

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

**FILED**

February 22, 1999

Cecil W. Crowson  
Appellate Court Clerk

CNA INSURANCE COMPANY	}	DAVIDSON CIRCUIT
	}	No. Below 97C-1006
Plaintiff/Appellee	}	
	}	Hon. Hamilton Gayden, Jr.
vs.	}	Judge
	}	
	}	No. 01S01-9804-CV-00061
JAMES WOODS	}	
	}	
Defendant/Appellant	}	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 defendant/appellant, for which execution may issue if necessary.*

*IT IS SO ORDERED on February 22, 1999.*

*PER CURIAM*

IN THE SUPREME COURT OF TENNESSEE  
 SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
 AT NASHVILLE  
 (December 11, 1998 Session)

**FILED**

**February 22, 1999**

Hon. Hamilton Gayden, Jr.,  
 Judge. **Cecil W. Crowson**  
**Appellate Court Clerk**

CNA INSURANCE COMPANY, )  
 )  
 Plaintiff-Appellee, )  
 )  
 v. )  
 )  
 JAMES WOODS, )  
 )  
 Defendant-Appellant. )

DAVIDSON CIRCUIT  
 Hon. Hamilton Gayden, Jr.,  
 Judge. Cecil W. Crowson  
 Appellate Court Clerk  
 No. 01S01-9804-CV-00061

For Appellant:

J. Mitchell Grissim, Jr.  
 Harry L. Weddle, III  
 Nashville, Tennessee

For Appellee:

David J. Deming  
 Manier & Herod  
 Nashville, Tennessee

MEMORANDUM OPINION

Members of Panel:

William M. Barker, Associate Justice  
 William H. Inman, Senior Judge  
 Joe C. Loser, Jr., Special Judge

AFFIRMED

Loser, Judge

MEMORANDUM 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. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employee or claimant, Woods, insists the award of permanent partial disability benefits is inadequate and that the trial judge erred by allowing the employer's insurer, CNA, credit for temporary total disability benefits paid while the employee was working as a self-employed independent contractor. As discussed below, the panel has concluded the judgment should be affirmed.

CNA Insurance Company initiated this civil action to recover claimed overpayment of temporary total disability benefits. The employee served a counterclaim for additional temporary disability benefits, medical benefits and permanent disability benefits. After a trial of all issues, the trial judge awarded permanent partial disability benefits based on ten percent to the right leg and medical benefits as provided by law, but allowed a credit for temporary disability benefits paid after the employee was able to work though not released from medical care. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2).

The claimant is 59 years old with a college education and experience as a hotel manager, restaurant manager, truck driver and tow motor operator. In April or May of 1996, he began working for Top Brass Building Services, Inc., the employer, as a cleaning contractor.<sup>1</sup> On October 3, 1996, he injured his knee while operating a floor buffer.<sup>2</sup>

The emergency room physician diagnosed leg strain and contusion and referred the claimant to an orthopedic surgeon. Dr. Stuart Smith diagnosed a complete tear of the distal portion of the rectus femoris tendon, which he surgically repaired on October 8, 1996. The surgeon estimated the claimant's permanent impairment at ten percent to the right leg and restricted him from kneeling, any activity requiring more than 80 degrees knee flexion, or standing on his right leg for more than 4 hours in an 8 hour shift.

While the employee did not reach maximum medical improvement until February 27, 1997, the record establishes, and the trial court found, that the employee was working during all of January and February of that year and receiving compensation from Top Brass, as well as disability benefits from CNA. The credit for temporary total disability benefits is for that period of time.

Once the causation and permanency of an injury have been established by

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<sup>1</sup> CNA does not contend in this appeal that Woods was not a covered employee.

<sup>2</sup> CNA contends in its statement of facts and in oral argument that the injury actually occurred when he and his "paramour" were loading the trunk of a car for a personal trip to Atlanta. However, causation is not an issue on appeal. Moreover, the trial judge accredited the claimant's own testimony as to the injurious occurrence. We have addressed only those issues actually raised, as provided by TRAP 13b.

expert testimony, the trial judge may consider many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomical impairment, for the purpose of evaluating the extent of a claimant's permanent disability. Tenn. Code Ann. section 50-6-241(a)(2). The opinion of a qualified expert with respect to a claimant's clinical or physical impairment is a factor which the court will consider along with all other relevant facts and circumstances, but it is for the courts to determine the percentage of the claimant's industrial disability. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675 (Tenn. 1983). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review. Kellerman v. Food Lion, Inc., 929 S.W.2d 333 (Tenn. 1996). From our examination of the record, giving due weight to the findings of the trial judge, we are unable to find that the evidence preponderates against the trial judge's finding of ten percent permanent partial disability.

Temporary total disability refers to the injured employee's condition while disabled to work because of his injury and until he recovers as far as the nature of his injury permits. Redmond v. McMinn County, 209 Tenn. 463, 354 S.W.2d 435 (1962). Benefits for temporary total disability are payable until the injured employee is able to return to work or, if he does not return to work, until he attains maximum recovery from his injury, at which time his entitlement to such benefits terminates. Simpson v. Satterfield, 564 S.W.2d 953 (Tenn.

1978). By allowing CNA credit for temporary total disability benefits paid for January and February of 1997, the trial judge correctly terminated any liability for such benefits during the time the employee was able to work.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the defendant-appellant.

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Joe C. Loser, Jr., Special Judge

CONCUR:

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William M. Barker, Associate Justice

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William H. Inman, Senior Judge