

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(November 1999 Session)

MARY ALICE SLOAN v. CONTINENTAL CASUALTY COMPANY

**Direct Appeal from the Chancery Court for Madison County
No. 53985 Joe C. Morris, Chancellor**

No. W1999-00185-WC-R3-CV - Mailed September 13, 2000; Filed November 14, 2000

This is an appeal by Continental Casualty Company of a judgment for 35% permanent partial disability to the body as a whole awarded to Mary Alice Sloan for an injury that she sustained while working for Goody's Family Clothing, Inc. on November 1, 1996. The appellant agrees that the worker sustained a compensable, work-related injury and that they had paid temporary total disability benefits and medical expenses. The only issue is whether the preponderance of the evidence supports the trial court's award to the plaintiff. The judgment of the trial court is affirmed. The costs of this appeal are taxed to the defendant.

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

GEORGE W. ELLIS, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and F. LLOYD TATUM, SR. J., joined.

Carl K. Wyatt, Memphis, Tennessee, for the appellant, Continental Casualty Company.

George L. Morrison, Jackson, Tennessee, and Mary D. Perkins-Allen, Cookeville, Tennessee, for the appellee, Mary Alice Sloan.

MEMORANDUM OPINION

This worker's compensation appeal has been referred to the Special Worker's Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e) 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, accompanied by a presumption of the correctness of findings unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Stone v. City of McMinnville*, 866 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 court in a worker's compensation case. See *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W. 2d 452 (Tenn. 1988). However, considerable deference must be given to the trial judge, who has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved. *Jones v Hartford & Idem. Co.*, 811 S.W. 2d 516, 521 (Tenn. 1991).

FACTS

Mary Alice Sloan was sixty-three (63) at the time of the trial and had a high school diploma but no other education. Her work history included sewing machine operator, soldering electric boards for ships and operating clothing stores for approximately twenty-four (24) years. In 1966, she was hired as a department head for Goody's Department Store.

In her job Ms. Sloan had to put out merchandise and keep racks straight and everything color coordinated. Totes would be brought out, and she had to lift them, take the goods out, and put them on the racks. She had to do some cleaning that required some lifting and pulling.

When the accident occurred she was reaching for a tote that was stacked up high. It was heavier than she thought, and when she pulled it she dropped it and tried to catch it while it was falling. She immediately had pain in her lower back and down her right leg.

She was first treated by Dr. Paul Schwartz, a family practice physician, who recommended warm soaks and range of motion exercises. He imposed a twenty-pound lifting restriction and prescribed anti-inflammatory medication. On a second visit Dr. Schwartz limited her standing to eight hours out of every twenty-four and continued her lifting restrictions.

By December 16, 1996, her numbness had worsened and Dr. Schwartz recommended a CAT scan which was unremarkable. In February of 1997, Dr. Schwartz' examination revealed tenderness in the sacroiliac area, with a positive straight leg raising test. In April, Dr. Schwartz ordered physical therapy and recommended an MRI when Ms. Sloan's symptoms of numbness in the right extremity worsened. He referred her to Dr. Glen Barnett, a neurosurgeon.

Dr. Barnett's examination revealed limited range of motion, a positive straight leg raising test, and decreased sensation of the lateral aspect of her right foot. Her x-ray revealed spondylosis in her back. He diagnosed a low back strain and recommended an epidural injection. He testified that the work injury did not cause the spondylosis but the injury may have brought it to some degree of presence. He testified that her x-rays were unusual even considering her age. Dr. Barnett did not assess any permanent partial impairment but did testify that she needed future medical treatment for her injury in the form of epidural injections.

Dr. Schwartz treated Ms. Sloan for two years post-accident. He testified that during this period of time her complaints did not change, and he diagnosed her condition as low back strain with sacroiliac irritation. The sensation changes in her right lower extremity were the results of

“sacroilitis,” an inflammation specific to those joints that occurred as a result of the strain. He testified that Ms. Sloan retained a 2% permanent partial impairment to the body.

After being released by Dr. Schwartz, Ms. Sloan was examined by Dr. Robert J. Barnett, an orthopedic surgeon. He performed a physical exam that revealed extreme limited range of motion in her low back, as well as the absence of Achilles’ reflexes bilaterally. After reviewing her x-rays, he assessed a 10% permanent partial impairment to the body as a whole in accordance with the AMA Guides and a 20% permanent impairment to the body in accordance with their Orthopedic Guidelines. He recommended that she avoid lifting, bending, stooping, long standing and long sitting.

At trial, Mary Alice Sloan testified that she continues to have low back pain and right leg numbness. She explained that she had worsened and now cannot walk a very long way, and if she rides in a car, she has difficulty getting out. She testified that her leg and right toes stay asleep. She continues to have trouble standing, sitting, walking, and lifting. As of the trial, she was still taking prescription medication for pain. She testified that she left the employ of Goody’s Department Store in June, 1997, because she was not able to perform the work.

ANALYSIS

Dr. Paul Schwartz, who treated Mary Alice Sloan for over two years, testified that she retained a 2 percent permanent partial impairment to the body and placed permanent restrictions on her. Dr. Glen Barnett who saw Ms. Sloan on two occasions opined that she did not sustain any permanent injury but stated that she needed future medical treatment for her injury. Dr. Robert Barnett assessed 10 percent permanent impairment to the body as a whole in accordance with the AMA Guides and a 20 percent permanent impairment to the body in accordance with the Orthopedic Guidelines.

When medical testimony differs, it is within the discretion of the trial judge to determine which expert testimony to accept. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333,335 (Tenn. 1996); *Johnson v. Midwesco, Inc.*, 801 S.W. 2d 804 (Tenn. 1990).

Where the issues involve expert medical testimony and the medical proof is contained in the record by deposition as it is in this case, then this Court may draw its own conclusions about the weight and credibility of that testimony, since we are in the same position as the trial judge. With these principles in mind, we review the record to determine whether the evidence preponderates against the findings of the trial court.

Krick v. City of Lawrenceburg, 945 S.W. 2d 709,712 (Tenn. 1997); see also *Elmor v. Travelers Ins.*, 824 S.W. 2d 541, 544 (Tenn. 1992) (when testimony is presented by deposition, this Court is in just as good a position as the trial court to judge the credibility of those witnesses.)

The defendant challenges the amount of vocational disability assessed by the trial court. The extent of an injured worker's disability is an issue of fact. *Jaske v. Murray Ohio Mfg. Co.*, 750 S.W. 2d 150, 151 (1988). The Supreme Court discussed a similar injury in *Walker v. Saturn Corp.*, 986 S.W.2d 204 (Tenn. 1998). In *Walker*, the plaintiff claimed to have suffered a work-related injury in both her right and left arms. She received a disability rating on her left arm from medical providers but did not receive one on her right arm. Even though no doctor had given the plaintiff a disability rating to her right arm, the trial court found that she had suffered an 85 percent vocational disability rating to both arms. The Special Worker's Compensation Appeals Panel of the Supreme Court reversed the award. The Panel found that the medical testimony did not support an award of permanent partial disability to the right arm and modified the award to the left arm.

The Supreme Court reversed the Panel decision and reinstated the trial court's award of 85 percent permanent disability to both arms. The Court stated that:

The Panel correctly held that a vocational impairment is measured not by whether the employee can return to her former job, but whether she has suffered a decrease in her ability to earn a living. See *Corcoran*, 746 S.W. 2d at 458. This court stated in *Corcoran* that a vocational disability results when "the employee's ability to earn wages in any form of employment that would have been available to him in an uninjured condition is diminished by an injury." *Id.* at 459.

In assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and her capacity to work at the kinds of employment available in her disabled condition. Further, the claimant's own assessment of her physical condition and resulting disabilities cannot be disregarded. The trial court is not bound to accept physicians' opinions regarding the extent of the plaintiff's disability, but should consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability.

Walker, 986 S.W. 2d at 207-08.

CONCLUSION

All the doctors agree that Mary Alice Sloan suffered an injury and has some limitation. The only doctor that did not give her a permanent rating opined that she needed further treatment. The plaintiff testified regarding the impact the injury has had on her life. She had to give up the work that she had been doing for over twenty-five (25) years as a result of this accident.

We find that the trial court properly applied the relevant factors in determining the amount

of vocational disability suffered by the plaintiff. We find that the evidence does not preponderate against the judgment of the trial court.

The judgment of the trial court is affirmed. The costs of this appeal are taxed to the defendant.

GEORGE R. ELLIS, Special Judge

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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/Appellant, Continental Casualty Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM