IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

MARGIE BYERS	}	*WARREN GENERAL SESSIONS*
	}	*No. Below 6362-GSWC*
Plaintiff/Appellee	}	
	}	*Hon. Barry Medley*
vs.	}	*Judge*
	}	
	}	*No. 01S01-9711-GS-00245*
CALFEE COMPANY OF DALTON, INC.	}	
	}	
	}	
Defendant/Appellant	}	*AFFIRMED*

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 defendant/appellant, for which execution may issue if necessary.

IT IS SO ORDERED on December 3, 1998.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(September 16, 1998 Session)

MARGIE BYERS	)	WARREN GENERAL SESSIONS
	)	
Plaintiff-Appellee,	)	Hon. Barry H. Medley,
	)	Judge.
v.	)	
	)	No. 01S01-9711-GS-00245
CALFEE COMPANY OF	)	
DALTON, INC.	)	
	)	
Defendant-Appellant.	)	

For Appellant:

Kitty Boyte
Gracey, Ruth, Howard, Tate & Sowell
Tennessee
Nashville, Tennessee

For Appellee:

Sonya W. Henderson
Murfreesboro,

M E M O R A N D U M O P I N I O N

Members of Panel:

Frank F. Drowota, III, Associate Justice, Supreme Court
William H. Inman, Senior Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED

L o s e r ,

Judge

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employer, Calfee Company, insists the evidence preponderates against the trial court's award of permanent partial disability benefits based on forty percent to the body as a whole and in favor of a lesser award. As discussed below, this panel has concluded the judgment should be affirmed.

Our 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. section 50-6-225(e)(2). 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. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987).

At the time of trial, the employee or claimant, Margie Byers, was fifty-six years old with a GED and work experience primarily in low skill jobs such as cashier, waitress and baby sitter. She began working for the employer as a cashier, with additional duties of stocking shelves and cleaning the facility, in July of 1995. On December 12, 1995, she fell with a case of beer in her arms, injuring her neck, back and arms. She was taken to the emergency room by the employer. She has been seen subsequently by a number of doctors.

On January 3, 1996, the claimant saw Dr. Timothy Schoettle, a neurosurgeon, who ordered X-rays and MRI, from which he diagnosed a ligamentous injury with mild instability of the cervical spine, superimposed on degenerative disc disease. The doctor saw the claimant only once, but provided conservative care through a registered nurse and telephone calls. On April 4, 1996, he opined she had reached maximum medical improvement and would retain no permanent medical impairment.

Dr. John McInnis, an orthopedic surgeon, saw the claimant once and diagnosed cervical sprain, low back sprain and fibromyalgia. Dr. McInnis assessed the claimant's permanent medical impairment at five percent to the whole person, using appropriate guidelines.

Dr. David Gaw, another orthopedic surgeon, saw the claimant once and diagnosed degenerative cervical disc disease with superimposed strain and lumbosacral strain. Dr. Gaw assessed the claimant's permanent impairment at ten percent to the whole person, from appropriate guidelines, and restricted her from lifting more than thirty pounds, repetitive bending, stooping, and lifting with arms above the shoulder level. The trial court's award equals four times Dr. Gaw's impairment rating.

The employer first contends the trial judge erred in considering the opinion of Dr. Gaw over that of the other doctors. Trial judges have the discretion to determine which of conflicting medical testimony to accept or

reject. Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. 1996). We find in the record no reason for rejecting Dr. Gaw's opinion; and the trial judge did not err in accepting Dr. Gaw's opinion.

The employer next contends the trial judge erred in finding that it did not provide a meaningful return to work to the claimant, so as to cap her award pursuant to Tenn. Code Ann. section 50-6-241(a)(1). That section of the code provides that in cases where an injured worker is entitled to permanent partial disability benefits to the body as a whole 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 the injury, the maximum permanent partial disability award that the employee may receive is two and one-half times the medical impairment rating. If, however, the offer from the employer is not reasonable in light of the circumstances of the employee's physical disability to perform the offered employment, then the offer of employment is not meaningful and the injured employee may receive disability benefits up to six times the medical impairment. Newton v. Scott Health Care Center, 914 S.W.2d 884 (Tenn. 1995). On the other hand, an employee will be limited to disability benefits of not more than two and one-half times the medical impairment if his refusal to return to offered work is unreasonable. Id. The resolution of what is reasonable must rest on the facts of each case and be determined thereby. Id.

In this case, the claimant returned to work after reaching maximum medical improvement, but complained of inability to work because of disabling pain. Instead of attempting to accommodate her and because of her complaints, the claimant was terminated by the employer. Under such circumstances, we cannot say the trial judge erred in awarding more than two and one-half times the medical impairment rating.

In making determinations as to the extent of an injured worker's permanent disability, the 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. section 50-6-241. From a deliberate consideration of the record, we do not find the evidence to preponderate against the findings of the trial court.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the defendant-appellant.

Joe C. Loser, Jr., Special Judge

CONCUR:

Frank F. Drowota, III, Associate Justice

_____

William H. Inman, Senior Judge