

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

**FILED**  
June 18, 1999  
Cecil W. Crowson  
Appellate Court Clerk

LARRY ANTHONY BOSHEERS,	)	LAWRENCE CIRCUIT NO. CC5096
	)	
PLAINTIFF/APPELLEE,	)	
	)	HON. JIM T. HAMILTON, JUDGE
v.	)	
	)	
SPONTEX, INC. AND/OR TOTAL U.S.	)	S. CT. NO. 01S01-9712-CV-00275
GROUP,	)	
	)	
DEFENDANT/APPELLANT.	)	AFFIRMED

**JUDGMENT**

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 will be paid by defendant-appellant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE

**FILED**

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

June 18, 1999

AT NASHVILLE  
(July 20, 1998 Session)

**Cecil W. Crowson**  
**Appellate Court Clerk**

LARRY ANTHONY BOSHEERS,	)	LAWRENCE CIRCUIT
	)	
Plaintiff-Appellee	)	
	)	
v.	)	Hon. Jim T. Hamilton,
	)	Judge
SPONTEX, INC., AND/OR	)	
TOTAL U.S. GROUP	)	
	)	No. 01S01-9712-CV-00275
Defendant-Appellant	)	

For Appellant:

Dale A. Tipps  
Levine, Mattson, Orr & Geraciotti  
Nashville, Tennessee

For Appellee:

Ben Boston  
Christopher V. Sockwell  
Boston, Holt & Sockwell  
Lawrenceburg, Tennessee

MEMORANDUM OPINION

Members of Panel:

Ben Cantrell, Special Justice  
William H. Inman, Senior Judge  
Joe C. Loser, Jr., Special Judge

AFFIRMED  
Judge

Loser,

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 issues on appeal are (1) whether the evidence preponderates against the trial court's finding that the employee suffered a permanent partial disability of sixty-eight percent to the body as a whole and (2) whether the trial judge erred in commuting the award to a lump sum. As discussed below, the panel has concluded the judgment should be affirmed.

(1)

Our review of the first issue 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 extent of an injured worker's disability is an issue of fact. Jaske v. Murray Ohio Mfg. Co., Inc., 750 S.W.2d 150 (Tenn. 1988). 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. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987).

The employee or claimant, Larry Bosheers, injured his dominant right arm and shoulder in the course of his employment as a Shift Supervisor for Spontex, Inc. when he pulled on a buggy that had gotten stuck. Mr. Bosheers experienced extreme pain, weakness, muscle spasms, atrophy, and limited ability in his right arm and shoulder. The plaintiff was sent to numerous physicians in an attempt to cure his condition. Dr. Kaminski assigned a twenty-seven and three-fourths percent medical impairment to the right upper extremity or seventeen percent to the body as a whole. Dr. Howell opined a twenty-one percent impairment to the right upper extremity, or thirteen percent to the body as a whole. Dr. Dirr, a company approved physician, assigned a fifty percent impairment rating to the right upper extremity or thirty percent to the body as a whole.

After a trial on the merits, the trial court entered its Final Judgment, awarding the plaintiff workers' compensation benefits for sixty-eight percent permanent partial disability to the body as a whole, totaling \$96,823.84, to be paid in a lump sum. Spontex filed a timely Notice of Appeal.

The employer, Spontex, contends the trial court should have relied on the

thirteen percent impairment rating of Dr. Howell rather than the thirty percent impairment rating from Dr. Durr. Dr. Durr is a company approved physician. In a workers' compensation case, the trial judge has the discretion to determine which expert medical testimony to accept, when such evidence conflicts. Kellerman v. Food Lion, Inc., 929 S.W.2d 333 (Tenn. 1996). Additionally, Dr. Durr's and Dr. Howell's opinions concerning Mr. Bosheers' ability to work, and the restrictions they imposed, were similar.

The employer further insists that Mr. Bosheers never missed any work as a result of his injury and, because of this failure to miss work, his vocational disability is slight. However, length of total disability is only one of several elements to be considered for the purpose of evaluating vocational disability. The extent of a vocational disability is a fact to be determined from all the evidence, including lay and expert testimony. Henson v. City of Lawrenceburg, 851 S.W.2d 809, 812 (Tenn. 1993). The trial judge was in the best position to accredit the claimant's testimony as to the extent of his own disability, and he did. Moreover, Dr. Howell, the physician the defendant maintains should be given the greatest weight, testified it is rare that an individual returns to work after the type of injury suffered by this employee.

In determining vocational disability, the question is not whether the employee is able to return to the work being performed when injured, but whether the employee's earning capacity in the open labor market has been diminished. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 459 (Tenn. 1988). A claimant should not be penalized for his perseverance in the face of pain.

Further, Tenn. Code Ann. section 50-6-241(a)(1) provides, in part, "For injuries arising on or after August 1, 1992, in cases where an injured employee is eligible to receive any permanent partial disability benefits and the preinjury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is two and one-half (2 1/2) times the medical impairment rating." The award in this case is below that maximum. The evidence fails to preponderate against the finding of the trial judge.

(2)

Upon application by a party and approval by a proper court, benefits which are payable periodically may be commuted to one or more lump sum payment(s), if the court finds such commutation to be in the best interest of the employee and that the employee has the ability to wisely manage and control the commuted award. Tenn. Code Ann. section 50-6-229(a). Such applications are not granted as a matter of course. Forkum v. Aetna Life and Cas. Ins. Company, 852 S.W.2d 230 (Tenn. 1993). The injured worker has the burden of establishing first that a lump sum is in his best interest and, second,

that he is capable of wisely managing and controlling a lump sum, but the decision whether to commute to a lump sum is within the discretion of the trial court. Bailey v. Colonial Freight Systems, Inc., 836 S.W.2d 554 (Tenn. 1992). Thus, our review of the second issue is to determine whether the trial judge abused his discretion by commuting the award to a lump sum.

In this case, it is in the employee's best interest to obtain his benefits in a lump sum to pay off the mortgage on his home, an appropriate use. North American Royalties, Inc. v. Thrasher, 817 S.W.2d 308, 311-312 (Tenn. 1991). Mr. Bosheers also testified that any remaining funds would be placed in Certificates of Deposit for future college expenses. Again, the Supreme Court has found that a lump sum award is appropriate for future college costs. Staggs v. National Health Corp., 1993 WL 480634 (Tenn. 1993). There is substantial evidence that Mr. Bosheers has the ability to wisely manage and control a lump sum award. Accordingly, the panel finds no abuse of discretion in the trial court's commutation of the award to a lump sum.

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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Ben Cantrell, Special Justice

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William H. Inman, Senior Judge