IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

GRADY D. TURNER	}	*WARREN CHANCERY*
	}	*No. Below 6145-GSWC*
Plaintiff/Appellee	}	
	}	*Hon. Barry Medley*
vs.	}	*Judge*
	}	
	}	*No. 01S01-9712-GS-00271*
McMINNVILLE HEATING &	}	
AIR, INC.	}	*AFFIRMED AS MODIFIED*
Defendant/Appellant	}	*AND REMANDED*

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 appellee, for which execution may issue if necessary.

IT IS SO ORDERED on November 17, 1998.

PER CURIAM

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

GRADY D. TURNER,	)	
	)	
Plaintiff/Appellee	)	WARREN COUNTY
	)	
v.	)	NO. 01S01-9712-GS-00271
	)	
McMINNVILLE HEATING & AIR, INC.,	)	HON. BARRY MEDLEY,
	)	JUDGE
Defendant/Appellant	)	

For the Appellant:

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For the Appellee:

Larry B. Stanley
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Members of Panel:

Justice William M. Barker
Senior Judge John K. Byers
Special Judge Robert E. Corlew, III

AFFIRMED AS MODIFIED AND REMANDED
CORLEW, Special Judge

OPINION

This worker's compensation appeal has been referred to the Special Worker's Compensation Appeals Panel of the Supreme Court in accordance with the provisions of *Tennessee Code Annotated §*50-6-225 (e) (3) (1997 Supp.) for hearing and reporting to the Supreme Court of findings of fact and conclusions of Law. Our review is *de novo* upon the record accompanied by the presumption of correctness unless the preponderance of the evidence is otherwise. *Tennessee Code Annotated §*50-6-225 (e) (2) (1997 Supp.). All of the medical testimony in this cause was presented either by deposition or by stipulated medical records. None of the doctors testified in court, and thus the Trial Judge had no opportunity to observe the demeanor of these witnesses while testifying. Thus, as to this evidence, we review without a presumption of correctness upon the theory that we have the same opportunity to consider this evidence which the Trial Court enjoyed, and as we review the record *de novo*, we apply a presumption of correctness only with regard to testimony of witnesses who testified in person. *Krick v. City of Lawrenceburg,* 945 S.W.2d 709, 712 (Tenn. 1997).

This suit involves compensation for a 52 year old worker who sustained an injury to his back while working as an installer in the heat and air industry. It was undisputed that the injury was compensable, and all temporary benefits were paid. The Trial Judge found the Plaintiff to have sustained forty percent vocational

disability apportioned to the body as a whole. After a *de novo* review of the evidence, we find that the award to the Plaintiff must be limited to twenty-five percent (25%) and we thus affirm the award of the Trial Judge as modified. Some of the proof was not in controversy. The Plaintiff was able to read and write and perform basic mathematical calculations, despite the fact that he completed only the eighth grade. After his injury, the Plaintiff did not return to his employment, although the proof was controverted as to whether he had the physical ability so to return. Particularly in controversy were the opinions of the medical doctors. The employer provided to the Plaintiff a panel of three doctors. He selected Dr. Richard Bagby, who provided treatment for the Plaintiff and who testified before the Court. Dr. Babgy initially indicated that his evaluation of the Plaintiff suggested zero percent anatomical impairment, although his subsequent consideration reflected that the Plaintiff may have sustained as much as four percent (4%) anatomical impairment. Dr. George Lien also evaluated the Plaintiff, and it was Dr. Lien's opinion that the Plaintiff had not sustained a permanent injury, and thus, that the anatomical impairment rating was zero. Both Dr. Bagby and Dr. Lien testified by deposition, and this was the only testimony from medical professionals that the Court heard. By stipulation, however, the Court considered the opinions of Drs. Donald H. Deaton, Jr. and Robert M. Canon. Drs. Bagby and Lien are board certified orthopedists. Dr. Deaton is an osteopathic doctor who practices family medicine. Dr. Canon is an orthopedic surgeon. Dr. Canon opined that the Plaintiff sustained five percent (5%) anatomical impairment. Dr. Deaton was of the opinion that the Plaintiff sustained thirty-six percent (36%) anatomical impairment. There further was some controversy as to whether Dr. Deaton or Dr. Bagby was the treating physician. It is undisputed that Dr. Deaton was the Plaintiff's personal family

doctor, and that he was never authorized by the employer to provide treatment for the Plaintiff. It is further undisputed that Dr. Bagby was selected by the Plaintiff from a list of three treating medical professionals provided by the employer.

The Court must first determine the anatomical impairment rating sustained by the Plaintiff. We have considered each of the medical depositions and all of the medical records, as well as the Plaintiff's own testimony concerning his condition. We find, based upon work restrictions placed upon the Plaintiff and other evidence from the medical professionals, that the Plaintiff has in fact sustained a permanent injury. Considering the records introduced from Dr. Deaton and other medical evidence concerning Dr. Deaton's anatomical impairment rating, the restrictions placed upon the Plaintiff, and the Plaintiff's own testimony with regard to his abilities, we find that Dr. Deaton's rating considerably overstates the anatomical impairment suffered by the Plaintiff. We have, nonetheless, considered Dr. Deaton's opinion in reaching our findings as to the Plaintiff's anatomical impairment. Similarly, we find that Dr. Lien's anatomical rating understates the anatomical impairment suffered by the Plaintiff due to the work restrictions which have been placed on the Plaintiff. Nonetheless, we have also considered Dr. Lien's opinion in reaching our conclusion. We have considered the testimonies of these medical professionals in light of the lay evidence, and we have considered the relative experience and qualifications of the experts. We find, considering all of the evidence, that the Plaintiff has sustained five percent anatomical impairment, which is only slightly higher than that determined by Dr. Bagby, and precisely that determined by Dr. Canon. Though it is difficult to determine the bases of opinions of those doctors who did not testify and whose opinions are gleaned only from reading the medical records, we find that the Plaintiff's anatomical impairment is

more appropriately rated by the percentages provided by Drs. Bagby and Canon than by that provided by Dr. Deaton.

We further have considered the Plaintiff's advanced age, lack of education, and limited transferrable job skills, and have found that the Plaintiff is entitled to receive an award of twenty-five percent (25%) vocational disability, which is five times the anatomical rating. We expressly find that the Plaintiff has not returned to his pre-injury employer, and is thus entitled to receive more than the two and one-half times multiplier provided by the provisions of *Tennessee Code Annotated §*50-6-241 (a) (1) (1997 Supp.). We find that twenty-five percent (25%) vocational disability adequately compensates the Plaintiff given the provisions of the Worker's Compensation Act.

We affirm the finding by the Trial Court that the Plaintiff is entitled to an award of permanent partial disability, however, we modify the finding, reducing the percentage of permanent partial impairment to twenty-five percent (25%). The Plaintiff retains his lifetime medical benefits.

We therefore affirm the decision of the Trial Court as modified herein, and remand the decision to that Court for further proceedings in accordance with this Opinion.

The costs of this appeal is taxed to the Appellee.

Robert E. Corlew, III, Special Judge

CONCUR:

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William M. Barker, Justice

_____

John K. Byers, Senior Judge