

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
May 16, 2001 Session

**MARY ELLEN BARNES v. YASUDA FIRE and MARINE INSURANCE
COMPANY**

**Direct Appeal from the Circuit Court for Shelby County
No. 305806-5 T.D. Kay S. Robilio, Judge**

No. W2000-02559-SC-WCM-CV - Mailed July 2, 2001; Filed September 24, 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. In this appeal, the employee insists the evidence preponderates against the denial of workers' compensation benefits and asks this tribunal to determine the extent of her vocational impairment. As discussed below, the panel has concluded the judgment of dismissal should be reversed, the conditional award of permanent partial disability benefits based on 30 percent to the body as a whole affirmed, and the cause remanded with instructions.

**Tenn. Code Ann. § 50-6-225(e) (2000) Appeal as of Right; Judgment of the Circuit Court
Reversed in Part, Affirmed in Part and Remanded.**

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and ROBERT L. CHILDERS, SP. J., joined.

Richard D. Click, Memphis, Tennessee, for the appellant, Mary Ellen Barnes.

Ronald L. Harper and R. Scott Vincent, Memphis, Tennessee, for the appellee, Yasuda Fire and Marine Insurance Company of America.

MEMORANDUM OPINION

The employee or claimant, Mary Ellen Barnes, was 37 years old at the time of the trial. She has a high school education, has taken some college courses and has worked as a service station supervisor, in food service and in production. At the time of her claimed injury, she was working in production for Sharp Manufacturing Company, repetitively lifting and placing parts. On June 7, 1999, she felt a sharp pain radiating down her left arm. She continued working and reported the

accident to her employer the next day. She believes her injury was caused by repetitive lifting.

Ms. Barnes has had neck pain and headaches off and on since 1984. The medical proof as to causation is less than consistent, but it is clear that the claimant will retain some degree of permanent disability.

The trial court found that the injury occurred while the claimant was working for the employer, Sharp Manufacturing Company, but disallowed the claim for insufficient proof of medical causation. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. 1995).

Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 367 (Tenn. 1998). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review. Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. 1996). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Orman v. Sonoma, Inc., 803 S.W.2d 672, 676-77 (Tenn. 1991).

An accidental injury arises out of one's employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury, and occurs in the course of one's employment if it occurs while an employee is performing a duty he was employed to do. Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993). "Arising out of" refers to the origin of the injury in terms of causation and "in the course of" relates to time, place and circumstance. McCurry v. Container Corp. of America, 982 S.W.2d 841, 843 (Tenn. 1998). For an accidental injury to be compensable, both components are required. McCaleb v. Saturn Corp., 910 S.W.2d 412 (Tenn. 1995). They are not synonymous terms. McCurry at 843. Not every injury by accident which occurs in the course of employment is compensable; it is only compensable if it also arises out of employment, but any reasonable doubt as to whether such an injury arises out of the employment should be resolved in favor of the employee. Reeser v. Yellow Freight System, Inc., 938 S.W.2d 690, 692 (Tenn. 1997).

We agree with the trial court's finding that the injury to Ms. Barnes occurred in the course of employment. The issue then, fairly stated, is whether there is a causal connection between the work she was required to perform and the resulting injury, from a consideration of all the circumstances. In all but the most obvious cases, causation and permanency may only be established through expert medical testimony. Thomas v. Aetna Life and Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991).

The first physician the claimant visited following her June 7, 1999 injury was Dr. Arsen Haig

Manugian, a board certified orthopedic surgeon, to whom she gave a history of progressively worsening pain in her left side, shoulder and arm, numbness, loss of motion and weakness of her neck and headaches. She had reported neck pain without arm pain on a visit to the same clinic in 1998 when she saw a different doctor on three occasions. She told Dr. Manugian on June 14, 1999, that certain activities at work caused numbness in her left hand. She continued working and returned to Dr. Manugian for conservative care. Dr. Manugian testified on direct examination that there appeared to be no evidence of a specific incident at work that triggered the injury. A magnetic resonance imaging scan, ordered by the doctor, revealed disc protrusions at C-5 and C-4. On cross-examination, Dr. Manugian conceded that the claimant's repetitive use of her hands and arms at work could have aggravated a pre-existing degenerative or other condition. He referred her to Dr. Gary L. Kellett, a board certified neurosurgeon, and the two doctors performed corrective surgery and fusion of the claimant's neck. In response to a hypothetical question, Dr. Kellett opined the injury probably occurred on the job.

On December 22, 1999, the claimant visited Dr. Joseph C. Boals, III, whose qualifications as an expert are not questioned, for an examination and evaluation. Dr. Boals testified without equivocation that her injury was work related. All of the medical proof in the case is by deposition.

An injury is compensable, even though the claimant may have been suffering from a serious pre-existing condition or disability, if a work-connected accident can be fairly said to be a contributing cause of such injury. An employer takes an employee as he is and assumes the risk of having a weakened condition aggravated by an injury which might not affect a normal person. Parks v. Tennessee Municipal League Risk Management Pool, 974 S.W.2d 677, 679 (Tenn. 1998). Given the medical testimony, the fact that the record contains no other explanation and the fact that the injury occurred at work, the panel has concluded that the claimant's injury was probably one arising out of her employment and should be held compensable. The judgment of dismissal is therefore reversed.

The trial court gave the claimant a permanent disability rating of 30 percent to the body as a whole.¹ The claimant has asked this court to review that finding. The extent of an injured worker's vocational disability is a question of fact. Seals v. England/Corsair Upholstery Mfg., 984 S.W.2d 912, 917 (Tenn. 1999).

Once the causation and permanency of an injury have been established by expert testimony, the trial judge may consider many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomic impairment, for the purpose of evaluating the extent of a claimant's permanent disability. Tenn. Code Ann. § 50-6-241(b). The opinion of a qualified expert with respect to a claimant's clinical or physical impairment

¹We commend the trial court's use of alternative findings in this case, as encouraged by the Tennessee Supreme Court. See Cunningham v. Shelton Sec. Serv., Inc., _____ S.W.3d _____ (Tenn. 2001) (Dismissal at the close of a worker's compensation claimant's proof is rarely appropriate. Instead, the trial court should hear the entire case and make appropriate findings of fact, and alternative findings when necessary, for appellate review.)

is a factor which the court will consider along with all other relevant facts and circumstances, but it is for the court to determine the percentage of the claimant's industrial disability. Pittman v. Lasco Ind., Inc., 908 S.W.2d 932, 936 (Tenn. 1995).

Dr. Manugian estimated the claimant's permanent medical impairment at 12 percent to the body as a whole. Dr. Boals estimated her permanent medical impairment at 21 to 25 percent. Both used AMA guidelines. As already noted, the claimant is in her late thirties with a high school education and limited skills. She works with her hands. Dr. Boals testified that she should avoid working over her head, repetitive flexion, extension and rotation of her neck, and repetitive lifting. He prescribed a weight limit of about 15 pounds. She was totally disabled from July 17, 1999 to November 17, 1999, when she returned to work without any reduction in pay. In cases where an injured worker is entitled to permanent partial disability benefits to the body as a whole and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award the employee may receive is two and one-half times the medical impairment rating pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment or the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment. See Tenn. Code Ann. § 50-6-241(a)(1).

When the medical testimony differs, the trial court must choose which view to believe. In doing so, the court is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). Moreover, it is within the discretion of the trial judge to conclude the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-7 (Tenn. 1983).

In this case, the trial court accepted the opinion of Dr. Manugian and conditionally awarded permanent partial disability benefits based on two and one-half times his impairment rating. From our independent examination of the record, we cannot say the trial court abused its discretion by doing so or that the evidence preponderates against an award of permanent partial disability benefits based on 30 percent to the body as a whole.

For the above reasons, the judgment of the trial court dismissing the case for insufficient proof of causation is reversed. The conditional award of permanent partial disability benefits is affirmed and the case remanded to the Circuit Court for Shelby County for entry of a judgment consistent herewith, including an award of medical expenses, if any, paid by the claimant and temporary total disability benefits in accordance with the stipulation of the parties. Costs are taxed to the appellee, Yasuda Fire and Marine Insurance Company.

JOE C. LOSER, JR., SPECIAL JUDGE
IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

**MARY ELLEN BARNES v. YASUDA FIRE and MARINE INSURANCE
COMPANY**

**Circuit Court for Shelby County
No. 305806-5 T.D.**

No. W2000-02559-SC-WCM-CV - Filed September 24, 2001

JUDGMENT ORDER

This case is before the Court upon motion for review filed by the defendant/appellee, Yasuda Fire and Marine Insurance Company, 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.

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 are taxed to the defendant/appellee, Yasuda Fire and Marine Insurance Company, and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holder, J., not participating