IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(August 29, 1997 Session)

KAY PERRYMAN,	)	MARSHALL CHANCERY
	)	
Plaintiff-Appellee,	)	Hon. Lee Russell,
	)	Judge.
v.	)	
	)	No. 01S01-9703-CH-00069
COSMOLAB, INC.,	)	
	)	
Defendant-Appellant.	)	

For Appellant:

Luther E. Cantrell
Davies, Cantrell & Humphreys
Nashville, Tennessee

For Appellee:

Walter W. Bussart
Bussart & Medley
Lewisburg, Tennessee

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

Members of Panel:

Frank F. Drowota, III, Associate Justice, Supreme Court
William H. Inman, Senior Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED IN PART
MODIFIED IN PART
REMANDED

Loser, Judge

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employer contends the evidence preponderates against the trial court's award of permanent partial disability benefits and temporary total disability benefits. The employee concedes the award of temporary total disability benefits is excessive, but contends the trial court used an incorrect compensation rate. As discussed below, the panel has concluded the award of permanent partial disability benefits should be affirmed and the award of temporary total disability benefits modified. The case is remanded for additional proof as to the correct compensation rate.

The employee or claimant, Perryman, is forty years old with a high school education. She has worked for the employer for twenty years. In 1994, she injured her elbow at work. As part of her treatment, she was required to take medication which contained blue and yellow dyes, which were also used in the employer's manufacturing process. She had an allergic reaction to the dyes after taking the medication.

As a consequence, she is no longer able to work for the employer. She returned to gainful employment on October 31, 1994, thirteen weeks after the beginning of her inability to work because of the injury and treatment.

The proof of permanency consisted of the following from the testimony of Dr. Samuel Rowe Marney, Jr., a board certified specialist in Allergy and Immunology:

> Q. Dr. Marney, Ms. Perryman now has these allergies. Do you have an opinion based upon a reasonable degree of medical certainty as to whether she will have those in the future?
>
> A. Based on the usual course of allergies, she's almost certain to carry these allergies the rest of her life.

The trial judge awarded permanent partial disability benefits based on forty percent to the body as a whole and temporary total disability benefits for sixty-five weeks. The compensation rate was fixed at $216.22. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of

the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2).

Except where disability is obvious to a layman, a finding of permanency must be based on competent medical evidence that there is a medical probability of permanency or that disability is reasonably certain to be permanent. Kellerman v. Food Lion, Inc., 929 S.W.2d 333 (Tenn. 1996). Absolute certainty on the part of a medical expert is not necessary to support a workers' compensation award, for expert opinion must always be more or less uncertain and speculative. Id.

Dr. Marney's competence is not questioned and his testimony, fairly read, is that there is a reasonable medical probability of permanency. The award of permanent disability benefits is affirmed.

In making his findings, the trial judge inadvertently misstated the date of the claimant's return to gainful employment as October 31, 1995. The judgment is modified to reduce the award of temporary total disability benefits by fifty-two weeks.

Disability benefits are computed on a weekly basis and based on the injured employee's average weekly wages, or the earnings of the injured employee in the employment in which she was working at the time of the injury during the fifty-two weeks immediately preceding the date of injury, divided by fifty-two. Tenn. Code Ann. section 50-6-102(a)(1)(A).

We find in the record no direct proof of the claimant's average weekly wages during the fifty two weeks immediately preceding the injury. As a result, the trial judge was forced to guess at the appropriate compensation rate. It would serve no useful purpose to substitute our guess for his.

The cause is therefore remanded to the Chancery Court of Marshall County for the taking of additional proof as to the correct compensation rate and the entry of a judgment consistent herewith, with interest on accrued unpaid benefits. Costs on appeal are taxed to the defendant-appellant.

_____

Joe C. Loser, Jr., Special Judge

CONCUR:

_____

Frank F. Drowota, III, Associate Justice

_____

William H. Inman, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

KAY PERRYMAN,	}	*MARSHALL CHANCERY*
	}	*No. 9142 Below*
Plaintiff/Appellee	}	
	}	*Hon. F. Lee Russell,*
vs.	}	*Judge*
	}	
COSMOLAB, INC.,	}	*No. 01S01-9703-CH-00069*
	}	
Defendant/Appellant	}	*AFFIRMED IN PART; MODIFIED IN PART; 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 Cosmolab, Inc., Principal, and Surety, for which execution may issue if necessary.

IT IS SO ORDERED on November 13, 1997.

PER CURIAM