

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(May 23, 1997 Session)

FILED

January 7, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

HERCHEL SEAGRAVES,

Plaintiff/Appellee/
Cross Appellant,

VS.

NO. 02S01-9612-CH-00104

PLAZA MACHINE AND TOOL,

Defendant/Appellant/
Cross Appellee.

GIBSON COUNTY CHANCERY
CHANCELLOR
GEORGE R. ELLIS

FOR APPELLANT:
S. Newton Anderson
Memphis, Tennessee

FOR APPELLEE:
Clayton Mayo
Jackson, Tennessee

MEMORANDUM OPINION
Mailed November ____, 1997

Members of Panel:

Janice M. Holder, Associate Justice, Supreme Court
Robert A. Lanier, Special Judge
Don R. Ash, Special Judge

AFFIRMED

Ash, Special Judge

MEMORANDUM OPINION

This worker's 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) (1996 Supp.) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the employer Plaza Machine and Tool, contends: (1) that the evidence preponderates against the trial court's finding that the plaintiff suffered a permanent partial disability from his work related injury; (2) that the award of permanent partial disability benefits based on 47 % to the body as a whole is excessive; and (3) that the trial court erred by not permitting Plaza Machine and Tool to introduce into evidence the testimony of its private investigator, his written report, and his video tape of Mr. Seagraves. The employee, in his cross-appeal, contends that the trial court should have found that Mr. Seagraves suffered 100% disability to the body as a whole. The panel finds that the judgment of the trial court should be affirmed.

STANDARD OF REVIEW

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. § 50-6-225(e)(2) (1996 Supp.). This tribunal is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921 (Tenn. 1995).

FACTS

The claimant, Herchel Seagraves, was sixty-one at the time of trial and has an eleventh grade education. Mr. Seagraves worked as a machinist for the majority of his career. He had worked for Plaza Machine and Tool since November 1980. On April 6, 1992, Mr. Seagraves suffered an injury while working at Plaza Machine & Tool to his right arm, neck and shoulder. Mr. Seagraves was referred to Dr. Robert Hornsby for an examination of his injury. Dr. Hornsby, the treating physician, treated Mr. Seagraves conservatively for over one and a half years. Dr. Hornsby opined by deposition that Mr. Seagraves had a possible radiculopathy or nerve injury to the right upper extremity. Further, he opined that after Mr. Seagraves received treatment he would have flare-ups from time to time and need occasional intermittent treatment

to his neck and shoulder. Also, Dr. Hornsby opined that Mr. Seagraves retained a 20% permanent partial disability to the body as a whole. Mr. Seagraves, at the request of defendant, went to Dr. Ronald Bingham for an independent medical examination. Dr. Bingham conducted an EMG and a Nerve Conduction Study test on plaintiff's right upper extremity, which revealed normal results. Dr. Bingham opined by deposition that as a result of Mr. Seagraves accident, he had 0% permanent partial disability to the body as a whole and no work restrictions. At the time of trial plaintiff was unemployed.

FINDING OF DISABILITY

Appellant contends that the evidence presented at trial preponderates against the trial court's finding that the plaintiff suffered a permanent partial disability from his work related injury. When faced with conflicting medical testimony, the trial judge has discretion to accept the opinion of certain experts over that of others. Thomas v. Aetna Life & Casualty Co. (Tenn. 1991). Moreover, while causation and permanency of an injury must be proved by expert medical testimony, such testimony must be considered in conjunction with the lay testimony of the employee as to how the injury occurred and the employee's subsequent condition. Smith v. Empire Pencil Co., 781 S.W.2d 833, 835 (Tenn. 1989). It is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts. Hinson, 654 S.W.2d at 677. A trial judge may even predicate an award on medical testimony to the effect that the accident and subsequent injuries "could be" the cause of plaintiff's injury. Id. at 677. Although causation cannot be based upon speculative or conjectural proof, reasonable doubt is to be construed in favor of the employee. White v. Werthan Industries, 824 S.W.2d 158, 159 (Tenn. 1992).

In the instant case, there is conflicting testimony between Dr. Bingham who opined that Mr. Seagraves suffers no permanent partial impairment and Dr. Hornsby who opined that Mr. Seagraves suffers a 20% permanent partial impairment. Dr. Hornsby was plaintiff's treating physician for his work related injury. As such he is entitled to greater weight in his opinion of whether plaintiff's injury was caused by his work. See Crossno v. Publix Shirt Factory, 814 S.W.2d 730, 732 (Tenn. 1991) (treating physician's opinion entitled to greater weight). Moreover, Dr. Bingham did not comment on plaintiff's impairment until after he had received various treatments for his injuries. Further, Dr. Bingham's finding of 0% permanent partial impairment appears extreme considering the medical records,

depositions, and testimony of the plaintiff. Therefore, based upon the doctors' opinions, the lay testimony of the plaintiff, and the evidence in the record, the evidence does not preponderate against the trial court's finding that the plaintiff did sustain a compensable injury.

PERMANENT PARTIAL DISABILITY IMPAIRMENT RATING

Appellant further contends that the evidence presented at trial preponderates against the trial court's award of 47% permanent partial disability to plaintiff's body as a whole as a result of plaintiff's work related injury. The trial court is justified in the consideration of other factors such as age, job skills, education, training, and the like, in addition to anatomical impairment.

Worthington v. Modine Mfg. Co., 798 S.W.2d 232 (Tenn. 1990). The factors this panel is to consider in determining the amount of disability are the claimant's age (Jackson v. Greyhound Lines, Inc., 734 S.W.2d 617, 621 (Tenn. 1987)); his job skills, education, training, and length of disability (Employers Ins. v. Heath, 536 S.W.2d 341 (Tenn. 1977)); job opportunities in the marketplace (Hinson v. Walmart, 654 S.W.2d 675, 677 (Tenn. 1983)); whether the claimant has returned to work (Corcoran v. Foster Auto GMC, 746 S.W.2d 452, 459 (Tenn. 1987)); the claimant's own assessment of his or her physical condition and resulting disability (Corcoran, 746 S.W.2d at 458); and whether despite returning to work, whether the claimant's ability to earn wages in any form of employment (that would have been available to him in an uninjured condition) is diminished by an injury (Prost v. City of Clarksville, 668 S.W.2d 425 (Tenn. 1984)).

In the instant case, Mr. Seagraves is a 61-year-old man with an eleventh grade education. He has worked as a common laborer most of his life with no specialized or formal training. Mr. Seagraves' age decreases the chances of finding employers willing to hire a nearing retirement machinist. Furthermore, Dr. Hornsby opined that Mr. Seagraves' injury will cause him future problems because of the strong possibility of flare-ups from time to time. Mr. Seagraves' ability to find employment in the open labor market, in view of his age, education, physical condition, and skills, is impaired by his injury.

Based on the proof, this panel holds that Mr. Seagraves is entitled to a permanent partial impairment rating of 47% to the body as a whole, as well as any future medical treatment

required for his work related injury provided by his employer. Therefore, the evidence does not preponderate against the trial court's finding that plaintiff is 47% disabled.

DISCOVERY VIOLATION

Finally, appellant contends that the trial court erred by not permitting Plaza Machine and Tool to introduce into evidence the testimony of Anthony Crone and trial exhibits number 7 and number 8 for identification showing surveillance on Mr. Seagraves. Appellant's reliance on the trial court's local rules to justify his refusal to disclose the identity of his private investigator and video tape is misplaced for two reasons. First, it confuses his obligation to comply with appropriate discovery requests with his duty to identify the witnesses he intended to call at trial. Second, it places the trial court's local rule in direct conflict with the discovery rules in the Tennessee Rules of Civil Procedure.

The Tennessee Rules of Civil Procedure embody a broad policy favoring the discovery of any relevant, non-privileged information. Wright v. United Servs. Auto Ass'n, 789 S.W.2d 911, 915 (Tenn. Ct. App. 1990); Duncan v. Duncan, 789 S.W.2d 557, 560 (Tenn. Ct. App. 1990). Their purpose is to do away with trial by ambush, Ingram v. Phillips, 684 S.W.2d 954, 958 (Tenn. Ct. App. 1984), and to rid trials of the element of surprise that often leads to results based not upon the merits but upon unexpected legal maneuvering. Hood v. Roadtec, Inc., 785 S.W.2d 359, 362 (Tenn. Ct. App. 1989); Strickland v. Strickland, 618 S.W.2d 496, 501 (Tenn. Ct. App. 1981).

Tenn. R. Civ. P. 26.02(1) permits parties to discover the identity of all persons having relevant knowledge of any discoverable matter, including the facts relevant to any claim or defense involved in the litigation. However, parties are not entitled to discover the identities of the persons their adversary intends to call as witnesses at trial in the absence of a local rule or a court order. Strickland v. Strickland, 618 S.W.2d at 499; Reed v. Allen, 522 S.W.2d 339, 341 (Tenn. Ct. App. 1974).

The Tennessee Rules of Civil Procedure govern practice and procedure in all state trial courts. See Tenn. R. Civ. P. 1. However, trial courts may adopt local practice rules as long as the rules do not conflict with other applicable statutes or rules promulgated by the Tennessee Supreme Court. Hackman v. Harris, 225 Tenn. 645, 651, 475 S.W.2d 175, 177 (1972); Richie v.

Liberty Cash Grocers, Inc., 63 Tenn. App. 311, 320-21, 471 S.W.2d 559, 563 (1971); Tenn. S. Ct. R. 18; Tenn. Code Ann. § 16-3-407 (1994 Repl.).

Plaintiff's interrogatory #3 sought any photos, videos, motion pictures, or other pictorial or other representations taken of the plaintiff at any time whatsoever, and the person responsible for making these pictures or videos. The substance of the interrogatory sought unprivileged, relevant information and was consistent with Tenn. R. Civ. P. 26.02(1) because the employer's private investigator had a video tape of facts relevant to the claims or defenses involved in the case. Defendant had no legally defensible reason for declining to accede to the employee's pretrial request to reveal the identity of the employer's private investigator and to disclose the video tape. Plaza Machine and Tool objected to this request, alleging that it was outside the scope of discovery and that the materials requested were attorney-work product, and further stating that it did not have any of the materials inquired about. The employer then supplemented its response to plaintiff's interrogatory #3 by stating that it would not respond any further to this question without a formal motion submitted by plaintiff's attorney. The private investigator's testimony, video tape and report show the plaintiff raising his arms above his head at times while washing his vehicle and another at a self-service car wash and then drying them at his residence. The purpose of this testimony was to undermine plaintiff's claim that the accident he sustained left him with difficulty raising his arms above chest level and lessened his ability to perform domestic activities. Therefore, defendant should have disclosed these sought after items when the plaintiff requested the information on April 19, 1994.

The employer's failure to respond to his adversary's discovery request did not, however, automatically render his private investigator's testimony and his video tape inadmissible. Trial courts have broad discretion to fashion sanctions for discovery abuses that are commensurate with the parties' conduct. Lyle v. Exxon Corp., 746 S.W.2d 694, 699 (Tenn. 1988); Airline Constr., Inc. v. Barr, 807 S.W.2d 247, 263 (Tenn. Ct. App. 1990). They may permit a witness to testify even if withholding the witness' identity was contrary to the rules of discovery. Doochin v. United States Fidelity & Guaranty Co., 854 S.W.2d 109, 114 (Tenn. Ct. App. 1993). The nature of the sanction depends upon: (1) the party's reasons for failing to provide the requested

discovery; (2) the importance of the information sought to be discovered; and (3) the time needed to respond effectively to the information. Strickland v. Strickland, 618 S.W.2d at 501.

The plaintiff had ample opportunity to file an appropriate motion forcing the defendant to produce the video tape. Based upon the record, this is an appropriate case for sanctions in regard to the failure to disclose. The trial court erred in not allowing either the introduction of this evidence or this matter being continued until the issues of sanctions and discovery could be completed. When a witness' name is not revealed during discovery, the trial court has discretion about how to proceed. Pettus v. Hurst, 882 S.W.2d 783, 787 (Tenn. Ct. App. 1993) perm. app. denied (1994). A judge may permit the testimony, or may exclude the testimony, or may grant a continuance to allow preparation. Airline Construction, Inc. v. Barr, 807 S.W.2d 247, 263 (Tenn. Ct. 1990) perm. app. denied (1991).

Reversal of a judgment is required only when the error involves a substantive right and more probably than not affected the trial's outcome. Tenn. R. App. P. 36(b). The panel has had an opportunity to review the video tape in question. Accordingly, we find that not reviewing the video tape and not admitting the private investigator's testimony and his written report was, at most, harmless error.

Defendant contends that the trial court should have found that plaintiff suffered 100% disability to the body as a whole as a result of plaintiff's work related injury. Appellee relies on the fact that since Mr. Seagraves is considered disabled by the Social Security Administration, this Court should find him 100% disabled. Awards or findings of the Social Security Administration are not admissible in the courts of Tennessee in workers' compensation cases for the purpose of showing the existence or the extent of an employee's permanent disability. Bingham v. Dyersburg Fabrics Co., Inc., 567 S.W.2d 169, 171 (Tenn. 1978). Among the many reasons are: 1) employer is not a party to proceedings before the social security administration; and has no opportunity to cross-examine or to rebut employee's proof; and 2) the criterion for determining the existence or extent of permanent disability, temporary or total, under Tennessee workers' compensation statutes and case law differs widely from the definitions of disability applicable for social security purposes. See 42 U.S.C. § 416(i)(1) (1992) and 42 U.S.C. § 423(d) (1992). Id. Therefore, this issue is without merit.

Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987). Therefore, the judgment of the trial court is accordingly affirmed. Costs on appeal are taxed to the defendant-appellant.

Don R. Ash, Special Judge

CONCUR:

Robert Lanier, Special Judge

Janice M. Holder, Associate Justice

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

HERCHEL SEAGRAVES,)	GIBSON CHANCERY
)	NO. 10894
Plaintiff/Appellee/Cross Appellant,)	
)	Hon. George R. Ellis,
vs.)	Chancellor
)	
PLAZA MACHINE AND TOOL,)	NO. 02S01-9612-CH-00104
)	
Defendant/Appellant/Cross Appellee.)	AFFIRMED

<p>FILED</p> <p>January 7, 1998</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>
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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 Appellant, and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 7th day of January, 1998.

PER CURIAM

(Holder, J., not participating)

