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

GLORIA BENSON	)	
	)	
Plaintiff/Appellant	)	**DAVIDSON CHANCERY**
	)	
v.	)	**NO. 01S01-9706-CH-00137**
	)	
NORTHERN TELECOM, INC.	)	**HONORABLE IRVIN KILCREASE**
	)	**CHANCELLOR**
Defendant/Appellee	)	

For the Appellant:

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For the Appellee:

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MEMORANDUM OPINION

Members of Panel:

Justice Adolpho A. Birch, Jr.
Senior Judge John K. Byers
Special Judge Hamilton V. Gayden, Jr.

AFFIRMED

Hamilton Gayden
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 plaintiff filed this suit and alleged she sustained a back injury on September 13, 1991, while trying to lift a typewriter and alleged a gradual worsening of that injury in January, 1995.

At the time of the trial the plaintiff had been working for her employer, Northern Telecom, for 21 years. At the time of the alleged injury, and up until the date of the trial the plaintiff worked in her home.

Contrary to plaintiffs' allegation that she had injured her back on September 13, 1991, while attempting to lift a typewriter, Dr. Leon Ensalada testified by deposition that the plaintiff injured her back cleaning out a closet in May, 1991 in a non work related incident; the basis for Dr. Ensalada's testimony was a statement by the plaintiff herself to Dr. Ensalada that she had injured her back while cleaning out a closet and medical records from plaintiffs' physician at the time of the May, 1991, closet incident. The previous history was given by the plaintiff to her previous physician, Dr. Lee Selby. Dr. Ensalada testified that the plaintiff's radiculopathy originated from the May, 1991 incident.

At the trial, however, the plaintiff testified that she could not remember cleaning the closets nor seeing Dr. Selby seven times in May for the injury. Though the Chancellor did not address a credibility issue, it is clear from the record that credibility was a paramount consideration.

Dr. Gregory Lanford, plaintiff's treating physician, who did not have the benefit of Dr. Selby's earlier records concerning the non work related closet injury, diagnosed the plaintiff as suffering from radiculopathy and he performed surgery on a ruptured disc. Dr. Lanford related the chronic problems with plaintiff's back and subsequent surgery to the typewriter incident.

The trial court found that the plaintiff did not meet her burden of proving causation. The Court found that the injury resulted from the May, 1991 non work related injury.

The issues before us on this appeal are: (1) Did the court err in finding the plaintiff did not

meet her burden of proof on the issue of causation, and (2) Whether previous payment of

temporary total benefits from the alleged September, 1991, claim, and the admission in defendant's subsequent pleadings in this case, estop the defendant from disputing causation?

The plaintiff had the burden of proof to prove every element of her case. Humphry v. David Withersoon, Inc. 734 S.W.2nd 315 (Tenn.1987). Dr. Selby's records, reasonably relied upon by Dr. Ensalada, connect the plaintiff's low back pain to the non work related May, 1991, injury. Dr. Ensalada, the most recent treating physician also testified; however, he did not have the benefit of Dr. Selby's records as did Dr. Ensalada. And, to reiterate, the plaintiff admitted to Dr. Ensalada that she injured her back in May 1991.

It is discretionary with the trial Judge to give weight to the respective medical opinions and to accept those opinions it believes is the more probable. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2nd 675.(1983). In this case, the panel does not disturb the finding of the Chancellor on the issue of causation, that the injury was non work related.

The defendant has also argued that the trial court erred in holding that the plaintiff was not entitled to permanent partial benefits because the defendant admitted the injury as being work related in their answer and also because the defendant paid plaintiff temporary total benefits for a period of time for the same injury benefits.

Based on the record, it is clear the issue of causation was tried by consent. Plaintiff's counsel did not object to presentation of Dr. Ensalada's testimony nor did plaintiff's counsel object to the cross-examination of the plaintiff about the closet injury. In addition. Plaintiff's counsel cross-examined Dr. Ensalada and had the opportunity to question him relative to the closet injury.

While it is true the pleadings of the defendant do not reflect a denial of the claim, nevertheless the proof introduced at the trial and during the taking of Dr. Ensalada's deposition reflect that the plaintiff knew or should have known the causation of the claimed injury was an issue. It is also true that the defendant did not move to amend its pleadings at any time during the trial or in a post trial motion. However, in this case this is not fatal as the test is substance over form: Did the plaintiff have a fair chance to try the issue and present its own proof? We

answer in the affirmative.

"Generally speaking, trial by implied consent will be found where the party opposed to the amendment knew or should reasonably should have known of the evidence relating to the new issue did not object to the evidence, and was not prejudiced thereby." Zack Cheek Builders, Inc. V. McLeod, 597 S.W. 2nd 888, 890 (Tenn. 1980).

As to the remaining issue of whether previous payment of temporary total benefits estop the defendant from controverting permanent disability benefits, the panel cites part of T.C.A. §. 50-6-205(d):

> (d) If payments have been made without an award, and the employer subsequently elects to controvert his liability, notice of controversy shall be filed with the director within (15) days of the due date of the first omitted payment. In such cases the prior payment of compensation shall not be considered a binding determination of the obligations of the employer as to future compensation payments. Likewise, the acceptance of compensation by the employer shall not be considered a binding determination of the obligations of the employer as to future compensation payments; nor shall the acceptance of compensation by the employee be considered a binding determination of his rights."

The Panel holds, as a matter of law , that the defendant could raise the issue of compensability of permanent partial benefits after payment of temporary total benefits.

We affirm the judgment of the trial court. Costs to be paid by Plaintiff/Appellant.

_____
Hamilton V. Gayden, Jr., Special Judge

CONCUR:

_____
Adolpho A. Birch, Jr., Justice

_____
John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

GLORIA BENSON,	)	DAVIDSON CHANCERY
	)	NO. 95-1285-I
PLAINTIFF/APPELLANT,	)	
	)	HON. IRVIN KILCREASE,
v.	)	CHANCELLOR
	)	
NORTHERN TELECOM, ET AL.,	)	S. CT. NO. 01S01-9706-CH-00137
	)	
DEFENDANTS/APPELLEES.	)	AFFIRMED

JUDGMENT

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 Plaintiff/Appellant, for which execution may issue if necessary.

It is so ordered this 22nd day of April, 1998.

PER CURIAM

BIRCH, J. NOT PARTICIPATING