

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

**MICHELE RENEE SMITH v. COOKEVILLE REGIONAL MEDICAL
CENTER**

**Direct Appeal from the Circuit Court for Putnam County
No. 99NO224 John J. Maddux, Judge**

**No. M2001-00982-WC-R3-CV - Mailed - April 9, 2002
Filed - May 10, 2002**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with *Tennessee Code Annotated* § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The defendant appeals the judgment of the trial court finding that the employee, an ICU nurse: 1) suffered a back injury while caring for a patient that aggravated her pre-existing back condition; 2) gave proper notice of her injury under the circumstances; and 3) sustained a 17% anatomical impairment and 37% permanent partial disability to the body as a whole. We hold that the evidence does not preponderate against the trial court's findings. Accordingly, the judgment of the trial court is affirmed.

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

JAMES L. WEATHERFORD, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., and JOE C. LOSER, JR., SP. J., joined.

Robert R. Davies, Nashville, Tennessee, for the appellant, Cookeville Regional Medical Center.

W.I. Howell Acuff, Cookeville, Tennessee, for the appellee, Michele Renee Smith.

MEMORANDUM OPINION

Mrs. Michele Smith was 33 years old at the time of trial. In 1994, Mrs. Smith obtained her master's degree in nursing from Vanderbilt University and started working in the Neurosurgical Intensive Care Unit at Baptist Hospital in Nashville.

In 1995, Mrs. Smith first began experiencing problems with her back. She was in the shower when “something felt like that it went out and I felt like I was going to pass out...” She went to the emergency room and was eventually referred to a neurosurgeon. She experienced low back pain with pain radiating to her leg, but an MRI revealed no abnormalities. She missed approximately 1 month of work. After she was released by the neurosurgeon, she saw a chiropractor for treatment for a few months until her symptoms resolved.

In September 1997, Mrs. Smith took a position in the ICU of Cookeville Regional Medical Center (CRMC) after moving to Cookeville due to her husband’s employment. In the ICU she would care for one to two patients during a 12 hour shift.

Shortly after moving to Cookeville, Mrs. Smith sought treatment from Dr. Mitchell P. Shea, chiropractor, for “a neck problem, stress type crick in your neck.” In June of 1998, she again saw Dr. Shea for treatment of low back pain during her pregnancy. He treated her for back pain with pain radiating down her leg. Mrs. Smith’s pregnancy precluded use of x-rays, MRI’s, or special studies. According to Dr. Shea, Mrs. Smith recovered in less than 21 days - before an MRI or nerve study would have been indicated according to protocols.

Shortly after the birth of her daughter, Mrs. Smith sought treatment from Dr. David Enrico, D.C., because she had low back pain and after sitting she would find that her legs would “go to sleep.” Dr. Enrico found that she had low back pain and pain radiating down her right leg with sciatica. Mrs. Smith did not find Dr. Enrico’s treatment helpful and returned to the care of Dr. Shea. On January 15, 1999, Dr. Shea noted that no sciatica was present. He continued to treat her back for 9 visits from January 15 through February 5, 1999.

Dr. Shea scheduled an MRI for February 5, 1999, as Mrs. Smith described it, “just to see if there was—see what was there, because I wasn’t having consistent results from treatment.” Her symptoms “would get better and then get a little worse, and get better and get a little worse.”

Mrs. Smith had been on maternity leave from CRMC from November 2, 1998, through February 1, 1999. She returned to work on February 2, 1999, and worked her 12 hour shift in the ICU.

On the morning of February 5, 1999, she was involved in giving a bed bath to a 250 pound patient who was paralyzed, sedated and on a ventilator. Mrs. Smith washed the top half of the patient, then got the assistance of two co-workers, Jeff Robinson and Tim Tobbitt, to help her roll the patient over, wash his back, and change the sheet on the bed.

Mrs. Smith and Mr. Robinson were at the foot of the waist-high bed, holding the bottom edge of the sheet while Mr. Tobbitt pulled the patient toward the head of the bed. She was tensioning the sheet so that it would not bunch up under the patient when Mr. Tobbitt moved him toward the head of the bed. He did not lift the 250 pound patient completely off the bed during this movement. As he moved the patient, Mrs. Smith felt a “pop” in her lower back and remarked to her

co-workers something like, "Wow, that didn't feel good."

At the time of the incident she did not feel an excruciating pain, but more of a growing tiredness in her lower back, that continued to worsen. She did not mention anything about this incident to her night shift supervisor. The MRI was performed as scheduled later that morning. Mrs. Smith was not scheduled to work again until February 12, 1999.

After returning home that Friday morning, she had "progressive pain increasing with pain running down my back of my right leg." By Sunday morning she could not get out of the shower, out of bed or into a chair without assistance.

On Sunday, February 7, 1999, she met Dr. Shea at his office. After physical therapy did not improve her symptoms, Dr. Shea referred her to the emergency room at CRMC. The emergency room was busy that day and Mrs. Smith was in the waiting room for over 2 hours.

According to Mrs. Smith, she told Judy McDaniel, the triage nurse, Dr. Samuel and Dr. Lanier that her injury was work related. She testified that she naively assumed that going to her own emergency room took care of any notice problem.

Mrs. Smith's father, Mr. Robert Hartupee, was familiar with her previous back problems, and stated he could see "a great deal of difference" with her 2/5/99 injury. He had to help her out of the shower when she could not straighten herself; and he also took her to Dr. Shea's office and then on to the emergency room. He heard her tell 3 maybe 4 medical personnel that she had injured her back at work a few days before.

Mrs. Smith's husband, Michael Smith, testified that her previous back problems had been "fairly minor". He stated that she had told him on February 5 or 6 that "she had done something about lifting or turning a patient of some sort and felt something pop." He grew increasingly concerned when her symptoms worsened over the course of the weekend. Mr. Smith suggested that she have it looked at because, "[t]his was a whole lot worse just from her actions." He heard her tell the nurse taking vital signs and other people in the hospital that her injury had "happened at work."

The MRI revealed a disc herniation at L5/S1. Dr. Lanier recommended Dr. David McCord, neurosurgeon, because he did "micro surgery." Mrs. Smith stayed overnight at CRMC and received pain killers and muscle relaxants. The next morning, she was transported by ambulance to Centennial in Nashville.

Dr. McCord met her at Centennial and took her history: "[t]wo days or thereabouts beforehand she had been at work and had an acute exacerbation of not only back pain but also leg pain. The right was worse than the left. She had difficulty walking. She was having trouble controlling her urine." He then conducted an exam that "was remarkable for some fairly impressive back pain." He testified that the motor exam was difficult to conduct due to the amount of pain that she was in, but that he did detect weakness in the right foot and ankle as well as the loss of some

reflexes. She was scheduled for surgery the very next day, “given the fact that she was in such pain and weakness and trouble holding her urine....”

Dr. McCord’s operative notes reflect that once surgery began it became clear that a simple one-level procedure was not an option due to the amount of damage and instability at L5/S1. Dr. McCord performed a disk replacement and fusion.

After three days she was discharged from the hospital but returned on February 15, 1999, with complaints of severe headache and leakage of spinal fluid which later resolved. Early in the week following the surgery she called her nurse manager and told her she had hurt her back at work, gone to the emergency room, and later had surgery.

Ms. Karen Bradford, Human Resources Generalist for CRMC, testified Mrs. Smith notified her by telephone after the surgery that she had had a work injury and requested a form to turn it in under workers’ compensation. CRMC received the form on March 5, 1999, which was within 30 days of the injury.

According to Ms. Bradford, Dr. Lanier and Dr. Samuel were not employees of CRMC. Although Nurse McDaniel was employed by CRMC, she was not a “charge nurse” and not in a supervisory or administrative position on February 7, 1999. Ms. Bradford stated that CRMC did not get discounts on medical bills from authorized providers and that the CRMC emergency room was listed on CRMC’s panel of three.

On April 23, 1999, Dr. McCord released her to return to work with some restrictions. Dr. McCord testified that he would discourage continuous heavy lifting, frequent bending, and particularly stooping. He would also be concerned about overhead work and working at heights on a continual basis.

On February 8, 2000, Dr. McCord found she had reached maximum medical improvement. He assigned a 17% impairment to the body as a whole based on the 4th Edition of the AMA Guidelines¹ and stated that her injury was an aggravation of her pre-existing back condition.

On January 25, 2001, Mrs. Smith saw Dr. Thomas J. O’Brien, orthopedic surgeon, for an independent medical examination. Dr. O’Brien found that the work activities of February 5, 1999, were not the cause of Mrs. Smith’s ruptured disc at L5-S1.

According to Dr. O’Brien, she had the hallmark findings of a disc herniation before the incident of February 5, 1999, and would have had to undergo a surgical procedure on her back regardless of the incident on that day. He also noted that the accepted medical treatment for the L5-

¹At the time of Dr. McCord’s deposition on March 30, 2000, the most recent edition of the AMA Guides was the 4th edition.

S1 disc herniation was limited microdiskectomy which is approximately 1/4 of the cost of the procedure performed by Dr. McCord.

Dr. O'Brien found that she did not sustain any impairment as it related to her work activities of February 5, 1999, but would have a 12% permanent impairment to the body as a whole utilizing the 5th Edition of the AMA Guidelines. He did not assign any restrictions to Mrs. Smith.

Mrs. Smith continues to have numbness in her toes- "my toes are asleep pretty much all the time." This numbness extends up through her foot then she lies on her side. She tends to have worse symptoms in her right leg but both legs are involved. She also has intermittent shooting pain that runs down her right leg. She no longer lifts heavy items as she did before her injury. She cannot carry or hold her daughter for more than a few minutes at a time; and bathing her daughter is "one of the things that causes more pain than anything."

Her husband testified she now has difficulty putting their daughter into the crib, sitting for long periods of time, getting in and out of the car and getting on the floor to play with their daughter.

The trial court found Mrs. Smith, her husband, and her father to be a very credible witnesses.

The trial court found that Mrs. Smith had sustained a back injury at L5-S1 as a result of an injury by accident arising out of and in the course of employment. As to causation, the trial court found that the injury incurred on February 5, 1999, advanced the severity of the condition which she was already in; and in addition to increased pain, caused a permanent anatomical change in her pre-existing condition.

The trial court found that Mrs. Smith was in an emergency situation and suffering severe pain for which she was given pain killers and other drugs that clouded her understanding and judgment. The trial court concluded that CRMC had received timely notice of the injury and proper notice under the circumstances.

The trial court gave greater weight to Dr. McCord's testimony than to that of Dr. O'Brien and found that the medical testimony established a permanent partial impairment of 17% to the body as a whole. The trial court awarded 37% permanent partial disability to the body as a whole and found that Mrs. Smith was entitled to recover \$61,540.96 in medical expenses from CRMC.

ANALYSIS

Review of findings of fact by the trial court shall be *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. *Tenn. Code Ann. § 50-6-225(e)(2). Stone v. City of McMinnville*, 896 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 courts in workers' compensation cases.

Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 456 (Tenn. 1988).

Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

When the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Insurance Co. of North America*, 884 S.W.2d 446, 451 (Tenn. 1994).

I. Whether the evidence preponderates against the finding of the trial court that the plaintiff sustained an aggravation, exacerbation or increase in the severity of her pre-existing back condition on February 5, 1999, arising out of and in the course of her employment with CRMC.

In order to be eligible for workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." *Tenn. Code Ann.* § 50-6-102(12).

If a work injury aggravates a pre-existing condition merely by increasing pain, but does not otherwise "injure or advance the severity" of the employee's condition the claimant did not sustain an injury by accident within the meaning of the Workers' Compensation Act and is not entitled to compensation. *Cunningham v. Goodyear Tire and Rubber Co.*, 811 S.W.2d 888, 891 (Tenn. 1991). To be compensable, the pre-existing condition must be advanced, there must be anatomical change in the pre-existing condition, or the employment must cause an actual progression of the underlying disease. *Sweat v. Superior Industries Inc.*, 966 S.W.2d 31, 33 (Tenn. 1998).

Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have thus consistently held that an award may properly be based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. *Reeser v. Yellow Freight Systems, Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997)(citations omitted.)

Dr. McCord testified unequivocally that this injury was an aggravation of her pre-existing condition. According to Dr. McCord, she was in severe pain and had weakness and loss of reflexes which required surgery.

Dr. O'Brien was of the opinion that she had the hallmark findings of a disc herniation prior to February 5, 1999.

Both her husband and her father stated that the February 5th episode was very different from her previous back problems. While she did seek treatment for an episode of back pain starting in January 1999, Mrs. Smith was able to work her full 12 hour shifts in the ICU after returning to work from maternity leave. Two days after the injury on February 5th, 1999, she was unable to get out of bed or a chair without assistance.

After reviewing the medical and lay testimony, we find that the evidence does not preponderate against the trial court's finding that Mrs. Smith sustained an aggravation of her pre-existing back condition on February 5, 1999.

II. Whether the evidence preponderates against the trial court's finding that Mrs. Smith gave notice of her alleged work-related injury within the period of time prescribed and in the form required by the Tennessee Workers' Compensation Act before incurring substantial medical and related expenses.

Tennessee Code Annotated § 50-6-201 provides:

(a) Every injured employee or such injured employee's representative shall, immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, give or cause to be given to the employer who has no actual notice, written notice of the injury, and the employee shall not be entitled to physician's fees or to any compensation which may have accrued under the provisions of the Workers' Compensation Law from the date of the accident to the giving of such notice, unless it can be shown that the employer had actual knowledge of the accident; and no compensation shall be payable under the provisions of this chapter unless such written notice is given the employer within thirty (30) days after the occurrence of the accident, unless reasonable excuse for failure to give such notice is made to the satisfaction of the tribunal to which the claim for compensation may be presented.

In determining whether there is reasonable excuse to give notice otherwise required by *Tennessee Code Annotated* § 50-6-201, the courts consider 1) actual knowledge, 2) lack of prejudice, and 3) capacity of the employee to timely notify. *Gluck Brothers v. Pollard*, 426 S.W.2d 763 (Tenn. 1968).

The trial court found Mrs. Smith to be a very credible witness. Mrs. Smith stated that she told the triage nurse and at least two doctors that this was a work related injury when she arrived at her employer's emergency room for treatment. She was later admitted to CRMC and stayed overnight before being transferred to Nashville.

The CRMC Emergency Room was listed on CRMC's panel of physicians and the hospital did not receive discounts on medical bills from authorized providers.

As the trial court noted, by all accounts Mrs. Smith was in severe pain and was treated with pain medication and muscle relaxants which affected her understanding and judgment. Dr. McCord opted to perform surgery the very next day after he examined her due to his concerns about pain and weakness in her leg.

After reviewing the facts of this case, we are unable to say that the evidence preponderates against the trial court's finding that CRMC should be responsible for Mrs. Smith's medical expenses.

III. Whether the trial court erred by accepting the medical testimony of Dr. McCord that Mrs. Smith retained a 17% anatomical impairment over the testimony of Dr. O'Brien, the evaluating physician, who assessed a 12% impairment.

Dr. McCord, the treating physician, assigned 17% anatomical impairment according to the 4th Edition of the AMA Guides (the current edition at the time of his deposition). Dr. O'Brien assigned a 12% anatomical impairment rating using the 5th Edition of the AMA Guides.

The trial court has the discretion to accept the opinion of one medical expert over another medical expert. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333 (Tenn. 1996).

We find that the evidence does not preponderate against the finding of the trial court that Mrs. Smith retained a 17% anatomical impairment.

CONCLUSION

The judgment of the trial court is affirmed . Costs are taxed to the appellant.

JAMES L. WEATHERFORD, SR.J.

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL

**MICHELE RENEE SMITH v. COOKEVILLE REGIONAL MEDICAL
CENTER**

**Circuit Court for Putnam County
No. 99NO224**

No. M2001-00982-WC-R3-CV - Filed - May 10, 2002

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 will be paid by the appellant, Cookeville Regional Medical Center, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM