

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

**DIANNA GAIL THOMPSON V. TRAVELERS INDEMNITY CO., CHARTER
OAKFIRE INSURANCE CO., AND TOSHIBA AMERICAN CONSUMER
PRODUCTS, INC.**

**Direct Appeal from the Criminal Court for Wilson County
No. 01-101WC, Hon. J. O. Bond, Circuit Judge**

**No. M2004-01913-WC-R3-CV - Mailed: August 19, 2005
Filed - September 20, 2005**

This case is before the court upon the entire record including the Order of Referral to the Special Workers' Compensation Panel, in compliance with Tenn. Code Ann. § 50-6-225(e)(3) for a hearing and reporting of findings of fact and conclusions of law. Dianna Gail Thompson suffered a work-related injury to her back and neck as a result of her attempt to move a wooden pallet during the course and scope of her employment as a relief operator. Ms. Thompson promptly reported her injury to her supervisor and sought medical care. The treating physician concluded that Ms. Thompson had a strained back and found no permanent impairment. Ms. Thompson thereafter sought other physicians who treated her condition. Thereafter a doctor performing an independent medical evaluation, assigned a 5% impairment to the body as a whole for her back injury. The trial court, in determining whether the employee's injury was permanent, considered this conflicting medical testimony and after evaluating that medical testimony, awarded Ms. Thompson a 12.5% permanent impairment to the body as a whole and the benefits associated therewith. The employer in this appeal contends that the trial court erred in accrediting the independent medical evaluation over that of the treating physician's evaluation of Ms. Thompson's injury. The employer also contends that the trial court erred when it ordered the employer to pay 6.4 weeks of temporary total disability based on records submitted after the proof had closed. Therefore, this appeal is limited to whether the trial court's award of permanent partial disability benefits was excessive and whether the award of 6.4 weeks of temporary total disability benefits was based on sufficient proof. After carefully considering the record, we affirm the trial court's determination of 12.5% permanent partial disability and reverse the trial court's award of 6.4 weeks of temporary total disability benefits, finding that the trial court impermissibly reopened proof and accepted inadequate evidence for a finding of temporary total disability award. We, therefore, affirm in part and reverse in part the trial court's determination.

**Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right; Judgment of the Circuit Court
Affirmed in Part and Reversed in Part.**

J. S. (Steve) Daniel, SR. J. delivered the opinion of the court, in which Frank Drowota, C.J., and John A. Turnbull, SP. J., joined.

Terry L. Hill, Manier & Herod, Nashville, TN, for the appellant, Toshiba American Consumer Products, Inc.

William Joseph Butler and Frank D. Farrar, Farrar, Holliman & Butler, Lafayette, TN, for the appellee, Dianna Gail Thompson

OPINION

I. Facts and Procedural History

Mrs. Dianna Gail Thompson has worked for Toshiba American Consumer Products, Inc. (“Toshiba”), for 16 years prior to the industrial accident which is the subject of this appeal. In her employment she has held various jobs including material handler and PC operator. After this on-the-job injury, Ms. Thompson has been retained as an employee by Toshiba and was returned to work as a relief operator at the same or a greater wage as before her injury. At the time of the trial she was 36 years of age, a high school graduate with no additional formal education or vocational training.

On April 30, 2003, Ms. Thompson was moving skids (wood pallets) as a relief operator when she experienced a pop in her lower back. After the injury she continued to feel pain which started in her lower back and traveled through her right leg to her big toe. As a result of this injury, Ms. Thompson had difficulty in lifting, bending and sitting for extended periods of time. Daily activities including gardening, mowing the grass, sweeping, making beds, vacuuming, taking down curtains, washing clothes, and carrying the clothes hamper resulted in low back and right leg pain. Ms. Thompson’s testimony in this regard was substantiated by the testimony of her companion, Mr. Eric Montgomery.

Ms. Thompson promptly reported her injury to her supervisor and Toshiba authorized Ms. Thompson to receive treatment from Dr. Scott Baker who diagnosed her with a lumbosacral strain. Dr. Baker authorized Ms. Thompson to be off from work for one week then released her back to her employment. Unsatisfied with his care, Ms. Thompson sought the treatment of Dr. Stephen Neely without the approval of Toshiba. When Toshiba refused to pay for Dr. Neely’s care, Ms. Thompson requested that Dr. Baker refer her to Dr. Roy Terry, which was done.

Dr. Terry reviewed an MRI, EMG, and bone scan and found a disk dessication but “no abnormality.” Dr. Terry was of the opinion that there were no positive objective findings to substantiate any problems in Ms. Thompson’s lower back.¹ Dr. Terry, in his evaluation and treatment, never provided any medication or prescribed any physical therapy for Ms. Thompson.

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“Q. Based upon your review of her MRI studies, EMG, your review of all the prior records and your evaluation of this patient on physical and clinical exam, do you have an opinion as to whether there were any positive, objective findings to substantiate any problem in her low back?

A. I think, solely from an objective standpoint, the answer to that would be no.

Q. You say in your note that she had no tenderness, that’s on page two of your September 9 note. You have seen here today a report from Dr. Wheelhouse that indicates that there was tenderness. How is tenderness measured?

Ms. Thompson sought an independent medical evaluation from Dr. Walter Wheelhouse. Dr. Wheelhouse performed an additional physical examination and found a reduction in each of the range of motion measurements. Dr. Wheelhouse diagnosed an L5-S1 disk protrusion and radiculopathy in the right leg and assigned Ms. Thompson a partial permanent impairment rating of 5% to the body as a whole. He imposed restrictions on her work activities to avoid “lifting over 25 pounds maximum occasionally and avoid repetitive bending, stooping, lifting, twisting, turning or reaching overhead.” In addition, Dr. Wheelhouse prescribed pain relievers and recommended home exercises.

At the trial of this case, these two conflicting medial depositions of Drs. Terry and Wheelhouse were submitted as the only medical proof. The trial court accredited the independent medical evaluation testimony of Dr. Wheelhouse and also accredited the veracity of Ms. Thompson and her witnesses as to her injury and awarded Ms. Thompson permanent partial disability benefits of 12.5% to the body as a whole.²

At the close of the proof and over the defendant’s objection, Ms. Thompson’s attorney submitted attendance records which he had obtained from Toshiba during discovery. This document showed dates which she was absent from work and the reasons for the absences included “doctor,” “WC,” “personal business” and “vacation day.” Without any further explanation or proof as to the source of the document and without notice to the defendant or an opportunity to cross-examine the author of these records, the trial court accredited this document as a basis for awarding 6.4 weeks of temporary total disability benefits associated with this work-related injury.

Toshiba has sought appellate review of the trial court’s decision. The two issues raised for our consideration are (1) whether the trial court’s award of permanent partial disability benefits was excessive and (2) whether the trial court erred when it ordered the employer to pay the employee 6.4 weeks of temporary total disability benefits based on the status of the proof.

II. Standard of Review

A. By patient response. You push on somebody or push in a certain place and the patient says, I feel bad or I don’t feel bad or this hurts or this doesn’t hurt.

Q. Was there ever any evidence of any neurologic changes on any of the tests that were done?

A. No, sir.

Q. Based upon your review of the records, and your evaluation of her, along with a review of the test results, were you able to form an opinion, based upon a reasonable medical certainty as to whether or not she would have an permanent physical impairment, based upon the Fifth Edition of the A.M.A. Guideline, and if so, what is that opinion?

A. I did not believe she would have any permanent impairment, based upon the Fifth Edition of the A.M.A. Guidelines to Permanent Impairment, as I did not feel she had any objective findings to explain her condition.

Q. Did you put any restrictions on her, as far as her low back was concerned?

A. No, sir.”

² This represents the maximum award possible for the claim because of her return to employment at Toshiba in a position at the same or greater pay. Her disability claim is capped by statute at 2 _ times the multiplier of the anatomical disability. Tenn. Code Ann. § 50-6-241(a)(1).

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). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. The standard governing appellate review of the findings of fact of a trial judge requires this panel to examine in depth the trial court's factual findings and conclusions. GAF Building Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001). Conclusions of law are subject to a de novo review on appeal without any presumptions of correctness. Niziol v. Lockheed Martin Energy Systems, Inc., 8 S.W.3d 622, 624 (Tenn. 1999). When medical testimony is presented by deposition, this court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000).

III. Analysis Permanent Partial Disability Benefits

The employer appeals the judgment of the trial court on the grounds that the evidence does not support the percentage of disability awarded and requests that this court reduce and amend the judgment of the trial court accordingly. The employer contends that the evidence preponderates against an award of permanent partial disability because of two fundamental facts which demonstrate that the employee's injury was not of permanent nature: (1) the treating physician found a 0% disability rating and (2) the employee returned to the same position she worked in before her injury.

First, Toshiba contends that the trial court erred by accepting Dr. Wheelhouse's determination of 5% medical impairment instead of Dr. Terry's 0% determination. Toshiba's assertion is grounded on deposition testimonies in which both Drs. Terry and Wheelhouse agree that there is no objective proof of Ms. Thompson's work-related radiculopathy.

It is well settled that an employee who has suffered "an injury by accident arising out of and in the course of employment which causes either disablement or death" is eligible for benefits under the Workers' Compensation Act. Tenn. Code Ann. § 50-6-102(a)(5). Permanent partial disability benefits may be awarded to an injured employee who has suffered a disability partial in character but adjudged to be permanent. Tenn. Code Ann. § 50-6-207(3)(A).

In workers' compensation claims, the employee has the burden of proving every element of her case by a preponderance of the evidence. Tindall v. Waring Park Association, 725 S.W.2d 935, 937 (Tenn. 1987). To recover permanent partial disability benefits, an injured employee must establish permanency and causation by medical testimony, though the extent of the disability may be determined from lay testimony as well. Bailey v. Knox County, 732 S.W.2d 597, 597 (Tenn. 1987). Many pertinent factors are considered in determining what may constitute a permanent partial disability, including the skills, education and training of the employee as well as job opportunities and other factors bearing upon employability. Id.

It is an established rule that in evaluating the medical evidence in a case, the trial judge may accept the opinion of one medical expert over another medical expert. Kellerman v. Food

Lion, Inc., 929 S.W.2d 333, 335 (Tenn. 1996); Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990). Moreover, the fact that one of the medical experts is the treating physician while the other is the employee's expert witness is merely a single factor that may be considered by the court in accepting one opinion over the other. Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992).

In this case, the trial judge received testimony from medical experts by deposition and used that testimony to render his decision. When the medical testimony appears by deposition, our panel is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies, since we are in the same position as the trial judge. Cooper v. INA, 884 S.W.2d 446, 451 (Tenn. 1994).

Although application of the above rule allows us to reevaluate the experts' testimonies, we do not find any reason in this case to believe that the trial court's findings should be disturbed. Considering the overall integrity of the employee, the trial judge believed 5% to be the correct anatomical disability and accredited Dr. Wheelhouse's testimony.³

Next, Toshiba challenges the trial court's award of permanent partial disability benefits by arguing that Ms. Thompson's return to work demonstrates that her vocational disability is nominal. Ms. Thompson continues in her former position and earns the same wages as she did before her injury. The standard for measuring vocational disability is not "whether the employee can return to her former job but whether she has suffered a decrease in her ability to earn a living." Walker v. Saturn Corp., 986 S.W.2d 204, 208 (Tenn. 1998). This court has held that the claimant's own assessment of her situation may provide evidence of her decrease in ability to earn a living. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975); Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn. 1972). Ms. Thompson testified that both her back and leg pain have limited her ability to perform her job, and her boyfriend provided corroborating testimony. We concluded that although this is a generous award, that the evidence does not preponderate against the trial judge's finding, and we affirm the judgment of 12.5% partial permanent disability benefits.

IV. Temporary Total Disability Benefits

Toshiba appeals the trial court's award of 6.4 weeks of temporary total disability, arguing that Ms. Thompson did not meet her burden of proof. Toshiba argues the trial judge erred in reopening the proof after the plaintiff had rested, to allow proof that Ms. Thompson's absences from work equated to a total time of 6.4 weeks.

Temporary total disability benefits may be awarded to an employee disabled by his injury for the period that he is unable to work until he recovers as far as the nature of his injury permits. Redmond v. McMinn County, 209 Tenn. 463, 468 (Tenn. 1961). The purpose of such benefits is to allow for "the healing period during which the employee is totally prevented from working."

³ In his ruling, the trial judge described his rationale for accepting Dr. Wheelhouse 5% determination instead of Dr. Terry's 0% determination. "The Court's not so ignorant on these things. I know they take [their doctors] out to dinner and they wine and dine them....You have to pick people you think will testify favorably to you....I've seen [the physicians' depositions and] I believe the five percent is correct..., when you take [her testimony] into consideration."

Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 776 (Tenn., 2000) (quoting Gluck Bros., Inc. v. Coffey, 222 Tenn. 6, 13-14, 431 S.W.2d 756, 759 (1968)).

In order to establish the “prima facie case of entitlement to temporary total disability, [the] employee must prove that he [or she] was (1) totally disabled to work by a compensable injury; (2) that there was a causal connection between the injury and his inability to work; and (3) the duration of that period of disability.” Id. (quoting Simpson v. Satterfield, 564 S.W.2d 953, 955 (Tenn. 1978)). In this case there is no properly introduced evidence to meet this standard.

Generally, permitting additional proof after a party’s counsel has announced that proof is closed is within the discretion of the trial court, and that exercise of discretion will not be disturbed on appeal unless it appears that an injustice has resulted. Simpson v. Frontier Community Credit Union, 810 S.W.2d 147, 149 (Tenn.1991); Higgins v. Steide, 335 S.W.2d 533, 536 (Tenn. App.1959). However, the trial court’s reopening and accepting as proof of the duration of a period of temporary total disability a written document that simply states the dates of work that Ms. Thompson missed, with vague entries for her absences, created an injustice to Toshiba. This procedure denied Toshiba the right to confront the claim of the petitioner as to the work-related nature of the absence. The trial court granted a temporary disability award to Ms. Thompson for a portion of dates marked for non-injury related reasons, including “family sickness,” without allowing Toshiba any chance to rebut.⁴ Further, this admission of the evidence was not a harmless error, but rather had a direct effect on the trial’s outcome; without the records, the prima facie case for total disability could not have been made.

A trial court decision which is against logic or reasoning that causes an injustice to the complaining party constitutes an abuse of discretion. However, the abuse of discretion standard does not permit the appellate court to (1) substitute its judgment for that of the trial court, or (2) set aside a decision unless it appears a different result would have ultimately been reached. State v. Shirley, 6 S.W.3d 243, 247 (Tenn.1999); Higgins v. Steide, 335 S.W.2d 533, 551 (Tenn. Ct. App. 1959) (finding that a reviewing court should not reverse a harmless error). In Higgins, it was an abuse of discretion to reopen proof to permit the plaintiff to call a witness whom the plaintiff could have located and had present during the trial; but the reviewing court, being doubtful that such error had affected the verdict of the jury, would not reverse the judgment for the plaintiff. Higgins, 335 S.W.2d at 551 (Tenn. Ct. App. 1959).

We find that the trial court committed reversible error by awarding temporary total disability benefits when the court reopened proof and accepted the attendance record of Ms. Thompson without further proof that her absences were related to her work injury. We find that this procedure was an abuse of the trial court’s discretion.⁵

⁴ The attendance records show the dates the employee was absent from work and the reasons for the absences. Although most dates included in the 6.4 weeks maintain “WC” or “doctor,” a few state “family sickness.”

⁵ On their face, the attendance records appear to be inadmissible hearsay. If Ms. Thompson attempted to make the records admissible pursuant to the “records of regularly conducted activity” exception to the hearsay rule by establishing a proper predicate for their admission through witness testimony, Toshiba would have had at least the chance to rebut, by cross-examination. Tenn. R. Evid. 803(6).

Trial judges are given discretion in order to direct the course of trial and ascertain truth, but their discretion must be consistent with the administration of justice.

After careful review of the record, this panel affirms the trial court's award of 12.5 % permanent partial disability benefits and reverses the 6.4 weeks award of total temporary disability. Costs of the appeal are assessed to the appellant, Toshiba America Consumer Products, Inc.

J. S. DANIEL, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
JUNE 10, 2005 SESSION

**DIANNA GAIL THOMPSON v. TRAVELERS INDEMNITY CO., CHARTER
OAKFIRE INSURANCE COMPANY, TOSHIBA AMERICAN CONSUMER
PRODUCTS, INC.**

**Circuit Court for Wilson County
No. 03-0936**

No. M2004-01913-WC-R3-CV - Filed - September 20, 2005

JUDGMENT

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 appeals 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 the Appellant, Toshiba America Consumer Products, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM