

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

DEBORAH SMITH,)	
)	SULLIVAN LAW
Plaintiff/Appellee)	
)	
v.)	NO. 03S01-9903-CV-00035
)	
PICCADILLY CAFETERIA, INC.,)	HON. R. JERRY BECK
)	
Defendant/Appellant)	

For the Appellant:

Jack M. Vaughn
215 E. Sullivan Street
Kingsport, TN 37660

For the Appellee:

J. David Miller
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MEMORANDUM OPINION

Mailed: March 17, 2000

Filed: June 15, 2000

Members of Panel:

Justice William M. Barker
Senior Judge John K. Byers
Special Judge Howell N. Peoples

AFFIRMED

BYERS, Senior Judge

_____This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2); *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995).

The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. See *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

_____The trial court found the plaintiff sustained an accidental injury—repetitive stress injury to the rotator cuff of her right shoulder—while in the course and scope of her employment rendering her unable to work as of August 5, 1997, and that the defendant received timely notice of the injury on January 19, 1998. The trial court set the plaintiff's workers' compensation benefit at \$257.83 per week and found a 66% permanent partial disability to the body as a whole. The trial court further awarded temporary total disability benefits for 68 weeks and 3 days, medical expenses of \$11,711.98, discretionary costs of \$1,056.80, and 20% of the plaintiff's attorney fees.

We affirm the judgment of the trial court.

FACTS

The Plaintiff, who was 48 years of age at the time of trial, is a married mother of four children who are grown and live in the area. She has an eighth-grade education and a long employment history as a waitress. She also has some experience working on a production line. She began working for the defendant, Piccadilly Cafeteria, in the bakery in 1985. Her duties with the defendant included lifting heavy trays and bowls of ingredients, frequently above shoulder level, into and

out of ovens, cabinets, shelves and bins. She was also required to lift 100 pound bags of flour, 150 pound bags of sugar and 50 pound bags of powdered milk.

The plaintiff began experiencing problems with her right shoulder in April of 1997. She had previously suffered bouts of tendinitis and initially believed she was dealing with another tendinitis flare-up. On June 16, 1997, she consulted Dr. Griffith about the problems; he told her that her job activities could be a significant contributing factor to her condition. On June 23, 1997, an MRI of the plaintiff's shoulder revealed a torn rotator cuff in her right shoulder. During her next visit with Dr. Griffith, she learned of the test results and was told the condition resulted from the repetitive motion and stress to her shoulder from her work in the defendant's bakery.

The plaintiff informed her supervisor of the test results. He commented that she should quit doing so much farm work. The plaintiff explained the injuries were not the result of any farm work, but rather, resulted from the continuous lifting on the job. The defendant denied the plaintiff's version of the conversation, but another employee confirmed the plaintiff's version of the conversation.

The plaintiff's treating doctor took her off work on August 5, 1997 (writing a letter to her supervisor to that effect) and opined that her injury was debilitating at that time. He also sent a letter on November 24, 1997 stating his opinion that the injury was caused by work activities. The plaintiff underwent surgery to decompress the shoulder and repair the rotator cuff on March 11, 1998.

The plaintiff still has some weakness in her shoulder and experiences difficulty performing tasks at or above shoulder level.

MEDICAL EVIDENCE

Dr. Mark Griffith, M.D., an orthopedic surgeon and the plaintiff's treating physician, testified via deposition. Dr. Griffith saw the plaintiff on June 16, 1997, at which time she complained of shoulder pain in both shoulders and pain along the right elbow. She also indicated she had been having noticeable weakness and pain

in her right shoulder with prolonged use for nearly a year with progressive worsening over the past months. Dr. Griffith ordered an MRI and an EMG. He also discussed the possible work-relatedness of her problem. Dr. Griffith took the plaintiff off work on August 5, 1997. After conservative treatment, he performed surgery on March 11, 1998, to repair a torn rotator cuff and correct other shoulder problems. He determined the plaintiff reached maximum medical improvement on November 30, 1998, and opined she had sustained a 19% impairment to the upper extremity, or 11% to the body as a whole.

_____ Dr. William M. Platt, M.D., board certified in physical medicine and rehabilitation, also testified via deposition. Dr. Platt examined the plaintiff at the request of defense counsel. He reviewed Dr. Griffith's records and the plaintiff's hospital records including the radiology, the MRI and the lab reports. Dr. Platt also had a functional assessment done on the plaintiff. The plaintiff told Dr. Platt about her 13 year history involving lifting from 30-50 lbs. on a regular basis and reaching overhead to retrieve pans to bring them to waist level. Dr. Platt's diagnosed degenerative acromioclavicular joint with status post resection and partial thickness rotator cuff tear with post status repair. He could not give an opinion as to the exact cause of the plaintiff's injuries but opined that a number of factors were at work including the plaintiff's work history. He felt the shoulder problems represented a slow, progressive course of injury. He determined her impairment to be 12% to the upper extremity or 7% to the body as a whole. Dr. Platt also stated that Dr. Griffith's method of assessment—where he added a percentage for loss of strength and combined model—was incorrect.

DISCUSSION

The defendant says the trial court committed reversible error by holding the plaintiff had complied with the notice requirements of the Tennessee Workers Compensation Law. The defendant argues that notice with respect to gradual injuries is the date when the employee is no longer able to work. *Lawson v. Lear*

Seating Corp., 944 S.W.2d 340, 343 (Tenn. 1997). The defendant then argues that from the last day the plaintiff was able to work, August 5, 1997, until Dr. Griffith's letter of November 24, 1997, sufficient notice was not given. Thus, the plaintiff was outside the 30 day written notice provision. The burden then fell to the plaintiff to prove actual notice—a burden the plaintiff failed to carry according to the defendant.

_____The defendant's argument is refuted by the principles in *Lawson*. The *Lawson* court noted the difficulty of pinpointing an injury date in cases of repetitive stress injuries. The plaintiff notified the defendant as soon as was practical; the August 5th letter was sufficient to put the defendant on notice. The defendant had actual knowledge and that is sufficient for statutory purposes.

The defendant also says the trial court committed reversible error by holding the plaintiff's claim was timely brought despite the statute of limitation having run on her claim which should have barred recovery on the alleged claim. The defendant argued the plaintiff's claim was filed outside the one year statute of limitations and should be barred because: 1) the plaintiff failed to give notice; and 2) the plaintiff had been experiencing pain in her shoulder for a year prior to seeing Dr. Griffith in June of 1997, and the injury began when she first experienced pain. The plaintiff's last day of work was August 5, 1997, and the statute began to run on that date. The complaint was filed on January 19, 1998, well within the statute of limitations.

The defendant argues that the trial court should have awarded benefits according to the 7% rating given by Dr. Platt. However, the trial court has the discretion to accept the opinion of one medical expert over another medical expert. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333 (Tenn. 1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990). In this case, the trial court permissibly chose to accept the opinion and rating of the plaintiff's treating physician.

As to the defendant's argument regarding the lack of support for the trial court's application of the maximum multiplier, the trial court made the proper findings required by the statute:

The plaintiff . . . is forty-eight years old, has an eighth grade education, no transferable vocational skills; has received no additional specialized training that can be determined, and has always worked in physically demanding jobs
.....

The evidence does not preponderate against the trial court's findings in this regard.

Finally, the defendant says the trial court committed reversible error by failing to cap the award at 2.5% since the defendant offered the plaintiff employment within her restrictions. See TENN. CODE ANN. § 50-6-241. However, the offer of employment must be meaningful. In this case, the offer, which was vague as to duties, availability and pay, was made for the first time at trial. Such an offer is not meaningful.

For the reasons stated herein, we affirm the judgement of the trial court. The costs of the appeal are taxed to the defendant.

John K. Byers, Senior Judge

CONCUR:

William M. Barker, Justice

Howell N. Peoples, Special Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

DEBORAH SMITH v. PICCADILLY CAFETERIA, INC.

Circuit Court for Sullivan County

No. C32271(B)

No. E1999-01307-WCM-CV

Filed: June 15, 2000

JUDGMENT

This case is before the Court upon Piccadilly Cafeteria, Inc.'s 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 Piccadilly Cafeteria, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

BARKER, J., NOT PARTICIPATING