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

KELLIE SHOUN,	)	WASHINGTON CHANCERY
	)	
Plaintiff/Appellee,	)	
	)	
VS.	)	Hon. G. Richard Johnson,
	)	Chancellor
SOUTHEAST INDUSTRIES, INC.,	)	
	)	
Defendant/Appellant.	)	No. 03S01-9902-CH-00019

For the Appellant:

T. Kenan Smith
Hodges, Doughty & Carson
617 W. Main Street
P. O. Box 869
Knoxville, Tenn. 37901-0869

For the Appellee:

Robert D. Arnold
Arnold, Haynes & Sanders
P. O. Box 1879
Johnson City, Tenn. 37605

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

MODIFIED and AFFIRMED.

THAYER, 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 employer, Southeast Industries, Inc., has appealed from the action of the trial court in awarding the employee, Kellie Shoun, 50% permanent partial disability to the body as a whole.

Several issues are being raised by the appeal. The primary question is the claim by the employer that the injury was not work-related. Other issues concern whether the trial court was in error in fixing the award of disability, in awarding temporary total disability benefits and in ruling certain questions by defense counsel were leading questions.

Kellie Shoun was 25 years of age at the time of the trial (which was five years after the date in question) and was a high school graduate. She had an associate's degree from Northeast State Community College in computer programming.

She was employed by Southeast as a "laminator" which she said involved heavy lifting of boxes of metal parts. On August 29, 1994, while moving boxes and placing them on a shelf, she stated she felt a strain in her low back. She said she told her supervisor, Jacqueline Dugger, that she had strained her back while lifting the boxes and Ms. Dugger told her to take some aspirin. She testified the pain continued that night and she was having muscle spasms and during the next day, she mentioned the problem to supervisor Dugger again. Later on September 1st she said as she was stepping out of the bathtub, she felt a pop in her back as she lifted her leg over the tub and the pain was so bad she could hardly walk.

On the same day of the bathtub incident, she went to see Dr. Lonnie Jackson, a chiropractor who had been treating her for a number of years for migraine headaches, knee injury, etc. Dr. Jackson treated her for a period of time and then referred her to an orthopedic doctor. The record indicates she first came under the care of Dr. Mark T. McQuain and then she saw Dr. Richard Duncan who performed surgery.

She never returned to work at Southeast after the bathtub incident but returned on September 21, 1994, in order to fill out a workers' compensation accident report but was told by a company representative that a workers' compensation claim could not be filed as she was injured at home. Thus, she had to provide for her own medical care which exhibit #7 indicates is in excess of $33,000.

Defense witness Jacqueline Dugger testified she was not told of an on-the-job injury and that she first learned of the claim on September 21st. Two other company officials also testified they were not aware of her being injured until the 21st of September.

Steven Shoun, the employee's father, testified he observed his daughter "crouched over" when she came home on August 30th and that the next day, she was leaning further forward and walked with a limp.

All of the expert medical testimony was by deposition except for the written report of Dr. Tchou.

Dr. Lonnie Jackson testified he saw her on September 1, 1994 and she related a history of having felt sharp pain in her low back while lifting boxes of metal at work and she reported hearing a pop in her back while stepping out of the bathtub; that she was bent forward and had a gait in her walk; he noticed that her right leg was shorter than the left leg which indicated an unstable sacroiliac joint; that he felt her condition was caused by the incident at work on August 29th and he treated her for about thirteen months and then referred her to an orthopedic doctor since she was not improving much.

Dr. Mark T. McQuain, a physician specializing in physical medicine and rehabilitation, first saw Ms. Shoun on June 9, 1995 and she related to him that on August 29, 1994 she felt a burning sensation in the center of her spine that went down to her tailbone; that this occurred at work while lifting boxes and she also related to him the incident on September 1st about getting out of the bathtub. Dr. McQuain stated he was of the opinion the lifting incident at work caused her sacroiliac condition; that he rendered conservative treatment for a period of time and then referred her to his partner, Dr. Richard Duncan. On cross-examination, he

stated that if her first problem began with the incident of getting out of the tub at home, then he would not believe the condition was work-related.

Dr. Richard W. Duncan, an orthopedic surgeon, testified he was of the opinion she had a chronic right sacroiliac joint dysfunction which should be corrected by surgery as that was the only option left after long periods of conservative treatment by other doctors. He performed surgery on May 21, 1997, when he did a fusion by inserting two screws to stabilize the joint. He said she improved after surgery but would continue to have some pain from time to time. He gave her a 9% medical impairment and restricted her from lifting, pushing or pulling more than thirty pounds and told her to avoid excessive bending and twisting.

A medical report of Dr. Sheng Tchou was filed in evidence. Dr. Tchou did an independent evaluation during December 1998 and indicated she had a 15% medical impairment and that she should not lift, etc. over ten pounds.

Dr. Norman Hankins, a rehabilitation consultant, testified orally and found her vocational disability to be 48% under Dr. Duncan's restrictions and 87% under Dr. Tchou's restrictions.

On appeal the case is to be reviewed *de novo* accompanied by a presumption of the correctness of the findings of fact unless we find the preponderance of the evidence is otherwise. T.C.A.§ 50-6-225(e)(2).

The first issue relates to causation of injury. The employer argues the bathtub incident at home was when the employee first sustained an injury. The trial court heard conflicting evidence on this point. Ms. Shoun's testimony and the testimony of her father established the injury began prior to the bathtub incident and became worse while getting out of the tub at home a few days later. In resolving this conflict of evidence, the trial court made a specific finding that Ms. Shoun was a "very credible witness." Additionally, the expert medical evidence supported the trial court's conclusion the injury was work-related. The employer did not offer any conflicting medical evidence. We find this issue to be without merit.

The employer questions the award of 50% disability. In fixing permanent disability, the 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. *Orman v. William-Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991). Medical impairment ratings and vocational opinion are also to be considered but are not controlling on the issue of permanent disability. The evidence does not preponderate against the trial court's finding on the permanent disability award.

An issue is raised concerning the award of temporary total disability benefits. The trial court found the employee was entitled to temporary total disability benefits from September 1, 1994 thru June 1998. The employer offered no evidence on this point and we find Dr. McQuain's testimony supported the trial court's conclusion. This issue is also without merit.

In the last issue, the employer contends the trial court was in error in sustaining objections to several questions when defense counsel was engaged in direct examination of witness Jacqueline Dugger. On page 137 of the transcript, the following appears:

> Q. Now, during the time that she was there, these days that we just discussed, from August 22nd, 1994 to September 2, 1994, did she ever tell you, "My back is stiff and bothering me from any work that I was doing."
> A. No, she sure didn't.
> Q. Did you ever see her - - and this is important - - did you ever see her limp?
> A. No. I sure didn't.
> MR. ARNOLD: Object to leading and suggestive questions.
> THE COURT: Sustained.
> Q. Did you observe her in any way favoring any part of her body?
> A. No.
> MR. ARNOLD: Object to leading and suggestive questions.
> THE COURT: Sustained.
> Q. Did you observe any type of pain or anguish in any way?
> MR. ARNOLD: Objection. That's leading and suggestive.
> THE COURT: Sustained.

Rule 611(c), Tennessee Rules of Evidence, provides that leading questions should not be allowed on direct examination of a witness except as may be necessary to develop testimony. A leading question has been defined as one which "suggests a specific answer desired." Cohen, Sheppeard, Paine, Tennessee Law of Evidence, § 611.6.

The employee had presented evidence on the subject of each of these questions and we are of the opinion the questions were not leading or suggestive of an answer. However, this error in admission of evidence is not of such a nature to affect the result of the court's final ruling and we have considered the answers to these questions in our review of the record.

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

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
E. Riley Anderson, Chief Justice

_____
H. David Cate, Special Judge

IN THE SUPREME COURT OF TENN
AT KNOXVILLE

KELLIE SHOUN, Plaintiff/Appellee	)	WASHINGTON CHANCERY No. 30415
VS.	)	No. E 1999-02192-WC-R3-CV
SOUTHEAST INDUSTRIES, 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 Appellant, Southeast Industries, Inc. and T. Kenan Smith, surety, for which execution may issue if necessary.

03/21/00