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

FILED

AUGUST 21, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

EBASCO CONSTRUCTORS, INC. and INSURANCE COMPANY OF NORTH AMERICA,	)	RHEA CHANCERY
Plaintiffs/Appellants	)	NO. 03S01-9701-CH-00009
v.	)	HON. JEFFREY F. STEWART, CHANCELLOR
DONALD RICE,	)	
Defendant/Appellee	)	

For the Appellants:

F.R. Evans
Milligan, Barry, Hensley & Evans
800 First Tennessee Bldg.
Chattanooga, TN 37402

For the Appellee:

James S. Thompson
Logan, Thompson, Miller, Bilbo, Thompson & Fisher, P.C.
30 Second St.
P.O. Box 191
Cleveland, TN 37354-0191

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

Members of Panel:

E. Riley Anderson, Justice
Don T. McMurray, Judge
William H. Inman, Senior Judge

AFFIRMED **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.

The paraphrased issue in this case is whether the finding of 15% permanent partial disability is supported by a preponderance of the evidence under our standard of review as mandated by Rule 13(d), T.R.A.P. and T.C.A. § 50-6-225(e)(2). It is not disputed that the appellee suffered a job-related accidental back injury on August 12, 1993, while using a 20-pound drill with one hand because of close working quarters.

Officially, he lost no time from work but was assigned to lighter duties until he was laid off in July 1994. He testified that during the year following his injury, he missed about 25-30 days because of back pain. In October 1994 he was employed by another company as a pipefitter but was laid off after only three weeks because he could not do heavy lifting. He took re-training courses in valve technology and obtained satisfactory employment not involving the lifting of heavy materials. He testified that he can no longer engage in physical activities which require heavy lifting.

Dr. Herbert Dodge was his treating physician. He initially prescribed conservative treatment for a spondylolisthesis at the lowest part of the low back, with accompanying muscle spasms. He did not relate the spondylolisthesis to an injury, because it was congenital, but said the muscle spasm was caused by trauma. Dr. Dodge continued to see the appellee who complained of pain but followed instructions with respect to light work. He opined that the appellee had a three (3%) percent medical impairment to his whole body as a result of his injury.

Dr. Lester Littell examined the appellee on one occasion, March 2, 1994, for the purpose of evaluation. He concurred in the diagnosis of spondylolisthesis and testified that if the condition is symptomatic, i.e., if the patient suffered a reported injury which was documented and if he complains of pain, the AMA Guidelines call for a seven (7%) percent impairment rating.

The trial judge found injury, causation and impairment. He attributed greater weight to the opinion of Dr. Littell and used the 2.5 multiplier in arriving at a finding of 15% permanent partial disability.

The appellant argues that the impairment assigned by both orthopedic specialists was based upon a pre-existing developmental condition unrelated to the employment and not advanced by the job injury. If so, there can be no recovery of benefits. *See Cunningham v. Goodyear Tire & Rubber Co.*, 811 S.W.2d 888 (Tenn. 1991). But the thrust of both medical opinions indicated that an injury caused the pre-existing anomaly to become symptomatic, which resulted in impairment within the ambit of the Workers' Compensation Law.

The appellant next argues that the trial court erred in applying the disability cap of 2.5 times the impairment assessment of Dr. Littell, who examined the appellee only on one occasion and found no advancement of the pre-existing condition. However, Dr. Littell apparently relied in part upon the medical records generated by Dr. Dodge, who also recognized that the injury caused the spondylolisthesis to become symptomatic, which is cognizable under the AMA Guidelines as a ratable injury. Dr. Dodge did not utilize the Guidelines ["they were not written in stone"], and we cannot say that, given all the circumstances, the impairment percentage assessed by the evaluating physician should not have been preferred over that of the treating physician.

The judgment is affirmed and costs assessed to the appellant.

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William H. Inman, Senior Judge

CONCUR:

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E. Riley Anderson, Justice

_____

Don T. McMurray, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

EBASCO CONSTRUCTORS, INC. and INSURANCE COMPANY OF NORTH AMERICA,	)	RHEA CHANCERY
	)	No. 8318
Plaintiff/Appellants	)	
vs.	)	Hon. Jeffrey F. Stewart, Chancellor
DONALD RICE,	)	
Defendants/Appellee.	)	03S01-9701-97010-CH-00009

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 defendant/appellant, Ebasco Constructors, Inc. and surety, F. R. Evans, for which execution may issue if necessary.

08/21/97

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 the plaintiff-appellant and sureties, for which execution may issue if necessary.

IT IS SO ORDERED this ____ day of June, 1997.

PER CURIAM

Anderson, J. - Not Participating

al to the Special Worker' 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 act 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 plaintiff-appellant, Vernon Harris and Gilbert and Faulkner. surety, for which execution may issue if necessary.

06/03//97

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 defendant/appellant, Baptist Hospital of East Tennessees and Barry K. Maxwell, surety, for which execution may issue if necessary.

07/11/97

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 the plaintiff-appellant and sureties, for which execution may issue if necessary.

IT IS SO ORDERED this ____ day of June, 1997.

PER CURIAM

Anderson, J. - Not Participating

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It is, therefore, ordered that the Panel's findings of act 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 plaintiff-appellant, Vernon Harris and Gilbert and Faulkner. surety, for which execution may issue if necessary.

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