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

LARRY DONALD SETSOR, Plaintiff/Appellee v. ENGLAND CORSAIR UPHOLSTERY MFG. COMPANY, INC., Defendant/Appellant	)	CLAIBORNE CHANCERY NO. 03S01-9708-CH-00103 BILLY JOE WHITE, CHANCELLOR

For the Appellant:	**For the Appellee:**
William A. Simms ARNETT, DRAPER & HAGOOD 2300 First Tennessee Plaza Knoxville, TN 37929	James M. Davis 214 North Jackson Street Morristown, TN 37814

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

Members of Panel:

Justice Adolpho A. Birch, Jr.
Senior Judge William H. Inman
Special Judge Roger E. Thayer

AFFIRMED

INMAN, Senior Judge

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with T.C.A. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The employee [appellee] sustained three successive cervical spine injuries while working for the employer [appellant]. Appellee filed suit in January 1995 for the first injury and in August 1995 for the second injury. Appellant filed suit in August 1996 for judicial determination of its rights and obligations after the appellee alleged the third injury in May 1996. These three cases were consolidated for trial.

The trial judge found the appellee had sustained 25 percent vocational disability from the first injury, 25 percent from the second injury, and no vocational disability from the third injury. The employer appeals, insisting that the trial judge improperly assessed the credibility of the medical evidence to reach an excessive award and erred in authorizing the employee to choose a new treating doctor.

We affirm the judgment of the trial court.

Larry Donald Setsor, the appellee, is 45 years old, has a high school education, and has three months' vocational training[1] for air-conditioning and refrigeration repair. He also trained to sell insurance, and attempted unsuccessfully to do so for eight months. His work experience includes upholstering, assembly line production and truck driving for this employer.

In April 1994, appellee ruptured a cervical disc at C6/7 while unloading furniture at work. The employer sent him to a chiropractor, who referred him to Dr. Fred Killeffer, a neurosurgeon, who performed surgical removal of a disc

[1]He did not complete the course.

fragment and decompression on August 2, 1994. Dr. Killeffer assessed ten percent permanent impairment to the body as a whole for this injury, based on the *AMA Guidelines,* 4th Ed., and returned the appellee to work with no restrictions in October, 1994.

After the appellee returned to work, he developed an aggravation of the previous neck injury. Dr. Killeffer performed a second cervical disc surgery at C5/6 on June 27, 1995. After this surgery Dr. Killeffer assessed an additional five percent permanent impairment to the body as a whole and returned the appellee to work with no restrictions in October, 1995.

In May 1996 the employee was involved in an automobile accident while driving for the employer and claimed another neck injury. He was treated conservatively by Dr. Killeffer, who released him to return to work on August 8, 1996 with no restrictions and no permanent impairment.

The employee underwent examination and evaluation by two independent medical examiners. Dr. Gilbert Hyde, orthopedic surgeon, assessed 26 percent permanent partial impairment to the body as a whole for his three injuries combined[2] and opined he should avoid repetitive bending, twisting or motion of the head and neck and should lift no more than 20 to 25 pounds or ten pounds frequently. Dr. Wayne Page, board-certified in family practice, who practices occupational medicine, assessed 22 percent permanent partial impairment to the body as a whole[3] and opined he should avoid repetitive bending and twisting of the neck or lifting over 30 pounds.

Dr. Norman Hankins, vocational rehabilitation specialist, testified that the employee has an I.Q. of 115, reads at the eighth grade level and performs math

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[2]Ten percent for the first injury; ten percent for the second injury, and six percent for the third injury.

[3]Ten percent for the first injury; ten percent for the second injury, and two percent for the third injury.

at the high school level. His clerical skills are in the lowest five percent. He has no restrictions on working conditions as defined by the U. S. Department of Labor, *i.e.*, he can work inside or outside, in various temperatures and/or humidities, and around noise, gas, fumes, dust and odors. Tests to determine malingering revealed that the employee put forth a good effort. Considering the work restrictions placed on him by the various medical doctors, the employee would have a loss of 65 percent of the jobs available to him in Claiborne, Campbell, Scott, Union, Anderson and Knox counties.

Registered Occupational Therapist Jennifer Hughes interpreted testing performed by a physical therapy technician in January 1996 and opined the employee met or exceeded all work requirements for his current job.

The employee was limited to a maximum vocational disability award of two and one-half times the medical impairment ratings, since he returned to work at the same or higher pay for this employer;[4] therefore the trial court was faced with the following maximum awards based on the medical evidence:

(1) Dr. Killeffer - 15% medical = maximum of 37.5% vocational
(2) Dr. Hyde - 26% medical = maximum of 65% vocational
(3) Dr. Page - 22% medical = maximum of 55% vocational

The trial court awarded 50 percent vocational impairment to the body as a whole, which was apportioned as 25 percent for the first injury, 25 percent for the second injury, and zero percent for the third injury.

All medical experts agreed that the appellee's medical impairment for the first injury was ten percent. The trial court applied the maximum multiplier and determined that the employee had a 25 percent vocational disability from the first injury.

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[4]T.C.A. § 50-6-241(a)(1)

The medical experts differed in their opinions about the medical impairment the appellee suffered from his second injury, with Dr. Killeffer assessing five percent, Dr. Hyde ten percent and Dr. Page ten percent. The trial court, accepting the opinions of two of the medical experts, Drs. Hyde and Page, over that of Dr. Killeffer, found the appellee had sustained ten percent medical impairment, and awarded 25 percent vocational impairment by applying the two and one-half times multiplier.

The medical experts again differed in their opinions about the medical impairment the appellee suffered from his third injury, with Dr. Killeffer assessing zero percent, Dr. Hyde six percent and Dr. Page two percent. In this instance, the trial judge accepted the opinion of Dr. Killeffer over that of Drs. Hyde and Page, and found no permanent impairment.

In making determinations, the court shall 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. T.C.A. § 50-6-241(a)(1); *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986).

The trial judge commented extensively on the depositional testimony of the medical experts, and it is clear that he considered their testimony in depth.[5] We have reviewed the evidence *de novo*, applying the factors set forth in T.C.A. § 50-6-241(a)(1), and conclude that the preponderance of the evidence supports the trial judge's decision to award 50 percent vocational disability.

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[5]The trial judge also commented on the record about the medical experts' reputations, which comments we will not consider. "Whatever may have been the personal observations and individual views of the judge as a person, these factors have no place whatever in his exercise of judicial discretion." *Vaughn v. Shelby Williams*, 813 S.W.2d 132 (Tenn. 1991), citing *Moore v. Russell*, 294 F. Supp. 615, 620-21 (E.D. Tenn. 1968). In the case before us, whatever the trial judge's personal views may be, it is apparent that he accredited Dr. Hyde in one instance and Dr. Killeffer in another, which indicates to this panel that his decision was based on the testimony itself and not on any personal views.

The employer next argues that the trial court erred in allowing the employee to choose another doctor. The judgment provides:

> "10. The Court finds that if the Employee needs treatment regarding the injuries received on April 25, 1994 or the aggravation injury occurring between September 1994 and March 1995, and if the Employee wishes to change from his current treating physician of Fred A. Killeffer, M.D. with regard to the future treatment of said injuries, the Employee may do so upon providing written notification to his Employer of his desire to do so, whereupon the Employer and its Insurance Carrier shall provide the Employee with a panel of three physicians as required by T.C.A. § 50-6-204(a)(4)."

All of the evidence proves that the employee was never given a panel of three physicians from which to choose a treating doctor. We find that the trial judge was within his statutory authority[6] in ordering the employer to do so.

The judgment of the trial court is affirmed with costs assessed to the appellant.

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William H. Inman, Senior Judge

CONCUR:

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Adolpho A. Birch, Jr., Justice

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Roger E. Thayer, Special Judge

[6] **T.C.A. § 50-6-204(a)(4).** "The injured employee shall accept the medical benefits afforded hereunder; provided, that the employer shall designate a group of three or more reputable physicians or surgeons not associated together in practice, if available in that community, from which the employee shall have the privilege of selecting the operating surgeon or the attending physician . . ."