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

FILED

May 8, 1998

Cecil W. Crowson
Appellate Court Clerk

ANDY PHILLIPS, Plaintiff/Appellee ANTHONY HALL CONSTRUCTION, LUMBERMENS MUTUAL CASUALTY COMPANY, and DEPARTMENT OF LABOR, WORKERS' COMPENSATION DIVISION, SECOND INJURY FUND, Defendants/Appellants	)	WILSON CRIMINAL NO. 01S01-9710-CC-00213 HON. J. O. BOND, JUDGE

For the Appellant:

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

Members of Panel:

Justice Janice M. Holder
Senior Judge William H. Inman
Special Judge William S. Russell

MODIFIED

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.

This case involves a weighty issue of whether the judgment is supported by the preponderance of all the evidence. RULE 13(d), T. R. A. P. 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. 1995). Adjunctive is the established rule that we are as well positioned as the trial judge to gauge the worth of the depositional testimony, and we have done so, in accordance with our prerogative and responsibility. *Cooper v. INA,* 884 S.W.2d 446, 451 (Tenn. 1994); *Landers v. Fireman's Fund Ins. Co.,* 775 S.W.2d 355, 356 (Tenn. 1989).

The plaintiff is 39 years old. He completed eleven years of schooling and apparently has no marketable job skills. On December 21, 1995, while working on a barn, he chose to descend from the roof by sliding down a brace rather than using a ladder as instructed. He fell against another brace and injured his left arm and back.

He continued to work but developed problems the following day and was given his choice of physicians. He selected Dr. Wayne Wells, who passed him on to Dr. Michael Moore, who released him to return to work on January 15, 1996 with temporary restrictions against overhead lifting and lifting more than 25 pounds with his left arm.

The plaintiff returned to work on January 17, 1996. His employer, who was constructing a residence in another county, assigned him to sweep and otherwise clear the floors, but the plaintiff left the job the following day. He returned to the job on January 22 and was told by his employer to "do whatever he felt he could do," but the plaintiff declined to work.

Two months later, the plaintiff informed his employer that he did not intend to return to the job, and he thereafter made no effort to secure employment other than self-employment as a repairman of lawn equipment.

The Medical

He was seen by *Dr. John McInnis* - after his brief stint with Drs. Wells and Moore - on May 16, 1996. Dr. McInnis is an orthopedic specialist who practices in Nashville. He did an MRI which was normal. He had a mild bulging at L4-5 and L3-4 with no evidence of disc herniation. On June 17, 1996 he again saw and treated the plaintiff and found "pretty well full motion of his lumbar spine" in flexion, extension, right and left lateral bending. He reported that

"We have been unable to substantiate a serious injury to his back."

Dr. McInnis found no disability.[1]

The plaintiff thereupon contracted with *Dr. Robert P. Landsberg* for an examination and evaluation. Dr. Landsberg is an orthopedic specialist who practices in Goodlettsville. He examined the plaintiff on November 19, 1996.

[1]The opinion of Dr. McInnis appears on Form C-32 prescribed by the Dep't. Of Labor, as authorized by T.C.A. § 50-6-235(c) which provides that "a written medical report of a treating or examining physician shall be admissible at any stage of a workers' compensation claim in lieu of a deposition . . . " Often these Forms contain but scant information and thus do not fare well when contrasted to a deposition. However, Form C-32 in this case is rendered more worthy by the inclusion of recitative findings by Dr. McInnis, and thus on a par, or nearly so, with a deposition. We do not denigrate the use of the Form, because its purpose is a salutary one: the reduction of costs. But the bare-bones type is frequently of minimal value, and care should be taken to insure that pertinent and pithy information is recited.

He diagnosed a lumbar strain with mild disc protrusion and *mechanical low back pain* in the lumbar spine, with no radiculopathy, but some limitation of motion. He testified that, as he interpreted the *Guidelines,* and using a device called an inclinometer, the plaintiff had a seven percent impairment rating, "with another four percent for flexion and five percent for extension, two percent each for lateral flexion to the right and left, therefore 13 percent for decreased range of motion combined with seven percent from Table 75 would give a 19 percent permanent impairment rating to the whole person."

Prior to his examination by Dr. Landsberg, the plaintiff was treated by Dr. Willard West, an orthopedic specialist in Lebanon, who performed a myelogram. The plaintiff did not return to Dr. West for a follow-up; rather he was referred to Dr. Landsberg by his attorney.

The Pleadings

The complaint was filed September 20, 1996 in the Criminal Court of Wilson County. The plaintiff alleged that he suffered an injury to his left arm and back while on the job and sought benefits for disability "both to the body as a whole and to each and every member of plaintiff's body . . . affected by said injury." The defendants filed a general, *pro forma* answer, essentially denying the allegation of injury, and relied upon an alleged violation of T.C.A. § 50-6-110(a) which provides that no compensation shall be allowed for any injury caused by the employee's wilful refusal or failure to use a safety appliance, in this case, a ladder.

The Judgment

The trial court found, *inter alia*, that the plaintiff "is 66 percent vocationally disabled . . ." and that "Dr. Robert Landsberg's medical deposition should be given more weight than the testimony of Dr. John C. McInnis." The

trial court further found that the plaintiff made an unsuccessful attempt to return to work, which was not a meaningful return to work and hence not subject to a limitation of 2.5 times the medical impairment rating under T.C.A. § 50-6-110(a)(1). No violation of T.C.A. § 50-6-110(a) was found.

The Issues

1. Whether the finding of the trial court that the plaintiff was not guilty of misconduct within the purview of T.C.A. § 50-6-110(a) is supported by a preponderance of the evidence.

2. Whether the court erred in failing to apply the multiplier of 2.5 times the impairment as prescribed by T.C.A. § 50-6-241(a)(1).

3. Whether the court erred in finding that the depositional testimony of Dr. Landsberg should be given more weight than the testimony of Dr. McInnis.

4. Whether the award of 66 percent is excessive.

Analysis

Issue No.1. There is no evidence of perversity or horseplay by the plaintiff, who was merely rash or careless. The evidence does not preponderate against the finding that the plaintiff was not guilty of misconduct which would bar a recovery. *See, Rogers v. Kroger Co.*, 832 S.W.2d 538 (Tenn. 1992). Moreover, the plaintiff had already begun his descent when he was instructed to use a ladder.

Issue No. 2. If an employee unreasonably refuses to return to work, an award of disability is limited to 2.5 times the impairment rating. *Newton v. Scott Health Care Center*, 914 S.W.2d 885 (Tenn. 1995). We are uncertain of the trial court's reason(s) for refusing to apply the 2.5 multiplier, and reproduce his comments:

> "Well, the question is: Is it two-and-a-half times or is it top of the list as far as his course? And then if it gets up past a certain amount, you add 24 percent from the Second Injury Fund.

> I believe the employee had some fault about whether or not he still had his job or not. I think that still rests - some of it rests with the employee. I think part of it rests with the employer.
>
> Of course, when we multiply by 3.5, that's going to give a rating of about 66 percent to the body as a whole, which means a total of 90 percent if you added 24. So it's not a Second Injury Fund injury. It will be 66 percent to the body as a whole."

As nearly as may be ascertained from this record, the trial court relied on the subjective determination by the plaintiff that he could not return to work, although the record is unrefuted that work was available and the plaintiff was invited to return to "do whatever he felt like." These are heady words, not often found in the employer-employee context. Moreover, Dr. McInnis squarely testified that the plaintiff had no serious problems and even Dr. Landsberg stopped short of stating that the plaintiff could not return to work without restrictions. In light of the unequivocal testimony of the *treating* physician - who testified that the *plaintiff had no impairment* - in combination with the absence of any expert testimony of the plaintiff's inability to work, it would be insupportably anomalous to hold that the plaintiff's subjective determination was sufficient evidence of his inability to work. We therefore find that the refusal of the trial judge to apply the 2.5 multiplier is not supported by a preponderance of the evidence.[2] The refusal of the plaintiff to return to work was not reasonable.[3] *See, Newton, supra.*

Issue No. 3. The appellant takes issue with the finding of the trial judge that Dr. Landsberg's deposition should be given more weight than the testimony of Dr. McInnis. In this connection, we reproduce the comments of the trial judge,

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[2]The multipliers, T.C.A. § 50-6-241(a)(1), do not apply in cases involving injuries to scheduled members, but only to injuries to the body as a whole. *Atchley v. Life Care Center,* 906 S.W.2d 428 (Tenn. 1995).

[3]In this connection, we note that the plaintiff nevertheless continued his side-line employment as a lawn mower repairman, known to require considerable lifting, pulling, pushing, and endurance.

in light of his rather singular disregard of the opinion and findings of the treating physician for those of an IME hired for the purpose:

> "Looking at Dr. Landsberg's deposition, a bulging disk has been talked about here. I think most of us who have been around this very long and you look at the sheets that they give us on *AMA Guidelines*, a bulging disk does have a place within the *Guidelines* and it does have a disability rating resulting from that. That's where we swear that what we'll do is follow these *Guidelines*.
>
> And I don't know what Dr. McInnis did on his test. It doesn't sound like he did that type of evaluation from reading what I'm reading here. He just said he didn't find anything really wrong.
>
> Then I noticed on his last - he says: On exam today, on 6-17-96, he said he was pretty well full motion, which means he didn't have full motion. Then he questioned in his flexion and extension, right and left lateral bending. He said: He complains of pain in extremes of the motions. So evidently he wasn't 100 percent there.
>
> Then doctors use words like serious injury. Well, to some doctors serious means one thing, to another doctor it means something else. I really don't know what he means when he says serious injury. To substantiate a serious injury.
>
> I get a lot more out of Dr. Landsberg's deposition. He did, without question, use the correct tools in his evalution process of measurements. He comes up with a 19 percent anatomical rating."

We have carefully considered the testimony of each of these orthopedic surgeons. The anatomical impairment rating assessed by Dr. Landsberg - whose testimony we have reproduced - was somewhat confusing, and we can find no reason whatever to disregard the findings and opinion of Dr. McInnis. We agree with the appellant that the testimony of Dr. McInnis is entitled to serious consideration in light of his status as the treating physician, superimposed upon his unequivocal opinion that the plaintiff has no impairment. *See, Crossno v. Publix Shirt Factory,* 814 S.W.2d 730 (Tenn. 1991); *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672 (Tenn. 1991).

Issue No. 4. The appellant next insists that a finding of 66 percent vocational disability is excessive. We agree. In light of the singular fact that the treating

physician[4] found *no impairment,* and the somewhat confusing assessments of the IME, we find the award of 66 percent is not supported by a preponderance of all the evidence. We find from all of the evidence that the plaintiff has a 35 percent permanent partial disability to his whole body and is entitled to benefits accordingly. Costs are assessed to the parties evenly and the case is remanded.

_____

William H. Inman, Senior Judge

CONCUR:

_____

Janice M. Holder, Justice

_____

William S. Russell, Special Judge

[4]Dr. McInnis saw saw the plaintiff three times. Dr. Landsberg, one time. The plaintiff *was never treated* by any physician, as that term is generally understood. The anomaly of the absence of treatment vis-a-vis a finding of 66 percent disability is evident.

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

ANDY PHILLIPS,	*}*	*WILSON CRIMINAL*
	}	*No. 96-1737 Below*
Plaintiff/Appellee	*}*	
	}	*Hon. J. O. Bond,*
vs.	*}*	*Judge*
	}	
ANTHONY HALL CONSTRUCTION,	*}*	
LUMBERMENS MUTUAL CASUALTY	*}*	
and DEPT. OF LABOR, WORKERS'	*}*	*No. 01S01-9710-CC-00213*
COMPENSATION DIVISION,	*}*	
SECOND INJURY FUND,	*}*	
	}	
Defendants/Appellants	*}*	*MODIFIED.*

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 the parties evenly; one-half by Plaintiff/Appellee, Andy Phillips, and one-half by Defendants/Appellants, Anthony Hall Construction & Lumbermen's Mutual Casualty Company and Surety, for which execution may issue if necessary.

IT IS SO ORDERED on May 8, 1998.

PER CURIAM