

**IN THE SUPREME COURT OF TENNESSEE**

**SPECIAL WORKERS' COMPENSATION APPEALS PANEL**

**AT NASHVILLE**

(October 22, 1996 Session)

**FILED**  
**January 17, 1997**  
**Cecil W. Crowson**  
**Appellate Court Clerk**

RITA B. BAKER, )  
 )  
Plaintiff/Appellant, )  
 )  
VS. )  
 )  
CKR INDUSTRIES, INC., )  
 )  
Defendant/Appellee. )

FRANKLIN CIRCUIT

Hon. Thomas W. Graham,  
Judge

No. 01S01-9604-CV-00074

For the Appellant:

Floyd Don Davis  
FLOYD DON DAVIS, P.C.  
Winchester, Tennessee

For the Appellee:

David T. Hooper  
HOOPER & HOOPER  
Brentwood, Tennessee

**MEMORANDUM OPINION**

Members of Panel:

Frank F. Drowota, III, Associate Justice, Supreme Court  
Robert S. Brandt, Senior Judge  
Joe C. Loser, Jr., Special Judge

AFFIRMED AS MODIFIED

Brandt, Judge

## MEMORANDUM OPINION

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 of findings of fact and conclusions of law.

The plaintiff is employed by CKR Industries, a Winchester company that makes rubber windshield and door sealers for Nissan. A piece of plywood fell on her on January 4, 1993, and she filed suit alleging that as a result, she is totally, permanently disabled. The trial court found otherwise and ruled that she has no permanent disability. Because the trial court's finding is fully supported by the evidence, we affirm the decision.

The minor nature of the accident is one factor supporting the trial court's decision. The four foot-by-eight foot single sheet of plywood surrounded by a metal frame was being used as a bulletin board and was standing next to where the plaintiff worked. It only fell one or two feet onto her shoulder. The plaintiff did not seek any medical treatment for several days.

She never missed any work on account of the accident that she alleges left her totally and permanently disabled. She now works ten-to-twelve hours a day, five days a week.

The most reliable medical evidence does not support her claim of permanent disability. Her primary treating physician was Dr. Ray Fambrough, an orthopedic surgeon in Huntsville, Alabama. He diagnosed the plaintiff as having "subacromial impingement" which is nothing more than bursitis of the shoulder. Dr. Fambrough concluded that the blow to the plaintiff's shoulder did not in itself cause the bursitis, but that it exacerbated it. He testified that any impairment from the blow to the shoulder would be negligible.

The plaintiff asked for a second opinion and was sent to Dr. Richard A. Bagby, a Winchester orthopaedic surgeon. He treated the plaintiff and sent her to physical therapy. He concluded that the plaintiff has no permanent impairment.

The testimony of the three other doctors who saw the plaintiff is as inconclusive as it is predictable. Dr. James P. Anderson, a Nashville neurologist who saw the plaintiff for the first time over a year after the accident, testified that the plaintiff has a 13% whole body impairment. The company-selected neurologist, Dr. Richard Rubinowicz, contradicted Anderson's diagnosis and concluded that the plaintiff has no permanent impairment. The doctor the plaintiff's lawyer selected, Dr. Richard Fishbein, found permanent impairment.

Though we affirm the trial court's decision denying compensation, we conclude that it was error for the trial court to have ordered the employer to pay for the plaintiff's visits to Dr. Anderson and to pay for the expensive tests he ordered. CKR Industries provided medical care to the plaintiff in compliance with the workers' compensation statute, Tenn. Code Ann. § 50-6-204. When the plaintiff wanted an opinion in addition to Dr. Fambrough's, the employer paid for her to be seen and treated by Dr. Bagby. The plaintiff's use of Dr. Anderson took place completely outside the procedure mandated by the statute, and there is no justification for requiring the employer to pay for it. *Buchanan v. Mission Insurance Co*, 713 S.W.2d 654, 657 (Tenn. 1986).

The plaintiff complains because the trial court did not make a contingent finding of disability as suggested by this Court in *Braden v. Sears, Roebuck and Company*, 833 S.W.2d 496, 499 (Tenn. 1992). We must note, respectfully, that the plaintiff misconstrues the suggestion in *Braden*. There the trial court denied workers' compensation after finding that the accident did not arise out of the employment. We merely suggested that when the trial court makes such a decision, a contingent finding on the extent of permanent disability will prevent a remand for a new trial in the event the decision denying workers' compensation is overturned on appeal as it was in *Braden*.

There are many situations in which a trial court might find that there is permanent disability, but at the same time for some other reason find that the worker is not entitled to compensation. Failure of the worker to give timely notice is one situation. Failure to timely file suit is another. Disqualifying misconduct is still another, or that the accident did not arise out of the employment, as the trial court found in *Braden*. But when the trial court has found that the plaintiff has not proven permanent disability, the trial court cannot at the same time make a contingent finding on the extent of permanent disability.

Finally, the plaintiff complains because the trial court did not grant a new trial after it was pointed out that only the plaintiff's shoulder injury case was to be decided. The plaintiff had another injury, and the trial court apparently misunderstood counsels' stipulation and decided both cases. But the confusion was cleared up in an amended judgment, so there was no reason for a new trial.

In summary, we affirm the trial court's decision in all respects except for the award of Dr. Anderson's expenses to the plaintiff. That portion of the trial court's decision is reversed. Costs are taxed to the plaintiff.

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Robert S. Brandt, Judge

CONCUR:

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Frank F. Drowota, III, Associate Justice

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Joe C. Loser, Jr., Judge

IN THE SUPREME COURT OF TENNESSEE

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RITA BAKER,	}	FRANKLIN CIRCUIT
	}	No. 8358 Below
Plaintiff/Appellant	}	
	}	Hon. Thomas W. Graham,
vs.	}	Judge
	}	
CKR INDUSTRIES, INC.,	}	No. 01S01-9604-CV-00074
	}	
Defendant/Appellee	}	AFFIRMED AS MODIFIED.

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 will be paid by Plaintiff/Appellant and Surety for which execution may issue if necessary.*

*IT IS SO ORDERED on January 17, 1997.*

PER CURIAM