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

JACQUELINE LINDBLOOM,	)	
	)	
Plaintiff/Appellee,	)	HAMILTON CHANCERY
	)	
v.	)	NO. 03S01-9810-CH-00115
	)	
METRO 8 SHEET METAL, INC.,	)	HON. W. FRANK BROWN, III
	)	CHANCELLOR
Defendant/Appellant.	)	
	)	

FILED
February 28, 2000
Cecil Crowson, Jr.
Appellate Court
Clerk

For the Appellant:

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For the Appellee:

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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
Special Judge Robert E. Corlew, III
Special Judge Robert Vann Owens

AFFIRMED AS MODIFIED — CORLEW, Special Judge

This worker's compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with the provisions of *Tennessee Code Annotated §*50-6-225 (e) (3) (1998 Supp.) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The Appellant raises two issues for consideration by the Court: 1) whether the Trial Court's award of permanent partial disability payments of forty percent to the leg is supported by the facts and the evidence, and

2) whether an award for temporary partial disability benefits is justified by the evidence. After consideration of all of the evidence and the applicable law, we find that the judgment of the Trial Court should be modified with respect to both issues, and otherwise affirmed and remanded.

The Appellee in his brief asks the Court to further consider whether the period of temporary partial disability awarded by the Trial Court should actually be extended. No notice of appeal of this issue, however, was filed by the Appellee, and this issue was not otherwise addressed except in response to the brief of the Appellant. We are not in a position to consider this issue. *Tennessee Rules of Civil Procedure*, Rule 13 (b). Our decision however, were this issue to be properly raised, would cause us to deny the further relief sought.

The facts show that the Appellee was employed by the Appellant, in marketing and outside sales in the Chattanooga, Tennessee area. The Appellee was the only Tennessee employee of the Appellant which conducted its primary operations in North Carolina. The Appellee maintained an office in her home, and also used her car not only in traveling to see prospective clients, but also in transporting clients to meals or snacks during sales calls. On or about April 10, 1997, the Appellee testified that she worked in her office during the morning hours, then prepared to go to the business of a client, Dupont, for the purpose of securing written promotional copy. Although she had no specific appointment, she intended to arrive at the client's place of business at approximately 2:30 p.m., and felt that she might be called upon to utilize her car to transport the clients to a nearby restaurant for coffee. The Appellee testified that she first began driving her vehicle in the direction of the business of the client, stopping en route at a liquor store to obtain a bottle of wine for her own personal use during the upcoming weekend, then went to a nearby carwash, in order to clean her car, but found either that the carwash was closed or that service could not be obtained promptly, and then returned to the property of the apartment complex where she resided. Instead of going to her apartment, the Appellee went to the trash receptacle, or dumpster on the property, for the purpose of cleaning the inside of her vehicle. As she stepped away from the dumpster, her foot slipped on a piece of glass. She fell, and severely fractured her ankle, requiring surgery. The Appellee remained off duty for a period of time, was released to return to work, and subsequently was incapacitated some few months later for a period of two weeks when further surgery was performed to remove a plate and screws which had been inserted in her ankle to aid in the healing process. Her doctor testified that the Appellee has full range of motion, and is able to do all activities, with pain being the only limiting factor. He specifically stated that the Appellee can walk for a long distance so long as it does not

hurt her and that if she were able to run before the accident she should be able to run after the accident. Her only limitation further was as to "full squatting." Some pain, discomfort, and swelling were the symptoms which the Appellee reported to her doctor.

The Appellee is fifty-four years of age. She completed high school, although she did not pursue collegiate work. She has worked extensively in the area of public relations for a bank in New York state and a Chamber of Commerce in New Hampshire, before moving to Chattanooga. She worked in sales for a magazine, a newspaper, and another business publication. She also worked as a secretary. She testified that she has the ability to establish her own firm, and had in fact done so as a sole proprietor.

The question as to whether the Appellee's injury arose out of the course and scope of her employment is not before the Court, that issue not being raised on appeal. The Trial Court found the injury to be compensable, and we concur, although the facts in this cause could leave some doubt as to the issue of compensability of this injury. The evidence shows that the Appellee was injured when she fell while cleaning out her car. We feel the injury is compensable only because the Appellee had worked during the morning in her office, and had paused during the afternoon to clean her vehicle for the specific purpose of traveling to the business place of a client with the probability of transporting the client to a restaurant for purposes of discussing business proposals during a meal or snack. The evidence shows that the Appellee routinely used her vehicle for transporting clients, and, the event having occurred during the day rather than prior to the commencement of her regular workday or after its conclusion, the purpose for the action being to benefit the employer. An injury is said to arise out of employment where there is a rational, causal connection to the work. *Williams v. Tecumseh Products Company,* 978 S.W.2d 932, 935 (Tenn. 1998). Thus, as the Trial Court found, this is a compensable injury.

We have considered the percentage of vocational disability which should appropriately be awarded to the Appellee. First, we have considered the testimony as to the anatomical impairment rating. The treating physician determined that the Appellee had sustained ten percent anatomical impairment. He stated that he utilized the *American Medical Association Guides to Impairment* in reaching his decision, testifying as follows:

> I used the guidelines. [T]he ten percent anatomical impairment rating] is not completely based on the *AMA Guidelines*. But as the book itself says, it is only a guideline. It is not a Bible of the impairment. In other words, some of the situations are not there to follow. You have to use your experience and then the literature of the other activities.
>
> ... And then there is no definite guidelines [sic] for her situation, what it is. That is the reason I did not in my notes put any pages of the graph or - what do you call - table or anything like that. There is no definite guidelines for her situation in that book.
>
> ... This is only guidelines, as the book indicates. And sometimes you might

> have to use - go outside the book with your experience and the literature and the other things to give some impairment for particular people. And this person has got a significant pain and still has got some swelling, and that is the reason why I give ten percent medical impairment.
>
> ... There is no guidelines [sic] available in that book for her condition. There's nothing there available there in that book.

Deposition testimony of Channappa Chandra, M.D., at pages 10, 16, and 17. Although Dr. Chandra testified that he used the *Guides*, respectfully the evidence clearly shows he did not. Doctors certainly are not required to parrot the wording of the *Guides*. Clearly, the *Guides* are meant to be guides, but doctors should utilize their own skill, experience, and training in formulating opinions as to anatomical impairments. To be admissible under the statutes, however, an opinion as to anatomical impairment based on the *Guides* should be one where the doctor is able to cite some reference within the *Guides*. Here, Dr. Chandra acknowledged that he found no reference within the *Guides* to support an anatomical rating for the Appellee. Although he makes specific reference to the *AMA Guides*, his testimony shows that he did not follow those guides in making his determination as to an anatomical impairment rating. The provisions of *Tennessee Code Annotated §*50-6-204 (d) (3) (1998 Supp.) are very restrictive, requiring that in order to testify as to an anatomical impairment rating, a doctor must use either the *AMA Guides* or the *Manual for Orthopedic Surgeons. Id.*

In whole body impairment ratings, Tennessee law requires an anatomical impairment rating to be

> determined pursuant to the provisions of the *American Medical Association Guides to the Evaluation of Permanent Impairment* (American Medical Association), the *Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment* (American Academy of Orthopedic Surgeons) or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community.

*Tennessee Code Annotated §*50-6-241 (1998 Supp.) This standard is slightly less restrictive than that set forth in *Tennessee Code Annotated §*50-6-204 (d) (3) (1998 Supp.). The injury suffered by the Appellee was limited to her leg, a scheduled member, for which injury the provisions of *Tennessee Code Annotated §*50-6-241 (1998 Supp.) are inapplicable. Nonetheless, we see no basis for the adoption of a different standard for the establishment of an anatomical impairment rating apportioned to the body as a whole rather than to a scheduled member. Had the medical expert been in a position to testify that although his rating was not based on the *AMA Guides*, he used some other appropriate method which was generally accepted in the medical community in order to formulate his opinion as to the percentage of anatomical impairment, under *Tennessee Code Annotated §*50-6-241 (1998 Supp.), his rating would have been acceptable. His testimony does not reflect that he was

able so to testify. Nonetheless, the testimony of the doctor, which is unrefuted, clearly demonstrates his opinion that the Appellee suffered a permanent injury. Although he established no specific work restriction, he established limitation due to pain.

Thus we find that there is no competent proof of an anatomical impairment. Our Supreme Court has previously held, however, that vocational disability may be established where no anatomical impairment rating was provided when permanent restrictions are established. *Walker v. Saturn Corporation*, 986 S.W.2d 204, 207 (Tenn. 1998); *Hill v. Royal Insurance Company*, 937 S.W.2d 873, 876 (Tenn. 1996).

Despite the fact that there is no competent proof as to anatomical rating, because the proof shows that the Appellee sustained an injury which is permanent, we find it is appropriate to consider the award of vocational disability in this cause. The Plaintiff sustained a severe injury. She had a temporary plate and screws inserted in her ankle. She has no work restrictions other than a pain limitation but her doctor has testified that it is his unquestioned opinion that the Appellee is permanently impaired.

In determining the percentage of vocational disability, we have considered evidence presented by the Appellee, including her testimony as to problems which she has suffered since the occurrence of the injury, and specifically what she is now able to do only with difficulty, and what she is unable to do. We have considered the expert testimony, specifically the pain restrictions placed by the doctor, and that she has no other work restrictions. We have considered the Appellee's age, education, transferable job skills and training, job opportunities, and capacity to work in the types of employment available to her in her condition after her injury. Her age, fifty-four, is a factor which will work against her in the job market. She has a high school education, but has no additional training. She has a number of transferable job skills, including ability and experience in marketing, and in development of specialized publications and advertising specialties. She has testified as to her desire to return to New Hampshire, where she lived prior to moving to Tennessee. She testified further as to the availability of jobs for her at that location. Further, the evidence reflects that due to the nature of her restrictions and the nature of her duties, the ability of the Appellee to continue to work in her current condition within her training and skills is great. Considering all of this evidence, we find that the Chancellor correctly determined that the Appellee is entitled to vocational disability, yet in our consideration of the evidence, *de novo*, we find that the vocational disability suffered should be limited to twenty percent.

We have further considered the issue of temporary total disability. The Trial Court found that the Appellee was entitled to nearly eight weeks additional temporary total disability for times after her further surgery to remove hardware from her ankle. We have

further considered this issue, and find the testimony of the doctor, by deposition, to show that the Appellee was again able to ambulate after her surgery after a two week period of incapacitation, and we therefore further modify the decision of the Trial Court to find that the additional temporary total disability award should be limited to an additional two weeks.

The Appellee has not properly perfected appeal, but raises the issue that additional money, in the form of temporary partial disability should be awarded from the date when the Appellee reached maximum medical improvement until she submitted her resignation from her employer. The evidence in this regard showed that after the Appellee returned to work following her injury, she was paid by her employer on a different basis than she had previously been paid. Previously, she was paid a draw against her commissions, and subsequently, after she returned to work following her injury, she worked on a straight commission basis. Although there was not a large amount of proof presented at to this issue, there was evidence that the employer felt that the Appellee had not made sufficient sales before her injury to justify her draws, and therefore she was required to repay a portion of her draws. For that reason, the evidence shows that the Appellee received no income after she returned to her job, apparently repaying sums which had been previously paid to her in a draw over and above that which was justified by the commissions she earned. Nonetheless, there is insufficient proof in the record to demonstrate any partial disability during this time period. We fully recognize that the Appellee was continuing to recover from her injury, and continuing to recover from her surgery. Nonetheless, she has been released to return to work, and the testimony of her doctor shows she was able to work. There is no basis for any award of further temporary disability, total or partial, after a worker returns to full duty or after he reaches maximum medical improvement, whichever first occurs. There is insufficient evidence here to justify further temporary disability payments. Thus we affirm the decision of the Trial Judge in all respects, yet we modify the award of vocational disability assigning a disability rating of twenty percent, apportioned to the leg, and we further modify the findings, reducing the number of weeks temporary total disability is awarded. We therefore affirm as modified, and remand this cause for collection of costs which are assessed against the Appellee, and for further matters in accordance with this opinion.

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Robert E. Corlew, III, Special Judge

CONCUR:

_____
William M. Barker, Justice

_____
Robert Vann Owens, Special Judge

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Cecil Crowson, Jr.
Appellate Court
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JACQUELINE LINDBLOOM,	)	HAMILTON CHANCERY
Plaintiff/Appellee,	)	No. 97-0542
	)	No. E 1998-00495-WC-R3 CV
v.	)	
	)	Hon. W. Frank Brown, III,
	)	Chancellor
METRO 8 SHEET METAL, INC.	)	
Defendant/Appellant	)	

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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

Costs on appeal are taxed to the plaintiff-appellee, Jacqueline Lindbloom, for which execution may issue if necessary.

02/28/00