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

ROBBIN RODDY,	)	RHEA CHANCERY
	)	
Plaintiff/Appellee	)	NO. 03S01-9704-CH-00041
	)	
v.	)	HON. JEFFREY F. STEWART,
	)	CHANCELLOR
SPRING KNITS, INC., and	)	
CIGNA INSURANCE COMPANY,	)	
	)	
Defendants/Appellants	)	

For the Appellant:

John D. Barry
Milligan, Barry, Hensley & Evans
800 First Tennessee Building
701 Market Street
Chattanooga, TN 37402

For the Appellee:

J. Arnold Fitzgerald
P. O. Box 227, 1470 Market St.
Dayton, TN 37321

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

Members of Panel:

Chief Justice E. Riley Anderson
Senior Judge John K. Byers
Special Judge Roger E. Thayer

AFFIRMED.

BYERS, Senior Judge

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. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The employee alleged injury to her back when she lifted a bolt of cloth at work. The trial court found that her back condition was caused by a work related accident and awarded 45 percent permanent partial vocational disability and medical expenses, including those of the treating surgeon, which were unauthorized.

We affirm the judgment of the trial court.

On Saturday, August 8, 1992, the employee, Robbin Roddy, was inspecting rolls of fabric at work when a co-worker brought her an unusually heavy roll to work with. When she threw the roll up in a bin, her back "just popped." She reported the injury to her supervisor, James Hood, who went with her to the office where they completed an injury report. Hood then sent her home.

She was aware that the company posted at the work site a list of three doctors from whom she could choose. On the following Monday she went to the Family Medical Center, to the office of one of those doctors, Dr. Richard R. Jost, where she and her family had been seen in the past for routine medical care.

It is uncontested that the employee never saw Dr. Jost for examination, evaluation, treatment or assessment of disability for this injury. For all of her treatment she saw Mr. Robert Wayne Harrison, a certified physician's assistant employed and supervised by Dr. Jost. The record indicates that apparently the employee was accustomed to referring to the physician's assistant as "Dr. Rob." In fact, the record shows that counsel for the defendant occasionally referred to him as "Dr. Harrison."

When asked about his role in the treatment of the employee, Mr. Harrison testified that he is "permitted to do all aspects of medical care with the exception of write prescriptions. That's actually been changed by statute at the present, but at the time in question, I guess we're dealing with a record of 1992, so at that time the statute did not allow prescription writing."

Mr. Harrison first saw the employee on August 13, 1995. She gave him a history of having injured her back at work for Spring-Knit while lifting a heavy roll of material. She complained of pain in the low back area. He testified that a relatively complete orthopaedic examination of the back was done and that it revealed tenderness over the iliosacral region. He further stated that she had relatively full motion although she appeared to be in some discomfort with bending. Her reflexes were normal in both legs at that time. He instructed her "to remain off work, bed rest, heat, just general conservative - - what we would refer to as conservative medical care, was given an anti-inflammatory medication."

Mr. Harrison saw the employee again on August 17, 1992 and found that she was still complaining of marked pain. He interpreted an x-ray done at that time as revealing spina bifida occulta at L5-S1 with minimal disc space narrowing at L5 and no other acute changes. When deposed, he explained that spina bifida occulta is "a relatively minor congenital problem found in a fairly high significance of normal population, not felt in itself to be clinically significant." He advised the employee to "return to work [on August 20th] with absolutely no lifting." She was given pain medication and Xanax.

Mr. Harrison saw the employee on August 20, 1992 for follow-up and determined she was "somewhat better." He told her to continue the "no lifting restrictions for seven days and return to see him in one week.

On August 28, 1992 Mr. Harrison saw the employee for follow-up and determined she continued to show progressive improvement but still had some pain in the lower back radiating into the buttocks. He told her to continue on light duty for seven more days and then to return to full duty without restrictions.

Ms. Roddy testified at trial that she was in severe pain and unable to care for her own daily needs throughout this time, and that her condition grew progressively worse. She was never able to tie her shoes, required help in dressing, could not get into her car by herself, could not drive, and basically could not function without help. When she was returned to work by Mr. Harrison she worked only four hours a day. She testified that "because I, I was just working four hours a day and he [James Hood, plant manager] said he needed more than that, so he fired me."

Mr. Hood testified that the employee called in on September 9, 1992 to tell him that she needed to go to Nashville on personal business and he told her to come in first to do some work in the office, then go to Nashville. She refused. He then told her, "Well, you'll just have to do what you have to do and I have to do what I have to do." He said that he never heard from her again and then got somebody to take her place and terminated her.

Ms. Roddy testified that after she was fired she worked briefly opening bottles at a bar and then went to Illinois to stay with her sister. Her sister got her a part-time job sitting at a table separating small screws from nuts and bolts. While in Illinois she continued to suffer severe back pain, she was in the emergency room every night getting a shot, she was miserable, and she saw numerous different emergency room doctors, all of whom told her the same thing. On Thanksgiving day she came back to Tennessee.

On November 30, 1992 the employee went back to the Family Medical Center where she again saw Mr. Harrison. His notes indicate she told him that while she was in Illinois she saw an orthopedic surgeon who advised that she may have a herniated disc and recommended a CT scan in Illinois, but she chose to return to her home in Tennessee for additional evaluation. She told Mr. Harrison that her back pain had worsened and his exam revealed that she appeared to be in severe pain. He scheduled a CT scan for the following morning.

The next note in Mr. Harrison's record is dated December 7, 1992:

> "Pt. boyfriend brought in 2 empty bottles (Percodan & Xanax 1 mg.) from Dr. Bennell Caughran in Chattanooga. He stated that Dr. Caughran wanted family M.D. to write new prescriptions for both because he could not phone in prescriptions, but needed them written. Dr. Caughran's office was contacted and he said yes he wanted Rob to write the prescriptions for her."

There is no indication that the prescriptions were written.

That day the employee went to the emergency room and requested to see Dr. Donathan Ivey. When asked at trial why she went to see Dr. Ivey, she stated:

> "Well, he was, he was one of the physicians that were on our, was on our list for workmen's comp with Dr. Jost and Dr. Ivey and - - I think it might have been Dr. Bacon or some doctor here in Dayton. So I went to Ivey and he put me in surgery the next morning. He said he didn't see how I'd stood it this long."

Dr. Ivey, who is a general surgeon and neurosurgeon, testified that the employee gave the following history when he first saw her on December 8, 1992:

> "She had had a CAT scan done in Rockwood, Tennessee and was told that she had a ruptured disc. And she was examined by a physician in Chattanooga and was told that she needed surgery. But her insurance, according to her, her insurance company refused to reimburse the physician for the surgery. The patient was admitted from the emergency room on December the 7th."

Dr. Ivey performed a lumbar myelogram and an isoview CT scan and diagnosed ruptured lumbar intervertebral disc with right sciatica. He performed surgery on December 10, 1992 and at surgery a large, extruded intervertebral disc was removed at L-5 on the right. He opined her condition was " . . . very severe. She had an extruded disc. Now, an extruded disc is the worst kind. That's where the disc has literally exploded."

Dr. Ivey continued to follow the employee for postoperative care and ultimately assessed ten percent medical impairment to the body as a whole based on the *American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Ed.* He gave her permanent restrictions to refrain from heavy lifting and advised her that her symptoms might also be aggravated by bending and stooping.

The trial judge found the employee's back condition to be work related and awarded the employee 45 percent permanent partial vocational disability to the body as a whole. He also ordered the employer to pay $10,641.50 in contested medical expenses for the surgery and treatment by Dr. Ivey.

The employer contends that the employee has failed to prove that her exploded disc was caused by her work accident; that the employee's medical expenses for surgery and treatment by Dr. Ivey are not compensable because the employee had already chosen Dr. Jost as her approved physician; and that the award of 45 percent permanent partial disability is excessive.

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 finding, unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2). *Stone v. City of McMinnville,* 896 S.W.2d 584 (Tenn. 1991).

The employer contends the employee must have had another injury after her work related injury and that the supposed later injury caused her exploded disc. For evidence, they say that Mr. Harrison never diagnosed a herniated disc and Dr. Jost's supervisory review of Mr. Harrison's notes confirmed the absence of a hemiated disc.

In rendering his Memorandum Opinion, the trial judge specifically noted having "observed the testimony and demeanor of the witnesses who testified in open court." Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. *See Humphrey v. David Witherspoon, Inc.,* 734 S.W.2d 315 (Tenn. 1987). When an issue hinges on the credibility of witnesses, the trial court will not be reversed unless there is found in the record clear, concrete, and convincing evidence other than the oral testimony of witnesses that contradicts the trial court's findings. *Galbreath v. Harris,* 811 S.W.2d 88, 91 (Tenn. App. 1990), *cert. denied,* 502 U. S. 939 (1991).

Where 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). The medical evidence in this case was submitted by the depositions of Dr. Ivey and Dr. Jost. Since Dr. Jost never saw the employee and relied completely on the records provided to him by his physician's assistant, Mr. Harrison, we find the deposition of Dr. Ivey to be more credible.

The employer has presented no evidence of any alleged injury which might be responsible for the employee's exploded disc. It is uncontested that the employee did injure her back at work, and her testimony that there was no other injury was found to be credible by the trial judge. We defer to the trial court's determination that the employee's back condition is work related.

The employer next contends that the services of Dr. Ivey were not authorized and therefore his surgery and treatment are not compensable.

TENN. CODE ANN. § 50-6-204(a)(4) provides:

> "The injured employee shall accept the medical benefits afforded hereunder; provided, that the employee shall designate a group of three (3) or more reputable physicians or surgeons not associated together in practice, if available in that community, from which the injured employee shall have the privilege of selecting the operating surgeon or the attending physician; and, provided further, that the liability of the employer for such services rendered the employee shall be limited to such charges as prevail for similar treatment in the community where the injured employee resides. The above listing of

> physicians or surgeons may include doctors of chiropractic within the scope of their licenses."
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> Our Supreme Court has held that:
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> "Where the employer fails to give the employee the opportunity to choose the ultimate treating physician from a panel of at least three physicians, he runs the risk of having to pay the reasonable cost for treatment of the employee's injuries by a physician of the employee's choice. . . . The decision turns on the issue of whether, under the circumstances, the employee was justified in obtaining further medical services, without first consulting the employer or its insurer."

United States Fid. & Guar. Co. v. Morgan, 795 S.W.2d 653 (Tenn. 1990), *citing Burlington Industries, Inc. v. Clark,* 571 S.W.2d 816 (Tenn. 1978).

The record in this case reveals that when she was first injured, the employee went to the office of one of the doctors on the employer's list. Although she sought treatment at that office on four occasions, she was never seen by any physician. Her condition continued to worsen. The trial court accredited her testimony, which revealed that emergency doctors in Illinois x-rayed and told her she needed surgery. She had a CT scan in Rockwood and was told there that she needed surgery. She was in severe pain and sent her boyfriend to the office of her treating physician's assistant to get her pain medication refilled, but there is no record that the request was honored. Mr. Harrison testified that he was not at that time authorized to prescribe medication. The next day the employee reported to the emergency room and requested to see another doctor who was also on the list of the employer's approved physicians. It is uncontested that the surgery and treatment performed by this physician was reasonable and necessary. Mr. Harrison, who is not a surgeon, would not have been able to perform the needed surgery. Under these circumstances, we find that the employee acted in good faith and was justified in seeking medical treatment on her own. *See United States Fidelity and Guar., supra.* Therefore, we affirm the trial court's order that the employer pay these medical costs.

Finally, the employer says that the trial court's award of 45 percent permanent partial vocational disability is excessive.

In making determinations, the court shall 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. TENN. CODE ANN. § 50-6-241(a)(1).

The employee is 35 years old and has a ninth grade education and work experience as a bar maid, housekeeper and factory employee. She is permanently restricted from heavy lifting and continues to have back pain and inability to bend and stoop. The preponderance of the evidence supports the trial court's award of 45 percent permanent partial disability.

The judgment of the trial court is affirmed with costs assessed to the appellant.

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John K. Byers, Senior Judge

CONCUR:

_____
E. Riley Anderson, Chief Justice

_____
Roger E. Thayer, Special Judge

IN THE SUPREME COURT OF TENNESSEE

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ROBBIN RODDY,	)	RHEA CHANCERY
	)	No. 8001
Plaintiff/Appellee,	)	
	)	
vs.	)	Hon. Jeffrey F. Stewart,
	)	Chancellor
	)	
SPRING KNITS, INC. And CIGNA INSURANCE COMPANY.	)	
	)	03S01-9704-CH-00041
Defendants/Appellants	)	

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation 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 on appeal are taxed to the appellants, Spring Knit, Inc. And Cigna Insurance Company and surety, John D. Barry, for which execution may issue if necessary.

11/25/97