

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

**ANITA CHAPMAN v. E-Z SERVE PETROLEUM MARKETING
COMPANY d/b/a E-Z SERVE, INC., ET AL.**

Circuit Court for Wilson County
No. 10023

No. M1999-00441-WC-R3-CV - Decided - May 2, 2000

JUDGMENT

This case is before the Court upon 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 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 will be paid by appellant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

IN THE SUPREME COURT OF THE STATE OF TENNESSEE
AT NASHVILLE
(DECEMBER 16, 1999)

ANITA CHAPMAN,)	WILSON COUNTY
)	CIRCUIT COURT
Plaintiff, Appellee,)	
)	No. M1999-00441-WC-R3-CV
)	
vs.)	Honorable Clara Byrd,
)	Judge
E-Z SERVE PETROLEUM MARKETING)	
COMPANY d/b/a E-Z SERVE, INC., and)	
ROYAL INSURANCE COMPANY,)	
)	
)	
Defendant, Appellant.)	

For Appellant
Randolph A. Veazey
Connie Jones
Nashville, Tennessee

For Appellee
Sarah Stein
Phillip Miller
Nashville, Tennessee

MEMORANDUM OPINION

Mailed March 21, 2000
Decided May 2, 2000

Members of the Panel:
Justice Adolpho A. Birch, Jr.
James L. Weatherford, Senior Judge
Hamilton V. Gayden, Jr., Special Judge

AFFIRMED
AS MODIFIED

Hamilton V. Gayden, Jr.
Special Judge

MEMORANDUM OPINION

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

Plaintiff, Anita Chapman, filed a claim for worker's compensation alleging that she was hurt on the job sometime in May or June 1996. Plaintiff was employed as a convenience clerk with E-Z Serve where she alleges she injured her right foot while squatting to fill a cigarette order. Her job duties as an convenience clerk required her to be constantly on her feet on a concrete floor.

The trial court determined that Plaintiff's injury was compensable; the court found that she was injured on the job from which injury arose tarsal tunnel syndrome, plantar fasciitis and neuritis to her lower right extremity. The court awarded her temporary total benefits, permanent partial benefits, discretionary costs, healthcare related costs, and lifetime medical benefits. Defendant appealed.

The issues for this appeal are as follows: (1) whether the court erred in finding the injury was job related; (2) whether the court erred by giving more credibility to the testimony of the Plaintiff's two unauthorized physicians as opposed to the testimony of the Defendant's authorized, independent medical expert; (3) whether the court erred in awarding medical benefits to unauthorized physicians, and; (4) whether the court erred in granting discretionary costs.

Three physicians testified by way of deposition: two of Plaintiff's five treating physicians testified, Dr. Guillermin, a neurosurgeon, and Dr. Hawthorn, a podiatrist. Testifying for the Defendant as an independent medical examiner was Dr. O'Brien, a board certified orthopaedic surgeon.

The Plaintiff, a 43 year old female, had held jobs in the past as a housekeeper at a motel, a clerk in a video rental store, a cashier and stocking clerk at a drug store, a secretary to her husband in a small business and also had assisted her husband in a tavern they owned for a period of time. Claimant completed the eleventh grade, did not graduate and has not pursued a GED. However, she can read, write, operate business machines, type and has had some experience with computers.

On the day she experienced symptoms to her right foot and ankle she told the store manager;

however, she did not think it was a significant injury and there was no claim for medical treatment from her employer at that point in time.

The Appellant argues that Plaintiff suffers from a pre-existing physical condition, not a compensable injury. Defendant contends that Dr. O'Brien's superior experience and board certification (neither of Plaintiff's physicians were certified), render him more qualified and that, therefore, his opinion should receive greater weight than those of Plaintiff's doctors. Defendant also points to Dr. O'Brien's consideration of all of Plaintiff's medical records (the Plaintiff's physicians did not rely on all of the previous medical care given to Plaintiff as a result of the alleged injury) and argues that the timing of Plaintiff's visit to Dr. O'Brien supports his lower impairment rating. Dr. O'Brien also testified her condition was not work-related and gave her a lower rating than Dr. Guillermin.

A history of Plaintiff's medical care for this injury is as follows: on June 13, 1996, she first went to see her family physician, Dr. Cameron Shearer; she complained of several maladies including pain to her right foot. She later returned to see Dr. Shearer who in turn referred her to Dr. Gregory White, an orthopaedic surgeon; Dr. White treated the Plaintiff from August 15 through November 20, 1996.

Dr. White performed a plantar fasciotomy on her right foot on November 4, 1996. On November 25, 1996, during the treatment from Dr. White, Plaintiff learned from him that he was of the opinion that her foot problems were work-related. Plaintiff called her supervisor at that time to notify him of a claim for the foot injury.

Neither Defendant nor Plaintiff followed up on the November 25, 1996 report of the injury as a work-related injury, and thus no provision was made for authorized medical attention for the Plaintiff.

After surgery by Dr. White, however, Plaintiff continued to experience problems and was treated by Dr. Alex Chernowitz, an orthopaedic surgeon associated with Dr. White.

Plaintiff subsequently left Dr. Chernowitz and sought treatment from Dr. Francis Hawthorn, a podiatrist. Pursuant to his diagnosis, on April 13, 1997, Dr. Hawthorn performed a second plantar fasciotomy and a Morton's neurectomy. After Plaintiff continued to manifest symptoms of tarsal tunnel syndrome, Dr. Hawthorn referred her to Dr. John Guillermin, a neurosurgeon.

Dr. Hawthorn testified he referred the Plaintiff to Dr. Guillermin as he, Dr. Guillermin, had

treated tarsal tunnel syndrome in other patients. Dr. Guillermin defined tarsal tunnel syndrome in the Plaintiff's case as an "entrapment neuropathy where the tissue, where a nerve goes to a canal, normal canal and for some reason that canal gets smaller or puts pressure on the nerve and irritates it and then that's the entrapment syndrome, so that is the entrapment in the ankle and foot."

Dr. Guillermin treated Plaintiff from September 15, 1997 to April 27, 1998. During the treatment of the Plaintiff he ordered an EMG and consequently diagnosed her with tarsal tunnel syndrome. He then performed a tarsal tunnel release, which left Plaintiff with some residual discomfort and numbness. Dr. Guillermin testified further that given the history given to him by the Plaintiff of how she claimed to have been injured, that the incident was the precipitating cause of tarsal tunnel. Dr. Hawthorn also testified that the Plaintiff's job activities, standing for prolonged periods of time on a concrete floor, caused her to have tarsal tunnel syndrome complicated later by plantar fasciitis and neuritis.

After the lawsuit was filed, at Defendant's request, Plaintiff saw Dr. Thomas J. O'Brien, an orthopaedic surgeon, for an independent medical evaluation. Dr. O'Brien agreed with the other treating physicians that Plaintiff suffered from tarsal tunnel syndrome but opined that it was not related or caused by her employment; he further asserted that the two plantar fasciotomies undergone by the Plaintiff were not designed to treat tarsal tunnel syndrome disorder. Dr. O'Brien testified, in part as follows:

Tarsal tunnel syndrome involves a compression of the posterior tibial nerve or its branches, the medial plantar nerve and the lateral plantar nerve. This is the nerve that courses around the medial aspect of the ankle. That's the inside of the ankle. That nerve runs with a group of tendons.

Tarsal tunnel syndrome is relatively uncommon, and far and away the most common cause is idiopathic. That's a term which means that there has been no causal trauma associated with the development.

The idiopathic tarsal tunnel syndrome is caused by, in most cases, individual factors such as local anatomic factors; that is, the anatomy of the patient's tibial nerve and the anatomy of the surrounding structures, that is, the tendons that it runs with.

. . . In my opinion, her tarsal tunnel syndrome would have developed whether or not she was working in a convenience store. That is, her tarsal tunnel syndrome would have developed with the day-to-day activities. . .

In contrast, however, Dr. Guillermin, her treating neurosurgeon, testified that, "...one of the causes of tarsal tunnel syndrome is venous stasis and venous stasis means decreased flow or congestion of, which are the tiny veins around the nerve in the tarsal tunnel so that the space left for

the nerve if you have a stasis in those veins is less and therefore you have pressure on the nerve.”

Dr. Guillermin further testified that tarsal tunnel syndrome may also be caused by “any kind of acute or severe injury but a repetitive stress to that area would also fall in that category or prolonged pressure depending on how one’s foot is used during a certain activity.” During Dr. Guillermin’s testimony, he referred to a treatise, Wilkins’ Neurosurgery and quoted from it: “Venous stasis from prolonged standing may precipitate symptoms in some individuals.”

In this case, there are diametrically opposed medical opinions on the issue of causation. On the one hand is Dr. Guillermin, a treating physician, whose primary expertise lies with nerve type injuries coupled with the testimony by Plaintiff’s podiatrist, Dr. Hawthorn, who specializes in the foot, and on the other hand is a certified orthopaedic surgeon, Dr. O’Brien, the independent expert who only saw the Plaintiff one time and whose expertise concerns bones, muscles and tendons. Plaintiff’s causation testimony is buttressed by the medical records of three additional non-testifying physicians coupled with her own history of the injury.

Upon appeal the Panel is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. Landers v. Fireman’s Fund Ins. Co., 775 S.W. 2d 355 (Tenn. 1989). The Panel is of the opinion that the trial court did not err in finding by a preponderance of the evidence that the Plaintiff was injured while on her job. 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 and that it contains the more probable explanation. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-677 (Tenn. 1983).

Defendant next argues that the trial court erred in awarding 70% permanent partial disability to the right leg. Defendant argues that Plaintiff’s impairment should be limited to the foot.

Dr. Guillermin opined that Plaintiff reached maximum medical improvement on December 1, 1997, and he rated her with a 14% permanent partial disability to the right foot, or 10% to the right leg, or 4% to the whole body. In addition, he placed restrictions on Plaintiff’s activities. Dr. Guillermin also validated the previous surgeries the Plaintiff underwent as being necessary. Dr. O’Brien, however, rated her at 5% to the right leg, or a right foot rating of 7%. Dr. O’Brien recommended Plaintiff restrict her standing and walking to two hours at a time. He placed no restriction on her ability to work a full-time job.

Dr Hawthorn, the Plaintiff's podiatrist, testified:

I think the tarsal tunnel started with the ...injury...and...one of the after events of that kind of injury is that it tends to alter your gait. It's called physiological splinting and it tends to change the way you walk. It puts additional stresses and strains on your foot. . . I think the plantar fasciitis developed subsequent to a gait change, and I think once that came alive, I think she underwent a very subtle gait change again, which subsequently led to some neuritis, at the ball of her foot, or neuroma.

The testimony of the Plaintiff's experts support a finding of impairment to the leg as opposed to the foot.

Defendant further asserts that Plaintiff is able to work at any of her former places of employment with the modification that she stand no longer than 30 minutes at a time, and that Plaintiff has other marketable skills. Defendant also contends that the award is excessive.

Plaintiff argues that she is precluded from returning to any of her former places of employment due to her disability and restrictions. She points to Dr. Guillermin's recommendation that she obtain a sedentary job, her lack of formal training in office-type work, and her lack of a high school degree.

The Panel is of the opinion that the Plaintiff is qualified to do sedentary-type jobs and does possess the necessary skills. The Panel therefore reduces the permanent partial disability rating to 50% of the body as a whole.

As to the issue of medical benefits awarded by the trial court for unauthorized medical treatment, Defendant argues that Plaintiff failed to follow statutory procedures regarding authorized treatment as set forth in Tenn. Code Ann. Section 50-6-204 (d)(5), including the time span after she instituted a claim, and Defendant denied it. Therefore, Defendant argues, the award for unauthorized treatment is erroneous.

During her initial treatment, Plaintiff was unaware that her condition was work-related. She states that once she made a claim, which was denied, she had no choice but to seek treatment on her own. Plaintiff asserts that the treatment she received was beneficial, necessary and compensable.

We are of the opinion the court properly awarded medical benefits for Plaintiff's treating physicians.

In so far as the issue of discretionary costs awarded to the Plaintiff by the trial judge is concerned, Defendant argues that Dr. Guillermin's \$148.00 fee was consultational rather than a deposition fee and therefore should not have been granted as discretionary costs under Rule 54.04

Tenn. Rules of Civil Procedure. The Panel reverses the Chancellor on the awarding of the \$148.00 dollar fee as it is a consultation fee with the Plaintiff's attorney and is thus not recoverable.

The Panel affirms but modifies the trial court's award. Appellant shall be taxed the costs of this appeal.

Hamilton V. Gayden, Jr., Special Judge

CONCUR:

Justice Adolpho A. Birch, Jr.

James L. Weatherford, Senior Judge