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

VIRGIL RAINEY, Plaintiff/Appellant v. OAK RIDGE SCHOOLS, Defendant/Appellee and DINA TOBIN, DIRECTOR, DIVISION OF WORKERS' COMPENSATION, TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND, Third-party defendants/Appellees	)	ANDERSON CIRCUIT NO. 03S01-9607-CV-00077 HON. JAMES B. SCOTT, JR., JUDGE

For the Appellant:	**For the Appellee--Second Injury Fund:**	**For the Appellee--Oak Ridge Schools**
Bruce D. Fox Ridenour, Ridenour & Fox 108 S. Main Street P. O. Box 530 Clinton, TN 37717-0530	John Knox Walkup Attorney General & Reporter Dianne Stamey Dycus Senior Counsel Civil Division 1510 Parkway Towers 404 James Robertson Pkwy Nashville, TN 37243-0499	Pamela L. Reeves P.O. Box 131 Knoxville, TN 37717

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

Members of Panel:

Frank F. Drowota, III, Justice
William H. Inman, Senior Judge
Joseph C. Loser, Jr., Special Judge

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 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 plaintiff alleged that on February 15, 1994, during the course of his employment as a janitor, he suffered a lumbar strain while lifting a trash barrel which resulted in permanent, partial disability.

As the case unfolded it developed that the plaintiff had a job-related injury in 1979, requiring surgery, for which he received an award for 21.25 percent permanent partial disability.

The medical proof established that the 1994 lifting incident aggravated a long-standing disc problem to the extent of causing some nerve irritation but no anatomical changes. The treating orthopedic physician, Dr. Fred Killeffer, testified that the plaintiff had a four percent impairment attributable to the 1994 accident, but opined that he should not continue to work as a painter or custodian.

The defendant offered the plaintiff continued employment at the same wages, with an accommodation for the restrictions recommended by his physician. The plaintiff testified that he attempted to work but could not do so within the lifting restrictions.

The trial judge found that the plaintiff was unable to return to his former employment and awarded him "six times his aggravation of a pre-existing condition which is 24 percent to the body as a whole." We assume this finding is intended to mean six times the impairment of four percent attributable to the 1994 injury.

The plaintiff appeals, insisting that his entitlement should not have been limited to six times his impairment because he met three of the four criteria set forth in Tenn. Code Ann. § 50-6-242 and thus should have been awarded a greater degree of disability.

Pursuant to the provisions of Tenn. Code Ann. § 50-6-242, a trial court *may* award an employee permanent partial disability benefits in excess of the maximum disability allowed by applying the multiplier but not to exceed 400 weeks. In such cases, there must be clear and convincing evidence to support at least three of the following four criteria:

1. The employee lacks a high school diploma or general equivalence diploma for the employee cannot read or write on a grade eight level;

2. The employee is age 55 or older;

3. The employee has no reasonably transferrable job skills from prior job vocational background and training; and

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

As the trial court held, the plaintiff had the burden to prove by aclear and convincing evidence that he met at least three of these factors. *Tindall v. Waring Park Association,* 725 S.W.2d 935, 937 (Tenn. 1987). The Supreme Court has previously noted that the legislature clearly intended to restrict disability awards in workers' compensation cases and that the delineated limits should be exceeded only when there is a showing by clear and convincing evidence that the limits should be exceeded. *Middleton v. Allegheny Electric Co., Inc.,* 897 S.W.2d 695, 698 (Tenn. 1995).

The plaintiff, age 58, does not have a high school diploma or a GED but is able to read and write without problem. The trial court did not find, however, that the plaintiff has no reasonably transferrable job skills or that there are no reasonable employment opportunities available.

The vocational expert evidence offered by the plaintiff was the testimony of Dr. Clay Colvin, who testified that the plaintiff has no reasonably transferrable job skills and that he does not believe there are any reasonable job opportunities available for him. Dr. Colvin admitted, however, that he performed no diagnostic, vocational, psychological or functional capacity tests upon the plaintiff, whom he saw only one time in July, 1995, for approximately one hour. At the time of his evaluation, Dr. Colvin had not seen any medical restrictions by Dr. Killeffer and had not reviewed Mr. Rainey's functional capacity evaluations. Moreover, he conceded that if the plaintiff exhibited mobility as alleged by the employer, he would more than likely be capable of doing light duty work.

There was evidence presented that the plaintiff had job skills and reasonable employment opportunities available. Vivian Bumgardner, private investigator, testified that she observed Mr. Rainey squatting, standing, walking, climbing in and out of a truck, operating a wrecker service, including hauling and selling junk cars,

operating a tractor and changing the equipment on the tractor. This testimony supports the opinion of Dr. Killeffer, the treating physician, who testified that Mr. Rainey is capable of light duty work.

We note, as did the trial judge, the abundance of contradictory evidence in the record which focuses on the credibility issue. Since the trial court saw and heard the witnesses, considerable deference should be given to his decision. *Townsend v. State,* 826 S.W.2d 434, 437 (Tenn. 1992).

Our review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, 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. 1991).

We find that the evidence preponderates in favor of the trial court's opinion, which is affirmed. Costs are assessed to the appellant.

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William H. Inman, Senior Judge

CONCUR:

_____
Frank F. Drowota, III, Justice

_____
Joseph C. Loser, Jr., Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

VIRGIL RAINEY,	)	ANDERSON CIRCUIT
	)	No. 94LA0407
Plaintiff/Appellant,	)	
vs.	)	Hon. James B. Scott, Jr.
	)	Judge
OAK RIDGE SCHOOLS	)	
	)	
Defendant/Appellee,	)	No. 03S01-9607-CV-00077
	)	
DINA TOBIN, DIRECTOR, DIV. OF WORKERS' COMPENSATION TENN. DEPARTMENT OF LABOR, SECOND INJURY FUND.	)	
	)	
Third -party defendants/appellees	)	

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Worker' Compensation 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 act 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 plaintiff-appellant and Bruce Fox, surety, for which execution may issue if necessary.

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