

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(June 29, 1998 Session)

FILED

October 21, 1998

**Cecil W. Crowson
Appellate Court Clerk**

CHERRE HOWARD,)	DAVIDSON CHANCERY
)	
Plaintiff-Appellee,)	Hon. Ellen Hobbs Lyle,
)	Chancellor
v.)	
)	No. 01S01-9708-CH-00179
GRANITE STATE INSURANCE)	
COMPANY,)	
)	
Defendant-Appellant.)	

For Appellant:

William L. Abernathy, Jr.
III
J. Frank Thomas
Leitner, Williams, Dooley & Napolitan
Nashville, Tennessee

For Appellee:

Joseph L. Mercer,
Nashville, Tennessee

MEMORANDUM OPINION

Members of Panel:

Frank F. Drowota, III, Associate Justice, Supreme Court
William H. Inman, Senior Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED

Loser,

Judge

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employer's insurer, Granite State Insurance Company, contends the chancellor erred in awarding permanent partial benefits based on sixty-five percent to the body as a whole. As discussed below, the panel has concluded the judgment should be affirmed.

Our review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2). The extent of an injured worker's vocational disability is an issue of fact. Jaske v. Murray Ohio Mfg. Co., Inc., 750 S.W.2d 150 (Tenn. 1988).

The employee or claimant, Cherre Howard, is sixty-four years old and has a high school education and experience in collections and clerical work. For the sixteen years preceding her injury, she worked as a collector for Professional Adjustment Service. On February 29, 1996, she fell down a flight of stairs while leaving work, dislocating her left shoulder.

She later reported to the emergency room at Southern Hills Hospital, where a physician fractured both bones in her forearm, while unsuccessfully attempting to manipulate her shoulder into its socket. She subsequently saw another doctor at the same hospital, who twice performed open surgery to cure the injuries. The claimant returned to the operating doctor for follow-up care and he ultimately released her with an estimated eight percent permanent whole body impairment rating. However, the doctor concedes the claimant's condition worsened after he last saw her.

When her condition worsened, she was referred to Dr. Allen Anderson, who assigned a permanent whole person impairment rating of nineteen percent and who restricted her from lifting more than ten pounds, from lifting any weight frequently and from pushing, pulling or climbing. The doctor diagnosed arthrofibrosis and a torn rotator cuff, which could not be repaired because of lack of bone. He testified the claimant could not use her injured arm.

The chancellor, giving greater weight to Dr. Anderson's opinion, first awarded disability benefits based on seventy percent to the body as a whole, then reduced the award to one based on sixty-five percent to the body as a whole. The claimant has returned to work, but earns less than before the accident.

The employer's insurer insists the chancellor erred in accepting the opinion of Dr. Anderson, who saw the claimant only once, instead of the opinion of the operating surgeon and because the claimant has been reasonably successful in her return to work. The employee insists the testimony of the operating surgeon can be discounted because her condition admittedly worsened

after she left the operating surgeon's care.

The chancellor found that it would be difficult for the employee to compete in the job market because of her age, restrictions and limited education and experience. She now types with one hand. The age of the employee, her job experience, educational level and ability to perform her job in a disabled condition are important factors to consider when determining an employee's vocational disability. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 678 (Tenn. 1991). Moreover, trial courts are free to fully consider lay testimony, including that of the injured worker, as well as the expert testimony. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 677 (Tenn. 1983). In this case, the chancellor gave considerable weight to Ms. Howard's own testimony concerning her limitations at work since the injury.

For the above reasons, the evidence fails to preponderate against the findings of the trial court. Additionally, it was not error to accept the opinion of Dr. Anderson, under the circumstances.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the defendant-appellant.

Joe C. Loser, Jr., Special Judge

CONCUR:

Frank F. Drowota, III, Associate Justice

William H. Inman, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

CHERRE HOWARD

Plaintiff/Appellee

vs.

GRANITE STATE INSURANCE
COMPANY

Defendant/Appellant

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DAVIDSON CHANCERY

No. Below 96-1252-III

Hon. Ellen Hobbs Lyle
Chancellor

No. 01S01-9708-CH-00179

AFFIRMED

FILED
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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 by Defendant/Appellant and Surety for which execution may issue if necessary.

IT IS SO ORDERED on October 21, 1998.

PER CURIAM

