**IN THE SUPREME COURT OF TENNESSEE**
**SPECIAL WORKERS' COMPENSATION APPEALS PANEL**
**AT KNOXVILLE**

FILED

**July 14, 1997**

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

| | | |
|---|---|---|
| SANDRA KAY PEMBERTON, | ) | CAMPBELL CHANCERY |
| | ) | |
| Plaintiff/Appellee | ) | NO. 03S01-9604--CH-00044 |
| | ) | |
| v. | ) | HON. BILLY JOE WHITE, |
| | ) | JUDGE |
| CAMPBELL COUNTY BOARD OF | ) | |
| EDUCATION, SUE ANN HEAD, | ) | |
| DIRECTOR OF THE DIVISION OF | ) | |
| WORKERS' COMPENSATION, | ) | |
| TENNESSEE DEPARTMENT OF | ) | |
| LABOR, SECOND INJURY FUND, | ) | |
| STATE OF TENNESSEE and | ) | |
| CHARLES BURSON, ATTORNEY | ) | |
| GENERAL, | ) | |
| | ) | |
| Defendants/Appellants | ) | |

**For the Appellants:**

John Knox Walcup
Attorney General & Reporter

Dianne Stamey Dycus
1510 Parkway Towers
404 James Robertson Pkwy
Nashville, TN 37243-0499

Elizabeth A. Townsend
Gerald L. Gulley, Jr.
Baker, McReynolds, Byrne, Brackett
O'kane & Shea
P.O. Box 1708
Knoxville, TN 37901-1708

**For the Appellee:**

David H. Dunaway
David H. Dunaway & Associates
100 S. Fifth St.
P. O. Box 231
LaFollette, TN 37766

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

**Members of Panel:**

Frank F. Drowota, III, Justice
William H. Inman, Senior Judge
Joseph C. Loser, Jr., Special Judge

**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.

The plaintiff was awarded lifetime benefits based on a finding of total, permanent vocational disability, with the employer and Second Injury Fund ordered *de novo* concurrent, *pro rata* payments for permanent disability until the plaintiff reaches age 65.

Because we find that the preponderance of the evidence does not support a finding of total and permanent disability, but supports a finding of 75% permanent partial disability to her whole body, the judgment is modified to award the plaintiff weekly benefits for 300 weeks.

Our review is *de novo* on the record, accompanied by the presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise. T.C.A. § 50-6-225(e)(2). *Seiber v. Greenbrier Ind.*, 906 S.W.2d 444, 446 (Tenn. 1995).

The plaintiff injured her neck and shoulders on September 15, 1992, rupturing a cervical disc. Dr. Bernhard Kliefoth performed surgery and released the plaintiff to return to work with no restrictions on October 7, 1992. She was employed as a teacher's aide and suffered the injury while lifting a child. She was then 37 years old.

On April 1, 1991, she had injured her neck but had not pursued a claim; in this connection, the orthopedic surgeon, Dr. William Kennedy, testified that about one-half of the plaintiff's impairment was attributable to the former injury.

Because of ongoing shoulder pain, the plaintiff saw Dr. David Hauge, who performed surgery on July 7, 1994 for suprascapular nerve entrapment and testified that the plaintiff had a 9% impairment for the cervical injury and a 15% impairment for the nerve entrapment, for a total of 17% impairment to her whole body.

Dr. Kennedy evaluated the plaintiff on May 5, 1993 and testified that she had a 20% impairment due to neck problems. As noted, he attributed one-half of the impairment to the 1991 injury.

After the plaintiff was released by Dr. Hauge, who believed she tended to amplify her pain symptoms, she requested a referral to Dr. Kelley Walker, a psychiatrist, who evaluated her for about one hour. She relied exclusively on statements by the plaintiff and reviewed no records nor consulted with other experts.

At no time did the plaintiff ever complain of depression to Dr. Hauge or to any treating physician until after she was released by Dr. Hauge to return to work. When she met with Dr. Walker, however, she told the psychiatrist that she had had problems with depression since October 1992.

Dr. Walker admitted that much of the information related by the plaintiff was untrue or exaggerated. She did not testify that the plaintiff's condition was permanent and admitted that permanency of impairment could not be determined until a psychiatric condition has stabilized.

The plaintiff also selected Dr. Lane Cook from a panel of three psychiatrists. Dr. Cook noted that the plaintiff "does appear to have genuine symptoms of major depression and it does appear likely to be secondary to the work-related injury of 1992." He could not state within a reasonable degree of medical certainty that the plaintiff either had any permanent psychiatric impairment or, if so, whether the plaintiff had reached her maximum medical improvement. Dr. Cook did note that the plaintiff's testing on the Minnesota Multiphasic Personality Inventory (II) "was an invalid profile" and *"represent[ed] an intentional attempt to appear to show just how badly she feels."*

The plaintiff was examined by two vocational experts. The first, Dr. Norman Hankins, testified that, based on an evaluation of the plaintiff that he had performed in March 1993, the plaintiff had an I.Q. of 108; could read and spell above the 12th grade level and above the median when compared with female bank clerks. Dr. Hankins also admitted that his vocational history of the plaintiff did not reflect that the plaintiff had performed such employment as the city recorder of Jacksboro, Tennessee, or as a bookkeeper or as a model; the plaintiff admitted at trial that she had not relayed her full previous employment history to Dr. Hankins, who opined that the plaintiff was one hundred percent vocationally disabled.

The second vocational expert, Dr. Ronald Caldwell, examined the plaintiff on July 18, 1995. He related that, based upon medical restrictions, the "worst-case scenario" of the plaintiff's vocational impairment would be eighty percent; Dr. Caldwell testified that the additional limitations imposed by Dr. Walker were contradictory, because those restrictions were "inconsistent with a person who's making satisfactory progress towards a master's degree . . . ." Dr. Caldwell elaborated on this opinion by noting that

> a person's ability to satisfactorily complete requirements for a master's degree requires a person to concentrate, to work independently, to relate effectively to advisors, teachers, other students, to tolerate the stress necessary to meet deadlines, . . . testing situations, and it requires a person to maintain enthusiasm and interest in the work that they're doing.
>
> . . . [i]t requires a significant amount of confidence and self-esteem to . . . maintain that kind of work . . . . [I]t requires sustained activity to do that. The -- Ms. Pemberton's transcript from Lincoln Memorial University indicates that as she progressed towards her bachelor's degree, in the spring of 1993 she took seventeen hours, fall of 1993 eighteen hours, and her final semester she took eleven hours, and she received her degree that semester, that spring semester of 1994. And in the fall of 1994, she took nine hours, spring of 1994, nine hours. That's a pretty full load for a master's degree student. A master's degree student will not normally take, you know, a fifteen to eighteen hour load, that's too much.

Dr. Caldwell noted that the plaintiff had a grade point average in the current term of 3.67 on a scale of 4.00, and a fall semester 1994 grade point average of 3.50. He then concluded that the plaintiff was employable in the open job market in the six-county area in various clerical and administrative jobs, as well as obvious opportunities in the educational field including private tutoring.

The record is replete with evidence that the plaintiff is able to work at several types of employment. We demonstrate:

She was 37 years old at the time of her work-related injury. She had an I.Q. of 108 and had been working on a bachelor's degree at Lincoln Memorial University at the time she sustained a permanent physical impairment in September 1992 during the course and scope of her employment. She was then employed as an instructional aide for the Campbell County Board of Education and had worked at this position before with the Campbell County Board of Education. Previously she

worked at several radio stations as news director, was city recorder in Jacksboro, Tennessee and modeled while working for the city.

After the September 1992 injury, the plaintiff finished her undergraduate degree at Lincoln Memorial University and enrolled in a program of graduate studies at Lincoln Memorial University, completing two semesters of graduate school in 1994-95 with grades of four "A's," a "B," and a "B-." As Dr. Caldwell testified, the plaintiff's work in finishing her undergraduate and graduate degrees indicated her

> ability to satisfactorily complete requirements for a master's degree requires a person to concentrate, to work independently, to relate effectively to advisors, teachers, other students, to tolerate the stress necessary to meat deadlines, . . . testing situation, and it requires a person to maintain enthusiasm and interest in the work that they're doing.

Although given a work-related psychiatric disability by Dr. Walker, the plaintiff, significantly, was not observed by any of her treating physicians to display any behavior that Do. Walker described as indicating a psychiatric disability until *after* she had reached maximum medical improvement.

With respect to the testimony of Dr. Hankins, he was unaware that the plaintiff had attained a bachelor's degree and had largely completed the requirements for a master's degree. We think the significance of this lack of information is obvious and will not belabor the point.

The plaintiff was also seen by Dr. Lane Cook, a psychiatrist., at her request. Suffice to say that an important test he administered was invalid due to a "fake bad" attitude, according to his testimony.

From all of which we conclude that the evidence preponderates against a finding of total and permanent disability and preponderates in favor of a finding of 75% permanent partial disability to the body as a whole. The judgment is accordingly modified, with costs assessed to the appellee.

William H. Inman, Senior Judge

CONCUR:

_____

Frank F. Drowota, III, Justice

_____

Joseph C. Loser, Jr., Special Judge