of permanent total disability.

A review of Dr. Ragland's testimony on the subject of disability shows that he stated the following: ". . . [the plaintiff] would definitely be at severe limitation due to his condition and I would be somewhat surprised if there would be a job available that would allow him to work. I commented later on that it would be my guess that he would be able to work at the sedentary level at best and I wasn't even sure how he would tolerate that." In addition, although Dr. Naldosky thought that the plaintiff would be capable of performing some sedentary jobs, he concluded that: ". . . Mr. Berger has chronic pain that's severe. He has a history of three low back surgeries. He does not have relevant transferable skills. He's fifty-three years of age. Because of all these factors it's very doubtful that he'll be able to obtain and maintain employment in any occupation. . . . I think realistically he's a hundred percent disabled for work." Moreover, the lay testimony of the plaintiff and his wife, which

was found credible by the trial judge, supports the award of permanent total disability.

Denial Of Motion To Reduce The Judgment

The last issue raised by the defendant is whether the trial court erred in denying the defendant's motion to reduce the judgment by the amount of social security benefits attributable to employer contributions under Tenn. Code Ann. § 50-6-207 (4)(A). The burden of proof would be on the defendant to prove by a preponderance of the evidence that the amount of contributions it made toward the plaintiff's social security benefits should reduce the plaintiff's benefits in this case. Because there was no proof in the record on this issue, the finding of the trial judge must be approved.

Denial of Discretionary Costs

The single issue raised by the plaintiff is whether the trial court erred in failing to award discretionary costs. We find the trial court did not abuse its discretion in denying certain discretionary costs to the plaintiff.

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:

_____
Charles D. Susano, Jr., Special Judge

_____
Joe C. Loser, Jr., Special Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

GLENN M. BERGER,	)	HAMBLEN CHANCERY
	)	No. 96-CV-457 Below
Appellee,	)	
	)	Hon. Kindall Lawson,
v.	)	Judge.
	)	
	)	No. 03S01-9708-CV-00102
LEAR SEATING CORP.,	)	
	)	
Appellant.	)	AFFIRMED.

FILED

October 6, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

JUDGMENT ORDER

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well-taken and should be denied; 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 on appeal are assessed to the appellant.

IT IS SO ORDERED this .... day of October, 1998.

PER CURIAM