

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT JACKSON
(August 29, 1996 Session)

FILED

April 1, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

MICHAEL EUGENE SMITH,)	OBION CHANCERY
)	
Plaintiff-Appellee,)	Hon. William Michael Malone,
)	Chancellor.
v.)	
)	No. 02S01-9603-CH-00037
GOODYEAR TIRE AND RUBBER)	
COMPANY,)	
)	
Defendant-Appellant.)	

For Appellant:

For Appellee:

Randy N. Chism
Elam & Glasgow
Union City, Tennessee

Jeffrey A. Garrety
Garrety & Sanders
Jackson, Tennessee

MEMORANDUM OPINION

Members of Panel:

Lyle Reid, Associate Justice, Supreme Court
F. Lloyd Tatum, Special Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED

Loser, 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. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employer contends the award of permanent partial disability benefits is excessive and, particularly, that the award exceeds the limitation contained in Tenn. Code Ann. section 50-6-241(a)(1). As discussed below, the panel has concluded the award should be affirmed.

The employee or claimant, Smith, is forty-seven and a high school graduate. He has worked for Goodyear since 1969, at several different jobs, all involving manual labor. On May 13, 1994, he injured his back lifting.

The claimant was referred to an orthopedic surgeon, who diagnosed a central disc herniation at L5-S1, which was surgically repaired bilaterally. As a result of the injury and surgery, he can lift only 30 pounds frequently and 50 pounds occasionally. He is further limited in his bodily activities and has a permanent medical impairment of ten percent to the whole body. The operating surgeon testified that the claimant is medically disqualified from returning to his pre-injury job or any other one which would require heavy lifting or painful activity.

When the claimant returned to work after a period of recuperation, he was offered a choice of jobs. The one he accepted was within his limitations, but he receives a lower hourly wage than he was earning before the injury. He continues to have pain and stiffness from working.

The chancellor awarded permanent partial disability benefits on the basis of forty percent to the body as a whole. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2).

For injuries occurring after August 1, 1992, in cases where and injured worker is entitled to permanent partial disability benefits to the body as a whole and 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 the injury, the maximum permanent partial disability award the employee may receive is two and one-half times the medical impairment rating. Tenn. Code Ann. section 50-6-241(a)(1). If the offer of return employment is not reasonable in light of the circumstances of the employee's physical disability to

perform the offered employment, then the offer of employment is not meaningful and the injured employee may receive disability benefits up to six times the medical impairment. Newton v. Scott Health Care Center, 914 S.W.2d 884 (Tenn. 1995).

On the other hand, an employee will be limited to disability benefits of not more than two and one-half times the medical impairment rating if his refusal to return to offered work is unreasonable. *Id.* The resolution of what is reasonable must rest on the facts of each case and be determined thereby. *Id.*

While some of the jobs from which this employee could have chosen would have paid a wage equal to or greater than his pre-injury wage, we cannot say the evidence preponderates against the chancellor's finding that the employee acted reasonably in accepting work within his medical limitations and restrictions. Because the employer chooses to pay a lower wage for the job the employee reasonably chose, the chancellor correctly concluded that Tenn. Code Ann. section 50-6-241(a)(1) is inapplicable.

The evidence also fails to preponderate against an award based on forty percent permanent partial disability to the body as a whole. The judgment of the trial court is accordingly affirmed. Costs on appeal are taxed to the defendant-appellant.

Joe C. Loser, Jr., Judge

CONCUR:

Lyle Reid, Associate Justice

F. Lloyd Tatum, Judge

