

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

FILED

October 23, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

DARLA HOLT,)
)
Plaintiff/Appellee)
)
v.)
)
NATIONAL UNION FIRE INS. CO.,)
)
Defendant/Appellant)

CUMBERLAND CIRCUIT
Hon. John A. Turnbull,
Judge
NO. 03S01-9601-CV-00003
(No. NJ-1942 Below)

For the Appellant:

Michael S. Pemberton
Eric S. Nowinski
Lewis, King, Krieg, Waldrop & Catron, P.C.
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For the Appellee:

Donna Brown Wilkerson
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MEMORANDUM OPINION

Members of Panel:

Justice Penny J. White
Senior Judge John K. Byers
Special Judge Joseph C. Loser

AFFIRMED

BYERS, Senior Judge

_____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.

The trial court awarded plaintiff 30% permanent partial disability to the body as a whole. Defendant challenges the permanency of the injury and the methodology used by the trial judge to reach his finding. We affirm the judgment of the trial court.

Plaintiff, 28, has a GED and has been trained as a certified nursing technician. Most of her work experience has been in this area. She was involved in a car accident in 1988 which eventually led to a total right hip replacement in July 1992 due to avascular necrosis. Plaintiff injured her back lifting a patient on November 7, 1993.

Plaintiff was treated by Dr. Boyd D. Matthews, a chiropractor, who testified in this case by deposition. He opined that plaintiff had central disc protrusions at L4-L5 and L5-S1 based upon his examination, plaintiff's complaints and the results of various imaging studies. He assigned plaintiff a permanent impairment rating of 33% to the body as a whole. He arrived at this impairment rating by rating various impairment factors and compiling them under the AMA Guides.

Dr. Robert H. Haralson, III, an orthopedic surgeon, examined the plaintiff at the request of the defendant and testified by deposition. He opined that, although plaintiff certainly had a back injury, she did not retain any permanent impairment. He acknowledged that plaintiff had protruding discs at L4 and L5; however, he opined that they did not impinge on plaintiff's nerves and that they pre-existed her back injury, based on his review of CT scans taken before and after the work-related injury.

The trial judge discredited the testimony of Dr. Boyd D. Matthews. With Dr. Matthew's testimony discredited, there was no medical testimony upon which to base a medical impairment finding. The trial judge, in his ruling, found, based upon

his experience and knowledge of the AMA Guidelines, there was a six to eight percent medical impairment sustained by the plaintiff.

Our review is *de novo* on the record accompanied by the presumption of correctness of the findings of fact of the trial court unless the evidence otherwise preponderates. TENN. CODE ANN. § 50-6-225(e)(2).

Permanency of an impairment, unless obvious, must be shown by expert medical testimony. *Tindall v. Waring Park Ass'n.*, 725 S.W.2d 935, 937 (Tenn. 1992). We conclude that a trial court may not find the existence of a medical impairment in the absence of expert medical evidence upon which to base such a finding. The record in this case as viewed by the trial judge contained no expert medical evidence upon which to find an impairment rating.

However, where evidence is documentary, we are equally situated as is the trial court in assessing credibility and weight of the evidence. *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355 (Tenn. 1989). After careful review of Dr. Matthews deposition, we find the testimony of Dr. Matthews that the plaintiff has retained a permanent impairment to be credible. We find that Dr. Matthews in assigning 33% medical impairment assigned various percentages to individual impairment factors. We conclude that not all of these factors are attributable to the injury at issue in this case. We conclude that the record does show that the plaintiff sustained a permanent impairment as a result of the injury in this case. Based upon the record as a whole, including the depositions, medical records and lay testimony, we find the evidence does not preponderate against the judgment of the trial court.

We affirm the judgment of the trial court and tax the cost of appeal to the defendant/appellant.

John K. Byers, Senior Judge

CONCUR:

Penny J. White, Justice

Joseph C. Loser, Special Judge

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DARLA HOLT,)
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Plaintiff-Appellee,)
)Hon. John A. Turnbull,
)Judge
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V.)No. 03S01-9601-CV-00003
)
)
NATIONAL UNION FIRE)
INSURANCE CO.,)
)
Defendant-Appellant.)AFFIRMED.

JUDGMENT ORDER

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well taken and should be denied; 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 defendant-appellant, for which execution may issue if necessary.

IT IS SO ORDERED this 23 day of October 1996.

PER CURIAM

White, J. - Not participating.

