IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE JANUARY 1999 SESSION

F ILED

March 18, 1999

Cecil Crowson, Jr.
Appellate Court
Clerk

ALLAN ROBERT KOTOUC,	)	HAMILTON
	)	
Plaintiff/Appellee,	)	NO. 03S01- 9807-CH-00076
	)	
v.	)	HON. HOWELL N. PEOPLES
	)	CHANCELLOR
STAR KNITWEAR, INC., and/or	)	
STAR KNITWEAR, LLC.,	)	
	)	
Defendants/Appellants	)	

For the Appellants:

G. David Allen, Jr.
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For the Appellee:

Richard A. Schulman
Patrick, Beard, Schulman
& Jacoway, P.C.
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MEMORANDUM OPINION

Members of Panel:

Justice Frank F. Drowota, III
Senior Judge John K. Byers
Senior Judge William H. Inman

AFFIRMED. INMAN, Senior 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 plaintiff injured his left arm in an industrial accident on August 4, 1995. He was treated by Neil H. Spitalny, orthopedic surgeon, who diagnosed the problem as a partial biceps muscle tear. Conservative treatment was recommended, which essentially involved brief immobility of the arm. Further treatment was indicated because the plaintiff continued to complain of pain on rotation of his arm. Examinations by other specialists convinced Dr. Spitalny that the plaintiff was suffering from a compression of an ulnar nerve, for the correction of which he performed a surgical release on August 27, 1996.

The surgical procedure was only partially successful. The plaintiff continued to experience pain caused by contractions of muscle, with some discomfort attributable to a cervical problem unrelated to the August 4, 1995 problem. He reached maximum medical improvement on February 7, 1997, with a medical impairment rating of ten percent to his arm.

The Chancellor found that the plaintiff had a disability "within the meaning of the workers' compensation law" of 75 percent to his left arm. The employer appeals, insisting that the award of 7.5 times the impairment rating is excessive and is not supported by the proof. Employer also complains that the Chancellor found that Dr. Spitalny did not correctly interpret the *AMA Guidelines* and relied upon his personal analysis of the *Guidelines*.

Our 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

finding, 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 Chancellor commented that Dr. Spitalny testified that he did not use a "dynamometer to make his measurements as far as loss of strength, loss of use, which are the *Guidelines* called for." There was no elaboration by the Chancellor, and no indication, that we are able to discern, that the Chancellor believed Dr. Spitalny's assessment would have been higher had he used the dynamometer. The employer argues that the use or non-use of a dynamometer requires expert testimony and that the Chancellor improperly injected his personal views into the issue of anatomical impairment. This argument would focus our attention, *see, Fuller v. Speight,* 571 S.W.2d 840 (Tenn. App. 1978), but we find nothing in the record which indicates that the obviously high disability rating awarded by the Chancellor was based on his personal views of the *Guidelines.*

The appellant next complains of the undue attribution of credibility to the plaintiff, who was 59 years old at the time of trial and a high school graduate, with a work history of truck driving and various jobs essentially involving heavy labor. He drove a truck for 25 years and quit because he was "partially night blind." He worked for Wilbert Vault Company and quit because of "the weather." He began working for Star Knitwear in 1989 and worked for about six years before his described accident. He testified that he cannot now raise his left arm above his head, and "has problems carrying weight."

Following his release by Dr. Spitalny, he returned to work at Star, but quit because he was unable to do the job. He then secured employment at a Sears Store, then at American Manufacturing, then at Koch Foods as a security guard.

The plaintiff was required to fill out an application for employment for each employer after he quit his job with Star. He admittedly made many statements to various employers that were contrary to his testimony. The Chancellor commented

> "The Court has observed the plaintiff as he testified and is satisfied that his testimony here in court is truthful and that where he contradicted any statements made on the job applications, that the statements on the job applications are, in fact, inaccurate.
>
> The Court is satisfied with his explanation that he made those representations in order to obtain employment to avoid the loss of his home and his automobile."

Employer argues strenuously that this Court should, as a matter of principle, review the trial court's determination of the plaintiff's credibility, because the record does not justify this finding. On one of the applications, the plaintiff represented that he could climb, balance, stoop, kneel, crouch, crawl, bend, reach, etc., i.e., that he had no problem with his arm. His explanation at trial was that "he misunderstood the questions" on the applications. His explanation for the false answers on other applications for employment was that "he needed the job."

In Tennessee the trial judge is the best judge of the credibility of witnesses because of the person-to-person confrontation, and we cannot substitute our judgment on this issue for that of the Chancellor. *See, Humphrey v. David Witherspoon, Inc.,* 734 S.W.2d 315 (Tenn. 1987). But we do not wish to be understood as condoning the deliberate misrepresentation of material facts by a litigant; appellate review is limited, and the rules must be followed. For this reason we are unable to find that the Chancellor's faith in the truthfulness of the plaintiff's testimony is not supported by a preponderance of all the evidence.

All of which leads us to the principal issue for review: whether the 75 percent disability is excessive. The employer expresses some astonishment about this award, because, it argues, the proof simply does not support a finding that the plaintiff is disabled to the extent found.

Dr. Spitalny was the only expert who testified, and he estimated the plaintiff's anatomical impairment at ten percent, with a lifting restriction of 30 to 40 pounds. While there is no proof of diminished job opportunities, the plaintiff is now 60 years old, and we know what the world knows, that a 60-year-old man with no readily marketable skills who has an impairment to his arm is not a viable job candidate. The award is generous indeed, and we reiterate that we cannot substitute our judgment for that of the trial judge. Neither can we find that the judgment preponderates against the award.

The judgment is affirmed at the costs of the appellant.

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William H. Inman, Senior Judge

CONCUR:

____
Frank F. Drowota, III, Justice

____
John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

FILED

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Appellate Court
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ALLAN ROBERT KOTOUC,) HAMILTON CHANCERY
) No. 96-0696
Plaintiff-Appellee,)
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) No. 03S01-9807-CH -00076
v.)
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STAR KNITWEAR, INC., and/or) Hon. Howell N. Peoples
STAR KNITWEAR, LLC.,) Chancellor
)
Defendants/Appellants.)

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 appellants and David Allen,Jr., for which execution may issue if necessary.

03/18/99