IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, NOVEMBER 1999 SESSION

FILED

March 27, 2000

Cecil Crowson, Jr.
Appellate Court
Clerk

KATHY MAE PERRY,	)	CARTER CHANCERY
	)	
Plaintiff/Appellee,	)	
	)	
vs.	)	Hon. G. Richard Johnson,
	)	Chancellor
TENNESSEE DISTRIBUTION, INC.,	)	
	)	
Defendant/Appellant	)	No. 03S01-9904-CH-00042

For the Appellant:

Steven C. Rose
P. O. Box 1404
Kingsport, TN 37662

For the Appellee:

Howell H. Sherrod, Jr.
249 East Main Street
Johnson City, TN 37604-5707

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

Members of Panel:

E. Riley Anderson, Chief Justice
Roger E. Thayer, Special Judge
H. David Cate, Special Judge

AFFIRMED. CATE, Special Judge

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 only issue for resolution is whether the preponderance of the evidence supports the trial court's award to the plaintiff, Kathy Mae Perry, of 50 percent permanent partial disability to the right leg. We think it does and affirm.

The plaintiff was 40 years old on December 15, 1998. She dropped out of school in the eleventh grade but later received a general equivalency diploma. She had training in cosmetology and worked as a beautician for 8 months. She also had experience as a cashier.

In July 1992 she was employed by the defendant, Tennessee Distribution, Inc. On August 23, 1996, she bumped her right knee while working for the defendant. At that time her job was a standup forklift driver.

Subsequently the plaintiff went to see the defendant's nurse who referred her to Dr. Goulding, who then referred her to Dr. Mark Aiken, an orthopedic surgeon. Dr. Aiken first saw the plaintiff on September 24, 1996 and again on November 4, 1996. At the latter visit he released her to return on an as needed basis. His diagnosis of the plaintiff's injury was a mild prepatellar bursitis.

The plaintiff sought additional medical treatment and was sent by the defendant to see Dr. Alan Williams, II, who treated the plaintiff from December 17, 1996 through May 12, 1998. On April 15, 1997 he performed a diagnostic arthroscopy. His diagnosis of the plaintiff's injury was chondromalacia of the patella and the femoral condyle of the right knee.

The plaintiff missed work from April 4, to June 12, 1997 when she took a voluntary layoff and had the arthroscopy. Since mid June, 1997 she has worked for the defendant as a standup forklift driver, the job she was doing at the time of the accidental injury.

It was Dr. Williams' opinion that the plaintiff had sustained a 5 percent impairment to her lower right extremity. He restricted her to a 40 hour work week.

This restriction was described as a self-limiting type of restriction based on what the plaintiff told him.

Dr. Aiken, who initially opined that the plaintiff had no permanent impairment, felt that a 5 percent impairment to the lower extremity and the 40 hour week restriction were consistent with Dr. Williams' diagnosis.

According to the plaintiff she cannot do a job requiring full-time sitting or standing without pain and swelling. She does not believe she could be a beautician or cashier. She also has problems walking for exercise on the track or on the treadmill and doing housework which requires ladder climbing.

Appellate review is *de novo,* accompainied by a presumption in favor of the correctness of the findings of fact by the trial court, unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

In fixing permanent legal disability, the trial court must consider many factors including the employee's age, education, work experience, local job opportunities, etc., and this is to be examined in relation to the open labor market and not whether the employee is able to return and perform the job held at the time of the injury. A workers' compensation claimant's own assessment of their physical condition and resulting disabilities is competent testimoney and cannot be disregarded. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676, 678 (Tenn. 1991).

The injury reduces the plaintiff's vocational marketability. Thus we conclude the evidence does not preponderate against the trial court's award of 50 percent permanent partial disability to the right leg.

The judgment of the trial court is affirmed. Costs of the appeal are taxed to the defendant-employer.

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H. David Cate, Special Judge

CONCUR:

_____
E. Riley Anderson, Chief Justice

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Roger E. Thayer, Special Judge

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AT KNOXVILLE

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Cecil Crowson, Jr.
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KATHY MAE PERRY, Plaintiff/Appellee	)	Carter Chancery No. 23792
VS.	)	No. E 1999-02198-WC-R3-CV
TENNESSEE DISTRIBUTION, INC. Defendant/Appellant.	)	Hon. G. Richard Johnson Chancellor

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 Defendant/ Appellant, Tennessee Distribution, Inc. and Steven C. Rose, surety, for which execution may issue if necessary.

03/27/00