

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

November 29, 2005 Session

**SANDRA DENISE TOMLIN v. FEDERAL RESERVE BANK OF
ATLANTA/NASHVILLE BRANCH, ET AL.**

**Direct Appeal from the Circuit Court for Sumner County
No. 24176-C C.L. Rogers, Judge**

**No. M2005-01401-WC-R3-CV - Mailed - March 31, 2006
Filed - May 4, 2006**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the supreme court of findings of fact and conclusions of law. The Plaintiff asserted gradually occurring back problems coupled with arm injuries, long subsisting. Her treating physician diagnosed degenerative disc disease, aggravated by the duties of her job. An independent medical examiner, and another physician, disagreed, finding no organic basis for her complaints, which implicated malingering.

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

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and DONALD P. HARRIS, SR. J., joined.

Jerry R. Humphreys, Nashville, Tennessee, attorney for Appellant, Federal Reserve Bank of Atlanta/Nashville Branch.

Ann Buntin Steiner, Nashville, Tennessee, attorney for Appellee, Sandra Denise Tomlin.

MEMORANDUM OPINION

The Plaintiff began her employment with the Federal Reserve Bank of Atlanta/Nashville Branch,¹ on December 17, 1995. On September 25, 2003, she filed a complaint for workers' compensation benefits alleging several injuries. The alleged injuries include a gradually occurring

¹ Jurisdiction is not questioned. *See*, 12 U.S.C.A. Section 632; *Fed. Reserve Bank of Atlanta v. Thomas*, 220 F.3rd 1255 (11th Cir. 2000).

injury to both arms caused by repetitive use, a developing pain in her back, an injury to her right hand and arm caused by an accident, carpal tunnel syndrome in her left hand and fibromyalgia.

The Defendant initially admitted the Plaintiff gave notice of her “injuries and conditions.” Later, by amended answer, it was averred that the Plaintiff failed to provide adequate statutory notice. The Defendant has denied that Plaintiff’s condition is the result of a compensable injury and, thus, asserts she is not entitled to benefits under the workers’ compensation law.

The trial judge found that the Plaintiff sustained compensable work-related injuries to her cervical and lumbar spine arising from her employment and retained a 75 percent permanent partial disability to the body as a whole as a result of those injuries. The trial court also found that Ms. Tomlin’s claims for fibromyalgia and left carpal tunnel syndrome were not compensable since they did not result from a work-related injury.

The Defendant appeals and asserts the evidence presented at trial preponderates against the findings of the trial court that the Plaintiff gave notice as required by the workers’ compensation law and that her pre-existing back condition was aggravated by her employment. Defendant has also raised the issue of whether the trial court was justified in accrediting the testimony Ms. Tomlin’s treating physician over the testimony two evaluating physicians. The Plaintiff has also appealed challenging the findings of the trial judge that she failed to prove she suffered from fibromyalgia, and this condition was caused by the duties of her employment.

Our review is de novo upon the record accompanied by a presumption that the judgment is correct unless the evidence preponderates against it. Tennessee Rules Appellate Procedure 13(d). To that end, our review is in depth but we cannot substitute our judgment for that of the trial judge. Tenn. Code Ann. § 50-6-225(e)(2); *McCormick v. Aabakus, Inc.*, 101 S.W.3d 60, 62 (Tenn. 2000); *Ivey v. TransGlobal Gas & Oil*, 3 S.W.3d 441, 446 (Tenn. 1999); *Galloway v. Memphis Drum Service*, 822 S.W.2d 584, 586 (Tenn. 1991).

BACKGROUND

The Plaintiff was thirty-four years old at the time of trial. After employment by the Defendant, she initially performed unskilled work for about five years. She was then assigned to the currency department loading and pushing heavy carts. As a result of this work, she developed problems with her back. In January 2001, she sought treatment from her family physician, Dr. Raymond Fuller. She continued to work, and her back pain worsened to the extent she consulted a pain specialist. According to Ms. Tomlin, she told her supervisor about her back problems and that she had sought treatment. She missed no time from work as a result of the condition in her back until November 23, 2002. Ms. Tomlin states she did not realize she had an actual injury to her back until April 2003, when Dr. Fuller referred her to Dr. Leone for pain management and to Drs. Hazelwood and Bartholomew for further treatment and evaluation.

During the time Plaintiff was being treated for her back condition, she asked her supervisor,

Tom Spencer, if she should report her condition as work related. Mr. Spencer advised that if she or her doctor felt the condition was work related, she should pursue it. Plaintiff told him, at that time, her condition was not work related.

In November 2002, Plaintiff was taking pain medication which caused her to black out, fall asleep, slur her speech and lose concentration. Her supervisors, Tom Spencer and Don Wilson, met with her in November 2002 to discuss her work performance. During the meeting, she did not claim that her condition was work related even though she personally assumed that it was. Don Wilson received a note from Dr. Fuller a few days later, who reported that the Plaintiff would not be able to work because she was seeking treatment by a pain specialist for her condition. She remained off work until mid January 2003.

Plaintiff returned to work in mid January 2003, working only two days of a four-day week in order to attend physical therapy. She was placed on restrictions by Dr. Fuller. Her last working day with the Defendant was April 17, 2003, when she took an extended leave of absence based on Dr. Fuller's reports. At that time, Plaintiff considered her medical condition to be work related, although she spoke to her supervisor, Mr. Wilson, about her medical condition on three occasions, May 21, 2003, June 18, 2003, and July 21, 2003, and never indicated she believed her condition was work related. Her employment was terminated on July 24, 2003 due to her inability to perform the essential functions of her position. On August 20, 2003, she forwarded to the Defendant a document entitled "Amended Notice of Claim." This document stated it was her "formal claim for workers' compensation," and was the first written notice to Defendant she claimed workers' compensation benefits.

MEDICAL PROOF

Dr. Raymond L. Fuller, certified by the American Board of Osteopathic Internal Medicine in Pulmonary and Internal Medicine, was Ms. Tomlin's family physician. She first complained to him of neck and lower back pain on April 5, 2001. Dr. Fuller ordered x-rays that revealed spurring in the lumbar vertebrae. This spurring, according to Dr. Fuller, was a response to physical stress. Bone responds to stress by attempting to strengthen itself by adding bone tissue in the stressed area creating a spur or osteophyte. Dr. Fuller referred Ms. Tomlin to Dr. Wolfe, a neurologist who performed a EMG. This test, performed September 24, 2001, revealed a neuropathy with a carpal tunnel syndrome of the right and cervical disc changes affecting both the right and left arms.

Over time her symptoms grew progressively worse. She was referred to physical therapy which afforded no relief. Dr. Fuller referred her to a pain management expert, who prescribed various medications. The pain management group performed an MRI of the lumbar and cervical spine on December 24, 2003. The image of the lumbar spine revealed degenerative disc disease and a small, shallow central disc protrusion at L5-S1. The image of the cervical spine showed a shallow, central disc protrusion at C5-6, narrowing the anterior subarachnoid space and flattening the ventral surface of the spinal chord.

Dr. Fuller diagnosed the Plaintiff as having degenerative disc disease, which, in turn, probably led to fibromyalgia. He restated that the degenerative disc disease was aggravated and worsened by the repetitive motion required in her job and, as a result, her back pain became progressively more intense over the three and a half years following her initial complaint. He assigned an impairment rating of 28 percent to the body for the cervical spine, and 28 percent for the lumbar spine. Dr. Fuller indicated that disability based on fibromyalgia is still being debated, but believed her impairment has been increased to a total of 80 percent because of the fibromyalgia. Dr. Fuller testified that impairment coupled with her depression rendered her unable to work. He recommended restrictions of no more than one hour for sitting, standing or walking, and that she should not use either of her feet or her hands for repetitive movement.

Cross-examination revealed that Dr. Fuller referred the Plaintiff to a veritable host of physicians, including pain management specialist, OB/GYN specialist, sleep apnea specialist, psychologist and psychiatrist, among others.

Dr. Jeffrey Hazelwood is board certified in physical medicine and rehabilitation with a subspecialty board certification in pain management. He initially saw the Plaintiff on March 11, 2004 on a referral by Dr. Fuller. She reported to Dr. Hazelwood her back pain began in January, 2001. She had no specific acute injury. According to the Plaintiff, her pain was attributable to repetitious bending and lifting bundles of money and pushing carts. She described a second "flare up" in August of 2002, working the same job, with increased cervical and lumbar pain radiating into the hands. Initially, her pain was located in the neck and low back.

Dr. Hazelwood reviewed a MRI scan of her cervical region from March 1, 2004 which showed mild degenerative changes and no disc herniation. An MRI scan of the lumbar spine performed on the same date revealed mild degenerative disc disease at L5-S1. Dr. Hazelwood testified that she had a shallow central disc protrusion at C5-C6 and a small central disc protrusion at L5-S1, and some mild limitation with cervical range of motion. She had essentially full range of motion of the lumbar spine and good range of motion in all four extremities. She had diffuse tenderness in the musculature. Her neurologic examination was normal except for generalized non-anatomic sensory deficits. Based upon his examination, Dr. Hazelwood diagnosed Plaintiff with fibromyalgia with underlying degenerative disc disease that is typically age related. Dr. Hazelwood did not believe the disc bulges and protrusions were causing the pain that Ms. Tomlin complained of. He was of the opinion the MRI's showing degenerative changes were not clinically related to her symptoms and, moreover, were not significant enough to cause total disability.

With regard to permanent impairment, Dr. Hazelwood stated that because Ms. Tomlin had no spasm or guarding, had an asymmetrical range of motion, and had no radiculopathy, she would have no impairment according to the *AMA Guides* (Fifth Edition). It was also his opinion that Ms. Tomlin's fibromyalgia was not related to her work.

Dr. Thomas O'Brien, a board-certified orthopedic surgeon, saw the Plaintiff on June 2, 2004 for an independent medical examination. Her complaints were diffuse in nature and included

headaches, neck pain, bilateral shoulder pain, bilateral leg pain with numbness and tingling extending into the calves and feet. Upon physical examination, Dr. O'Brien found no identifiable muscle spasm. Ms. Tomlin exhibited some inconsistency with range of motion testing but with repeated testing she was able to achieve a full range of motion in her back. During the examination of her back, Plaintiff demonstrated three out of five positive Waddell signs. According to Dr. O'Brien, Waddell signs are provocative tests that are performed as part of the examination of the back or lumbar spine and are designed to elicit a non-organic or non-anatomic pain response. Upon physical examination of Plaintiff's upper and lower extremities, Dr. O'Brien found Plaintiff initially demonstrated inconsistent effort but with repeated testing, was able to achieve normal strength and reflexes. Further, Plaintiff had a normal and negative Hoffman's sign, meaning she had no pressure on the spinal cord.

Dr. O'Brien reviewed MRI scans of Plaintiff's cervical and lumbar spine and found only minor degenerative changes with no compression on the nerves. He believed that Plaintiff did not sustain an injury at work in 2001 or 2003, and further opined, because of his non-anatomic or non-organic findings, that Plaintiff was engaged in symptom magnification. Dr. O'Brien testified that while he did not treat patients with fibromyalgia, it was not a work-related condition and Plaintiff's symptoms were not related to her work. Dr. O'Brien found nothing to indicate Ms. Tomlin should not work and also found that she had no anatomical impairment. He believed she had subjective complaints that were not verifiable by objective findings on her imaging studies.

The trial court accepted the opinion of Dr. Fuller, the treating physician, that the Plaintiff suffered an injury consisting of activation or aggravation of pain from degenerative disc disease arising from her employment.

DISCUSSION

The issues, as restated, are whether the Plaintiff's pre-existing back condition was aggravated by her employment, whether she gave proper notice, and whether the court erred in accepting the opinion of the treating physician. The Appellee complains that the trial court erred in failing to find that her fibromyalgia was related to her employment.

Aggravation of Injury

The Employer, citing *Cunningham v. Goodyear Tire & Rubber*, 811 S.W.2d 888, 891 (Tenn. 1991), argues that work which aggravates an employee's pre-existing injury or condition by increasing the amount of pain, but does not otherwise "injure or advance the severity" of the employee's injury or condition, is not compensable. The medical evidence must show that in addition to the manifestation of increased pain there is permanent anatomical change in the pre-existing injury or condition, *Talley v. Virginia Ins. Reciprocal*, 775 S.W.2d 587, 591 (Tenn. 1989), and must establish a causal connection between the anatomical change and the work-related aggravation to the pre-existing injury or condition. See generally, *Bowling v. Raytheon Co.*, 448 S.W.2d 405 (Tenn. 1969).

The Plaintiff suffered from back and neck problems beginning in January 2001. She sought treatment in April 2001 and, again, in August 2002. Her pain began to intensify until in November 2002, she was unable to perform her job because of the pain and the pain medications. The testimony of Plaintiff and her physician establishes Plaintiff had increased pain. Dr. Fuller, the treating physician, testified Plaintiff's degenerative disc condition was aggravated by her work, thereby causing fibromyalgia. The Employer argues there is no testimony in the record that establishes a permanent anatomical change as a result of aggravation of her degenerative disc disease but the Plaintiff's x-rays revealed spurring and her imaging studies showed disc protrusions at L5-S1 and C5-C6. The latter studies were completed on December 24, 2003, and the findings were the same as those for the imaging studies completed on March 1, 2004.

Dr. O'Brien testified the MRI scans showed only minor degenerative changes with no compression of the nerves. Dr. Hazelwood testified that the underlying degenerative disc disease was typically age related and that the disc bulges and protrusions were not causing Plaintiff's pain. He also stated the degenerative changes were not clinically related to her symptoms and not significant enough to cause total disability. He diagnosed the source of Plaintiff's problems as fibromyalgia, not degenerative disc disease, while the treating physician testified that the degenerative disease was clearly aggravated by her work. The trial judge accepted the opinion of the treating physician as was his prerogative. *Orman v. Williams Sonoma*, 803 S.W.2d 672, 675-678 (Tenn. 1991). The issue is close, but we cannot find that the finding of the trial court is not supported by the preponderant evidence.

Notice

The Defendant admits that it had knowledge of Plaintiff's medical condition but argues that no notice of any work-related injury was given until after the Plaintiff had treated with various physicians for approximately two years and incurred a multitude of physicians' fees. There is no evidence that the Plaintiff requested a panel of physicians, or that the Defendant provided her a panel. Plaintiff first sought treatment for her back problems in April 2001. She testified that by April 2003, she considered her condition to be work related, but it was not until August 2003 that she gave written notice of her alleged injury. Tennessee Code Annotated section 50-6-201 provides:

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 knowledge, written notice of the injury, and the employee shall not be entitled to physician's fees or any compensation which may have accrued under the provisions of the worker's 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 . . .

Mere knowledge by the employer of the employee's illness is insufficient to charge the employer with knowledge that the employee sustained a work-related injury, unless it is obvious that a work-related injury has occurred. While the Workers' Compensation Act should be construed

liberally in favor of the employee, the burden of showing the required notice to the employer of an accidental injury is upon the employee claiming workers' compensation benefits. *McKinney v. Berklinc Corp.*, 503 S.W.2d 912, 915 (Tenn. 1974). *See also, Owen v. CNA Ins. Co.*, 715 S.W.2d 598 (Tenn. 1986). It is worth noting that the Plaintiff was experienced in workers' compensation matters. She had reported her carpal tunnel problems and settled her claim for the injury to her right arm. We also note that the Plaintiff told her supervisor that her condition was not work related. Moreover, she was in daily contact with Don Wilson, a supervisor, and never told him that her condition was work related. Dr. Fuller's work restrictions and work excuses did not state her condition was work related. There is no doubt that the Plaintiff had ample opportunities to report her condition as work related but failed to do so during the early stages of her problems. The circumstances, taken as a whole, however, reveal that the Employer had actual notice of the Plaintiff's problems, and suffered no prejudice, except for the medical expenses incurred, because of her failure to give written notice. *A.C. Lawrence Leather Co. v. Britt*, 414 S.W.2d 830, 834 (Tenn. 1967).

We agree that the Defendant is not responsible for the medical and related expenses incurred before the Plaintiff formally reported her injury. *See*, Tenn. Code Ann. § 50-6-201(a). Moreover, we note that the trial court disallowed medical expenses amounting to \$30,874 for treatment of carpal tunnel syndrome and fibromyalgia, found not to be work related.

Acceptance of Medical Testimony

The Employer argues correctly that when the medical testimony is presented by deposition, as it was in this case, we are able to make an independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Ins. Co. of N. Am.*, 884 S.W.2d 446, 451 (Tenn. 1994). It is well settled that when medical testimony differs, it is within the sound discretion of the trial judge to determine which expert testimony to accept. The trial court has the discretion to accept the opinion of one medical expert over another, *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. 1996); *Johnson v. Midwesco*, 801 S.W.2d 804, 806 (Tenn. 1990), and while a treating physician's testimony is entitled to considerable weight, no rule of law requires a trial court to accept the testimony of the treating physician over any other conflicting medical testimony. Dr. Fuller, the treating physician, was closely questioned about the impairment rating he assessed. He testified Plaintiff's impairment was twenty-eight percent for the cervical column and twenty-eight percent for the lumbar spine, according to the *AMA Guides*. He attributed much of the Plaintiff's impairment to fibromyalgia.

The provisions of Tennessee Code Annotated section 50-6-204(d)(3) (1998 Supp.), with respect to an anatomical impairment rating, require an expert to use either the *AMA Guides* or the *Manual for Orthopedic Surgeons*. In whole body impairment ratings, Tennessee law requires an anatomical impairment rating to be 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.

The Employer argues that Dr. Fuller did not particularize the portions of the *AMA Guides* that he relied upon in assessing the Plaintiff's impairment, which renders his testimony inadmissible. We disagree. Dr. Fuller testified that he assigned the Plaintiff an impairment rating according to the *AMA Guides*, and we think this testimony satisfies the statutory requirements.

It is not inappropriate to state that a resolution of this case is difficult. The trial judge "accepted" the testimony of the treating physician, an osteopathic physician, in preference to the opinions of an independent medical examiner, a board-certified orthopedic surgeon, and another physician, board-certified in physical medicine and rehabilitation, both of whom testified that the Plaintiff's condition was not work related and that she had no anatomical impairment. Superimposed is the troublesome evidence that this thirty-four-year-old Plaintiff, well versed in workers' compensation requirements, is a malingerer. The medical testimony presents much more than a "dueling doctor" scenario.² While it is conceded that medicine is not an exact science, the fact remains that it is difficult to understand, much less reconcile, the astonishing divergent medical opinions in this case, keeping in mind that two board-certified medical specialists not only testified that the Plaintiff was not impaired, but that her complaints were not job related. In contrast, her treating physician testified that, in practical effect, she was totally disabled as result of job-related activities.

We are required to accord much deference to the trial court's factual findings on issues related to the credibility of witnesses and the weight to be given to their testimony. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); citing *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. *Tobitt v. Bridgestone/Firestone, Inc.*, 59 S.W.3d 57, 61 (Tenn. 2001).

Because the Workers' Compensation Act is a remedial statute it must be given an equitable construction, *see* Tennessee Code Annotated section 50-6-116, as to persons entitled to its benefits and as to its terms and provisions. *Armstrong v. Liles Construction Co.*, 389 S.W.2d 261, 263 (Tenn. 1965) and *Buck & Simmons Auto v. Kesterson*, 250 S.W.2d 39, 41 (Tenn. 1952). As stated by the Tennessee Supreme Court in *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991), the medical testimony should not be evaluated in total isolation, but "must be considered in conjunction with the lay testimony of the employee as to how the injury occurred and the employee's subsequent condition." In the case at bar, there was considerable lay evidence that the cervical and lumbar injuries were related to Ms. Tomlin's job duties. The Plaintiff and her parents testified with particularity about those duties and how the Plaintiff's condition worsened as she worked. Even Mr. Wilson, who was the financial services director for the Federal Reserve Bank, agreed that it was

² Which the 2005 amendments to the Workers' Compensation Law - not here applicable - are designed either to eliminate or alleviate.

common sense that an employee who was having back problems and pushed heavy carts for an extended time would aggravate or worsen that back condition. Significantly, it is not disputed that the Plaintiff, before being placed in the currency department, had no problems with her back but began to have problems after she started pushing carts weighing up to 800-pounds from the vault to the room where she was working.

Fibromyalgia

Finally, the Plaintiff presents for review the issue of whether the trial court erred in concluding that fibromyalgia was not work related. The preponderant medical conclusions are that:

1. Fibromyalgia is a controversial diagnosis, (Dr. Fuller);
2. Many physicians do not recognize it as a disease, (Dr. Fuller);
3. It still being debated as to whether disability could be attributed to fibromyalgia, (Dr. Fuller);
4. Fibromyalgia was not related to the Plaintiff's work, (Dr. Hazelwood); and
5. Fibromyalgia is not work related, (Dr. O'Brien).

The trial judge found that the evidence was not sufficient to establish a causal connection between the Plaintiff's work and any clinical diagnosis of fibromyalgia. The evidence does not preponderate against this finding.

The judgment is modified to exclude the Employer from liability for payment of medical expenses before notice was given, as herein stated. Otherwise, the judgment is affirmed. Costs are allocated, 75 percent to the Appellant and 25 percent to the Appellee.

WILLIAM H. INMAN, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
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**Circuit Court for Sumner County
No. 24176-C**

No. M2005-01401-WC-R3-CV - Filed - May 4, 2006

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 appeals 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 are allocated, 75 percent to the Appellant, Federal Reserve Bank of Atlanta/Nashville Branch and 25 percent to the Appellee, Sandra Denise Tomlin, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM