IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE

VIVIAN JEANETTE PAYNE, Plaintiff/Appellee v. SEQUATCHIE VALLEY COAL CORPORATION Defendant/Appellant	No. 01S01-9610-CH-00214 Sequatchie Chancery HON. JEFFREY F. STEWART, CHANCELLOR

FOR THE APPELLANT:

MICHAEL A. GERACIOT;
DALE A. TIPPS
LEVINE, MATTSON, ORR
& GERACIOTI
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FOR THE APPELLEE:

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MEMORANDUM OPINION

MEMBERS OF PANEL:

LYLE REID, ASSOCIATE JUSTICE, SUPREME COURT
WILLIAM H. INMAN, SENIOR JUDGE
WILLIAM S. RUSSELL, RETIRED JUDGE

MODIFIED AND REMANDED RUSSELL, SP. J.

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

This case has an unusually long and complicated history. The employee/plaintiff fell at work on September 26, 1990 injuring her back. The trial did not take place until April 12, 1995; and the issues were taken under advisement until July 10, 1996. The plaintiff was awarded temporary total disability benefits from September 26, 1990, through November 9, 1990, a total of $1,176.00. The defendant was held liable for the medical bills of Drs. Richard W. Brackett, Paul A. Broadstone and John W. Laramore; and the plaintiff was judged responsible for any other medical expenses incurred in the past, but future medical expenses were ordered paid by the defendant. Certain expenses in connection with depositions were assessed as discretionary costs to be paid by the defendant, as were the regular court costs.

The plaintiff was found by the trial court to be 50% permanently partially disabled to the whole body; and awarded 200 weeks compensation, which calculates to $39,200.00.

On this appeal the only issue raised relates to the award of permanent partial disability. The employer/appellant contends that no permanent partial disability resulted from this accident; and, even if there was some permanent partial disability it was not 50% to the body as a whole.

The plaintiff was a clerical worker. No doubt she fell in the course of her employment, and claimed a back injury. She has a history of back problems dating back to her teens. At the time of her fall she was 43 years old and had completed three years of college study. From July 1986 until August of 1988 a chiropractor, Rickey Hurst, treated her for low back pain resulting from lumbosacral strain, as well as neck and shoulder pain. In October of 1986 she saw W.E. Vanatta, another chiropractor, for an injury to her lower back caused by moving furniture. She saw him again in August of 1988 with similar symptoms. She began seeing Leland Northcutt, another chiropractor, in September of 1988, complaining of low back pain. She recorded for him that her condition developed in high school, and stated that she had been receiving chiropractic treatment for 20 to 25 years.

The plaintiff worked approximately seven days following the fall in issue. She then started seeing her family physician, Dr. John Laramore, and saw him several times. He released her to return to work on November 19, 1990. She worked about four months and was terminated for excessive absenteeism on March 22, 1991.

She again was treated by Leland Northcutt, D.C., for back and

neck pain. He found muscle spasm and restricted motion, the same findings that he had made before her fall on September 26, 1990. On December 19, 1990, she was again treated by Northcutt, with complaints of pain caused by a fall on her kitchen floor. A week later she returned to him with the same complaints, saying that she had fallen again. He continued to treat her until September 14, 1991. He testified that he could not give her an impairment rating because she had not completed her rehabilitation program.

The plaintiff was treated by an orthopaedic surgeon, Dr. Paul Broadstone. He first saw her on January 9, 1991, more than three months after her fall at work. In her history given to Dr. Broadstone she denied having any previous neck or back problems prior to the fall at work. She complained to him of pain in the whole spine, worse in the lower back. The pain began four days after her fall at work. He testified that while she was under the care of Dr. Laramore (who referred her to him) that she had negative x-rays of the skull, right knee and lumbar spine; and that she also had normal EMG and nerve conduction studies. An MRI of both the cervical and lumbar spine done in November of 1990 was normal. Dr. Broadstone had a bone scan of the plaintiff done in February of 1991 and the results were normal, except for evidence of bursitis in the right shoulder area. His diagnosis was some residual inflammation in the muscle and tendons and charted it as lumbosacral inflammation.

Dr. Broadstone continued to treat the plaintiff for several weeks. She complained of numbness, tingling in the right lower extremity and some feeling of weakness in the right lower extremities. He concluded that she had "a fibrositis type

picture", which is inflammation of the fibrous tissue in the body. He testified:

> It's more of a diffuse process and can affect varying parts of the body that have fibrous tissue. It's not a real well-defined disease process.
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> * * * * * *
>
> There's probably several causes. I'm not up on all of them, that's why I usually have the rheumatologist to evaluate and treat these people.
>
> * * * * * *
>
> They deal with many arthritic conditions or inflammatory conditions of the joints which is what arthritis is; muscles, tendons. And they also treat the fibrositis for some of the autoimmune type disease like rheumatoid and lupus and those kinds of processes.

Dr. Broadstone testified that he had never given the plaintiff any restrictions or placed her on any restrictions as far as physical activity was concerned. He testified that her final orthopaedic diagnosis was diffuse spinal pain of unknown etiology. His examinations and treatments failed to yield to him any specific diagnosis for her problem. He referred her to a rheumatologist, Dr. Richard W. Brackett, to see what he thought.

Dr. Brackett diagnosed the plaintiff's condition as fibromyalgia, or soft tissue rheumatism, and bursitis of the right hip region. He testified that " all likelihood it was triggered by her accident in September of 1990". He did not think that the bursitis was related to the fall at work. He testified that joint pain can be a symptom of fibromyalgia, and that tissue or muscle pain is "one of the hallmarks of the syndrome". He continued to treat her through July 30, 1992. She was then complaining of arms

and legs hurting and was tender in her muscle groups. He prescribed a tricyclic anti-depressant "that she was unable to afford previously".

On cross-examination Dr. Brackett testified that upon her first visit the plaintiff hurt all over: her legs, her low back, her upper back, her shoulders, her arms and her neck. He agreed that there are many possible cases of fibromyalgia: stress, idiopathic, multiple medical illnesses, thyroid dysfunction, electrolyte abnormalities related to other arthritic processes. His testimony as to the cause of her fibromyalgia was founded upon her subjective history. He heard no details of stress in her life. He testified that fibromyalgia is usually a chronic disorder; but said that accident related fibromyalgia "should be a short-term syndrome". In the plaintiff's case, he testified that her syndrome would be expected to be resolved in three to six months. He also testified that hypothyroidism was a potential cause of fibromyalgia, and that the plaintiff complained of a history of hypothyroidism. He testified further her prior complete hysterectomy and her cessation of the taking of hormone replacement pills "can give very similar symptoms to fibromyalgia", if her ovaries were not intact. Dr. Brackett admitted that in his first report on the plaintiff's condition, dated May 3, 1991, that he stated that he could not unequivocally say that her soft tissue rheumatism was directly related to her fall on the job. When asked about the plaintiff's falls after the fall on the job, Dr. Brackett testified that any fall might cause a condition like this. He also admitted that the A.M.A. guidelines do not give an impairment rating for this condition.

The plaintiff saw other doctors. She saw Dr. Robert Sendele, another orthopaedic surgeon; Dr. Ogrodowczyk, a chiropractor; and Drs. Donothan Ivy, George Graves and a Dr. Boehn. There is no evidence that any of them assigned plaintiff an impairment rating.

Dr. Kenneth Stanly, D.C., saw the plaintiff on March 31, 1994. He diagnosed muscle strain/sprain injuries to her entire spine, assigned her an impairment rating of 20% to the body as a whole, based upon decreased range of motion of the spine.

The trial judge noted that the plaintiff was presently working full time at a local golf course in an information booth. She answers the telephone, handles the payroll and is involved with some work on the computer.

The trial judge based his finding of 50% permanent partial impairment to the body as a whole upon the diagnosis by Dr. Brackett of traumatic fibromyalgia.

We review the judgment of the trial court de novo upon the record, with a presumption of correctness unless the preponderance of the evidence is otherwise. Tennessee Code Annotated Section 50-6-225 (e).

Accepting as fact that the plaintiff has permanent fibromyalgia, we find the evidence that it is the proximate result of the fall at work to be legally insufficient to establish that fact. Additionally, the medical evidence preponderates against the testimony of Dr. Kenneth Stanley, D.C.

We hold that the judgment of 50% permanent partial disability to the whole body is reversed and that the judgment be modified to a finding of no permanent partial disability; and that the judgment for future medical expenses be modified to exclude liability of the defendant for future medical expenses incurred in the treatment of fibromyalgia.

Costs on appeal are assessed to the defendant/appellant.

_____
WILLIAM S. RUSSELL, SPECIAL JUDGE

CONCUR:

_____
LYLE REID, ASSOCIATE JUSTICE

_____
WILLIAM H. INMAN, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

VIVIAN JEANETTE PAYNE	)	Sequatchie County No. 1597
	)	
Plaintiff/Appellee	)	Hon. Jeffrey F. Stewart,
	)	Chancellor
v.	)	
	)	Supreme Court No.
SEQUATCHIE VALLEY COAL CORPORATION	)	01-S-01-9610-CH-00214
	)	
Defendant/Appellant	)	Modified and Remanded

JUDGMENT ORDER

This case is before the Court upon motion for review 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, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well-taken and should be denied; 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.

Cost will be paid by defendant/appellant and surety, for which execution may issue if necessary.

It is so ordered this 2nd day of December, 1997.

PER CURIAM

Reid, J., not participating