

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE  
(March 14, 1996 Session)

**FILED**  
July 24, 1996  
Cecil Crowson, Jr.  
Appellate Court Clerk

VICKIE WINNINGHAM,	)	PUTNAM CIRCUIT
	)	
Plaintiff-Appellee,	)	Hon. John Tumbull,
	)	Judge
v.	)	
	)	No. 01S01-9510-CV-00177
MASTERS HEALTH CARE	)	
CENTER,	)	
	)	
Defendant-Appellant.	)	

For Appellant:

William E. Halfacre, III  
Madewell, Jared, Halfacre & Williams  
Cookeville, Tennessee

For Appellee:

Michael H. Knowlton  
Edwin G. Sadler  
Cookeville, Tennessee

MEMORANDUM OPINION

Members of Panel:

Adolpho A. Birch, Jr., Associate Justice, Supreme Court  
Ben H. Cantrell, Special Judge  
Joe C. Loser, Jr., Special Judge

AFFIRMED AS MODIFIED

Loser, 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. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employer, Masters Health Care Center, contends (1) that the evidence preponderates against the trial judge's finding that the claimant suffered any permanent partial disability from her injury, and (2) that the evidence preponderates against an award of fifty-five percent to the body as a whole. The panel concludes the judgment of the trial court should be modified as provided herein.

The claimant, Vickie Winningham, is thirty-nine years old and a high school graduate. She has experience in a variety of unskilled jobs and has worked for this employer since April of 1989 as a nursing assistant.

On October 27, 1991, she strained her back while lifting and turning a patient. She went first to Dr. Lloyd Hassler, who prescribed physical therapy.

The claimant was referred by a representative of Crawford and Company to three physicians, Dr. James Talmadge, Dr. Arthur Gernt Bond and Dr. Michael Moore. All three testified at the trial by deposition. All three of them found her to be deconditioned from smoking and being overweight. She is five feet, three inches tall and weighs approximately two hundred fifty pounds.

Dr. Talmadge diagnosed mild low back strain, symptom magnification and incontinence. Only the back sprain was, according to his testimony, causally related to the injury at work. He estimated her permanent impairment from the injury at none.

Dr. Bond's diagnosis was essentially the same, except that he diagnosed degenerative changes unrelated to the injury at work. He agreed that the claimant is not permanently impaired as a result of any work related injury.

Dr. Moore diagnosed mechanical low back syndrome and symptom magnification. He assessed her permanent impairment at seven percent to the whole body using the third edition of American Medical Association guidelines and at five percent using the fourth edition, from her injury.

The claimant returned to work for two and one-half days, then quit, because of discomfort. She has not looked for other work, but acknowledged that she is able to work and her intent to do so when her claim is finally resolved. She can walk for thirty minutes, but has gained fifty pounds.

Two vocational experts testified at the trial. Dr. Norman Hankins, who testified by deposition, estimated the claimant's industrial disability at seventy-two percent. Dr. George Copple, who testified in person, estimated her industrial disability at between eighteen and twenty percent.

Dr. Copple has been a clinical psychologist since 1948 with an emphasis on individuals with injuries. He testified that he has done thousands of evaluations for the Social Security Administration. In formulating his opinion, he reviewed all of the claimant's medical records, interviewed her for two hours and observed her during the trial. His opinion was based in part on the medical evidence, which the panel finds very persuasive, that any impairment the claimant has is brought on by her deconditioning, not any physical injury at work. Nevertheless, the trial judge found him to be unpersuasive. The trial judge did not find his testimony to be incredible, as claimant contends.

The trial court found that the claimant suffered a permanent disability arising out of and in the course of her employment and awarded permanent partial benefits on the basis of fifty-five percent to the body as a whole. 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. section 50-6-225(e)(2). This tribunal is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1991).

The party claiming the benefits of the Workers' Compensation Act has the burden of proof to establish her claim by a preponderance of all the evidence. Parker v. Ryder Truck Lines, Inc., 591 S.W.2d 755 (Tenn. 1979). Testimony of witnesses is evaluated on the basis of reasonableness and unreasonableness of the testimony given, the interest, bias, prejudice or lack thereof on the part of the witnesses, their general credibility, their opportunity to see and observe, and all the other standards and criteria applicable to factual decisions in a nonjury civil action. Id.

In weighing and evaluating conflicting testimony from expert witnesses, their relative qualifications must also be considered. This tribunal is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Seiber v. Greenbrier Industries, Inc., 906 S.W.2d 444 (Tenn. 1995).

Dr. James B. Talmadge is a summa cum laude graduate of the medical school at Ohio State University. He has been affiliated with the Cookeville General Hospital since 1979, has served as team physician for women's athletics at Tennessee Tech University since 1987 and is certified by

the American Board of Orthopedic Surgery, the American Board of Emergency Medicine and the American Disability Evaluation Research Institute. He is fifty years old and licensed in Tennessee.

Dr. Arthur Gernt Bond graduated from the medical school at Vanderbilt University in 1957, where he served a residency in neurosurgery and later became a member of the faculty. He held hospital appointments at Baptist Hospital in Nashville, Vanderbilt University Hospital and Park View Hospital and was chief of staff at Baptist for two years. He received his Tennessee license in 1957 and was certified by the American Association of Neurological Surgeons in 1967. He was sixty years old when he gave his deposition in this case.

Dr. Michael Moore received his medical degree from Eastern Virginia Medical School in 1981. He is forty-one years old and specializes in physical medicine and rehabilitation in Lebanon. He is certified by the American Board of Electrodiagnostic Medicine, the American Board of Physical Medicine and Rehabilitation and the National Board of Medical Examiners. He has a Tennessee license, is the medical director of a fifteen bed inpatient rehabilitation unit and team physician for Cumberland University.

The panel finds the depositions of Dr. Talmadge and Dr. Bond to be very persuasive. Both found no permanent impairment. On the other hand, the testimony of Dr. Moore and the two psychologists cannot be ignored either.

From a consideration of all the lay and expert testimony, the panel finds that the evidence preponderates against an award based on fifty-five percent permanent partial disability to the body as a whole and in favor of one based on ten percent permanent partial disability to the body as a whole. The judgment is modified accordingly. Costs on appeal are taxed to the plaintiff-appellee.

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Joe C. Loser, Jr., Judge

CONCUR:

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Adolpho A. Birch, Jr., Associate Justice

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Ben H. Cantrell, Special Judge

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VICKIE WINNINGHAM, )  
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V. )  
MASTERS HEALTH CARE CENTER, )  
Defendant-Appellant. )

NO. 01-S-01-9510-CV-00177

July 3, 1996

PUTNAM CIRCUIT

**Cecil Crowson, Jr.**  
**Appellate Court Clerk**

O R D E R

The Appellee, Vickie Winningham, has filed a petition to rehear in this cause, which the Panel has considered and concludes should be denied.

It is so ORDERED.

Enter this the 3rd day of July, 1996.

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ADOLPHO A. BIRCH, JR., Chief Justice