IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT KNOXVILLE
(May 6, 1998 Session)

BRODERICK KELSEY,	)	HAMILTON CHANCERY
	)	
Plaintiff-Appellee,	)	Hon. Howell Peoples,
	)	Chancellor.
v.	)	
	)	No. 03S01-9710-CH-00121
KRAFT FOOD SERVICES, INC. and	)	
TRAVELERS INDEMNITY	)	
COMPANY OF ILLINOIS,	)	
	)	
Defendants-Appellants.	)	

For Appellants:

Robert J. Uhorchuk
Thomas E. LeQuire
Spicer, Flynn & Rudstrom
Chattanooga, Tennessee

For Appellee:

John D. McMahan
G. Brent Burks
McMahan & Associates
Chattanooga, Tennessee

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

Members of Panel:

Charles D. Susano, Jr., Special Justice, Supreme Court
John K. Byers, Senior 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. The appellants contend the trial court's award of benefits based on six times the medical impairment rating is excessive. The appellee contends the award is inadequate because the chancellor erred in "finding three of the four factors listed under Tenn. Code Ann. section 50-6-242 were not proven by clear and convincing evidence" and that the award of benefits based on forty-two percent to the body as a whole is inadequate. The appellee also contends the chancellor erred in failing to award its vocational expert's fee as discretionary costs. As discussed below, the panel has concluded the judgment should be affirmed.

At the time of the trial, the claimant, Kelsey was thirty-five years old and a high school graduate. Following high school graduation, he served three years in the United States Army, where he worked as a warehouseman and equipment operator. He has worked as a truck driver. He worked for the employer, Kraft Food Services, for about two years until June 27, 1995, when he suffered a compensable back injury while lifting a case of potatoes. He has not worked since.

The treating physician, Dr. Seiters, diagnosed a protruding or bulging disc, provided conservative care and estimated his permanent medical impairment at seven percent to the body as a whole. The doctor further opined the claimant reached maximum medical improvement on November 15, 1995 and could return to light work. The treating physician and another doctor who had first examined the claimant were of the opinion that the claimant could be exaggerating his symptoms.

At the trial, the claimant gave conflicting testimony concerning his ability to read. On direct examination, he testified that he could not read. On

cross examination, he testified that he spent his time reading. He estimated his own vocational disability at one hundred percent.

A vocational expert testified the claimant was able to read at a fourth to sixth grade level and write at less than an eighth grade level. The expert assessed his vocational impairment at eighty-five to ninety percent.

The chancellor found the claimant had a high school diploma, was less than fifty-five years old and had reasonable employment opportunities available locally. He awarded permanent partial disability benefits based on forty-two 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). 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. Krick v. City of Lawrenceburg, 945 S.W.2d 709 (Tenn. 1997). In this case, the claimant and his vocational expert, as well as all the lay witnesses, testified in person.

Where an injured worker is entitled to receive permanent partial disability benefits to the body as a whole, and the pre-injury employer does not return 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 that the employee may receive is six times the medical impairment rating determined pursuant to the above guidelines. Tenn. Code Ann. section 50-6-241(b).

Notwithstanding the above limitation, a court may award permanent partial disability benefits, not to exceed four hundred weeks, in appropriate cases where permanent medical impairment is found and the employee is entitled to receive the maximum award of two and one-half or six times the

medical impairment. In such cases, Tenn. Code Ann. section 50-6-242 requires the trial judge to make a specific documented finding, supported by clear and convincing evidence, that on the date the employee reached maximum medical improvement, at least three of the following four circumstances existed:

> (1) The employee lacked a high school diploma or general equivalency diploma or could not read or write on a grade eight level;
>
> (2) The employee was age fifty-five or older;
>
> (3) The employee had no reasonably transferable job skills from prior vocational background and training; and
>
> (4) The employee had no reasonable employment opportunities available locally considering the employee's permanent medical condition.

It is the trial court, not the appellate tribunal, which must make the required findings before exercising the discretion to award disability benefits greater than six times the medical impairment rating. In this case, the trial judge expressly said he was unable to make the necessary findings from the proof.

The trial court's award will not ordinarily be disturbed unless the appellate tribunal finds an abuse of that discretion or that the evidence preponderates against the findings of the trial court. This panel finds no abuse of discretion. Moreover, the evidence fails to preponderate against the chancellor's findings.

By Tenn. R. Civ. P. 54.04(2), reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions or trials, and guardian ad litem fees are recoverable as discretionary costs. See, generally, Marshall C. Miles v. Voss Health Care Ctr., 96 S.W.2d 773 (Tenn. 1995). Under the circumstances of this case, we find no error in disallowing recovery of the vocational expert's fee as a discretionary cost.

_____
Joe C. Loser, Jr., Special Judge

CONCUR:

_____
Charles D. Susano, Jr., Special Justice

_____
John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

FILED

July 13, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

BRODERICK KELSEY, HAMILTON CHANCERY

Plaintiff/Appellee No. 96-1079

vs.

Hon. Howell Peoples,
Chancellor

KRAFT FOOD SERVICES, INC., and
TRAVELERS INDEMNITY
COMPANY OF ILLINOIS, No. 03S01-9710-CH-00232

Defendants/Appellants,

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' 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 fact 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 defendants/appellants, Kraft Food Services, Inc. and Travelers Indemnity Company Of Illinois and David C. Nagle, surety for which execution may issue if necessary.

07/13/98