

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, NOVEMBER 1999 SESSION

FILED
March 28, 2000
Cecil Crowson, Jr.
Appellate Court
Clerk

JAMES G. SPEARS,)	ANDERSON CIRCUIT
)	
Plaintiff/Appellee,)	
)	
vs.)	Hon. James B. Scott, Jr.,
)	Circuit Judge
PATHWAY BELLOWS, INC.,)	
)	
Defendant/Appellant.)	No. 03S01-9812-CV-00148

For the Appellant:

James T. Shea, IV
P. O, Box 1708
Knoxville, TN 37901-1708

For the Appellee:

Roger L. Ridenour
P. O. Box 530
Clinton, TN 37717-0530

MEMORANDUM OPINION

Members of Panel:

E. Riley Anderson, Chief Justice
Roger E. Thayer, Special Judge
H. David Cate, Special Judge

AFFIRMED.

CATE, Special Judge

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 to the Supreme Court of findings of fact and conclusions of law.

The defendant, Pathway Bellows, Inc., appeals the trial court's award of twenty percent (20%) permanent partial disability to the left upper extremity.¹ We agree with the trial court and affirm.

The plaintiff, James Spears, was 56 years old in February, 1999. He dropped out of school in the 10th grade and joined the U. S. Army. While in the Army he worked in communications and received his general equivalency diploma.

After being honorably discharged from the Army, he went to work as an assembler and later as a welder. While working for a small machine shop he learned to weld very thin exotic material. This type of welding requires a very steady hand and a tremendous amount of concentration.

In 1969, the plaintiff went to work for the defendant. From 1969 to 1997 the plaintiff traveled all over the world welding exotic material for the defendant.

On August 4, 1997, he was cutting parts that weighed around 200 pounds. He would push, catch and stand them on the ground. Later in the day his left shoulder began to bother him. He told his supervisor who sent him to Ambulatory Care where he saw Dr. Hilton.

Subsequently, Dr. Hilton referred the plaintiff to Dr. Sidney Wallace, an orthopedic specialist, who first saw the plaintiff on September 17, 1997. Dr. Wallace diagnosed the plaintiff's injury as a rotator cuff syndrome on the left side. Dr. Wallace treated the plaintiff from September 17 through November 11, 1997, when Dr. Wallace released the plaintiff to return to his normal work duties. At this time Dr. Wallace felt the plaintiff should have another physician examine him because he had seen a video, showing the plaintiff doing things, which he thought impaired the doctor-patient relationship.

¹T.C.A. § 50-6-207 (3)(A)(ii)(m) denotes the upper extremity as arm. The parties agreed during oral argument that the final judgment mistakenly awarded benefits to the body as a whole and should be amended to award benefits to the arm.

The video as interpreted by Dr. Wallace indicated the plaintiff was climbing in and out of a bobcat and showed him raising the hood of a truck using his left arm. Dr. Wallace thought these efforts of the plaintiff were inconsistent with his instructions to not use his left hand. Dr. Wallace opined that the plaintiff had sustained no permanent impairment.

The plaintiff was terminated by the defendant in November, 1997. The cause of the termination is currently involved in other litigation.

The plaintiff saw Dr. Paul Naylor, an orthopedic surgeon, for evaluation on March 30, 1998. Dr. Naylor diagnosed the plaintiff's problem as an impingement syndrome, which is an irritation of the rotator cuff due to an overlying acromial bone that was exacerbated by his lifting at work on August 4, 1997. He felt the plaintiff had sustained a 5% permanent impairment to his upper extremity and that he should avoid repetitive or significant overhead lifting.

The plaintiff indicated he could return to the work he was doing when he was terminated, which was inside and did not require lifting above shoulder level. However he would have difficulty doing work requiring raising his arm above shoulder level, which could be required in other welding work such as outside work.

Dr. Craig Colvin, a vocational rehabilitation counselor, believed the plaintiff was 25% to 30% vocationally impaired with accommodations, but if there were no work restrictions, there would be no impairment.

Jane Colvin Robinson, a vocational rehabilitation counselor, indicated that there would be no vocational impairment based on Dr. Wallace's no restriction assessment, and 12% to 15% vocational impairment based on Dr. Naylor's restrictions.

The case is to be reviewed *de novo* accompanied by a presumption in favor of the correctness of the findings of fact by the trial court unless we find the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

Concerning the award of permanent disability, in weighing evidence, the trial court is not bound by any witnesses' testimony but has the discretion to conclude that the opinion of one witness should be accepted over the opinion of another witness. Thomas v. Aetna Life & Cas. Co., 812 S. W. 2d 278 (Tenn. 1991); Orman v. Williams Sonoma, Inc., 803 S. W. 2d 672, 676 (Tenn. 1991).

In fixing permanent legal disability, the trial court must consider many factors including the employee's age, education, work experience, local job opportunities, etc., and this is to be examined in relation to the open labor market and not whether the employee is able to return and perform the job held at the time of the injury.

Orman v. Williams Sonoma, Inc., supra; Clark v. National Union Fire Ins. Co., 778 S. W. 2d 586, 588 (Tenn. 1989).

Also, vocational disability evidence is one factor to be considered in determining the loss of use of a scheduled member. Duncan v. Boeing Tennessee, Inc., 825 S. W. 2d 416 (Tenn. 1992).

Both doctors found objective evidence of an injury. The plaintiff is restricted from performing overhead lifting due to pain, which decreases his occupational marketability as found by the trial court. Accordingly, we can not conclude that the evidence preponderates against the determination of the trial court.

The judgment of the trial court awarding 20% permanent partial disability to the left arm is affirmed. Costs of the appeal are taxed to the defendant-employer.

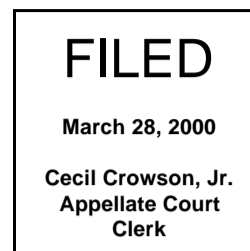
H. David Cate, Special Judge

CONCUR:

E. Riley Anderson, Chief Justice

Roger E. Thayer, Special Judge

IN THE SUPREME COURT OF TENN
AT KNOXVILLE



JAMES G. SPEARS, Plaintiff/Appellee)	Anderson Circuit
)	No. 97LA0510
)	
VS.)	No. E 1998-00636-WC-R3-CV
)	
PATHWAY BELLOWS, INC. Defendant/Appellant.)	Hon. James B. Scott, Jr. Circuit Judge
)	

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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

Costs on appeal are taxed to the Defendant/ Appellant, Pathway Bellows, Inc. and James T. Shea, IV , surety, for which execution may issue if necessary.

03/28/00