

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON  
August 16, 2002 Session

**JANINE MERRYMAN v. AQUA GLASS CORPORATION**

**Direct Appeal from the Chancery Court for McNairy County  
No. 7572 Martha Brasfield, Chancellor**

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**No. W2001-02897-SC-WCM-CV - Mailed December 5, 2002; Filed March 6, 2003**

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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. §50-6-285(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the defendant employer Aqua Glass Corporation contends the evidence preponderates against the trial court's finding of a compensable back injury and an award of twenty-six percent (26%) permanent partial disability to the body as a whole. For the reasons stated in this opinion, we affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2001 Supp.) Appeal as of Right; Judgment of the Chancery Court Affirmed**

W. MICHAEL MALOAN, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J. and JOE C. LOSER, JR., SP. J., joined.

Steven S. Maroney, Amber A. Edwards, Jackson, Tennessee, for appellant, Aqua Glass Corporation

Scott G. Kirk, Jackson, Tennessee, for the appellee, Janine Merryman

**MEMORANDUM OPINION**

The plaintiff, Janine Merryman (Merryman) was forty-six (46) years old at trial. She graduated from high school and earned a Bachelor's Degree in Religious Arts and Theology. She has a commercial truck driver's license and a certificate for training in computer pattern making. Her prior work experience includes a waitress, waitress trainer, receptionist, dental surgical assistant, cashier, and pattern maker.

Merryman began working for Aqua Glass in the production department as a roller and later as a sprayer. She testified she fell at work on November 18, 1996, and hurt her low back, left hip and knee. She felt a pop in her lower back and had a hot pain shoot down her left leg. After giving notice of the accident, she continued to work that day and did not miss any work thereafter.

Merryman continued to have pain in her hip and leg and requested to see a doctor. She was referred to Dr. Micky Smith in Savannah, who referred her to Dr. Keith Nord in Jackson. Dr. Nord saw her on March 17, 1997 and took a history of an accident at work but no fall and complaints of hip and knee pain. His physical examination of her back and left leg did not disclose a ruptured disc or lateral meniscus tear in her knee. Dr. Nord diagnosed left hip greater trochanteric bursitis and released her to work with no restrictions on March 31, 1997. Dr. Nord was of the opinion she had reached maximum medical improvement on February 4, 1998, and assigned no impairment to her back and a five percent (5%) permanent impairment to her left lower extremity. Prior to February 4, 1998, Dr. Nord testified Merryman did not complain of back pain. Merryman continued to see Dr. Nord for hip and knee pain. On her last visit of October 14, 1998, Dr. Nord's office notes state Merryman complained of back pain which Dr. Nord diagnosed as a lumbosacral strain. Merryman testified she told Dr. Nord of her back pain throughout her treatment.

Merryman saw Dr. Claiborne Christian on September 29, 1999, for a second opinion. Dr. Christian took a history of a slip and fall at work with injuries to the low back and left extremity and complaints of continued back pain. An MRI did not reveal any abnormalities in her lumbar spine but an X-ray showed early degenerative changes at the L5-S1 level. On her last visit of December 16, 1999, Dr. Christian agreed with Dr. Nord and assigned five percent (5%) impairment for her knee injury and no impairment for her back. Dr. Christian did not find any evidence of spondylolisthesis in Merryman's back. When asked about Dr. Boals' finding of spondylolisthesis, Dr. Christian stated "It is just not consistent with my understanding of her injury which was a slip and fall at work and not a fall off a building or a high speed car accident."

Dr. Joseph Boals evaluated Merryman on January 17, 2001. Dr. Boals agreed Merryman had a five percent (5%) impairment to her left leg, but was of the opinion the fall at work had aggravated a pre-existing congenital spondylolisthesis at the L5-S1 level in her lower back and assigned a twenty-three percent (23%) permanent impairment to the body as a whole. Dr. Boals states in his notes: "For some reason, it seems the physicians missed this diagnosis (spondylolisthesis)." Dr. Boals assigned permanent restrictions of no prolonged walking, standing, stooping, climbing, repetitive bending or twisting of her back and stated he did not think Merryman could work as an over the road truck driver.

Merryman testified she did not have any back problems prior to her fall at work in November 1996, but now has persistent pain in her low back, left hip and knee. She takes prescription pain medication as needed and she would be able to do her previous employment but with difficulty. Merryman left Aqua Glass in October 2000 and began in May 2001 working with her husband as an over the road truck driver with "one hundred percent (100%) no touch freight." She testified she can no longer ride her motorcycle, bowl, play tennis, or pick up her grandson.

After a September 24, 2001 trial, the trial court found Merryman had sustained a compensable injury to her back and left leg and awarded a twenty-six percent (26%) permanent partial disability to the body as a whole. The defendant, Aqua Glass, has appealed and contends that the evidence preponderates against the trial court's finding of a compensable injury to Merryman's back and that the award was excessive.

## ANALYSIS

The scope of review of issues of fact is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). *Lollar v. Wal-Mart Stores, Inc.*, 767 S.W.2d 143 (Tenn. 1989). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court's factual findings. *Humphrey v David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). However, where the issues involve expert medical testimony which is contained in the record by deposition, as it is in this case, then all impressions of weight and credibility must be drawn from the contents of the depositions, and the reviewing court may draw its own impression as to weight and credibility from the contents of the depositions. *Overman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676-77 (Tenn. 1991).

## CAUSATION

To establish causation, the employee may introduce lay as well as expert medical testimony and any reasonable doubt as to whether an injury arose out of the employment is to be resolved in favor of the employee. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 168 (Tenn. 2002), *Legions v. Liberty Mutual Ins. Co.*, 703 S.W.2d 620, 622 (Tenn. 1986). When the medical evidence conflicts, the trial court has the discretion to accept the opinion of one physician over that of another physician. *Kellerman v. Food Lion, Inc.*, 920 S.W.2d 333, 335 (Tenn. 1996); *Johnson v. Midwesco*, 801 S.W.2d 804, 806 (Tenn. 1990).

In the present case, the employer relies on the opinions of the physicians who treated Merryman for two (2) years, Drs. Nord and Christian, that Merryman has no permanent impairment to her back. Dr. Boals who saw Merryman more than four (4) years after her injury was the only doctor to diagnose spondylolisthesis in her low back. Further, Dr. Nord's records first indicate complaints of back pain about two (2) years after her injury. Merryman relies on the evaluation of Dr. Boals who opined her fall at work aggravated a preexisting congenital condition in her back, spondylolisthesis, and made the condition symptomatic. Merryman testified she had no problems with her back before the fall and now has persistent pain..

The trial court in her findings noted the testimony as to Merryman's back injury was "conflicting and disputed," but clearly relied on Dr. Boals' opinion. The trial court found Merryman to be a credible witness and found in her favor on the issue of causation. We find the evidence does not preponderate against the trial court's finding of a compensable injury to the back.

#### VOCATIONAL DISABILITY

The extent of vocational disability is a question of fact to be determined from all the evidence, including both expert and lay testimony. *Collins v. Horomet Corp.*, 970 S.W.2d 941, 943 (Tenn. 1998). In assessing vocational disability, the trial court is required to consider many pertinent factors such as the age, education skills and training, local job opportunities and capacity to work at types of employment available in the worker's disabled condition. Tenn. Code Ann. §50-6-241(a)(1); *Worthington v. Modine*, 798 S.W.2d 232, 234 (Tenn. 1990.)

The employer emphasizes Merryman's education and work experience as factors which preponderate against the trial court's award. Further, Merryman works as an over the road truck driver—a job Dr. Boals testified she could not do. Merryman testified she had no prior back problems but now works in pain and takes prescription medication because of her fall at work. Her present job as an over the road truck driver does not require her to lift freight.

After considering all the evidence in this case, we find the evidence does not preponderate against the trial court's award of twenty-six percent (26%) permanent partial disability to the body as a whole.

#### CONCLUSION

The judgment of the trial court is affirmed. The costs of this appeal are taxed to the employer, Aqua Class Corporation.

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W. Michael Maloan, Special Judge

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**JUDGMENT ORDER**

This case is before the Court upon the motion for review filed by the defendant-appellant, Aqua Glass Corporation, 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, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to the appellant, Aqua Glass Corporation, and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Janice M. Holder, J., not participating