IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, NOVEMBER 1999 SESSION

JUDY F. BARNETT	)	UNICOI CHANCERY
	)	
Plaintiff/Appellant	)	
	)	
VS.	)	Hon. Thomas J. Seeley, Jr.,
	)	Chancellor
NN BALL & ROLLER, INC. and	)	
WASAU INSURANCE COMPANIES	)	
	)	
Defendants/Appellees	)	No. 03S01-9811-CH-00133
		Decided: May 10, 2000

For the Appellant:

J. Christopher Booth
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For the Appellees:

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

Members of Panel:

E. Riley Anderson, Chief Justice
Roger E. Thayer, Special Judge
H. David Cate, Special Judge

AFFIRMED. THAYER, Special 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 appeal has been perfected by the employee, Judy F. Barnett, from the action of the trial court in awarding her 65% permanent partial disability to the body as a whole. On appeal the employee insists the award of disability is not sufficient and that her disability should be fixed at 100%.

Mrs. Barnett was 43 years of age and is a high school graduate. She had taken a drafting course but never used it. She said she had also taken a basic computer concepts course and a typing course. Her prior work experience was in a sewing factory and a grocery store.

She began work for defendant, NN Ball & Roller, Inc., in 1984 and at the time in question, she was employed as an inspector of steel bearings. In 1990-91 she testified she had an allergy reaction after being out in the sun (not work-related) for some period of time and it had been diagnosed as photodermatitis.

The inspector position required her to examine steel bearings on an assembly line passing in front of her. She said that prior to this inspection, the production process involved cleaning the bearings with kerosene in order to cut off grease and that after a ball wash, the bearings were dipped in pack oil. She said that as the process operated there was a strong odor which settled in her hair and clothing.

She testified she began having problems in 1993 and that it continued throughout her employment. Her problems were shortness of breath, swollen eyes, sores in her nose, ears peeling, earaches, upset stomach and headaches. She worked until June 2, 1997 and stopped working on her doctor's advise. During the course of her employment, the employer attempted to accommodate her medical problems by improving the ventilation, changing her job and other efforts which did not greatly improve her condition and she was eventually terminated on January 8, 1998 because the company could not comply with her medical restrictions.

Causation of injury is not an issue. Material Safety Data Sheets were introduced into evidence. The manufacturer of the pack oil warned it could cause

eye irritation, drying or defatting of the skin, etc. The warning with reference to the kerosene stated it could cause irritation of the skin, eyes and respiratory tract, etc.

During November 1997 plaintiff began seeing Dr. Donna Wyche Bashor who was board certified in internal medicine and was specializing in a allergy and immunology practice. Dr. Bashor testified by deposition and said the work environment caused her problems; that she had "contact dermatitis, secondary to the petroleum and napthenic distillates." and that she had advised the patient to stop work as it was hazardous to her health. Dr. Bashor treated her over a period of time and stated that Mrs. Barnett improved to some degree after leaving the workplace but indicated she would continue to have problems. Future work restrictions including avoidance of dust, dirt, hydrocarbons, solvents, chemicals, etc. and the workplace should have good ventilation and not exposed to extreme temperature changes.

Dr. Bashor stated even though Mrs. Barnett had left the environment which caused her problems to develop, her condition was such that it would be easier to have problems in the future unless she was very careful. The doctor opined she had a 24% medical impairment because of her skin condition and a 9% impairment because of developing a reactive airway disease.

Plaintiff was also examined and evaluated by Dr. Samuel D. Breeding on behalf of the employer during August 1998. He testified by deposition and gave a 10% medical impairment on the contact dermatitis condition but was of the opinion she did not have any impairment relating to a respiratory condition.

As to plaintiff's ability to work in the future, she told the trial court she had looked for employment but had not been successful and that she planned to take a secretarial course. Witness Ron Norman, a rehabilitation counselor, testified orally and stated the medical restrictions resulted in very limited jobs she could do as an immune system disorder was very difficult to work with. He was of the opinion that clerical type position would work with her restrictions.

Dr. Norman Hankins, a vocational consultant, testified orally and opined she had a 71% vocational disability. Witness Julian Nadolsky, also a vocational consultant, opined she had a 18% vocational disability as a result of Dr. Bashor's restrictions and a 5% vocational disability based on Dr. Breeding's restrictions.

Witness Nadolsky was asked if he could explain the wide difference in vocational assessment he had given and that of Dr. Hankins. He replied that according to their reports their findings by a computer analysis was very close as his computer analysis indicated 18% vocational disability and Dr. Hankins computer analysis resulted in a 15% vocational disability. However, he said Dr. Hankins's final analysis assumed plaintiff was capable of doing medium occupations (lifting up to 50 pounds) prior to her injury and he was of the opinion she had only been qualified to work in light occupations (not lifting over 20 pounds) and that this difference could have resulted in the large difference of vocational disability.

The case is to be reviewed by us *de novo* accompanied by a presumption in favor of the correctness of the findings of fact by the trial court unless we find the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

The first two issues raise questions concerning the adequacy of the award of 65% disability. We find the trial court was faced with conflicting expert medical evidence as well as conflicting evidence among the several consultant witnesses. In weighing evidence, the trial court is not bound by any witnesses' testimony but has the discretion to conclude that the opinion of one witness should be accepted over the opinion of another witness. *Thomas v. Aetna Life & Cas. Co.,* 812 S.W.2d 278 (Tenn. 1991); *Orman v. Williams-Sonoma, Inc.,* 803 S.W.2d 672, 676 (Tenn. 1991).

In fixing permanent legal disability, the trial court must consider many factors including the employee's age, education, work experience, local job opportunities, etc. and this is to be examined in relation to the open labor market and not whether the employee is able to return and perform the job held at the time of the injury. *Orman v. Williams-Sonoma, Inc., supra*; *Clark v. National Union Fire Ins. Co.,* 774 S.W.2d 586, 588 (Tenn. 1989). Medical impairment ratings and vocational opinions are also to be considered but are not controlling on the issue of permanency.

From our independent review of the record, we cannot say that the evidence preponderates against the conclusion of the trial court as to the award of disability.

The last issue raises a question concerning the cross-examination of plaintiff by defense counsel. It is argued the trial court was in error in allowing defense counsel to question plaintiff about her credit card debts and when she traded cars and where she financed her vehicles. We find no merit to this contention. The

employee had requested the trial court to commute a portion of the award pursuant to our statute and plaintiff's counsel of record at the trial stage examined plaintiff regarding her financial condition etc. in an effort to support a finding of the statute that she could wisely manage and control any commuted award. Defense counsel had a right to cross-examine the employee on this issue since a decision of the trial court could result in changing the award from a periodic payment of benefits to a lump sum benefit. Additionally, this issue was not raised at the trial court and cannot be raised for the first time on appeal. Rule 36, T.R.A.P.

The judgment entered by the trial court is affirmed. Costs of the appeal are taxed to the plaintiff.

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Roger E. Thayer, Special Judge

CONCUR:

_____
E. Riley Anderson, Chief Justice

_____
H. David Cate, Special Judge

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

JUDY F. BARNETT V. NN BALL & ROLLER, INC., ET AL.

Chancery Court for Unicoi County
No. 6172

No. E1998-00534-WC-R3-CV - Decided May 10, 2000

JUDGMENT

This case is before the Court upon defendants' 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.

The motion to supplement the record is, hereby, DENIED.

PER CURIAM

Anderson, C.J., not participating