IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
October 18, 2001 Session

HEATHER LYNN KEY v. AMERICAN INSURANCE COMPANY

Direct Appeal from the Criminal Court for Macon County
No. 99-104 & 99-147 J. O. Bond, Judge

No. M2001-00980-WC-R3-CV - Mailed - January 15, 2002
Filed - May 29, 2002

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 trial court found the plaintiff to be 22 ½ percent anatomically impaired, and applied a multiplier of 2 ½ times in awarding benefits based upon a 56.25 vocational percent impairment. The evidence preponderates against a finding of 22 ½ percent anatomical impairment.

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

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J. and HOWELL N. PEOPLES, SP. J., joined.

William R. Pigue and A. Allen Smith, III, Nashville, Tennessee, for the appellant, American Insurance Company.

William Joseph Butler and E. Guy Holliman, Lafayette, Tennessee, for the appellee, Heather Lynn Key.

MEMORANDUM OPINION

Background

On March 18, 1999, the plaintiff filed a complaint for workers' compensation benefits resulting from alleged injuries to her *right* shoulder, arm and neck.

On May 19, 1999, she filed another complaint for workers' compensation benefits resulting

from alleged injuries to her *left* shoulder and arm.

The defendant responded that the plaintiff continued to work, that her injuries were minimal, and that she suffered no significant anatomical impairment or vocational disability.

The cases were consolidated for trial. The trial court found that the plaintiff sustained a 22 ½ percent anatomical impairment resulting in a 56.25 percent vocational impairment and awarded benefits accordingly.

The defendant appeals, insisting that the award is excessive because the findings are not supported by credible proof. Our review is *de novo* on the record with the presumption that the judgment is correct unless the evidence otherwise preponderates. Rule 13 (d) T.R.A.P.

The Evidence

The plaintiff is a 29 year old mother of two children, ages seven and nine. She is a high school graduate with some college work and vocational courses in computer science and various hobbies. She began working for Bosch Braking Systems in April 1995, doing assembly work. She resigned her job on March 7, 2000 because "I didn't feel I was getting better."

It is significant that she missed no time from work, and she testified that at the time of trial nine months after she left work her condition had improved. She was then under no medical treatment, and she "had no interest in working."

She testified that she had difficulty in performing household chores, driving her car and other activities which required physical exertion. Her husband corroborated her testimony concerning her imposed work limitations.

Plaintiff testified that she first began having difficulties in October of 1998 when she began experiencing discomfort in her right shoulder and arm. She was treated by Dr. Michael Bernui, whose notes indicate that he initially treated her *left* shoulder and arm. At a follow-up visit, she complained of discomfort in her *right* shoulder and arm, and Dr. Bernui treated her conservatively. She next saw Dr. Bernui several months later, shortly before filing suit, complaining of persistent pain in her right arm and shoulder. He continued to prescribe physical therapy and the use of anti-inflammatory drugs, but determined that a nerve conduction study would be useful in evaluating the plaintiff's condition. He referred her to a neurologist, Dr. Alan Bachrach, for a complete EMG study. The study was performed of the right upper extremity and revealed no evidence of abnormality.

Dr. Bernui continued to treat the plaintiff on a weekly basis. With no objective evidence of physical dysfunction, he ordered an x-ray of her right shoulder which revealed no abnormality. He thereupon referred the plaintiff to an orthopedic specialist, Dr. Thomas Gautsch.

Dr. Gautsch saw the plaintiff on two occasions for treatment of her right arm and shoulder complaints. He ordered an MRI "to look for any pathology that might show up on MRI scan that was not apparent on a set of regular x-rays." After concluding that he could find nothing abnormal upon examination or through testing, Dr. Gautsch suggested she return to her regular work without restrictions. She continued to work at Bosch Braking Systems Corporation doing her regular job through the remainder of 1999 up until her resignation on March 6, 2000. As stated, during the entirety of this period, the plaintiff did not seek medical treatment.

She filed suit on March 19, 1999 and, with the exception of one visit to Dr. Gautsch in May of that year, sought no additional medical treatment thereafter while continuing to perform all of her regular job functions. She was, however, "evaluated" by 3 additional physicians: Dr. Robert Landsberg, Dr. S.M. Smith, and Dr. David Gaw.

Dr. Landsberg evaluated the plaintiff for the first and only time on August 26, 1999 at the request of plaintiff's counsel and opined that she might have a minimal 2 percent impairment to each upper extremity.

Plaintiff's attorney then referred her to Dr. S. M. Smith for the sole purposes of evaluation. He acknowledged that the EMG, MRI and X-rays were all "normal"; however, but testified that the plaintiff retained a 34 percent permanent partial anatomical disability rating to the body as a whole.

The plaintiff was then examined by Dr. David Gaw at the request of the defendant. He testified, in effect, that the plaintiff was malingering, but that "I think this lady has got what's called a chronic pain syndrome." Noting a lack of objective medical evidence of impairment, Dr. Gaw then concluded that the plaintiff was anatomically impaired by 5 percent to the body as a whole.

No vocational expert testified.

Analysis

The defendant correctly argues that the initial injury concerns the extent, if any, of the anatomical impairment suffered by the plaintiff, and secondarily, the degree to which such impairment rendered the plaintiff vocationally disabled. ***Corcoran v. Foster Auto GMC***, 746 S.W.2d 452 (Tenn. 1988).

It is well established that a trial court has discretion to accept the opinion of one medical expert over that of another, subject to certain standards. ***Orman v. Williams Sonoma, Inc.***, 803 S.W.2d 672, 676 (Tenn. 1991), and ***Johnson v. Midwesco, Inc.***, 801 S.W.2d 804 (Tenn. 1990). The decisions have tended to give greater deference to treating physicians, because "[i]t seems reasonable that the physicians having greater contact with the Plaintiff would have the advantage and opportunity to provide a more in-depth opinion, if not a more accurate one." ***Orman***, *supra.*

Only two of the five testifying physicians actually treated the plaintiff - Drs. Bernui and

Gautsch. Drs. Landsberg, Smith and Gaw evaluated the plaintiff for the purposes of this litigation.

Dr. Bernui's treatment of the plaintiff began in October of 1998, when the plaintiff complained of *left* shoulder and arm discomfort, although she testified that the discomfort initially arose in her *right* shoulder and arm. The plaintiff complained about her right shoulder and arm on her second visit, approximately a week later. Dr. Bernui prescribed a conservative course of treatment, including physical therapy and anti-inflammatory drugs.

Throughout the course of her treatment and up until the time of her voluntary resignation in March of 2000, she continued to perform all of her regular job functions. She did not return to Dr. Bernui or seek treatment elsewhere until she filed the complaint.

The medical diagnoses and evaluations are reiterated:

> Dr. Bernui did not opine as to the plaintiff's anatomical impairment utilizing the AMA Guidelines. His testimony that the plaintiff suffered from no permanent impairment of consequence is bolstered by the fact that the plaintiff continued to perform her regular job function up to the day she voluntarily resigned.
>
> The other treating physician, Dr. Gautsch, corroborates the opinion of Dr. Bernui. In evaluating the x-rays, MRI and after his personal assessment of the plaintiff, Dr. Gautsch testified that there was no anatomical basis upon which he could assign a permanent restriction or limitation of activities.
>
> Dr. Landsberg, who evaluated the plaintiff at her request, noted the absence of objective medical proof of impairment and opined that she had a minimal impairment of 2 percent to each arm, and recommended certain restrictions subject to change.

The plaintiff thereupon contracted with Dr. S.W. Smith to examine and evaluate her. Utilizing range of motion methodology, he opined that the plaintiff retained a 34 percent permanent partial impairment rating to her whole body.

The defendant thereupon contracted with Dr. David Gaw, a prominent orthopedic surgeon, to examine and evaluate the plaintiff. He testified the plaintiff demonstrated "inappropriate response/symptom magnification," and that since she might suffer from chronic pain syndrome she retained 5 percent anatomical impairment.

It seems obvious that the evidence strongly preponderates against the finding of the trial court, who preluded his findings with this statement:

> Whether it's five (5) or fifteen (15) percent anatomical rating or a thirty-four (34) percent anatomical, that really doesn't make a whole lot of difference under the comp law now . . . It's hard to come up

> with a number in a case like this. It really is it seems like. I think the anatomical rating should probably be, probably, seventeen (17) percent by the time you look at both shoulders and neck from all I can read and *that's pulling one out of the wood.*" (Emphasis added).[1]

As we have observed, a trial court has discretion to accept the opinion of one medical expert over that of another but standards have been established as to how that discretion should be exercised and what factors are appropriately considered.[2] *See,* ***Elmore v. Travelers Ins. Co.***, 824 S.W.2d 541 (Tenn. 1990), citing, ***Orman v. Williams Sonoma, Inc.***, 803 S.W.2d 672, 676 (Tenn. 1991); ***Johnson v. Midwesco, Inc.***, 801 S.W.2d 804 (Tenn. 1990). These factors include not only the qualifications of the experts, but also the circumstances of their examination, the information available to them during their examination, and the evaluation of the importance of that information by other experts. ***Elmore,*** *infra., citing,* ***Orman***, *infra.*

Neither the trier of fact nor a reviewing body can ignore the uncontroverted proof that (1) the plaintiff did not miss work throughout her employment, (2) she sought no additional medical treatment beyond that provided by Drs. Bernui and Gautsch, (3) the objective medical evidence revealed by diagnostic studies indicated no abnormalities, and (4) she voluntarily quit her job and has since made no effort to obtain employment of any kind.

Superimposed is the comment of the trial judge, heretofore quoted, that a finding of 17 percent anatomical rating is "pulling one out of the wood."

The trial court added an additional 5 percent impairment for the plaintiff's "Chronic Pain Syndrome." This exchange explains:

Mr. Holliman (Appellee):	I didn't understand whether it's the vocational disability due to the chronic pain syndrome. Is that included in that two-and a-half times?
The Court:	No, it's not.

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[1] The trial court further stated "the court finds that she's got the work-related *injury* that occurred and she's got permanent disability on that. On top of that she's got psychological injuries that have been brought about by the work *injury*."

A psychological injury was not alleged in either complaint, and there is no proof of, or reference to, psychological injury in the record or the briefs. We note that the trial judge referred to the "work injury" [in the singular] without further elucidation as to which extremity, or shoulder, was affected, although he thereafter stated "by the time you look at *both* shoulders. . . ."

[2] Each physician testified by deposition. Therefore, the trial court's evaluation of the expert testimony is not afforded deference as in cases where expert testimony is offered in the presence of the trial court. *See,* ***Elmore v. Traveler***, 824 S.W.2d 541 (Tenn. 1992).

Mr. Pigue (Appellant):	I thought we just resolved that at the end of the trial, Judge, about trying anything today.
The Court:	I can add that in there.
Mr. Pigue (Appellant):	I know, but I thought that's what we're doing. That's what we all agreed to do.
The Court:	Well, I'd add another five (5) percent just for that order and that will bring it up to twenty-two (22) and-a-half (½) percent. . . .

Dr. Smith, on whose testimony the trial court relied, made no mention of chronic pain syndrome. It was the opinion of Dr. Gaw that the plaintiff retained a 5 percent impairment solely on account of chronic pain syndrome.

We find the evidence preponderates against the finding of anatomical impairment of twenty-two and one-half percent.[3] We find the evidence preponderates in favor of an anatomical impairment of 5 percent with a vocational disability of two and one-half times the anatomical rating, or 12 ½ percent. The judgment will be modified accordingly.

The appellee presents for review the issue of whether the trial court erred in applying "too low a multiplier." She argues that her "chronic pain syndrome" is a condition which severely disables her and prevents her from performing most jobs in the open labor market. No vocational expert testified, and we find no evidence in the record to support these statements.

The appellee argues that although she returned to work for a period of nine months without medical restrictions and without seeking additional medical treatment until her voluntary resignation on March 6, 2000, that "judicial economy" demands the invocation of the maximum multiplier available under the Tennessee Workers' Compensation Law. We do not agree.

It is not disputed that the appellee made a meaningful return to work. Tenn. Code Ann. § 50-6-241(a)(1) which reads, in pertinent part:

> (when) the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employed was

[3] The origin of the extra one-half percent is not revealed in the record.

> receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is two and one-half (2 ½) times the medical impairment rating. . .

The appellee offers no sufficient justification why the trial court should have deviated from this standard.

The trial court, after a consideration of all the proof offered at trial found that the two and one-half multiplier would be applicable, stating: ". . .*she voluntarily quit.* There wasn't any proof on that as far as whether or not she asked them to move her, or whether or not they tried, or whether they had a job." (Emphasis added).

Appellee cites the recent opinion of ***Niziol v. Lockheed Martin Energy Systems, Inc,***, 8 S.W.3d 622 (Tenn. 1999) in support of her contention that the provisions of the reconsideration statute, Tenn. Code Ann. § 50-6-241(a)(2) (b), do not require that a plaintiff prove that the injury was related to the loss of employment. ***Niziol*** is inapplicable here. ***Niziol*** involved a request to re-open under § 241(a)(2) for reconsideration of the initial assessment of industrial disability. This case, however, involves an initial determination of vocational disability under Tenn. Code Ann. § 50-6-241(a)(1).

The trial court correctly ruled that the appellee's voluntary resignation limited her recovery to two and one-half times an appropriate anatomical impairment rating. The issue presented by the appellee is not well taken.

As modified, the judgment is affirmed, with costs assessed equally to the parties. The case is remanded for all appropriate purposes.

PER CURIAM

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JUDGMENT

This case is before the Court upon the motion for review filed by Heather Lynn Key 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;

It appears to the Court that the motion for review is not well taken and is therefore denied. The Panel's findings of fact and conclusions of law, as modified and attached hereto, are incorporated by reference, adopted, and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Heather Lynn Key, for which execution may issue if necessary.