

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
(April 26, 2000 Session)

INGRAM INDUSTRIES, INC. v. CARLESS DYKE KELLER.

**Direct Appeal from the Chancery Court for Cocke County
No. 98-135 Telford E. Forgety, Jr., Chancellor**

**No. E1999-00703-WC-R3-CV - Mailed: May 25, 2000
Filed: July 5, 2000**

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 trial court awarded the plaintiff 24 percent vocational disability to the body as a whole. The defendant contends that the preponderance of the evidence does not support the trial court's award. We affirm.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court is Affirmed.

LAFFERTY, SR. J., delivered the opinion of the court, in which BARKER, J., and PEOPLES, SP. J., joined.

Debra L. Fulton and Beverly D. Nelms, Knoxville, Tennessee, for the appellant, Ingram Industries, Inc.

P. Richard Talley, Dandridge, Tennessee, for the appellee, Carless Dyke Keller.

MEMORANDUM OPINION

On May 29, 1997, the plaintiff, age 46, sustained work-related injuries to her left and right shoulders from operating an electric pallet jack. Ordinarily, the plaintiff was in inventory control, but due to a change in ownership of the companies, she was assigned the task of moving items by the use of a forklift. The plaintiff is left-handed and operates this forklift using her arms. The parties do not dispute that the plaintiff sustained a work-related injury.

MEDICAL EVIDENCE

On February 23, 1998, Dr. Stephen P. Graham, an orthopedic surgeon, saw the plaintiff with a complaint of pain in both shoulders. X-rays of the left shoulder revealed some down-sloping of the shoulder bone, which was developmental. The plaintiff had impingement syndrome in both

shoulders. In March, 1998, an MRI revealed a possible tear of the anterior part of the rotator cuff on the left shoulder. No tear was seen on the right shoulder. Dr. Graham recommended arthroscopic surgery. During this surgery, Dr. Graham observed mild irritation of the joint, with some inflamed tissue, but no significant bone damage. Dr. Graham removed some bursal scarred tissue, but did not see any tear in the muscle at that point. In a follow-up visit, Dr. Graham concluded that the plaintiff's shoulder problems were adhesions which was consistent with diagnosis of impingement rather than any tear in the muscle. These adhesions were caused by the use of the pallet jack. Due to continued complaints by the plaintiff, Dr. Graham performed surgical manipulation on the plaintiff's shoulders to determine any loss of range of motion in July, 1998. It was Dr. Graham's opinion that the plaintiff had full range of motion in the right shoulder, but the left shoulder had some tightness. On September 9, 1998, the plaintiff reached maximum medical improvement. The plaintiff could perform her prior job, but she did have limited motion of her shoulder. Dr. Graham opined that the plaintiff sustained a 9 percent impairment to the upper extremity, which then related to a 5 percent impairment to the body as a whole. Dr. Graham opined that the plaintiff did not sustain any impairment to the right shoulder.

At the request of the defendant, Dr. John E. B. Harrison, an orthopedic surgeon, examined the plaintiff. After taking the plaintiff's history, review of her medical treatment and records, Dr. Harrison opined that the plaintiff had evidence of adhesive capsulitis of the left shoulder and that she had complaints of bilateral chronic shoulder pain, worse on the left, with evidence of shoulder impingement. Using the AMA Guide Fourth Edition, Dr. Harrison opined that the plaintiff sustained a 10 percent permanent partial physical impairment to the left upper extremity. As to the right upper extremity, Dr. Harrison opined a 2 percent partial physical impairment. In Dr. Harrison's opinion, these ratings converted to 7 percent impairment to the body as a whole.

At the request of plaintiff's counsel, Dr. William E. Kennedy, an orthopedic surgeon, examined the plaintiff in April, 1999. At the time of the interview, Dr. Kennedy determined that the plaintiff sustained work related injuries to both of her shoulders. She still had constant dull pain more severe in the left shoulder and persistent aching in the right shoulder. Dr. Kennedy described Dr. Graham's surgery as a debridement of the subacromial space and arthroscopic acromioplasty. Dr. Kennedy explained that Dr. Graham cleaned out the space underneath that shelf of bone that is called the acromion, and he also removed a portion of the under surface of that shelf of bone in order to decompress that space and allow more room for the gliding of the normal structures beneath the shelf, including the rotator cuff and the head of the humerus. Using the AMA Guides, Dr. Kennedy opined that the plaintiff sustained an 11 percent permanent physical impairment to the left shoulder. Dr. Kennedy opined that the plaintiff was due an additional 10 percent permanent physical impairment to the left shoulder due to her resection acromioplasty. This 10 percent impairment rating is permitted by the AMA Guides for a resection arthroplasty of the acromioclavicular joint. Dr. Kennedy recognized that the plaintiff did not have this procedure, but in his experience as an orthopedic surgeon, acromioplasty is very similar to a resection arthroplasty of this joint. Dr. Kennedy opined that these ratings converted to a 20 percent permanent physical impairment to the left upper extremity. As to the right shoulder, Dr. Kennedy opined that the plaintiff sustained a 4 percent permanent physical impairment due to the mild loss of range of motion. Dr. Kennedy opined

that the plaintiff's 20 percent impairment of the left shoulder converted to 12 percent to the body as a whole. As to the right shoulder, Dr. Kennedy found that the 4 percent impairment equals 2 percent to the whole person, totaling 14 percent. In cross-examination, Dr. Kennedy acknowledged his determination that Dr. Graham's surgery was like arthroplasty and that the plaintiff's total permanent physical impairment would be 9 percent to the body as a whole.

LEGAL ANALYSIS

The defendant asserts that the trial court's award is excessive and is not supported by a preponderance of the evidence. Further, the defendant complains that the trial court erred in relying upon the testimony of Dr. Kennedy as opposed to the testimony of the treating physician, Dr. Graham.

A 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); *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to conduct an independent examination of the record to determine where the preponderance of the evidence lies. *Williams v. Tecumseh Products Co.*, 978 S.W.2d 932, 935 (Tenn. 1998).

Where the trial record contains oral testimony of a witness or witnesses, this Court shall give considerable deference to the trial court's findings regarding the weight and credibility of that testimony. *Townsend v. State*, 826 S.W.2d 434, 437 (Tenn. 1992). However, when the determination of factual issues involves medical testimony derived solely from depositions, as in the present case, this Court is in the same position as the trial court when reading the testimony and may draw its own conclusions about the weight, credibility, and significance of such testimony. *Seiber v. Greenbrier Indus. Inc.*, 906 S.W.2d 444, 446 (Tenn. 1995); *See Henson v. City of Lawrenceburg*, 851 S.W.2d 812, (Tenn. 1993).

The defendant contends that the trial court should have given greater weight to the deposition of Dr. Graham, the treating physician. Citing *Orman v. Williams-Sonoma, Inc.*, 803 S.W.2d 672, 677 (Tenn. 1991); *Crossno v. Publix Shirt Factory*, 814 S.W.2d 732 (Tenn. 1991). These authorities do. Beyond this proposition, however, is the rule that a trial court may conclude that the opinion of a certain expert should be accepted over the opinion of other experts. *Thomas v. Aetna Life and Cas., Co.*, 812 S.W.2d 278, 283 (Tenn. 1991).

The defendant takes issue with Dr. Kennedy's opinion that the plaintiff's surgery was not arthroplasty, but arthroscopic surgery. Dr. Graham described the procedure of arthroplasty as "where we're going in and resecting out the joint and replacing it. Arthroscopy is you're just looking in and trying to clean things out." Dr. Kennedy opined the plaintiff's surgery procedure as acromioplasty, which is similar to resection arthroplasty of the acromioclavicular joint. Both physicians describe this procedure as major surgery. In its ruling, the trial court commented on the difference in opinion of these two doctors as "you know doctors have different opinions, like lawyers and everybody else,

it always happens that way.” Likewise, the trial court was quite impressed with the plaintiff as a witness, her return to work, working hard, but she continued to have problems.

We are not disposed under the *de novo* credibility rule to out of hand reject the trial court’s determination as to which medical evidence to accept unless there is contained in the depositions some indicia of untrustworthiness. We have reviewed the medical depositions in this cause and we find no reason to disagree with the conclusions reached by the trial court.

We affirm the judgment and tax the costs against the defendant.

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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 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, Carless Dyke Keller, for which execution may issue if necessary.

07/05/00