

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

FILED

November 14, 1997

Cecil W. Crowson
Appellate Court Clerk

ELSIE HOPKINS,)
)
 Plaintiff/Appellee)
)
 v.)
)
 SAN ANTONIO SHOE, INC.)
)
 Defendant/Appellant)
)

FRANKLIN CHANCERY
NO. 01S01-9610-CH-00216
HON. JEFFREY F. STEWART,
CHANCELLOR

For the Appellant:

Fred C. Statum, III
BOBO, HUNT & BOBO
Shelbyville, Tennessee

For the Appellee:

Frank C. Lynch
LYNCH, LYNCH & LYNCH
Winchester, Tennessee

MEMORANDUM OPINION

MEMBERS OF PANEL

LYLE REID, ASSOCIATE JUSTICE, SUPREME COURT
WILLIAM S. RUSSELL, RETIRED JUDGE
W. MICHAEL MALOAN, SPECIAL JUDGE

AFFIRMED

MALOAN, SPECIAL JUDGE

This Workers' Compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated §50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

On May 2, 1994, the plaintiff, Elsie Hopkins, fell at work and injured her right shoulder. At trial and on appeal the defendant, San Antonio Shoe, Inc., accepted the claim as compensable. The trial court awarded thirty-five percent (35%) permanent partial disability to the body as a whole and assessed a bad faith penalty of twenty percent (20%) of the temporary total disability benefits due in accordance with Tennessee Code Annotated §50-6-225(k). The defendant employer contends on appeal the evidence preponderates against a vocational disability award of thirty-five percent (35%) permanent partial disability to the body as a whole and any finding of bad faith. The plaintiff requests an award of post judgment interest. For the reasons stated in this opinion, the judgment of the trial court is affirmed.

The scope of review of issues of fact is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tennessee Code Annotated § 50-6-225(e)(2). *Lollar v. Wal-Mart Stores, Inc.*, 767 S.W.2d 143 (Tenn. 1989). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court's factual findings. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). However, where the issues involve expert medical testimony which is contained in the record by deposition, as it is in this case, then all impressions of weight and credibility must be drawn from the contents of the depositions, and the reviewing court may draw its own impression as to weight and credibility from the contents of the depositions. *Overman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676-77 (Tenn. 1991).

Plaintiff, Elsie Hopkins, is 48 years of age and has a tenth grade education . Her prior work history consists of repetitive work in the garment and shoe industry and she has no vocational training. She was employed by the defendant, San Antonio Shoe, Inc., for approximately 8 years when she injured her right shoulder on May 2, 1994. She reported the injury to her employer and was taken by her supervisor, Paul Darrow, to be seen by Dr. Jack Milam. Dr. Milam treated her conservatively and placed her arm in a sling for 6 to 8 weeks.

Mr. Darrow filmed another employee doing Ms. Hopkins' job and showed the film to Dr. Milam. As a result, Ms. Hopkins was returned to her regular duties after 3 weeks. Ms. Hopkins continued to be treated by Dr. Milam until November, 1994. On each visit to Dr. Milam, plaintiff had to seek permission from the company and on each occasion she was accompanied by Mr. Darrow. Ms. Hopkins was subsequently treated by Dr. Richard Bagby, an orthopedic surgeon from November, 1994, until March, 1995. Ms. Hopkins again had to obtain permission to visit Dr. Bagby and on each occasion the office manager, Joan Smith, would accompany her and remain in the examining room while being treated by Dr. Bagby. On one occasion Ms. Smith told Dr. Bagby "she's got in her head she has pulled muscles and ligaments." Dr. Bagby released Ms. Hopkins in March, 1995, and stated there was nothing more he could do for her. Ms. Hopkins requested a second opinion and selected Dr. Keith Brown from a panel of physicians. Dr. Brown examined Ms. Hopkins in March of 1995 and recommended surgery. Joan Smith asked Dr. Bagby to review Dr. Brown's finding and give his opinion as to whether Ms. Hopkins needed surgery. When Dr. Bagby disagreed with Dr. Brown, the defendant sent the following letter of April 19, 1995, to Ms. Hopkins:

Dear Ms. Hopkins:

Approximately 1 year ago you fell outside the SAS factory on your way to work. Since that time we have thoroughly investigated the circumstances of your accident. We have come to the conclusion that there was no negligence on the part of SAS and that your injuries are not work related. Despite these findings SAS has paid you compensation and medical expenses. We have attempted to provide you with the best medical care possible which included obtaining a second opinion on your treatment. In light of the circumstances of your injury and the consideration already extended by the company, we will no longer be responsible for any benefits or medical expenses for your injury. If you would like a leave of absence, we will do our best to accommodate you. If you have any questions, please feel free to contact me.

Sincerely,
Lew Hayden

On April 22, 1995, a conference was held with Ms. Hopkins, Joan Smith, and plant manager Ned Hindman. Ms. Hopkins was told to go to a doctor of her choice and to file any medical expenses with her group health insurance carrier and no further worker's compensation benefits would be afforded to her.

Ms. Hopkins was then seen by Dr. Gary Stevens who referred her to Dr. Burton Elrod on July 28, 1995. Dr. Elrod performed surgery on September 6, 1995, to repair her rotator cuff and resection the distal clavicle. She was released to full duty on February 21, 1996. Dr. Elrod was of the opinion she had six percent (6%) permanent partial impairment to the body as a whole, and he recommended Ms. Hopkins restrict her overhead and heavy lifting and reaching with her arms extended. Ms. Hopkins returned to work, but she has not been as productive, nor has she earned as much as before her injury.

At the conclusion of a trial on May 10, 1996, the trial court awarded thirty-five percent (35%) permanent partial disability to the body as a whole which was within one percent (1%) of the maximum award of six (6) times the impairment rating set forth in Tennessee Code Annotated §50-6-241. Temporary total benefits in the amount of \$4,606.10 were awarded. The trial court found the defendant to have exercised bad faith in the denial of benefits and awarded a twenty percent (20%) penalty on the unpaid temporary total disability benefits or \$921.22 pursuant to Tennessee Code Annotated §50-6-225(k).

Tennessee Code Annotated §50-6-241(a)(1) requires the trial court to consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition in determining the extent of an injured worker's permanent disability. From a consideration of all these factors, we are not persuaded the evidence preponderates against the trial court's award of thirty-five percent (35%) to the body as a whole.

Tennessee Code Annotated §50-6-225(k) provides:

(k) If an employer wrongfully fails to pay an employee's claim for temporary total disability payments, the employer shall be liable, in the discretion of the court, to pay the employee, in addition to the amount due for temporary total disability payments, a sum not exceeding twenty-five percent (25%) of such temporary total disability claim; provided, that it is made to appear to the court that the refusal to pay such claim was not in good faith and that such failure to pay inflicted additional expense, loss or injury upon the employee; and provided further, that such additional liability shall be measured by the additional expense thus entailed.

The trial court found the defendant employer acted in bad faith in denying plaintiff's benefits. The defendant employer attempts to justify its actions as a dispute between Dr. Bagby and Dr. Elrod as to whether plaintiff needed surgery. However, the defendant's letter of April 19, 1995, does not terminate her benefits on the basis of Dr. Bagby's medical opinion. The

stated reason to terminate her benefits was “there was no negligence on the part of SAS and that your injuries are not work related.” This letter and the defendant’s improper attempts to control the plaintiff’s medical treatment clearly show to this panel the employer’s decision to terminate benefits was in total disregard of the Worker’s Compensation law, without any basis in fact, and in bad faith. Ms. Hopkins testified she was required to rely on loans and gifts from friends, family, and her church to meet her financial obligations while her benefits were terminated. The evidence does not preponderate against the trial court’s assessment of a twenty percent (20%) bad faith penalty.

The panel further finds the plaintiff is entitled to interest on the judgment of May 23, 1996, to present, pursuant to Tennessee Code Annotated §50-6-225(h)(1) as the entire award of permanent partial disability and temporary total disability benefits have all accrued. *Woodall v. Hamlett*, 872 S.W.2d 677 (Tenn. 1994); *West American Insurance Co. v. Montgomery*, 861 S.W.2d 230, 232 (Tenn. 1993).

The judgment of the trial court is affirmed. This appeal is dismissed at defendant’s costs.

W. Michael Maloan, Special Judge

Concur:

Lyle Reid, Justice

William S. Russell, Senior Judge

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<i>ELSIE HOPKINS,</i>	}	<i>FRANKLIN CHANCERY</i>
	}	<i>No. 14,417 Below</i>
<i>Plaintiff/Appellee</i>	}	
	}	<i>Hon. Jeffrey F. Stewart,</i>
<i>vs.</i>	}	<i>Chancellor</i>
	}	
<i>SAN ANTONIO SHOE, INC.,</i>	}	<i>No. 01S01-9610-CH-00216</i>
	}	
<i>Defendant/Appellant</i>	}	<i>AFFIRMED.</i>

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 San Antonio Shoe, Inc., Principal, and Surety, for which execution may issue if necessary.

IT IS SO ORDERED on November 14, 1997.

PER CURIAM