

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

(January 27, 2000 Session)

ANN PHILLIPS v. MARVIN WINDOWS

**Direct Appeal from the Chancery Court for Lauderdale County
No. 10,510 Martha B. Brasfield, Chancellor**

No. W1999-02243-WC-R3-CV - Mailed June 8, 2000; Filed July 18, 2000

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. The defendant, Marvin Windows (Marvin), appeals the judgment of the Lauderdale Chancery Court awarding the plaintiff, Ann Phillips (Phillips), permanent partial disability of seventeen percent (17%) to the body as a whole.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Trial Court Affirmed

MALOAN, SP. J., delivered the opinion of the court, in which HOLDER, J., and WEATHERFORD, SR. J., joined.

J. Arthur Crews, II, Jackson, Tennessee, for the appellant, Marvin Windows.

Donna Brown Wilkerson, Jackson, Tennessee, for the appellee, Ann Phillips.

MEMORANDUM OPINION

Phillips was forty-two (42) years of age at trial. She graduated from high school and completed a vocational school basic computer class. Before working for Marvin in 1987 or 1988, she worked in various factories as a machine operator, inspector, order picker, and clerk. She began at Marvin as a door builder on the assembly line, and worked in the subassembly department when she injured her back on September 10, 1996. Phillips described her jobs at Marvin as "labor intensive" and required lifting on a frequent basis. Prior to this injury, she did not have any problems with her back.

On September 10, 1996, Phillips was lifting a bundle of door panels when she felt a pop in her low back with pain in her back and left leg. After reporting her injury, she was sent to Dr. Tucker at the Ripley Clinic. Dr. Tucker gave her medication, put her on light duty for two weeks

and referred her to Dr. Canale in Memphis. On the date of her appointment, October 29, 1996, Dr. Canale was not available, so she saw Dr. Fereidoon Parsioon. Dr. Parsioon examined her and found a full range of motion in her back and diagnosed her condition as low back pain. Dr. Parsioon ordered a MRI which disclosed very mild degenerative joint disease in her lower facet joints. He felt Phillips' back pain was probably related to her facet arthritis and recommended a nerve block.

Dr. Gary Kellett saw Phillips for a second opinion on November 29, 1996. He also found a full range of motion in her back. Her MRI showed degenerative changes of the lower joint lumbar facet joints. Dr. Kellett stated her examination and symptoms suggested lumbar radioculopathy. He also recommended the nerve block which was performed and temporarily relieved her back pain.

Because her symptoms continued, Phillips asked to see another doctor. She was seen by Dr. Riley Jones in Memphis on October 24, 1997. Dr. Jones ordered a bone scan and EMG, which were both negative. He diagnosed mild fascial pain and referred her to physical therapy for three (3) weeks. A physical therapist's report indicated severe back dysfunction and recommended a non-bending job. Phillips felt the physical therapy did not help her and she went to Dr. Siad in Covington on her own and received additional nerve blocks, which offered some relief.

Dr. Joseph Boals examined Phillips for an independent medical evaluation on August 18, 1997. On examination, he found a full range of motion and x-rays showed moderate joint arthritis. Dr. Boals diagnosed her condition as facet joint arthritis of the lumbar spine which was either caused by or aggravated by her work. He assigned a seven percent (7%) permanent impairment to the body as a whole and suggested lifting restrictions of fifteen (15) to twenty (20) pounds with possible future modification if she improves and for her to reduce her bending and twisting. Doctors Parsioon, Kellett, and Jones did not place any restrictions on Phillips or find she had any permanent impairment.

Phillips continued to work at Marvin at the same job and pay for approximately one (1) year. She then changed jobs to the bundling department, which requires less bending and twisting and little or no overtime. At trial, Phillips testified her back injury limits her ability to lift and to sit or stand for long periods of time. She takes pain pills and uses a heating pad to relieve her pain. She is able to do her present job at Marvin, but would be unable to do many of her former jobs due to her back injury.

Marvin states the issue on appeal is "whether the award given by the trial court of seventeen percent (17%) permanent partial disability to the body as a whole was in error."

ANALYSIS

The scope of review of issues of fact is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. *Tennessee Code Annotated* §50-6-225(e)(2); *Lollar v Wal-Mart Stores, Inc.*, 767 S.W.2d 143 (Tenn. 1989). When a trial court has seen and heard witnesses, especially where issues

of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court's factual findings. *Humphrey v David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). However, where the issues involve expert medical testimony which is contained in the record by deposition, as it is in this case, then all impressions of weight and credibility must be drawn from the contents of the depositions, and the reviewing court may draw its own impression as to weight and credibility from the contents of the depositions. *Overman v Williams Sonoma, Inc.*, 803 S.W.2d 672, 676-77 (Tenn. 1991). With this standard in mind, this panel must consider whether the evidence preponderates against the trial court's award of seventeen percent (17%) permanent partial disability to the body as a whole.

Marvin contends that no award of permanent partial disability is justified by the proof in this case in that none of the treating doctors have assigned any impairment rating or placed any restrictions on Phillips' ability to work. Further, Marvin submits Dr. Boals' finding of permanent impairment should be disregarded because his impairment rating of seven percent (7%) permanent impairment is based on Table 75, Section IIC, page 133, of the AMA Guides, 4th Edition. Table 75, Section IIC assigns a seven percent (7%) impairment of the whole person when the following is present in an intervertebral or other soft-tissue lesion of the lumbar spine, "unoperated on, stable, with medically documented injury, pain and rigidity associated with moderate to severe degenerative changes on structural tests; includes unoperated on herniated nucleus pulposes with or without radiculopathy." Marvin points out Boals' diagnosis was facet joint arthritis of the lumbar spine and submits this diagnosis does not fall within the parameters of Table 75. Without any "valid" impairment rating, Marvin contends it was error for the trial court to award any vocational disability.

Phillips submits the medical and lay testimony support the trial court's award of disability. On cross-examination, Dr. Parsion stated it was possible to assign a seven percent (7%) impairment rating for moderate to severe degenerative changes or a five percent (5%) impairment rating for none to minimal degenerative changes to an intervertebral disc or other soft tissue lesion where there is an injury, pain and rigidity, although he chose not to assign any impairment to Phillips in the present case. Neither Dr. Kellett nor Dr. Jones were asked about the application of Table 75 to Phillips' condition.

This panel is unable to determine whether Dr. Boals relied on the appropriate table in the AMA Guides or not. Even if he did not use the proper table, as Marvin contends, we do not believe Dr. Boals' opinion of permanent impairment should be totally rejected as "invalid." Numerous awards have been affirmed on appeal even though reliance on the AMA Guides was imprecise, once causation and permanency are established by expert testimony. *Walker v Saturn Corporation*, 986 S.W.2d 204, 207 (Tenn. 1998); *Hill v Royal Insurance Co. and CKR Industries, Inc.*, 937 S.W.2d 873, 876 (Tenn. 1996); *Harness v CNA Insurance Co.*, 814 S.W.2d 733, 735 (Tenn. 1991); *Davenport v Taylor Feed Mill and Aetna Life Insurance Co.*, 784 S.W.2d 923, 925 (Tenn. 1990); *Corcoran v Foster Auto GMC, Inc.*, 746 S.W.2d 452, 458 (Tenn. 1988).

Disagreements among treating and evaluating physicians as to the existence and degree of permanent impairment and restrictions are common in workers' compensation cases. The trial court

has the discretion to accept or reject the opinion of one medical expert over the opinion of another medical expert(s). *Kellerman v Food Lion, Inc.*, 929 S.W.2d 804, 806 (Tenn. 1990); *Johnson v Midwesco, Inc.*, 801 S.W.2d 804, 813 (Tenn. 1990); *Hinson v Wal-mart Stores, Inc.*, 654 S.W.2d 675 (Tenn. 1983).

In assessing vocational disability, the trial court may consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in employee's disabled condition. *Tennessee Code Annotated*, §50-6-241; *Worthington v Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990). The employee's own assessment of her physical condition and resulting disabilities can also be considered. *Uptain Constr. Co. v McClain*, 526 S.W.2d 458, 459 (Tenn. 1975); *Tom Still Transfer Co. v Way*, 482 S.W.2d 775, 777 (Tenn. 1972).

Marvin contends and Phillips concedes she made a meaningful return to work after her injury and the limitation of two and one-half (2-1/2) times the anatomical impairment in *Tennessee Code Annotated* §50-6-241(a)(1) applies. Therefore, the maximum award in this case would be seventeen and one half percent (17-1/2%) permanent partial disability.

Phillips testified she had no prior problems with her back. She has transferred to a less demanding job at Marvin, takes medication, and regularly uses a heating pad to relieve her low back pain. Based on all the relevant factors considered by the trial court, we are of the opinion the award may be generous as it is almost the maximum allowed by statute, but the evidence does not preponderate against the award of seventeen percent (17%) permanent partial disability to the body as a whole.

CONCLUSION

The judgment of the trial court is affirmed with the costs of this appeal assessed to the defendant, Marvin Windows.

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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 on appeal are taxed to the defendant, Marvin Windows, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM