IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

	}	*DAVIDSON CHANCERY*
ERMA LITTLE	}	*No. Below 13,618*
Plaintiff/Appellee	}	
	}	*Hon. Jeffrey F. Stewart*
vs.	}	*Chancellor*
	}	
	}	*No.01S01-9712-CH-00273*
ROYAL INSURANCE COMPANY	}	
	}	*AFFIRMED IN PART; REVERSED*
Defendant/Appellant	}	*IN PART; AND REMANDED*

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 equally by the Plaintiff and the Defendant, for which execution may issue if necessary.

IT IS SO ORDERED on November 25, 1998.

PER CURIAM

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

ERMA LITTLE,	)	
	)	
Plaintiff/Appellee	)	FRANKLIN CHANCERY
	)	
v.	)	NO. 01S01-9712-CH-00273
	)	
ROYAL INSURANCE COMPANY,	)	HON. JEFFREY F. STEWART,
	)	CHANCELLOR
Defendant/Appellant	)	

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

Members of Panel:

Justice William M. Barker
Senior Judge John K. Byers
Special Judge Robert E. Corlew, III

AFFIRMED IN PART;
REVERSED IN PART;
AND REMANDED.

BYERS, Senior Judge

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. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

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 findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 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 court in a workers' compensation case. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

The trial court found the plaintiff was entitled to recover for a work related injury to her right shoulder and cervical spine. The plaintiff was awarded temporary total benefits for 15.6 weeks and was found to have suffered a 75 percent permanent partial vocational disability. The trial court awarded $82,270.05 in medical benefits, plus expenses incurred for travel in connection with the treatment of her cervical spine.

The defendant raises the following issues:

1. Did the trial court err in finding that the Employee sustained a compensable cervical disc injury, in the course and scope of her employment with CKR?

2. Is the trial court award of seventy-five percent (75%) permanent partial disability to the body as a whole excessive and contrary to the weight of the evidence?

3. Did the trial court err in awarding the Employee medical benefits for unauthorized treatment by Dr. McCord and health care providers to whom she was referred by Dr. McCord?

4. Did the trial court err in awarding the Employee medical benefits for treatment to her cervical spine which were unrelated to her employment?

5. Did the trial court err in awarding the Employee benefits for the entire amount of her disputed and unauthorized medical bills, without credit or offset for payments of said disputed bills in the sum of $67,455.89 made by the Employer through its self-insured medical benefits plan?

6. Did the trial court err in awarding the Employee temporary total disability benefits, without credit or offset for short-term disability benefits, in the sum of $6,333.71, paid to the Employee during the disputed period under Employer funded disability coverage?

7. Did the trial court err in awarding discretionary costs to the Employee related to the deposition of Dr. McCord?

We affirm the judgment in part, reverse the judgment in part, and remand the case to the trial court.

The plaintiff was 47 years of age at the time of trial. She has a G.E.D., a varied employment background which gives her a broad working experience, and training which qualifies her as a typist, a computer operator, and a driver of a forklift.

At the time of the injury in this case, the plaintiff was performing a task which involved the lifting of a "cell" that weighed approximately 14 pounds and which required her to extend her arms and lift over her head. In April or May 1992, the plaintiff developed pain in her right shoulder. She testified her arm hurt when she attempted to lift.

The defendant does not dispute that the plaintiff sustained a compensable injury to her shoulder. The dispute in this case revolves around whether the plaintiff sustained a compensable injury to her cervical spine.

In addition to this, there is a contest as to (1) whether the defendant is liable for medical bills incurred as a result of medical treatment for the cervical spine because the physician who did the treatment was not an authorized physician and (2) whether the plaintiff suffered any work related injury to her spine.

Authorization of Medical Care

Was the treatment and surgery on the plaintiff's cervical spine done by an authorized physician? If not, was the plaintiff justified in seeking medical care on her own?

The record shows that on June 18, 1992, the plaintiff was sent by the defendant to see a Dr. Worthington about the pain she was experiencing. After approximately one week of treatment, she spoke to the director of human services about seeing a specialist and was given a list of three doctors. The plaintiff was sent, according to her, to a Dr. Fambrough. She testified the director of human services made the appointment. Dr. Fambrough told the plaintiff she needed surgery on her shoulder. The plaintiff testified she was concerned about this advice so she went back to the director of human services and told him that she wanted a second opinion. According to the plaintiff, she was denied this and then went to a Dr. Brown on her own.

The plaintiff testified Dr. Fambrough did not want to do an M.R.I. but Dr. Brown did. The plaintiff voiced her concern to the human services director about the contrary positions taken by the two doctors on the need for an M.R.I. The plaintiff was then sent by the defendant to Dr. Stewart F. Stowers, an orthopedic surgeon. Dr. Stowers performed an M.R.I. and ultimately did surgery on the plaintiff's right shoulder.

Some months after the shoulder surgery, the plaintiff continued to complain of neck problems and pain and numbness in her right long finger and hand. Dr. Stowers had the plaintiff undergo neurological testing to determine if there was some problem with her cervical spine. An E.M.G. was done by Dr. Richard Lisella on April 23, 1993 and interpreted as being normal.

On August 25, 1992, the plaintiff told Dr. Stowers of her visit to Dr. Brown, who had obtained another M.R.I. and recommended surgery on her neck. Dr. Stowers reviewed this M.R.I. done on August 4, 1993 and determined it was no different than the one he had done on August 9, 1993 and in his opinion showed no need for neck surgery.

On October 6, 1993, the plaintiff saw Dr. David H. McCord of the Tennessee Spine Center on referral from Dr. Brown. The plaintiff testified she was aware that Dr. McCord was an unauthorized physician at the time. The plaintiff first saw Dr. McCord on October 6, 1993.

The complaint in this case was filed on October 14, 1993. On November 1, 1993, the plaintiff's attorney wrote the insurance company about treatment by Dr. McCord. Counsel was advised by a letter dated November 10, 1993 that the insurance company would not authorize medical treatment by unauthorized people. The letter reflects that counsel was aware that Dr. Stowers was the authorized physician and the company would afford treatment recommended by Dr. Stowers. At this stage of the medical history, the plaintiff had seen at least two authorized physicians concerning her problems and Dr. Stowers had reported that there was no injury to the plaintiff's cervical spine which required treatment.

Dr. McCord did surgery on the plaintiff's cervical spine on March 17, 1994. So far as we can tell from this record, the plaintiff did not notify the defendant of any dissatisfaction with Dr. Stowers prior to going to Dr. McCord. The plaintiff did not file any motion with the trial court seeking to have the

appointment of a neutral physician to examine her concerning the claims of a neck problem.

Tenn. Code Ann. § 50-6-204(a)(4) provides:

> The injured employee shall accept the medical benefits afforded hereunder; provided, that the employer shall designate a group of three (3) or more reputable physicians or surgeons not associated together in practice, if available in that community, from which the injured employee shall have the privilege of selecting the operating surgeon or the attending physician; and, provided further, that the liability of the employer for such services rendered the employee shall be limited to such charges as prevail for similar treatment in the community where the injured employee resides. The above listing of physicians or surgeons may include doctors of chiropractic within the scope of their licenses.

Tenn. Code Ann. § 50-6-204(d)(5) provides:

> In case of dispute as to the injury, the court may, at the instance of either party, or on its own motion, appoint a neutral physician of good standing and ability to make an examination of the injured person and report such physician's findings to the court, the expense of which examination shall be borne equally by the parties.

In the case of *Freeman v. Kimberly-Clark Corp.,* No. 02S01-9612-CV-00106, Shelby County (Tenn. Jan. 15, 1998, filed at Jackson), a workers' compensation panel denied fees to an unauthorized physician. In *Bazner v. American States Ins. Co*., 820 S.W.2d 742 (Tenn. 1991), the Supreme Court held that whether an employee is justified in seeking additional medical services without consulting with the employer depends upon the circumstances of each case. The proper standard in this regard is whether the employee acts in good faith in seeking another physician without employer approval. *See United States Fidelity and Guaranty Co. v. Morgan,* 795 S.W.2d 653 (Tenn. 1990) and other cases cited in *Freeman.*

We find Dr. McCord was an unauthorized physician. The trial judge ordered the defendant to pay the plaintiff the sum of $82,270.05 for medical expenses incurred as a result of the surgery upon her cervical spine. The plaintiff concedes in this case that the award should be reduced to $63,587.95. The

defendant's self-funded health insurance policy had already paid $67,455.89 in medical bills for the plaintiff's neck injury.

We find the judgment of the trial court in ordering the defendant to pay the plaintiff the amount of medical bills, which the plaintiff did not pay but were paid by the insurance company, cannot stand. *Staggs v. National Health Corp.,* 924 S.W.2d 79 (Tenn. 1996). Further, we find the treatment for the plaintiff's cervical spine was not done by authorized medical personnel and the expenses are not recoverable by the plaintiff.[1] We note the plaintiff offered no records to show she had paid any of these bills.

Compensability

Did the plaintiff sustain a medical injury to her cervical spine?

The medical evidence concerning this case is contained primarily in the depositions of four physicians, including Dr. McCord, Dr. Stowers, Dr. Rosenthal, and Dr. Ensalada, as well as various other records filed therewith.

Dr. McCord, who did surgery on the plaintiff's cervical spine, was of the opinion the plaintiff had sustained a herniated or protruding disc which required surgery. He was of the opinion this resulted from her work for the defendant.

The three other physicians testified the plaintiff had no disc herniation which required surgery and that at most she had some degenerative disc problem at C6-C7, which was normal for a person of her age. Each of them was of the opinion there was no work related injury to the plaintiff.

The trial judge accepted the opinion of Dr. McCord and found the plaintiff had a work related injury to the C6-C7 vertebrae.

The trial court has the discretion to accept the opinion of one medical expert over that of another medical expert. *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804 (Tenn. 1990); *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333 (Tenn.

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[1] This does not require the return of the $63,587.95 paid by the health plan.

1996). The acceptance of one expert's testimony over another is based upon the perception of the credibility of one expert over that of other experts who testify.

The assessment of credibility of witnesses is reserved exclusively for the trial judge when the testimony is given by witnesses in person at trial. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). When the testimony is given by deposition, however, as the medical evidence is in this case, we may make an independent assessment of the weight of the medical evidence.

In this case, we are not firmly convinced of the validity of Dr. McCord's diagnosis, treatment, and conclusion about the plaintiff's cervical spine. We reviewed the various backgrounds of each of the physicians who testified by deposition.

Dr. Robert F. Stowers, an orthopedic surgeon who was licensed to practice in 1989, testified concerning all the tests he ran and the conclusion he reached that the plaintiff had no evolvement with her C6-C7 vertebrae other than normal degenerative disease. He explained she had no need for surgery and there was no work related injury to her neck. Dr. Stowers testified the injury to the plaintiff's shoulder caused pain at the base of the neck but would not be related to a disc problem. Dr. Stowers' curriculum vitae is attached to his deposition and is impressive as to his schooling, training, presentation to professional societies, and publications.

Dr. Phillip Rosenthal, a neurological surgeon, is licensed in Pennsylvania, New York, Missouri, and Tennessee and practices in Nashville. He was named a Diplomat on the National Board of Medical Examiners on July 2, 1984. He saw the plaintiff for purposes of evaluation, examined her, and looked at a vast array of tests done by the numerous medical personnel who had seen her, which included tests by many physicians and the report of Dr. McCord. Dr. Rosenthal was of the opinion, based on pre-surgery records which indicated there was no abnormality at the C6-C7 level, surgery was not necessary. Dr. Rosenthal was of

the opinion the plaintiff had suffered no job related injury to her neck. Dr. Rosenthal's credentials as to schooling, publication, and presentations are also impressive.

Dr. Leon Ensalada, who specializes in pain management, practiced in Nashville and now practices in Madison, Tennessee. Dr. Ensalada received all of the records conceming the plaintiff's neck and shoulder problems. From all of these, too numerous to list, he concluded that the plaintiff had not sustained a work related injury to her neck and that the surgery done by Dr. McCord was not necessary. Dr. Ensalada's credentials are also impressive.

Dr. David H. McCord, an orthopedic surgeon, has been practicing orthopedic surgery since 1991 but was apparently licensed to practice medicine sometime prior to that, according to his curriculum vitae. He was board certified in 1993. Dr. McCord diagnosed the plaintiff with a disc evolvement at the C6-C7 level which was impinging on a nerve and required surgery. He performed this surgery on March 17, 1994 to relieve the impingement. He was of the opinion the problem was caused by her work with the defendant. Dr. McCord's record is impressive in the matter of schooling, but not as impressive to us as the records of the other three physicians who testified.

The record shows the three physicians who testified found the plaintiff had no evolvement which required the surgery performed by Dr. McCord. Only Dr. McCord, of those who testified, reached the conclusion that surgery was required.

The following questions were asked of Dr. Ensalada and the following answers were given:

> Q. Dr. Ensalada, are you familiar with the reputation of Dr. David McCord in the medical community in the Nashville, Middle Tennessee area?
>
> A. Yes.
>
> Q. What is his reputation in the medical community in this area?

A. Based upon information I have had available to me, Dr. McCord recently had his privilege to perform spine surgery revoked at Centennial Medical Center after an investigation of his practices at that hospital. Based upon information available to me --

MR. ROGERS: I'm going to object to this testimony unless he has evidence of these allegations. If this is hearsay evidence, then I'm going to object to it.

BY MR. VEAZEY:

Q. All right. Go ahead and answer, Doctor.

A. Based upon information available to me, Dr. McCord has had his privileges reinstated at Centennial Medical Center, but apparently he will have the number surgeries he performs limited, and he will have to have second surgical opinions for the surgeries that he has performed.

On cross-examination on this issue, the following took place:

Q. You indicated earlier that certain evidence had been provided pertaining to Dr. McCord and his privileges. What evidence was provided?

A. Well, if I understand your question correctly, I wasn't provided evidence, but in my discussions with doctors who practice in Nashville, and in discussions with doctors who practice at the Centennial Medical Center, I came to understand that Dr. McCord's privileges were apparently temporarily revoked.

Q. So you have not been furnished nor have you reviewed any documentation pertaining to his privileges, correct?

A. That's correct.

Q. You are relying upon discussions you have had with certain doctors?

A. Yes, that's correct.

Q. What doctor have you discussed that with?

A. I don't recall.

Q. Pardon?

A. I don't recall.

Q. You do not recall the doctor who told you these most serious allegations pertaining to Dr. McCord? You do not recall that doctor?

A. No, I recall that there were a number of doctors discussing this at various times. I don't remember who was involved.

Q. Just give me one name of one doctor you discussed it with.

A. I don't recall that I have discussed it with anybody.

Q. Well, then, how did you gain this knowledge if you didn't discuss it with anybody?

A. I had an opportunity to hear other people discuss these issues.

Q. What other people have you heard discuss those issues?

A. As I've testified, I don't recall the specific doctors.

The trial judge's memorandum held that the evidence was hearsay and would be ignored because the witness could not even recall the names of those people in the medical community who made the statements.

We do not believe this evidence is hearsay on such basis.

Rule 803 of the Tennessee Rules of Evidence sets out exceptions to the admission of hearsay evidence. The exception under Rule 803(21) is for the "Reputation of a person's character among associates or in the community."

The inability of the witness to name those whom he heard discuss the asserted problem of Dr. McCord in our view does not make the testimony inadmissible. At most, it goes to its weight. In any event, we believe it must be weighed along with the other testimony in this case on whether the plaintiff had sustained an injury to her cervical spine and whether the surgery performed was necessary.

We, of course, do not determine the weight of the evidence by numerical quotient but by the quality of the evidence presented and the background and apparent knowledge of the experts who testify. In our view, the evidence preponderates in favor of the finding as expressed by three of the physicians that there was no job related injury to the plaintiff's neck nor any necessity for the surgery which was performed.

Vocational Disability

Is the award of 75 percent vocational disability excessive?

Under the circumstances of this case, we find the award of 75 percent vocational disability is excessive.

In reaching the amount of vocational disability based on the medical evidence, the trial judge considered the 16 percent medical impairment to the body as a whole testified to by Dr. McCord. He further considered the six percent medical impairment to the body testified to by Dr. Stowers as a result of the injury to the plaintiff's shoulder. We have found there was no cervical spine injury arising from the plaintiff's work. We, therefore, determine the amount of an award based upon the six percent medical impairment rating along with the testimony of the plaintiff concerning the effect her injuries have upon her.

Dr. Stowers placed significant restrictions upon the plaintiff, including a proscription against lifting with the arm in an extended position and a weight limitation of 20 pounds. Because we find there was no job related cervical injury, a factor relied on by the trial judge in awarding 75 percent vocational disability, we conclude the evidence supports an award less than 75 percent and we reduce the award in this case to 50 percent.[2]

Medical Benefits

These issues have been settled by our determination that the plaintiff sustained no cervical injury related to the work she did for the defendant and our determination that the treatment was not authorized. The judgment granting benefits to the plaintiff cannot stand.

Temporary Total Disability

Did the trial court err in awarding the plaintiff temporary total disability benefits which were paid by the employer's self-funded insurance coverage?

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[2] Tenn. Code Ann. § 50-6-241 is not applicable in this case because the injury occurred prior to the effective date of the Act. Thus, the limitations in the Act are not applicable.

The defendant relies upon the provisions of Tenn. Code Ann. § 50-6-114(b) to assert its right to a set off of the temporary total benefits. We do not believe it may do so.

The benefits were paid to the plaintiff at alternate times during the years of 1992, 1993, 1994, and 1995. Tenn. Code Ann. § 50-6-114(b) by amendment effective July 1, 1996. Prior to the adoption of this amendment, set off was not the rule. We conclude this amendment cannot be retroactively applied to offset benefits paid prior to its enactment.

Discretionary Costs

The trial judge awarded the plaintiff costs for Dr. McCord's deposition in the amount of $996.00. We find this was not warranted and reverse that portion of the judgment. The trial judge awarded the plaintiff $2,024.68 for travel expenses for her to travel to Dr. McCord's office for treatment. We find this should not have been awarded and we reverse that portion of the judgment.

Conclusion

We affirm the judgment of the trial court which found the plaintiff had sustained a compensable injury as a result of her work for the defendant. We modify the judgment and find the plaintiff has suffered a 50 percent permanent medical impairment to the body as a whole rather than 75 percent as ordered by the trial judge.

We find the award of medical expenses to the plaintiff for treatment of an alleged injury to the plaintiff's neck is erroneous and we reverse that portion of the judgment. We find the award of discretionary costs for taking Dr. McCord's deposition in the sum of $996.00 and the award of travel expenses for treatment by Dr. McCord in the amount of $2,024.68 are in error and we reverse that portion of the judgment.

We find the award of temporary total disability, without offset sought by the defendant, was proper and we affirm that portion of the judgment.

The cost of this appeal is taxed equally to the plaintiff and the defendant.

_____
John K. Byers, Senior Judge

CONCUR:

_____
William M. Barker, Justice

_____
Robert E. Corlew, III, Special Judge