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

# JANICE S. HOSKINS (BREWER) v. SEAMAN CORPORATION

**Direct Appeal from the Chancery Court for Sullivan County**
**No. 17363(M) John S. McLellan, III, Judge**

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**No. E2000-00842-WC-R3-CV - Mailed**
**Filed: January 5, 2001**

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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. The plaintiff was laid off 66 months after returning to work following settlement of her claim for workers' compensation benefits. After the lay-off she filed this action to recover additional benefits.

**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.

Michael E. Large, Bristol, Tennessee, for the appellant, Janice S. Hoskins (Brewer).

Jack M. Vaughn, Kingsport, Tennessee, for the appellee, Seaman Corporation.

## OPINION

In August 1994 a judgment approving a worker's compensation settlement was entered on a joint petition filed by the parties to this action. The judgment provided benefits based upon a permanent partial disability of 20 percent to the whole body, plus benefits for temporary total disability and medical expenses.

In March 1999 the plaintiff petitioned the trial court to increase her benefits "in accordance with the previously entered judgment and in accordance with Tenn. Code Ann. § 50-6-24 (2)."

The sought increase was denied and the plaintiff appeals. The issues presented for review are: (1) did the trial court err by not considering the lay testimony of Mrs. Brewer as competent

evidence, and (2) did the trial court err by basing its decision exclusively on the vocational rating given by Seaman Corporation's expert witness and thereby failing to make an independent review of the relevant factors in evidence.

Our review is *de novo* on the record. We presume the correctness of the judgment unless it is contrary to the preponderance of the evidence. RULE 13(d) TENN.. R. APP. P.

The plaintiff suffered a back injury which resulted in a claim for worker's compensation benefits which was settled, as previously mentioned. She returned to her employment in 1994 and was laid-off in March 1999. During the five and one-half years between her return to work and her separation, a janitorial job was customized for her so that the restrictions recommended by her physician could be observed. Following her lay off, she filed various applications for employment, without success. She attributes her failure to receive employment to the fact that she always revealed her back problem, which continued to cause pain and discomfort.

On June 22, 1999, the plaintiff was offered a job by the defendant as Lab Technician which operated on a 12-hour shift basis, which she declined. The thrust of her testimony is that she continues to suffer pain, discomfort and numbness in her back and considers herself unable to work.

**The Expert Proof**

Her physician is Dr. Neal Jewell, orthopedic specialist. He has treated the plaintiff from the beginning. On August 15, 1999, he reported that his examination of her *revealed no significant changes* from his earlier examination in November 1995. He thought she "remained eligible for work with light duty restrictions," unchanged from his prior recommendations.

In May 1999, Dr. Jewell saw the plaintiff who stated that she was "here to get disability." She complained of increasing symptoms, and Dr. Jewell thought that "her episode of increasing symptoms may be directly related to the request that she return to work.."

A Vocational Rehabilitation Counselor testified that based on the plaintiff's age (44), education, (8th grade), past vocational profile and the restrictions placed on her, she would retain a 20 percent vocational loss in the current labor market.

He expressed the opinion that a person's motivation, desire and interest to want to work play a key component in the ability to return to work after an injury. "A person must have the desire or interest to want to return to work or go into some sort of gainful activity in order for the placement and development phase to succeed." Having reviewed the plaintiff's records and talked to her, the counselor believed that she does not want to return to work. He based his opinion on Dr. Jewell's notation of the plaintiff's increased complaints of symptomology around the time she received a recent job offer and his learning from her that she had applied for disability which was under appeal.

## The Lay Testimony

The plaintiff testified at length regarding her asserted inability to work. Her testimony was not credited by the trial judge. Such lack of creditation, when superimposed upon the expert testimony, forecloses the issue on appeal. *See, Humphry v. David Witherspoon,* 734 S.W.2d 315 (Tenn. 1987).

The evidence does not preponderate against the judgment which is affirmed at the costs of the appellant.

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WILLIAM H. INMAN, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

**JANICE S. HOSKINS (BREWER) V. SEAMAN CORPORATION**
**Sullivan County Chancery Court**
**No. 13-763**

**No. E2000-00842-WC-R3-CV - Filed: January 5, 2001**

**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, Janice S. Hoskins (Brewer) and Michael E. Large, surety, for which execution may issue if necessary.

01/05/01