

**IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE JANUARY 1996 SESSION**

CAROL VICTORIA (VICKY) PITNER,)
)
Plaintiff/Appellant)
)
v.)
)
VANDERBILT CHILD AND)
ADOLESCENT PSYCHIATRIC)
HOSPITAL, Employer)
and FIDELITY AND CASUALTY)
INSURANCE COMPANY OF NEW)
YORK, Defendant Carrier,)
)
Defendant/Appellee)

DAVIDSON CHANCERY
NO. 01S01-9507--CH-00114
HON. ROBERT S. BRANDT,
CHANCELLOR

<p>FILED</p> <p>April 26, 1996</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>
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For the Appellee:

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MEMORANDUM OPINION

Justice Frank F. Drowota, III
Senior Judge John K. Byers
Special Judge Robert L. Childers

AFFIRMED 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.

Plaintiff injured her right arm, shoulder and neck at work on September 26, 1988. The trial court awarded 24 percent permanent partial disability to the body as a whole. Further, the trial court ordered a credit to the employer for temporary total disability benefits paid after May 5, 1992, the date the court found as plaintiff's date of maximum medical improvement.

We affirm the judgment of the trial court.

Plaintiff is 38 years old with a college degree. While working as a recreation specialist at Vanderbilt Child and Adolescent Psychiatric Hospital, she was injured as she attempted to catch a falling patient. She was treated in the Emergency Room for acute thoracic strain but continued to have pain.

Further evaluation led to surgical removal of torn cartilage and the distal clavicle on August 2, 1990 by Dr. J. Willis Oglesby. She did not improve, and subsequently began seeing Dr. John Campa, a neurologist, on July 1, 1991.

Dr. Campa treated plaintiff with nerve blocks, injections, physiotherapy, biofeedback and anti-depressant medications. He diagnosed C5-6 subligamentous disk protrusion with secondary radiculopathy and C6-7 degenerative disk disease with secondary radiculopathy. He opined she requires further rehabilitation, including future surgery, to improve functioning and permit light to medium work. On July 21, 1993, when plaintiff advised she did not choose to have the recommended surgery, Dr. Campa opined that therefore she had reached maximum medical improvement, and assessed 24 percent medical impairment to the body as a whole under AMA Guidelines.

During the period when plaintiff was being treated by Dr. Campa, she was sent back to Dr. Oglesby, the surgeon, for an independent medical examination on May 5, 1992. Dr. Oglesby opined she had reached maximum medical improvement as of that date. He assessed 10 percent permanent partial disability to her right upper extremity using the guidelines of the American Academy of Orthopedic Surgeons. He limited her

work to exclude lifting and overhead use of the right arm and opined she could not return to work where people might grab her arm.

The trial judge set plaintiff's permanent partial disability at 24 percent to the body as a whole. In making this determination, he considered plaintiff's age, education and work history. He considered her testimony about continuing pain in her shoulder and tingling in her hand. He noted that she is now self-employed and has held various jobs since her injury, and opined that she is eminently employable, even with her disability. We find that the trial judge correctly applied the factors in *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452 (Tenn. 1988) and we affirm the award of 24 percent permanent partial disability to the body as a whole.

The trial judge decided the factual issue of plaintiff's date of maximum medical improvement in favor of May 5, 1992, the date set by her surgeon, Dr. Oglesby, rather than July 1, 1993, the date given by Dr. Campa.

In determining that plaintiff was not entitled to temporary disability benefits after May 5, 1992, the trial judge considered not only her surgeon's assessment of the date of maximum medical improvement, but also the fact that plaintiff received unemployment compensation benefits during that period, conduct inconsistent with her contention that she was totally disabled. Further, plaintiff applied for various jobs during that time. There was ample evidence to support the court's finding of fact.

Our review is *de novo* on the record with a presumption that the findings of fact of the trial court are correct unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2). We find that the trial judge did not err in setting plaintiff's date of maximum medical improvement as May 5, 1992 and we affirm the judgment in this respect.

The judgment of the trial court is affirmed and costs are assessed to appellant. The case is remanded to the trial court for entry of any orders necessary to carry out this judgment.

John K. Byers, Senior Judge

CONCUR:

Frank F. Drowota, III, Justice

Robert L. Childers, Special Judge