IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
October 13, 2000 Session

# CAROL DICKENS v. FEDERAL-MOGUL SYSTEMS PROTECTION, INC., ET AL.

**Direct Appeal from the Criminal Court for Smith County**
**No. 98-144 J. O. Bond, Judge**

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**No. M1999-02264-WC-R3-CV - Mailed - December 13, 2000**
**Filed - January 17, 2001**

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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 trial court found the plaintiff had suffered a twenty percent vocational disability to the body as a whole and that she was entitled to receive temporary total disability payments from August 27, 1997, through May 11, 1998. The defendant raises as issues the failure of the trial judge to exclude a medical deposition entered into evidence by the plaintiff; the failure of the trial judge to limit the award to two and one-half times the medical impairment rating of five percent; and questions the extent of the temporary total benefits awarded. We affirm the judgment in part and modify the judgment in part.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Criminal Court is Modified in Part and Affirmed in Part**

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which FRANK F. DROWOTA III, J. and TOM E. GRAY, SP. J., joined.

D. Randall Mantooth and Kristin M. Oberdecker, Nashville, Tennessee for appellants, Federal-Mogul Systems Protection, Inc. and Federal-Mogul Systems Protection, Inc. d/b/a Bentley Harris, Inc. and Liberty Mutual Insurance Company.

Hugh Green, Lebanon, Tennessee, for the appellee, Carol Dickens.

## OPINION

The trial court found the plaintiff had suffered a twenty percent vocational disability to the

body as a whole and that she was entitled to receive temporary total disability payments from August 27, 1997, through May 11, 1998.

The defendant raises as issues the failure of the trial judge to exclude a medical deposition entered into evidence by the plaintiff; the failure of the trial judge to limit the award to two and one-half times the medical impairment rating of five percent; and questions the extent of the temporary total benefits awarded.

We affirm the judgment in part and modify the judgment in part.

## Biography

At the time of trial the plaintiff was twenty-nine years of age; she had a twelfth grade education. She had previously worked as a sales clerk in a store, as a cashier and a seamstress. She had worked for the defendant approximately two and one-half years before the injury that is the subject of this case.

## Issues

On July 18, 1997, the plaintiff was lifting fiberglass material which weighed approximately seventy pounds. She turned to place the material on a conveyer belt and felt a sharp pain in her lower back. The defendant furnished medical care for her injury.

## Medical Evidence

Dr. Roy Johnson saw the plaintiff for her injury and treated her until August 19, 1997, when he released her to return to light work. Dr. Johnson placed restrictions of a twenty pound maximum lifting on a frequent basis or carrying objects up to ten pounds on a frequent basis. Dr. Johnson found the plaintiff had suffered a back sprain and fixed no permanent impairment rating.

The plaintiff was seen by Dr. Michael M. Moore, a specialist in physical medicine and rehabilitation, on referral from her attorney. Dr. Moore first saw the plaintiff on November 10, 1997. He diagnosed the plaintiff's injury as a soft tissue injury with mechanical low back pain. Dr. Moore continued to see the plaintiff until May 11, 1998, when he testified she reached maximum medical improvement.

Dr. Moore was of the opinion the plaintiff could do light duty work which would allow her to lift up to thirty pounds intermittently and restricted her from sitting or standing more than forty-five minutes at a time.

Dr. Moore did not "phase the plaintiff out of work," at any time during her treatment. He was told, it appears by the plaintiff, that her job required heavy work. He found the plaintiff suffered a five percent medical impairment to the body as a whole based upon her subjective complaint of

pain.

On August 20, 1997, the plaintiff fell in the bathtub at home and was treated by Dr. Petty for back pain. She did not report this fall to Dr. Johnson or Dr. Moore.

**Return to Work**

Upon receipt of Dr. Johnson's restriction on August 19, 1997, the defendant created a light duty job for the plaintiff. This job involved standing and picking up bobbins which weighed from one pound to less than one pound. These were picked up one at a time from a basket, wound and dropped into another basket. The plaintiff was not allowed to pick up a basket of bobbins because the weight exceeded her restrictions. Another employee was assigned to work with the plaintiff and did the heavy lifting. The plaintiff was paid for this work at the same rate that she received prior to the injury.

On August 27, 1997, the plaintiff told the defendant she could no longer do the work to which the defendant assigned her. The human resource assistant for the defendant came to her on the 27th of August 1997 to discuss the light duty work. The plaintiff informed the assistant of the fall in the bathtub and gave her a note from Dr. Petty that said she was able to return to work.

The plaintiff said she could not do the light duty job that had been given to her because it caused pain when she bent forward. The supervisor told the plaintiff they still had light work available to her. However, the plaintiff resigned from her job. The plaintiff had worked the light duty job for approximately two weeks.

**Discussion**

The complaint of the defendant of the medical deposition of Dr. Moore is based on what appears to be a custom developed by attorneys in developing deposition evidence. Statements of counsel indicate opposing counsel is customarily given time to meet with a material witness prior to taking of the deposition. Defense counsel says plaintiff's counsel cut short his time to confer with Dr. Johnson prior to the taking of the deposition and thus denied him the customary politeness engendered by the custom.

We, of course, encourage and would not wish to discourage attorneys from cooperative efforts to facilitate the taking of evidence pre-trial; however, we are unable to pose upon the legitimacy of defense counsel's complaint because we must act upon the basis of rules and statutes in such matters. We cannot supervise various customs crafted by various bar associations or practiced in various areas of the state. We therefore affirm the action of the trial court in allowing Dr. Moore's deposition to be entered into evidence in this case.

**Return to Work**

The issue of whether the awarded for the plaintiff should be limited to two and one-half percent of six percent as provided by Tennessee Code Annotated §50-6-241(a)(1) or Tennessee Code Annotated §50-6-241(B) is based upon whether the employer has offered the employee a job which is reasonably shown to be within the medical restrictions placed on the plaintiff. Further, in determining the issue the courts must find whether the employee's refusal to return to or remain at work is reasonable or unreasonable. The result of this rule is that each case must be determined upon the facts of the case. *See Newton v. Scott Health Care Center*, 914 S.W.2d 884 (Tenn. 1995) and *Brown v. Campbell County Board of Education*, 915 S.W.2d 407 (Tenn. 1995).

In this case, none of the physicians placed restrictions on the plaintiff that exceeded the requirements of the job the defendant fashioned for her. No medical evidence in this case shows the plaintiff could not perform the light duty job assigned to her.

The testimony of Dr. Moore was that the plaintiff's complaints of pain were subjective. It seems obvious the plaintiff's complaint that she could not do the work was subjective without any objective evidentiary support of any source.

Based upon the record in this case, we find the evidence preponderates against the finding that the plaintiff's refusing to do the job which was within all the medical restrictions and evidence of the defendant's willingness to maintain light duty work for the plaintiff, makes the plaintiff's refusal to remain at work unreasonable. We therefore find that the award in this case should be set at twelve and one-half percent partial vocational disability to the body as a whole.

**Temporary Total Disability**

The trial judge awarded the plaintiff temporary total benefits from August 27, 1997, the day the plaintiff quit work, until May 11, 1998, the date Dr. Moore said she reached maximum medical improvement. We do not find the evidence in this case supports said finding.

Dr. Moore testified he never found the plaintiff should be off work. Interestingly, Dr. Moore, based on the plaintiff's report, thought the plaintiff work was performing heavy duty work. The record shows Dr. Johnson had released the plaintiff to light duty work on August 19, 1998, and she returned to duty on that date, to a light duty job was crafted for her. Temporary total benefits end when the employee becomes able to work or reached maximum medical benefits. *Prince v. Sentry Insurance Co.*, 908 S.W.2d 937 (Tenn. 1995).

In this case, all the medical evidence shows the defendant was able to perform light duty employment by August 19, 1997.

In *Gluck Brothers, Inc. v. Coffey*, 431 S.W.2d 756 (Tenn. 1986), the plaintiff was returned to gainful work within the medical limits set by the physician. The plaintiff claimed he was unable to work due to pain. The court in *Gluck* held the plaintiff's claim supported only by by lay witnesses was insufficient to sustain an award for temporary total benefits.

In this case the plaintiff's subjective complaint of pain is insufficient to support the trial court's award of temporary total benefits from August 27, 1997, until May 11, 1998.

The plaintiff was entitled to temporary total benefits from July 18, 1997, the date of injury, until August 19, 1997, the date she was returned to work within her restrictions.

We affirm the judgment of the trial court in finding the plaintiff sustained a five percent medical impairment to the body as a whole. We modify the judgment to show the award is limited to two and one-half percent of the medical improvement rating, i.e., twelve and one-half percent vocational improvement, and we find the trial court properly admitted Dr. Moore's deposition into evidence.

The costs of this appeal are taxed equally to the plaintiff and defendant.

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JOHN K. BYERS, SENIOR JUDGE

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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 fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid equally by the plaintiff and defendant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM