

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
March 27, 2001 Session

**LINDA SUE PINKARD v. FINDLAY INDUSTRIES, INC.**

**Direct Appeal from the General Sessions Court for Warren County  
No. 6843-GSWC Larry Ross, Judge**

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**No. M2000-01320-WC-R3-CV - Mailed - June 13, 2001  
Filed - July 16, 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 Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the employer insists (1) the trial court's finding of permanent partial impairment or disability is contrary to the preponderance of the evidence, (2) the trial court erred in denying the employer's request for the appointment of a neutral physician, and (3) the award of permanent partial disability benefits on the basis of 60 percent to the body as a whole is excessive. As discussed below, the panel has concluded the judgment should be affirmed.

**Tenn. Code Ann. § 50-6-225(e) (2000) Appeal as of Right; Judgment of the General Sessions Court of Warren County Affirmed.**

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., and JAMES WEATHERFORD, SR. J., joined.

Patrick A. Ruth, Nashville, Tennessee, for the appellant, Findlay Industries, Inc.

William Joseph Butler and Frank D. Farrar, Lafayette, Tennessee, for the appellee, Linda Sue Pinkard.

**MEMORANDUM OPINION**

At the time of the trial on March 17, 2000, the employee or claimant, Linda Sue Pinkard, was 36 years old with a ninth grade education and no special skills or training. She did have experience as a production worker and was employed by Findlay, a sewing factory, for more than ten years.

On November 24, 1998, while lifting material onto a table at work, she felt a sudden pull in her back. Later that night she felt numbness in her legs and tingling in her toes. She was sent to Riverpark Hospital for emergency care and presented with a panel of possible treating physicians, from whom she chose Dr. Robert Dimick, a neurosurgeon, in Nashville. Dr. Dimick released her

after providing conservative care. Thereafter, she saw Dr. John Thompson on the recommendation of her attorney.

Dr. Dimick diagnosed low back pain and spasm, degenerative disc disease, a protruded disc and stenosis, with mild to moderate pressure on the nerve roots. The doctor conceded the injuries could have been caused or aggravated by trauma at work. Without measuring her loss of motion or sensation, Dr. Dimick estimated her permanent impairment rating at zero percent.

Dr. Thompson, an orthopedic surgeon in Sparta, opined that the claimant's injuries were work-related. He estimated her permanent impairment at 17 percent to the whole body and restricted her from lifting more than 20 pounds occasionally, 10 pounds frequently or 5 pounds repetitively. He prescribed standing no more than 30 minutes at a time or more than 50 minutes of each hour, no more than occasional bending, stooping, kneeling and no squatting, climbing, crouching, crawling or twisting.

Dr. S. M. Smith, an orthopedic surgeon in Jamestown, saw the claimant for an independent medical examination and evaluation in July 1999. Dr. Smith diagnosed a ruptured disc at L5-S1. He estimated the claimant's permanent impairment at 19 percent to the whole body and prescribed permanent restrictions.

The claimant's own testimony, supported by other lay proof, was that she could not work within her restrictions. She was unable to continue in a janitorial service job that she had held before her injury at Findlay. She did return to work for Findlay at a lower paying job in the parts room, but is concerned whether she would be able to find any work if she lost her job.

Upon the above summarized evidence, the trial court found the claimant's permanent medical impairment to be 15 percent to the body and awarded permanent partial disability benefits based on 60 percent to the body as a whole. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225 (e)(2). This tribunal is not bound by the trial court's findings but instead conducts an independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 177 (Tenn. 1999). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). The extent of an injured worker's vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 451 (Tenn. 1999).

The appellant contends the trial judge should have rejected Dr. Smith's opinion because his examination was conducted in the claimant's attorney's office and because Dr. Smith's opinion is

different from the opinion of the doctor to whom the claimant was referred by the employer. The appellant contends Dr. Thompson's opinion should have been rejected only because he disagreed with the same doctor. When the medical testimony differs, the trial judge must choose which view to believe. In doing so, he is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672 (Tenn. 1991). Moreover, it is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). From our independent examination of the record, we cannot say that the trial court abused its discretion or that the evidence preponderates against the trial court's finding of permanency.

Next, the appellant argues that the trial judge is required by Tenn. Code Ann. § 50-6-204(d)(5) to appoint a neutral physician in cases where there is conflicting medical proof because a workers' compensation case should be a search for the truth. The subsection provides as follows:

(5) In case of dispute as to the injury, the court may, at the instance of either party, or on its own motion, appoint a neutral physician of good standing and ability to make an examination of the injured person and report such physician's findings to the court, the expense of which examination shall be borne equally by the parties.

We construe the subsection as giving the trial court the discretion to appoint a neutral physician, but not requiring it. Thus the trial court should not be reversed in the absence of an abuse of that discretion. In this case, the employer offered no proof, lay or expert, in opposition to the employee's proof. Under the circumstances, we cannot say the trial court abused its discretion by not appointing a neutral physician.

The employer finally contends the award of permanent partial disability benefits is excessive because she is able to work. The employee cites the rule that the ultimate issue for the trial court is her ability to work in any form of employment that would have been available to her in an uninjured condition, citing Walker at 208. In determining the extent of an injured worker's permanent disability, the trial courts are to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities for the disabled, and capacity to work at types of employment available in the claimant's disabled condition. Tenn. Code Ann. § 50-6-241(a)(1). From a consideration of those factors, to the extent that they were established by the proof in this case, we are not persuaded that the evidence preponderates against the trial court's award.

For those reasons, the judgment of the trial court is affirmed. Costs are taxed to the appellant, Findlay Industries, Inc.

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JOE C. LOSER, JR., SPECIAL 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 by the appellant, Findlay Industries, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM