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Guy M. Hicks
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February 10, 1999

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Proceeding for the Purpose of Addressing Competitive Effects of Contract Service Arrangements Filed by BellSouth Telecommunications, Inc. in Tennessee*
Docket No. 98-00559

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Motion to Compel Discovery from Competing Intervenors. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In re: ***Proceeding for the Purpose of Addressing Competitive Effects of Contract Service Arrangements Filed by BellSouth Telecommunications, Inc. in Tennessee***

Docket No. 98-00559

BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO COMPEL DISCOVERY FROM COMPETING INTERVENORS

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully moves that the Tennessee Regulatory Authority compel AT&T Communications of the South Central States, Inc. ("AT&T"), Sprint Communications Company, L.P. ("Sprint"), MCImetro Access Transmission Services, Inc. ("MCImetro"), NEXTLINK Tennessee, L.L.C. ("NEXTLINK"), e.spire Communications, Inc. ("e.spire"), NewSouth Communications, L.L.C. ("NewSouth"), and Time Warner Communications of the Mid-South, L.P. ("Time Warner") (collectively "the Competing Intervenors") to respond fully and completely to BellSouth's discovery requests. Served on September 16, 1998 and October 21, 1998, BellSouth's First and Second Set of Data Requests seek information relevant to the issues in this proceeding, which the Competing Intervenors generally have either refused or simply failed to provide. While the Competing Intervenors have objected to certain of BellSouth's requests, their objections are without merit and should be overruled.

II. ARGUMENT

First Data Requests Nos. 2 and 3.

First Data Request No. 2. Do you contend that any BellSouth Contract Service Arrangement is anticompetitive?

First Date Request No. 3. If the answer to the foregoing request is in the affirmative, for each CSA which you contend is anticompetitive, please:

(a) identify the CSA by applicable CSA, tariff, or docket number;

(b) identify the terms, conditions, or provisions of the CSA which you contend are anticompetitive, if any;

(c) state all facts which support your contention that the CSA or any terms, conditions, or provisions contained therein are anticompetitive; and

(d) identify all documents which support your contention that the CSA or any terms, conditions, or provisions contained therein are anticompetitive.

AT&T: In its responses served on October 16, 1998, AT&T declined to answer these Data Requests, stating that it had not "had sufficient opportunity to review BellSouth's Contract Service Arrangements in order to determine whether any individual Contract Service Arrangement is anticompetitive." Because BellSouth made its Contract Service Arrangements ("CSAs") available for inspection by counsel for the parties, including AT&T, more than four weeks prior to the time discovery responses were due, AT&T's claim that it needed more time to answer BellSouth's discovery seems disingenuous. Furthermore, regardless of whether or not AT&T had sufficient time when it prepared its original responses, AT&T has had more than four months to supplement its responses, which it has failed to do. The Authority should order that AT&T promptly answer these Data Requests.

Sprint: Rather than answer the question that it had been asked -- whether it contends that any of BellSouth's CSAs is anticompetitive -- Sprint elected instead to extol the virtues of "Fresh Look." The purpose of this proceeding is to consider the competitive effects of BellSouth's CSAs, not to revisit an issue presently pending in another proceeding. Sprint should be directed to respond fully and completely to BellSouth's Data Requests.

MCI, NEXTLINK, and e.spire: MCI, NEXTLINK, and e.spire also elected not to answer BellSouth's Data Requests, claiming that they did "not at this time have a position" on the issue. If MCI, NEXTLINK and e.spire truly do not have a position on whether or not BellSouth's CSAs are anticompetitive, why are they participating in this docket? Furthermore, the use of the phrase "at this time" suggests that MCI, NEXTLINK, and e.spire may seek to change their minds. Such fence straddling defeats the purpose of discovery. *See Seagraves v. Plaza Machine & Tool*, 1998 Tenn. LEXIS 9 *8 (Tenn. Jan. 8, 1998) (purpose of Tennessee Rules of Civil Procedure, which "embody a broad policy favoring the discovery of any relevant, nonprivileged information, ... is to do away with trial by ambush and to rid trials of the element of surprise that often leads to results based not upon the merits but upon often unexpected legal maneuvering") (citations omitted) (copy attached). This proceeding has been pending for more than six months, and BellSouth is entitled to discover each party's position on the issues. If MCI, NEXTLINK, and e.spire continue to cling to the position that they have no position, they should be precluded from contending otherwise later in these proceedings.[1]

[1] The claim that MCI, NEXTLINK, and e.spire have no position on the substantive issues in this case appears merely to be a half-hearted attempt by the companies' attorneys to "answer" BellSouth's Data Requests. Apparently, not a single MCI, NEXTLINK, or e.spire employee was ever consulted in answering these Data Requests, since only the attorneys were identified as the persons participating in the preparation of their answers. BellSouth is entitled to discover the views of the parties, not the views of the parties' outside attorneys.

First Data Requests Nos. 4 and 5.

First Data Request No. 4. Do you contend that any BellSouth Contract Service Arrangement is discriminatory?

First Data Request No. 5. If the answer to the foregoing request is in the affirmative, for each CSA which you contend is discriminatory, please:

(a) identify the CSA by applicable CSA, tariff, or docket number;

(b) identify the terms, conditions, or provisions of the CSA which you contend are discriminatory, if any;

(c) state all facts which support your contention that the CSA or any terms, conditions, or provisions contained therein are discriminatory; and

(d) identify all documents which support your contention that the CSA or any terms, conditions, or provisions contained therein are discriminatory.

AT&T: As was the case with the preceding Data Requests, AT&T claimed that it had not "had sufficient opportunity to review BellSouth's Contract Service Arrangements in order to determine whether any individual Contract Service Arrangement is discriminatory." BellSouth respectfully disagrees, as four weeks should have been more than sufficient time for AT&T to take a position on one of the central issues in this case. Furthermore, even assuming AT&T needed more time, it has had almost four months to review BellSouth's CSAs and to supplement its responses accordingly, which AT&T has failed to do. AT&T should be directed to answer promptly these Data Requests.

MCI, NEXTLINK, and e.spire: As was the case with the preceding Data Requests, MCI, NEXTLINK, and e.spire claim that they do "not at this time have a position" on the issue of whether or not BellSouth's CSAs are discriminatory. It is not clear what additional

information is required for these parties to take a position on one of the threshold issues in this case. BellSouth has responded fully to MCI's, NEXTLINK's and e.spire's discovery requests, and they have had more than four months to review BellSouth's CSAs. If MCI, NEXTLINK, and e.spire continue to cling to the position that they have no position, MCI, NEXTLINK, and e.spire should be precluded from contending otherwise later in these proceedings. Otherwise, these parties will be permitted to engage in "trial by ambush," which defeats the very purpose of discovery.

NewSouth and Time Warner: New South and Time Warner contend that BellSouth's CSAs are discriminatory "to the extent that similarly situated customers are offered different terms, conditions, and rates." However, New South and Time Warner failed to identify the CSAs they contend are discriminatory or to state the facts and identify the documents that support their contention, even though they were expressly asked to do so. Although NewSouth and Time Warner claim that specific CSAs cannot be identified "until BellSouth discloses all information relevant to the customer for whom the CSA was created," BellSouth has disclosed this information. BellSouth has made the CSAs themselves available for review and has responded fully to multiple discovery requests by multiple Intervenors. Nothing more is required for NewSouth and Time Warner to provide the requested information, and they should be ordered to do so immediately.

First Data Requests Nos. 6, 7, 8, 9, 10, 11, 12, and 13

First Data Request No. 6. Have you entered into any Special Contracts from January 1, 1994 to the present?

First Data Request No. 7. If the answer to the foregoing request is in the affirmative, please identify each such Special Contract, including:

(a) the effective date of the Special Contract;

(b) the term of the Special Contract;

(c) the telecommunications services provided under the Special Contract; and

(d) the differences in the rates, terms, and conditions for the telecommunications services provided under the Special Contract and the rates, terms, and conditions for those same services as set forth in your approved tariffs in Tennessee.

First Data Request No. 8. Do any of the Special Contracts you have entered into since January 1, 1994 contain any provisions which require that the person subject to the Special Contract pay termination charges in the event the person cancels service orders prior to installation or terminates the Special Contract before the term of the agreement has expired?

First Data Request No. 9. If the answer to the foregoing request is affirmative, please:

(a) identify each such Special Contract; and

(b) describe any termination charges that would apply under each such Special Contract if the person subject to the Special Contract cancels a service order prior to installation or terminates the Special Contract before the term of the agreement has expired.

First Data Request No. 10. Has any person subject to a Special Contract entered into with you since January 1, 1994 been assessed or paid termination charges for canceling a service order prior to installation or terminating the Special Contract before the term of the agreement has expired?

First Data Request No. 11. If the answer to the foregoing request is in affirmative, please:

(a) identify the person involved and the Special Contract under which the termination charges were assessed or paid;

(b) state the amount of termination charges that were assessed or paid; and

(c) describe with specificity the method by which the termination charges were calculated.

First Data Request No. 12. Are the services that you provide under each Special Contract available at the same rate to any person who meets the terms and conditions of the Special Contract?

First Data Request No. 13. If the answer to the foregoing request is in the affirmative, please:

(a) describe the criteria you consider, if any, in determining whether a person meets the terms and conditions of the Special Contract;

(b) identify all documents the refer or relate to the criteria you consider, if any, in determining whether a person meets the terms and conditions of the Special Contract;

(c) describe the procedures you utilize, if any, in determining whether a person meets the terms and conditions of the Special Contract; and

(d) identify all documents that refer or relate to the procedures you utilize, if any, in determining whether a person meets the terms and conditions of the Special Contract.

AT&T, MCI, NEXTLINK, e.spire, New South, and Time Warner: Other than Sprint, all of the Competing Intervenors objected to answering any of BellSouth's Data Requests seeking information concerning their special contracts, claiming that such information was "irrelevant to this proceeding and not calculated to lead to the discovery of admissible evidence." *See, e.g.,* AT&T's Objections at 3-6; *see also* MCI Objections at 3. The Competing Intervenors take an unduly narrow view of relevancy. According to the Authority's own rules, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the

subject matter of the [proceeding] more probable or less probable than it would be without the evidence." Chapter 1220-5-2-.01 (outlining rules of evidence in arbitration proceedings). *See also* Rule 401 of the Tennessee Rules of Evidence. As the Tennessee Supreme Court has observed, "to be relevant, evidence must tend to prove a material issue." *Tennessee v. DuBose*, 953 S.W.2d 649, 653 (Tenn. 1997) (quoting Advisory Commission Comment to Rule 401).

Here, information concerning special contracts offered by BellSouth's competitors is relevant to this proceeding because such information tends to prove material issues concerning the competitiveness of BellSouth's CSAs. Director Greer recently made this point clear in his comments at the January 19, 1999 Directors' Conference. Director Greer urged the Authority to "consider reviewing the CLEC CSAs in order to determine how similar they may or may not be." According to Director Greer, "If we determine that the CLECs and BellSouth have similar conditions and terms, then the issue of anticompetitiveness might go away." (Tr. at 51) (copy attached). Director Greer stated emphatically that he was "definitely in favor" of "reviewing and making a part of this docket the terms and conditions of the competitors' CSAs for the purpose of comparisons." (*Id.*).

One of the issues the Authority intends to resolve is "the circumstances under which contract service arrangements should be offered in lieu of extended service arrangements in the general tariff." The circumstances under which BellSouth's competitors offer special contracts in lieu of extended service arrangements in their tariffs is directly relevant to assessing the competitiveness of BellSouth's CSAs, particularly if BellSouth's competitors are offering special contracts under the same circumstances as BellSouth is offering CSAs. This is the information BellSouth seeks in its First Data Requests Nos. 6 and 7, and the Competing Intervenors should be directed to answer these requests.

Another issue the Authority intends to address concerns the circumstances in which termination charges are appropriate as well as the method by which termination charges should be calculated for special contracts and extended service arrangements under general tariffs. The termination charges that BellSouth's competitors seek to impose through their special contracts are relevant to this issue. The Authority may very well conclude that the termination charges in BellSouth's CSAs or extended service arrangements are appropriate if they are the same or substantially similar to the termination charges offered by BellSouth's competitors. BellSouth's First Data Requests Nos. 8, 9, 10, and 11 are designed to elicit this information, and the Competing Intervenors should be compelled to answer these requests.

The Authority also intends to consider the criteria in establishing a definition of "similarly situated customers" and the procedures to identify such customers. Under Tennessee law, all telecommunications carriers must make the terms of a special contract available to any "similarly situated" customer. *See* Rule 1220-4-8-.07(3)(c) (competing providers must make available "[a]ny special pricing package, contract, or discount" "to any similarly situated customer satisfying the required terms and conditions of the special agreement upon request"); Rule 1220-4-2-.55(g)(2) ("special contracts or special pricing packages" offered by interexchange carriers "shall be allowed as long as the service is available at the same rate to any customer meeting the special terms and conditions"). The criteria and procedures used by the Competing Intervenors to identify customers who are similarly situated to their special contract customers is relevant to the Authority's inquiry and may provide useful information in resolving this issue. Accordingly, the Competing Intervenors should be directed to answer BellSouth's First Data Requests Nos. 12 and 13, which seek to obtain this information.

Notwithstanding the Competing Intervenors' claims to the contrary, information concerning special contracts offered by BellSouth's competitors is relevant to this proceeding. That BellSouth may be the incumbent local exchange provider rather than a new entrant goes to the weight of the evidence, not its relevancy. Furthermore, the only way BellSouth can obtain information concerning the special contracts offered by the Competing Intervenors is through discovery. Although the Competing Intervenors are required to file summaries of their special contracts, Rule 1220-4-8-.07(3)(b), Rule 1220-4-2-.55(g)(1), it does not appear that they are complying with this requirement. Accordingly, the Authority should grant BellSouth's motion to compel.

Sprint: While electing to answer these Data Requests by claiming that it had not entered into any special contracts from January 1, 1994 to the present, Sprint made clear that its response was only with respect to "Sprint Communications Company L.P. and reflects information only about that entity." Sprint Response at 4, n.1. However, BellSouth's Data Requests were not so limited. In the Definitions and Instructions to BellSouth's First Data Requests, Sprint was defined to include "Sprint Communications Company L.P." as well as its "parent, subsidiaries, and affiliates." Sprint did not object to this definition, and thus should be directed to answer BellSouth's Data Requests as they relate to Sprint Communications Company L.P.'s parent, subsidiaries, and affiliates as well.

Second Data Request No. 1

Second Data Request No. 1. If you are providing telephone exchange service to customers in the State of Tennessee, please:

(a) state the date you began providing such service in Tennessee;

(b) identify all counties in Tennessee where you currently provide or offer to provide such service; and

(c) identify all counties in Tennessee where you are not currently providing or offering to provide telephone exchange service, but plan to provide or offer to provide such service within the next twelve (12) months.

AT&T: AT&T did not file objections to this Data Request. However, rather than providing the information requested, AT&T simply stated that it "provides service and plans to provide service in Tennessee pursuant to the terms of its certificate, which is publicly available for review and inspection." This answer is nonresponsive because there are numerous companies that have been granted a certificate of convenience and necessity to provide local service in Tennessee, but which have yet to do so. This Data Request seeks information about AT&T's current local service offerings and immediate plans to provide local service in Tennessee, and AT&T should be directed to provide this information immediately.

MCI, NEXTLINK, and e.spire: MCI, NEXTLINK, and e.spire objected to answering BellSouth's Data Request, contending that the requested information was "neither relevant nor likely to lead to the discovery of relevant information." MCI Response at 1; NEXTLINK Response at 1; e.spire Response at 1. This objection is without merit. Information concerning the areas where the Competing Intervenors are competing or intend to compete against BellSouth is relevant to the criteria and procedures for establishing similarly situated customers, since the extent to which a particular customer has competitive alternatives for service is one factor that the Authority may want to consider.

Second Data Requests Nos. 2, 3, 4, and 5

Second Data Request No. 2. Have you ever decided not to offer to provide telecommunications service to a person in Tennessee because the person was subject to a CSA with BellSouth?

Second Data Request No. 3. If the answer to the foregoing request is in the affirmative, for each such person, please:

(a) identify the person involved;

(b) identify the telecommunications services you would have offered to provide the person had the person not been subject to a CSA with BellSouth; and

(c) identify all documents that refer or relate to your decision not to offer to provide telecommunications service to a person in Tennessee because the person was subject to a CSA with BellSouth.

Second Data Request No. 4. Have you ever offered to provide telecommunications service to a person in Tennessee who declined your offer, in whole or in part, because the person had previously entered into a CSA with BellSouth?

Second Data Request No. 5. If the answer to the foregoing request is in the affirmative, for each such person, please:

(a) identify the person involved;

(b) identify the telecommunications services you offered to provide; and

(c) identify all documents that refer or relate to your offer to provide telecommunications service to a person in Tennessee which was declined, in whole or in part, because the person had previously entered into a CSA with BellSouth.

AT&T: While contending that it has not provided telecommunications service to potential customers because the customer was subject to a CSA with BellSouth, AT&T claims it cannot provide any underlying facts to support this contention because "there is no central repository of the information." AT&T Response at 3. AT&T makes a similar claim in seeking to excuse its failure to state whether or not any potential customer has ever declined AT&T's offer to provide service because the customer was subject to a CSA with BellSouth. Although AT&T insists that it is in the process of gathering the requested information, it has had more than three months to do so and to supplement its responses accordingly. That responding to BellSouth's discovery may be time consuming and difficult does not excuse AT&T from furnishing the requested information in a timely fashion. AT&T should be directed to answer BellSouth's Data Requests completely and fully, or it should be precluded from asserting claims it cannot prove.

MCI, NEXTLINK, and e.spire: MCI, NEXTLINK, and e.spire objected to answering these Data Requests, contending that the requested information was "neither relevant nor likely to lead to the discovery of relevant information." MCI Response at 1; NEXTLINK Response at 1; e.spire Response at 1. This objection is without merit because the information BellSouth seeks is directly relevant to the competitive effects of BellSouth's CSAs. In assessing those competitive effects, the Authority should consider the extent to which competing carriers have decided not to offer service or their offers to provide service have been declined because the customer was subject to a CSA with BellSouth.

Although NEXTLINK and e.spire claim that BellSouth is "trying to turn this proceeding into an antitrust suit," nothing could be further from the truth. NEXTLINK Response at 2; e.spire Response at 2. BellSouth's Data Requests are merely intended to discover the facts

necessary to test the theory that BellSouth's CSAs are anticompetitive because they result in customers being "locked up," which purportedly deprives competitors of the opportunity to serve those customers. The Authority should consider whether competitors have in fact been denied such an opportunity in assessing the merits of this theory.

Time Warner: While not objecting to BellSouth's data requests, Time Warner failed to provide the requested information, claiming that it "is not available at this time." However, it is not clear what efforts, if any, Time Warner is making to look for the requested information. At the very least, Time Warner should be directed to do what AT&T apparently is doing, which is contacting each of its salespeople in Tennessee.

Second Data Request No. 6 and 7

Second Data Request No. 6. Do you contend that BellSouth's CSAs are not available for resale in Tennessee?

Second Data Request No. 7. If the answer to the foregoing request is in the affirmative, please:

(a) state all facts which support your contention that BellSouth's CSAs are not available for resale in Tennessee, including describing with particularity any efforts you have made to resell a BellSouth CSA in this State; and

(b) identify all documents which support your contention that BellSouth's CSAs are not available for resale in Tennessee, including any documents that refer or relate to your efforts to resell a BellSouth CSA in this State.

MCI, NEXTLINK, and e.spire: While not objecting to these Data Requests, neither MCI, NEXTLINK, nor e.spire made any serious attempt to answer them. For example, without answering whether it contends that BellSouth's CSAs are not available for resale, MCI states that

"each CSA must be reviewed to ascertain conditions or prohibitions imposed on the customers in a resale scenario." Because MCI has had approximately four months to review these CSAs, MCI should be directed to answer BellSouth's Data Requests.

Likewise, NEXTLINK and e.spire claim that they do "not have sufficient information to answer this question," although it is unclear what additional information they require. NEXTLINK and e.spire go on to allege that "language in some of the CSAs filed by BellSouth indicates that the customers may not switch providers except upon notice to, and agreement by, BellSouth." However, neither NEXTLINK or e.spire identify these CSAs in question, despite being asked to do so. NEXTLINK and e.spire should be directed to state clearly whether they contend that BellSouth's CSAs are not available for resale in Tennessee, and, if so, to state the facts and identify the documents that support this contention.

NewSouth and Time Warner: In their answers to BellSouth's First Data Requests, both NewSouth and Time Warner contend that BellSouth's CSAs are anticompetitive because "BellSouth does not make its CSAs available for resale." NewSouth Response at 2; Time Warner Response at 2. In BellSouth's Second Data Requests, BellSouth sought to discover the facts supporting this contention. For whatever reason, neither NewSouth nor Time Warner bothered to respond, and they should now be compelled to do so.

III. CONCLUSION

For the foregoing reasons, the Authority should grant BellSouth's motion and enter an order compelling AT&T, MCI, Sprint, NEXTLINK, e.spire, NewSouth, and Time Warner to respond fully and completely to BellSouth's First and Second Data Requests.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

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1ST CASE of Level 1 printed in FULL format.

HERCHEL SEAGRAVES, Plaintiff/Appellee/Cross Appellant, VS. PLAZA MACHINE AND TOOL, Defendant/Appellant/Cross Appellee.

NO. 02S01-9612-CH-00104

SUPREME COURT OF TENNESSEE, SPECIAL WORKERS' COMPENSATION APPEALS PANEL, AT JACKSON

1998 Tenn. LEXIS 9

January 7, 1998, Filed

PRIOR HISTORY: [*1]

CHANCERY COURT. GIBSON COUNTY CHANCELLOR GEORGE R. ELLIS.

DISPOSITION: AFFIRMED.

COUNSEL: FOR APPELLANT: S. Newton Anderson & Thomas F. Preston, Memphis, Tennessee.

FOR APPELLEE: Clayton Mayo, Jackson, Tennessee.

JUDGES: Members of Panel: Janice M. Holder, Associate Justice, Supreme Court, Robert A. Lanier, Special Judge, Don R. Ash, Special Judge. CONCUR: Robert A. Lanier, Special Judge, Janice M. Holder, Associate Justice.

OPINIONBY: Don R. Ash

OPINION: MEMORANDUM OPINION

Ash, Special Judge

This worker's 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) (1996 Supp.) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the employer Plaza Machine and Tool, contends: (1) that the evidence preponderates against the trial court's finding that the plaintiff suffered a permanent partial disability from his work related injury; (2) that the award of permanent partial disability benefits based on 47% to the body as a whole is excessive; and (3) that the trial court erred by not permitting Plaza Machine and Tool to introduce into evidence [*2] the testimony of its private investigator, his written report, and his video tape of Mr. Seagraves. The employee, in his cross-appeal, contends that the trial court should have found that Mr. Seagraves suffered 100% disability to the body as a whole. The panel finds that the judgment of the trial court should be affirmed.

STANDARD OF REVIEW

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. § 50-6-225(e)(2) (1996 Supp.). This tribunal is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. *Wingert v. Government of Sumner County, 908 S.W.2d 921 (Tenn. 1995).*

FACTS

The claimant, Herchel Seagraves, was sixty-one at the time of trial and has an eleventh grade education. Mr. Seagraves worked as a machinist for the majority of his career. He had worked for Plaza Machine and Tool since November 1980. On April 6, 1992, Mr. Seagraves suffered an injury while working at Plaza Machine & Tool to his right arm, neck and shoulder. Mr. Seagraves was referred to Dr. [*3] Robert Hornsby for an examination of his injury. Dr. Hornsby, the treating physician, treated Mr. Seagraves conservatively for over one and a half years. Dr. Hornsby opined by deposition that Mr. Seagraves had a possible ridiculopathy or nerve injury to the right upper extremity. Further, he opined that after Mr. Seagraves received treatment he would have flare-ups from time to time and need occasional intermittent treatment to his neck and shoulder. Also, Dr. Hornsby opined that Mr. Seagraves retained a 20% permanent partial disability to the body as a whole. Mr. Seagraves, at the request of defendant, went to Dr. Ronald Bingham for an independent medical examination. Dr. Bingham conducted an EMG and a Nerve Conduction Study test on plaintiff's right upper extremity, which revealed normal results. Dr. Bingham opined by deposition that as a

result of Mr. Seagraves accident, he had 0% permanent partial disability to the body as a whole and no work restrictions. At the time of trial plaintiff was unemployed.

FINDING OF DISABILITY

Appellant contends that the evidence presented at trial preponderates against the trial court's finding that the plaintiff suffered a permanent partial [*4] disability from his work related injury. When faced with conflicting medical testimony, the trial judge has discretion to accept the opinion of certain experts over that of others. *Thomas v. Aetna Life & Casualty Co., 812 S.W.2d 278 (Tenn. 1991)*. Moreover, while causation and permanency of an injury must be proved by expert medical testimony, such testimony must be considered in conjunction with the lay testimony of the employee as to how the injury occurred and the employee's subsequent condition. *Smith v. Empire Pencil Co., 781 S.W.2d 833, 835 (Tenn. 1989)*. It is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts. *Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 677 (Tenn. 1983)*. A trial judge may even predicate an award on medical testimony to the effect that the accident and subsequent injuries "could be" the cause of plaintiff's injury. *Id. at 677*. Although causation cannot be based upon speculative or conjectural proof, reasonable doubt is to be construed in favor of the employee. *White v. Werthan Industries, 824 S.W.2d 158, 159 (Tenn. 1992)*.

In the instant case, there is conflicting testimony between Dr. Bingham who opined that [*5] Mr. Seagraves suffers no permanent partial impairment and Dr. Hornsby who opined that Mr. Seagraves suffers a 20% permanent partial impairment. Dr. Hornsby was plaintiff's treating physician for his work related injury. As such he is entitled to greater weight in his opinion of whether plaintiff's injury was caused by his work. See *Crossno v. Publix Shirt Factory, 814 S.W.2d 730, 732 (Tenn. 1991)* (treating physician's opinion entitled to greater weight). Moreover, Dr. Bingham did not comment on plaintiff's impairment until after he had received various treatments for his injuries. Further, Dr. Bingham's finding of 0% permanent partial impairment appears extreme considering the medical records, depositions, and testimony of the plaintiff. Therefore, based upon the doctors' opinions, the lay testimony of the plaintiff, and the evidence in the record, the evidence does not preponderate against the trial court's finding that the plaintiff did sustain a compensable injury.

PERMANENT PARTIAL DISABILITY IMPAIRMENT RATING

Appellant further contends that the evidence presented at trial preponderates against the trial court's award of 47% permanent partial disability to plaintiff's [*6] body as a whole as a result of plaintiff's work related injury. The trial court is justified in the consideration of other factors such as age, job skills, education, training, and the like, in addition to anatomical impairment. *Worthington v. Modine Mfg. Co., 798 S.W.2d 232 (Tenn. 1990)*. The factors this panel is to consider in determining the amount of disability are the claimant's age (*Jackson v. Greyhound Lines, Inc., 734 S.W.2d 617, 621 (Tenn. 1987)*); his job skills, education, training, and length of disability (*Employers Ins. v. Heath, 536 S.W.2d 341 (Tenn. 1977)*); job opportunities in the marketplace (*Hinson v. Wal-Mart, 654 S.W.2d 675, 677 (Tenn. 1983)*); whether the claimant has returned to work (*Corcoran v. Foster Auto GMC, 746 S.W.2d 452, 459 (Tenn. 1987)*); the claimant's own assessment of his or her physical condition and resulting disability (*Corcoran, 746 S.W.2d at 458*); and whether despite returning to work, whether the claimant's ability to earn wages in any form of employment (that would have been available to him in an uninjured condition) is diminished by an injury (*Prost v. City of Clarksville, 688 S.W.2d 425 (Tenn. 1985)*).

In the instant [*7] case, Mr. Seagraves is a 61-year-old man with an eleventh grade education. He has worked as a common laborer most of his life with no specialized or formal training. Mr. Seagraves' age decreases the chances of finding employers willing to hire a nearing retirement machinist. Furthermore, Dr. Hornsby opined that Mr. Seagraves' injury will cause him future problems because of the strong possibility of flare-ups from time to time. Mr. Seagraves' ability to find employment in the open labor market, in view of his age, education, physical condition, and skills, is impaired by his injury.

Based on the proof, this panel holds that Mr. Seagraves is entitled to a permanent partial impairment rating of 47% to the body as a whole, as well as any future medical treatment required for his work related injury provided by his employer. Therefore, the evidence does not preponderate against the trial court's finding that plaintiff is 47% disabled.

DISCOVERY VIOLATION

Finally, appellant contends that the trial court erred by not permitting Plaza Machine and Tool to introduce into evidence the testimony of Anthony Crone and trial exhibits number 7 and number 8 for identification showing surveillance [*8] on Mr. Seagraves. Appellant's reliance on the trial court's local rules to justify his refusal to disclose the identity of his private investigator and video tape is misplaced for two reasons. First, it

confuses his obligation to comply with appropriate discovery requests with his duty to identify the witnesses he intended to call at trial. Second, it places the trial court's local rule in direct conflict with the discovery rules in the Tennessee Rules of Civil Procedure.

The Tennessee Rules of Civil Procedure embody a broad policy favoring the discovery of any relevant, nonprivileged information. *Wright v. United Servs. Auto Ass'n, 789 S.W.2d 911, 915 (Tenn. Ct. App. 1990); Duncan v. Duncan, 789 S.W.2d 557, 560 (Tenn. Ct. App. 1990).* Their purpose is to do away with trial by ambush, *Ingram v. Phillips, 684 S.W.2d 954, 958 (Tenn. Ct. App. 1984),* and to rid trials of the element of surprise that often leads to results based not upon the merits but upon unexpected legal maneuvering. *Hood v. Roadtec, Inc., 785 S.W.2d 359, 362 (Tenn. Ct. App. 1989); Strickland v. Strickland, 618 S.W.2d 496, 501 (Tenn. Ct. App. 1981).*

Tenn. R. Civ. P. 26.02(1) permits parties to discover [*9] the identity of all persons having relevant knowledge of any discoverable matter, including the facts relevant to any claim or defense involved in the litigation. However, parties are not entitled to discover the identities of the persons their adversary intends to call as witnesses at trial in the absence of a local rule or a court order. *Strickland v. Strickland, 618 S.W.2d at 499; Reed v. Allen, 522 S.W.2d 339, 341 (Tenn. Ct. App. 1974).*

The Tennessee Rules of Civil Procedure govern practice and procedure in all state trial courts. See Tenn. R. Civ. P. 1. However, trial courts may adopt local practice rules as long as the rules do not conflict with other applicable statutes or rules promulgated by the Tennessee Supreme Court. *Hackman v. Harris, 225 Tenn. 645, 651, 475 S.W.2d 175, 177 (1972); Richie v. Liberty Cash Grocers, Inc., 63 Tenn. App. 311, 320-21, 471 S.W.2d 559, 563 (1971);* Tenn. S. Ct. R. 18; Tenn. Code Ann. § 16-3-407 (1994 Repl.).

Plaintiff's interrogatory # 3 sought any photos, videos, motion pictures, or other pictorial or other representations taken of the plaintiff at any time whatsoever, and the person responsible for making these pictures or [*10] videos. The substance of the interrogatory sought unprivileged, relevant information and was consistent with Tenn. R. Civ. P. 26.02(1) because the employer's private investigator had a video tape of facts relevant to the claims or defenses involved in the case. Defendant had no legally defensible reason for declining to accede to the employee's pretrial request to reveal the identity of the employer's private investigator and to disclose the video tape. Plaza Machine and Tool objected to this request, alleging that it was outside the scope of discovery and that the materials requested were attorney-work product, and further stating that it did not have any of the materials inquired about. The employer then supplemented its response to plaintiff's interrogatory # 3 by stating that it would not respond any further to this question without a formal motion submitted by plaintiff's attorney. The private investigator's testimony, video tape and report show the plaintiff raising his arms above his head at times while washing his vehicle and another at a self-service car wash and then drying them at his residence. The purpose of this testimony was to undermine plaintiff's claim that the [*11] accident he sustained left him with difficulty raising his arms above chest level and lessened his ability to perform domestic activities. Therefore, defendant should have disclosed these sought after items when the plaintiff requested the information on April 19, 1994.

The employer's failure to respond to his adversary's discovery request did not, however, automatically render his private investigator's testimony and his video tape inadmissible. Trial courts have broad discretion to fashion sanctions for discovery abuses that are commensurate with the parties' conduct. *Lyle v. Exxon Corp., 746 S.W.2d 694, 699 (Tenn. 1988); Airline Constr., Inc. v. Barr, 807 S.W.2d 247, 263 (Tenn. Ct. App. 1990).* They may permit a witness to testify even if withholding the witness' identity was contrary to the rules of discovery. *Doochin v. United States Fidelity & Guaranty Co. 854 S.W.2d 109, 114 (Tenn. Ct. App. 1993).* The nature of the sanction depends upon: (1) the party's reasons for failing to provide the requested discovery; (2) the importance of the information sought to be discovered; and (3) the time needed to respond effectively to the information. *Strickland v. Strickland, [*12] 618 S.W.2d at 501.*

The plaintiff had ample opportunity to file an appropriate motion forcing the defendant to produce the video tape. Based upon the record this is an appropriate case for sanctions in regard to the failure to disclose. The trial court erred in not allowing either the introduction of this evidence or this matter being continued until the issues of sanctions and discovery could be completed. When a witness' name is not revealed during discovery, the trial court has discretion about how to proceed. *Pettus v. Hurst, 882 S.W.2d 783, 787 (Tenn. Ct. App. 1993)* perm. app. denied (1994). A judge may permit the testimony, or may exclude the testimony, or may grant a continuance to allow preparation. *Airline Construction, Inc. v. Barr, 807 S.W.2d 247, 263 (Tenn. Ct. 1990)* perm. app. denied (1991).

Reversal of a judgment is required only when the error involves a substantive right and more probably than

not affected the trial's outcome. Tenn. R. App. P. 36(b). The panel has had an opportunity to review the video tape in question. Accordingly, we find that not reviewing the video tape and not admitting the private investigator's testimony and his written report was, at [*13] most, harmless error.

Defendant contends that the trial court should have found that plaintiff suffered 100% disability to the body as a whole as a result of plaintiff's work related injury. Appellee relies on the fact that since Mr. Seagraves is considered disabled by the Social Security Administration, this Court should find him 100% disabled. Awards or findings of the Social Security Administration are not admissible in the courts of Tennessee in workers' compensation cases for the purpose of showing the existence or the extent of an employee's permanent disability. *Bingham v. Dyersburg Fabrics Co., Inc., 567 S.W.2d 169, 171 (Tenn. 1978).* Among the many reasons are: 1) employer is not a party to proceedings before the social security administration; and has no opportunity to cross-examine or to rebut employee's proof: and 2) the criterion for determining the existence or extent of permanent disability temporary or total, under Tennessee workers compensation statutes and case law differs widely from the definitions of disability applicable for social security purposes. See *42 U.S.C. § 416*(i)(1) (1992) and *42 U.S.C. § 423*(d) (1992). Id. Therefore this issue is without merit. [*14]

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. *Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987).* Therefore, the judgment of the trial court is accordingly affirmed. Costs on appeal are taxed to the defendant-appellant.

Don R. Ash, Special Judge

CONCUR:

Robert A. Lanier, Special Judge

Janice M. Holder, Associate Justice

BEFORE THE TENNESSEE REGULATORY AUTHORITY

COPY

TRANSCRIPT OF DIRECTORS' CONFERENCE

Tuesday, January 19, 1999

APPEARANCES:

For BellSouth:	Mr. Guy Hicks Mr. Bennett Ross
For e.spire, SECCA, and NEXTLINK:	Mr. Henry Walker
For United Telephone SE:	Mr. James Wright
For Intermedia:	Mr. Don Baltimore
For TN-American Water:	Mr. T.G. Pappas Mr. Dick Sullivan
For Consumer Advocate Div.:	Mr. L. Vincent Williams
For Tri-City Regional Airport Authority:	Mr. George Oldham, III
For TRA Staff:	Mr. David Waddell Mr. Richard Collier Mr. Edward Phillips

Reported By:
Christina Meza, RPR, CCR

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a prehearing conference to prepare this matter for hearing, including resolving all outstanding discovery requests, determining whether other discovery is necessary, and setting a schedule if the parties desire to file prehearing briefs and prefiled testimony and a hearing date so that this matter will come before the Authority in a timely period.

DIRECTOR GREER: Mr. Chairman, before I -- I generally agree with where you are going. I want to ask my fellow Directors to make another consideration in approving the hearing officer's report. While we may or may not want to open this docket to include all other CSAs, I think we might want to consider reviewing the CLEC CSAs in order to determine how similar they may or may not be. If we determine that the CLECs and BellSouth have similar conditions and terms, then the issue of anticompetitiveness might go away.

I'm not opposed to opening this docket to CLEC CSAs. I am definitely in favor, however, in reviewing and making a part of this docket the terms and conditions of the competitors' CSAs for the purpose of comparisons. If the CLEC CSAs should be made a part of the record through discovery, that the TRA could require them to be submitted under protective order

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 1999, a copy of the foregoing document was served on the parties of record via facsimile, overnight, or US Mail, postage prepaid:

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