

IN THE SUPREME OF TENNESSEE

AT NASHVILLE

<p>FILED</p> <p>June 15, 1999</p> <p>DAVIDSON CHANCERY Cecil W. Crowson Appellate Court Clerk</p>
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<p>NPS ENERGY SERVICES, INC.</p> <p style="padding-left: 40px;"><i>Plaintiff/Appellee</i></p> <p>vs.</p> <p>WILLIAM E. RANKIN</p> <p style="padding-left: 40px;"><i>Defendant/Appellant</i></p>	<p>} } } } } } } } }</p>	<p>DAVIDSON CHANCERY</p> <p>No. Below 96-2345-1</p> <p>Hon. Irvin H. Kilcrease</p> <p>No. 01S01-9805-CH-00088</p> <p>AFFIRMED</p>
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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 June 15, 1999.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(March 31, 1999 Session)

FILED
DAVIDSON CHANCERY
June 15, 1999
Hon. Iryin H. Kilcrease,
Chancellor
Cecil W. Crowson
Appellate Court Clerk

NPS ENERGY SERVICES, INC.)
)
Plaintiff-Appellee,)
)
v.)
)
WILLIAM E. RANKIN,)
)
Defendant-Appellant.)

DAVIDSON CHANCERY
June 15, 1999
Hon. Iryin H. Kilcrease,
Chancellor
No. 01S01-9805-CH-00088

For Appellant:

J. Anthony Arena
Schulman, LeRoy & Bennett
Nashville, Tennessee

For Appellee:

Jade A. Rogers
Gallatin, Tennessee

MEMORANDUM OPINION

Members of Panel:

Frank F. Drowota, III, Associate Justice
Thomas W. Brothers, Special 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 in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The injured employee contends the evidence preponderates against the trial court's finding that he is not permanently vocationally disabled. As discussed below, the panel has concluded the judgment should be affirmed.

The employee or claimant, Rankin, suffered a back strain while performing his duties as a boilermaker, while employed by NPS Energy Services, Inc. on May 2, 1996. His foreman sent him to the first aid clinic where he was treated with ice and assigned to light duty. When the pain persisted, he was referred to Dr. William Gavigan, who ordered tests and provided conservative care.

Dr. Gavigan diagnosed lumbar strain and ruled out a herniated disc. A magnetic resonance imaging test ordered by the doctor revealed "mild" and "insignificant" degenerative disc disease and a disc bulge, according to Dr. Gavigan, who detected some "symptom magnification" and opined there would be no permanent medical impairment. The claimant has continued to work as a boilermaker.

The claimant's attorney referred him to Dr. David Gaw for an evaluation. Dr. Gaw essentially agreed with Dr. Gavigan's findings, but assigned a permanent impairment rating of five percent to the whole body.

The chancellor, relying on Dr. Gavigan's opinions, found that the employee failed to establish permanency by a preponderance of the evidence. 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. § 50-6-225(e)(2). In all but the most obvious cases, permanency must be established by expert medical testimony. Wade v. Aetna Casualty and Surety Company, 735 S.W.2d 215 (Tenn. 1987).

When the medical testimony differs, the trial judge must choose which view to believe. In doing so, he is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672 (Tenn. 1991). Moreover, it is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Hinson v. Wal-Mart Stores, 654 S.W.2d 675, 675-7 (Tenn. 1983).

The record reflects that both physicians are eminently qualified orthopedic surgeons. Thus, we cannot say that the chancellor, who also had the opportunity to observe and evaluate the lay testimony, abused his discretion by

accepting the opinion of the treating physician, Dr. Gavigan.

For those reasons, the panel cannot find that the evidence preponderates against the chancellor's findings. The judgment of the trial court is affirmed. Costs on appeal are taxed to the defendant.

Joe C. Loser, Jr., Special Judge

CONCUR:

Frank F. Drowota, III, Associate Justice

Thomas W. Brothers, Special Judge