

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE JANUARY 1997 SESSION

FILED

March 24, 1997

Cecil W. Crowson
Appellate Court Clerk

UNITED STATES FIDELITY &)	
GUARANTY and PARACLESIOUS)	CLAY CHANCERY
HEALTHCARE, INC.,)	
)	
Plaintiffs/Counter-Defendants)	NO. 01S01-9607--CH-00138
/Appellants)	
)	
v.)	HON. VERNON NEAL,
)	CHANCELLOR
HOLLY SCOTT,)	
)	
Defendant/Counter-Plaintiff)	
/Appellee)	

For the Appellants:

Robert R. Davies
One Center Square, Suite 200
620 Market Street
P.O. Box 2644
Knoxville, TN 37901

For the Appellee:

Mary A. Parker
Suite 511, Cummins Station
209 Tenth Avenue, South
Nashville, TN 37203

MEMORANDUM OPINION

Members of Panel:

Frank F. Drowota, III, Justice
John K. Byers, Senior Judge
William H. Inman, Senior Judge

**AFFIRMED and
REMANDED**

INMAN, 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.

I

This action was filed by the employer and its insurer as one for declaratory judgment that "this case needs to be heard by the Court to determine the respective rights of the parties pursuant to the Tennessee Workers' Compensation Act," since the employee was claiming a back injury sustained while assisting a patient during the course of her employment by Clay County Hospital.

The defendant answered and counter-claimed, stating that she attempted to keep a patient from falling from a bed as a result of which she injured her back.

The Chancellor found that the accident occurred as alleged, as a result of which the defendant was 70% vocationally disabled and awarded benefits accordingly.

The plaintiffs appeal and present for review (1) whether the finding of 70% disability is excessive; (2) whether the multiplier was exceeded, (3) whether a partial lump sum was properly awarded.

II

The defendant is a 38-year-old licensed practical nurse and a certified nurse's aide. She was assisting a patient at home who rolled from bed and both of them hit the floor. As stated by the employer, the only issues litigated were the extent of permanent partial disability and the requested commutation of the award to a lump sum.

She testified that she could no longer perform the duties of an LPN.

Dr. Ray Hester, a neurosurgeon, testified that he initially saw the defendant on September 14, 1993. She complained of back pain and he later determined that she had a ruptured disc which surgery would not correct. Weight restrictions were imposed. He opined that she had a 5% impairment for thoracic strain and disc

rupture and 10% impairment to her whole body because of lumbar radiculopathy, for a combined rating of 15% whole body impairment.

Dr. Robert E. Clendenin, an orthopedic specialist, saw the defendant on July 19, 1994. He testified that most of her symptoms were subjective, that she had a five percent impairment owing to thoracic strain and that her complaints were magnified.

Dr. Robert Weiss examined the defendant. He testified that her subjective complaints were disproportionate to objective findings and that her subjective complaints were inconsistent. The MRI, myelogram and CT scan were unremarkable, according to Dr. Weiss.

III

Our standard of review is *de novo* on the record, accompanied by the presumption that the trial court's findings of fact are correct unless the evidence otherwise preponderates. T.C.A. § 50-6-225(e)(2). The judgment appears to be generous in light of the evidence of malingering, the relatively modest anatomical impairment, the absence of surgical intervention and the emphasis from whatever source on the defendant's need for financial assistance. But we cannot substitute our judgment for that of the trial court and taken as a whole we are unable to find that the evidence preponderates against the judgment.

IV

Appellant complains that Dr. Hester failed to follow the A.M.A. Guidelines. We have read the questions propounded to him along this line, and his responses thereto, and agree with the Chancellor that the guidelines were substantially adhered to and that the multipliers mandated by T.C.A. § 50-6-241(b) were properly applied.

V

The Chancellor ordered that \$30,000.00 of the award should be paid in a lump sum. We are unable to find an abuse of discretion, since there is ample proof in this record that the defendant is responsible, mature and capable of money management. The funds will be used for housing, a permanent asset, and necessary for a proper livelihood for the defendant and her three children. See *Burris v. Cross Mountain Coal Co.*, 798 S.W.2d 745 (Tenn. 1990).

The judgment is affirmed at the appellants' costs. We remand to the trial court for assessment of costs of appeal.

William H. Inman, Senior Judge

CONCUR:

Frank F. Drowota, III, Justice

John K. Byers, Senior Judge

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UNITED STATES FIDELITY &	}	CLAY CHANCER
GUARANTY and PARACLESIOUS	}	
HEALTHCARE, INC.,	}	No. 3451 Below
	}	
Plaintiffs/Counter-Defendants/	}	Hon. Vernon Neal,
Appellants	}	Chancellor
	}	
vs.	}	
	}	
HOLLY SCOTT,	}	No. 01S01-9607-CH-00138
	}	
Defendant/Counter-Plaintiff/	}	
Appellee	}	AFFIRMED AND REMANDED.

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 Plaintiffs/Appellants and Surety for which execution may issue if necessary.

IT IS SO ORDERED on March 24, 1997.

PER CURIAM