

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT KNOXVILLE  
October 10, 2000 Session

**KAREN HENSON v. FINELLI, HAUGE, SANDERS and RAGLAND, M.C.,  
P.C.**

**Direct Appeal from the Chancery Court for Knox County  
No. 131824-3 Sharon J. Bell, Chancellor**

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**No. E2000-01193-WC-R3-CV - Mailed**

**Filed: January 5, 2001**

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. This is a Rule 60 case. The plaintiff alleges that after her claim for workers' compensation benefits for a cervical spine and shoulder injury was settled and judicially approved she continued to suffer pain and discomfort owing to a torn rotator cuff and nerve impingement which was not discovered by her treating physician, thus implicating Rule 60.02.

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

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which E. RILEY ANDERSON, C.J. and JOHN K. BYERS, SR. J., joined.

Kimberlee A. Waterhouse, Lenoir City, Tennessee, for the appellant, Karen Henson.

James T. Shea, IV, Knoxville, Tennessee, for the appellee, Finelli, Hauge, Sanders and Ragland, M.C., P.C.

**OPINION**

The plaintiff was an employee of a firm of physicians. On October 8, 1996, she sustained an injury to her cervical spine while carrying medical records. She was extensively treated and received a 9 percent impairment rating. Her worker's compensation claim was settled for \$21,626.64 and all present and future medical expenses. She returned to work as the personal assistant to Dr. Hauge.

On June 30, 1997, she filed a motion to alter or amend the October 8, 1996 judgment approving her settlement, alleging that she had suffered additional injuries which were not discovered by Dr. Hauge and were unknown to her. One of these injuries was a torn rotator cuff; another was a chronic right shoulder impingement syndrome. The case was reopened by order entered May 11, 1998, and the matter was tried December 1, 1999, resulting in the plaintiff being awarded an additional 14 percent whole body impairment based upon the torn rotator cuff injury. She was also awarded temporary disability benefits. The plaintiff appeals and presents for review the issues of whether the Chancellor erred in denying her benefits for a suprascapular nerve injury, and for a psychiatric injury. The appellee also presents for review the issue of whether the Chancellor erred in awarding the plaintiff an additional 14 percent to her whole body for the shoulder injury, and whether the court erred in awarding temporary total benefits.

Plaintiff continued working for Dr. Hauge following the approval of the settlement. She testified that her pain continued to increase and she ultimately quit her job at Dr. Hauge's office January 27, 1997.

After leaving her employment with Dr. Hauge, plaintiff was seen by various physicians, the first of whom was Dr. Frederick A. Killeffer, a neurosurgeon. He first saw plaintiff February 11, 1997 at the request of Dr. Hauge. At that time plaintiff was complaining of pain in her right shoulder, right arm and complaints of tingling in her arm. Dr. Killeffer performed a physical examination and further requested a myelogram and CAT scan, both of which tests demonstrated an excellent surgical result from an anatomical point of view with no evidence of nerve impingement and no problem with the fusion or the plating, which was implanted by Dr. Hauge. Dr. Killeffer then recommended that plaintiff have electrophysiologic studies performed to rule out any form of suprascapular nerve impingement or entrapment syndrome. These tests demonstrated that plaintiff did not have a suprascapular nerve entrapment syndrome as of February 27 or 28, 1997. Dr. Killeffer then referred plaintiff to Dr. Paul Naylor, for an orthopedic evaluation of her shoulder.

On March 7, 1997, plaintiff was seen by Dr. Paul Naylor, who was advised by plaintiff that she had chronic neck pain and shoulder problems which began on August 1, 1995 when she was lifting charts at Dr. Hauge's office. She was complaining of pain radiating into both arms on that initial visit. On April 9, 1997, Dr. Naylor performed surgery on plaintiff's shoulder and found she had sustained a partially torn rotator cuff on the right. He performed an acromioplasty on plaintiff's right shoulder. For five or six weeks she did well, but then incurred a traumatic injury to her shoulder while throwing a softball and began having more pain and problems. In his second deposition, plaintiff received an additional impairment rating of 7 percent to the whole person.

Dr. Naylor referred plaintiff to Dr. Paul Copeland, who in turn transferred plaintiff to Dr. Peter E. Konrad, a neurosurgeon, who diagnosed plaintiff as having a suprascapular nerve entrapment on the right. The surgery performed by Dr. Konrad did not help plaintiff and she subsequently returned to approximately the same level of discomfort as she had had prior to the surgery.

Plaintiff later was seen by a psychiatrist, Kenneth O. Jobson, in September 1997. He opined that plaintiff had a highly variable course of depression and indicated that she would have times when she would be very depressed and other times where she would be completely depression free. He was unable to specifically identify what portion of plaintiff's body either the neck, shoulder or arm were the cause of her claimed chronic pain problems.

### **The Medical Proof**

In January 1997 the plaintiff's continuing complaints of neck and shoulder pains during the course of her employment impelled Dr. Hauge to order an MRI and x-rays of her neck and shoulder. These tests were normal, and Dr. Hauge decided to withdraw. He referred the plaintiff to Dr. Killeffer, as we have noted, but during his treatment of the plaintiff he removed a herniated disk in her cervical spine and implanted an osteosynthetic plate. The plaintiff returned to work a week later.

Dr. Killeffer ordered a myelogram and a CAT scan to determine if there was evidence of a recurrent or residual ruptured disk in plaintiff's neck and to determine if there was any problem with the previous surgery. Those tests were normal. But because of tenderness over her shoulder blade on the right side he ordered electrophysiologic tests in an effort to determine if plaintiff had a problem with her suprascapular nerve. These tests were normal, and he referred the plaintiff to Dr. Naylor for orthopedic evaluation.

Dr. Naylor began treating plaintiff with medicines and scalene blocks for a short period then did another MRI of plaintiff's shoulder. He compared the new MRI with the MRI taken by Dr. Hauge on June 20, 1996, and determined that the old MRI showed some problem with her shoulder as did the new MRI.

Dr. Naylor operated to repair a torn rotator cuff on April 9, 1997, and performed a second surgery to touch up a little fraying and adhesions a few months later. These surgeries failed to alleviate the pain across the top of plaintiff's shoulder, the back of her shoulder or the top part of her arm. After these surgeries Dr. Naylor continued plaintiff on a regime of physical therapy, injections and released her to work on January 12, 1998. She worked for about five to six weeks but with an increase in lifting, began having increased pain and discomfort. In February of 1998, Dr. Naylor believed plaintiff had reached maximum medical improvement and assessed a permanent impairment rating of 7 percent to the body as a whole due to rotator cuff injury. Dr. Naylor continued to follow her through April 1998, and opined that she had shoulder, neck pain and still complained of pain shooting down the back of her shoulder. He referred plaintiff to Vanderbilt University where Dr. Copeland removed the cervical plate and transferred her to Dr. Konrad. Removal of the plate did not alleviate the pain plaintiff continued to have across the right trapezius muscle on the top of her right shoulder and to the edge of the top of her right arm.

Dr. Konrad thought that plaintiff suffered from suprascapular nerve entrapment and he ordered a diagnostic block which is described as, "a very small local injection of anesthetic into that area just containing the nerve." The diagnostic block confirmed his opinion and he operated to

relieve the entrapped nerve. Plaintiff responded positively with a significant amount of pain relief, but the nerve was blanched, indicating a restriction of blood flow to the nerve.

Dr. Konrad assessed plaintiff at a 12 percent impairment to the body as a whole and recommended physical therapy to strengthen her shoulder and to increase her range of motion. He opined that due to weakness, plaintiff would not be able to perform activities which required her to elevate her hands above chest level. She did not have the recommended therapy, and nine months after the last surgery she was back to the same level of discomfort and inability to work. She was referred back to Dr. Naylor for follow up treatment. Plaintiff last saw Dr. Naylor in July of 1999 and he recommended that she get into a chronic pain management program to deal with her chronic pain.

Plaintiff was referred to the Pain Clinic which in turn referred her to Dr. Kenneth Jobson, psychiatrist, for chronic pain issues and depression. He testified that he treated plaintiff from September 1997, through July 1999. Plaintiff had a diagnosis of “major depressive disorder, single episode, moderate to severe.” Dr. Jobson treated plaintiff primarily with antidepressant medication for depression and to help with pain as depression seems to make pain worse and pain seems to make depression worse.

Dr. Jobson testified that plaintiff was cooperative in her treatment and that she demonstrated a severe desire to get better. He did not believe that plaintiff was malingering or that she was an addict or abusing her medicines. He testified that plaintiff’s depression was a result of her on-the-job injuries and the resulting pain, and that it is more likely than not that she will need to see somebody to take responsibility for her psychiatric medications for the rest of her life. The physiology of the depression was present the entire time and her symptoms vary from extremely well to basically nonfunctional. He testified that plaintiff:

. . . now has a recurring or worsening recrudescing of depression that worsens with the pain and there are periods of time when she is incapacitated and not able to work or do her housework and other times when . . . her mood is doing well when her pain is less severe. I think there will be permanent psychiatric change . . . a variable permanent psychiatric change.

He stated that plaintiff has a permanent impairment rating in accordance with AMA guideline to be Class III, moderate, resulting in a permanent impairment of between 25 and 50 percent.

Dr. Julian Nadolsky, a vocational rehabilitation expert, testified that after evaluating plaintiff initially in January 1999, his opinion was that she had a 78 percent vocational impairment as result of her physical injuries and permanent impairment to her neck, shoulder and suprascapular region and the resultant restrictions placed upon plaintiff. After his initial assessment, Dr. Nadolsky reviewed depositions of Dr. Hauge, Dr. Naylor, Dr. Konrad and Dr. Jobson and as a result of the information contained in these depositions, with particular emphasis on Dr. Jobson’s testimony, Dr. Nadolsky opined that plaintiff was 100 percent disabled for any type of regular job, that she is 100

percent disabled except for episodes when she is able to work, probably with different employers

### **The Findings**

The Chancellor found that as to the rotary tear, a mistake was made because it was not initially discovered. She thought the plaintiff's shoulder may have been further injured by throwing a softball, but was of the view that the proof did not establish an additional injury.<sup>1</sup>

The Chancellor found that the suprascapular nerve entrapment was ruled out in February 1997, but in any event the evidence preponderated against a finding that it arose from the August 1995 injury.

The Chancellor declined to find permanent psychiatric impairment owing to Dr. Jobson's opinion that the plaintiff would have bouts of depression from time to time, which does not constitute permanent impairment, and for the additional reason that the psychiatric injury is caused by shoulder and neck pain which existed at the time of the original settlement.

Benefits for temporary total disability were awarded for the period January 27, 1997 through January 12, 1998, and for the period February 27, 1998 through April 17, 1998.

### **Analysis**

The appellee argues that Rule 60.02 is not an appropriate procedural remedy available to the appellant.

This rule provides as relevant here:

“On motion and upon such terms as are just, the Court may relieve a party . . . from a final judgment . . . for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect . . .”

This rule is to be invoked only in cases of overwhelming importance, or those involving extraordinary circumstances or extreme hardship. *Banks v. Dement Construction Company, Inc.*, 817 S.W.2d 16 (Tenn. 1991), *Brown v. Consolidated Coal Co.*, 518 S.W.2d 234 (Tenn. 1974), *Underwood v. Zurich Insurance Company*, 854 S.W.2d 94 (Tenn. 1993).

In *Corby v. Matthews*, 541 S.W.2d 789 (Tenn. 1976) the Supreme Court permitted the modification of worker's compensation judgment on Rule 60.02 grounds of mistake. The trial court awarded 10 percent to the right arm; after the judgment further surgery was required. Relief was allowed “based on the physician's mistake.”

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<sup>1</sup> The impairment rating was increased by 14 percent.

In the case at Bar, the proof is satisfactory that Dr. Hauge made a mistake by failing to diagnose the rotator cuff injury. We find that the evidence does not preponderate against the finding of the Chancellor that a mistake occurred which resulted in an increased impairment. We also are of the opinion that the evidence does not preponderate against the award of benefits for temporary total disability since the evidence is satisfactory that the initial mistake essentially caused the temporary disability.

We further are of the opinion that the evidence does not preponderate against the judgment respecting the psychiatric claim, which markedly tracks the factual basis of *Underwood*.

In *Underwood, supra*, a psychiatric problem was diagnosed after a final judgment was entered. A Rule 60.02 motion was filed, and relief was denied. The judgment was affirmed.

After holding that a motion for relief based on Rule 60.02 grounds addresses itself to the sound discretion of the trial judge, and that appellate review is to determine if the discretion was abused, the court held that the language of our worker's compensation statute [Tenn. Code Ann. § 50-6-231] requires finality of lump-sum judgments and prevents modification.

We note that the Chancellor denied relief on the psychiatric claim for the reason that the "bouts of depression" described by Dr. Jobson does not constitute permanent impairment. If the escape language of *Underwood, supra*, ["the factual circumstances here do not present a case of overriding importance, or extraordinary importance, or extreme hardship within the meaning of Rule 60.02(5)"] is implicated, this finding by the Chancellor finds adequate support in the record.

The judgment is affirmed at the costs of the appellant.

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WILLIAM H. INMAN, SENIOR JUDGE

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**KAREN HENSON V. FINELLI, HAUGE, SANDERS AND RAGLAND,**  
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**Knox County Chancery Court**  
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**No. E2000-01193-WC-R3-CV - Filed: January 5, 2001**

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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 facts 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 Appellant, Karen Henson and Kimberlee A. Waterhouse, surety, for which execution may issue if necessary.

01/05/01