

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

December 13, 2010 Session

**JACQUELINE MORRIS v. JACKSON CLINIC PROFESSIONAL  
ASSOCIATION**

**Appeal from the Chancery Court for Madison County  
No. 66650 James F. Butler, Chancellor**

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**No. W2010-01475-SC-WCM-WC - Mailed April 20, 2011; Filed July 15, 2011**

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In this workers' compensation action, the employee sustained a compensable injury to her shoulder. Her initial treating physician assigned a 9% impairment to the body as a whole. After additional surgery, her subsequent treating physician assigned a 6% impairment to the body as a whole. An evaluating physician assigned a 17% impairment. The trial court chose the evaluating physician's impairment, and awarded the employee 25.5% permanent partial disability ("PPD") to the body as a whole. The employer has appealed, arguing that the evaluating physician's rating did not comply with the AMA Guides and that the award therefore is excessive.<sup>1</sup> We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;  
Judgment of the Chancery Court Affirmed**

W. MICHAEL MALOAN, SP. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J., and DONALD P. HARRIS SR. J., joined.

P. Allen Phillips, Jackson, Tennessee, for the appellant, Jackson Clinic Professional Association.

George L. Morrison, III, and Spencer R. Barnes, Jackson, Tennessee, for the appellee, Jacqueline Morris.

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<sup>1</sup>Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law.

## MEMORANDUM OPINION

### Factual and Procedural Background

On December 16, 2009, Jacqueline Morris (“Employee”) filed a complaint in the chancery court of Madison County seeking workers’ compensation benefits for alleged injuries to her shoulder. The complaint sought benefits from Jackson Clinic Professional Association (“Employer”), a medical clinic. In its answer, Employer admitted that Employee had sustained a compensable injury but contended that the degree of permanent partial disability (“PPD”) was minimal. A trial was held before the chancery court on June 14, 2009. The parties stipulated that the injury was compensable, but contested the extent of Employee’s anatomical impairment and permanent disability. The medical evidence at trial consisted of the testimony of two physicians, Dr. Gregory Wolf and Dr. Apurva Dalal, both of whom testified by deposition. Through their testimony, the parties introduced Employee’s medical records generated by the other treating physicians.

Employee injured her right shoulder in the course of her employment on April 10, 2007. She was initially evaluated and treated by Dr. Parker Panovec, a primary care physician. Dr. Panovec referred her to Dr. Michael Smigelski, an orthopaedic surgeon. Dr. Smigelski ordered a Magnetic Resonance Imaging scan, which showed a torn rotator cuff. Employee was provided with a panel of orthopaedic surgeons from whom she could seek treatment. She selected Dr. Kelly Pucek.

Dr. Pucek performed a surgical repair of the rotator cuff, excision of the distal clavicle, and subacromial decompression on December 4, 2007. Employee did not improve significantly after that procedure. Dr. Pucek provided conservative care until June 2008. At that time, he released her from his care.

Employee continued to have significant symptoms. As a result, she requested and received a second evaluation from another orthopaedic surgeon, Dr. Blake Chandler. Dr. Chandler ordered additional tests, which indicated a recurrent tear of the rotator cuff. Dr. Chandler performed a second surgical procedure in August 2008. Employee’s condition improved initially, but then deteriorated. Differences of opinion arose between Employee and Dr. Chandler regarding her physical therapy. Employee was referred to Dr. Wolf.

Dr. Wolf ordered an MR arthrogram. The MR arthrogram showed no recurrent tear of the rotator cuff or other pathology. Dr. Wolf provided an anti-inflammatory injection and released Employee from his care. He assigned 10% anatomical impairment to the right arm, which converts to 6% to the body as a whole. He based his rating on the distal clavicle excision, which is specifically listed in the American Medical Association, Guides to the

Evaluation of Permanent Physical Impairment (Linda Cocchiarella & Gunnar B.J. Andersson, eds., 5th ed. 2001) (“the AMA Guides”). He testified that Employee’s range of motion was nearly normal but conceded that he had not made measurements with a goniometer as required by the AMA Guides. Dr. Wolf placed no permanent restrictions on Employee’s activities.

At the request of her attorney, Dr. Dalal examined Employee. Dr. Dalal opined that Employee retained a 28% impairment to her right upper extremity, which converts to 17% to the body as a whole. His rating was based on 10% for the distal clavicle excision, 5% for the two rotator cuff repairs, 5% for the two subacromial decompressions, and 3% for the Employee’s diminished range of motion, which he measured with a goniometer. On cross-examination, Dr. Dalal conceded that the AMA Guides did not assign separate impairment related to the subacromial decompression and torn rotator cuff repairs. He testified that he included the additional impairment based on his professional judgment and the catchall provision at page eleven of the AMA Guides.

At the time of trial, Employee continued to work for Employer, and her job consisted of cashier duties. She had worked for Employer for thirteen years in various clerical positions before her injury. She received a favorable performance evaluation shortly before trial. A portion of that evaluation included Employee’s self-assessment of her performance, and she stated that she had exceeded her job requirements in all areas.

Employee was fifty-eight years old at the time of the trial. She is a college graduate. Prior to working for Employer, she had been a middle school teacher, an office manager for a dentist, and an advertising sales representative for a newspaper. She testified that she has pain in her shoulder daily. She stated that she was unable to brush or wash her hair with her right hand. She testified that she had difficulty doing laundry, vacuuming, and doing yard work. She stated that cold weather and air conditioning increased her shoulder pain. She did not believe she could perform any of her previous jobs.

Employee’s supervisor, Susan Plunk, testified that Employee’s job performance was satisfactory. Ms. Plunk observed Employee on a daily basis and stated that Employee did not have any difficulty performing her job duties, although Employee had left work early on one occasion due to shoulder pain.

The trial court adopted Dr. Dalal’s impairment rating and awarded Employee 25.5% PPD to the body as a whole. Employer appealed, contending that the trial court erred by accepting Dr. Dalal’s impairment because it did not comply with the AMA Guides, and the award therefore is excessive.

## Standard of Review

The standard of review of findings of fact is “de novo upon the record of the trial court, accompanied by a presumption of correctness of the finding, unless the preponderance of evidence is otherwise.” Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness’ demeanor and to hear in-court testimony. Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 898 (Tenn. 2009). When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). A trial court’s conclusions of law are reviewed de novo on the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

## Analysis

Tennessee Code Annotated section 50-6-204(d)(3) (2008) requires assessments of anatomical impairment to be made using the AMA Guides.<sup>2</sup> Employer contends that Dr. Dalal’s impairment rating was not based on the AMA Guides because his assessment included contributions to impairment from two procedures, subacromial decompression and rotator cuff repair, that are not specifically listed in the AMA Guides. On that basis,

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<sup>2</sup>Tennessee Code Annotated section 50-6-204(d) provides:

(A) To provide uniformity and fairness for all parties in determining the degree of anatomical impairment sustained by the employee, a physician, chiropractor or medical practitioner who is permitted to give expert testimony in a Tennessee court of law and who has provided medical treatment to an employee or who has examined or evaluated an employee seeking workers' compensation benefits shall utilize the applicable edition of the AMA Guides as established in § 50-6-102 or, in cases not covered by the AMA Guides, an impairment rating by any appropriate method used and accepted by the medical community.

(B) No anatomical impairment or impairment rating, whether contained in a medical record, medical report, including a medical report pursuant to § 50-6-235(c), deposition or oral expert opinion testimony shall be accepted during a benefit review conference or be admissible into evidence at the trial of a workers' compensation matter unless the impairment is based on the applicable edition of the AMA Guides . . . .

Tenn. Code Ann. § 50-6-204(d)(3)

Employer contends that the trial court erred by accepting Dr. Dalal's impairment rating as the basis of the disability award.

Dr. Dalal testified that he considered that absence of specific impairments for the two surgical procedures to be a "drawback" of the Fifth Edition. He therefore assigned the additional impairment based on language of the AMA Guides that permits physicians to use their professional judgment to assign impairment for "new or complex" conditions.<sup>3</sup> He conceded that the procedures used to treat Employee were in existence at the time the Fifth Edition was issued and had been so for some time.

Dr. Wolf took the position that range of motion and other functional criteria are used by the AMA Guides to rate these conditions and procedures. It is undisputed, however, that Dr. Wolf did not follow the protocol for measuring range of motion.

The trial court explained its decision to accredit Dr. Dalal's impairment rating as follows:

The Guides generally provide that anatomical impairment is a change in the normal anatomy that occurs as a result of an injury or surgery. The core issue here is whether or not to rate the surgical procedures and combine them with loss of motion in giving an impairment rating. Physicians differ on this on a

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<sup>3</sup>The AMA Guides provide:

Given the range, evolution, and discovery of new medical conditions the *Guides* cannot provide and impairment rating for all impairments. Also, since some medical syndromes are poorly understood and are manifested only by subjective symptoms, impairment ratings are not provided for those conditions. The *Guides* nonetheless provides a framework for evaluating new or complex conditions. Most adult conditions with measurable impairments can be evaluated under the *Guides*. In situations where impairment ratings are not provided, the *Guides* suggests that physicians use clinical judgment, comparing measurable impairments resulting from the unlisted condition to measurable impairment resulting from similar conditions with similar impairment of function in performing activities of daily living.

The physician's judgment, based upon experience, training, skill, thoroughness in clinical evaluation, and ability to apply the *Guides* criteria as intended will enable an appropriate and reproducible assessment to be made of clinical impairment. Clinical judgment, combining both the 'art' and 'science' of medicine, constitutes the essence of medical practice.

Am. Med. Ass'n, Guides to the Evaluation of Permanent Physical Impairment 11 (Linda Cocchiarella & Gunnar B.J. Andersson, eds., 5th ed. 2001) (italics in original).

regular basis. This case is no exception. Often it is based upon their personal beliefs or interpretation of the A.M.A. Guides as to whether this should, or should not, be done. Many qualified physicians who have appropriate and excellent credentials see it one way or the other. In this case, Dr. Wolf testified that he did not provide additional ratings for the other procedures other than the distal clavicle excision, although he acknowledged that other physicians interpret the Guides differently in this regard and that he feels it is reasonable for them to add for those other procedures. Of course, this makes it difficult for the Court because of the lack of agreement among physicians and even the courts as to whether or not these ratings should be combined. Since neither of the ratings in this case were performed by an MIR Registry physician, none of the ratings has any presumption of correctness over the others. Both Dr. Wolf and Dr. Dalal explained their ratings and their respective positions on rating the various procedures. In the past, this Court has gone both ways, but most recently has expressed its opinion that it is not one rating or the other, but a combination of ratings when dealing with a shoulder injury. This Court has held most recently, that it is not inappropriate to provide a rating for a rotator cuff and other associated procedures according to Chapter 1 of the Guides, and combine those ratings with a rating for loss of range of motion. It is in fact not one or the other, but a combination of both when rating the upper extremity. In this case, Dr. Pucek gave a 9% rating. After the second surgery, Dr. Wolf only gave a 6% rating. This is not logical to the Court and indicates the difficulty encountered in using the A.M.A. Guides and rating the shoulder. Dr. Dalal gave a 17% rating which he accomplished by rating all of the procedures and combining it with the rating for loss of motion. The Court accepts Dr. Dalal's rating as being the most reasonable under all of the circumstances that exist in this case.

As the trial court noted, this case does not involve an impairment rating from an independent medical examiner from the Medical Impairment Registry, which is given a statutory presumption of correctness. Tenn. Code Ann. § 50-6-204(d)(5). It was necessary for the trial court to choose one of the assessments assigned by the expert witnesses. Each doctor contended that his impairment was correct, but neither doctor precisely followed the AMA Guides. Dr. Wolf did not follow the protocols established by the AMA Guides for measuring range of motion. Dr. Dalal supplemented his rating with additional components not contained in the AMA Guides.

Confronted with these imperfect results, the trial court attempted to reach a result consistent with its observation and understanding of the effects of Employee's work injury

on her ability to obtain and hold employment. It concluded that Dr. Dalal's impairment rating provided a more accurate basis for assigning disability.

Having examined the medical testimony taken by deposition, we make our own judgment as to which medical expert's opinion is most reliable. Bohanan, 136 S.W.3d at 624. Dr. Wolf acknowledged that he did not think it was unreasonable for a physician to rate Employee's injury differently and that it was reasonable for Dr. Dalal to add the results from the other procedures. Dr. Dalal's rating was done according to his best professional judgment. We therefore accept Dr. Dalal's anatomical impairment rating for Employee's injury.

### **Conclusion**

The judgment is affirmed. Costs are taxed to appellant, Jackson Clinic Professional Association, and its surety, for which execution may issue if necessary.

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W. MICHAEL MALOAN, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE  
AT JACKSON

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**Chancery Court for Madison County  
No. 66650**

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**No. W2010-01475-SC-WCM-WC - Filed July 15, 2011**

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**JUDGMENT ORDER**

This case is before the Court upon the motion for review filed by Jackson Clinic Professional Association, 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Jackson Clinic Professional Association, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

HOLDER, Janice M., J., Not Participating