

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

**FILED**

November 7, 1997

Cecil W. Crowson  
Appellate Court Clerk

MARGARET WILLIAMSON,	)	MONTGOMERY CIRCUIT
	)	
Plaintiff/Appellee	)	NO. 01S01-9703-CV-00066
	)	
v.	)	HON. JAMES E. WALTON,
	)	CHANCELLOR
CLARKSVILLE MEMORIAL HOSPITAL	)	
	)	
Defendant/Appellant	)	

**For the Appellant:**

Charles C. Trabue III  
Jeffrey Zager  
Trabue, Sturdivant & Dewitt  
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511 Union Street  
Nashville, TN 37219-1738

**For the Appellee:**

Stacy A. Turner  
105 South Third Street  
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**MEMORANDUM OPINION**

**Members of Panel:**

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

**AFFIRMED and  
REMANDED.**

**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 trial judge found that the plaintiff had a 10 percent anatomical impairment which, extrapolated by the multiplier of 2.5, resulted in a permanent partial disability of 25 percent and awarded benefits accordingly.

The employer appeals, insisting that there is no basis for a finding of an anatomical impairment of 10 percent.<sup>1</sup> The thrust of the Hospital's argument is directed to the alleged discrediting of Dr. Fishbein's testimony by the Chancellor.<sup>2</sup>

It is conceded that the plaintiff, a nurse, sustained a neck and shoulder injury on July 8, 1993 while lifting a patient at the defendant Hospital. She was initially seen by Dr. Douglas Porter, an orthopedist of Clarksville, who referred her to Dr. G. B. Lanford, a neurosurgeon, whom we assume practices in Nashville.<sup>3</sup> Dr. Lanford testified that the plaintiff had some disc bulging and spondylosis, but no nerve root compression and no operative problems. Because of continuing arm and back pain Dr. Lanford assessed her anatomical impairment at 5 percent.

Dr. Richard E. Fishbein, orthopedist, practicing in Antioch, testified that at the request of plaintiff's counsel he examined the plaintiff on July 7, 1994. Before that time he had been furnished with copies of Dr. Porter's and Dr. Lanford's evaluations, and had reviewed the x-ray and myelogram reports. He referred to Dr. Porter's report that the plaintiff had suffered an acute herniation of a disc; he found exquisite tenderness over the para cervical muscles, weakness of grip strength, "and basically I noted that she had a herniated disc as noted, and that her history and physical findings were consistent with it." Dr. Fishbein opined that she had a

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<sup>1</sup> The record consists only of the depositions of Dr. Lanford and Dr. Fishbein, and the memorandum of the Chancellor.

<sup>2</sup> As observed by a different Panel on another occasion, the plaintiff, in this Montgomery County case, travelled a long distance in employing Dr. Fishbein, overlooking many dozens of orthopedic specialists in the process.

<sup>3</sup> Neither his deposition nor his CV reveal this information.

category 3 radiculopathy secondary to her herniated disc with a 15 percent impairment to her whole body.

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). 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).

The difficulty presented by the testimony of Dr. Fishbein is to be found in the fact that he did not read Dr. Porter's notes carefully.

Dr. Porter only suspected, initially, a herniated disc. It was not his final diagnosis, and there is no evidence of such a condition.

Thus is formed the predicate for the appellant's argument: since anatomical impairment must be shown by expert testimony, the impairment of 15 percent by Dr. Fishbein cannot be considered because the predicate of his opinion -- the herniated disc -- did not exist. As the trial judge found, "there is no evidence of an acute, herniated disc and that assumption by Dr. Fishbein is not what is shown." This leaves us with, the argument continues, the opinion of Dr. Lanford that the plaintiff had a 5 percent impairment, and therefore the finding of 10 percent is not supported by the proof.

The trial court recognized the problem. But he apparently thought that a finding of 5 percent would not adequately compensate the plaintiff. We quote from his bench-pronounced finding:

"A lot had to do with the credibility of Ms. Williamson, as to whether or not when she makes these complaints, she's being truthful. I have observed her from the stand, testifying, and the other witnesses who have testified. I believe Ms. Williamson is credible. I believe she is telling the truth. I believe she does have pain running down into her arm and causing the difficulties about which she testified.

When I consider all of that, it is appropriate for the Court to determine the anatomical impairment based upon the medical proof, and then when there is some dispute in that medical proof, I can also look to facts outside of that, which I have done. And the facts specifically which I have looked to is the complaint of pain that Ms. Williamson makes, and it was discussed by both doctors and treated differently.

In any event, I find that Ms. Williamson has sustained a 10 percent anatomical impairment as a result of this injury."

The direct examination of Dr. Fishbein indicated that his finding of 15 percent impairment was based entirely on his understanding that Dr. Porter had diagnosed a herniated disc. But on cross-examination, he testified that the acute disc herniation was only one of his assumptions, the other being that the plaintiff had some loss of reflex and some loss of normal curvature of her neck. Absent the cross-examination, there is no doubt that the opinion of Dr. Fishbein could have no probative value whatever, since it would have been based on a faulty premise.

But notwithstanding that we do not resoundingly agree that the testimony of Dr. Fishbein may be considered at all, we are unable to find, under the prevailing standard of review, that the finding of 10 percent anatomical impairment is contrary to the preponderance to the evidence. The judgment is accordingly affirmed at the costs of the appellant, and the case is remanded.

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William H. Inman, Senior Judge

CONCUR:

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Frank F. Drowota, III, Justice

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Joe C. Loser, Jr., Special Judge

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AT NASHVILLE

MARGARET WILLIAMSON,  
Plaintiff/Appellee

vs.

CLARKSVILLE MEMORIAL  
HOSPITAL,  
Defendant/Appellant

} MONTGOMERY CIRCUIT  
} No. C10-114 Below  
} Hon. James E. Walton  
} Judge

}  
} No. 01S01-9703-CV-00066  
}  
} AFFIRMED AND REMANDED.

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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 Clarksville Memorial Hospital and Surety, for which execution may issue if necessary.*

*IT IS SO ORDERED on November 7, 1997.*

PER CURIAM