

has discussed the issue at length in *Chism v. Mid-South Milling Co.*, 762 S.W.2d 552, 558 (Tenn.1988):

"The doctrine of employment at will has long been recognized in this state, with the concomitant right of either party to terminate such a relationship with or without cause..." (Citations omitted).

"Both by statute and case law in this and other states some restrictions have been imposed upon the right of an employer to terminate an employee, usually for reasons of well-defined public policy. For example, in Tennessee any right to terminate an employee for service on a jury has been eliminated, and statutory sanctions for violation have been provided. See T.C.A. § 22-4-108(f). There are restrictions upon employment or termination of persons for discriminatory reasons involving race, creed, color, sex, age, religion or national origin. See T.C.A. § 4-21-402(a). There are similar restraints to prevent discrimination in the hiring and termination of handicapped persons. See T.C.A. § 8-50-103; see also *Plasti-Line, Inc. v. Tennessee Human Rights Comm'n*, 746 S.W.2d 691 (Tenn.1988)..."

"It is obvious that the exception cannot be permitted to consume or eliminate the general rule. Corporate management, in cases such as this, must be allowed a great deal of discretion in the employing or discharging of corporate officers, where the latter are not employed for a definite term and have no formal contract of employment. *Whittaker v. Care-More, Inc.*, 621 S.W.2d 395, 397 (Tenn.App.1981). To be liable for retaliatory discharge in cases such as this, the employer must violate a clear public policy. Usually this policy will be evidenced by an unambiguous constitutional, statutory or regulatory provision. Further, the violation must be a substantial factor in the termination of an at-will employee, agent or officer."

No public policy was violated in this case. Accordingly we vacate the judgment of the Court of Appeals and reinstate the judgment of the trial court. The costs on this appeal are assessed against the appellant.

The case is remanded to the trial court for such other and further proceedings required.

DROWOTA, C.J., and FONES,
COOPER and HARBISON, JJ., concur.



Douglas Wayne DAVENPORT,
Plaintiff-Appellee,

v.

TAYLOR FEED MILL and Aetna Life
Insurance Co., Defendants-Appellants.

Supreme Court of Tennessee,
Middle Section, at Nashville.

Feb. 12, 1990.

Employer and insurer appealed from judgment of the Equity Court, Warren County, L.F. Stewart, Chancellor, entered in workers' compensation proceeding. The Supreme Court, Fones, J., held that: (1) permitting physician to rate claimant's anatomical impairment based on old edition of approved treatise was not error; (2) issue of whether hypothetical question posed to expert in workers' compensation was based on facts not on evidence was question for chancellor to determine; but (3) lump-sum payment could not be awarded.

Affirmed in part and reversed in part.

1. Workers' Compensation ⇌1419

Permitting physician to rate claimant's anatomical impairment based on old edition of approved treatise was not error in workers' compensation proceeding, where vocational, not anatomical, disability was at issue. T.C.A. § 50-6-204(d)(3).

2. Workers' Compensation ⇌1703

Issue of whether hypothetical question posed to expert in workers' compensation

case was based on facts not on evidence was question for chancellor to determine. T.C.A. § 50-6-225(e).

3. Evidence ⇨553(4)

Hypothetical question must be supported by evidence presented at trial.

4. Workers' Compensation ⇨11

Purpose of Workers' Compensation Act is to provide injured workers with periodic payments which are a substitute for their regular wages; thus, general statutory scheme is periodic. T.C.A. § 50-6-229.

5. Workers' Compensation ⇨1019

Employee in a workers' compensation case has burden of proving that he or she has special needs or that exceptional circumstances exist warranting award of lump-sum payment. T.C.A. § 50-6-229.

6. Workers' Compensation ⇨1005

Lump-sum payment could not be awarded in workers' compensation case, where claimant did not file motion requesting lump-sum award, no hearing was held to establish special need for lump-sum payment, and no evidence was cited in order recognizing exceptional circumstances warranting such award. T.C.A. § 50-6-229.

Arthur E. McClellan, Gallatin, for defendants-appellants.

Michael D. Galligan, McMinnville, for plaintiff-appellee.

FONES, Justice.

This is a workers' compensation case, and Defendant brings this appeal from the judgment of the Warren County Chancery Court that Plaintiff incurred an occupational disability of sixty percent to the body as a whole. Defendant appeals on three grounds: (1) the trial court erred in permitting a physician to testify as to anatomical impairment when he based his rating on an old edition of an approved treatise; (2) the trial court erred in permitting an expert to testify as to vocational disability when the hypothetical question was based upon facts not in evidence; and (3) the trial court

erred in awarding one lump sum payment. We affirm the judgment of the trial court on all issues except the order that the award be paid in a lump sum.

Douglas Wayne Davenport, the plaintiff, was an employee of the defendant, Taylor Feed Mill, for six and one-half years. Plaintiff's job consisted of grinding mill grains. On 3 October 1987, Plaintiff was injured at work. While stacking 100 pound feed bags, he bent over to pick up a bag and felt a sharp pain in his lower back. Plaintiff informed Defendant of his injury, but continued to work for several days.

On 13 October 1987, Plaintiff consulted Dr. Douglas Haynes, a licensed physician practicing orthopedic medicine. Dr. Haynes concluded that Plaintiff had sustained a ruptured lumbar disc. He determined that Plaintiff had a permanent impairment to the body as a whole. He gave a twelve percent disability rating based on the second edition of the *American Medical Association Guidelines to the Evaluation of Permanent Partial Impairment*.

As to work restrictions, Dr. Haynes testified by deposition, "I told him that I did not feel that he would be able to return to his old job, that being working at a feed mill carrying heavy sacks of feed and fertilizer." He further testified as follows:

Q Have you, along with your assessment of permanent impairment—have you discussed with him any limitations that he might have in any other work he might do?

A Yes. I told him that I felt a fifty (50) pound permanent weight lifting [ban] would be indicated.

Q How about—have you discussed with him his repetitive bending, stooping and lifting?

A Yes. I also told him that I felt it would be inadvisable for him to rely—and I even went further and stated—on manual labor as a source of income for the future, and I encouraged him to seek training for [a] more sedentary type of job.

Dr. Jennings Marshall, associate professor of Economics at Samford University, also testified at trial. Dr. Marshall had

interviewed Plaintiff before trial concerning his work experience, medical restrictions, and educational qualifications. He had also reviewed a psychological evaluation and two medical depositions, including Dr. Haynes'. When Dr. Marshall began to describe Plaintiff's characteristics, but before he gave an opinion, the defense attorney objected to his testimony. The basis of the objection was that Dr. Marshall relied on hearsay to form his opinion and that a hypothetical question was the only proper way for him to testify. Prior to the Chancellor making a specific ruling, Plaintiff's attorney relented and solicited Dr. Marshall's opinion through a hypothetical question. Dr. Marshall was asked to assume many facts, but the only assumption relevant to this appeal concerned work restrictions. He was asked to "assume that the doctor also testified that [Plaintiff] should—that manual labor is excluded for him?" After all the assumptions were made Dr. Marshall concluded, "I think a person with the assumed conditions that you described—their prospects for employment would be greatly diminished and, I think, to the point of sixty-five (65%)." On cross examination Dr. Marshall admitted, "If he can do repeated bending, stooping, lifting, that would increase employment prospects for him." He explained that "it would be a question of whether the fifty (50) pounds—the below fifty (50) pounds could be done repetitively or just on occasion."

At the end of the trial on 16 March 1989, the Chancellor ruled, "All right. I am going to give him a judgment for sixty percent (60%) disability. I think that is about what he has. Court will be adjourned." In his order on 30 March 1989, the Chancellor decreed that the award must be paid in a lump sum.

I.

[1] Dr. Haynes' rating of twelve percent disability was based on the second edition of the *American Medical Association Guidelines to the Evaluation of Permanent Partial Impairment*. At the time of the trial, these guidelines were published

in their third edition. Tenn.Code Ann. § 50-6-204(d)(3) states:

To provide uniformity and fairness for all parties, any medical report prepared by a physician furnishing medical treatment to a claimant shall use the American Medical Association Guides to the Evaluation of Permanent Impairment, (American Medical Associations) or the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment, (American Academy of Orthopedic Surgeons). A physician shall utilize the most recent edition of either publication in determining the degree of anatomical impairment. A practitioner shall be required to give an impairment rating based on one (1) of the two (2) publications noted above.

Defendants' appeal on this issue rests upon the statute above and *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn.1987). In *Humphrey*, a young chiropractor based his testimony on an old edition of an A.M.A. guide. He found that the employee did sustain some permanent partial disability, and he rated it at ten percent. We held that it was error to admit the chiropractor's testimony, and we reversed. This rule of law, however, was subsequently qualified. A rating that conforms to the statutory requirements is unnecessary when causation and permanency are already established. See *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 457 (Tenn.1988) and *Lyle v. Exxon Corp.*, 746 S.W.2d 694, 699 (Tenn.1988). In *Lyle*, we held that "use of one of the two guides named in the statute was unnecessary, although preferable, where causation and permanency have been established by expert testimony, because the issue then becomes the extent of vocational disability, not anatomical disability." 746 S.W.2d at 699. In the present case, Defendants specifically admitted that Plaintiff had a "permanent impairment," and they never questioned the causation element. In fact, the Chancellor found that the central issue for him to decide was the amount of permanent partial disability. Thus, vocational, and not anatomical, disability was the issue

at trial, and the admission of Dr. Haynes' rating was not error.

II.

[2] Through a series of questions Plaintiff's attorney asked Dr. Marshall to assume many facts and characteristics. Defendants challenge only one assumption in their appeal. Defendants argue that the assumption concerning work restrictions was based upon facts not in evidence. Dr. Haynes restricted Plaintiff by telling him it would be "unadvisable for him to rely" on manual labor for employment and that he should seek a "more sedentary type of job." Dr. Marshall was asked to assume that Dr. Haynes "excluded" manual labor for Plaintiff. Defendants urge this Court to find that this was not a proper characterization of Dr. Haynes' restrictions.

[3] A hypothetical question must be supported by the evidence presented at trial. *Banks v. St. Francis Hosp.*, 697 S.W.2d 340, 343 (Tenn.1985). In *Cortrim Manufacturing Co. v. Smith*, 570 S.W.2d 854 (Tenn.1978), this Court addressed the problem faced when an attorney's interpretation of the evidence differs from the facts. In *Cortrim Manufacturing*, the plaintiff's work consisted of bending, stooping, stretching, and reaching down to the floor. Plaintiff's attorney, in his hypothetical question, stated that the job consisted of a "tremendous amount" of such bending. We held:

The words "tremendous amount" may have been an exaggeration to some extent but, in our view, does not necessarily render the question objectionable. Counsel must be given some leeway in his choice of words in framing such questions and the matter is primarily one for the exercise of discretion by the trial judge.

Id. at 856. We further held that restating the hypothetical in cross examination is the proper remedy for pointing out deficiencies in the opposing party's question. *Id.* In the case at hand, the Chancellor heard the direct and cross examinations of Dr. Haynes and held for the plaintiff.

On cross examination, Dr. Marshall stated that if Plaintiff could do repeated bending it "would increase employment prospects for him." He went on to say that the percentage of disability would depend on whether the bending could be done repetitively or just on occasion. Plaintiff believes that the words "unadvisable for him to rely" can be interpreted to mean "excluded," while Defendants argue that there was no explicit prohibition. This is a matter of interpretation for the trial court. In his award of sixty percent permanent partial disability, the Chancellor obviously believed Plaintiff's interpretation of Dr. Haynes' testimony, and a preponderance of the evidence is not otherwise. Tenn.Code Ann. § 50-6-225(e) (1988).

III.

[4] A purpose of the Workers' Compensation Act is to provide injured workers with periodic payments which are a substitute for their regular wages. *Van Hooser v. Mueller Co.*, 741 S.W.2d 329, 330 (Tenn. 1987). Thus, the general statutory payment scheme is periodic. An exception to this general scheme is the lump sum award. See Tenn.Code Ann. § 50-6-229 and *Smith v. Gallatin Nursing Home*, 629 S.W.2d 683, 684 (Tenn.1982).

[5, 6] The employee has the burden of proving that he has special needs or that exceptional circumstances exist warranting an award of a lump sum payment. See *Van Hooser*, 741 S.W.2d at 331 and *Flowers v. South Central Bell Tel. Co.*, 672 S.W.2d 769, 772 (Tenn.1984). Plaintiff did not file a motion requesting a lump sum award, no hearing was held to establish a special need for a lump sum payment, and no evidence was cited in the Chancellor's order recognizing exceptional circumstances warranting such an award.

As a result, we must reverse the Chancellor's award of a lump sum payment. We affirm the award of sixty percent permanent partial disability to the body as a whole. This cause is remanded for the entry and enforcement of a decree requiring Defendants to pay the accrued benefits and to pay the balance in accordance with

the statutory scheme. The costs of this appeal are taxed to the appellants.

DROWOTA, C.J., and COOPER,
HARBISON and O'BRIEN, JJ., concur.



STATE of Tennessee, Appellee,

v.

Dewey Scott FRAZIER, Appellant.

Supreme Court of Tennessee,
at Knoxville.

Feb. 12, 1990.

Defendant filed postconviction petitions, alleging that convictions resulted from guilty plea proceedings wherein he was not advised of constitutional rights. The Criminal Court, Sullivan County, Garrett, J., dismissed petitions, and defendant appealed. The Court of Criminal Appeals affirmed, and defendant filed Rule 11 application. The Supreme Court held that: (1) some convictions and violations were not subject to postconviction attack, and (2) waiver issue was not available to State.

Remanded.

1. Courts ⇨100(1)

Convictions entered in trial courts prior to release of *Boykin v. Alabama* by the United States Supreme Court were not subject to postconviction attack on ground that defendant was not advised of constitutional right against self-incrimination before entering guilty plea. U.S.C.A. Const.Amend. 5.

2. Criminal Law ⇨998(7)

Violations of decision of Supreme Court of Tennessee regarding plea allocation that exceeded requirements set forth by United States Supreme Court in *Boykin v. Alabama* were not constitutional viola-

tions and were not available except on direct appeal.

3. Criminal Law ⇨998(3)

Issue of waiver for failure to raise adequacy of plea allocation was not available to State in postconviction proceeding.

4. Criminal Law ⇨273.1(4), 1167(5)

Constitutional violation in accepting guilty pleas without proper allocation was subject to substantial compliance and harmless error scrutiny.

Charles W. Burson, Atty. Gen. and Reporter and James W. Milam, Asst. Atty. Gen., Nashville, for appellee.

Dewey Scott Frazier, Nashville, pro se.

ORDER AND OPINION

PER CURIAM.

State v. Prince and McDowell, released 4 December 1989 at Jackson, 781 S.W.2d 846 (Tenn.) requires that we grant defendant's Rule 11 application and remand to the trial court. However, it is appropriate that we address an issue that the remand makes relevant and that has been properly pretermitted. The court's examination of the record reveals that defendant, having filed four prior post-conviction petitions, filed nine separate post-conviction petitions on 22 April 1988, alleging that each resulted from guilty plea proceedings wherein he was not advised of the constitutional right against self-incrimination and violations of *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) and *State v. Mackey*, 553 S.W.2d 337 (Tenn.1977) and that the nine convictions were used to enhance a bank robbery conviction to a life sentence as a Habitual Criminal on 3 December 1976. Defendant sought appointment of counsel, amendment of his petition, a hearing on the merits, and appropriate relief. The trial court dismissed the petitions without appointment of counsel or an evidentiary hearing, finding waiver and the self-incrimination issue previously determined.