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

FILED

May 16, 1997

Cecil W. Crowson
Appellate Court Clerk

NAOMI GENTRY, Plaintiff/Appellee v. LUMBERMENS MUTUAL CASUALTY and JACKSON COUNTY HOSPITAL, Defendants/Appellants	)	JACKSON CHANCERY NO. 01S01-9608-CH-00165 HON. C. K. SMITH, CHANCELLOR

For the Appellant:

D. Randall Mantooth
James Lee Deckard
Leitner, Moffitt, Williams, Dooley & Napolitan, PLLC
2300 First American Center
Nashville, TN 37238

For the Appellee:

E. Guy Holliman
William Joseph Butler
Farrar & Holliman
102 Scottsville Hwy.
P. O. Box 280
Lafayette, TN 37083

M E M O R A N D U M O P I N I O N

M e m b e r s of P a n e l

Justice Frank F. Drowota, III
Senior Judge William H. Inman
Special Judge William S. Russell

AFFIRMED as MODIFIED **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.

This action was filed January 18, 1995 seeking benefits for a back injury sustained on April 6, 1994 while employed by the defendant hospital. The allegations of the complaint were generally denied, thus requiring the plaintiff to prove every element of her case by a preponderance of the evidence, except when relying upon TENN. CODE ANN. § 50-6-242 which requires clear and convincing evidence as a predicate.

The appellee allegedly suffered a back injury while lifting a patient. She was initially treated by a general practitioner in Gainsboro, Dr. E. M. Dudney, who referred her to Dr. Ray Hester, a neurosurgeon in Nashville, on May 5, 1994.

Dr. Hester had treated the plaintiff for injuries she sustained in an automobile accident in 1982. These injuries involved, *inter alia*, a ruptured disc. She was released from treatment in 1983 with a 15 percent permanent partial impairment, and her activities were restricted.

As stated, Dr. Hester saw the plaintiff eleven years later for this workers' compensation injury. He ordered a CT scan which revealed no significant pathology or findings and ultimately diagnosed her complaint as a lumbar strain. On July 19, 1995, he advised the employer by letter that:

> " . . . Mrs. Gentry apparently had a back strain. She had underlying degenerative joint disease in her back which was the result of her previous injuries to her back and not the more recent one where she was doing some lifting. *I don't think she has any permanent impairment in relation to her lifting incident and no anatomical changes as a result of it."*

At some point before his deposition was taken for proof, Dr. Hester changed his opinion. He testified that the appellee had a five percent permanent impairment solely as a result of her 1994 injury. He found no objective signs of radiculopathy or loss of structural integrity. He imposed moderate lifting restrictions, and thought the appellee should be able to return to work. He found no anatomical changes in her back.

Significantly, he testified that his impairment ratings of 15 percent for the 1982 injury and five percent for the 1994 injury were "separate and not a part and parcel of

each other." He would have allowed the appellee to resume working in December, 1994.

The employer arranged an evaluation of the appellee by Dr. Manuel Weiss, a neurosurgeon in Nashville, who found a normal range of motion, no muscle spasm, and no need for work restrictions. He thought she reached maximum medical improvement on June 14, 1994. The appellee's attorney countered this evaluation by arranging an independent evaluation of his client by an orthopedic surgeon in Goodlettsville, Dr. Robert P. Landsberg.[1]

He testified that the appellee had a 20 percent impairment as a result of the 1994 injury, but conceded that he had not taken her 1982 injury into account, and that the *AMA Guides to the Evaluation of Permanent Impairment* justified only a ten percent rating in any event. On cross-examination he conceded that *to apportion her impairment between the 1982 and 1994 injuries would be speculative.* Dr. Landsberg was critical of the *AMA Guides,* and shifted his focus to the range of motion test which he believed justified an impairment rating of 20 percent attributable to the 1994 injury.[2]

The trial judge found that the appellee had sustained a 75 percent permanent partial disability to her whole body, and that she had proved by clear and convincing evidence the application of three of the four factors enumerated by TENN. CODE ANN. § 50-6-242. She was awarded benefits during 300 weeks, plus temporary, total benefits from June 14, 1994 through August 1, 1995, future medical expenses for services to be furnished by Dr. Hester, together with expenses she incurred for treatment by Drs. Dudney and Hester. The employer appeals, presenting for review the propriety of each of those decretal provisions.

Our review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. TENN. CODE ANN. §

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[1]As observed by a Panel Judge in a comparable case, "no explanation occurs except the obvious" as to why geographical considerations presented no bar to the selection of an orthopedic specialist in a town north of Nashville.

[2]According to Dr. Hester, the appellee suffered a ruptured disc in the 1982 automobile accident which, as previously noted, resulted in a 15 percent impairment. Notwithstanding, the appellee says that the ruptured disc "went away" and that she had fully recovered from the 1982 injury.

50-6-225(3)(2). *Stone v. City of McMinnville,* 896 S.W.2d 584 (Tenn. 1991). The application of this standard requires this Court to weigh in more depth the findings and conclusions of the trial courts in workers' compensation cases. *Corcoran v. Foster Auto GMS,* 746 S.W.2d 452, 456 (Tenn. 1988). Where, as in this case, 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. *Cooper v. INA,* 884 S.W.2d 446 (Tenn. 1994).

Dr. Hester, the treating physician, opined, before the issue became advocative, that the appellee *had no impairment* and *no anatomical changes* resulting from the 1994 injury. His opinion was based on accepted, sophisticated tests which indicated, at most, a lumbar strain. Significantly, he was supremely situated to address and treat the plaintiff's back since it was he who had treated her in 1982 for a back injury which resulted in a herniated disc with an assessment of 15 percent impairment and moderate restrictions on physical activities.

As already stated, Dr. Hester changed his opinion and testified that the appellee had a five percent impairment solely attributable to the 1994 injury. But he persisted in his opinion that she had no radiculopathy - a matter of significance - no loss of structural integrity, and no anatomical changes.

Dr. Lansberg examined the appellee at her request for the purpose of giving testimony. He disdained a portion of the *AMA Guides* for the range of motion model which he believed justified an impairment rating of 20 percent. He said that if five percent of this rating existed before the 1994 injury, the remaining fifteen percent would be attributable to the 1994 injury. This assertion overlooks the fact that the appellee retained a 15 percent impairment from her 1982 injury. Properly considered, therefore, even Dr. Landsberg's opinion is that the appellee retained only a five percent impairment, and Dr. Hester made it abundantly clear that he apportioned but five percent of the appellee's impairment to the 1994 injury.

Dr. Weiss, who testified that the appellee had no impairment, was taken to task because his examination was brief and revealed no impairment.

Dr. Hester 'separated and apportioned' the impairment which occurred as a result of the 1994 injury. The thrust of the testimony of Dr. Landsberg - taken as a whole - is that he did also. The appellee concedes - repeatedly - that this is not "an

aggravation case," and that the defendant would not be liable for the injuries sustained in the 1982 automobile accident.

There was an unusual amount of lay testimony offered, much of it directed to the work ethic of the appellee and the curtailment of it by the 1994 injury, especially her inability to work in tobacco. We have read her testimony carefully, and note that she is able to do the usual personal and household chores as before; we also note that she conceded she had not worked in tobacco for five or six years.

We further conclude that the preponderance of the evidence requires a finding that the medical impairment of five percent is the basis upon which an award of vocational disability must be determined. Contrary to the insistence of the appellee, *Seiber v. Greenbrier Industries,* 906 S.W.2d 444 (Tenn. 1995) is inapposite.

The question next occurring is whether the trial judge was limited to a multiplier of two and a half times the impairment rating under TENN. CODE ANN. § 50-6-241(a)(1) or a multiplier of six times the medical impairment under TENN. CODE ANN. § 50-6-241(b). The appellee offered to return to work but the hospital declined, ostensibly on account of the restrictions imposed for a back strain. The anomaly is apparent, but we think the appellee is entitled to an award of six times the impairment rating, or thirty percent of her whole body.

TENN. CODE ANN. § 50-6-242 is not implicated.

The appellant insists that it is not liable for the medical expenses owing to Drs. Dudney and Hester, because it provided the appellee with a panel of three physicians as required by the workers' compensation law.

This argument is sound, as far as it goes. The difficulty lies in the fact that the Panel was not provided until May 9, 1994, more than a month after the injury occurred. In the meantime, the appellee bad been seen by the physicians of her choosing.

TENN. CODE ANN. § 50-6-204(B)(4) requires an injured employee to accept medical benefits if the employer designates a group of three or more reputable physicians not associated in practice from which to choose. If the employer fails to furnish its employee with a Panel, the employee is justified in selecting her own physician. *See Atlas Power Co. v. Grimes,* 292 S.W.2d 13 (Tenn. 1956). We hold that because the Panel of physicians was not timely furnished, the appellee was

justified in selecting her own physician.

The trial judge appointed Dr. Hester as the future treating physician, and we find no support in the record for this action. The evidence is vague on the issue of the need for future medical treatment relative to this 1994 back strain, and since the employer belatedly furnished a Panel of physicians to the appellee it is clear that absent just cause she must avail herself of the services of one of these physicians. *See Rice Bottling Co. v. Humphreys,* 372 S.W.2d 170 (Tenn. 1963).

The appellee was awarded benefits for temporary, total disability from June 14, 1994 through August 1, 1995. The employer complains of this action, alleging that it is unsupported by the evidence.

We have carefully considered the testimony of Dr. Hester, who said that the appellee reached maximum medical improvement in April 1995, although she was medically approved to return to work in December, 1994. Benefits for temporary disability compensate an employee during a healing period when she is *totally* prevented from working. *Vanatta v. Tomlinson,* 774 S.W.2d 921 (Tenn. 1989). A temporary, total disability period exists during the time the employee is *disabled to work. Simpson v. Satterfield,* 564 S.W.2d 953 (Tenn. 1978). The expert testimony is not disputed that the appellee was approved to return to work in October, 1994.

Conclusion

The judgment is modified to find that a finding of 75 percent permanent partial disability is not supported by a preponderance of the evidence, but that the preponderant evidence requires a finding that the appellee suffered a 30 percent permanent partial disability as a result of the 1994 injury, thus entitling her to recover 120 weeks of benefits. The judgment is further modified to find that the appellee is entitled to recover temporary, total benefits from June 1994 through December 1994. That part of the judgment appointing Dr. Hester as the appellee's physician is vacated, although his charges to date are properly allowable for the reasons stated.

Otherwise, the judgment is affirmed. Costs are assessed to the parties evenly.

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William H. Inman, Senior Judge

CONCUR:

_____
Frank F. Drowota, III, Justice

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William S. Russell, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

NAOMI GENTRY, Plaintiff/Appellee	)	Jackson Chancery No. 95-03 Below
V.	)	NO. 01-S-01-9608-CH-00165
LUMBERMENS MUTUAL CASUALTY and JACKSON COUNTY HOSPITAL Defendants/Appellants	)	Hon. C.K. Smith Chancellor AFFIRMED AS MODIFIED.

JUDGMENT ORDER

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well-taken and should be denied; 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 are apportioned evenly between the parties. One half of the costs are assessed against the appellant, one half against the appellee, and execution may issue if necessary.

It is so ordered this 16th day of May, 1997.

PER CURIAM

Drowota, J., not participating