

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

FILED

February 21, 1997

**Cecil W. Crowson
Appellate Court Clerk**

ANGELA THURMAN,) No. 01S01-9605-CH-00089
Plaintiff/Appellee) (No. 9917 below)
)
) WILSON COUNTY CHANCERY
v.)
)
)
CNA INSURANCE COMPANIES and) HON. C.K. SMITH, CHANCELLOR
TRW COMMERCIAL STEERING)
DIVISION,)
Defendants/Appellants)
_____)

FOR APPELLANTS:

DAVID J. DEMING
First Union Tower, Suite 2200
150 Fourth Avenue North
Nashville, TN 37219-2494

FOR APPELLEE:

E. GUY HOLLIMAN
WILLIAM JOSEPH BUTLER
P. O. Box 280
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MEMORANDUM OPINION

MEMBERS OF PANEL:

ADOLPHO A. BIRCH, JR., CHIEF JUSTICE, SUPREME COURT
JOHN K. BYERS, SENIOR JUDGE
WILLIAM S. RUSSELL, RETIRED JUDGE

This appeal from the judgment of the trial court in a workers' compensation case has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated Section 50-6-225 (e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

THE CASE

The injured employee, Angela Thurman, age 28, suffered an injury during the course and scope of her employment on September 7, 1994, when a metal housing weighing between forty and fifty pounds fell from a table onto her left foot. The foot was crushed. Subsequent medical treatment included three surgical operations to free tendons, remove dead tissue and facilitate healing.

At the time of the trial the plaintiff was working at substantially the same job, making even more money. While she would sometimes have to take a break to rest her foot, to relieve pain and reduce swelling, she was able to do the work even though it involved constant standing or walking.

Three physicians testified by deposition. Dr. Kaelin, the treating physician, opined that she retained a 5% anatomical

impairment to the left foot. Dr. Landsberg, who saw the employee for an evaluation at the request of her attorney, evaluated her permanent anatomical impairment as 14% to the left foot. Dr. Fishbein, also employed by her attorney to determine her permanent impairment, set her anatomical impairment at 7%.

The trial judge rendered judgment based upon a 55% vocational impairment to the left foot.

THE ISSUE

Complaint is made that the 55% impairment to the foot is excessive, and that the court erred in allowing the \$612.00 costs of Dr. Landsberg's deposition as a part of the discretionary costs.

APPLICABLE LAW

Our review is de nova upon the record of the trial court, accompanied by a presumption of correctness of the findings below, unless the preponderance of the evidence is otherwise. Tennessee Code Annotated Section 50-6-225 (e)(2) (1991). This standard of review requires this court to weigh in depth the factual findings and conclusions of the trial court. Humphrey v. David Witherspoon, Inc., 734 S.W. 2d 315 (Tenn. 1987).

The issue of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. Worthington v. Modine Mfg. Co., 798 S.W. 2d 232, 234 (Tenn. 1990).

A medical expert's rating of anatomical disability is one of the relevant factors, but the vocational disability is not restricted to the precise estimate of anatomical disability made by a medical witness. Corcoran v. Foster Auto GMC, Inc., 746 S.W. 2d 452, 458 (Tenn. 1989).

When the medical testimony is presented by deposition, as it was in this case, this court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. 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).

CONCLUSION

This injured employee has returned to her regular job. Admittedly, she sometimes suffers pain and discomfort; but it has not disabled her. She works long hours and her pay is greater than before the accident. Her employer's representative testified that she is a very good employee whose performance is totally satisfactory.

It is our judgment that she should have a judgment for 35% permanent partial impairment to the left foot, and we reduce the judgment accordingly.

The issue regarding discretionary costs is without merit.

Costs on appeal are assessed to the appellant.

WILLIAM S. RUSSELL, SPECIAL JUDGE

CONCUR:

ADOLPHO A. BIRCH, JR.,
CHIEF JUSTICE

JOHN K. BYERS, SENIOR JUDGE

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ANGELA THURMAN,	}	WILSON CHANCERY
	}	No. 9917 Below
<i>Plaintiff/Appellee</i>	}	
	}	Hon. C. K. Smith,
vs.	}	Chancellor
	}	
CNA INSURANCE COMPANIES and	}	No. 01S01-9605-CH-00089
TRW COMMERCIAL STEERING	}	
DIVISION,	}	
	}	
<i>Defendants/Appellants</i>	}	AFFIRMED, AS MODIFIED.

JUDGMENT ORDER

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 Defendants/Appellants and Surety. for which execution may issue if necessary.

IT IS SO ORDERED on December 6, 2000.

PER CURIAM