

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

(September 11, 2003 Session)

**MARIE ANN BURNETT v. WAL-MART STORES, INC.**

**Direct Appeal from the Circuit Court for Henry County  
No. 1767 Creed McGinley, Judge**

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**No. W2003-00060-WC-R3-CV- Mailed October 2, 2003; Filed November 10, 2003**

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This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. Section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of the finding of fact and conclusions of law. The only issues submitted to the trial judge were the extent of the employee's vocational disability and whether the disability was related to the accident. Employer appeals the award of thirty percent permanent disability to the body for employee's work related accident. We affirm.

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

JOE H. WALKER, III, SP.J., delivered the opinion of the court, in which JUSTICE JANICE M. HOLDER, J., and JOE C. LOSER SP.J., joined.

Kevin J. Youngberg, Jackson, Tennessee for the appellant, Wal-Mart

Robert T. Keeton, Jr., Huntingdon, Tennessee, for the appellee, Marie Ann Burnett

**MEMORANDUM OPINION**

**FACTUAL BACKGROUND**

At the time of trial, employee was 40 years of age. She has seventh grade education, and a history of factory work. While working for Wal-Mart in May 1998 she fell and injured her back, right leg and right wrist. She was referred by her employer to Dr. Terry Harrison, who treated her conservatively. Dr. Harrison allowed employee to return to light duty for a period of time, but in 2001 took her off work, and has not released her to return to work. During the course of treatment, she was referred to Dr. Ray Hester, Dr. Pete Blanton, Dr. Frank Jordan for pain treatment, and Dr. Glenn Barnett for evaluation.

During the course of medical treatment, employee experienced neck pain, spinal axis pain that radiates to her lower back. She experienced numbness in her right arm and right leg. She had multiple diagnostic tests that did not reveal the source of her discomfort.

Dr. Ray Hester, neurosurgeon, felt employee would benefit from restrictions such as not bending from the waist while standing and no working with her arms out in front of her when standing, and felt that the most impairment she would have would be five percent (5%), but was unwilling to rate her since she had not reached maximum medical improvement.

Dr. Terry Harrison was of the opinion that the work-related accident exacerbated her problems with degenerative joint disease and prior back problems, and assessed her impairment at five percent (5%) permanent disability to the body related to the accident. He placed work restrictions of lifting less than ten pounds, standing or walking less than three hours, sitting less than three hours with frequent change of position, and limited ability to push or pull. She should engage in limited reaching, and not above her head. She was very restricted in stooping, kneeling, crouching, and twisting. She should not work in cold environments as this will increase the spasms that she has.

Dr. Glenn Barnett saw employee for evaluation during her treatment by Dr. Harrison. During this time she was working as a door greeter for employer and reported that she continues to have pain in her neck and lower back, and numbness in her right arm and leg. She was unable to move her back much beyond about ten degrees, and complained of pain in straight leg raises. CT of the spine was within normal limits. He could detect no focal neurological deficits and did not have an explanation of her continued complaints of pain and discomfort. He requested a thoracic spine x-ray and bone scan, but indicated that those tests were not approved to be performed.

After the accident, employee continued to experience physical problems. During the course of medical supervision and treatment, she returned to work at Wal-Mart on "light duty," greeting people at the door, answering the phone, and working in the fitting room. She worked part time on light duty until March 2001, when Dr. Harrison wrote Wal-Mart indicating that she could no longer continue to work. She was placed on leave of absence, and could return to work if she obtains a release from the doctor, which she has been unable to obtain.

During the light duty work she had difficulty with the duties, even though her employer made a chair available to her. She testified that she tried to perform the job and would like to return to work.

The trial court awarded employee vocational disability of thirty percent to the body, which equates to 120 weeks at the compensation rate of \$73.80 per week, for a lump sum of \$8,856.00.

## DISABILITY BENEFITS

Employer sought review of the judgment arguing that the evidence preponderates against the trial court's finding that employee is entitled to permanent disability benefits.

Under the Tennessee Workers' Compensation Law, injuries by accident arising out of and in the course of employment which cause either disablement or death of the employee are compensable. Tenn. Code Ann. § 50-6-102(a)(12). 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. Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993). In all but the most obvious cases, causation may only be established through expert medical testimony, Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (1991), but an injured employee is competent to testify as to his own assessment of his physical condition and such testimony should not be disregarded. McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn. 1999).

An injured employee who meets the statutory criteria is entitled to certain monetary benefits, including the payment of all medical expenses arising from the accident together with a recovery for any temporary or permanent disability resulting from the accident. Tenn. Code Ann. § 50-6-207.

Employer alleges that since employee was diagnosed as having a pre-existing back problems, and was treated for prior back problems, and since throughout the course of treatment and tests there were no objective findings, that the trial court erred in awarding benefits.

Dr. Harrison's records reflect that he had treated employee for a prior back complaint, which employee and Dr. Harrison indicated had resolved before the accident herein. Dr. Harrison related the current complaints and the disability to the accident.

When the medical testimony differs, the trial judge must choose which view to believe. In doing so, he 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 that 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).

The reviewing court must give considerable deference to the trial court's findings with regard to the weight and credibility of oral testimony, as it is the trial court which had the opportunity to observe the witness's demeanor and to hear the in-court testimony. Long v. Tri-Con Industries, Ltd., 996 S.W.2d 173, 178 (Tenn. 1999) (citing Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487 (Tenn.1997)). The trial court observed employee and accredited her testimony with regard to the accident, the continuing problems she experienced, and her inability to continue working. Where the issues involve expert medical testimony and all the medical

proof is contained in the record by deposition . . . then this Court may draw its own conclusions about the weight and credibility of that testimony." Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn.1997).

From our independent examination of the record, we are not persuaded the trial court abused its discretion by accepting the opinion of Dr. Harrison, the treating physician who was chosen by the employer.

#### AMOUNT OF AWARD

Employer maintains that the trial court erred by failing to apply the two and a half times multiplier cap, and erred by awarding six times the anatomic impairment rating.

Tennessee Code Annotated section 50-6-241(a)(1) and (b) provide as follows:

For injuries arising on or after August 1, 1992, in cases where an injured employee is eligible to receive any permanent partial disability benefits, pursuant to § 50-6-207(3)(A)(i) and (F), 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 injury, the maximum permanent partial disability award that the employee may receive is two and one-half (2 1/2) times the medical impairment rating determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment (American Medical Association), the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community.

Tenn. Code Ann. § 50-6-241(a)(1) (1999).

Subject to factors provided in subsection (a) of this section, in cases for injuries on or after August 1, 1992, where an injured employee is eligible to receive permanent partial disability benefits, pursuant to § 50-6-207(3)(A)(i) and (F), and the pre-injury employer does not return the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is six (6) times the medical impairment rating determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment (American Medical Association), the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic

Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community.

Tenn. Code Ann. § 50-6-241(b) (1999).

Employer contends the award is excessive and particularly that it exceeds two and one-half times the medical impairment rating. 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 that 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. Tenn. Code Ann. § 50-6-241(a)(1). If the offer from the employer is not reasonable in light of the circumstances of the employee's physical disability to perform the offered employment, then the offer of employment is not meaningful and the injured employee may receive disability benefits up to six times the medical impairment. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 630 (Tenn. 1999)

The resolution of what is reasonable must rest on the facts of each case and be determined thereby. *Newton v. Scott Health Care Center*, 914 S.W.2d 884 (Tenn. 1995). If an employee returns to work but is unable to perform his duties due to a work-related injury, then the worker's resignation would be reasonably related to the injury, and there would be no meaningful return to work. *Lay v. Scott*, 109 S.W.3d 293 (Tenn. 2003).

It appears from the record that the employee attempted to return to light duty work but was unable to perform even these duties because of her injury. She did not quit, her doctor sent her employer a letter indicating that she was not able to work. She had not been released by the doctor to return to any type of employment by the time of trial. Under such circumstances, the evidence fails to preponderate against the trial court's finding that the employee did not have a meaningful return to work. The limitation of two and one-half times the medical impairment is therefore inapplicable.

The fact of employment after injury is a factor to be considered in determining the extent of an injured worker's disability, but that fact is to be weighed in light of all other considerations, including the employee's skills and training, education, age, local job opportunities, capacity to work at the kinds of employment in his or her disabled condition, rating of anatomic disability by a medical expert and the employee's own assessment of his or her physical condition and resulting disability. *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000). Additionally, the extent of an injured worker's disability is an issue of fact. *Walker v. Saturn Corp.*, 986 S.W.2d 204, 207 (Tenn. 1998). Giving due deference to the finding of the trial court, we cannot say the evidence preponderates against the trial court's finding with respect to the extent of the claimant's vocational disability.

## MEDICAL EXPENSES

Employer maintains that employee was referred to Dr. Harrison for treatment and that Dr. Harrison at some point referred employee to Dr. Blanton, an orthopedic surgeon, who referred employee to Dr. Barnett for evaluation from a neurosurgical specialist. Dr. Barnett was unable to determine the cause of claimant's problem and released her with no permanent impairment from the work related accident. Employer maintains it does not owe further medical expenses from the time she was released by Dr. Barnett, even though the treatment was from approved doctors. Employer maintains that the referral by Dr. Harrison, "thereby essentially ceding his status as the designated authorized treating physician to Dr. Blanton."

Dr. Harrison testified that he was still treating employee during the time she was referred to Drs. Blanton and Barnett for evaluation. Employee was not advised by employer that Dr. Harrison was relieved of treating her for the injury. Dr. Harrison was not informed that he was relieved by employer from treating employee. Dr. Harrison continued treating employee and continued referring her to other specialist for tests and evaluations. The trial court properly ruled that these medical expenses should be paid by employer.

An injured employee who meets the statutory criteria is entitled to certain monetary benefits, including the payment of all medical expenses arising from the accident. Tenn. Code Ann. § 50-6-207.

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

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JOE H. WALKER, III, SP.J.

IN THE SUPREME COURT OF TENNESSEE  
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**Circuit Court for Henry County  
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**JUDGMENT ORDER**

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 on appeal are taxed to the Appellant, Wal-Mart Stores, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM