

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

FILED

February 21, 1997

**Cecil W. Crowson
Appellate Court Clerk**

JAMES W. SMITH,) No. 01S01-9604-CR-00073
Plaintiff/Appellee)
)
) WILSON COUNTY CRIMINAL
v.)
)
WILSON COUNTY CONCRETE CO., INC.) HON. J.O. BOND, JUDGE
and AETNA CASUALTY & SURETY CO.,)
Defendants/Appellants.)
_____)

FOR THE APPELLANTS:

WILLIAM B. JAKES III
ALICE MARGARET ESSARY
300 James Robertson Parkway
Court Square Building
Nashville, TN 37210

FOR THE APPELLEE:

HUGH GREEN
100 Public Square
Lebanon, TN 37081

MEMORANDUM OPINION

MEMBERS OF PANEL:

ADOLPHO A. BIRCH, JR., CHIEF JUSTICE, SUPREME COURT
JOHN K. BYERS, SENIOR JUDGE
WILLIAM S. RUSSELL, RETIRED JUDGE

AFFIRMED

RUSSELL, SPECIAL JUDGE

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated Section 50-6-225 (e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

THE CASE

James W. Smith, the plaintiff/appellee, age 60, was a 35 years loyal and totally satisfactory employee of the defendant/appellant concrete marketing company. His job was operating and maintaining a truck used for mixing and delivering concrete, as well as doing mechanic and other maintenance shop work.

On February 14, 1994, he injured his back in the course and scope of his employment. Two physicians who treated his injury opined that he sustained a 5% permanent anatomical impairment. A third physician, after conducting an examination of the employee, found no permanent anatomical impairment.

Dr. Robert Weiss, an attending physician, placed work restrictions of no heavy lifting of more than 40 pounds and no repetitive lifting of 30 pounds or more, no repetitive bending and stooping, and no extended maintenance of a single posture. It was

testified that the plaintiff would not be able to do his previous job.

The trial judge determined that the plaintiff was 100% permanently disabled to work and entered judgment accordingly.

THE ISSUE

The sole issue is whether or not the trial judge erred in awarding 100% vocational disability when the expert medical evidence was that the plaintiff's anatomical impairment was 5%.

Tennessee Code Annotated Section 50-6-242 requires that the trial judge make specific findings, supported by clear and convincing evidence, that at least three of the four criteria set out therein are proved before the award can exceed 6 times the 5% anatomical impairment testified to by the medical experts. The employer concedes that the first two criteria are proved; that is, the employee lacked a high school diploma and cannot read or write on an eighth grade level; and he is 55 years old or older.

The issue is whether or not there is clear and convincing evidence that James W. Smith either had no reasonably transferable job skills from prior vocational background and training, or that he has no reasonable employment opportunities available locally considering his permanent medical condition.

STANDARD OF REVIEW

Our review is de novo upon the record, accompanied by a presumption of the correctness of the judgment unless the evidence otherwise preponderates. Tennessee Code Annotated Section 50-6-

FINDINGS OF TRIAL JUDGE

_____The trial judge specifically held, inter alia:

Does he have any transferable job skills to other jobs? * * * The answer's no.

* * * * *

I think the clear and convincing evidence in this case is that if he had to go to work 40 hours a week to receive his pay week after week he couldn't do it, not based on what I've seen and what I've read. I don't think he could do it.

* * * * *

And I don't know of any other job he could do in this community, because there aren't [sic] any proof of them.

CONCLUSION

The evidence well supports the factual findings and judgment of the trial court. We affirm the judgment, and remand the case for its enforcement. Costs on appeal are assessed to the appellants.

WILLIAM S. RUSSELL, SPECIAL JUDGE

CONCUR:

ADOLPHO A. BIRCH, JR.,

CHIEF JUSTICE

JOHN K. BYERS, SENIOR JUDGE

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JAMES W. SMITH,	}	WILSON CRIMINAL
	}	No. 94-558
Plaintiff/Appellee	}	
	}	Hon. James O. Bond,
vs.	}	Judge
	}	
WILSON COUNTY CONCRETE CO.,	}	No. 01S01-9604-CR-00073
INC. and AETNA CASUALTY &	}	
SURETY CO.,	}	
	}	
Defendants/Appellees	}	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 Defendants/Appellants and Surety, for which execution may issue if necessary.

IT IS SO ORDERED on February 21, 1997.

PER CURIAM