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

SHANNON FORREST,	)	CARROLL CIRCUIT
	)	
Plaintiff/Appellee	)	NO. 02S01-9705-CV-00050
	)	
v.	)	HON. CREED MCGINLEY
	)	JUDGE
HENRY I. SIEGEL COMPANY,	)	
INC.,	)	
	)	
Defendant/Appellant	)	
	)	
v.	)	
	)	
BLUE CROSS/BLUE SHIELD OF	)	
TENNESSEE,	)	
	)	
Intervening Plaintiff	)	

FILED

March 3, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

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

Members of Panel:

Justice Janice Holder
Senior Judge John K. Byers
Senior Judge William H. Inman

MODIFIED and AFFIRMED — **INMAN, Senior Judge**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with T.C.A. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The trial court found that the plaintiff has a 70 percent permanent partial disability to her whole body as a result of a compensable injury she sustained in September 1993, and awarded benefits accordingly, together with medical payments and mileage. The employer appeals, insisting that these findings are not supported by a preponderance of the evidence.

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. T.C.A. § 50-6-225(e)(2). *Stone v. City of McMinnville,* 896 S.W.2d 548, 550 (Tenn. 1995).

The plaintiff is 30 years of age with limited marketable skills. She commenced work for the defendant in 1988 and quit in September 1996. In September 1993 she operated a "top press," and pressed upwards of 2,000 pairs of trousers each day. She testified that pain and a tingling sensation developed in her right leg and hip for which she sought medical attention, and advised her supervisor of her problems. Her physician was Dr. Lawrence, whom she heard call Jeff Harris, plant manager, to inform him of her condition and request lighter duty.

She did not work for "six to eight weeks." Dr. Lawrence referred her to the Jackson Orthopedic Clinic for examination and treatment, and she was later examined and treated at the Semmes Murphey Clinic in Jackson. Various tests were performed, including a CAT scan and MRI. She was eventually referred

to the Tennessee Spine Center in Nashville, by Dr. Law, who, in the meantime, did a spinal fusion on November 30, 1994.

She returned to work in January 1995. Her back and leg problems again arose and she quit her job.

Her primary physician was Dr. William H. Lawrence, an osteopath, who treated her on September 9, 1993 for pain in her right leg and hip. He continued to see her for the same complaints, and testified that he called her supervisor "to see if he could possibly change her job," explaining that pivoting and turning and "mashing this pedal" hundreds of times per day were causing a disc syndrome.

She was later seen by Dr. Karl Misulis, a neurologist, on a referral by Dr. Lawrence. His diagnosis was S-1 radiculopathy or irritation of the nerve root, unremarkable. Because of her continuing complaints of pain and numbness, he referred her to Dr. David McCord of the Tennessee Spine Center in Nashville. Dr. Misulis was not very much impressed with the seriousness of her problems, stating that it was a combination of activities that she does at home, smoking, and that whatever her difficulty, it developed over time.

Dr. James Thomas Craig, an orthopedic surgeon, saw the plaintiff on September 30, 1993 on a referral from Dr. Lawrence. She complained of radiating pain, and he believed that she should continue to be treated conservatively. She did not relate to Dr. Craig a history of having injured herself at work.

Dr. Melvin D. Law, Jr., an orthopedic surgeon, performed a laminectomy and fusion, on a referral from Dr. Misulis, on June 17, 1994. He is not board-certified. He testified that her disability was eight percent according to the *American Medical Association Guides to the Evaluation of Permanent*

Impairment, 4th Ed., and 15 percent according to the *American Association of Orthopedic Surgeons Guide.*

The appellant argues that no proper notice was given by the plaintiff of her purported physical problems. The plant manager, Mr. Harris, denied talking with Dr. Lawrence, and adduced evidence that he was not working on the day Dr. Lawrence allegedly called him. The plaintiff testified that she personally advised Mr. Harris of her injury on September 1, 1993, but the documented evidence revealed that he was in Louisville, Kentucky, on that day. Further exacerbative of the notice issue insofar as the plaintiff is concerned is the fact that she executed Disability Claim forms wherein she - and Dr. Lawrence - represented that her problems were not job-related. Moreover, she did not relate to Drs. Craig and Smith, of the Jackson Clinic, that her problems were job-related, and she told Dr. Misulis that her problems were not job-related. During an extended period her medical expenses were paid by Blue Cross-Blue Shield, which later intervened in this action to recover the amounts paid on her behalf.

It is a familiar assertion that each fact-based claim for workers' compensation "stands on its own bottom," and the circumstances of this case tend to excite the suspicion of a certain inevitability. But we cannot substitute our judgment for that of the trial court; we are limited by law to a determination of where the preponderance of the evidence lies. T.C.A. § 50-6-225(a), and in doing so, the issue of the credibility of the live witnesses becomes crucial. As stated, we may gauge the worth of depositional testimony as well as the trial judge, and have done so. These experts were not in agreement, a not unusual posture. Appellant argues that Dr. Lawrence lacks credibility and should be disregarded, because he twice certified that the plaintiff's problems were not

job-related, and later changed his mind. A thorough critique is aimed at other expert testimony, all of which has given us pause to reflect since a workers' compensation case is to be proved like any other case, free of any emotional basis. While the related issues of notice and causation are close indeed, we cannot find that the resolution of them by the trial judge is contrary to the preponderance of all of the evidence.

Next, the appellant argues that Dr. Law, who was the plaintiff's personal physician, testified that according to the *AMA Guidelines,* the plaintiff had an eight percent impairment, which would limit a finding of permanent partial disability to a maximum of 48 percent.

Dr. Law also testified that under the *American Academy of Orthopedic Surgeons Guidelines*, the plaintiff's impairment rating was 15 percent, which the trial court accepted and found as the percentage of impairment. A reproduction of Dr. Law's testimony would be instructive:

> Q: Okay. Doctor, at my request have you looked at the Orthopaedics Rating Manual, and if so, do you have an opinion based upon a reasonable degree of medical certainty as to what degree of permanent physical impairment she would have utilizing that guide?
>
> A: Yes, she's - - utilizing the American Academy of Orthopaedic Surgeons Guidelines, her impairment rating would fall into 15 percent using that - - using that guideline.
>
> Q: And I believe - - if you utilized the DRE method contained in the AMA Guides, what would be her degree of disability?
>
> A: Right. I asigned her a degree of disability at 8 percent based on the DRE method for the AMA Guidelines.
>
> Q: Is there several different ways that a rating can be figured under the AMA Guide?
>
> A: Yes, there's the range of motion model, which is from the Third Edition, and then the DRE method, which is from the Fouth Edition. The guidelines are very

difficult because the - - they're - - some guidelines are based on range of motion, some on diagnosis, some on the actual surgical procedure. The - - for diagnosis-related guidelines, she actually gets a lower rating, and that's the guide - - that's the guide that I've used in this case. For the surgical procedure, which is a fusion, such as the American Board of Orthopaedic Surgeons Guidelines, or using the guidelines of the Third Edition, which are actually part of the Fourth Edition, the range of motion model, then the impairment rating is higher, and it really depends on how the particular physician - - which guide he uses to do that. I tend to favor the Fourth Edition because it's the newer version. It's the newest way to do it. But - - and that's my sole - - that's my main reason for going with that, because it's the new method.

. . . . .

Q: With respect to the rating that you've given, you wrote Mr. Boren a letter on April the 17th of 1995, and in that letter indicated tht under the AMA Guidelines, which would be the - - using the Fourth Edition - -

A: That's correct.

Q: - - that she would have an 8 percent impairment to the body as a whole following this surgery?

A: That's correct.

Q: And that was the method that you selected or that you chose and felt was appropriate in giving this woman an appropriate impairment rating?

A: Yes.

Q: So when Mr. Boren suggests to you the Orthopaedic Surgeon Guidelines which have a different result, that's one that you did not elect to use in your suggestion to Mr. Boren in your letter of April 17. Is that a fair enough statement?

A: That's correct. I've used those guidelines. Actually, in my spine fellowship I used those guidelines quite extensively, mainly because they're easy.

Q: That is the Orthopaedic Guidelines?

A: Yes, the Academy of Orthopaedic Surgeons Guidelines. They're easy to use, and there's not a whole lot to figure out in using those guidelines.

Q: At the same time, it would appear that you prefer the method that you suggested to Mr. Boren in your letter of April 17.

A: Right. I used the newer method. It seems to be more standardized.

Q: And we'll make a copy of this lettter of April 17th as the next numbered exhibit, whatever that would be.

(Deposition Exhibit 3 marked.)[1]

A: *I also was not aware that Tennessee even accepted the American Academy of Orthopaedic Surgeons Guidelines.*

It is patent from this testimony that Dr. Law utilized and relied upon the *AMA Guidelines.*

In *Bolton v. CNA Ins. Co.,* 821 S.W.2d 932 (Tenn. 1991),the Supreme Court held that only physicians could assess permanent physical impairment. Dr. Laws did so, using the *AMA Guides.* The trial court impermissibly assessed the plaintiff's physical impairment.

The appellant next argues that the incorrect multiplier was used. T.C.A. § 50-6-241(a)(1) provides:

> For injuries after August 1, 1992, in cases where an injured worker is entitled to permanent partial disability benefits to the body as a whole, and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is two and one-half times the medical impairment rating determined pursuant to certain guidelines. T.C.A. § 50-6-241(a)(1) (1995 Supp.).

The plaintiff returned to work upon her release from treatment. She worked for nearly *two years* before quitting, because of her inability to perform the work comfortably. Various factors are to be considered in a determination

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[1]"Dear Mr. Boren: This patient's impairment falls between the DRE Lumbosacral Category II and DRE Lumbosacral Category III. The combination of these two values would yield a whole person impairment of 8%. This can be found on page 3/102 in the Guides to the Evaluation of Permanent Impairment, Fourth Edition, American Medical Association. Sincerely, Melvin D. Law, Jr., M.D."

of whether a resumption of work is meaningful, and we cannot find that this plaintiff's resumption was meaningful. She more or less "toughed it out" for many months, but quit when her physical condition worsened. The trial judge, by extrapolation, used a multiplier of 4.6 in his finding, and we cannot say that the evidence requires a modification of this multiplier.

We have considered the issues of the medical expenses and mileage allowance. The evidence does not preponderate against these awards.

The evidence preponderates against a finding of 70 percent permanent partial disability and in favor of a finding of permanent partial disability of 36.8 percent to the body as a whole. As modified, the judgment is affirmed, with costs assessed equally.

____
William H. Inman, Senior Judge

CONCUR:

____
Janice Holder, Justice

____
John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

SHANNON FORREST, Plaintiff/Appellee, vs. HENRY I. SIEGEL COMPANY, INC., Defendant/Appellant, vs. BLUE CROSS/BLUE SHIELD OF TENNESSEE, Intervening Plaintiff.	))))))))))))))))	CARROLL CIRCUIT NO. 3007 Hon. Creed McGinley Judge NO. 02S01-9705-CV-00050 MODIFIED AND AFFIRMED.

FILED

March 3, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

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 equally by Appellant and Appellee, for which execution may issue if necessary.

IT IS SO ORDERED this 3rd day of March, 1998.

PER CURIAM

(Holder, J., not participating)