

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

( November 30, 2000 Session)

**ANGELA McCOIN v. LUMBERMENS MUTUAL CASUALTY  
COMPANY and WILSON SPORTING GOODS, INC.**

**Direct Appeal from the Circuit Court for Robertson County  
No. 8929 James E. Walton, Circuit Judge**

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**No. M2000-00813-WC-R3-CV - Mailed - February 6, 2001  
Filed - March 9, 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 of findings of fact and conclusions of law. The employer appeals the trial court award of thirty-five percent disability to the arm, and the award of temporary total disability and temporary partial disability benefits after the employee had returned to work for another employer. We affirm.

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

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J. and JOE C. LOSER, JR, SP. J., joined.

Margaret Moore, Gideon & Wiseman, Nashville, Tennessee, for the appellant, Lumbermens Mutual Casualty Company and Wilson Sporting Goods, Inc.

Larry D. Wilks, Springfield, Tennessee, for the appellee, Angela McCoin.

## MEMORANDUM OPINION

### BACKGROUND FACTS

Angela McCoy (McCoy) is forty years of age and has earned a G.E.D. In October 1996, while employed by Wilson Sporting Goods, Inc. (Wilson), she began to experience pain in her right elbow. She notified Wilson, who provided a panel of treating physicians. She first went to Dr. Arthur Cushman, who instructed her to use a hand splint, to perform certain exercises, and to take Naprosyn. In January 1998, McCoy's right elbow started causing her pain again. She went to John McInnis, M.D. for treatment. Dr. McInnis treated her with cortisone injections and released her to return to work on March 23, 1998 with certain restrictions. Wilson paid temporary total disability payments for the period McCoy was unemployed. Dr. McInnis assigned McCoy a five percent (5%) permanent impairment to the right arm. Wilson did not have a position available within McCoy's restrictions and so terminated her employment. McCoy then found part-time work with the Montgomery County School System, starting April 1, 1998. On June 1, 1998, McCoy sought a second medical opinion concerning her right elbow from Douglas Weikert, M.D. Dr. Weikert performed a right lateral epicondyle debridement and partial osteotomy on July 28, 1998. McCoy returned to part-time work at the Montgomery County School System on August 10, 1998. After the surgery, Dr. Weikert assigned McCoy a five percent (5%) medical impairment to the right arm.

The trial judge found that Wilson owed McCoy temporary total disability payments for the period beginning June 1, 1998, the date of her first visit to Dr. Weikert, to August 9, 1998, the last day she was unemployed. The trial judge also found that Wilson owed McCoy temporary partial disability payments from August 10, 1998 to January 25, 1999, the date Dr. Weikert released McCoy to return to work with no restrictions. Additionally, the trial judge found that McCoy suffers from a thirty-five (35%) vocational disability.

### STANDARD OF REVIEW

The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. Nelson v. Wal-Mart Stores, Inc., 8 S.W.3d 625, 628 (Tenn. 1999); Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990). Our review of the trial court's finding in this case is de novo upon the record, "accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. §50-6-225(e)(2) (1999). We are obliged to review the record on our own to determine where the preponderance of the evidence lies. Ivey v. Trans Global Gas & Oil, 3 S.W.3d 441, 446 (Tenn. 1999); Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 456 (Tenn. 1988). Although deference still must be given to the trial judge when issues of credibility and weight of oral testimony are involved, Seals v. England/Corsair Upholstery Mfg. Co., 984 S.W.2d

912, 915 (Tenn. 1999); Jones v. Hartford Accident & Indem. Co., 811 S.W.2d 516, 521 (Tenn. 1991), this Court is able to make its own independent assessment of the medical proof when the medical testimony is presented by deposition or C-32 form. Landers v. Fireman's Fund Ins. Co., 775 S.W.2d 355, 356 (Tenn. 1989); Henson v. City of Lawrenceburg, 851 S.W.2d 809, 812 (Tenn. 1993).

## DISCUSSION

### A. Vocational Disability Rating.

At trial, the only evidence presented was the testimony of McCoin and the C-32 form completed by Dr. Weikert. Dr. Weikert's medical impairment rating, which is the same rating previously given by Dr. McInnis, is not contested. However, a medical impairment rating does not equal a vocational disability rating. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000). A vocational disability rating incorporates the medical limitations of the employee, as well as the employee's skills and training, education, age, and local job opportunities. Id. Defendants called no witnesses at trial. Therefore, the trial judge was left to base his decision on the evidence presented by McCoin. The trial judge weighed the credibility of McCoin during her live testimony. While our review of the record is *de novo*, a trial judge's weighing of the credibility of a live witness is given deference by this court. Seals, 984 S.W.2d at 915. Accordingly, Defendants have not shown that the preponderance of the evidence presented at trial weighs against the trial court's ruling, and so the trial court's award of a thirty-five percent (35%) vocational disability stands.

### B. Additional Temporary Disability Benefits.

The trial judge awarded temporary disability benefits from the time McCoin began seeing Dr. Weikert to the time he released her to return to work with no restrictions. The award was a mix of total and partial disability benefits depending on McCoin's work situation at the time. Defendants object claiming that since McCoin began working for a different employer in the time between leaving Wilson and undergoing treatment from Dr. Weikert that she is not eligible for temporary disability benefits.

Cleek, 19 S.W.3d at 777-78, recognized that an injured employee may be eligible for a second period of temporary disability benefits after a nominal return to work, "when (1) the employee is no longer capable of performing either that job or any other job because of the work-related injury; and (2) the employee, at the time of resignation [or termination], has yet to reach maximum medical improvement from the original injury." Here McCoin was unemployed due to her injury from June 1, 1998 to August 9, 1998. Clearly, the rule expressed in Cleek applies, and the trial judge properly awarded McCoin an additional period of temporary total disability benefits.

As for the temporary partial disability payments, the rule of Cleek is applicable by extension. Cleek concerned a claim for temporary total disability payments. It provides that when an employee is totally disabled due to the original injury after a nominal return to work, then that employee may recover temporary total disability payments. When an employee is partially disabled due to the original injury after a

return to work, it would follow that the employee is owed partial disability benefits for the time the employee is partially disabled, until the employee has reached maximum medical improvement. This is what the trial judge awarded.

### **CONCLUSION**

The judgment of the trial court is affirmed. This case remanded for any necessary proceedings. Costs are taxed to appellants and their sureties.

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Howell N. Peoples, Special Judge

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

**ANGELA McCOIN v. LUMBERMENS MUTUAL CASUALTY  
COMPANY, ET AL.**

**Circuit Court for Robertson County  
No. 8929**

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**No. M2000-00831-WC-R3-CV - Filed - March 9, 2001**

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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 by the appellants and their sureties, for which execution may issue if necessary.

**IT IS SO ORDERED.**

**PER CURIAM**