

**IN THE SUPREME OF TENNESSEE**

**AT NASHVILLE**

**FILED**  
November 19, 1999  
Cecil Crowson, Jr.  
Appellate Court Clerk

MARRIOTT INTERNATIONAL, ~~INC~~ DAVIDSON  
CIRCUIT

2529

} No. Below 97C-

Plaintiff/Appellant

vs.

} Hon. Mary Ashley Nichols

}

}

}

No. M1998-00242-WC-R3-CV

LYNN SALTER

}

}

Defendant/Appellee

}

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 by appellant, Marriott International, Inc., for which execution may issue if necessary.*

*IT IS SO ORDERED on November 19, 1999.*

**PER CURIAM**



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. In this appeal, the employer/appellant, Marriott International, Inc. ("Marriott"), contends that (1) the trial judge was not duly elected and, therefore, the trial was in violation of the state constitution; (2) permanent partial disability should not be awarded to Lynn Salter, employee/appellee ("Salter"); and (3) temporary total disability payments should be returned to Marriott. Therefore, the employer requests that this panel reverse the judgment of the trial court and remand for further proceedings. As discussed below, the panel affirms the judgment of the trial court.

Lynn Salter is 42 years old and is a high school graduate. She is a certified office assistant but has worked as a waitress most of her life. Salter was injured on May, 14 1996, while setting up a buffet for her employer, Marriott. As Salter was lifting a case of pastries off a cart in order to place the pastries on the buffet, the pastries started to fall. Salter tried to set the pastries back onto the cart. When she did, the cart rolled, Salter lost her balance and fell to the marble floor injuring her lower back.

Salter was taken to the Baptist Hospital emergency room by her daughter. At the emergency room, Salter was diagnosed with a lumbar strain with spasm. Six days later, Salter went to see the orthopedic surgeon of Marriott's choosing. This physician, Dr. Jack Miller, observed a palpable back spasm that was both "objective" and could not be "feigned" by a patient. Salter continued treatment with Dr. Miller. She was treated by him fourteen times over a fourteen-month period.

Salter had a previous back injury in 1991 that required her to seek medical treatment. This injury was treated conservatively, and she was able to return to her waitress job in about a year. Salter was given no impairment

rating in 1991. She did undergo an MRI scan for her 1991 injury which was compared to an MRI from the 1996 injury by a radiologist, Dr. Mark Freeman. The 1996 MRI showed some changes to Salter's spine that were not present in the 1991 MRI. Dr. Miller used the 1996 MRI as well as the information he gathered from physical examination to diagnose and to treat Ms. Salter.

On July 28, 1997, Dr. Miller assessed Salter as having a permanent impairment of 10 percent to the body as a whole. Also, Dr. Miller placed permanent restrictions on Salter as a result of her injury of May 14, 1996. Those restrictions were: ten pounds maximum lifting, and no repetitive stooping or bending or picking anything up off the floor repetitively .

Salter was not able to return to her waitress job at Marriott, and Marriott was not able to find her another position within her restrictions. Marriott paid temporary total disability payments and full medical benefits of \$253.05 weekly to Salter during the time she was temporarily totally disabled. Salter tried to run a catering business out of her home which lost a substantial amount of money and eventually failed. During the time she was engaged in the catering business, Salter stayed within the permanent restrictions set by Dr. Miller. After reaching maximum medical improvement, Salter took a job with a credit collection agency doing clerical work.

The trial court awarded Salter 35% permanent partial disability as well as future medical expenses for this injury. In making the award, the judge relied exclusively on Dr. Miller's assessment of Salter.

Appellate 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. § 50-6-225(e)(2) (1991 & Supp. 1998). This appellate court must conduct an independent examination of the record to determine where the preponderance of the evidence lies. Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487

(Tenn. 1997).

Marriott argues that the judge who heard this case was not a duly elected judge and the trial was in violation of the state constitution. Marriott objected to this judge at trial and did not sign a consent form pursuant to Tenn. Code Ann. § 17-2-118(e). At oral argument an order was entered by stipulation of the parties which provided that Mar Ashley Nichols, the acting judge in the case was appointed pursuant to the controlling provisions of Tenn. Code Ann. § 17-2-188(f)(2). Judge Nichols was appropriately appointed pursuant to the statute and was legally sitting. The controlling portions of that statute are:

- (f) The provisions of subsections (a)-(e) shall not apply where a judge finds it necessary to be absent from holding court, and appoints a substitute judge:
- (2) A full-time officer of the judicial system under the judge's supervision whose duty it is to perform judicial functions...

In this case, Judge Nichols was the Special Master for the Circuit Courts in Davidson County; therefore, she was “a full-time officer...” who became a substitute judge in accordance with Tenn. Code Ann. § 17-2-118(f)(2). Here the parties were not required to consent. Here the restrictions set forth in Tenn. Code Ann. § 17-2-118(f) were met and sections (a)-(e) did not apply.

Next, Marriot argues that the trial court should have accepted the diagnosis of Dr. Freeman, a radiologist who never treated Salter, instead of Dr. Miller, the treating physician of Marriott's choosing. Based on a comparison of two MRIs taken before and after the injury, Dr. Freeman testified that he was unable to tell if there were any anatomical change in Salter's back that could have been caused by the fall on May 14, 1996. In contrast, Dr. Miller testified that his diagnosis was determined by tests and procedures as well as by a comparison of the two MRIs.

In his testimony by deposition, Dr. Miller testified that Salter displayed objective symptoms of a back injury six days after the fall. The symptoms were in the form of palpable back spasms that, in the words of Dr. Miller,

could not be “feigned” by a patient. While Marriott makes several arguments that the trial court should have used Dr. Freeman’s diagnosis instead of Dr. Miller’s, we are not persuaded that the preponderance of the evidence weighs in Marriott’s favor.

Where the issues involve expert medical testimony and all the medical proof is contained in the record by deposition, as it is in this case, then this Court may draw its own conclusions about the weight and credibility of that testimony, since we are in the same position as the trial judge. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). From a careful review of the record and consideration of the circumstances of this case, we find no error by the trial judge in accepting the opinions of Dr. Miller.

Finally, we turn to the issue of whether the temporary total disability payments that Marriott made to Salter should be returned. Marriott argues that Salter made a return to work while she was still receiving temporary total disability payments and those payments should be reimbursed to Marriott.

The facts are undisputed that Salter did attempt to run a catering and cake decorating business while she was still receiving temporary total disability payments. Salter stayed within the physical restrictions set for her by her treating physician. Over the fourteen-month temporary total disability period, Salter was only able to bake cakes and make gift baskets for Marriott and her church on a sporadic basis. Furthermore, the business lost a substantial amount of money during this period.

The law in Tennessee has long been settled that the temporary total disability period is the healing period during which the employee is totally prevented from working. Gluck Bros., Inc. v. Coffey, 431 S.W.2d 756, 759 (Tenn. 1968). Furthermore, temporary total disability benefits are determined either by the ability to return to work or the attainment of maximum recovery. Simpson v. Satterfield, 564 S.W.2d 953, 955 (Tenn. 1978). These principles have been reiterated by the Tennessee Supreme Court as recently as 1992. See Thompson v. Leon Russell Enterprises, 834 S.W.2d 927, 929-30 (Tenn.

1992).

The issue in this case is whether Salter returned to meaningful employment during the temporary total disability period. We believe that she did not. Salter was able to perform sporadic functions to bake cakes or teach cake decorating. However, this sporadic activity does not rise to the level of a meaningful return to work. Marriott cites several instances where Salter prepared a cake or cupcakes for Marriott functions during the period of temporary total disability. However, over a fourteen-month period occasional cake baking does not constitute a meaningful return to work. Salter was totally unable to work as a waitress. Consequently, we find that Salter was totally unable to return to meaningful employment during the temporary total disability period nor had she attained maximum medical improvement. Therefore, the trial court correctly awarded temporary total disability payments.

Accordingly, the judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Marriott.

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Samuel L. Lewis, Special Judge

**CONCUR:**

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Frank F. Drowota, III, Associate Justice  
Supreme Court

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Frank Clement, Jr., Special Judge

**IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
(July 15, 1999 Session)**

Marriott International, Inc.,	)	Davidson Circuit
	)	M1998-00242-WC-R3-CV
Plaintiff/Counter-	)	
Defendant/Appellant,	)	
	)	
v.	)	Mary Ashley Nichols,
	)	Judge
<hr/>		
e	)	
LYNN SALTER	)	
	)	
Defendant/ Counter-	)	
Plaintiff/Appellee,	)	

**FILED**

**November 19, 1999**

**Cecil Crowson, Jr.**  
Appellate Court Clerk

**For Appellant:**  
Jane Stahl  
Shumacker & Thompson  
Chattanooga, Tennessee

**For Appellee:**  
Sarah Stein  
Nashville, Tennessee

**MEMORANDUM OPINION**

Mailed:

**Members of the Panel:**

Frank F Drowota, III, Associate Justice, Supreme Court  
Frank Clement, Jr., Special Judge.  
Samuel L. Lewis, Special Judge.

AFFIRMED

Samuel L. Lewis, Special Judge

**MEMORANDUM OPINION**

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Workers' Compensation Appeals Panel of the Supreme Court in accordance



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