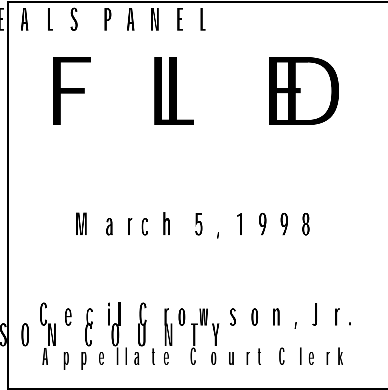
IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON



PATRICIA DIANE HAYES,	)	
	)	
Plaintiff/Appellee,	)	GIBSON COUNTY
	)	
VS.	)	HON. GEORGE R. ELLIS
	)	CHANCELLOR
WAL-MART STORES, INC.	)	
	)	No. 02-S-01-9705-CH-00048
Defendant/Appellant.	)	

FOR APPELLANT:

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(Appeal)

C. Mark Donahoe
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(Trial)

FOR APPELLEE:

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MEMORANDUM OPINION

MEMBERS OF PANEL:

JANICE M. HOLDER, JUSTICE
HEWLITT P. TOMLIN, JR., SENIOR JUDGE
CORNELIA A. CLARK, SPECIAL JUDGE

REVERSED CLARK, SPECIAL JUDGE

This worker's compensation appeal has been referred to the special worker's 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. Defendant raises two issues on appeal: (1) that the trial court erred in finding plaintiff suffered a thirty-five (35%) percent permanent partial disability to the body as a whole; and (2) that the trial court erred in awarding plaintiff reimbursement for chiropractor Ronald Teddleton's outstanding bill of $9,061.90. For the reasons set forth below, we reverse the judgment of the trial court.

Plaintiff was forty-one years old at the time of trial. She was five feet, four inches tall and weighed about 195 pounds. She completed the eighth grade and later received a G.E.D. Her prior work history consisted primarily of unskilled factory jobs. All required lifting, moving and bending. She was initially employed by defendant ("Wal-Mart") in March 1992 as a sales floor associate.

On July 22, 1994, plaintiff was employed at Wal-Mart on the stocking crew. This job involved significant lifting to put merchandise on shelves. While lifting a box off a pallet she felt a pulling sensation and extreme pain in her low back. Proper notice of the injury was given to her employer. Defendant does not contest the fact that a compensable injury has occurred.

Plaintiff was initially approved to see Ronald Teddleton, D.C., who had treated her previously for unrelated problems. He saw her over sixty times from July 25, 1994, through November 1, 1994. She continued to work during this time, but missed work frequently because of pain. In October, 1994, Wal-Mart requested that plaintiff transfer her care and treatment to Dr. R. Louis Murphy. Plaintiff did not object to this transfer. Dr. Murphy immediately referred her to Dr. Joseph Rowland. During the next fifteen months, plaintiff also was treated by Dr. Cunningham, Dr. Roderick C. Webb, Jr. and Dr. R. Riley Jones. Plaintiff neither requested nor sought further treatment from Dr. Teddleton, and she was not referred back to him by any authorized treating physician.

Dr. Riley Jones diagnosed plaintiff as having facet syndrome and lumbosacral strain. A CT scan revealed a disc bulge at L-3. An MRI showed annular tears posteriorly at L-3-4, L-4-5, a central disc

protrusion, and mild canal stenosis at L-3-4. Dr. Jones opined by C-32 form that plaintiff retained a five (5%) percent permanent impairment to the body as a whole. She was advised to exercise and lose weight, since her weight contributed to her back problems. However, none of plaintiff's authorized treating physicians ever stated that she would require additional medical or chiropractic treatment after she was released from their care.

On September 25, 1995, plaintiff was seen by Dr. Robert J. Barnett for an independent medical evaluation. Dr. Barnett testified by deposition. He reviewed tests performed on plaintiff by other doctors and concurred generally in the diagnosis given by those physicians. Dr. Barnett believed she had aggravated degenerative disc disease in her lower back. He rated her permanent disability at ten (10%) percent to the body as a whole, based primarily on his finding of unoperated herniated nucleus pulposus or degenerative changes and her marked loss of motion. Dr. Barnett also instructed that she should avoid all lifting, long standing, long sitting, and climbing. He did not voice an opinion on whether further treatment was reasonable or necessary. Dr. Barnett did agree that losing weight would improve plaintiff's back problems.

In February 1996, Dr. Teddleton contacted plaintiff to inform her that he had installed new therapeutic equipment that might be

beneficial to her. Plaintiff accepted his solicitation and returned to him for treatment from February 23, 1996, to April 24, 1996. At no time did either Dr. Teddleton or plaintiff inform Wal-Mart of his resumption of treatment. As far as defendant knew, plaintiff had reached maximum medical improvement in 1995 and had been released to return to work by her treating physician.

On March 20, 1996, Teddleton billed Wal-Mart for the treatments he performed from February 23 to March 20, 1996. On about April 10, 1996, Dr. Teddleton received a letter from Wal-Mart stating that he was not authorized to treat plaintiff. However, he continued to do so.

Plaintiff remained employed by Wal-Mart for almost two years after her injury. Her supervisor changed her job duties to accommodate her limitations. She received a raise during that period. In May, 1996, she quit voluntarily. Thereafter plaintiff went to work for Southern Source, packaging small parts for Maytag. She continues to be able to complete a forty-hour shift at her present position with Southern Source.

In October, 1996, plaintiff was seen by Robert W. Kennon, Ph.D., a psychologist who performs vocational disability evaluations for injured workers. Dr. Kennon testified by deposition that plaintiff

had no cognitive impairments or restrictions and that she suffered no vocational disability separate from her physical limitations. He did acknowledge that her pre-existing mental and physical limitations created significant restrictions to her employability.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). This tribunal is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921 (Tenn. 1995).

I.

Wal-Mart does not contest that plaintiff has suffered a compensable injury. The first issue in this appeal is whether the trial court's finding of thirty-five (35%) percent permanent partial disability to the whole body is excessive because (1) plaintiff's recovery is limited by the provisions of Tenn. Code Ann. § 50-6-241(a)(1) and (2) the impairment ratings established by Drs. Teddleton and Barnett should not have been considered. Wal-Mart contends that Dr. Jones' five (5%) percent assessment is the only valid rating in this case, and that plaintiff's maximum recovery is limited to twelve and one-half (12-1/2%) percent impairment to the

body as a whole.

When an injured employee is adjudged to be permanently disabled, she is entitled to benefits based on a percentage of disability. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452 (Tenn. 1988). For injuries occurring on or after August 1, 1992, 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 the employee may receive is two and one-half times the medical impairment rating. Tenn. Code Ann. § 50-6-241(a)(1).

If the offer of the employer is not reasonable in light of the circumstances of the employee's physical ability to perform the offered employment, then the offer of employment is not meaningful and the injured employee may receive benefits up to six times the medical impairment. Newton v. Scott Health Care Center, 914 S.W.2d 884 (Tenn. 1995). On the other hand, an employee will be limited to disability benefits of not more than two and one-half times the medical impairment if his refusal to return to work is unreasonable. Id. The resolution of what is reasonable must rest

on the facts of each case. Id.

In this case plaintiff was initially off work for about thirty (30) days on the advice of Dr. Teddleton. After her return to work she missed occasional days because of pain. However, she was placed on lighter duty work and continued working for Wal-Mart for over two years. Employer representatives considered her a good worker and never made any complaints about her disability. Her job was never in jeopardy. She continued to make the same wage and received one raise during the two-year period. Plaintiff herself voluntarily chose to quit her employment and seek another position. On the facts of this case, plaintiff's return to work by Wal-Mart was "meaningful" and her recovery is limited to two and one-half times the medical impairment rating rendered by the expert(s) in this case.

Defendant argues that the assessments of impairment made by both Dr. Teddleton and Dr. Barnett may not be considered by the panel because they do not comply with Tenn. Code Ann. § 50-6-204(d)(3), which provides in pertinent part as follows:

> To provide uniformity and fairness for all parties, any medical report prepared by a physician furnishing medical treatment to a claimant shall use the American Medical Association Guides to the Evaluation of Permanent Impairment (American Medical Association) or the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of

> Orthopedic Surgeons). A physician shall utilize the most recent edition of either publication in determining the degree of anatomical impairment. A practitioner shall be required to give an impairment rating based on one (1) of the two (2) publications noted above.

This panel agrees that Dr. Teddleton did not correctly interpret the AMA Guides in assigning a permanent impairment of twenty-eight (28%) percent. In particular, he did not use Table 75, page 113, of the AMA Guidelines, because he wanted to take into consideration range of motion, sensory motor weakness, and ligamentous injuries. In order to reach his stated rating, Dr. Teddleton used Tables 20 and 21, page 151, from the "nervous system" section of the AMA Guides. He did not use the injury model or the range of motion model used by Dr. Jones and Dr. Barnett in assessing spine disorders. Therefore, his assessment must be disregarded altogether.

Our determination about Dr. Barnett's assessment is a closer one. Dr. Barnett saw plaintiff only once, but he reviewed all her prior medical records. He agreed with Dr. Jones that the proper reference in the AMA Guides was Table 75, page 113. Wal-Mart takes issue with Dr. Barnett's assessment of the existence of a herniated disc. In his testimony, however, Dr. Barnett pointed out that the distinction between a disc that is bulging and one that is herniated is minor. He referenced a portion of Dr. Jones' C-32 form

indicating that the MRI showed "annular tears posteriorly at L3-4, L4-5." Dr. Barnett therefore concluded that it was appropriate to refer to the disc as herniated and to assess a higher impairment rating. We cannot conclude that his opinion is erroneous.

In determining the extent of vocational disability, the trial court must consider many pertinent factors, in addition to anatomical disability, including age, job skills, education, training, duration of disability, job opportunities in the local area, and the capacity to work at those jobs that are available. Worthington v. Modine Manufacturing Company, 798 S.W.2d 232, 234 (Tenn. 1990). The court may base its finding of extent of disability on both expert and non-expert opinions. Employers Insurance Company of Alabama v. Heath, 536 S.W.2d 341, 342-43 (Tenn. 1976). When, as here, the medical testimony is presented by deposition and C-32 form, this panel is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. Cooper v. Insurance Company of North America, 884 S.W.2d 446, 451 (Tenn. 1994).

After a careful review of the record, this panel finds that the proper underlying permanent partial disability impairment rating is ten (10%) percent to the body as a whole. Based on all the other factors required to be considered, the panel awards plaintiff the maximum impairment rating to which she is entitled on the facts of

this case - two and one-half times the underlying rating, or twenty-five (25%) percent permanent partial disability to the body as a whole.

II.

The second issue raised by Wal-Mart is whether it should be required to reimburse plaintiff for unauthorized medical treatment. Tenn. Code Ann. § 50-6-204(a)(4) provides that an employee is required to accept medical benefits afforded by the employer, provided the employer designates a group of three or more reputable physicians or surgeons from which the injured employee may choose. An employee who is dissatisfied with the medical care provided by an employer is under a duty to notify the employer before incurring alternative medical assistance. Buchanan v. Mission Insurance Company, 713 S.W.2d 654 (Tenn. 1986). This requirement is relaxed only if an employee can shows that he had a reasonable excuse for not consulting with the employer before incurring the expenses. Harris v. Kroger Company, Inc., 567 S.W.2d 161 (Tenn. 1978).

In this case the panel finds that plaintiff has not articulated a sufficient reason for returning to Dr. Teddleton's care without notice. Over sixteen months elapsed between plaintiff's last

treatment in 1994 and her return in February, 1996. In the interim she had reached maximum medical improvement and had been released from all further care and treatment by her authorized treating physicians. Dr. Teddleton initiated the 1996 contact and solicited plaintiff's return by suggesting he had obtained new equipment that might be beneficial to her treatment. Plaintiff was aware that Wal-Mart disapproved of Dr. Teddleton's treatment, because she had agreed to transfer her care away from him months earlier. At no time did she contact defendant or seek authorization to reinstitute treatment with a provider who previously had been replaced. Therefore, defendant is not responsible for paying the Teddleton bill in the amount of $9,061.90.

The judgment of the trial court is reversed. The case is remanded to the trial court for any further proceedings necessary to effectuate the judgment of this panel. Costs are taxed to the plaintiff-appellee.

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CORNELIA A. CLARK, SPECIAL JUDGE

CONCUR:

____

JANICE M. HOLDER, JUSTICE

____
HEWLITT P. TOMLIN, JR., SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

PATRICIA DIANE HAYES,	)	Gibson Chancery
	)	No. H-3451
Plaintiff-Appellee,	)	
	)	Hon. George R. Ellis, Chancellor
v.	)	
	)	
WAL-MART STORES, INC.,	)	NO. 02S01-9705-CH-00048
	)	
Defendant-Appellant.	)	Reversed

FILED

March 5, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

JUDGMENT ORDER

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well-taken and should be denied; 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 the plaintiff-appellee.

It is so ordered this _____ day of _____________, 1998.

PER CURIAM

Holder and Reid, JJ., not participating