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

FILED

September 10, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

JOANN GLOVER,	)	
	)	GREENE CIRCUIT
Plaintiff/Appellee	)	
	)	NO. 03S01-9607-CV-00076
v.	)	
	)	HON. BEN K. WEXLER,
PHILIPS CONSUMER ELECTRONICS COMPANY,	)	JUDGE
	)	
	)	
Defendant/Appellant	)	

For the Appellant:

G.P. Gaby
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For the Appellees:

Robert Payne Cave, Sr.
104 N. College St.
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M E M O R A N D U M O P I N I O N

Members of Panel:

E. Riley Anderson, Justice
John K. Byers, Senior Judge
Roger E. Thayer, Special Judge

REVERSED IN PART,
AFFIRMED IN PART and
REMANDED

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 plaintiff, who was 38 years of age at the time of this trial and who has a meager education, testified she fell over a fan on September 15 or 16, 1993 while working for the defendant and injured her back.

The trial judge awarded 31% permanent partial disability to the body as a whole. We affirm in part and reverse in part.

The plaintiff testified she told her supervisor at the time of the fall that she was injured. The supervisor denied he received this report. The dispensary nurse at the plant notes that on September 16 at 3:45 p.m., the plaintiff came to the dispensary and complained of back pain which, the note showed, was reported to be the result of a fall three years previously. There is no indication the nurse in the dispensary referred the plaintiff to an approved physician for treatment or evaluation of work injuries. The entry shows the plaintiff was sent home and ordered to take Advil for the pain.

On September 17, 1993, the plaintiff was seen by Dr. Stanley of the Takoma Medical Group. Medicine for pain and muscle relaxers were prescribed for the plaintiff. The plaintiff was next seen in March 1994 by the group, then June 13, 1994, July 2, 1994, October 4, 1994, November 1, 1994 and March 1995.

The testimony concerning the plaintiff's treatment and depression was given by Dr. Richard J. Aasheim, a family practitioner. The testimony reveals the plaintiff had a plethora of ailments, many attributable to her general physical condition, which showed a person 5'2" who weighed more than 180 pounds and was moderately obese. We need not go into great detail concerning the overall medical findings concerning the plaintiff. The pertinent parts of the doctor's testimony for the purpose of this case is his finding the plaintiff had lower back pain and muscle spasm as a result of the fall she related to him, with underlying chronic back pain prior to the fall. He testified that the fall aggravated and advanced pre-existing chronic back pain.

Dr. Aasheim's records on October 4, 1994 show he noted "She may return to full activities as needed." Dr. Aasheim, in his testimony, was equivocal about the meaning of this. At any rate, Dr. Aasheim did not fix any medical impairment rating as a result of his treatment of the plaintiff.

Dr. William Kevin Bailey, a specialist in physical medicine, examined the plaintiff on November 11, 1995.

The crux of Dr. Bailey's testimony is that the plaintiff exhibited signs of symptom magnification and malingering. Dr. Bailey found the plaintiff suffered some early disc degeneration but found she had not suffered any permanent impairment as a result of the fall.

The defendant raises the following issues on appeal:

1) Whether the plaintiff provided her employer with adequate notice of her work injury within 30 days of its occurrence.

2) Whether the trial court erred in awarding recovery for medical expenses incurred prior to the date of the work-related accident and injury and for awarding medical expenses incurred after the date of the work-related injury but which were not related to that injury.

3) Whether the evidence preponderates against the trial court's award of permanent disability benefits.

We reverse the judgment of the trial court in so far as the judgment finds the plaintiff entitled to be compensated for permanent partial disability.

There was conflicting testimony as to whether the plaintiff gave adequate notice of her accidental injury as required by T.C.A. § 50-6-201. The plaintiff testified she gave notice of the accident to her supervisor at the time it occurred. The supervisor testified the plaintiff did not give notice. The company's dispensary records show the plaintiff reported to the dispensary on September 16, 1993. The entry on those records did not record a report the plaintiff had fallen over a fan. The plaintiff testified she told the nurse in the dispensary she had fallen as she claims in this case. On September 23, 1993, Dr. Walter C. Chapman, an approved physician of the defendant, wrote a report or letter to the defendant informing them that plaintiff

had fallen over a fan some four or five weeks prior to September 23, 1993.

Based upon the oral testimony and the records introduced into the case, the trial judge found sufficient notice of the accident had been given to satisfy the notice requirements of T.C.A. § 50-6-201. The evidence in the record does not preponderate against this finding.

The defendant contests the award of five separate medical bills for the plaintiff by the trial court. Three of these bills were incurred prior to the accident in this case. Two were incurred as a result of a visit to the hospital emergency room for treatment of anxiety.

The plaintiff concedes the award of medical expenses prior to the injury was erroneous. We reverse that portion of the judgment which ordered payment of these expenses.

As to the medical expenses which the defendant says are for visits to the emergency room for anxiety, the defendant makes only a general denial of responsibility for these expenses. Instead of pointing us to a page in Dr. Aasheim's deposition or otherwise delineating why they should not be paid, the defendant merely states, "See Dr. Aasheim's deposition." We have read the deposition but are not inclined to support the defendant's claim where they have failed to definitively address why these are not payable. We thus affirm the holding of the trial judge on these expenses.

Dr. Aasheim made no finding of a percentage of medical impairment of the plaintiff in this case. We find his deposition to be somewhat short of certainty on whether the plaintiff suffered any permanent injury. Dr. Bailey found the plaintiff suffered no permanent impairment as a result of the injury.

To support an award of permanent disability, there must be medical evidence to show a permanent impairment exists unless the impairment is obvious, *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990), nor can an award be based upon speculative medical evidence. *Singleton v. Procon Products,* 788 S.W.2d 809 (Tenn. 1990).

The plaintiff has the burden of proving all of the essential elements of her

case, *White v. Werthan Industries,* 824 S.W.2d 158, 159 (Tenn. 1992). This includes showing she has sustained a permanent vocational disability as a result of an industrial accident.

We find the plaintiff has failed to prove permaennt disability and find from an in-depth review of the case that the evidence preponderates against the finding of the trial judge that the plaintiff sustained a 31% permanent partial disability to the body as a whole as a result of her injury. *See* T.C.A. § 50-6-225(e)(2).

We, therefore, reverse the judgment of the trial court so far as it holds the plaintiff is entitled to recover for a permanent impairment. We further reverse the judgment so far as it awarded medical expenses incurred before the injury. We affirm the award of all other medical expenses.

The cost of this appeal is taxed equally to the plaintiff and the defendant.

_____
John K. Byers, Senior Judge

CONCUR:

_____
E. Riley Anderson, Justice

_____
Roger E. Thayer, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

JOANN GLOVER, Plaintiff-Appellant, V. PHILIPS CONSUMER ELECTRONICS COMPANY, Defendant-Appellee.	))))))))))	Greene Circuit NO. 03-S-01-9607-CV-00076 Hon. Ben K. Wexler, Judge Affirmed in part; reversed in part; and remanded.

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 are taxed equally to the plaintiff and the defendant.

It is so ordered this _____ day of _____, 1997.

PER CURIAM

Anderson, C.J., not participating