

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE MAY 1996 SESSION

FILED

September 13, 1996

Cecil W. Crowson
Appellate Court Clerk

VICKY LADD,)	MONTGOMERY CHANCERY
)	
Plaintiff/Appellee)	NO. 01S01-9509--CH-00158
)	
v.)	HON. ALEX W. DARNELL
)	CHANCELLOR
PERMA-VIEW PROCESSED GLASS,)	
)	
Defendant/Appellant)	

For the Appellant:

Stephen K. Heard
Third National Financial Ctr.
14th Flr., 424 Church St.
Nashville, TN 37219

For the Appellee:

Cleo G. Hogan
107 North Third St.
Clarksville, TN 37040

MEMORANDUM OPINION

Members of Panel:

Justice Adolpho A. Birch, Jr.
Senior Judge John K. Byers
Special Judge William S. Russell

**AFFIRMED in part,
REVERSED in part,
and REMANDED.**

BYERS, Senior Judge

_____ 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.

Plaintiff injured her back on December 8, 1989 while working for defendant.

The trial judge set the weekly benefit rate at \$144.67, ordered defendant to pay certain discretionary costs and awarded plaintiff 35 percent permanent vocational disability.

We affirm the trial judge's award of 35 percent permanent vocational disability and remand for further hearing on plaintiff's weekly benefit rate and discretionary costs.

Plaintiff was injured at work on December 8, 1989 when a crate hit her in the back, resulting in a contusion of her left shoulder and subsequent symptomatic thoracic outlet syndrome and reflex sympathetic dystrophy. She was evaluated and treated by a number of doctors but has continued to have severe pain and other symptoms.

Dr. W. D. Hudson saw plaintiff on the date of the accident and diagnosed brachial plexus contusion. When plaintiff continued to have severe pain, Dr. Hudson determined she had reflex sympathetic dystrophy from trauma to the left brachial plexus nerve fiber and referred her for neurosurgical evaluation and for treatment of chronic pain. He thought her permanent partial impairment was probably between twenty and thirty percent.

Dr. Andrew Miller, orthopedic surgeon, treated plaintiff at the employer's request. He prescribed physiotherapy, heat, traction and an exercise program, with no improvement in plaintiff's symptoms. Dr. Miller diagnosed cervical degenerative arthritis at C-4 through C-6 and mild bulging disc at C-4/5, which he did not think were related to her work.

Dr. John W. Klemin, chiropractor, diagnosed chronic cervicothoracic strain or sprain complicated by rotary scoliosis and vertebral subluxations resulting in thoracic outlet syndrome and thought the prognosis for recovery was guarded.

Dr. Arthur Bond, neurosurgeon, evaluated plaintiff on August 8, 1991 and opined that plaintiff's history was compatible with thoracic outlet syndrome

aggravated by trauma. He thought she should see a vascular surgeon for evaluation of the thoracic outlet syndrome.

Dr. E. Dewey Thomas, orthopedic surgeon, evaluated plaintiff on May 19, 1993 and concurred with Dr. Bond that plaintiff has a thoracic outlet syndrome but “in addition may well have some cervical radicular pain, which is most difficult to separate from thoracic outlet syndrome.” He assessed five to seven percent permanent partial impairment to the cervical spine and body as a whole and further stated that plaintiff would have additional impairment related to the thoracic outlet problem but he did not give a specific additional rating because it is not covered in the AMA Guidelines.

Dr. Howard Kirshner, Professor of Neurology at Vanderbilt University Medical Center evaluated plaintiff on March 29, 1994. He thought plaintiff had a history of acute injury with bruising of the anterior chest and possibly brachial plexus area, along with reflex sympathetic dystrophy. He opined she would have no neurological permanent impairment because he found no fixed neurological deficit. He thought plaintiff should go to a comprehensive pain clinic and have a sympathetic block to the left arm.

From all of this medical evidence and the testimony of the plaintiff and her supervisor, the trial judge awarded plaintiff 35 percent permanent vocational disability to the body as a whole.

Our review is *de novo* on the record accompanied by a presumption that the findings of fact of the trial judge are correct unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2).

The trial judge may, when there is a difference in opinion between medical experts, accept the opinion of one or more over the opinion of another or others. *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804 (Tenn. 1990). When the medical testimony is presented by deposition this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Landers v. Fireman’s Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989). We have reviewed the testimony, depositions and medical records in evidence and find that the preponderance of the evidence supports the trial judge’s award of 35 percent permanent vocational disability, and we affirm the judgment in

that respect.

Appellant contends that there is no proof in the record to support the trial judge's determination of the appropriate compensation rate ("average weekly wage") or the award of discretionary costs. Appellee explains that "Appellee's Proposed Order was provided to Appellant without response, then submitted to the Court where it languished awaiting Appellant's Alternative Order." When no alternate Order was filed, the Chancery signed Appellee's Order. While the Motion for Discretionary Costs was in preparation, the notice of the instant appeal was served.

Our review of the record in this case reveals that, indeed, there is insufficient undisputed evidence in the record to set the appropriate compensation rate, and we find no evidence in the record upon which the trial court could have relied in awarding the requested discretionary costs. We therefore remand this case for hearing on discretionary costs and compensation rate. After the fixing of these, if neither party appeals, this case is completed, but if there is objection, the right of appeal remains with the objecting party.

Costs of this appeal are assessed to the appellant and the case is remanded.

John K. Byers, Senior Judge

CONCUR:

Adolpho A. Birch, Jr., Justice

William S. Russell, Special Judge