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

FILED

May 27, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

ELIZABETH ANNE FLICKNER,	)	
	)	KNOX CHANCERY
Plaintiff/Appellant	)	
	)	NO. 03S01-9708-CH-00095
v.	)	
	)	HON. SHARON BELL,
CRETE CARRIER CORPORATION,	)	CHANCELLOR
	)	
Defendant/Appellee	)	

For the Appellant:

David C. Lee
J. D. Lee
LEE, LEE & LEE
422 Gay Street
Knoxville, TN 37902

For the Appellee:

James T. Shea, IV
BAKER, McREYNOLDS, BYRNE
O'KANE, SHEA & TOWNSEND
P. O. Box 1708
Knoxville, TN 37901

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

Members of Panel:

Justice Adolpho A. Birch, Jr.
Senior Judge William H. Inman
Special Judge Roger E. Thayer

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.

Ms. Flickner is 55 years old, has eight years of formal education, and has worked as a truck driver for most of her adult life. She testified that she injured her back in 1975 in a work-related accident in Florida, that she underwent back surgery after the injury, and that she received Florida workers' compensation benefits for that injury. Exhaustive attempts by the parties failed to discover her Florida workers' compensation records owing to the 20-year time lapse.

Ms. Flickner testified that after the 1975 injury she recovered and was able to work full-time at various jobs, mostly truck driving, for the next 20 years. On June 16, 1995, she injured her lower back while driving a truck for Crete Carrier Corporation, and the extent of her vocational disability from that injury is the issue before us.

After the 1995 injury, Ms. Flickner was treated by Dr. Robert E. Finelli, who diagnosed lumbar disk defects at L3/4 and L4/5, and scar tissue from her previous surgery at L3/4 and L5/S1. He performed extensive lumbar surgery on September 18, 1995.

Vocational Rehabilitation Specialist Dr. Julian Naldosky testified for the employee that she could no longer perform her truck driving job and had no skills which would transfer to a semi-skilled, light or sedentary job. He opined that jobs available to her in her disabled condition, in light of her employment background, abilities and education, and assuming her ability to tolerate sitting and standing throughout the workday, would include cashier in a restaurant or parking lot, ticket seller, retail receiving clerk, automobile self-serve service station attendant, gate tender, security monitor, hardware assembler, gasket inspector, packager of small parts or small products, and a bottling line

attendant. These jobs enable a person to alternate sitting and standing but do not allow the person to sit or stand at will. If she is limited to sitting and standing at will, she would be 100 percent vocationally disabled.

Vocational Consultant Jane Colvin Roberson testified for the employer that with her current restrictions, the employee could be a trucking company dispatcher, recruiter, log clerk, lay-away clerk in a retail store, sales counter clerk or sales position in which she could sit or stand at will. She opined that the employee has a 75 to 78 percent vocational loss due to her injury.

Ms. Flickner testified that after the surgery she tried unsuccessfully to find sedentary work, that she obtained her G.E.D. ["by the skin of my teeth"] and that, at the time of trial, she was taking an adult education computer class through the Department of Vocational Rehabilitation to improve her employability.

The trial court found that her medical impairment was two percent, applied the statutory multiplier of six, and awarded 12 percent permanent partial disability to the body as a whole as a result of her 1995 injury. The only issue on appeal is whether the trial court appropriately applied Dr. Finelli's expert testimony in finding the extent of vocational disability.

The employee [appellant] contends the Chancellor disregarded the medical evidence and improperly took judicial notice of and interpreted the *AMA Guidelines to Evaluation of Permanent Impairment,* Fourth Edition, without any supporting medical testimony.

The employer [appellee] contends the Chancellor appropriately interpreted and applied the provisions of the *AMA Guides* because Dr. Finelli's testimony demonstrated the impairment rating he gave the appellant had not been determined in accordance with the applicable provision of the *AMA Guidelines.*

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 application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

At trial, the Chancellor and counsel for the parties agreed that Dr. Finelli's January 6,1997 depositional testimony concerning the appellant's medical impairment rating was unclear. The parties were directed by the Chancellor to conduct a second deposition, at which time Dr. Finelli's opinion as to Ms. Flickner's medical impairment rating as a result of her 1995 back injury was to be clarified. Dr. Finelli's testimony on February 17, 1997 is instructive:

DIRECT EXAMINATION, BY MR. LEE:

> Q: Doctor, will your opinions in this deposition be to a reasonable degree of medical certainty?
>
> A: Yes.
>
> Q: And would you describe to the Court - - we're taking this by videotape - - what Elizabeth Flickner's impairment rating is as a result of your September 18, 1995 surgery?
>
> A: Before I answer that, can we go back to the original injury of twenty years ago and then we can just kind of walk through this?
>
> Q: Certainly.
>
> A: Ms. Flickner had a surgical procedure at her lower interspace of L5-S1 and the interspace above it at L4-5. And just based on that type of history in which she's told us, and if you go to the *AMA Guidelines*, this would be rated as a pre-existing impairment rating of ten percent for the first level and one percent for the second level, for a total of eleven percent. She had a history of twenty years of having no problems until a new injury occurred. And here she was found to have a ruptured disc at the third disc called L3-4. And this was a bona fide disc, brand new, which was documented by additional x-rays. There was a question of having a recurrent disc down below at L4-5. Because of the twenty year hiatus, the fact that she had been working during this time, and a new injury occurred

essentially twenty years later, her rating would be ten percent again to the virgin interspace of L3-4. The *AMA Guidelines* add an additional two percent when exploring a previously operated interspace. Her impairment rating for the second surgery would be twelve percent.

Q: Is that to a reasonable degree of medical certainty?

A: Yes.

MR. LEE: You may ask.

CROSS EXAMINATION BY MR. SHEA:

Q: Doctor, impairment ratings, as you understand, are to be given in accordance with the *AMA Guidelines,* Fourth Edition?

A: That's correct.

Q: And in this case, you're relying upon Table 75 of the musculoskeletal provision of the *AMA Guidelines,* Fourth Edition?

A: That's correct.

Q: I understand that in accordance with the *AMA Guidelines,* Fourth Edition, that in regard to an intervertebral disc or soft tissue lesion, in Table 75, Section II-F, if you have multiple level surgical procedures with or without operations and with or without residual signs or symptoms, that would amount to a ten percent impairment rating?

A: That's correct.

Q: I understand that it's your opinion, based upon the *AMA Guidelines,* that in regard to this first surgery back in 1975, which was located at L5-S1 and L4-5, that Ms. Flickner would have an eleven percent rating. That would be ten percent plus the one percent?

A: That's correct.

Q: It's true also that in accordance with Table 75 of the *AMA Guidelines,* Section G, that if a person has multiple operations with or without residual symptoms, that for the second surgery to the lumbar area, that the plaintiff would have an additional two percent?

A: That's correct.

Q: And in this case there was an additional surgery in this case to a new area of the lumbar portion of the body at L4-5?

A: That's correct.

Q: And it's true therefore that under Section - -

A: I'm sorry. L3-4.

Q: I'm sorry. L3-4, and some additional work at L4-5?

A: That's correct.

Q: And that pursuant to Table 75, Sections II-G-1 that plaintiff would

therefore be entitled to an additional two percent in accordance with the *AMA Guidelines* for that new surgery in the lumbar level; isn't that correct?

A: *That's your interpretation of that. [emphasis added]*

Q: Is there - -

MR. LEE: Well, let him finish his answer.

MR. SHEA: Okay. I didn't realize that he had not.

A: Yeah. That's your interpretation of that.

Q: Okay, Doctor.

A: This is the way I interpret it. And you have to remember, you're dealing with the *AMA Guidelines* which are guidelines. Let's take, for example, this lady twenty years ago had three operations, one, two and three. It would be ten, eleven, twelve. And then because this had already been a violated interspace, that was taken into consideration for her workmans' comp injury, the second operation at these two levels would have been four percent.

The real issue is this new interspace at L3-4 after twenty years is a new disc. It's a new disc. It's not an old disc. You still have to open the skin higher than where the previous interspace operation was. You have to do the bone work and violate the foramina which is what the impairment rating is given for. So the actual work at the L3-4 interspace level is ten percent. The second - - when you go down to the previous operated interspace - - you might disagree with this, but this is the way - - you've got to have some sanity - - they assume that because the bone work has been done, it's easier to operate on a second interspace. Well, that's not true. You have a lot of scar tissue. And that's probably where the failings of the impairment rating system for the *AMA Guidelines* are, but you have to add some consistency to the rating. And the way I interpret it is, a brand new interspace is ten percent, because other work has been done at 4-5, there is scar tissue, there is arthritis that's been taken into consideration with the original rating of twenty years ago. And all we're doing is going in there and removing the scar tissue and going down and inspecting the disc, and that gives an additional two percent impairment.

Q: Well, Doctor, in regard to this provision of Table 75 of the *AMA Guidelines*, however, it does seem to indicate, does it not, that in regard to a second operation to the lumbar area of the spine that the added impairment rating pursuant to these guidelines would be two percent?

A: No. *You're misreading it. [emphasis added]*

Q: All right. That's - -

A: Multiple operations with or without residual surgery, second operation at the same interspace. *That's the way I interpret that. [emphasis added]*

Q: Does it say that, though, Doctor?

A: No, it does not.

Q: And does it not seem to indicate in the three columns, multiple levels of the spine, that is, cervical, lumbar, thoracic?

A: It does. But, again, a second operation at a new interspace is a new problem.

Q: That's true. No question about that.

A: And, again, whether you call the area cervical, thoracic, or lumbar, there's still spinal segments.

Q: I see. *The issue for us in this lawsuit, Doctor, is what the rating would be in accordance with the AMA Guidelines.[emphasis added]*

A: *The way I interpret it is twelve percent. [emphasis added]*

Q: And it would be twelve percent for the new injury?

A: That's right. It would be ten percent for the new virgin interspace at L3-4 and two percent for the second previously operated interspace.

Q: And you and I have discussed this and you're saying that I interpret the *Guidelines* differently from you, but are they subject to interpretation on that issue? That is -

A: *The Guidelines are vague here, but I try to use common sense. [emphasis added]* I mean, you've got a period of twenty years where the patient was pain free, and then a new problem occurs. This was not addressed.

- - - - -

Q: In regard to the actual wording, though, of new level or new operation, under Table 75, Section II that would just indicate an additional two percent for each level after the original ten percent in 1975?

A: *Maybe this is the difference between a lay person like yourself and a medical doctor . . . [emphasis added]*

After reviewing Dr. Finelli's deposition and hearing further argument by counsel, the Chancellor held that the appellant had sustained two percent medical impairment, applied the multiplier of six, and awarded a judgment of 12 percent permanent partial disability to the body as a whole.

The employee appeals, insisting essentially that the trial court disregarded Dr. Finelli's depositions, which are the only medical evidence of the extent of her permanent partial disability, in finding two percent medical impairment and awarding 12 percent permanent partial disability based on the multiplier of six as provided in T.C.A. § 50-6-241.

In making its determination of vocational impairment, the trial court shall consider all pertinent factors, including lay and expert testimony, employee's

age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition. T.C.A. § 50-6-241(a)(1); *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986).

Expert medical testimony must be given in accordance with the standards set out in T.C.A. § 50-6-204(d0(3), which provides:

> **(3)** 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,* or the *Manual for Orthopedic Surgeons in Evaluation Permanent Physical Impairment.* 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 of the two publications noted above.

When the medical testimony is presented by deposition, as it was in this case, 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, 451 (Tenn. 1994); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989).

We have reviewed the depositions of Dr. Finelli and find that he utilized the most recent edition of the *AMA Guidelines* in assessing medical impairment, as indicated by his testimony (1) that his opinion was based upon the *AMA Guidelines,* (2) that he was relying upon Table 75, (3) that in assessing 12 percent impairment he was interpreting the *AMA Guidelines,* and (4) that "the *Guidelines* are vague here, but I try to use common sense." Dr. Finelli's assessment of twelve percent medical impairment is fully documented and supported by his expert medical interpretation of the *AMA Guidelines* and the preponderance of the medical evidence.[1]

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[1]We do not have the familiar issue of accrediting the opinion of one medical expert over another because the appellee, who was aware of Dr. Finelli's opinion, never presented countervailing expert testimony as to the extent of appellant's medical impairment.

The trial court determined that appellant was entitled to the multiplier of six times the medical impairment. The six-times multliplier is not to be applied automatically, but should be reserved for the most severe of all unscheduled permanent partial disabilities. The evidence indicates that there were many jobs Ms. Flickner could do with her medical restrictions, and that she has had the benefit of vocational rehabilitation re-training for sedentary work. We find the application of the multiplier of six is not supported by the preponderance of the evidence and that the evidence supports a multiplier of four. Applying the multiplier of four to the medical impairment of twelve percent, we find the preponderance of the evidence supports a finding of 48 percent vocational disability. We so modify the holding of the trial court, and as modified, the judgment is affirmed, with costs assessed to the appellee.

_____

William H. Inman, Senior Judge

CONCUR:

_____

Adolpho A. Birch, Jr., Justice

_____

Roger E. Thayer, Special Judge

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ELIZABETH ANNE FLICKNER	)	
	)	
Plaintiff/ Appellant	)	KNOX CHANCERY
	)	
	)	
	)	No. 128871-3 .
	)	Hon Sharon Bell
	)	Chancellor
	)	
	)	No. 03S01-9708-CV-00095
	)	
CRETE CARRIER CORPORATION	)	
	)	
Defendant/Appellee.	)	

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 defendant/appellee, Crete Carrier Corporation, for which execution may issue if necessary.

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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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