THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT KNOXVILLE
(June 30, 1998 Session)

FILED

January 20, 1999

Cecil Crowson, Jr.
Appellate Court
Clerk

INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY as workers' compensation insurance carrier for CANTLEY ELLIS MANUFACTURING COMPANY,	)	
Plaintiff-Appellant,	)	SULLIVAN CIRCUIT
v.	)	Hon. Richard Ladd, Judge.
DARRELL MEADE,	)	
Defendant-Appellee.	)	No. 03S01-9712-CV-00146

For Appellant:

Robert M. Shelor
Kristi D. McKinney
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Knoxville, Tennessee

For Appellee:

Jonathan R. Bunn
Bristol, Virginia

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

Members of Panel:

William M. Barker, Associate Justice, Supreme Court
Joe C. Loser, Jr., Special Judge
Roger E. Thayer, 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 employer insists the award of permanent partial disability benefits is excessive and the employee insists he is permanently and totally disabled. Additionally, the employee contends "the trial court erred in rejecting the testimony of the vocational specialist in its totality." As discussed below, the panel has concluded the judgment should be affirmed.

The trial court awarded permanent partial disability benefits based on sixty 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). The extent of an injured worker's disability is an issue of fact. Jaske v. Murray Ohio Mfg. Co., 750 S.W.2d 150 (Tenn. 1988). 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. Jones v. Sterling Last Corp., 962 S.W.2d 469 (Tenn. 1998).

The employee or claimant, Meade, is 58 years old with a third grade education, an intelligence quotient of 74 and experience as a laborer. He suffered a compensable soft tissue injury to his back, which is the subject of this case. The undisputed medical proof is that he has a permanent impairment of five percent to the body as a whole and is permanently restricted from any repeated bending, stooping or squatting, heavy lifting, working over heavy terrain, excessive ladder or stair climbing, strenuous pushing or pulling, or working with his hands above the level of his shoulders. One doctor restricted him from lifting even twenty pounds occasionally. The claimant attempted to return to work but, because of his restrictions, could not perform his duties, and was not working at the time of the trial.

He has no other educational, vocational or job training. A vocational expert testified that he had no reasonably transferable job skills from former employment and opined his vocational disability was one hundred percent. The expert qualified his opinion by saying that although the claimant

was not reasonably employable on the open labor market, there may be some jobs he could perform.

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. Tenn. Code Ann. section 50-6-241(b). If a court awards a multiplier of five or greater, then the court must make specific findings of fact detailing the reasons for its award, considering all relevant factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities and capacity to work at types of employment available in claimant's disabled condition. Tenn. Code Ann. section 50-6-241(c).

Notwithstanding the above limitations, a court may award permanent partial disability benefits, not to exceed four hundred weeks, in appropriate cases where permanent medical impairment is found. In such cases, the court must 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. Tenn. Code Ann. section 50-6-242.

The opinion of a vocational expert is generally necessary to establish that the employee had "no reasonably transferable job skills from prior vocational background and training" or "the employee had no reasonable employment opportunities available locally considering the employee's permanent medical condition," or both. Ingram v. State Industries, Inc., 943

S.W.2d 381 (Tenn. 1995). "Clear and convincing evidence" means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. Middleton v. Allegheny Elec. Co., Inc., 897 S.W.2d 695 (Tenn. 1995).

The trial judge discredited the vocational expert's opinion that the claimant was one hundred percent disabled, but found, based on clear and convincing evidence, that the claimant lacked a high school or general equivalency diploma, was more than fifty-five years old and had no reasonably transferable job skills. The trial judge made detailed findings of fact, as required, and found the claimant to be a credible witness; and his rejection of the opinion of the vocational expert with respect to the extent of permanent disability was well grounded. We do not find from the record that the trial judge rejected the expert's opinion, supported by the claimant's own credible testimony, that the claimant had no reasonably transferable job skills.

Under such circumstances, we are unable to say the evidence preponderates against the finding of the trial judge despite the fact that it resulted in an award that exceeded the statutory multiplier, but is less than the maximum award for permanent partial disability. The judgment of the trial court is affirmed. Costs on appeal are taxed to the plaintiff-appellant.

_____
Joe C. Loser, Jr., Special Judge

CONCUR:

_____
William M. Barker, Associate Justice

_____
Roger E. Thayer, Special Judge

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v.	)	S. C. NO 03S01-9712-CV-146
DARRELL MEADE,	)	
DEFENDANT/APPELLEE.	)	AFFIRMED

JUDGMENT

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well taken and should be denied; 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

Plaintiff/Appellant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

BARKER, J., NOT PARTICIPATING