IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

WILLIAM JERRY JOHNSON,	)	
	)	
Plaintiff/Appellee,	)	CHESTER CHANCERY
	)	
v.	)	No. 02S01-9807-CH-00066
	)	
CNA INSURANCE COMPANY,	)	HONORABLE JOE C. MORRIS, JUDGE
	)	
Defendant/Appellant.	)	

For the Appellant:

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For the Appellee:

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

Members of Panel:

Justice Janice M. Holder
Senior Judge John K. Byers
Senior Judge F. Lloyd Tatum

AFFIRMED **TATUM, Senior Judge**

O P I N I O N

This workers' compensation appeal was referred to the Special Workers' Compensation Appeals Panel of the Supreme Court pursuant to Tenn. Code Ann. §50-6-225(e)(3) (Supp. 1998) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

This is an appeal by CNA Insurance Company, the workers' compensation insurance carrier for TJ & L Construction Company, from a judgment of the Chancery Court of Chester County finding that plaintiff was entitled to workers' compensation benefits on the basis of total and permanent disability to the body as a whole. It was stipulated that the plaintiff, William Jerry Johnson, was injured on February 14, 1994, during the course of his employment for TJ & L Construction Company. While lifting tires, he injured his back. In the only issue presented, the insurance carrier states that the evidence preponderates against the trial court's finding of total and permanent disability, since jobs are available to the employee within his vocational skill level and physical limitations.

The plaintiff and his wife testified in open court. The plaintiff stated he was born June 1, 1945, and had an eighth grade education, having quit school before completing the ninth grade. The plaintiff testified that he obtained a G.E.D. in 1995 or 1996.[1] Except for four years service in the Navy as a cook, the plaintiff had several jobs, all of which involved the operation of heavy equipment and manual labor.

The plaintiff testified that since the accident, he has had severe back pain and is never completely free of pain in his lower back and right hip. He testified that he obtained nerve blocks from his doctor, which made the pain bearable for about two months. The plaintiff testified that he has pain when he bends, does much lifting, or sits for more than thirty to forty minutes. When driving an automobile, he has to stop and walk around because of the pain. He cannot stand in one place for very long or walk very far without stopping and resting. He testified that he cannot bend, run, or jump without pain. He stated that he can no longer bowl, dance, ride horses, or have sex with his wife. He cannot

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[1]Educational functional testing done by Dr. William M. Jenkins on February 13, 1996, revealed that the plaintiff functioned at a tenth grade level in reading, fourth grade level in spelling, and seventh grade level in arithmetic.

remain in one position very long because of his back injury. He must get up at night and walk around, which disturbs his wife and forces her to sleep in another bedroom. The plaintiff gave several examples of activities that he could no longer perform, but we will not burden this opinion with discussing in detail these activities.

The plaintiff testified that he went to a vocational school in an attempt to take a tool and die course, but, because he was hurting so much, he lasted less than one-half day. He also attempted to drive a truck from Nashville to Chester County. He explained, "It beat me to death. I stayed in bed for about three days afterward." He testified that he could neither sit nor stand long enough to hold a regular job.

Ms. Fay Johnson, the plaintiff's wife, generally corroborated the testimony of Mr. Johnson. She testified that the plaintiff could not help around the house or carry in groceries. He is short-tempered, forgetful, and walks with a slight limp.

Dr. Moacir Schnapp, a neurologist with the subspecialty of pain management, testified for the plaintiff by deposition. Dr. Schnapp first saw the plaintiff on November 9, 1995, after he had been previously seen by other doctors whose testimony is not in the record, except for that of Dr. Feler. Dr. Schnapp diagnosed plaintiff as suffering with "lumbar facet arthropathy." He testified that plaintiff had a ten percent permanent physical impairment of the body as a whole, according to the AMA Guidelines. Dr. Schnapp thought that five percent of this impairment was attributable to preexisting lumbar degenerative conditions, and the other five percent was related to the industrial accident. The preexisting degenerative condition was not symptomatic until the time of the accident. Dr. Schnapp testified that the five percent he related to the accident was based upon plaintiff's complaint of pain. Without these complaints, the doctor would not have rated the plaintiff with regard to the injuries received in the accident.

Dr. Schnapp treated the plaintiff with physical therapy, multiple medications, and cryoprobe.[2] Dr. Schnapp gave his deposition on June 13, 1996, and the last nerve block that he had administered prior to that time was on April 19, 1996. Dr. Schnapp testified that the plaintiff's pain was caused by moving joints in his lower back, and the only way that this could be avoided is by a surgical fusion of the affected segments. He testified that this

[2]Cryoprobe is the freezing of nerves in the low back or "nerve blocks."

surgery was extensive, not always effective, and, in the plaintiff's case, he did not recommend it.

Dr. Schnapp did not exclude the plaintiff from the work force, but "returned him to whatever gainful employment that he could perform, providing his limitations were respected." Dr. Schnapp placed the following physical limitations on the plaintiff:

1. Only occasional stair or ladder climbing;
2. Only occasional bending or stooping;
3. Rarely or never prolonged stooping;
4. Only occasional kneeling;
5. Only occasional crouching;
6. Rarely or never crawling;
7. Rarely or never torso twisting;
8. Maximum lift one time only, 50 pounds;
9. Lifting floor to waist occasionally, 35-40 pounds;
10. Lifting above waist to shoulder occasionally, 30-35 pounds;
11. Frequent lift or carry, 25 pounds;
12. Push or pull, 20 pounds;
13. Standing at one time, 30 minutes;
14. Standing total in one shift, 4 hours;
15. Walking at one time, 30 minutes;
16. Walking in one shift, 5 hours;
17. Sitting at one time, 30 minutes; and
18. Sitting total in one shift, 4-5 hours.

Dr. Joseph C. Boals, an orthopedic surgeon, examined the plaintiff on July 25, 1996, at the request of the plaintiff's attorney. Dr. Boals testified on behalf of the plaintiff by deposition. Dr. Boals determined the anatomical disability of the plaintiff to be between seven and ten percent to the body as a whole, according to the AMA Guidelines, as a result of the injuries sustained in the industrial accident. He stated that he would not exclude the plaintiff from the work force, as long as the restrictions placed upon plaintiff by Dr. Schnapp were observed.

Dr. Claudio Andres Feler, a neurological surgeon, testified by deposition taken by the defendant. Dr. Feler treated the plaintiff two times, and his partner treated him on one occasion.[3] He testified that testing done by him, including a myleogram, EMG, and nerve conduction study, showed normal results. It was his opinion that the plaintiff suffered from a muscle or ligamentous injury which should recover within nine months.[4] He testified that plaintiff had no ratable impairment.

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[3]Dr. Feler and his partner treated the plaintiff in June and July, 1995.

[4]The overwhelming evidence is that plaintiff did not recover within nine months.

The plaintiff offered the deposition of Dr. William M. Jenkins, and the defendant offered the deposition of Ms. Brenda C. Dailey, both vocational experts. Taking into account the plaintiff's age, educational functioning, work history, and medical restrictions, Dr. Jenkins was of the opinion that the plaintiff was one hundred percent vocationally disabled.[5] Ms. Dailey was of the opinion that the plaintiff was eliminated from all of his past employment, but that he could presently work at some jobs with further vocational guidance. Ms. Dailey found openings in the plaintiff's general residential area for security guards, salesman, sander at a furniture factory, and jobs she described as involving light assembly work. The actual physical activity required to perform these jobs was not shown. Dr. Jenkins made no survey of employments available near the plaintiff's immediate place of residence, but based his opinion on his general knowledge of the labor market.

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). We must make an independent examination of the evidence to determine where the preponderance of the evidence lies. *Wingert v. Government of Sumner County*, 908 S.W.2d 921, 922 (Tenn. 1995). Where the trial judge has seen and heard witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must still be accorded to those circumstances on review. *Townsend v. State*, 826 S.W.2d 434, 437 (Tenn. 1992). However, this tribunal is as well situated to gauge the weight, worth, and significance of deposition testimony as the trial judge. *Seiber v. Greenbrier Indus., Inc.*, 906 S.W.2d 444, 446 (Tenn. 1995).

In *Collins v. Howmet Corp.*, 970 S.W.2d 941, 943 (Tenn. 1998), the Court stated:

> Furthermore, it is well established that the extent of vocational disability is a question of fact to be determined from all the evidence, including lay and expert testimony. Factors to be considered in determining the extent of vocational disability include the employee's job skills and training, education, age, extent of anatomical impairment, duration of impairment, local job opportunities, and the employee's capacity to work at the kinds of employment available to her in her disabled condition. The employee's own assessment of her physical condition and resulting disability is competent testimony that should be

[5]The multipliers provided in Tenn. Code Ann. § 50-6-241 are inapplicable to permanent total disability. *Davis v. Reagan*, 951 S.W.2d 766 (Tenn. 1997).

considered as well. (citations omitted).

After examining the record with the above principles in mind, we cannot say that the evidence preponderates against the finding of the trial court. The plaintiff was past 50 years of age when this accident occurred. Although he obtained a G.E.D. after quitting high school in the ninth grade, his actual academic training was very limited. He has no job skills or training in an area of employment that he is physically able to do. Although the impairment, as measured by the AMA Guidelines, is not great, the practical impairment imposed upon him by the restrictions of his treating physician greatly reduces his activity. He is in constant pain, which can only be made "bearable" by periodic nerve blocks. The medical restrictions eliminate the plaintiff from performing most activities. There is expert testimony that the plaintiff is one hundred percent vocationally disabled.

After reviewing this entire record, we find that the evidence does not preponderate against the findings and judgment of the trial judge. His judgment is affirmed.

Costs are adjudged against the defendant.

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F. LLOYD TATUM, SENIOR JUDGE

CONCUR:

_____
JANICE M. HOLDER, JUSTICE

_____
JOHN K. BYERS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

WILLIAM JERRY JOHNSON,	)	CHESTER CHANCERY
	)	NO. 8956
Plaintiff/Appellee,	)	
	)	Hon. Joe C. Morris,
vs.	)	Chancellor
	)	
CNA INSURANCE COMPANY,	)	NO. 02S01-9807-CH-00066
	)	
Defendant/Appellant.	)	AFFIRMED.

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 Appellant, and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 19th day of July, 1999.

PER CURIAM