

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(January 27, 2000 Session)

DOROTHY TAYLOR v. SENIOR CITIZENS SERVICES, INC., ET AL.

**Direct Appeal from the Circuit Court for Shelby County
No. 70466-9T.D. Robert L. Childers, Judge**

No. W1999-02152-WC-R3 -CV Mailed June 21, 2000; Filed August 1, 2000

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225 (e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The plaintiff, Dorothy Taylor, appeals the judgment of the Circuit Court of Tennessee for the 30th Judicial District at Memphis, where the trial court found: (1) that Ms. Taylor failed to give proper notice to her employer regarding her carpal tunnel injury, (2) that if the trial court had found the carpal tunnel injury to be compensable, it would have awarded Ms. Taylor a 10% permanent impairment to each extremity and temporary total disability benefits up to May 7, 1997, (3) that Ms. Taylor had a 10% permanent impairment to the body as a whole as a result of a back injury and awarded a judgment in the amount of \$6,043.20, (4) that Ms. Taylor was entitled to open medical benefits for life as they related to the specific back injury she suffered on January 31, 1994, (5) that the defendants were not required to pay for unauthorized medical bills for treatment of Ms. Taylor's back or (6) for the evidentiary deposition of John Howser, M.D. For the reasons stated in this opinion, we affirm the judgment of the trial court.

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

WEATHERFORD, SR. J., delivered the opinion of the court, in which HOLDER, J., and MALOAN, SP. J., joined.

Albert G. McLean, Memphis, Tennessee, for the appellant, Dorothy Taylor .

Wm. B. Walk, Jr., Memphis, Tennessee, for the appellees, Senior Citizens Services, Inc. d/b/a Senior Services, and Hartford Insurance Co.

MEMORANDUM OPINION

The employee, Dorothy Taylor, was forty years old at the time of trial. She has an 11th grade education and later took a course and became a certified nursing assistant. Ms. Taylor worked for

Senior Citizens Services, Inc. as a personal care aid from October 17, 1988 until April 27, 1994. Her daily job activities included lifting patients in and out of wheel chairs and putting them in the tub, giving bed baths, making beds, doing some house cleaning, cooking, running errands, and taking vital signs.

Prior to her job at Senior Citizens Services, Inc., Ms. Taylor worked for Court Manor Nursing Home for two years where she performed the same job activities. Before working at Court Manor Nursing Home, she worked for a cleaners as a flat iron worker for about seven (7) months. Prior to that time, she and her husband had operated a restaurant lounge from 1983 to 1985 where she handled the paper work, the purchasing and inventory. She also worked behind the bar.

Ms. Taylor stated that she had injured her back in 1991, but had recovered after being off work for about three months. She also testified that she hurt her right hip and shoulder in June of 1993, but was only off a few days from that injury. She never received any permanent disability benefits from either prior injury.

Ms. Taylor testified that she injured her back on January 31, 1994, when she was putting a patient back to bed. Ms. Taylor had the upper part of the patient's body while another person was holding the patient's legs. When the other person dropped the patient's legs, Ms. Taylor twisted her back and she heard a "pop" in her lower back and it started to hurt "real bad." Pursuant to the company's procedures, Ms. Taylor advised the work schedulers of her injury and they in turn were to inform her supervisor. About two weeks later, Ms. Taylor personally told her supervisor, Mattie Hewlett, about the accident.

Ms. Taylor testified that she stayed off work for three days and then attempted to go back to work, but was unable to do so because of back pain. She saw her family doctor, Dr. A. E. Horne, one (1) week exactly from the date of the accident. Prior to this time, she had not been given the names of any workers' compensation approved doctors. Ms. Taylor stayed off work approximately one (1) month after the accident.

Senior Citizens Services authorized Ms. Taylor to see Dr. Mark Harriman, who began his treatment of Ms. Taylor in March of 1994. Dr. Harriman testified that:

My exam at that time was fairly non-physiologic. I did not think that there was anything going on. She was very histrionic in her presentation. She had pain to light touch, had pain when I checked her deep tendon reflexes. Otherwise, she was neurologically intact.

I felt like at that time we should just give her a few days to get ready and go back to work and sent her back to work as of the 22nd of March.

Dr. Harriman also stated, "She was very jumpy on exam, exhibited signs of symptom magnification without any real physical exam findings to go along with it."

Ms. Taylor subsequently went back to work and her back started hurting again. On March 29, 1994, Dr. Harriman examined Ms. Taylor again, sent her to physical therapy for about ten days and prescribed pain medication.

According to Dr. Harriman, "I felt we should go ahead and give her the benefit of the doubt and get her some therapy because she had already made her mind up she was not going back to work." On April 5, 1994, Dr. Harriman released Ms. Taylor for full duty with no restrictions or impairment. Dr. Harriman testified that Ms. Taylor had reached maximum medical improvement on April 5, 1994, and did not have any permanent impairment.

Ms. Taylor testified that she went back to work again and started having pain in the same place in her back. She was not able to continue working at Senior Citizens Services because of the pain in her back. Her last day of work was April 27, 1994. Jeff Weesner, Vice President of Human Resources at Senior Citizens Services, testified that according to his records, Ms. Taylor worked six (6) days in April of 1994. Since January 31, 1994, Ms. Taylor had worked a total of nine days .

Ms. Taylor testified that she started having problems with her hands around June of 1994. She stated that she had some pain in her hands before June of 1994, but the first time she told Dr. Horne about the pain was probably in June of 1994.

Dr. Horne's records reflect that the first time that Ms. Taylor said anything about having any problem with either hand was on June 13, 1994. His notes on that date were as follows: "Recheck back pain--numbness (R) hand and leg....to see Dr. Anthony Segal on 6-20---workmen's comp doctor."

In June of 1994, Ms. Taylor saw Dr. Segal, a neurosurgeon approved by workers' compensation, for follow-up treatment for her back. When she saw him for her back injury, Ms. Taylor testified that she told him about having the numbness in her fingers and pain in her arm and wrist. According to Ms. Taylor, Dr. Segal did not tell her what was wrong with her hands and did not even examine them.

Ms. Taylor was terminated from Senior Citizens Services in August of 1994 due to unavailability for work. For the remainder of 1994, Ms. Taylor did not work or receive further treatment. During this time period she was in bed most of the time or just at home, and her daughters took care of her housework. Ms. Taylor testified that she was not able to work at all.

Ms. Taylor saw Dr. Howser, a neurosurgeon, for the first time on February 10, 1995, with chief complaints of low back pain and right leg pain and numbness and tingling of the right leg and right hand and arm pain. She was referred to Dr. Howser by her attorney, David James, Jr.

According to Dr. Howser, Ms. Taylor told him at that time that the right hand and arm pain started about four to five months ago. Dr. Howser administered a Neurometer test which indicated carpal tunnel syndrome. On March 9, 1995, Dr. Howser's records reflect that he explained the

findings on the Neurometer to Ms. Taylor. However, Ms. Taylor testified that Dr. Howser never told her what caused her carpal tunnel syndrome.

On April 3, 1995, an EMG test performed by Dr. Bertorini confirmed a carpal tunnel problem bilaterally, worse on the right. Dr. Howser prescribed carpal tunnel splints and also some lumbar facet blocks for her back injury. On April 12, 1995, Dr. Howser prescribed a Boston Overlap brace for her back.

Ms. Taylor's counsel notified Senior Citizens Services and Hartford by letter dated June 13, 1995, certified mail, return receipt requested, that Ms. Taylor had been diagnosed with carpal tunnel syndrome. Senior Citizens Services received this letter on June 15, 1995, and Hartford received it on June 20, 1995. In this letter, counsel advised that Ms. Taylor had recently been diagnosed as suffering from carpal tunnel syndrome, and as yet no medical opinion had been given as to the cause of her condition. Also on June 13, 1995, Ms. Taylor filed a complaint for workers' compensation benefits, for the lumbar injury and carpal tunnel syndrome.

Dr. Howser continued treating Ms. Taylor for her lumbar injury and carpal tunnel syndrome and saw her on August 28, 1995, November 28, 1995, April 9, 1996, May 17, 1996, July 3, 1996 and August 23, 1996. Ms. Taylor's counsel received a letter dated April 18, 1996, in which Dr. Howser stated that her carpal tunnel syndrome was caused by repetitive use of the hands in the work place, and that Ms. Taylor had not reached maximum medical improvement with regard to her back injury. Her counsel then notified opposing counsel by letter dated April 29, 1996 that Ms. Taylor's carpal tunnel syndrome had been found to be work related.

Dr. Howser referred Ms. Taylor to the Neuro Clinic for carpal tunnel surgeries on her wrists. In January, 1997, she had surgery on her right wrist and in April, 1997, she had surgery on the left. Ms. Taylor continued to see Dr. Howser for treatment after her surgeries.

Dr. Howser testified that in his opinion, to a reasonable degree of medical certainty, Ms. Taylor's carpal tunnel syndrome was caused by the repetitive use of her hands in the work place. He agreed that eighty to ninety percent of carpal tunnel cases caused by repetitive use involve factory workers using the same kinds of tools or computer users, and that Ms. Taylor did not have these job activities. Dr. Howser testified that Ms. Taylor had a fifteen (15%) permanent partial impairment to each arm due to her carpal tunnel syndrome. Post-surgery, Dr. Howser did not perform any objective tests, such as the grip strength or two point discrimination test, to determine the results. Dr. Howser did admit that had he complied with the AMA Guidelines, the rating would have been 8% to each extremity. He testified that he assigns a fifteen percent (15%) impairment rating in ninety percent (90%) of his carpal tunnel cases, and it has "nothing to do with how good or poorly they do."

He also gave her permanent restrictions: (1) wearing carpal tunnel splints in the workplace, (2) keeping the amount of repetitive use of her hands to a minimum, if any, and (3) a ten to fifteen pound weight limit to protect the median nerves bilaterally. He further testified that she reached maximum medical improvement from her carpal tunnel syndrome on May 7, 1997, and that she had

been temporarily totally disabled from working at Senior Citizens Services prior to that point in time.

Dr. Howser testified that Ms. Taylor's January 31, 1994, accident at work "caused a lumbar facet syndrome and aggravated a previous existing lumbar canal stenosis and caused a radiculopathy." Dr. Howser stated that a CT scan revealed a bulge in the L5 disc space and mild lumbar canal stenosis at L5. An MRI performed in May, 1996, revealed an osteoarthritic bulge at the L5 disc space, and Dr. Howser concluded that this was a spur and not a ruptured disc. Dr. Howser stated that he tried to obtain relief for Ms. Taylor by lumbar epidurals and caudal blocks, without lasting success.

According to Dr. Howser, the findings on the CT were mainly degenerative and hypertrophy of the ligament and facet joints and what is called spinal stenosis. He concluded that these problems all preceded the injury and were related to the aging process.

Dr. Howser testified that the 1994 injury aggravated these pre-existing problems in Ms. Taylor's back to make her become symptomatic. Although he had not reviewed Dr. Harriman's records and was not aware of her 1991 back injury, Dr. Howser did not agree that her back problems were related to her back injury in 1991, as she had made a full recovery and she had returned to work without further problems.

Dr. Howser did give her permanent restrictions of lifting no more than ten to fifteen pounds and wearing a Boston Overlap Brace that would keep her from doing any bending or stooping. He testified that Ms. Taylor did not have any anatomical disability from her January 31, 1994 back injury; therefore, he would not assign any percent of anatomical permanent partial impairment.

He testified that there were no signs or indication on the part of Ms. Taylor that she had not been truthful or forthright about her problems or the pain she was experiencing.

Ms. Taylor did not work in 1995 or 1996. Her only efforts in obtaining work came with two job applications during the year of 1996 for Trinity Health Care and Methodist Hospital. Ms. Taylor had bilateral carpal tunnel surgeries in January and April of 1997, and even though the surgeries were successful, she did not seek employment in 1997. She did not attempt to go back into the restaurant business because she "didn't want to." She finally obtained a job in October, 1998, working for Pro-Serve, Inc., a chemical plant, where she does light cleaning, including sweeping floors, cleaning off tables, and cleaning bathrooms.

Ms. Taylor still takes Darvocet for pain in her lower back and hands. She stated that her back hurts all the time and her right hand hurts almost everyday, and her left hand hurts two or three times a week. According to Ms. Taylor, her fingers on the right hand are real sore and it hurts in her wrists and she has some pain going up her arm to her elbow. On the left hand, her fingers are not sore, but she has pain that goes up her arm into her elbow.

On February 10, 1998, Dr. Harriman again evaluated Ms. Taylor to conduct an independent medical examination for the back and carpal tunnel claims. In regard to the back claim, Dr. Harriman testified, "I felt that she was still presenting with symptom magnification, as far as her back was concerned, and I could find no evidence, physical evidence of any ongoing back problem. Her symptoms were subjective without objective findings to support them." Dr. Harriman concurred with Dr. Howser's opinion that Ms. Taylor did not have any permanent impairment to her back. Dr. Harriman went on to conclude that he "saw no reason why she should not be working without restrictions" regarding the back injury. Dr. Harriman opined that Ms. Taylor had reached maximum medical improvement on April 5, 1994, and released her for full duty with no restrictions.

In Dr. Harriman's independent medical exam report he stated:

[Ms. Taylor] says first of all that the carpal tunnel symptoms began in mid-1993. I have reviewed records dating back to 1991 in our chart concerning this patient and I do not see any complaint referable to the hands.... She currently says that her hands are giving her no problems at all. She currently says she is wearing splints, but says she is only wearing them because she was told to do by Dr. Howser.

Dr. Harriman testified that because she reported no problems or symptoms whatsoever to him, and that she was doing well, that he would put her in the zero impairment category regarding the carpal tunnel syndrome. Dr. Harriman also stated that he thought "that it would be extremely unlikely to develop carpal tunnel" from the type of job activities that Ms. Taylor performed at Senior Citizens Services. He also testified that in his opinion within a reasonable degree of medical certainty that it would be "virtually impossible" for Ms. Taylor's carpal tunnel syndrome to be causally related to her job at Senior Citizens Services if her last day of work was in May of 1994 and her earliest complaint of numbness and tingling in the hands did not occur until September of 1994 according to Dr. Howser's notes.

After hearing the proof and final argument of counsel, the trial court ruled from the bench that Ms. Taylor failed to give timely notice of her carpal tunnel injuries, and therefore was not entitled to recover for her carpal tunnel syndrome.

The trial court did state that if the Tennessee Supreme Court should find that Ms. Taylor is entitled to recover for her carpal tunnel injuries, the Court would award her 10% permanent partial disability to each arm and she would be entitled to temporary total disability benefits to May 7, 1997, the date of her maximum medical improvement.

The trial court found that Ms. Taylor's January 31, 1994 back injury was compensable, even though there was no anatomical permanent impairment because the permanent restrictions as to her activities affected her ability to get employment on the open labor market. The trial court found that Ms. Taylor had a ten percent (10%) permanent partial disability to the body as a whole. The trial court also did not award any temporary total disability benefits for the back injury in addition to those already provided by the defendants.

The trial court ruled that Ms. Taylor was entitled to open medical benefits for life as they related to the back injury, that Dr. Howser's bill and Dr. Horne's bill were unauthorized, and therefore not recoverable, and also that the defendants were not required to pay for the evidentiary deposition of Dr. Howser.

ANALYSIS

The scope of review of issues of fact is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. Tennessee Code Annotated § 50-6-225(e)(2); Lollar v. Wal-Mart Stores, Inc., 767 S.W.2d 143 (Tenn. 1989). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court's actual findings. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987).

Ms. Taylor has presented five issues in this appeal:

I. Whether the trial court erred in holding that Ms. Taylor failed to give proper notice to her employer of her carpal tunnel syndrome claim in accordance with Tenn. Code Annotated § 50-6-201?

II. If this Court finds that Ms. Taylor is allowed to recover for her carpal tunnel syndrome, what amount should she receive as permanent partial disability for that injury?

III. Whether Ms. Taylor is entitled to temporary disability benefits for both her carpal tunnel syndrome and her back injury?

IV. Whether Senior Citizens Services and Hartford Insurance Company should be required to pay for Ms. Taylor's medical bills from Dr. Howser and Methodist Hospital for treatment of carpal tunnel syndrome.

V. Whether Dr. Howser's evidentiary deposition fee should be considered as a cost of the case pursuant to Tenn. Code Annotated § 50-6-226 (c)(1) and charged against Senior Citizens Services and Hartford Insurance Company?

Senior Citizens Services and Hartford Insurance Company have presented an additional issue:

VI. Whether the trial court erred when it ruled that Ms. Taylor suffered a ten percent (10%) permanent partial disability to the body as a whole for her alleged back injury when neither the treating nor evaluating physician gave Ms. Taylor any anatomical impairment.

I. Whether the trial court erred in holding that Ms. Taylor failed to give proper notice to her employer of her carpal tunnel syndrome claim in accordance with Tennessee Code Annotated § 50-6-201.

Tennessee Code Annotated § 50-6-201 provides:

Notice of injury.—Every injured employee or such injured employee’s representative shall, immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, give or cause to be given to the employer who has no actual notice, written notice of the injury, and the employee shall not be entitled to physician’s fees or to any compensation which may have accrued under the provisions of the Workers’ Compensation Law from the date of the accident to the giving of such notice, unless it can be shown that the employer had actual knowledge of the accident; and no compensation shall be payable under the provisions of this chapter unless such written notice is given the employer within thirty (30) days after the occurrence of the accident, unless reasonable excuse for failure to give such notice is made to the satisfaction of the tribunal to which the claim for compensation may be presented.

Tennessee Code Annotated § 50-6-201.

The Tennessee Supreme Court held that the time for the plaintiff to give notice did not begin to run “until the plaintiff knew or as a reasonably prudent person should have known, that his [injury] was work connected.” Hawkins v. Consolidated Aluminum Corp., 742 S.W.2d 253,254 (Tenn. 1987).

In Hawkins, the Court went on to state:

It is well settled in this State that the running of the statute of limitations and of the time for giving notice of an injury is suspended until by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained.

Hawkins, 742 S.W.2d at 255.

There are conflicts in the record as to when Ms. Taylor first started experiencing symptoms of carpal tunnel syndrome. She testified that she had some pain in her hands, before June of 1994, but did not tell her family doctor, Dr. Horne, until June of 1994, when his records indicate she reported numbness in her right hand. While Dr. Howser testified that when he examined her on February 10, 1995, Ms. Taylor stated that her right hand and arm pain had started about four or five months ago, which would mean her symptoms started in September or October of 1994. According to Dr. Harriman’s February 10, 1998 independent medical exam record, Ms. Taylor told him that

her symptoms started in mid-1993. Ms. Taylor last worked for Senior Citizens Services on April 27, 1994.

Having seen and heard the witnesses, the trial court was in the best position to judge the weight and credibility of oral testimony. Here the trial court expressed concern about some of Ms. Taylor's testimony in general and on the issue of notice in particular:

As to the carpal tunnel injuries, I understand that lay people may not know that a particular injury is referable to an on-the-job injury, but given all of the testimony in this case-and again-my concern about some of the things, frankly, that [Ms. Taylor] has testified to in this case, I have some concern about that. Dr. Harriman's testimony in his deposition, that [Ms. Taylor] said that she first started experiencing symptoms of carpal tunnel in 1993, and based on that I just have some real problems with [Ms. Taylor's] failure to say anything at all to the employer about the carpal tunnel. For that reason, I don't think proper notice was given and, and therefore, I don't think it is compensable.

After tests confirmed Ms. Taylor had carpal tunnel syndrome, her counsel wrote the defendants on June 13, 1995, advising them that Ms. Taylor had recently been diagnosed as suffering from carpal tunnel syndrome, but it had not been determined by medical opinion whether or not this condition was work related. Also on June 13, 1995, Ms. Taylor's counsel filed a complaint for workers' compensation benefits which asserted the carpal tunnel claim: "[A]lthough she has not been advised as to whether or not said carpal tunnel syndrome is a result of her work for [Senior Citizens].... As soon as [Ms. Taylor] is advised whether or not her carpal tunnel syndrome is related to her work, [she] will so notify her employer within thirty (30) days of receipt of said information/opinion, as required by law."

On January 2, 1996, defendants filed a motion to compel the plaintiff to respond to Interrogatories and Request for Production of Documents that had been filed on July 18, 1995.

Dr. Howser continued to treat Ms. Taylor on August 28, 1995, November 28, 1995, and April 9, 1996, for her carpal tunnel symptoms and back pain. They also discussed carpal tunnel surgery. According to Ms. Taylor, no one ever told her that her carpal tunnel syndrome was related to her employment. It was not until April 18, 1996, that Dr. Howser stated in his letter that "Ms. Dorothy Taylor has a carpal tunnel problem which was caused by repetitive use of her hands in the workplace. She was last seen in my office on April 9, 1996, and was no better from the carpal tunnel problem. She will now have carpal tunnel surgery on the right."

Counsel then notified defendants by letter dated April 29, 1996, that Ms. Taylor's carpal tunnel syndrome had been diagnosed as work related. This notice did not come until almost one year after the filing of the complaint, over one year after the diagnosis of carpal tunnel, and two years after Ms. Taylor last worked for Senior Citizens Services.

Accordingly, after reviewing the record in this case, we find that the evidence supports the finding of the trial court that Ms. Taylor failed to meet her burden in regard to providing proper notice of her carpal tunnel injury to her employer, Senior Citizens Services, pursuant to Tennessee Code Annotated § 50-6-201.

It is our opinion that the evidence does not preponderate against a finding that through reasonable care and diligence, it was discoverable and apparent that a compensable injury had been sustained prior to April 18, 1996, the date of Dr. Howser's letter. This, together with the trial court's statements regarding Ms. Taylor's credibility on the notice issue to which we must give high deference, leads us to conclude that the trial court should be affirmed on this issue.

II. If this Court finds that Ms. Taylor is allowed to recover for her carpal tunnel syndrome what amount should she receive as permanent partial disability for that injury?

Our decision on the issue of notice renders this issue moot as to permanent partial disability benefits for carpal tunnel syndrome, and it is, therefore, pretermitted.

III. Whether Ms. Taylor is entitled to temporary disability benefits for both her carpal tunnel syndrome and her back injury?

Our decision on the issue of notice renders this issue moot as to temporary disability benefits for carpal tunnel syndrome, and it is, therefore, pretermitted.

According to the complaint and answer, defendants did provide temporary total disability benefits for the back injury, including authorized medical treatment for Ms. Taylor's on-the-job injury through June 14, 1994.

Ms. Taylor argues that she is entitled to receive temporary disability benefits for her back injury from the date of the injury, January 31, 1994, to April 16, 1996, the date of Dr. Howser's letter stating that she had not reached her maximum medical improvement as of that date as to her back injury, less the period of time that she worked at the company after the injury which was at most three (3) weeks.

Where issues involve expert medical testimony and all medical proof is contained in the record by deposition, the Supreme Court may draw its own conclusions about weight and credibility of that testimony. Krick v. City of Lawrenceburg, 945 S.W.2d 709 (Tenn. 1997).

Dr. Harriman opined that Ms. Taylor reached maximum medical improvement on April 5, 1994, and released her for full duty with no restrictions. After she saw Dr. Horne and Dr. Segal in June of 1994, Ms. Taylor did not work or receive further treatment for her back until she saw Dr. Howser in February of 1995.

According to Dr. Howser, Ms. Taylor had not reached maximum medical improvement as of April 18, 1996, and he gave her permanent restrictions regarding her back injury.

The trial court did express concern about Ms. Taylor's credibility and efforts to gain employment:

Now, one of the problems in this case, and one of the things that the Court always has to look at in a case like this, is so much hinges, particularly where there is a dispute, on the credibility of the Plaintiff in this case and frankly, the Court is somewhat concerned in the testimony of Ms. Taylor, because for a substantial period of time, in 1995; all of 1996, and a good part of 1997, frankly, she didn't make much effort to try to go out and get employment.

Now, I realize and understand that she was also dealing with a carpal tunnel problem at this point, and I understand that that had some effect on her ability to go out and seek employment. In any event, she has now returned to work and is able to work and has gotten a job.

After reviewing all the medical testimony, we are satisfied that the trial court was justified in ruling that Ms. Taylor was not entitled to any further temporary total disability benefits in addition to those already provided by the defendants.

This issue is without merit.

IV. Whether Senior Citizens Services and Hartford Insurance Company should be required to pay for Ms. Taylor's medical bills from Dr. Howser and Methodist Hospital for treatment of carpal tunnel syndrome.

Our decision on the issue of notice renders this issue moot, and it is therefore pretermitted.

V. Whether Dr. Howser's evidentiary deposition fee should be considered as a cost of the case pursuant to Tenn. Code Annotated § 50-6-226(c)(1) and charged against Senior Citizens Services and Hartford Insurance Co.

Tennessee Code Annotated § 50-6-226 (c)(1) provides:

The fees charged to the claimant by the treating physician or a specialist to whom the employee was referred for giving testimony by oral deposition relative to the claim, shall, unless the interests of justice require otherwise, be considered a part of the costs of the case, to be charged against the employer when the employee is the prevailing party.

Tennessee Code Annotated § 50-6-226(c)(1).

The trial court found that the bills associated with Dr. Howser's treatment of Ms. Taylor for her back "were not compensable as they were unauthorized and the plaintiff did not seek further treatment from Senior Citizens Services." The trial court stated in its ruling from the bench that "based on that same rationale, that I would not order that the Defendant pay for Doctor Howser's deposition either."

Appellate courts are generally disinclined to interfere with a trial court's decision in assessing costs unless there is a clear abuse of discretion. Perdue v. Green Branch Mining Co., 837 S.W.2d 56 (Tenn. 1992).

It is our opinion that the trial court did not abuse its discretion in denying the fee for Dr. Howser's deposition even though Ms. Taylor was the prevailing party on the issue of permanent partial disability for her back injury.

This issue is without merit.

VI. Whether the trial court erred when it ruled that Ms. Taylor suffered a ten percent (10%) permanent partial disability to the body as a whole for her alleged back injury when neither the treating nor evaluating physician gave Ms. Taylor any anatomical impairment?

In Hill v. Royal Insurance Co., 937 S.W.2d 873 (Tenn. 1996),¹ the Supreme Court upheld an award of permanent partial disability based on permanent restrictions despite the fact that the physician did not assign any anatomical impairment rating to the plaintiff in that case.

An anatomical impairment rating is not always indispensable to a trial court's finding of a permanent vocational impairment; anatomical impairment is distinct from the ultimate issue of vocational disability, and a medical expert's characterization of a condition as "chronic" and the placement of permanent medical restrictions is sufficient to prove that the condition was permanent. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998) (citing Hill v. Royal Ins. Co., 937 S.W.2d 873, 876 (Tenn. 1996)).

In Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d at 452 (Tenn 1988), the Supreme Court stated:

¹Judge Robert L. Childers, the circuit judge in the present case, was the author of this opinion sitting as Special Judge on the Special Workers' Compensation Appeals Panel of the Supreme Court. The provisions of Tenn. Code Annotated § 50-6-241 did not apply in that case as the plaintiff's injuries occurred prior to August 1, 1992. Neither party cited this case in the briefs submitted to this Panel.

[T]he ultimate issue is not the extent of anatomical disability but that of vocational disability, the percentage of which does not definitely depend on the medical proof regarding a percentage of anatomical disability.

Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d at 457.

An employer takes an employee as he finds him and assumes the risk of having a preexisting condition aggravated or accelerated by his employment. Hill v. Eagle Bend Manufacturing, Inc., 942 S.W.2d 483, 488 (Tenn. 1997).

To be compensable, the pre-existing condition must be advanced or there must be anatomical change in the pre-existing condition, or the employment must cause an actual progression of the underlying disease. Sweat v. Superior Industries, Inc., 966 S.W.2d 31, 32 (Tenn. 1998).

In Griffin v. Memphis Community Television Foundation, 748 S.W.2d 87 (Tenn. 1988), the Supreme Court upheld an award of twenty percent (20%) permanent partial disability to the body as a whole where the plaintiff suffered a superimposed cervical strain and pre-existing degenerative disc condition, but the doctor opined that there was no permanent partial impairment. The doctor did state that plaintiff would have residual symptoms and imposed a twenty pound weight lifting restriction. The Court held that this, together with the plaintiff's testimony regarding his disability, was enough to establish permanency. Griffin v. Memphis Community Tele. Found., 748 S.W.2d at 88-89.

Once causation and permanency have been established by expert medical testimony, the trial judge may consider many pertinent factors, including age, job skills, education, training, duration of disability, anatomical disabilities established by medical experts, and job opportunities available to a worker with those anatomical disabilities, to determine the extent of the worker's industrial disability. Hill v. Royal Insurance Co., 937 S.W.2d at 877 (citing Worthington v. Modine Manufacturing Co., 798 S.W.2d 232, 234 (Tenn. 1990)).

In his ruling from the bench the trial court referred to Dr. Howser's testimony as to whether the 1994 accident advanced the severity of her lumbar condition:

So I think he [Dr. Howser] starts out saying no, it didn't advance it, then he essentially says that, yes, it did advance it, because now she has a lumbar facet syndrome which she didn't have before, apparently; and aggravated a previous-existing lumbar canal stenosis and caused a radiculopathy from that standpoint.

The trial court then found that the permanent restrictions of lifting no more than ten to fifteen pounds and avoiding bending and stooping imposed by Dr. Howser for her back injury established permanency. He found that these permanent restrictions affected Ms. Taylor's ability to get employment on the open labor market. After considering Ms. Taylor's age, education, work and past

work experience, and the permanent restrictions, the trial court concluded that Ms. Taylor had a ten percent (10%) permanent impairment to the body as a whole.

After reviewing the record in this case, we find that the evidence does not preponderate against the trial court's award of permanent partial disability benefits.

CONCLUSION

The judgment of the trial court is affirmed. Costs are assessed to the Appellants. We remand the case to the trial court for the entry of any order necessary to carry out this judgment.

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

DOROTHY TAYLOR v. SENIOR CITIZENS SERVICES, INC., Et al.

**Circuit Court for Shelby County
No. 70466-9 T.D.**

No. W1999-02152-WC-R3-CV - Filed August 1, 2000

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 fact 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, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM