IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(July 1999 Session)

KENNETH WAYNE JONES,	)	
	)	**SHELBY CHANCERY**
Plaintiff/Appellee,	)	
	)	**NO. W1998-00357-WC-R3-CV**
v.	)	
	)	**HON. D. J. ALISSANDRATOS,**
ITT HARTFORD INSURANCE CO. and **CHANCELLOR M & D COATINGS, INC.,**	)	
	)	
Defendants/Appellants.	)	
	)	

FILED

December 3, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

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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 F. Lloyd Tatum
Senior Judge L. T. Lafferty

AFFIRMED

L. T. LAFFERTY, SENIOR JUDGE

OPINION

This worker's compensation appeal has been referred to the Special Workers Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

This case arose from a work-related back injury. Based upon the evidence presented at trial, the trial court found that the plaintiff was entitled to an award of 60 percent permanent partial disability to the body as a whole plus additional future medical benefits as provided by statute. This award was based on a finding that the plaintiff proved by clear and convincing evidence that he met three of the four criteria in Tennessee Code Annotated § 50-6-242 to justify an award above the caps in § 50-6-241(a)(1) and (b).

The defendant submits the following issues for our review:

1. Whether the trial court erred in finding that the plaintiff is entitled to an award under Tennessee Code Annotated § 50-6-242 of greater than the maximum award under Tennessee Code Annotated § 50-6-241(a)(1)?

2. Whether the trial court erred in allowing Dr. Greg Cates to testify about the criteria in Tennessee Code Annotated § 50-6-242 when discovery responses filed by the plaintiff did not state those opinions?

Review of the findings of fact made by the trial court is *de novo* upon the record accompanied by a presumption of correctness of the findings, 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. 1990). The application of this standard requires this court to weigh in depth the factual findings and conclusions of the trial court in a worker's compensation case. *See Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452, 456 (Tenn. 1988). However, considerable deference must be given to the trial court, who has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved. *Jones v. Hartford Accident & Indem. Co.,* 811 S.W.2d 516, 521 (Tenn. 1991).

After careful review of the record, we must affirm the trial court.

EVIDENTIARY FACTS

The plaintiff is a 23 year old resident of Parkin, Arkansas. He completed the 8th grade but has failed to obtain a GED and does not read well. The plaintiff has no formal job training and has primarily worked as a sandblaster in commercial painting jobs, the same type of position he held with defendant, M & D Coatings, at the time of his injury. The plaintiff described his job duties as requiring him to hold a two and one-half to three inch diameter hose equipped with a two inch hose "whip" and a nozzle between his legs and over his shoulder. The hose contained sand that was expelled from the hose under one hundred to one hundred forty pounds of pressure in order to sandblast paint off of steel. On August 25, 1996, the plaintiff was performing his sandblasting duties in a scaffolding basket, known as a "spyder," about 60 feet off the ground on the side of a grain tank. The basket became entangled in a cable protruding from the side of the tank. As the plaintiff was attempting to free the basket from the cables, he severely injured his back. The pain was so severe that he fell to his knees and was unable to straighten up.

The plaintiff testified he sought medical treatment from Dr. Anthony Segal, a neurologist, in September, 1996. After conservative treatment, Dr. Segal performed surgery on the plaintiff's back on December 16, 1996. Subsequently, the plaintiff underwent weeks of physical therapy. The plaintiff testified that Dr. Segal permitted him to return to work with restrictions in May, 1997. The plaintiff testified he returned to work, and, due to his work restrictions, his employer had him sweep floors and do general clean up. On the following day, the plaintiff's supervisor told him to move some pallets, but the plaintiff told the supervisor he could not do so, due to his work restrictions. The supervisor advised the plaintiff that if he would not move the pallets, the supervisor would show him the "Old Millington Road," which the supervisor told the plaintiff meant the road back to Arkansas. The plaintiff testified he needed the job, so he attempted to lift the pallets. He re-injured his back during the attempt. He was referred to the Pain Clinic, where Dr. Schnapp ordered nerve blocks, an epidural, and physical therapy. The plaintiff stated that Dr. Schnapp wanted him to stay in Memphis during December, 1997, for physical therapy, and the employer's compensation carrier agreed to pay for a motel room in Memphis. However, on December 23, 1997, the carrier failed to pay for the plaintiff's motel room, so it was necessary for the plaintiff to drive back and forth from Parkin, Arkansas, to obtain physical therapy. At the time of trial, the plaintiff testified he still had some pain in his lower back, but he wanted to retum to some type of employment.

The plaintiff testified that he filed two applications with the Arkansas unemployment office but had not received any calls. He also submitted applications to grocery stores and

sought work as a farm worker in the surrounding area but was unsuccessful. The plaintiff testified he had an appointment with a rehabilitation counselor to be tested for vocational ability in June, 1997, but, due to car problems, neither the counselor nor the plaintiff was able to make the appointment.

Under cross-examination, the plaintiff stated that in January, 1998, Dr. Schnapp seriously suggested that the plaintiff obtain a GED; however, at the time of trial in August, 1998, the plaintiff had only made an inquiry about the preparatory classes. The plaintiff testified he found a vocational institution in Forrest City, Arkansas, where he could obtain a GED, but he did not have transportation to get to the site, which is about 15 miles from his home. The plaintiff agreed he did not check to see if he could attend GED classes in West Memphis, Arkansas. He testified that he did not seek any employment with any commercial or residential painters or as a courier or security guard.

Dr. Greg Cates, a vocational expert, testified that he saw the plaintiff on March 12, 1998. Dr. Cates reviewed the plaintiff's medical records, the rehabilitative physical therapy records, and a job analysis performed by Eckman/Freeman Associates. Dr. Cates did not have the plaintiff perform any physical tests but did administer a reading test to the plaintiff. According to the protocol in the Wide Range Achievement Test Reading Section, Dr. Cates found that the plaintiff reads at the 7.4 grade level. Dr. Cates testified that he reviewed the functional capacity evaluation assessment done by a physical therapist at Crittenden Physical Therapy Services, which was considered to be valid by Dr. Segal. Both Dr. Segal and the physical therapist found the plaintiff was limited, from a lifting standpoint, to approximately thirty-five (35) to fifty-five (55) pounds. Both were also concerned that the plaintiff would exceed the safe lifting capabilities and exacerbate or increase his symptoms. Dr. Cates opined that the plaintiff lost approximately 60 percent of his vocational opportunities. He stated that the Eckman/Freeman job analysis of plaintiff's sandblasting job at M & D Coatings concluded that sandblasting and commercial painting fell into the "very heavy jobs" category. It was Dr. Cates's opinion that the plaintiff is limited to light work and has lost any ability to perform in areas in which he has demonstrated capabilities in the past. Dr. Cates opined that the plaintiff would be limited to jobs where he could get up and move around every twenty (20) or thirty (30) minutes, such as machine tender, a security guard, some assembly jobs, and in the garment industry as an inspector, bundler, tagger or other positions similar to that. Dr. Cates agreed that potential employers, with knowledge of the plaintiff's problems, would generally give jobs to an individual that could perform the job requirements, rather than to an impaired applicant. However, he agreed that the plaintiff does have job opportunities, although limited to a degree.

MEDICAL EVIDENCE

Both parties stipulated to the medical reports of the treating physicians. On September 13, 1996, the plaintiff was seen by Dr. Guy J. L'Heureux, an orthopedic specialist, who believed the plaintiff had a central L4-5 disc problem, but an MRI was necessary to confirm this suspicion. On September 18, 1996, the plaintiff was referred to a Memphis physician for further treatment by the insurance carrier.

Dr. Anthony Segal, a neurosurgeon, examined the plaintiff on September 26, 1996. Dr. Segal put the plaintiff on pain medication and stated in his records that the plaintiff was not able to work. After an MRI on October 10, 1996, disclosed a central and left moderate sized disc herniation at L4-5, Dr. Segal suggested conservative treatment with medication and specific stretching execerises. On November 7, 1996, the plaintiff fell off his porch and aggravated this back injury. Based upon the plaintiff's visits between November 8 and December 16, 1996, Dr. Segal believed it was necessary to perform surgery on the L4 disc. On December 16, 1996, Dr. Segal performed a left partial hemilaminectomy and diskectomy, L4-5, which involved the removal of a ruptured left disc. On May 19, 1997, Dr. Segal permitted the plaintiff to return to work for one month with a lifting restriction of thirty-five (35) pounds frequently and fifty-five (55) pounds occasionally and, when the plaintiff works above the shoulders, twenty-five (25) pounds frequently and thirty-five (35) pounds occasionally. Dr. Segal last saw the plaintiff on July 15, 1997, and, finding that the plaintiff had reached maximum medical improvement, assigned a permanent partial impairment rating of 8 percent to the body as a whole, consistent with individuals who have had back surgery and has almost no residuals. However, the plaintiff continued to see Dr. Segal in August with recurring leg and lower back pain, which required a post-operative MRI. The MRI showed post-operative scarring around the L5 nerve rootlet and a minor bulge.

On October 21, 1997, the plaintiff was seen by Dr. Moacir Schnapp, at the request of his counsel, for re-occurring back pain. Dr. Schnapp opined that the plaintiff was suffering from post laminectomy syndrome and depression. Dr. Schnapp was concerned that the plaintiff had not worked in over a year, and his condition was made worse by inactivity, improper posture, and very likely functional overlay. Dr. Schnapp stressed the importance of the plaintiff obtaining a GED, since the chance of plaintiff returning to employment was minimal after being unemployed for a year. Dr. Schnapp recommended a nerve block on December 10, 1997, and on December 16, 1997, the plaintiff underwent an epidural-block and was put on daily physical therapy. Although the plaintiff had participated sporadically in his physical therapy, Dr. Schnapp released the plaintiff on January 6, 1998, to return to work in his previous position as a sandblaster with limitations.

Dr. Schnapp concurred with Dr. Segal's assessment of 8 percent permanent partial impairment to the body as a whole.

LEGAL ANALYSIS

I.

The defendant asserts that the trial court erred in finding that the plaintiff is entitled to an award under Tennessee Code Annotated § 50-6-242, which governs when an award greater than the maximum award under § 50-6-241 can be given. Tennessee Code Annotated § 50-6-241(b) caps the award at six (6) times the medical impairment rating when the employee is not returned to work at an equal or greater wage than he was receiving at the time of the injury. Pursuant to § 50-6-241(c), an award of five (5) times or greater must be justified by the court with specific findings of fact detailing the reasons for awarding the maximum benefits.

Before the "escape provision" of § 50-6-242 can be invoked, the trial court must determine that the plaintiff is entitled to receive the maximum award under § 50-6-241(a)(2) or (b). The trial court in this case did not make the required specific findings, but we can do so from the record. The plaintiff testified that he was returned to work but was unable to do the job and reinjured his back. Therefore, he did not have a meaningful return to work and is eligible for up to a maximum of six (6) times the anatomical impairment rating in benefits pursuant to § 50-6-241(b). In determining the extent of benefits, the court is to consider "all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition." Tenn. Code Ann. § 50-6-241(b) & (c).

In reviewing the record, we find that the plaintiff is entitled to the maximum benefits of six (6) times the anatomical rating under § 50-6-241(b). The plaintiff has a back injury that prevents him from performing the type of heavy labor that comprises most, if not all, of his work experience and skills. He has limited education and has no formal job training. Dr. Cates testified that the plaintiff is also unable to lift more than thirty-five (35) pounds and cannot sit for more than twenty (20) to thirty (30) minutes. According to Dr. Cates, the plaintiff has lost approximately 60 percent of his vocational opportunities. These facts justify the maximum award of six (6) times the anatomical rating and make the plaintiff eligible for a higher award pursuant to § 50-6-242 as follows:

> Notwithstanding any provision of this chapter to the contrary, the trial judge may award employees permanent partial disability benefits, not to exceed four hundred (400) weeks in appropriate cases where permanent medical impairment is found and the employee is eligible to receive the maximum disability award under § 50-6-241(a)(2) or (b). In such cases the court, on the date of maximum medical improvement, must make a specific documented finding, supported by clear and

convincing evidence, of at least three (3) of the following four (4) items:

(1) The employee lacks a high school diploma or general equivalency diploma or the employee cannot read or write on a grade eight (8) level;

(2) The employee is age fifty-five (55) or older;

(3) The employee has no reasonable transferable job skills from prior vocational background and training; and

(4) The employee has no reasonable employment opportunities available locally considering the employee's permanent medical condition.

In *Middleton v. Allegheny Elec. Co., Inc.,* 897 S.W.2d 695 (Tenn. 1995), the Court defined clear and convincing evidence as "evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Id.* at 697 (citing *Hodges v. S.C. Toof and Co.,* 833 S.W.2d 896 (Tenn. 1992)).

The trial court found that the plaintiff met his burden of proving items (1), (3), and (4). Defendant contends that the plaintiff did not prove items (3) or (4) by clear and convincing evidence, and, thus, the maximum award should be capped at six (6) times the anatomical rating (48 percent), rather than the 60 percent that was awarded by the trial court. There is no dispute that the plaintiff does not have a GED and cannot read on an 8th grade level. Thus, the contest focuses on whether the plaintiff has shown by clear and convincing evidence items (3) and (4), namely that he has no reasonably transferable job skills from his prior vocational background and training and that no reasonable employment opportunities are available to him.

An examination of the record supports the trial court's findings that the plaintiff met his burden of proof on items (3) and (4) by clear and convincing evidence. As to the plaintiff's job skills and training, the proof establishes the plaintiff is primarily engaged in commercial sandblasting and painting. The job requires the manual lifting of a high pressure hose to clean metal tanks for re-painting and was described by Dr. Cates as being very heavy labor. As a result of a ruptured disc, the medical experts assigned an anatomical impairment rating of 8 percent to the plaintiff with maximum lifting restrictions of fifty-five (55) pounds occasionally.[1] The plaintiff's testimony of continuous pain and problems from the date of his injury through the date of trial is corroborated by the medical reports over a time span of two (2) years. The record reveals that the plaintiff attempted to find employment locally in Parkin, Arkansas, through the unemployment office and

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[1]In sandblasting, the plaintiff is required to place a high pressure hose between his legs and up to his shoulders to concentrate the spray of sand to remove old paint or rust.

various groceries stores and farms in the area, but was unsuccessful. Although the vocational expert did not have the plaintiff perform any tests to determine reasonable transferrable job skills, he did determine, from interviews with the plaintiff, the medical records, the functional capacity evaluation done by the Crittenden Rehabilitative Physical Therapy Services, and the defendant's job analysis that the plaintiff had a 60 percent vocational impairment.[2]

The trial court had the opportunity to hear the testimony and observe the witnesses. The trial court was in the best position to determine credibility. We find the evidence does not preponderate against the trial court's finding of 60 percent vocational disability, and we affirm.

II.

The defendant further asserts that the trial court erred in permitting Dr. Greg Cates, vocational expert, to testify about the criteria of Tennessee Code Annotated § 50-6-242, when discovery responses filed by the plaintiff did not state those opinions. The plaintiff counters that the trial court did not abuse its discretion in permitting Dr. Cates's testimony.

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[2]Dr. Cates did testify that the plaintiff could perform certain entry level unskilled jobs as a security guard, some assembly jobs, and jobs in the garment industry. However, the record is silent these jobs were reasonably available locally in the Parkin, Arkansas, area.

At the onset of the trial, the defendant, in a motion in limine, moved the trial court to exclude the testimony of Dr. Cates concerning "the plaintiff's lack of reasonable job skills," because that information was not included in plaintiff's interrogatory responses. Tennessee Rule of Civil Procedure 26.02 allows a party through interrogatories to require the other party to identify any expert witnesses the other party expects to testify at trial along with the substance of the expert's testimony. In addition, Rule 26.05 provides that a party is under a duty to reasonably supplement his response to a request for the identity of expert witnesses expected to be called at trial. Exclusion of an expert's testimony is an appropriate sanction for failure of a party to comply with these rules.

In the instant case, the trial court reviewed the plaintiff's response, and in overruling the defendant's motion in limine, held "a reasonable interpretation of that interrogatory is sufficient to deal with these issues and put all parties on notice thereof." We cannot say that the trial court abused its discretion in denying the defendant's motion to exclude the testimony of Dr. Cates. *Lyle v. Exxon Corp.,* 746 S.W.2d 694, 699 (Tenn. 1987).

We affirm the trial court's judgment. The costs of this cause are taxed to the defendant for all of which execution may issue.

_____
L. T. LAFFERTY, SENIOR JUDGE

CONCUR:

_____
JANICE M. HOLDER, JUSTICE

_____
F. LLOYD TATUM, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

KENNETH WAYNE JONES,	)	SHELBY CHANCERY
	)	NO. 109965-3 R.D.
Plaintiff/Appellee,	)	
	)	Hon. D. J. Alissandratos,
vs.	)	Chancellor
	)	
ITT HARTFORD INSURANCE CO. and M & D COATINGS, INC.,	)	NO. W1998-00357-WC-R3-CV
	)	
Defendants/Appellants.	)	

AFFIRMED

FILED

December 3, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

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 the Defendants, for which execution may issue if necessary.

IT IS SO ORDERED this 3rd day of December, 1999.

PER CURIAM