IN THE SUPREME COURT OF TENNESSEE
WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, JUNE 1998 SESSION

GREGORY HALE CHANCERY	)	McMINN
Plaintiff/Appellant	)	
V.	)	
ATHENS STOVE WORKS	)	
Defendant/Appellee	)	Hon. Earl H. Henley, Chancellor
and	)	
SUE ANN HEAD, DIRECTOR OF THE SECOND INJURY FUND	)	
Defendant/Appellee	)	NO. 03S01-9708-CH-00104

For the Appellant:

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M E M O R A N D U M O P I N I O N

Members of Panel:

William M. Barker, Justice
Joe C. Loser, Special Judge
Roger E. Thayer, Special Judge

AFFIRMED.

THAYER, Special 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, Gregory Hale, has perfected an appeal from a decision of the trial court which declined to modify and increase an award of 25% permanent partial disability to the body as a whole.

Plaintiff began working for defendant, Athens Stove Works, in 1987 and sustained an on-the-job injury during 1988 which resulted in surgery on his back for a disc problem. His doctor gave him a 15% medical impairment and the court awarded 25% disability to the body as a whole, etc. After being off from work for about eleven months, he returned to work performing the same duties.

On about April 17, 1990, while working as a welder, he sustained another injury to his back. A trial was conducted on June 4, 1993 which resulted in an additional award of 25% permanent partial disability to the body as a whole. A judgment for this award was entered on August 13, 1993. Before the judgment became final, plaintiff filed a motion for a new trial and/or to alter the judgment seeking to increase the award based on newly discovered medical evidence. The record indicates there were no further hearings until July 1997 when the court reconsidered the case by reviewing additional medical records of the treating physician and plaintiff's testimony and determined it was not appropriate to adjust or alter the award of disability.

At the trial for the second and last injury, plaintiff testified he was 34 years of age and was a high school graduate. He said he also had some vocational-technical school training and possessed a drafting license. He stated that after the 1990 injury, he continued to do light work (mostly sweeping) until about June 22, 1990, when he was terminated because his employer stated there was no work available which he could do in his condition.

The record indicates he has not worked since leaving employment with defendant. He told the court he was in a great deal of pain and could not sit or stand for any prolonged period of time and that he had to take medication regularly to mask the pain. His complaints of pain were to his low back and leg.

The only other witness was his treating doctor, John T. Purvis, a neurological surgeon, who saw and treated him for both injuries. Dr. Purvis testified by deposition and stated he had performed back surgery for the 1988 injury and that when he saw him on May 15, 1990 after the second injury, he was worse and had not completely recovered from his first injury. He said his osteoarthritis in his lumbar spine was the principal problem and this pre-dated the second injury. The doctor told the court that employee Hale did not appear able to do any of the jobs he had been trained for and he was of the opinion he should be in a job where he could move about and change positions frequently.

After the second injury which aggravated the old injury, his diagnosis was lumbar spondylosis with neuropathy of the L5 and S1 nerve roots right. He testified he was unable to do any type of manual labor and should not lift over 10 pounds and he should avoid repetitive bending or stooping. He gave an additional 5% impairment for the second injury saying the basic problem was the osteoarthritis.

Upon reviewing this evidence, the trial court awarded the employee 25% permanent partial disability to the body as a whole and dismissed the case against the Second Injury Fund. The evidence relating to the rehearing or reconsideration of the 25% award consisted of stipulated medical records of Dr. Purvis which covered numerous visits after the June 1993 trial and certain testimony from the employee. With regard to the employee's testimony, he described his condition as it existed in 1997 and told the court he felt he was unable to do any type of work and was receiving social security disability benefits.

All of the records of Dr. Purvis found plaintiff continued to appear worse; that some question existed as to whether there was a herniated disc; a lumbar myelography and CT scanning was ordered which showed severe spondylosis at L5-S1 and very definite at L3-4 and L4-5 with some nerve root compression at L5-S1 on left; a July 13, 1993 progress note indicated he felt the patient would benefit from laminectomy L3-L5 and a progress note during August 1993 indicated this surgery was performed.

Other records of the doctor indicated that on May 11, 1994 patient appeared some better but was still having back and leg pain. During April and May, 1995, the doctor wrote a letter to plaintiff's counsel stating there was no change in plaintiff's

permanent partial impairment and that he felt it would still be rated at 25% which the trial court interpreted as meaning no change in the 5% impairment and the 25% award for the second injury. Upon weighing the new evidence, the court declined to adjust the award of disability. A motion to reconsider was filed and overruled.

The case is to be reviewed accompanied by a presumption of the correctness of the findings of fact unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

The primary issue on appeal is whether the evidence preponderates against the decision to not increase the 25% award of disability. In this connection, we find the complaints of pain by the plaintiff during the 1993 trial and up until 1995 are about the same. He still has problems with his back and leg. At the 1993 trial Dr. Purvis opined he had not completely recovered from problems related to the 1988 injury and was of the opinion he should be in other employment. It is true that his records of visits during 1993-1995 contain some new findings but his opinion as to impairment seems to support the trial court's conclusion that no additional impairment has resulted. The trial court was in a much better position to judge plaintiff's credibility and we must defer to this to a certain extent. From our independent examination of the evidence, we cannot say the evidence preponderates against the findings of the trial court.

The Second Injury Fund argues the 25% award of disability was not subject to reconsideration because of provisions of T.C.A. § 50-6-231 prohibiting modification of lump sum payments. We do not believe this statute has application to the facts of this case. First, the record does not establish the award was paid by defendant. Additionally, we construe the statute to apply to final judgments. The judgment in question was not final when the motion to alter or amend it was filed on August 26, 1993, within the time allowed by Rule 59. T.R.Civ.P.

The judgment of the trial court is affirmed. Costs of the appeal are taxed to the plaintiff-employee.

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Roger E. Thayer, Special Judge

CONCUR:

_____
William M. Barker, Justice

_____
Joe C. Loser, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

FILED

January 7, 1999

Cecil Crowson, Jr.
Appellate Court
Clerk

GREGORY HALE,	)	McMinn Chancery
	)	No. 17,404
Plaintiff-Appellant,	)	
	)	
v.	)	Hon. Earl H. Henley, Chancellor
	)	
ATHENS STOVE WORKS, et al.,	)	NO. 03S01-9708-CH-00104
	)	
Defendant-Appellee.	)	AFFIRMED

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 are taxed to the plaintiff-appellant and his surety, for which execution may issue if necessary.

PER CURIAM

Barker, J., not participating