IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(July 12, 1999 Session)

GLORIA ROOKER	)	
Plaintiff/Appellee,	)	
	)	**SHELBY COUNTY CIRCUIT**
v.	)	
	)	**No. W1998-00273-WC-R3-CV**
ZURICH INSURANCE COMPANY	)	
	)	**HONORABLE D'ARMY BAILEY**
Defendant/Appellant		**JUDGE**

For the Appellee:

Steve Taylor
6263 Poplar Avenue
Suite 601
Memphis, Tennessee 38119

For the Appellant:

Archie Sanders, III
McWhirter & Wyatt
73 Union Avenue
Memphis, TN 38103

MEMORANDUM OPINION

MEMBERS OF PANEL:

JUSTICE JANICE M. HOLDER
SENIOR JUDGE F. LLOYD TATUM
SPECIAL JUDGE C. CREED MCGINLEY

AFFIRMED IN PART,
REVERSED IN PART

MCGINLEY, SPECIAL JUDGE

OPINION

_____This worker's 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) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the defendant's insurer appeals the award of

25% disability to the body as a whole, as well as the court ordered payment of medical charges by a physician not authorized by the employer. After thorough review of the record, this panel finds the award of permanent partial disability should be affirmed, but that portion of the judgment ordering payment of medical expenses for charges by an unauthorized physician should be reversed.

The plaintiff employee is a forty-six year old female. She attended but did not complete high school. She had obtained her GED. She had been working for Morning Star Foods, the defendant's insured, for nine years. The injury that gave rise to this award occurred on November 16, 1997, when the plaintiff, in the course of her employment, was attempting to "stomp down" cardboard boxes in a trash compacter at her employment. While engaged in this activity the cardboard gave way causing the plaintiff's left foot to drop approximately two to three feet. The plaintiff reported her injury to her supervisor and embarked on a course of medical treatment through authorized physicians, as well as a physician that the plaintiff saw of her own initiative. The plaintiff's complaints of pain in the right hip area were consistent throughout the course of her treatment.

At the time of trial the plaintiff continued to be unemployed although she had actively sought employment. She had enrolled in school and was attempting to vocationally retrain. Although two doctors had placed no restrictions on the plaintiff, the doctor who assessed permanent disability opined the plaintiff should not engage in repetitive lifting, pushing or pulling more than 25 pounds and should avoid bending and twisting at the same time. The plaintiff's prognosis was good if she confined her activities to these restrictions, but with periodic problems expected.

The trial court awarded permanent partial disability based on 25% to the body as a whole and ordered the payment of medical expenses for the plaintiff's unauthorized physician. Review of the findings of fact made by the trial court is *de novo* upon the record accompanied by presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). 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 evidences lies. *See, Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278, 282 (Tenn. 1991) (quoting *Humphrey v. Witherspoon, Ind.*, 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 the weight, credibility, and significance of such testimony. *Seiber v. Greenbier Indus., Inc.*, 906 S.W.2d 444, 446 (Tenn. 1995); *Townsend v State*, 826 S.W.2d 434, 437 (Tenn. 1992); *Thomas*, 812 S.W.2d at 283.

The defendant asserts that the trial court erred in its judgment for the plaintiff and submits the following issues for our review:

I. The trial court erred in finding that the plaintiff had sustained any permanent partial disability from her on the job injury;

II. That if the plaintiff sustained any permanent disability, the trial judge should not have exceeded the two and one-half times (2½) cap found in Tenn. Code Ann. § 50-6-241(a);

III. The trial court erred in ordering the defendant to pay medical expenses associated with the plaintiff's course of treatment with an unauthorized physician.

I.

The appellant insists that the evidence preponderates against the trial court's finding of permanent disability in this case. Following her injury in November 1997, the plaintiff was seen by Drs. Arnoff, Denton, Herriman, Bourland and Parsioon at the defendant's expense. Upon referral from her attorney she also saw Dr. Rizk. The testimony of Dr. Robert Bourland, Dr Fereidoon Parsioon, and Dr. Tewfik Rizk was presented by means of medical deposition for consideration by the court. Both Drs. Bourland and Parsioon, who were panel physicians, found no permanent disability. On the other hand Dr. Rizk, who was a treating physician, albeit not approved by the employer, diagnosed the plaintiff with right sacroiliac joint sprain and dysfunction and accessed a 8% anatomical permanent partial impairment to the body as a whole using AMA appropriate guidelines. He also placed restrictions on the plaintiff.

From our independent examination of the evidence, it fails to preponderate against an award based on 25% permanent partial disability to the body as a whole vocationally. As earlier stated, Dr. Rizk was a treating physician and not merely an evaluating physician. This physician saw the plaintiff on eleven different occasions and administered diagnostic tests as well as treatment consistent with his diagnosis. His diagnosis and finding of permanent impairment is supported by objective evidence. We find nothing in this record that would persuade us that the evidence

preponderates against the trial court's findings of permanent partial disability.

II.

The appellant insists that the trial court erred in not applying 2½ times cap found in Tenn. Code Ann. § 50-6-241(a). Dr. Rizk, the only physician who established a disability, found that the plaintiff had suffered an 8% permanent partial disability to the body as a whole according to appropriate AMA guidelines. The appellant asserts that since the plaintiff was returned to her employment the maximum award in this case could not exceed 20% vocational permanent partial disability to the body as a whole. The trial court found that the plaintiff had suffered 25% to the body as a whole which would exceed the 2½ times cap. It is uncontradicted that the plaintiff was returned to her employment and was terminated March 24, 1998 for excessive absenteeism. The appellant submits that there was a meaningful return to work and that the 2½ times cap should apply so as to limit this award. The plaintiff insists that although she was fired for excessive absences, her termination occurred in spite of the fact she had off work statements from her treating physician, Dr. Rizk. Since Dr. Rizk was not a panel physician the employer apparently refused to accept these. There was testimony by the plaintiff that for two weeks prior to her discharge she was in pain every day. The records also reflect that the restrictions placed on her by Dr. Rizk would not allow her to perform the job duties required of her. In examining this record we can not say that the evidence preponderates against the trial court's implicit finding that there was no meaningful return to work.

III.

In their third issue the appellant asserts that the trial judge erred in ordering the payments of medical expenses to a physician not authorized by the employer. After examination of the record, we find that the trial judge erred in ordering the payment of these expenses. The plaintiff of her own initiative, or more specifically upon referral by her attorney, embarked upon a course of medical treatment outside the panel of physicians furnished by the employer. In this case the defendant fully complied with Tenn. Code Ann. § 50-6-204(a)(4) in providing a panel of doctors for the plaintiff. The plaintiff first saw Dr. Rizk on December 10, 1997, and at that time had not completed her course of treatment through the panel of physicians. The defendant had not ceased to provide medical services for the

plaintiff, nor denied any reasonable request. Since the defendant afforded the plaintiff medical treatment and complied with the statue, the plaintiff should not be allowed to recover expenses for the medical services she received by the unauthorized physician of her choice. *U. S. Fidelity and Guaranty Company v. Morgan*, 795 S.W.2d,653 (Tenn.1990). Therefore that portion of the trial court's judgment ordering the payment of these expenses should be reversed.

CONCLUSION

After a thorough *de novo* review of the findings made by the trial court, accompanied by the statutory presumption of correctness, this panel finds that the 25% permanent partial disability to the body award should be affirmed, but that the judgment of the trial court ordering the payment of medical expenses for an unauthorized physician should be reversed.

C. CREED MCGINLEY, SPECIAL JUDGE

CONCUR:

JANICE M. HOLDER, JUSTICE

F. LLOYD TATUM, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

GLORIA ROOKER,	)	SHELBY CO. CIRCUIT
	)	NO. 91933-8
Plaintiff/Appellee,	)	
	)	Hon. D'Army Bailey,
vs.	)	Judge
	)	
ZURICH INSURANCE COMPANY,	)	NO. W1998-00273-WC-R3-CV
	)	
Defendant/Appellant.	)	AFFIRMED IN PART, **REVERSED IN PART**

FILED

January 4, 2000

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 paid by the Defendant/Appellant, Zurich Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED this 4th day of January, 2000.

PER CURIAM