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

(June 29, 1998 Session)

FILED

October 26, 1998

Cecil W. Crowson
Appellate Court Clerk

DIANNA SKELTON,	)	SMITH CRIMINAL
	)	
Plaintiff/Appellee	)	NO. 01S01-9710-CC-00229
	)	
	)	HON. J. O. BOND,
ROBERTSHAW CONTROLS COMPANY	)	JUDGE
and TRAVELERS INSURANCE COMPANY,	)	
	)	
Defendants/Appellants	)	

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

MODIFIED and
AFFIRMED

INMAN, Senior Judge

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

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 trial court awarded Dianna Skelton ["employee"] workers' compensation benefits based on one-hundred percent permanent, total disability. Robertshaw Controls Company ["employer"] appeals, challenging the extent of employee's disability, the admissibility of the opinion of a clinical psychologist as to permanency of employee's disability, and the failure of the trial court to apply the multiplier caps set forth in T.C.A. § 50-6-241(a)(1).

For the reasons herein stated, we modify the award to find 60 percent permanent vocational disability and, as modified, affirm the judgment of the trial court.

I

Mrs. Skelton had been employed as a factory laborer at Robertshaw for six years when, on September 4, 1992, she sustained a work-related injury to her lower back while lifting parts weighing about 30 pounds and placing them in an overhead bin. She timely reported the injury to Robertshaw and saw Dr. Bowden Smith, an approved physician, for treatment. Dr. Smith gave her epidural steroid blocks and heat treatments and took her off work for 2-1/2 weeks, then ordered lighter work in the Transition Room from September 22, 1992 until October 6, 1992, when she was released to return to full work.

She continued to experience back pain, complained to Robertshaw, and then saw another approved physician, Dr. Larry Laughlin, who ordered X-rays and prescribed physical therapy. She continued to complain of pain. On November 2, 1992, she saw Dr. Robert Weiss, neurosurgeon, also an approved

physician, who ordered a CT scan of her lumbar spine, opined the results were unremarkable, and diagnosed lumbar strain. His records indicate "I think we have objective studies that are negative, showing no definitive surgical lesion or significant neural impingement . . ." He recommended a work hardening program, which she finished with continuing significant back and left leg pain. On December 8, 1992 he advised her to return to full work with no restrictions and assessed no permanent impairment.

On December 9, 1992, Mrs. Skelton called Jean Hiett, Human Resources Administrator for Robertshaw, and told Hiett she could not work and was going to Dr. Willard West in Lebanon, and that she had an MRI scheduled through Dr. West for December 11, 1992 and would know the results on December 12, 1992. Ms. Hiett advised Mrs. Skelton that Robertshaw would not be responsible for this unapproved medical care.

On December 9, 1992 Mrs. Skelton went to Dr. West, whose MRI revealed a ruptured lumbar disc. Dr. West advised her to stay off work until she could see Dr. Timothy Schoettle, a surgeon, and someone in Dr. West's office wrote a "To Whom It May Concern" note to Robertshaw advising the employer of the diagnosis and need to be off work. The letter was not signed by Dr. West and therefore was not accepted by Robertshaw as a medical excuse.

Mrs. Skelton contacted Robertshaw and was told that the "rehab nurse" would go to Dr. West's office and talk to him. Robertshaw then sent Mrs. Skelton a letter asking her to attend a meeting on January 25, 1993, which Robertshaw describes thusly: "because of her unexcused absences, Plaintiff was terminated because no authorized physician had excused her from work." On January 28, 1993, Mrs. Skelton filed a union grievance.

Mrs. Skelton first saw Dr. Timothy Schoettle on January 29, 1993. He reviewed her MRI and ordered a myelogram, a CT scan and an EMG nerve conduction test. He determined she had a herniated lumbar disc at L5-S1 and performed surgical removal of the disc and decompression of the nerve root on February 9, 1993. He opined that her postoperative course was fairly typical and at her first postoperative visit he began her on a walking program. On April 14, 1993 he sent her to Thera Care for a conditioning program with the goal of getting her back into the work place. After three to four weeks in the program, the physical therapists determined that she showed no evidence of symptom magnification and was capable of returning to work at a light to sedentary level.

Mrs. Skelton's union grievance resulted in (1) her reinstatement as Robertshaw's employee, (2) back wages, (3) Robertshaw's acknowledgment of her injury as compensable, (4) Robertshaw's agreement to pay for the unapproved treatment provided by Drs. West and Schoettle, and (5) continuation of Mrs. Skelton under the care of Dr. Schoettle.

Upon reinstatement to her job in May 1993, and with the approval of Dr. Schoettle that she was able to work, she returned to work on May 24, 1993. Her initial work restrictions were to avoid lifting more than 15 pounds repetitively, avoid maintaining a single posture for long periods of time, and avoid repetitive bending, stooping and squatting. He advised her to continue on her medications of Reflan, Prozac and Soma.

According to Dr. Schoettle, when Mrs. Skelton returned to work she had many complaints of low back pain and had to lie down some at work but continued to work and make progress. Therefore, as of August 11, 1993, he assigned what he felt were permanent restrictions of occasional lifting up to twenty pounds, frequent lifting no more than fifteen pounds, no repetitive

bending, stooping or squatting, and no maintenance of a fixed posture for a lengthy period of time. He assessed "nine to ten percent anatomic impairment to the woman as a whole on a permanent basis" based on the 4th Edition of the *AMA Guidelines to the Evaluation of Permanent Impairment.*

Mrs. Skelton worked full-time within her restrictions at Robertshaw from August 11, 1993 until early March 1994, when she began to experience increased back pain, missed work and saw Dr. Schoettle on March 9, 11, 23 and April 20, 1994.[1]

Dr. Schoettle testified that he did not hear from Mrs. Skelton for about seven months, until she called his office in March 1994 stating that she was having terrible pain in her back and in her leg. She reported that she had always had some pain postoperatively but had been able to work until about one month before she called Schoettle, when she started having increased back pain "above and beyond what she had been used to." His examination revealed a positive straight leg raise test and a diminished ankle reflex, which indicated to him that the nerve root was either pinched or inflamed and there was a possibility of a recurrent ruptured disc.

MRI scan ruled out a recurrent ruptured disc but showed postoperative scarring. He prescribed physical therapy and epidural steroid blocks with the hopes of getting the nerve root irritation better.

When Mrs. Skelton reported back to Dr. Schoettle on April 20, 1994 and told him that the physical therapy did not decrease her back pain, his examination did not show much evidence of nerve root problems. His office notes for that date include the notation that "I put some very strict restrictions

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[1]Because Mrs. Skelton had already been assessed by Dr. Schoettle as having reached maximum medical improvement as of August 11, 1993, Robertshaw declined to provide temporary total disability benefits for her time off work in March and April to see Dr. Schoettle. Mrs. Skelton's awareness of this refusal soon came to play in a critical negotiation.

on light duty work that [I] will let her try to work with and also recommended she try to use her Chattanooga brace when she does work activities. I want to see her back again in a month and assess her progress, and at that time I think we likely would be at a point where we could make any change in permanent restrictions that might exist secondary to her exacerbation."

When deposed he testified that

> "What I did is, I filled out some work restrictions very similar to what we'd had before. Also at the request of the rehab nurse hired by the company and the workers' compensation carrier, I reviewed a video tape of some of the work activities that she would be doing, which primarily involved sitting and/or standing as was comfortable, and lifting little parts and putting them together and putting them back in. I reviewed that, and verbally and by letter, both the rehab nurse and I thought this would be okay work for her to do. I saw her back about a month later, and she indicated to me that when she went back to work after my restrictions in my letter that they would not let her work with those restrictions and had terminated her."

On Thursday, April 21, 1994, Mrs. Skelton returned to work and was told to go to the front office. There she met with employer and union representatives. The facts surrounding this meeting were highly contested at trial. Ms. Hiett for Robertshaw testified the company offered Mrs. Skelton work within her restrictions in the Transition Room,[2] which Mrs. Skelton refused, stating that "Travelers are not paying benefits now, and she did not want transition pay."[3] Hiett further testified that Skelton did not work on the day of the meeting, April 21, 1994, and never returned to work.

Mrs. Skelton testified that during the meeting she and the other attendees discussed her restrictions at length and then the others left her in the meeting room for two hours, after which the plant manager returned and took her to a

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[2]The Transition Room is not a regular work site. Workers receive $4.50 per hour and may have very light work or no work, but if they cannot progress to regular factory duty, they are terminated.

[3]The evidence, taken as a whole, indicates that Skelton was probably referring to the insurer's refusal to pay temporary total benefits for March and April. Apparently she thought that if she went to work in the Transition Room she would not get full pay and would soon be terminated.

job "setting bellows." She testified that she tried all day to do the job, which required that she sit at a table and manipulate small parts. However, sitting for long periods was quite painful and she tried to stand and do the job but was too tall (5'11") so she "ruined every part I did." She testified she worked at the job from 9:10 a.m. until lunch, took pain medication at lunch, returned to the work until 3:10 p.m., and then "had to leave" in tears, due to back pain, with 20 minutes remaining on the day's work shift. She told her supervisor that she had to leave, who replied, "OK hon, do you want me to drive you home?"

The last day of work for that week was Friday. Mrs. Skelton testified that on Friday, April 22, 1994 she called Jean Hiett to report that she could not work due to pain, but Ms. Hiett was not there, so she left a message. Copies of Ms. Hiett's telephone messages indicate conversations between Hiett and Skelton on April 25, 26 and 27, the focus of which was a joint effort to get pay for Skelton while she worked in the Transition Room and to obtain an updated or more specific report from Dr. Schoettle.

Mrs. Skelton testified she tried to contact Dr. Schoettle and that Ms. Hiett agreed to notify her if she were able to get in touch with the doctor. The employer's case manager, Ms. Debbie Fuson, wrote a letter to Dr. Schoettle on April 26, 1994 apparently asking for clarification about work restrictions. Dr. Shoettle replied by letter dated April 28, 1994 and faxed May 2, 1994:

> "In response to your letter of April 26, 1994, I have further reviewed my records on your client and my patient, Dianna Skelton. I feel that she is medically appropriate at this time to resume light duty work with the restrictions I have placed, and I base this upon my medical treatment, and upon the videotape and I have reviewed and her post operative radiographic studies.
>
> If she continues to feel that she is literally unable to work due to the pain, I would recommend an independent medical evaluation by another neurosurgeon such as Dr. Robert M. Weiss. . ."

The parties agree that there was no contact between Mrs. Skelton and her employer from April 27, 1994 until May 7, 1994, when Skelton received a termination letter dated May 5, 1994 from Robertshaw as follows:

> "We have, as you know, received a medical report from Dr. Timothy Schoettle, dated 4/20/94. This form outlines the temporary restrictions related to jobs you can perform at our plant.
>
> We have been able to accommodate these restrictions by either providing work in the factory or placing you in the Transition Room. Further, we have received information from Dr. Schoettle, dated April 28, 1994, reiterating that it is appropriate for you to resume light duty work within his temporary restrictions guidelines.
>
> Your last day worked was Thursday, April 21, 1994. Since you failed to report to work for the last ten (10) days, we must assume you voluntarily resigned as of your last day worked. Enclosed you will find your separation notice and COBRA letter."

Although the deposition of Dr. Schoettle was taken on September 26, 1994 and the record is silent about his later medical treatment, mileage records indicate Mrs. Skelton saw him eleven times after her termination from Robertshaw on May 5, 1994 and before trial on May 5, 1997.[4]

Mrs. Skelton testified that she worked two days in 1995 including ½ day with a salesman-trainer, trying to sell phone service, and 1½ days filling in for the secretary of the Gordonsville Planning Commission. She did not work in 1996. In February 1997 she began her own business of selling health food.

In October 1995, Mrs. Skelton's attorney referred her to Dr. Edward Tamberino, Ph.D., licensed clinical psychologist. Dr. Tamberino saw her eight times in 1995, approximately 35 times in 1996 and approximately three times a month for the first four months of 1997, up to the time of trial, at which he testified in person, over the objection of the employer that he was not competent to testify about causation or permanence of disability.

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[4]May 23, August 1, October 12 and December 5, 1994; April 26 and September 20, 1995; February 13, June 4 and December 3, 1996; January 8 and April 4, 1997.

Dr. Tamberino testified that he conducted various psychological tests, including the Minnesota Multiphasic Personality Inventory [MMPI], the Personality Adjustment Inventory [PAI], and a back pain test. He diagnosed post-traumatic stress disorder,[5] which he testified was recognized by the *AMA Guidelines* and the *Diagnostic and Statistical Manual IV* of the American Psychological Association, and opined that it was caused by her work-related back injury. He testified that she has significant depression, preoccupation with her body, concentration problems, significant sleeping problems and significant walking problems. He assessed 25 to 30 percent "cognitive impairment arising out of the [post-traumatic stress disorder] diagnosis that arises out of the physical problem." He testified that in making this assessment he used the 2nd and 4th Editions of the *AMA Guidelines to the Evaluation of Permanent Impairment.* He testified at length using the *AMA Guidelines* terminology and method of assessing permanent impairment but he was never asked, nor did he ever state, that he considered her condition to be permanent. In fact, he opined that, at the time of trial, she was improving.[6] [7]

In August 1996 the employer sent records of Dr. Tamberino's testing, diagnosis and treatment of Mrs. Skelton to Dr. Allen F. Bachrach, M.D., Ph.D., who is a board-certified psychiatrist and neurologist as well as a Tennessee-licensed clinical psychologist. Dr. Bachrach opined that there was no documentation in Dr. Tamberino's records to support the diagnosis of post-traumatic stress disorder.

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[5] A condition which he has diagnosed and treated in over 200 cases as a Veterans Hospital.

[6] Q: "Doesn't that mean if she's continuing to make progress that she might get better? A: Yes. Q: And continue to get better? A: Yes. That's why I gave that low of a disability rating."

[7] "Permanent impairment" as that term is used in the *AMA Guidelines* means "impairment that has become static or well-stabilized with or without medical treatment and *is not likely to remit despite medical treatment" [emphasis added].*

Dr. Bachrach then evaluated Mrs. Skelton in his office on December 10, 1996. His neurological testing and objective physical examination of Mrs. Skelton were normal, although she had pain complaints and moved carefully with regard to bending over. He felt Dr. Schoettle's assessment of nine to ten percent impairment to the body as a whole was reasonable and cited *AMA Guidelines*, 4th Edition, page 113, Table 75, section II-E. He opined she had a fairly good recovery, full motor strength, reflexes intact and no complaints of sensory loss.

Dr. Bachrach reviewed the psychological test results obtained by Dr. Tamberino, and found that there were no abnormalities indicated on the PAI.

On the MMPI, he found Dr. Tamberino's tests revealed hysteria, hypochondriasis, and, to a lesser extent, depression. He opined these three together indicate conversion and suggest that Mrs. Skelton "tends to pay more attention to her physical problems and physical complaints than is warranted by the organic pathology."

Dr. Bachrach opined that patients with post-traumatic stress disorder tend to be anxious, nervous, have flashbacks of a specific bad experience, have nightmares, and tend to avoid anything connected with those experiences. He questioned Mrs. Skelton and found that she did not have nightmares, flashbacks or any other symptoms of post-traumatic stress disorder. He reported that "[a]t this point I don't see any evidence that any additional impairment rating should be given for any psychiatric problems." Further, he opined that "This lady physically can do some things, but she is probably so attuned to her pain that there are probably jobs that she could do that she doesn't think she can do."

II

Robertshaw first argues that the trial court erred in admitting the testimony of Dr. Tamberino into evidence, in awarding discretionary costs for Dr. Tamberino's court appearance, and in awarding future psychological treatment, because the testimony of a psychologist is not sufficient to establish permanency or causation.[8]

Rule 702, Tennessee Rules of Evidence, provides:

> **Testimony by experts.** If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Numerous opinions of this Court have cited the testimony of clinical psychologists when a party alleges mental impairment. *See, Underwood v. Zurich Ins. Co.*, 854 S.W.2d 94 (Tenn. 1993); *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278 (Tenn. 1991); *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672 (Tenn. 1991); *Jaske v. Murray Ohio Mfg. Co.* 750 S.W.2d 150 (Tenn. 1988); *Wade v. Aetna Cas. & Sur. Co.*, 735 S.W.2d 215 (Tenn. 1987); *Gentry v. E.I. DuPont De Nemours & Co.*, 733 S.W.2d 71 (Tenn. 1987); *Riley v. Aetna Cas. & Sur. Co.*, 729 S.W.2d 81 (Tenn. 1987). The argument that the trial court erred in admitting the testimony of a clinical psychologist into evidence is without merit. However, while a clinical psychologist may have valuable testimony to offer, such testimony is not competent in a workers' compensation case on the issues of causation or permanence of medical impairment. *See, CIGNA Property & Casualty Ins. Co. v. Sneed*, 772 S.W.2d 422 (Tenn. 1989) ["The testimony of a clinical psychologist to whom appellant was referred by her attending osteopathic physician is not legally sufficient to support an award

[8]When the trial court asked Robertshaw why it had deposed Dr. Bachrach, also a clinical psychologist, if the testimony of such experts was inadmissible, the employer replied, "I would represent to the Court that Dr. Bachrach cannot offer a causal relationship opinion nor an opinion about permanency but [counsel for plaintiff] did it first and I knew what this doctor was going to say so I had to react to it. That's why."

of permanent partial disability"]; *Henley v. Roadway Express*, 699 S.W.2d 150 (Tenn. 1985) ["In *Freemon v. VF Corp., Kay Windsor Div.*, 675 S.W.2d 710 (Tenn. 1984), we expressly held that a psychologist was not a medical doctor and was not qualified to establish the permanence of an injury in a workers' compensation case."]

Robertshaw also argues that the trial court erred in awarding the cost of Dr. Tamberino's deposition because the evidence was inadmisible.

Tenn. R. Civ. P. 54.04 provides that "costs not included in the bill of costs prepared by the clerk are allowable only in the court's discretion. Discretionary costs allowable are: . . . reasonable and necessary expert witness fees for depositions or trials, . . ."

Since the trial court relied in part on the testimony of Dr. Tamberino, we conclude that his testimony was important to the court's decision. Therefore, he was a "necessary expert" within the meaning of Rule 54.04(2) and the award of discretionary costs is affirmed. *Ingram v. State Indus*. 943 S.W.2d 381 (Tenn. 1995); *Miles v. Marshall C. Voss Health Care Ctr.*, 896 S.W.2d 773 (Tenn. 1995).

The trial court authorized future psychological treatment by Dr. Tamberino, which Robertshaw appeals on the premise that since he is not competent to testify as to causation or permanence, there is no competent testimony to show the employee requires psychological treatment.[9] As we have shown, the fact that Dr. Tamberino cannot testify as to causation or permanence does not, *ipso facto*, mean that his testimony is otherwise irrelevant. The authorization of future psychological treatment is modified by

[9]Robertshaw argues that ". . . since Edward Tamberino's testimony should have been disallowed, and there is no competent medical testimony to establish a permanent work-related emotional or mental condition, the Defendants/Appellants respectfully submit that they should not be responsible for any future psychological treatment."

the requirement that, as a condition precedent to the liability of the employer for the payment of the reasonable expenses of such treatment, the employee must first obtain permission of the trial court upon proof of the necessity of the treatment and competent medical proof that the need for it is directly related to the accident of September 4, 1992.

III

Robertshaw next argues that the trial court erred in awarding permanent total disability benefits to Mrs. Skelton and that the award of permanent partial disability should be governed by the two and one-half times medical anatomical impairment rating ("multiplier cap") set forth in T.C.A. § 50-6-241(a)(1).

In order to receive permanent, total disability benefits, an employee must show that she is totally incapacitated from working at an occupation which brings such employee an income. T.C.A. § 50-6-207(4)(B). There is no dispute that Mrs. Skelton was working at the time of trial; she testified that she is self-employed, selling health products. Prior to going into business she had worked, albeit quite briefly, in a clerical position and selling phone service. All of the medical experts who testified opined that she could or should try to return to some type of gainful employment. Therefore, we find the trial court erred in awarding permanent, total disability benefits.

In making determinations about vocational disability, this court considers 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. TENN. CODE ANN. § 50-6-241(a)(1); *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986).

Dr. Shoettle testified that Mrs. Skelton retained ten percent permanent medical impairment to the body as a whole. She is 37 years old, has a high

school education and one year of college, and is currently taking college courses. Although her work experience is almost exclusively in factory labor, she has some experience in clerical and sales jobs and hopes to eventually obtain a college degree. Considering these factors, the evidence preponderates in favor of an award of permanent partial disability substantially less than one hundred percent.

If Robertshaw offered Mrs. Skelton a meaningful return to work, she can recover at most 25 percent permanent partial disability, by application of T.C.A. § 50-6-241(a)(1) [multiplier cap]. However, if the she attempted to return to work but was unable to do so owing to her disability, she can recover at most 60 percent, T.C.A. § 50-6-241(a)(1).

As stated, the evidence about the last day Mrs. Skelton worked was highly contested. The trial court accredited the testimony of Mrs. Skelton and discredited the testimony of Jean Hiett, the employer's human resources representative. Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

We find the evidence preponderates in favor of a finding that Mrs. Skelton tried to return to work but did not make a meaningful return to work and that she is entitled to 60 percent permanent partial vocational disability.

The judgment of the trial court is modified to award sixty percent permanent partial disability to the employee and to require prior approval and order of the trial court if Mrs. Skelton wishes to obtain future psychological

care by Dr. Tamberino. As modified, the judgment is affirmed, with costs assessed evenly to appellant and appellee.

_____
William H. Inman, Senior Judge

CONCUR:

_____
Frank F. Drowota, III, Justice

_____
Joe C. Loser, Jr., Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

DIANNA SKELTON	}	*SMITH CRIMINAL*
	}	*No. Below 93-145*
Plaintiff/Appellee	}	
	}	*Hon. J.O. BOND*
vs.	}	*Judge*
	}	
	}	*No. 01S01-9710-CC-00229*
ROBERT SHAW CONTROLS CO. And TRAVELERS INSURANCE COMPANY	}	
	}	
	}	
	}	
Defendants/Appellants	}	*MODIFIED AND AFFIRMED*

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 Plaintiff/Appellee and Defendants/Appellants for which execution may issue if necessary.

IT IS SO ORDERED on October 26, 1998.

PER CURIAM