

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

FILED

May 13, 1997

**Cecil W. Crowson
Appellate Court Clerk**

DIANNE B. FOWLER,) No. 0S01-9607-GS-00151
Plaintiff/Appellee)
)
) WARREN GENERAL SESSIONS
v.)
)
LIBERTY MUTUAL INSURANCE) HON. BARRY MEDLEY, JUDGE
COMPANY and DELORES' MARKET)
Defendants/Appellants)
_____)

FOR THE APPELLANTS:

ROBERT R. DAVIES
DAVIES, CANTRELL, HUMPHREYS & McCOY
P.O. Box 190609
Nashville, TN 37219-0609

FOR THE APPELLEE:

FRANK D. FARRAR
WILLIAM JOSEPH BUTLER
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P.O. Box 280
Lafayette, TN 37083

MEMORANDUM OPINION

MEMBERS OF PANEL:

FRANK F. DROWOTA, III, ASSOCIATE JUSTICE, SUPREME COURT
WILLIAM H. INMAN, SENIOR JUDGE
WILLIAM S. RUSSELL, RETIRED JUDGE

This appeal from the judgment of the trial court in a workers' compensation case has been referred to the Special Workers' Compensation Appeals Panel of the 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 dispositive issue in this case is whether or not the trial judge's award of compensation for permanent partial disability based upon a vocational disability of 50% to the body as a whole is adequately supported by the evidence. We hold that the evidence preponderates against an award in that amount and modify the judgment to reduce the permanent partial disability judgment to an amount based upon a vocational disability of 20% to the body as a whole. This modification renders moot the appellants' other issues.

It is the duty of this court to review the findings of fact of the trial court de novo upon the record, accompanied by a presumption of the correctness of those findings, modifying the trial court's judgment only when we judge it to be contrary to the preponderance of the evidence. Tennessee Code Annotated Section 50-6-225 (e)(2), so applied in countless cases.

The appellee, Dianne B. Fowler, worked at Delores' Market,

where her duties required her to operate the cash register, stock shelves, make sandwiches, etc. Occasionally she would unload stock from delivery trucks. On June 8, 1995, she injured her back by lifting a 24 pound bag of salt.

Two orthopedic surgeons testified by deposition. Dr. John C. McInnis diagnosed her injury as a low back muscle strain. He arranged to have an MRI of her low back, and it was essentially normal. The employee did have mild bulging of the disc at L4-5, which is not per se an abnormal finding. There was no evidence of a ruptured disc or pinching of a nerve. Dr. McInnis treated her until November 30, 1995, when he felt that she had reached maximum medical improvement. He placed no specific activity restrictions upon her and assessed an impairment rating of 0% to 5% to the body as a whole.

The second specialist, Dr. Roger Zwerner, saw her at the request of her attorney, for evaluation purposes. He reviewed the M.R.I. and agreed that it showed central bulging but no impingement on the nerve roots. He judged her impairment at 13%. He restricted her bending and stooping and heavy lifting, but indicated that she could do regular work. He advised her against taking a job where she had to make a living with her back. Dr. Zwerner testified that he anticipated that this type of injury would improve over a period of time.

Mrs. Fowler returned to her old job, working only four hours a day. She did this for two months, then quit. She testified that the work caused her severe pain. She testified that her condition had worsened since Dr. McGinnis last saw her.

It is our judgment that her vocational disability resulting from this low back muscle strain should be modified to 20% to the body as a whole.

The trial court's judgment is so modified and the cause remanded to the trial court for all necessary purposes. Costs on appeal are assessed to the appellants.

WILLIAM S. RUSSELL, RETIRED JUDGE

CONCUR:

FRANK F. DROWOTA, III,
ASSOCIATE JUSTICE, SUPREME COURT

WILLIAM H. INMAN, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

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DIANNE B. FOWLER,
Plaintiff/Appellee
vs.
LIBERTY MUTUAL INSURANCE
COMPANY & DELORES' MARKET,
Defendants/Appellants

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WARREN GENERAL SESSIONS
No. 6097-GSWC Below
Hon. Barry Medley,
Judge
No. 01S01-9607-GS-00151
MODIFIED AND REMANDED.

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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 Liberty Mutual Insurance Company and Delores' Market, Principals, and their Surety, for which execution may issue if necessary.

IT IS SO ORDERED on May 13, 1997.

PER CURIAM