IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

# NANCY ELIZABETH TAYLOR v. MT. JULIET HEALTH CARE CENTER, INC.

**Criminal Court for Wilson County**
**No. 97-0850**

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**No. M1999-00045-SC-WCM-CV**
**Filed - June 7, 2000**

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## JUDGMENT

This case is before the Court upon 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 Mt. Juliet Health Care Center, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

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

| | | |
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| NANCY ELIZABETH TAYLOR<br>Plaintiff/Appellee | )<br>) | NO. M1999-00045-WC-R3-CV |
| VS. | ) | WILSON COUNTY CRIMINAL |
| MT. JULIET HEALTH CARE CENTER, INC.<br>Defendant/Appellant | )<br>) | HONORABLE J. O. BOND, JUDGE |

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FOR THE APPELLANT:
Katherine A. Austin
210 3rd Ave. No.
P. O. Box 190683
Nashville, TN 37219-0683

FOR THE APPELLEE:
Brody N. Kane
102 East Main Street
Lebanon, TN 37087


**MEMORANDUM OPINION**


Mailed - March 10, 2000
Filed - June 7, 2000


*MEMBERS OF PANEL*

Frank F. Drowota, III, Associate Justice
Samuel L. Lewis, Special Judge
Tom E. Gray, Special Judge

AFFIRMED AS MODIFIED

Tom E. Gray, Special Judge

## 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. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

Mt. Juliet Health Care Center, Inc., the employer, contends in this appeal that the trial court erred in awarding the employee, Nancy Elizabeth Taylor, a vocational disability of fifty (50%) percent to the body as a whole and in commuting all of plaintiff's permanent partial disability benefits to a lump sum. As discussed below the panel has concluded the judgment should be affirmed as modified.

Employee is 41 years of age; she is a high school graduate and has additional training as a certified nursing assistant (CNA).

Following high school graduation, Nancy Elizabeth Taylor worked in the respiratory therapy department at McFarland Hospital in Lebanon, Tennessee for four (4) to five (5) months. Her job was to administer breathing treatments to patients who had pneumonia or other problems with their lungs.

She married and quit the job at McFarland Hospital because as she stated, "we wanted to start a family."

She reentered the work force in 1993 or 1994 as a substitute teacher. In 1996 she decided to take certified nursing assistant (CNA) training. CNA training was available at Mt. Juliet Health Care. Taking and completing the training, Ms. Taylor passed the examination and became a certified nursing assistant and was employed by Mt. Juliet Health Care on the 29th day of July, 1996.

On the 9th day of November, 1996 while at work for Mt. Juliet Health Care, Ms. Taylor was asked to assist in lifting and changing a patient who weighed approximately 300 pounds. While in the process of lifting the patient Ms. Taylor's feet slipped from under her. She fell backward with the fall rendering her unconscious. She regained consciousness and remembered that she was lying in the middle of the floor under the bed of the patient. The duty nurse put Ms. Taylor on a blanket and moved her into the hallway. She was transported by ambulance to University Medical Center where she was treated in the emergency room. She was not admitted to the hospital.

Mt. Juliet Health Care sent Ms. Taylor to Dr. Allen Redden who examined her and gave her a prescription for anti-inflammatory medicine and a prescription for pain medication. Dr. Redden referred Ms. Taylor to physical therapy. Dr. Redden treated Ms. Taylor from November, 1996 until March, 1997 and then Ms. Taylor was referred to Dr. John McInnis, an orthopaedic surgeon. Dr. McInnis first saw Ms. Taylor on the 1st day of April, 1997, and he ordered a magnetic resonance imaging (MRI) and restricted her to light duty with no lifting over 25 pounds and avoiding repetitive bending and stopping. Dr. McInnis saw Ms. Taylor for a second time on the 8th day of April, 1997, and he reported that the MRI revealed a disc herniation at L5-S1 with an extended fragment abutting the left S1 nerve root. Surgery was not a recommendation unless her leg pain became more severe. He observed that she might have to accept permanent restrictions, gave her a note for two (2) more physical therapy appointments and instructions in home exercises. He maintained the restrictions imposed on the first visit.

Ms. Taylor's last visit with Dr. McInnis was on the 22nd day of April, 1997. On examination Dr. McInnis reported that Ms. Taylor had "about 55 to 60 degrees of flexion, 30 degrees of extension, and full right and left lateral bending." In her left leg she had about 45 degrees of straight leg raising in the supine position and about 90 to 95 degrees of left straight leg raising in the sitting position. Surgery was an option. At this visit Dr. McInnis gave permanent restrictions of not lifting over thirty (30) pounds, avoiding frequent bending and stooping and he ascribed a six (6%) percent permanent physical impairment to the body as a whole based on the AMA Guidelines Fourth Edition. He stated he would see the patient again on an as needed basis.

Nancy Elizabeth Taylor was seen by Dr. Thomas J. O'Brien, orthopaedic spine surgeon, on the 22nd day of May, 1997. She was seen by Dr. O'Brien on this one occasion, and Dr. O'Brien rendered a report dated May 22, 1997. Dr. O'Brien testified by deposition at the trial.

According to Dr. O'Brien he took a history from Ms. Taylor; he reviewed the records of Dr. John McInnis; he personally reviewed the MRI; he reviewed the x-ray. He made physical examination of Ms. Taylor.

Diagnosis of Ms. Taylor by Dr. O'Brien was that she sustained an L5-S1 disc herniation as a result of an accident at work on the 9th day of November, 1996, and that she had preexisting degenerative disc disease at L5-S1. He told Ms. Taylor that she was a candidate for an L5-S1 decompressive procedure which would be designed to alleviate her leg symptoms and that in all

likelihood she would have some residual back pain.

Dr. O'Brien was of the opinion on May 22, 1997, that Ms. Taylor was at maximum medical improvement and that she had a five (5%) percent permanent partial impairment to the body as a whole based upon the AMA Guidelines for the Evaluation of Permanent Impairment, Fourth Edition, Table 75, page 113. He placed restrictions that she could lift up to fifty (50) pounds. He testified that Ms. Taylor does have a disc herniation and if her leg symptoms return that she would be a surgical candidate for a diskectomy procedure.

Frank Etlinger, Doctor of Chiropractics, began treating Nancy Elizabeth Taylor on the 4th day of November, 1997. He testified by deposition at the trial of this cause stating that he took a history from the patient, reviewed Dr. O'Brien's notes and that he performed a routine orthopedic neurological chiropractic examination. The opinion of Dr. Etlinger was that Ms. Taylor had sustained a lumbar spinal injury that "resulted in disc herniation and laxity of the adjacent ligaments." His treatment was spinal manipulation, the use of heat packs to reduce swelling and effect some pain relief and reduce muscle spasm and the use of electric muscle stimulation to further reduce muscle spasms. He saw Ms. Taylor on the 4th, 5th, and 11th of November, 1997. As of the date of the deposition Ms. Taylor had not returned to Dr. Etlinger.

Dr. Etlinger testified that based on the fourth edition of the AMA guidelines that Ms. Taylor had suffered a ten (10%) percent permanent partial impairment to the body as a whole and gave permanent restrictions not to lift more than twenty-five (25) pounds and to refrain from doing any bending, lifting or prolonged sitting.

Nancy Elizabeth Taylor testified that since the accident that she has done some private sitting with an older lady and that the care for this person does not require any lifting, bending or stooping. Activities given up, according to her, are water skiing and tennis and that she is not able to clean her house and has someone to come in for that purpose.

Application for licensed practical nurse training was made by Ms. Taylor to Sumner Regional Medical Center, but she was not admitted to the program. She testified that she passed the test for admission; that class size was limited and that on the application she reported a ruptured disc. After not being admitted to the LPN program at Sumner Regional, Ms. Taylor did enter Volunteer State Community College and in the fall semester, 1998, she was enrolled in a mathematics class, an English class and a vocabulary class.

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 findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); Krick v. City of Lawrenceburg 945 S.W. 2d 709, 712 (Tenn. 1997).

The party claiming the benefits of the Workers' Compensation Act has the burden of proof to establish her claim by a preponderance of the evidence. Oster, A Div. Of Sunbeam Corp. v. Yates 845 S.W. 2d 215, 217 (Tenn. 1992).

Nancy Elizabeth Taylor proved that her employer had actual notice of the accident at work, and she has proven by expert medical testimony of Dr. Thomas J. O'Brien that the accident at work caused the herniated disc. Dr. McInnis notes made an exhibit to the deposition of Dr. O'Brien confirms causation, and the testimony of Dr. Etlinger supports causation.

The trial judge was of the opinion that the testimony of Dr. Frank Etlinger should be given more weight than that of Dr. Thomas J. O'Brien. When the medical testimony is presented by deposition, as it was in this case, this Court makes its own assessment of the credibility and weight to be given to deposition testimony of medical experts. Henson v. City of Lawrenceburg 851 S.W. 2d 809, 812, (Tenn. 1993) Townsend v. State 826 S.W. 2d 434, 437, (Tenn. 1992)

Dr. Thomas J. O'Brien testified that the employee sustained a five (5%) percent permanent partial impairment to the whole body according to Table 75, page 113 of the AMA Guidelines for the Evaluation of Permanent Impairment, Fourth Edition.

Dr. Frank Etlinger found that the employee had (10%) percent permanent partial impairment rating to the whole body according to page 102, Category III of the AMA Guidelines for the Evaluation of Permanent Impairment, Fourth Edition.

Not testifying by deposition but included in the record as exhibit to the deposition of Dr. O'Brien are notes of Dr. John McInnis, and Dr. McInnis gave the employee a six (6%) percent impairment to her whole body. This rating was referenced in cross-examination of Dr. O'Brien.

Difference of opinion between Dr. O'Brien and Dr. Etlinger as to which table of the AMA Guidelines to use is based upon whether the employee has "significant signs of radiculopathy." According to the deposition testimony of Dr. O'Brien considering the guidelines as to radiculopathy and verification he states that the employee did not have the unilateral atrophy greater than two (2) centimeters and her neurologic examination was normal. The employee testified that Dr. O'Brien

used no instruments in examination.

In Dr. O'Brien's notes or report which he dictated May 22, 1997, after examination of the employee and which was made Exhibit 3 to his deposition, Dr. O'Brien on page 2 states "L5-S1 disk herniation with S1 radiculopathy."

In addition to difference of opinion concerning permanent partial impairment Dr. O'Brien and Dr. Etlinger differ as regards permanent restrictions. Dr. O'Brien opined that the employee could lift up to fifty (50) pounds, and he placed no other restrictions on her.

Dr. Etlinger was of the opinion that the employee should refrain from doing any bending, lifting, or prolonged sitting and that she would be able to lift about twenty-five (25) pounds. These permanent restrictions are in line with those ascribed by Dr. John McInnis.

Having considered the deposition testimony this Court sees no reason to disagree with the trial court in accepting the ten (10) percent permanent impairment to the body as a whole and the permanent restrictions as opined by Dr. Etlinger over the opinion of Dr. O'Brien.

The trial judge awarded the employee a fifty (50%) percent vocational disability. T.C.A. 50-6-241(c) provides that if the Court awards a multiplier of five (5) or greater, "the Court shall make specific findings of fact detailing the reasons for awards of the maximum impairment."

The trial judge considered lay and expert testimony; he considered the employee's age and her education and her work history. He considered the permanent restrictions and the employee's capacity to work. He accepted the testimony of the employee as credible and stated in his findings that she said she couldn't pick up fifteen (15) pounds while in therapy.

Where the trial judge has heard witnesses, especially where issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstance on review. Collins v. Howmet corp. 970 S.W. 2d 941 (Tenn. 1998).

The trial judge did not reference local job opportunities, but he did point out that Mt. Juliet Health Center had jobs available such as receptionist, nurse scheduler, social services and kitchen work, but did not place the employee in any of those jobs concluding that she could not do the jobs in her disabled condition.

Upon consideration, we cannot say the evidence preponderates against the findings of the trial judge that the employee suffered a fifty (50%) percent vocational disability.

Upon application by a party and approval by a proper court benefits which are payable

periodically may be commuted to one or more lump sum payment(s) if the Court finds such commutation to be in the best interest of the employee and the employee has the ability to wisely manage and control the commuted award. Tennessee Code Annotated 50-6-229(a).

The injured worker has the burden of proving that the lump sum award is in her best interest and that she is capable of wisely managing and controlling the commuted award. Bailey v. Colonial Freight Systems, Inc. 836 S.W. 2d 554 (Tenn. 1992) Jones v. General Accident Insurance Co. of America 856 S.W. 2d 133, 136 (Tenn. 1993).

Very limited testimony by Nancy Elizabeth Taylor and no other evidence was offered on the issue commutative of any award. Testimony offered was (transcript of trial, page 28, lines 5 - 20):

Q. Mrs. Taylor, are you responsible for your own finances?

A. Yes, I am.

Q And you keep your bank accounts?

A Yes, I do.

Q Are you able to do that on your own?

A Yes.

Q. So you feel you're responsible for your money affairs.

A Absolutely.

Q. We have requested that the Court that if it were to grant you a judgment that it be awarded in a lump sum. What would be your intention with that lump sum if that would be granted?

A. Well, I'd like to put it with some other investments that I have.

In a recent opinion, William Edmonds, plaintiff/appellant, vs. Wilson County and Wilson County Road Commission, Supreme Court No. M198-00451-S6-WCM-cv filed December 20, 1999 the court addressed commutation of a workers' compensation award and held that the injured worker carried the burden of proof as to ability to manage money and that it was in his best interest for a lump sum award when he testified that he would invest the money.

In Edmonds, supra, the injured worker presented testimony from his banker who had known the employee for more than twenty years and who testified that the employee could manage money and that he and the employee had discussed investment so the money could earn interest. The injured worker testified that the award could be invested and produce income. He also wanted to take a lump sum so the money would be in his estate for his wife and children if he died. Evidence

showed his house and ten acres, vehicle and farm equipment were debt free and that prior to his injury he had $18,000 in a savings account.

Investment of the lump sum award would be in Ms. Taylor's best interest, and it was her testimony that she wanted to put the money with other investments. The question is whether she carried the other prong of Tennessee Code Annotated §50-6-229(a) requiring a finding that she can wisely manage and control the commuted award.

The employee kept her bank accounts, and she testified that she was responsible in money matters. She has managed finances so as to have investments.

Although the testimony offered is sparse concerning ability to wisely manage money we cannot say that the trial court abused its discretion in commuting the award. Bailey v. Colonial Freight Systems, Inc. 836 S.W. 2d 554 (Tenn. 1992). Clayton v. Cookeville Energy, Inc. 824 S.W. 2d 167 (Tenn. 1992).

By Order entered on the 30th day of October, 1999, the parties agreed that temporary total disability benefits for a total of $6,833.76 were paid to the injured worker for the following dates:

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|---|---|---|
| From 11-10-96 | - | 12-05-96 |
| From 1-01-97 | - | 1-14-97 |
| From 2-01-97 | - | 2-28-97 |
| From 3-08-97 | - | 12-19-97. |

Stipulation was made at the trial that the employee was entitled to a workers' compensation rate of $190.00 per week.

The trial judge held that maximum medical improvement was the 22nd day of May, 1997, and that the employer was entitled to a credit for overpayment of temporary total disability benefits.

Mathematical calculations in the order which results in a credit to the employer in the amount of $3,793.54 is not correct.

From the date of payments for temporary total disability and the date of maximum medical improvement, the employee was entitled to 144 days or 20.5714 weeks for temporary total disability benefits at $190.00 per week for a total of $3,908.57. She was paid a total of $6,833.76. Overpayment by the employer was $2,925.19.

The order of the trial court is modified to reflect a credit for overpayment of temporary total disability benefits in the amount of $2,925.19 and not the $3,793.54 result in the order entered on the 30th day of October, 1998.

The judgment of the trial court is affirmed as modified and the cause remanded to the criminal court for Wilson County for enforcement of the judgment and such further proceedings, if any, as may be necessary. Costs on appeal are taxed to Mt. Juliet Health Care Center, Inc., appellant.

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Tom E. Gray, Special Judge

Concur:

Frank F. Drowota, III, Associate Justice

Samuel L. Lewis, Associate Justice