

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
(July 20, 2000 Session)

DEBRA WARD v. KANTUS CORPORATION

**Direct Appeal from the Circuit Court for Marshall County
No. 13463 Lee Russell, Judge**

**No. M1999-01718-WC-R3-CV - Mailed November 30, 2000
Filed - January 4, 2001**

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 defendant, Kantus Corporation, appeals the judgment of the Circuit Court for Marshall County, where the trial court awarded permanent partial disability benefits of \$32,879.60, representing a permanent partial disability of thirty-two and one-half percent (32.5%) to the body as a whole, and representing two and one-half times the plaintiffs impairment rating of thirteen percent (13%) with open future medical benefits. The trial court commuted the award to a lump sum, and taxed court costs to Kantus. The defendant submits that: (1) Ms. Ward's claim is barred by the statute of limitations; (2) she failed to give notice to her employer of her injury; (3) Ms. Ward did not sustain an injury arising out of and in the course and scope of her employment; (4) the trial court's award of thirty-two and one-half (32.5%) permanent partial disability to the body as a whole was excessive and contrary to the weight of the evidence; and (5) the trial court erred in affording equal or greater weight to the opinion of the evaluating physician than that of the treating neurosurgeon in determining permanent partial impairment and disability. 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 BIRCH, J. and COTTRELL J. joined.

Randolph A. Veazey, Connie Jones, Nashville, Tennessee for the appellant, Kantus Corporation.

C. Kelly Wilson, Shelbyville, Tennessee for the appellee, Debra Ward.

MEMORANDUM OPINION

The plaintiff, Ms. Debra Ward, was forty years (40) old at the time of trial. She completed the tenth (10th) grade in high school and then quit school to help her divorced mother provide for the family of six children. Ms. Ward later earned her Graduate Equivalency Degree (GED).

She also completed vocational training courses at Lake Michigan College in industrial blue print reading, geometric tolerancing, and statistical process control. Ms. Ward can read, write, perform mathematic computations, and has some computer skills.

Ms. Ward's employment history includes working at a manufacturing plant operating a drill and tamp machine for ten (10) months; at a plating company in Michigan for three (3) years, operating a machine which checked for accuracy of chrome plating on airplane bearings; at AdCo Die Casting in Michigan, for two (2) years in packing, and three (3) years in quality control, inspecting, weighing, and measuring coordinates on small aluminum die cast parts and casings; and as a temporary worker, at Calsonic Manufacturing, in Tennessee, inspecting parts for one year.

In October of 1992, Ms. Ward began working for Kantus Corporation, a manufacturer of automobile parts. Initially, she worked in the paint department inspecting radiator grilles. Ms. Ward was later transferred to the foaming department where she inspected foam pads for automobile dashboards or instrument panels. After inspecting the parts for defects, she would then place them on metal racks that were four levels high. This job required her to lift and reach overhead on a repetitive basis. Although she had worked at jobs requiring manual, repetitive labor since 1977, as of September 1996, Ms. Ward had never experienced physical problems with her neck and shoulders.

On Friday, September 6, 1996, Ms. Ward was preparing to close her shift by placing a plastic covering over four metal racks full of parts. As she reached overhead to do so, she felt "something kind of pull and sting real bad in my neck". As there was only five minutes left in her shift and she thought the "pain would just quit," she did not mention the incident to her supervisor. Instead, she went home and treated her neck with ice. But the pain in her neck grew worse and on Monday September 9, 1996, Ms. Ward reported the injury to her supervisor, Mr. John Kirby, immediately upon arriving at work that morning. Mr. Kirby sent her to Mr. John Cook, who handled the company's workers' compensation matters at the time, and Mr. Cook made an appointment for her with Dr. Brewer, one of the company's authorized physicians.

Ms. Ward went to see Dr. Brewer that same day and after a cursory physical examination, Dr. Brewer concluded that she had pulled a muscle in her neck. He prescribed mild pain medication and advised her to go back to work.

Although the pain medication provided temporary relief, Ms. Ward began experiencing a throbbing pain in her neck and in the back of her head. While visiting her personal doctor, Dr. Canonico for a sinus problem a few weeks later, she told him about the pain in her neck and head. Dr. Canonico examined her neck; said that she was simply having tension headaches, prescribed lorcet and told her to stop worrying so much. She continued seeing Dr. Canonico for treatment of tension headaches for approximately two (2) years.

In 1997, Ms. Ward was transferred to the injection mold department where she worked a lot of overtime. After starting this new position at Kantus, she stated "the headaches seemed to be getting worse in the back of my head." In January 1998, Ms. Ward experienced an especially severe headache--"the back of my head started hurting, and I had took, like, maybe four to six Tylenol that day. And by the time I left, I was having to hold my head because it was just throbbing real bad."

Although she thought that the headache was caused by the stress associated with the long hours, she nevertheless made an appointment with Dr. Blanton, Dr. Canonico's associate, because of the severity of the pain. Dr. Blanton examined Ms. Ward, stated that her problem was "out of his field" and referred her to Dr. Michael Moran, a neurosurgeon. Although he did not say anything to Ms. Ward during the appointment, Dr. Blanton apparently feared she might have an aneurysm.

Dr. Moran examined Ms. Ward after first taking her history and scheduled an MRI for February 4, 1998. Ms. Ward did not tell Dr. Moran that her problems were work-related. On February 5, 1998, Ms. Ward saw Dr. Moran again who explained that the MRI had revealed a herniated disc in her neck at C5-6 and C4-5, without spinal cord nerve impingement. They discussed treatment options including physical therapy and surgery. Dr. Moran prescribed a three week regimen of physical therapy.

However, Ms. Ward did not respond well to physical therapy and on March 5, 1998, she returned to Dr. Moran explaining that the pain was even greater than before. Dr. Moran then recommended surgery to fuse the discs which would require that she take a substantial period of time off from work after the surgery.

Soon after learning that her pain was due to a serious condition which would not get better without surgical intervention, Ms. Ward began to realize that the diagnosis of Drs. Brewer and Canonico might be wrong, and that her condition actually might be related to the September 6, 1996 incident. Therefore, immediately after the March 5, 1998 visit with Dr. Moran she met with Mr. David Fagan, the workers' compensation director at Kantus.

In that meeting, she told Mr. Fagan that she had been diagnosed with a herniated disc in her neck that required surgery, and that she thought it was related to the September 6, 1996, incident. In response, Fagan pulled Ms. Ward's file and saw that she indeed had sustained a neck injury on that date. According to Ms. Ward, Mr. Fagan told her that he would see if workers' compensation would provide coverage; but he did not think that it would because so much time had elapsed. Ms. Ward

testified that Ms. Betsy Shelton—a human resources director at Kantus—suggested that she apply for short-term disability coverage. Ms. Shelton explained that Ms. Ward would be assured of coverage until the workers' compensation issue was resolved.

On an earlier date, Ms. Ward had asked Mr. Fagan if he could move her from the instrument panel press job as it required a lot of overhead work that made her headaches more severe. Mr. Fagan stated that he would need to get formal restrictions from her doctor. Ms. Ward secured the restrictions from Dr. Moran, but Kantus could not accommodate the restrictions as they did not have such a position available.

Ms. Ward explained that she was very upset the day that she signed the disability application. "For the last three years, I've basically had to have surgery. And when he had mentioned surgery, I was quite tore up. I was crying. I didn't want to have to be put out of work. And because they couldn't accommodate the restrictions I was on, I had to go out of work on that day." Ms. Ward stated that "[a]ll I did was sign the form. Betsy told me she would take care of it all." Ms. Shelton filled out some of the paper work on the disability application, and the rest was filled out by Dr. Moran who indicated that Ms. Ward's condition resulted from an "illness".

According to Mr. Fagan, Ms. Ward did not talk with him about a workers' compensation claim, or tell him that she thought her head and neck problems might be work-related until the day she advised him she had been diagnosed with a herniated disc and was going to have surgery.

At that time, Mr. Fagan pulled her file and saw that she had an injury back in 1996. He testified that he explained to Ms. Ward that if she wanted to claim the herniated disc as a workers' compensation injury, it would take some time as he would have to contact the insurance company, get the claim approved, and she would have to see physicians authorized by the compensation insurer. Mr. Fagan explained that he thought that Dr. Moran probably would not be authorized, because he was not familiar with Dr. Moran. Mr. Fagan testified that Ms. Ward said that she would rather use Dr. Moran, even after he explained that the unauthorized doctor would have to be paid under health insurance, and would not be paid by workers' compensation. He stated she also understood that she could not receive short-term disability benefits if she was claiming this as a work injury.

On March 19, 1998, Dr. Moran performed a two-level cervical spine laminectomy and fusion at C4-5 and C5-6. After surgery Ms. Ward missed approximately five (5) months of work and during that period she did not have any headaches.

At the conclusion of that five (5) month period, Dr. Moran released Ms. Ward to return to work with restrictions for light duty. After about a month of light duty, Dr. Moran released her to go back to work on full duty. However, because she was still having trouble reaching overhead, Kantus made accommodations that limited the amount of overhead lifting she would have to do.

After returning to work, she began to experience pain in her neck and shoulders. On October

1, 1998, she went back to Dr. Moran who explained that there was nothing more he could do, and that she would have to learn to live with the pain.

Dr. Moran opined that she reached maximum medical improvement as of July 23, 1998, and that she retained a ten (10%) percent permanent partial impairment to the body as a whole. He did not assign permanent restrictions and stated, "[f]rom a structural, mechanical standpoint, she should be able to [do overhead work]. I can't guarantee that she'll be pain free when she does it, but from a biomechanical point, she should be strong enough to do overhead work."

The following exchange took place between Ms. Ward's counsel and Dr. Moran regarding the issue of causation:

Q. As to causation, Doctor, I believe that in your history that you took from her, she did not make mention of a work-related injury?

A. She did not.

Q. And I believe there was a description of some two years of problems?

A. Uh- huh.

Q. Is this type of injury the type of injury that could be caused by a trauma?

A. It could be caused by a trauma.

Q. Is it possible that a single incident of trauma could cause this injury?

A. Yes, it is.

Q. Is it possible that repetitive-type work could cause this type of injury?

A. Yes.

Q. As far as your opinion is concerned, can you tell us one way or another whether it is work-related or not?

A. I cannot say one way or another whether it's work-related.

Ms. Ward's attorney sent her to unauthorized physician, Dr. Richard Fishbein, for an

evaluation on September 15, 1998. After that single exam, Dr. Fishbein opined that Ms. Ward retained a permanent partial impairment of fifteen (15%) percent to the body as a whole. He gave Ms. Ward permanent lifting restrictions of ten to fifteen pounds repetitively, twenty-five pounds occasionally, and forty-five pounds maximally. He testified that she should require no further medical treatment for her injury and had had a good result from her surgery.

Dr. Fishbein also causally related Ms. Ward's spine condition and surgery to the September 6, 1996 incident. Dr. Fishbein testified that based on what Ms. Ward told him and the history provided, in his opinion her injury was caused by "her work at Bantus running a plastic molding machine." When asked when she developed this disorder, Dr. Fishbein replied, "I think the initial insult was in '96 and it progressed."

Ms. Ward is currently working at Kantus at her old job. Ms. Ward stated that she was an active person before the injury. Now she cannot do a lot of physical activities with her eleven year old son, and cannot clean her house like she used to before the injury. She has difficulty driving long distances because of the pain in her neck and head. She has trouble sleeping and is forced to use pain relievers on a more or less constant basis.

The parties stipulated that Ms. Ward's workers' compensation weekly benefit rate was \$252.92; and that she was not seeking temporary total disability benefits, because she had received employer funded short-term disability payments totaling \$5,340.00 which equaled or exceeded any claim for temporary total disability benefits that she might have had.

The trial court awarded permanent partial disability benefits of thirty-two thousand eight hundred seventy-nine dollars and sixty cents (\$32,879.60), representing a permanent partial disability of thirty-two and one-half (32.5%) percent to the body as a whole, based upon a permanent partial impairment rating of thirteen percent (13%), with open future medical benefits. The trial court commuted the award to a lump sum and taxed court costs to Bantus.

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. Tenn. Code Ann. §50-6-225 (e)(2); *Lollar v. Wal-Mart Stores, Inc.*, 767 S.W.2d 143, 149 (Tenn. 1989). This standard of review requires this Panel to weigh in more depth factual findings and conclusions of trial judges in workers' compensation cases. *Humphrey v. Witherspoon, Inc.*, 734 S.W.2d 315, (Tenn. 1987). Where the 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. *Id.*

Bantus Corporation has presented five (5) issues in this appeal:

I. Is the employee's claim barred by the applicable statute of limitations, contained in

Tennessee Code Annotated §50-6-203, by her failure to commence litigation within one (1) year of either the claimed injury or the last voluntary payment of medical treatment?

II. If the employee's claim is based upon a new or cumulative injury or aggravation of her prior condition, in 1998, is the employee's claim barred by her failure to give requisite notice of such claimed injury or aggravation, in accordance with *Tennessee Code Annotated* §50-6-201?

III. Did the trial court err in finding that the employee sustained a compensable permanent cervical injury arising out of and in the course and scope of her employment with Bantus Corporation?

IV. Is the trial court award of thirty two and one-half percent (32.5%) permanent partial disability to the body as a whole excessive and contrary to the weight of the evidence?

V. Did the trial court err in affording equal or greater weight to the opinion of the evaluating physician, Dr. Richard E. Fishbone, than the opinion of the treating neurosurgeon, Dr. Michael F. Moran, in determining permanent partial impairment and disability?

I. Is the employee's claim barred by the applicable statute of limitations, contained in *Tennessee Code Annotated* §50-6-203, by her failure to commence litigation within one (1) year of either the claimed injury or the last voluntary payment of medical treatment?

Tennessee Code Annotated §50-6-203(a) provides in pertinent part:

The right to compensation under the Workers' Compensation Law shall be forever barred, unless, within one (1) year after the accident resulting in injury or death occurred, the notice required by §50-6-202 is given the employer and a claim for compensation under the provisions of this chapter is filed with the tribunal having jurisdiction to hear and determine the matter; provided, that if within the one-year period voluntary payments of compensation are paid to the injured person or the injured person's dependents, an action to recover any unpaid portion of the compensation, payable under this chapter may be instituted within one (1) year from the latter of the date of the last authorized treatment or the time the employer shall cease making such payments, except in those cases provided for by §50-6-230. Where a workers' compensation suit is brought by the employer or the employer's agent and the employer or agent files notice of non-suit of the action at any time on or after the date of expiration of the statute of limitations, either party shall have ninety (90) days from the date of the order of dismissal to institute an action for recovery of benefits under this chapter.

It is well settled that “the running of the statute of limitations is suspended until by reasonable care and diligence, it is discoverable and apparent that an injury compensable under the workmen’s compensation law has been sustained.” *Ogden v. Matrix Vision of Williamson County, Inc.*, 838 S.W.2d 528, 530 (Tenn. 1992) (citations omitted). Furthermore, Tennessee courts have long held that the employee’s knowledge for statute of limitations purposes often depends entirely upon the medical advice he receives from a treating physician. See *Livingston v. Shelby Williams Industries*, 811 S.W.2d 511 (Tenn. 1991). (Statute did not begin to run until employee’s doctor diagnosed him with a compensable injury).

In *Union Carbide Corp. v. Cannon*, 523 S.W.2d 360, 361 (Tenn. 1975), an employer suffered an injury to her back on January 13, 1969, while at work. Although she suffered substantial pain, lost time from work, and was treated by several physicians in the ensuing months, none of these physicians diagnosed her with a permanent, compensable injury. *Cannon*, 523 S.W.2d at 361. On April 7, 1970, a physician concluded that the employee had suffered a herniated disc. *Id.* Our Supreme Court held that the statute of limitations did not begin to run until April 7, 1970—the date the injury was properly diagnosed, even though this diagnosis came over a year after the injury occurred. *Id.*

In this case Dr. Brewer, the company physician, told Ms. Ward that she had suffered a pulled muscle. Later Dr. Canonico told Ms. Ward that her pain was due entirely to tension headaches. Ms. Ward did not learn the true nature of her condition until Dr. Moran diagnosed her as having a herniated disc on February 5, 1998.

After reviewing the record in this case we find that with the exercise of reasonable care and diligence, it was not discoverable or apparent that a compensable injury had been sustained prior to February 5th, 1998.

It is our opinion that prior to Dr. Moran’s diagnosis, that Ms. Ward, based on the advice of Dr. Brewer and Dr. Canonico, had no reason to believe that her neck and head pain were related to the September 6, 1996 incident at work.

We find that the statute of limitations in this case, commenced on February 5, 1998, the date Ms. Ward’s injury was properly diagnosed. As Ms. Ward filed suit on May 13, 1998, Ms. Ward brought suit within the one year statute of limitations.

We find that the evidence supports the finding of the trial court, that Ms. Ward’s claim is not barred by the statute of limitations.

II. If the employee’s claim is based upon a new or commutative injury or aggravation of her prior condition, in 1998, is the employee’s claim barred by her failure to give requisite notice of such claimed injury or aggravation, in accordance with *Tennessee Code Annotated §50-6-201*.

Tennessee Code Annotated §50-6-201 provides that:

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.

An employee's duty to give notice does not arise until the employee is aware, or reasonably should have been aware, that he has sustained a compensable injury, whether that injury is gradual or one attributable to a single event. *Lyle v. Exxon Corp.*, 746 S.W.2d 694, 697-98 (Tenn. 1988). Furthermore, an employee's reasonable lack of knowledge of the nature and seriousness of his injury will excuse his failure to give notice within the thirty (30) day period. *Pentecost v. Anchor Wire Corp.*, 695 S.W.2nd 183, 185 (Tenn. 1985). Likewise, an employee's lack of knowledge that his injury is work related, if reasonable under the circumstances, will also excuse his failure to give notice within thirty (30) days. *Id.*

Here Ms. Ward suffered her initial injury five minutes before closing time on Friday, September 6, 1996. She notified Bantus of this injury immediately upon returning to work on the following Monday. However, because of the diagnoses of Dr. Brewer—who told her that she had a pulled muscle—and of Dr. Canonico—who repeatedly told her that her pain was due to tension headaches—Ms. Ward did not know, and it is our opinion, could not reasonably have known that she had sustained a compensable injury. It was not until February 5, 1998, when Dr. Moran explained that the MRI had revealed a herniated disc in her neck and suggested a number of options, including physical therapy or surgery that she learned the true nature of her condition. When Ms. Ward did not respond well to physical therapy, she returned to Dr. Moran on March 5, 1998, explaining that her pain was even greater than before, and that point Dr. Moran recommended surgery to fuse the disc which would require a substantial period of time off from work after the surgery.

According to Ms. Ward as she became aware of the seriousness of her condition, she began to realize that her condition was related to the September 6, 1996 injury. Therefore, immediately after the March 5, 1998, visit with Dr. Moran, Ms. Ward met with Mr. Fagan, the worker's compensation director at Bantus. In that meeting she told Mr. Fagan that she had been diagnosed

with a herniated disc in her neck, and that she thought it was related to the September 6, 1996 injury.

Accordingly, after reviewing the evidence in this case, it is our conclusion that the evidence supports a finding that Ms. Ward provided reasonable excuse for failure to give notice within the thirty (30) day period required by the statute and that the trial court should be affirmed on this issue.

III. Did the trial court err in finding that the employee sustained a compensable permanent cervical injury arising out of in the course and scope of her employment with Bantus Corporation?

To receive workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." *Tenn. Code Ann.* §50-6-102(12).

In *Reeser v. Yellow Freight System, Inc.*, 938 S.W.2d 690 (Tenn. 1997) our Supreme Court stated:

Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have thus consistently held that an award may properly be based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury.

938 S.W.2d at 692. (Citations omitted).

When the medical testimony is presented by deposition, this court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Insurance Co. of North America*, 884 S.W.2d 446, 451 (Tenn. 1994).

In addition to the medical proof, the claimant's own assessment of her physical condition and resulting disabilities is competent testimony and cannot be disregarded. *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972).

In this case, Ms. Ward alleges that the herniated disc was a gradual injury, attributable to years of repetitive-type work, which finally manifested itself on September 6, 1996, and that it continued to worsen thereafter. Dr. Moran testified that either a single traumatic incident or a repetitive type work could have caused the injury. Thus, Dr. Moran did testify that Ms. Ward's work activities "could be" because of her injury. In addition, there is other lay evidence to supplement Dr. Moran's testimony. According to Ms. Ward, she had experienced no problems whatsoever with her neck or shoulders before September 6, 1996. It was only after that date that her

neck and head began to give her problems.

Dr. Moran agreed that this type disorder could arise from just age, wear and tear, trauma at the work place, away from the work place and was unable to determine within any reasonable degree of medical certainty as to whether or not this disorder is related to her work.

Dr. Fishbein testified, unequivocally, that Ms. Ward's injury was work related and was specifically due to her repetitive type duties at work.

It is well settled that a trial court has wide discretion over whether to accept or reject expert testimony in workers' compensation cases. *Elmore v. Travelers Insurance Co.*, 824 S.W.2d 541,544 (Tenn. 1992). Dr. Fishbein was aware of the essentials of Ms. Ward's duties as a production technician at Kantus. Dr. Fishbein testified as to his opinion concerning causation that, "Based on what she told me, and the history, her work at Kantus running a plastic molding machine." And he testified that Ms. Ward had told him that her job duties involved putting pads on a rack and repetitive use of her neck while putting her pads in the machine.

Note: May need to expand more Dr. Fishbein's knowledge of her duties.

Ms. Ward testified that when she met with Dr. Fishbein she told him exactly what her duties were.

After reviewing the medical depositions and the testimony in this case, we are of the opinion that the evidence supports the finding of the trial court.

IV. Is the trial court award of thirty two and one-half percent (32.5%) permanent partial disability to the body as a whole excessive and contrary to the weight of the evidence.

Tennessee Code Annotated §50-6-241 (a)(1) provides:

For injuries arising on or after August 1, 1992, in cases where an injured employee is eligible to receive any permanent partial disability benefits, pursuant to §50-6-207 (3)(A)(i) and (F), and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is two and one-half (2 1/2) times the medical impairment rating determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment (American Medical Association), The Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community. In making determinations, the court shall consider all pertinent factors,

including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition.

In this case Dr. Moran gave Ms. Ward a medical impairment rating of ten percent (10%) based upon the AMA Guidelines using Table 75, page 113 Section 2 (E), "surgically treated disc lesion with residual medically documented pain and rigidity. She did have some residual pain. So she would get a nine percent (9%) for the cervical impairment, plus an extra one percent (1%) since two levels were operated on." Using these same guidelines, Dr. Fishbone gave her a fifteen percent (15%) impairment rating because he classified her injury according to the injury model as a cervical radiculopathy.

In its order, the trial court (1) combined these figures to arrive at a medical impairment rating of thirteen percent (13%); and then (2) multiplied that figure by the maximum multiplier of 2.5 to arrive at the 32.5% disability rating.

Once the causation and permanency of an injury had been established by expert testimony, the trial court may consider many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomical impairment, for the purpose of evaluating the extent of a claimant's permanent disability.

The fact that an employee is not under restrictions from her doctors, or is under minimal restrictions does not control. *See E. G. Lyle v. Exxon Corp.*, 746 S.W.2d 694 (Tenn. 1988). (Although doctor gave no restrictions, he assigned a ten percent (10%) impairment rating, and trial court awarded sixty percent (60%) permanent partial disability; judgment affirmed on appeal. After considering all of the relevant statutory factors, we find the evidence does not preponderate against the trial court's award of thirty-two and one half percent (32.5%) permanent partial disability to the body as a whole. Ms. Ward is forty (40) years old; has worked in manual labor factory jobs since she was seventeen (17) years old; has a minimal amount of education—a GED and testified that she is in more or less constant pain, which affects her ability to work and live her life. Although she did take three courses in quality control in Michigan, there was no showing that any jobs of this type were available in this area or in Ms. Ward's area.

V. Did the trial court err in affording equal or greater weight to the opinion of the evaluating physician, Dr. Richard E. Fishbein, than the opinion of the treating neurosurgeon, Dr. Michael F. Moran, in determining permanent partial impairment and disability?

This issue has been addressed in our discussion of issue three above. We find no error upon the trial court.

CONCLUSION

The judgment of the trial court awarding plaintiff, Ms. Debra Ward, thirty two and one half percent (32.5) permanent partial disability to the whole, with future medicals to remain open, is affirmed. The defendant, Bantus Corporation, is taxed with the costs of this appeal.

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
July 20, 2000 Session

DEBRA WARD v. KANTUS CORPORATION

**Circuit Court for Marshall County
No. 13463**

No. M1999-01718-WC-R3-CV - Filed - January 4, 2001

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 defendant, Kantus Corporation, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM