IN THE SUPREME COURT OF TENNESSEE
WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, DECEMBER 1997 SESSION

GWENDOLYN SUE MULKEY	)	KNOX CIRCUIT
	)	
Plaintiff/Appellant	)	
	)	
VS.	)	Hon. Harold Wimberly,
	)	Circuit Judge
PALM BEACH COMPANY and	)	
EMPLOYERS INSURANCE OF	)	
WAUSAU	)	
	)	NO. 03S01-9706-CV-00069
Defendants/Appellees	)	

For the Appellant:

Douglas C. Weinstein
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For the Appellees:

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Knoxville, Tenn. 37902

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

Members of Panel:

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

AFFIRMED.

THAYER, Special 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 appeal has been perfected by the employee, Gwendolyn Sue Mulkey, from a decision of the trial court resulting in a dismissal of the complaint. The Circuit Judge found the employee had failed to establish she had sustained an injury as a result of her work activities on August 13, 1993.

Plaintiff, age 42 years, had worked for defendant, Palm Beach Company, for a number of years. She was engaged in sewing work when she said she was lifting a bundle of coats and felt something pull in her neck. Later the same day, she testified she was lifting above her head and felt a pull in her low back. She went to see a doctor furnished by her employer and was returned to light duty work. She continued working until January 31, 1994, when she was terminated because the employer concluded there was no work available under the restrictions imposed by the doctor. She eventually found other employment and was working 20-22 hours a week as a janitor. She testified this type of work caused her neck and back to hurt.

The record indicates that she had sustained several work-related injuries in previous years and had been treated for a rib injury, a carpal tunnel syndrome injury and a shoulder injury.

All of the expert medical testimony was by deposition.

Dr. Jonathan N. Degnan, an orthopedic surgeon, first saw plaintiff on March 17, 1994, which was about seven months after the activities in question. He testified she complained of neck pain on the initial visit but did not complain of low back problems until the September 1994 visit. He found degenerative disc disease which was not work-related. He gave her a 9% impairment to the body as a whole and related the injury to her work duties upon the assumption the history given to him was accurate. In giving the history, she told the doctor she had recovered from all prior injuries and was not suffering from neck and back pain before August 1993.

Dr. Robert E. Finelli, a neurosurgeon, testified he had treated plaintiff for some of her prior injuries. He saw her during March 1993 (about 5 months before incident) and she had complaints then of neck and arm pain. He next saw her on

September 7, 1993 (about 3 weeks after incident) when she was complaining of neck, shoulder, arm and back pain. He performed a number of tests and concluded she had a neck and back strain which was consistent with her prior physical problems. He felt her present complaints were just a reoccurrence of previous complaints. He told the court she also informed him she had been involved in an automobile wreck.

Dr. Fred A. Killeffer, a neurosurgeon, first saw plaintiff on November 4, 1993, and reviewed medical records of numerous other doctors who had seen her. He concluded that she had had at least seven occurrences of this kind of pain over the past 4-5 years. He felt her symptoms were essentially the same as she had experienced in past years and her present complaints were not representative of a recent injury.

The case is to be reviewed on appeal de novo accompanied by a presumption of the correctness of the findings of fact unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

In resolving disputes in medical testimony, the trial court may choose which medical testimony to accept. In doing this, the court may consider the qualifications of the experts, the circumstances of their examination, the information available to them and the evaluation of the importance of that information by other experts. *Orman v. Williams-Sonoma, Inc.,* 803 S.W.2d 672, 676 (Tenn. 1991).

On appeal the only issue is whether the evidence preponderates against the decision of the trial court. We have carefully reviewed the record and are of the opinion the evidence does not preponderate against the conclusion of the trial court. In this connection, we note Dr. Finelli was the only expert to have seen plaintiff a short period of time prior to the incident and soon after the alleged injury. Also, the trial court was in a better position to judge credibility of the plaintiff who testified orally.

The judgment is affirmed. Costs of the appeal are taxed to the plaintiff.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
E. Riley Anderson, Chief Justice

_____
John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

FILED

February 19, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

GWENDOLYN SUE MULKEY,	)	KNOX CIRCUIT
	)	No. 2-166-95
Plaintiff/Appellant	)	
	)	
vs.	)	Hon. Harold Wimberly
	)	Judge
	)	
PALM BEACH COMPANY and EMPLOYERS INSURANCE OF WAUSAU,	)	
	)	No. 03S01-9706-CV-00069
Defendants/Appellees.	)	
	)	

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 plaintiff, Gwendolyn Sue Mulkey. and Douglas C. Weinstein, surety, execution may issue if necessary.

02/19/98

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-appellant and sureties, for which execution may issue if necessary.

IT IS SO ORDERED this ____ day of June, 1997.

PER CURIAM

Anderson, J. - Not Participating

al to the Special Worker' 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 act 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 plaintiff-appellant, Vernon Harris and Gilbert and Faulkner. surety, for which execution may issue if necessary.

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