

**IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEAL PANEL
KNOXVILLE, SEPTEMBER 1998 SESSION**

FILED February 17, 1999 Cecil Crowson, Jr. Appellate Court Clerk

JOHNNY McGAHA, CIRCUIT)	COCKE COUNTY
)	
Plaintiff/Appellee,)	No. 03S01-9711-CV-00137
)	
v.)	
)	Cocke Circuit No. 21,540
U.S. MARINE, INC./BAYLINER,)	
)	
Defendant/Appellant.)	Hon. Ben W. Hooper, Circuit Judge

For the Appellants:

Robert R. Davies
Stokes, Fansler, & Williams
P. O. Box 2644
Knoxville, Tennessee 37901

For the Appellees:

Thomas V. Testerman
Attorney at Law
301 East Broadway
Newport, Tennessee 37821

MEMORANDUM OPINION

Members of Panel:

E. Riley Anderson, Chief Justice
Roger E. Thayer, Special Judge
John S. McLellan, III, Special Judge

MODIFIED IN PART AND AFFIRMED

McLELLAN, Special Judge

This worker's 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 employer U. S. Marine, Inc./Bayliner has appealed from the action of the trial court in awarding the employee, Johnny McGaha, 70% permanent partial disability to the body as a whole, temporary total benefits for April 10, 1992 through September 19, 1993 and medical expenses of Dr. Michael Hood.

Upon appeal the employer contends (1) that the claimant failed to carry his burden of proof that he suffered a permanent anatomical injury and thus whether the trial court erred in awarding permanent partial disability benefits; (2) alternatively, whether the evidence presented supports the amount of the award of permanent partial disability; (3) the trial court erred in awarding temporary total disability benefits for April 10, 1992 through September 19, 1993; and, (4) whether the trial court erred in ordering the employer to pay the medical expenses of Dr. Michael Hood.

Johnny McGaha was 48 years of age at the time of trial and had completed the 8th grade receiving his GED while in the service of the United States Army. The employee attended a welding school but was never employed as a welder. His employment background consists of harvesting cabbage and raising tobacco while in his teens, being a United States Army cook, a nylon winder, a can maker, a car salesman, an assistant butcher, working in a shipping department, and on an assembly line. Mr. McGaha testified that all of these employment activities involved strenuous physical activity including the job of being car salesman which required changing tires and transmissions, and working on cars in addition to the paperwork involved. The employer required the plaintiff to undergo a pre-employment physical examination on May 8, 1991 with the results of the examination being that Mr. McGaha suffered no problems with his back.

In the present case, on February 15, 1992 the plaintiff was injured while working in the decking department while he and three other employees were lifting a boat deck weighing between 500 and 600 pounds. The plaintiff testified he suffered a sudden, excruciating “catching” pain in his lower back and testified “...I went to my knees...” The plaintiff went home thinking the pain would go away but over the weekend worsened and upon returning to work on

Monday, he reported it to his supervisor. When plaintiff's supervisor was advised of plaintiff's back injury, the supervisor became upset and cursed him. The supervisor stated that anyone who would go on a workman's comp claim would be a S.O.B. to the rest of the employees because the employer has a worker's comp bonus program to the employees if the employer pays out less on worker's compensation claims. As a result, the employee continued to work until he reached the point where he could not do the job and went to his family physician, Dr. Michael Hood. As a result of his supervisor's statements, the plaintiff submitted his medicals expenses on his private insurance and continued to work while being treated by his doctor until he was laid off from Bayliner in mid-April of 1992. Thereafter, plaintiff sought worker's compensation benefits and chose Dr. Charles Leonard from the employer's panel. The plaintiff was subsequently referred to Dr. Archer Bishop whom he saw on five occasions.

After his discharge from defendant's employment, plaintiff attempted work for other manufacturers but plaintiff testified that the physical requirements of lifting increased the pain to the point that plaintiff was unable to continue that employment. Plaintiff applied for and was approved to receive Social Security disability benefits.

Plaintiff first came under the medical care of Dr. Michael Hood who specializes in family medicine. Dr. Hood treats many patients with back injuries and his office contains a physical therapy department. Plaintiff was initially treated for back pain in February, 1992 shortly after plaintiff states he was injured on the job on February 15, 1992. Plaintiff testified he did not want to file the injury with worker's compensation because he thought it would get better and he wanted to handle it on his private insurance. Dr. Hood had previously treated the plaintiff and stated that he had no complaints of low back pain in the past. Dr. Hood further opined that plaintiff's back problems were related to the February 15, 1992 lifting episode. After attempting conservative treatment with medications, Dr. Hood admitted plaintiff into Cocke County Baptist Hospital on March 24, 1992 for diagnostic tests. Dr. Dana Edwards, a vascular surgeon, consulted with Dr. Hood and was of the opinion that the plaintiff's problems represented some type of muscle pull or strain. Dr. Hood placed the plaintiff on a Work Hardening Program. In late April, 1992, Dr. Hood had the plaintiff in an effort to relieve plaintiff's lower back pain undergo a caudal block at East Tennessee Baptist Hospital. Due to the plaintiff's having been referred by his employer to Dr. Archer Bishop, approximately one year had past when the

plaintiff was again examined by Dr. Hood for back problems on April 7, 1993.

Dr. Hood was of the opinion that maximum medical improvement occurred on September 20, 1993 and that according to the AMA Guidelines, he assessed a permanent partial impairment in the amount of 7% to the body as a whole. Dr. Hood, relied upon lack of range of motion which he measured with the use of the inclinometers. Dr. Hood testified in detail as to his method of determining accurate values of disability in a manner to guard against patients who are faking their results. Dr. Hood testified that at the time he first began treating plaintiff he would have had a total body disability of about 30% because of his back and with improvement that eventually decreased to 7% impairment.

Dr. Archer Bishop first saw the plaintiff on June 4, 1992 when the plaintiff underwent an orthopedic examination. Dr. Bishop testified the plaintiff had a satisfactory range of motion, no tenderness nor spasm, negative straight leg raising and normal heel to toe walk. Dr. Bishop ordered x-rays and a CT scan which appeared to be normal. Plaintiff again saw Dr. Bishop on July 1, 1992 and all lab test results were normal except for sedimentation rate which indicated an inflammatory process such as arthritis although x-rays were normal. Plaintiff was again treated by Dr. Bishop August 12, August 31, and September 22, 1992 for back complaints and with anti-inflammatory medication. On January 26, 1993 when plaintiff related occasional soreness and episodes of problems with his back, Dr. Bishop prescribed a different anti-inflammatory medication.

Dr. Bishop saw the plaintiff again on June 20, 1995 at which time he took x-rays and compared those x-rays to the x-rays in 1992 and 1993 and opined that there was no change or development of abnormality and that plaintiff had a full range of motion. Dr. Bishop's opinion was that the plaintiff was not suffering from post-traumatic arthritis and that the plaintiff suffered no permanent impairment based on lack of range of motion of the lumbar spine because plaintiff had full range of motion and plaintiff could work without restrictions.

As a result of the February 19, 1992 accident, the plaintiff asserts that Dr. Bishop had not consulted with Dr. Hood or reviewed Dr. Hood's records nor the records of Dr. Charles Leonard until the time of his deposition. Plaintiff further asserts that Dr. Bishop was unaware of the functional capacity evaluation that the plaintiff had undergone. Dr. Bishop stated that plaintiff complained of pain each time he examined him and that the back pain was related to the 1992

work injury and that certain physical activities will aggravate pain and make it more apparent and worse. Defendant asserts that the bone scan ordered by Dr. Hood in April, 1992 and which appeared to be normal is the only specific tests for arthritis and that there were no objective medical tests in Dr. Hood's records that were positive for arthritis.

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

The first issue raises a question of whether the plaintiff failed to carry his burden of proof that he suffered a permanent anatomical injury and thus the trial court erred in awarding permanent partial disability benefits. The trial court awarded a 70% vocational disability. The trial court issued its Memorandum Opinion filed August 31, 1995, wherein the court found that the last day worked was April 10, 1992. The trial court further noted that the plaintiff testified he could no longer do gardening, yard work, hunting, walking, fishing and camping, which he did prior to the injury and that the plaintiff complained he experienced depression, sleeplessness, crying, sitting in the dark, irritableness, hatefulness, and a feeling of coldness. The court noted that the plaintiff testified he had constant pain since the accident and that any use of his back aggravates his condition and increases the pain with activities such as driving or lifting and that the pain lasts two to three days during which time plaintiff must lay down. The court further noted that the plaintiff states he can only stand for five minutes at a time and that any bending or squatting will aggravate or increase the pain. Apparently the court was unaware that further action was being taken by the defendant to secure a deposition of Dr. Bishop which had been scheduled after the trial for September 5, 1995. The court thereafter issued its Supplemental Memorandum Opinion after the filing of Dr. Bishop's deposition and final arguments by counsel on January 30, 1996. The trial court determined in its Supplemental Memorandum Opinion that its findings were not changed but detailed its analysis of Dr. Hood's findings and Dr. Bishop's findings and testimony. In its Supplemental Memorandum Opinion, the trial court found that "...it is the loss of range of motion, which was specifically measured that caused the plaintiff to be impaired." in reviewing Dr. Hood's deposition testimony.

The trial court, in reviewing Dr. Bishop's testimony, noted that Dr. Bishop did not see the plaintiff until four months after the injury and that he felt the plaintiff's complaints were related

to his job injury and complaints of pain were not unusual. The trial court noted several passages of Dr. Bishop's testimony regarding the use of x-ray as an objective test for arthritis to determine abnormalities such as arthritic change regardless of whether it is a result of trauma or a result of aging. The trial court further found that Dr. Bishop's testimony that x-rays are the simplest method of objectively testing for arthritis "...flies in the face of his earlier testimony concerning the use of CT scans to find abnormalities such as arthritic change and disc space narrowing that are not seen on normal x-ray." The trial court found that Dr. Bishop's testimony was so inconsistent "... that it adversely affects the doctor's creditability." The court noted that Dr. Bishop continued to treat the plaintiff with anti-inflammatory medications from July 1, 1992 through June 20, 1995 and his test of July 1, 1992 showed plaintiff's sedimentation rate which indicated plaintiff might be having some inflammatory process such as arthritis. The court further noted that in response to a lengthy hypothetical question which the court found was based on facts in the record and which sought Dr. Bishop's opinion on the issue of whether plaintiff's pain was the result of job injury that a part of the doctor's response was "I had no way to detect any sign of any injury".

The dispute here is with the sharp difference of opinion between that of Dr. Hood and Dr. Bishop as to whether the plaintiff sustained permanent disability as a result of his injury. Where the medical testimony is presented by deposition, this court is able to make its own independent assessment of the medical proof to determine whether the preponderance of the evidence lies. *Cooper v. INA*, 884 S.W.2d 446 (Tenn. 1994). It is undisputed that the plaintiff had a pre-employment physical examination prior to being employed by the defendant which revealed no back problem and there is no evidence in this record that the plaintiff had a back problem before his work related injury. We find the deposition of Dr. Hood to be more creditable than that of Dr. Bishop. We further find that the medical testimony of Dr. Hood to be competent evidence to support an award of permanent disability when considered with all other evidence in the record. See T.C.A. § 24-7-114 and *Cates v. Better-Bilt Aluminum Products Co.*, 607 S.W.2d 476 (Tenn. 1980). The trial judge had the opportunity to see and hear the testimony of the plaintiff and great difference must be given to that finding and determining whether the evidence preponderates against the trial judge's determination. See *Humphrey v. David Witherspoon, Inc.*, 734 S.W. 2nd 315 (Tenn. 1987). When an issue hinges on creditability of a witness, the trial court will not be

reversed unless there is found in the record clear, concrete and convincing evidence other than the oral testimony of witnesses that contradicts the trial court's findings. *Galbreath v. Harris*, 811 S.W.2d 88, 91 (Tenn. App. 1990).

The second issue requires an examination of the record and a determination of whether the 70% award to the body as a whole is excessive when the medical impairment rating was 7%. In determining vocational disability, the trial court is required to consider many factors in fixing an award. The real tests is whether there has been a decrease in the employee's capacity to earn wages in any line of work available to the employee based on age, education, skills, training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition. *Ormon v. Williams-Sonoma, Inc.*, 803 S.W.2d 672, 678 (Tenn. 1991). Medical impairment rating and legal vocational disability awards are completely separate and distinct issues. *Wilks v. Resource Authority of Sumner County*, 932 S.W.2d 458 (Tenn. 1996). There is conflicting medical testimony between the treating physicians Dr. Hood and Dr. Bishop. The trial court gave more weight to the testimony of Dr. Hood finding several inconsistencies in the testimony of Dr. Bishop. Where, as here, there is conflicting medical testimony, the trial judge has discretion to conclude that the opinion of a particular expert should be accepted over that of another expert and that one expert's testimony contains a more probable explanation than another expert's testimony. *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278 (Tenn. 1991).

The medical proof submitted by the plaintiff through Dr. Hood relates the plaintiff's medical condition to the accident of February, 1992 and that the plaintiff reached maximum medical improvement on September 20, 1993 with a 7% permanent physical impairment in accordance with AMA Guidelines to the body as a whole. Dr. Hood advised the plaintiff to "get out" of the job requiring heavy lifting with his lower back and to get a job where he could sit down and work or do something without lifting. Dr. Hood diagnosed that the plaintiff initially had a lumbosacral sprain and that now he has post-traumatic arthritis with a limited range of motion as a result of the incident at work in February, 1992. Dr. Hood did not recommend surgery. Contrary to the employer's assertion, we find that Dr. Hood's restriction is a permanent work restriction. However, in consideration of the record as a whole and having found evidence of industrial disability, we are persuaded that the evidence preponderates against an award based on 70% permanent partial disability to the body as a whole.

As to the third issue, the employer contends that the trial court erred in awarding temporary total disability benefits for April 10, 1992 through September 19, 1993. This issue and the fourth issue of whether the court erred in ordering the employer to pay the medical expenses of Dr. Michael Hood is considered in the context of the testimony of the plaintiff as corroborated by defendant's witness, Evelyn Patterson, regarding incentives to employees if there are no worker's compensation injury claims. When plaintiff advised his supervisor of his work injury upon returning to work on Monday, February 17, 1992, his superior, the trial court noted, "jumped down my throat." As a result of being advised by his supervisor that anyone who would turn in a worker's compensation claim would be a S.O.B. to the rest of the employees, plaintiff sought treatment through his family doctor on his private medical insurance while under the thought that his low back condition would improve. Medical evidence substantiates that the nature of plaintiff's back injury is aggravated and made worse with certain activities. It is correct as defendant contends that the plaintiff continued to work; however, plaintiff stated his pain continued to increase until he was unable to perform his job duties and "it just got to the point where I couldn't do the job, I mean, you know, I just couldn't do". Plaintiff spoke to the supervisors concerning this on many occasions and was unable to perform his job adequately which he testified affects his fellow employee's incentives and if he couldn't perform his job, that it would pit fellow employees against him. He described his conversations about the injury with his supervisors as "...just a constant harassment type deal..."

The trial court found that while the plaintiff continued to work, it eventually came to the point where he could no longer work. Defendant terminated plaintiff by lay-off April 10, 1992. Dr. Hood testified that plaintiff reached maximum medical improvement on September 20, 1993. Under the circumstances in this case, the evidence does not preponderate against the trial court's finding in awarding temporary total disability benefits for April 10, 1992 through September 19, 1993.

It is in the same factual context that the issue raised by defendant as to whether the trial court erred in ordering the employer to pay the medical expenses of Dr. Michael Hood is considered. The work environment and the employer's policy of providing incentives to employees based upon production and based upon the department having no worker's compensation injuries combined with the uncontradicted evidence that plaintiff's supervisor got

upset, cursed the plaintiff, and advised him that anyone who filed a worker's compensation claim would be an S.O.B. to the rest of the employees justifies the plaintiff, under these circumstances, in obtaining medical services on his own. We find that the plaintiff acted in good faith in seeking medical treatment with Dr. Michael Hood on his own. *United States Fid. & Guar. Co. v. Morgan*, 795 S.W.2d 653 (Tenn. 1990), citing *Burlington Industries, Inc. v. Clark*, 571 S.W.2d 816 (Tenn. 1978). We therefore affirm the trial court's order that the employer pay these medical costs as the circumstances are sufficient to qualify under the statutory exemption to the general rule that a designated physician shall provide the medical care. See T.C.A. § 50-6-204 (a) (4).

Having found that the evidence preponderates against the finding of the trial court that the plaintiff has permanent partial disability of 70% to the body as a whole, it is the finding of the panel that he has permanent partial disability of 50% to the body as a whole for which he should be compensated at his agreed compensation rate. We modify the judgment and fix the percentage of permanent partial disability at 50% rather than 70% as fixed by the trial judge. The judgment is modified in part and as modified it is affirmed. Costs of the appeal are taxed to defendant.

John S. McLellan, III, Special Judge

CONCUR:

E. Riley Anderson, Chief Justice

Roger E. Thayer, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

FILED
February 17, 1999
Cecil Crowson, Jr. Appellate Court Clerk

JOHNNY McGAHA)	COCKE COUNT COUNTY
)	
Plaintiff/Appellee)	No. 21,540
)	
)	
v.)	No. 03S01-9711-CV-00137
)	
)	
U. S. MARINE, INC./BAYLINER)	Hon. Ben W. Hooper
)	Judge
)	
Defendant/Appellant)	
)	

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 defendant, U.S. Marine, Inc./Bayliner and and Robert R. Davies, surety for which execution may issue if necessary.

02/17/99