***IN THE SUPREME OF TENNESSEE***

***AT NASHVILLE***

**FILED**

**November 19, 1999**

**Cecil Crowson, Jr.**
**Appellate Court Clerk**

| | | |
|---|---|---|
| *SAMUEL LOPICCOLLO* | } | *RUTHERFORD CHANCERY* |
| | } | *No. Below* |
| *97WC-1529* | | |
| *Plaintiff/Appellee* | } | |
| | } | *Hon. Robert Corlew, III* |
| *vs.* | } | |
| | } | |
| | } | *No. M1998-00240-WC-R3-CV* |
| *PARAMOUNT PACKAGING CORPORATION (TENNESSEE) AND ST. PAUL FIRE & MARINE INSURANCE COMPANY* | } | |
| | } | |
| *Defendant/Appellants* | } | *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 defendant/appellant, Paramount, for which execution may issue if necessary.*

*IT IS SO ORDERED on November 19, 1999.*

*PER CURIAM*

**IN THE SUPREME COURT OF TENNESSEE**

**SPECIAL WORKERS' COMPENSATION APPEALS PANEL**

**AT NASHVILLE**
**(July 15, 1999 Session)**

**FILED**

**November 19, 1999**

**Cecil Crowson, Jr.**
**Appellate Court Clerk**

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|---|---|---|
| SAMUEL LOPICCOLLO, | ) | RUTHERFORD CHANCERY |
| | ) | |
| Plaintiff-Appellee, | ) | Hon. Robert Corlew, III, |
| | ) | Chancellor. |
| v. | ) | |
| | ) | M1998-00240-WC-R3-CV |
| PARAMOUNT PACKAGING | ) | |
| CORPORATION (TENNESSEE) AND | ) | |
| ST. PAUL FIRE & MARINE | ) | |
| INSURANCE COMPANY, | ) | |
| | ) | |
| Defendants-Appellants. | ) | |

For Appellants:

Sharon E. England
Brewer, Krause & Brooks
Nashville, Tennessee

For Appellee:

Douglas B. Omer
Nashville, Tennessee

MEMORANDUM OPINION
MAILED:

Members of Panel:

Frank F. Drowota, III, Associate Justice, Supreme Court
Samuel L. Lewis, Special Judge
Frank Clement, Jr., Special Judge

AFFIRMED

Lewis, Judge

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. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employer-appellant, Paramount Packaging Corporation ("Paramount"), contends that the preponderance of evidence establishes that the fifty-eight (58) percent whole body vocational disability rating awarded to the employee-appellee, Samuel Lopiccollo ("Lopiccollo"), at trial is too high and that the trial court's decision should be reversed. After reviewing the record, this panel finds that the evidence does not preponderate against the decision of the trial court.

Lopiccollo is thirty-eight years old and has a high school education. He worked for more than thirteen years as a press operator for Paramount. His job at Paramount required frequent lifting over fifty (50) pounds. Lopiccollo had vocational training for auto mechanics while he was in high school, but he never used this skill in any employment. All his former jobs required physical ability such as lifting to carry out his task.

On October 3, 1997, Lopiccollo was injured while he was working on the printing press. Dr. Thomas L. Gautsch, who treated Lopiccollo, diagnosed him as having a central disc herniation at L5-S1 level. To remove the herniation, Dr. Gautsch performed a microdiscectomy on November 24, 1997. Three months after the surgery, Lopiccollo continued to have back pain, but his leg pain had largely resolved. Lopiccollo stopped taking his medication on his own. Pursuant to AMA Guidelines, Dr. Gautsch assigned a fifteen percent permanent partial impairment rating and imposed restrictions limiting Lopiccollo to frequent lifting of up to ten pounds, occasional lifting and carrying of up to twenty pounds, with no bending, squatting, climbing, or reaching above shoulder level.

On March 13, 1998, Dr. Gautsch saw Lopiccollo after a Functional Capacity Evaluation (“FCE”) was performed. At that point, Dr. Gautsch

determined that Lopiccollo had reached maximum medical improvement and that he would set the permanent restrictions as determined by the FCE. The measurements of the FCE recommended that Lopiccollo could lift thirty pounds occasionally, fifteen pounds frequently and six pounds continuously. It also recommended that he could squat, kneel, sit, stand and walk frequently (34-66%), and bend, stair climb, and reach above the shoulder level continuously (67-100%). Based on the FCE, it was determined that Lopiccollo would be able to perform work in the "light" category.

Due to his disability, Lopiccollo thought that he could not return to his previous jobs. He also thought he could not find a job in the printing industry under his present physical condition. After the injury, Lopiccollo did not seek employment anywhere. Instead, he planned to go to school to find a new field of work. In the first place, Lopiccollo registered at Motlow College to take vocational training courses for heating and air conditioning. However, because of the restrictions on him for lifting and other physical activities, he decided to register for training as a pharmaceutical technician.

At the time of trial, Lopiccollo was not taking any medication except Ibuprofen and was not using a back brace or a TENS unit. He was raising about forty game chickens for profit.

The parties in this case stipulated that Lopiccollo sustained an injury in the course and scope of his duties as an employee of Paramount, that notice was proper, that medical bills have all been paid, and that the compensation rate be $394.82 per week. The trial court found that Lopiccollo sustained a fifteen (15) percent anatomical impairment due to his injury and awarded him a fifty-eight (58) percent vocational disability apportioned to the body as a whole.

The review of trial court's fact finding is de novo upon the record, accompanied by a presumption of the correctness, unless the preponderance of the evidence is otherwise. See Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 1998). Appellate courts must conduct an independent examination of the record to determine where the preponderance of the evidence lies. Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1991).

Paramount asserts that the trial court erred in awarding Lopiccollo a fifty-eight (58) percent permanent partial disability to the body as a whole because the court based its findings on erroneous facts. Paramount insists that the trial court believed the erroneous view of the restrictions assessed by Dr. Gautsch instead of the recommendation by the FCE. Paramount also insists that the trial court placed too much weight on Lopiccollo's testimony that he would be unable to return to prior employment due to an erroneous understanding of his restriction.

This panel will not decide on whether Dr. Gautsch's restrictions or the FCE's recommendation indicates more accurately the physical condition of Lopiccollo. However, in either case, Lopicollo will only be able to work in the "light" category, and he will have some kinds of limits on squatting, kneeling, balancing, standing, and walking. In either case, the restrictions imposed on him on lifting will preclude him from performing his previous job as a press operator, which requires frequent lifting over fifty (50) pounds. All of the jobs Lopiccollo had before he worked for Paramount required lifting in some form. The evidence in the record demonstrates that his impairment significantly limited the types of employment for which he was qualified and diminished his ability to earn wages in an employment that would have been available to him in an uninjured condition.

Paramount questions the validity of Lopiccollo's testimony, calling this panel's attention to facts such as Lopiccollo's discontinuance of medication on his own and his raising of game chickens for profit. In Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452 (Tenn. 1988), this Court held that the ultimate issue is the extent of vocational disability once medical evidence establishes causation and permanency. Id. at 457. Here, the facts brought up by Paramount may be relevant to the issue in this case, but these facts are ineffective in discrediting the medical evidence, which illustrates that Lopiccollo has sustained a substantial permanent injury. In addition, Paramount failed to show the link between these facts and Lopiccollo's working ability that would affect his employment in the open labor market or his chance of returning to previous positions.

Paramount insists that Lopiccollo's award should approximate the 2½ times cap (15% medical impairment rating × 2½ = 37.5% maximum permanent partial disability award) set under Tenn. Code Ann. § 50-6-241(a)(1) (Supp. 1998). It argues that considering his physical condition, his

intelligence, and his future plan to take courses at Motlow College, Lopiccollo will have numerous employment opportunities available in the future.

As Paramount admitted, the 2½ times cap applies only when the pre-injury 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. Tenn. Code Ann. § 50-6-241(a)(1) (Supp. 1998). Here, Lopiccollo never returned to his previous employment and his physical condition precluded him from doing so. If Lopiccollo finishes his courses at Motlow College, he might have numerous employment opportunities and have an income greater than before. However, this scenario is purely speculative. Moreover, reducing benefits because the employee has registered at a college will have a negative effect on injured workers' rehabilitation. In Harlan v. McClellan, 572 S.W.2d 641 (Tenn. 1978), this Court noted that an employee who rehabilitates himself and returns to work rather than relying on public relief should not be penalized for his rehabilitation or discouraged from reentry into the work force by the denial of benefits for subsequent injuries. Id. at 643-44. Here, Lopiccollo actively sought a job that he can do under his limited physical ability and registered at an educational institute to take proper courses. It may be true that Lopiccollo might have a better chance to obtain employment in the future upon completion of additional course work. However, if this panel were to lower the disability rate because of Lopiccollo's efforts to rehabilitate himself, this decision could create an incentive for injured employees to rely on public relief rather than to seek new jobs.

Accordingly, the judgment of the trial court is affirmed. Costs on appeal are taxed to the defendant-appellant, Paramount.

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Samuel L. Lewis, Special Judge

CONCUR:

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Frank F. Drowota, III, Associate Justice,
Supreme Court

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Frank Clement, Jr., Special Judge