

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

September 11, 2003 Session

MARCINA JELKS v. THE TRAVELERS INSURANCE CO.

**Direct Appeal from the Chancery Court for Gibson County
No. H 4515 George R. Ellis, Chancellor**

No. W2003-00927-SC-WCM-CV - Mailed December 29, 2003; Filed March 16, 2004

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 employer questions the trial court's findings as to permanency and extent of vocational disability. As discussed below, the panel has concluded the evidence fails to preponderate against the findings of the trial court.

Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the Chancery Court Affirmed

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

Kevin J. Youngberg and Zach C. Luttrell, Allen, Kopet & Associates, Jackson, Tennessee, for the appellant, The Travelers Insurance Company

David Hardee, Hardee & Martin, Jackson, Tennessee, for the appellee, Marcina Jelks

MEMORANDUM OPINION

The employee or claimant, Ms. Jelks, initiated this civil action to recover workers' compensation benefits for a work related injury. The Travelers Insurance Company, insurer of the employer, denied liability. After a trial on the merits, the trial court resolved the issues in favor of the claimant and awarded, inter alia, permanent partial disability benefits based on 25 percent to the body as a whole. Travelers has appealed.

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). This tribunal is not bound by the trial court's findings but instead conducts an independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). 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, because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). 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).

The claimant was working at a food processing plant on November 17, 1999, when she slipped and fell on a wet floor, injuring her low back, neck, right knee and right hip. She had immediate pain, which persists. She was conservatively treated by Dr. Keith Douglas Nord for a cervical and lumbo-sacral back strain. Dr. Nord recommended restricted duty, ordered a nerve conduction study and made a return appointment. The doctor continued seeing the claimant at least until January 15, 2001, but testified that she had long since reached maximum medical improvement. He estimated her permanent impairment to be none for the back and neck injury, but conceded she was permanently impaired in her right knee and shoulder.

On March 7, 2001, Ms. Jelks visited another orthopedic surgeon, Dr. Robert Barnett, who had evaluated her following a previous injury, to be evaluated for her present injury. As part of his examination, Dr. Barnett viewed x-rays taken following the November 1999 accident, compared them with earlier x-rays and determined that there had been anatomic changes in the claimant's low back. Based on his findings, Dr. Barnett assigned an impairment rating of 5 percent to the whole person for the low back injury. The injury was superimposed on her previous injury.

The appellant first contends there should be no award of permanent disability benefits because the claimant merely suffered increased pain with no anatomic change, relying solely on Dr. Nord's testimony that there was no anatomic change in the claimant's neck or low back. The argument ignores the doctor's testimony concerning the claimant's right knee and right shoulder. It ignores Dr. Barnett's testimony altogether. The trial court did not err in considering Dr. Barnett's testimony that there was an anatomic change. Moreover, the argument overlooks the long standing principle that an employer takes an employee as the employee is, with all defects and diseases, and assumes the risk of having a weakened condition aggravated by an injury which might not affect a normal person. Modern Upholstered Chair Co. v. Russell, 518 S.W.2d 519, 522 (Tenn. 1974). From a fair interpretation of Dr. Barnett's testimony, the injury aggravated and worsened a pre-existing condition. The argument is without merit.

The appellant next argues the trial court erred in awarding the equivalent of five times Dr. Barnett's medical impairment rating without making specific findings of fact. For injuries occurring

on or after August 1, 1992, where an injured worker is entitled to receive permanent partial disability benefits to the body as a whole, 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 the injury, the maximum permanent partial disability award that the employee may receive is six times the medical impairment rating determined pursuant to the above guidelines. Tenn. Code Ann. § 50-6-241(b). If a court awards a multiplier of five or greater, then the court must make specific findings of fact detailing the reasons for its award, considering all relevant factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities and capacity to work at types of employment available in claimant's disabled condition. Tenn. Code Ann. § 50-6-241(c). The claimant contends the trial court made exhaustive findings. In fact, the record reflects that the trial court, after quoting extensively from the record, simply said, "The Court finds the results of an accident that Marcina Jelks sustained while working for Adecco, for J. Hungerford – Hungerford Smith, where she sustained an accident under the workmen's comp laws of the State of Tennessee, that she sustained a twenty-five percent permanent, partial disability to the body as a whole."

The panel concludes that, although the trial court's finding fails to comply with the above statute, it is clear from the record that the trial court's finding that the claimant suffered a 25 percent permanent partial disability to the body as a whole was not based solely on the back injury. The judgment states that the trial court found that "the plaintiff suffered compensable injuries to her back, right shoulder and right knee." There was testimony that the claimant would retain permanent impairments of 3 percent to the body as a whole for her shoulder injury, 1 percent to the body as a whole for her knee injury and 5 percent for her back injury. Added together, the claimant is entitled to an impairment rating of 9 percent to the body as a whole. Since 25 percent does not exceed a multiple of five times 9 percent, the findings required by Tenn. Code Ann. § 50-6-241(c) were unnecessary.

Finally, the appellant contends the trial court erred in failing to limit the award of permanent partial disability benefits to two and one-half times the five percent medical impairment rating because the employee unreasonably refused to return to employment, citing Tenn. Code Ann. § 50-6-241(a)(1). The preponderance of the evidence is that the employee did not return to work because she was disabled from performing her duties, as she testified. The section is thus inapplicable.

For the above reasons, the judgment of the trial court is affirmed. Costs are taxed to the appellant.

JOE C. LOSER, JR.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

MARCINA JELKS v. THE TRAVELERS INSURANCE COMPANY

**Chancery Court for Gibson County
No. H 4515**

No. W2003-00927-SC-WCM-CV - Filed March 16, 2004

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by The Travelers 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.

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, The Travelers Insurance Company, and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holder, J., not participating