IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(August 13, 1999 Session)

FILED

December 8, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

LILA ROBERSON,	)	
	)	
Plaintiff/Appellee,	)	**MADISON CHANCERY**
	)	
v.	)	**NO. W1998-00374-WC-R3-CV**
	)	
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,	)	**HON. JOE C. MORRIS**
	)	
Defendant/Appellant.	)	

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

Members of Panel:

Justice Janice M. Holder
Senior Judge F. Lloyd Tatum
Senior Judge L. T. Lafferty

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

F. LLOYD TATUM, SENIOR JUDGE

OPINION

This workers' compensation appeal was referred to the Special Workers' Compensation Appeals Panel of the Supreme Court pursuant to Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

This case arose out of an automobile accident on February 1, 1996, in which the plaintiff, Lila Roberson, suffered fractures to her lower right leg and injured her face. The trial court found that the plaintiff suffered these injuries during the course and scope of her employment with the defendant's insured, the National Federation of Independent Businesses (NFIB). The court awarded the plaintiff a 40 percent permanent partial disability to the right leg and a 15 percent disability to the body as a whole for the injuries to her jaw. The defendant appeals this decision and raises the following issues: (1) whether the trial court erred in finding that the plaintiff carried her burden of proof to show by expert medical testimony that her jaw injury was compensable; and (2) whether the trial court erred in the amount of vocational disability benefits awarded the plaintiff for her foot injury.

Our standard of review on appeal in workers' compensation cases is de novo on the record with a presumption of correctness of the trial court's findings, unless the evidence presented preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2); Henson v. City of Lawrenceburg, 851 S.W.2d 809, 812 (Tenn. 1993). Under this standard of review, we are required to conduct an in-depth examination of the trial court's findings of fact and conclusions of law to determine where the preponderance of the evidence lies. See Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 282 (Tenn. 1991) (quoting Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987)); King v. Jones Truck Lines, 814 S.W.2d 23, 25 (Tenn. 1991). When oral testimony is presented at trial, we must give particular deference to the trial court's assessment of such live testimony; however, when medical testimony is presented by deposition, this Court may draw its own conclusions about its weight, credibility, and significance. Townsend v. State, 826 S.W.2d 434, 437 (Tenn. 1992); Thomas, 812 S.W.2d at 283. With these principles in mind, we turn to the facts of this case.

At the time of the trial on November 17, 1998, the plaintiff was a thirty-four year old woman with a bachelor of science degree in psychology and social work, and a master's degree in counseling and personnel services. Prior to her employment with defendant's insured, the National Federation of Independent Businesses (NFIB), the plaintiff had worked as a secretary, a donut shop employee, a spaghetti restaurant hostess, cook, and

waitress, as a night counselor for the West Tennessee School for the Deaf, and a social worker with the Department of Human Services (now the Department of Children's Services). The plaintiff admitted to having a prior head injury in 1986, a mid-back injury in the summer of 1995, and popping accompanied by pain in her left jaw before the car accident that is the subject of this suit.

The plaintiff began working for the NFIB in November of 1995 as a territory manager, recruiting members in thirteen counties. The position required the plaintiff to travel extensively and make approximately twelve to fifteen calls on businesses per day while carrying a thirty pound briefcase. While on company business on February 1, 1996, the plaintiff's car collided with a truck that pulled out in front of her on Highway 70 in Madison County. Plaintiff hit her head and was rendered unconscious. During the course of the accident, the plaintiff's right foot impacted the brake pedal, fracturing several bones. She also received a gash under her lip, her nose was injured, and she received injuries to the left side of her face. The fractures in her foot were treated by Dr. Frederick Azar, but weakness and pain in her right foot and ankle have plagued the plaintiff since.

The plaintiff was eventually released to return to work at the NFIB in June or July of 1996, but she left the organization on September 13, 1996, because she was not able to do the job. The plaintiff's ability to walk over various terrains and steps to get to businesses was impaired by the lack of strength in her injured right foot and ankle to support her properly. She testified that she could come down steps sideways, but if she tried to come down in a forward direction, she would fall to the front. When she first returned to work, the plaintiff had to use a cane to help her keep her balance while walking and carrying her heavy briefcase. She testified that she would be in tears by the end of the day with spasms and cramps in her right foot. The plaintiff finally returned to her job with the Department of Children's Services as a case manager in September of 1996 making one-half of what she would be making at the NFIB. Her duties with the Department required her to travel and pick up children in state custody or to meet families.

The plaintiff testified that she can no longer do many activities that she could do prior to the accident, due to the weakness in her right ankle and foot. She experiences cramps or spasms in the foot during cold weather and must wear orthopedic shoes or an orthotic device in her regular shoes. Her right foot goes to sleep when she drives long distances, and her ability to negotiate steps or stairs has been affected as well. However, she stated that she is able to perform all of her job duties as a case manager for the Department of Children's Services without any problems.

As to the plaintiff's jaw injury, she admitted that her left jaw had been popping for

a number of years before the accident and that her dentist had referred her to Dr. Lyle C. Muller for treatment, which she opted not to undergo at that time. After the accident, the plaintiff returned to Dr. Muller on February 15, 1996, because her upper lip area below her nose remained numb after the accident. She also noticed increased tightness on the left side of her jaw in front of her left ear which progressed to left-sided facial pain. Dr. Muller first treated her with an orthotic device that she was required to wear on her teeth twenty-four hours per day. She was eventually referred to Dr. Stein, who performed surgery on both joints of plaintiff's jaw in March of 1998. At the time of trial, plaintiff was still wearing an orthotic device and was looking at the prospect of having braces applied to correct the change in her teeth placement after surgery. She denied having jaw pain prior to the accident; however, she stated that the pain to her right jaw did not start until after her surgery. According to the plaintiff, she can no longer eat certain hard foods due to her jaw problems.

The depositions of Dr. Frederick Martin Azar, plaintiff's treating orthopedic physician, and Dr. Lyle E. Muller, plaintiff's treating orthodontist, were offered at trial. Dr. Azar first saw the plaintiff shortly after the car accident on February 6, 1996, with injuries to her right foot. X-rays revealed fractures in several of the plaintiff's mid-foot bones. One of the fractures involved a ligament that was torn from the bone with a small portion of bone attached to it. The plaintiff was treated with several hard casts and a Bledsoe boot, along with instructions to keep her weight off the foot for approximately two months. X-rays performed in early May 1996, revealed that plaintiff had a loss of calcium in the healing bones. On June 4, Dr. Azar decreased plaintiff's work restrictions and allowed her to drive without her Bledsoe boot; however, she was to do sedentary activities when not driving. The doctor released the plaintiff to return to light duty on June 13, 1996, with a return to full duty on June 17, 1996. On July 23, Dr. Azar felt that the plaintiff had reached maximum medical improvement and released her from his care. On August 20, 1996, Dr. Azar rated the plaintiff as having a 13 percent permanent partial disability to her lower leg, based on Table 37 of the AMA Guides. The doctor's rating was to the lower leg, rather than to the foot alone, based on the fact that plaintiff had atrophy of the calf of her right leg as a result of nonuse during the healing process of her foot injury. He testified that this would continue to improve with exercise.

In June of 1997, a year and a half after the accident, the plaintiff returned to Dr. Azar's office with complaints of pain, numbness, tingling, and swelling in her right foot. X-rays showed no significant problems, but a bone scan performed in April 1997, showed some generalized decrease in blood flow in the right foot and some questionable reflex

sympathetic dystrophy (RSD), an abnormal neurological condition that can occur after trauma. Dr. Azar thought the plaintiff was experiencing post-traumatic degenerative joint disease or post-traumatic arthritis. On August 26, the plaintiff's condition had improved, and there was no evidence of RSD. Dr. Azar did not restrict the plaintiff's activities other than to allow pain to be her guide.

Dr. Muller first saw the plaintiff ten months prior to the car accident on April 6, 1995. At that time, the plaintiff filled out a cranio-mandibular symptom survey, which revealed that she was experiencing pain in both temples, headaches in the back of her head, clenching or grinding of her teeth at night, popping in her left jaw, jaw locking, and pain and itching in both ears. After a series of diagnostic tests, Dr. Muller concluded in July 1995, that plaintiff's headaches were caused by a dislocated jaw with a slipped disc; however, the plaintiff chose to forego treatment at that time. Dr. Muller saw the plaintiff after the car accident on February 15, 1996, and found no significant damage to her teeth as a result of the teeth coming through her lip during the accident.

The plaintiff returned a little over one year later on April 8, 1997, and filled out a second cranio-mandibular symptom survey. Dr. Muller noted that the plaintiff's symptoms had worsened, and she was having a lot of neck and shoulder problems along with cheek pain and increased pain around her ears. The plaintiff was treated conservatively until November of 1997, but an MRI in December revealed dislocated discs in her temporomandibular joint (TMJ), arthritis, and osteoporosis. Dr. Muller referred the plaintiff to an oral surgeon, Dr. Stein, who performed surgery on March 18, 1998. At the point of maximum improvement on August 31, 1998, the plaintiff's jaw and teeth did not match up exactly.

Dr. Muller opined that the plaintiff's jaw problems became more severe and were aggravated by the car accident on February 15, 1996. He stated that a November 1996, horseback riding accident added neck symptoms to her problems. However, he stated that he had noted arthritic changes in the plaintiff's jaw in 1995 and that a number of things, such as chewing gum, could make her symptoms worse. Plaintiff admitted to Dr. Muller in July 1995, that she also chewed a lot of gum. Plaintiff did not miss work because of her TMJ, except immediately after her surgery. Dr. Muller's diagnosis of muscle spasms, fibular dislocation, arthritic changes in the condyle, and probable slipped disc in April of 1997 was identical to his July 17, 1995, pre-accident diagnosis. No restrictions were placed on plaintiff's work related to her jaw problems.

In rendering its decision in favor of the plaintiff, the trial court found that the automobile accident aggravated any previously existing condition of the plaintiff's jaw and

awarded her 15 percent disability to the body as a whole for this injury. This award was in addition to a separate award of 40 percent permanent partial disability to the right lower extremity that the plaintiff received for the injury to her leg.[1]

It is well established that the plaintiff in a workers' compensation case must prove causation and permanency of his injury by a preponderance of the evidence using expert testimony. See Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487 (Tenn. 1997); Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991); Roark v. Liberty Mutual Ins. Co., 793 S.W.2d 932, 934 (Tenn. 1990). However, expert testimony must be considered in conjunction with the employee's testimony as to how his injury occurred and his subsequent physical condition. Thomas, 812 S.W.2d at 283.

We disagree with the trial court's finding that the plaintiff suffered a compensable injury to her jaw as a result of the work-related automobile accident. The record shows that the plaintiff had pre-existing and long-standing problems with her jaw that were diagnosed by Dr. Muller in July of 1995 before the plaintiff began her employment with the NFIB. Dr. Muller's diagnosis had not changed in April, 1997, over a year after the accident. When Dr. Muller saw the plaintiff two weeks after the accident, she did not report any changes in her symptoms over what she originally was experiencing on her first visit in April, 1995. It was only after she had a serious fall from a horse ten months after the accident that the plaintiff returned to Dr. Muller in 1997 complaining of neck symptoms and additional cheek pain. Although Dr. Muller stated his opinion that the car accident aggravated this pre-existing condition, there is no indication in the record that he or any other doctor rated the plaintiff with an anatomical disability related to her jaw, and no restrictions were placed on the plaintiff's ability to work with her TMJ.

We acknowledge that the lack of an anatomical impairment rating by an expert is not always indispensable in finding a permanent vocational impairment; however, there must be other evidence in the record to support such a finding absent a rating. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). We do not find such other evidence in this record. The plaintiff testified that her jaw restricts her from eating certain types of foods, but what foods the plaintiff can or cannot eat have no effect on her ability to work. Even if causation could be established, the plaintiff has not shown that her ability to earn a living is impaired in any way because of her jaw problems. See id. at 208 (quoting Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 459 (Tenn. 1988)). The evidence

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[1]We note that the trial court did not use the correct method of determining a disability rating when both scheduled and non-scheduled injuries are sustained in one work-related accident. The proper method of calculation is to determine one disability rating that would encompass both injuries and apply that to the body as a whole. Kerr v. Magic Chef, Inc., 793 S.W.2d 927, 928 (Tenn. 1990).

preponderates against the findings of the trial court, and we, therefore, reverse the trial court's ruling with regard to the award for the plaintiff's jaw disability.

This leaves only the injury to the plaintiff's foot to be considered. Since this injury is to a scheduled member, Tennessee Code Annotated § 50-6-207(3)(A)(ii) governs this award. At the time the plaintiff reached maximum medical improvement, Dr. Azar's 13 percent disability rating was to the lower leg, which included the atrophy in the plaintiff's calf muscle from nonuse during the healing process which might improve over time.

In our de novo review, we find that the trial court's award of 40 percent vocational disability is reasonable in light of the plaintiff's job history, level of education, age, and her testimony that she continues to have some problems with extensive walking, climbing and descending stairs, long distance driving, and other activities that require use of her weakened foot. These same problems caused her to leave her position at the NFIB for a lower paying job at Department of Children Services. The evidence does not preponderate against a 40 percent vocational disability award. In this case, § 50-6-207(3)(A)(ii)(o) sets the award for the loss of a leg at 66-2/3 percent of the average weekly wage for eighty (80) weeks, and we affirm the trial court's judgment accordingly.

Therefore, we reverse the trial court's award of 15 percent permanent partial disability to the body as a whole based on the jaw injury. We affirm the trial court's award of 40 percent permanent partial disability related to her right leg.

This case is remanded to the trial court for any further action necessary, consistent with this opinion. Costs of this appeal shall be equally shared by the parties.

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F. LLOYD TATUM, SENIOR JUDGE

CONCUR:

_____
JANICE M. HOLDER, JUSTICE

_____
L. T. LAFFERTY, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

LILA ROBERSON, Plaintiff/Appellee, vs. THE INSURANCE COMPANY OF PENNSYLVANIA, Defendant/Appellant.	)	MADISON CHANCERY NO. 52718 Hon. Joe C. Morris, Chancellor NO. W1998-00374-WC-R3-CV AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

FILED

December 8, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

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 equally shared by the parties, for which execution may issue if necessary.

IT IS SO ORDERED this 8th day of December, 1999.

PER CURIAM