IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE

VICKIE SUE HEIDEL, Plaintiff/Appellee	)	PUTNAM COUNTY CIRCUIT
v.	)	No. 01S01-9709-CV-00195
BARNES & NOBLE BOOKSTORES, INC. and ROYAL INSURANCE COMPANY, Defendants/Appellants	)	HON. JOHN MADDUX, JR., JUDGE

FOR THE APPELLANTS:

RANDOLPH A. VEAZEY
CONNIE JONES
GLASCOW & VEAZEY
Washington Square
222 Second Ave., North
Suite 312
Nashville, Tennessee 37201-1649

FOR THE APPELLEE:

SONYA W. HENDERSON
218 West Main Street
Suite 1
Murfreesboro, Tennessee 37130

MEMORANDUM OPINION

MEMBERS OF PANEL

FRANK F. DROWOTA, III, ASSOCIATE JUSTICE
JOHN K. BYERS, SENIOR JUDGE
WILLIAM S. RUSSELL, RETIRED JUDGE

AFFIRMED, AS MODIFIED RUSSELL, SP. J.

This appeal in a workers' compensation case 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.

The plaintiff/appellee employee, Vicki Sue Heidel, was working as a janitor for the State of Tennessee at Tennessee Technological University when she sustained a low back sprain or strain while lifting a waste basket on January 31, 1992. Her workers' compensation claim against the State of Tennessee was resolved upon an adjudication of a resultant 6% permanent partial disability to the body as a whole.

On January 13, 1993, while working as a cashier in the bookstore at that same university she again injured her back by lifting a heavy sack of books at the check-out counter. This injury was diagnosed as a ruptured lumbar disc at L5-S1. A laminectomy was performed in April of 1993 by Dr. Bennett Blumenkopf, M.D., a neurological surgeon. Plaintiff retained a 10% permanent partial anatomical impairment to the body as a whole, and concluded this workers' compensation claim by receiving an award before the Claims Commission of Tennessee based upon 25% permanent partial vocational disability to the body as a whole.

Dr. Blumenkopf restricted her from lifting over 20 pounds; and advised against stooping, bending, lifting, or prolonged sitting or standing. She was unable to work from the injury date of January 13, 1993 through June 16, 1993. Thereafter, she had to build up to full time work over a protracted period. In time the bookstore operation was taken over by the defendant/appellant, Barnes & Noble Bookstores, Inc., and she became their employee. She was allowed accommodations such as a chair with padded seat and back, was permitted to alternately sit and stand and did not have to vacuum, clean or lift. She testified that there were days when she would have nerve spasms in her leg or from her back to her legs, and "she missed a lot of work". She had ongoing medical treatment for her chronic back pain through May of 1994, immediately preceding a new back injury suffered on or about July 15, 1994.

Dr. Blumenkopf diagnosed a recurrent disc herniation at L5-S1, and again treated it surgically. He opined that as a result of this injury and resultant surgery that the plaintiff retained an additional 2% permanent partial impairment to the body as a whole in addition to the 10% which resulted from the first surgery. He testified that she reached maximum medical improvement in February of 1995. She was released to return if the need arose. She returned in August, 1995, complaining of pain in the right leg. Another M.R.I. at that time showed scarring, but nothing requiring surgery. Physical therapy was prescribed, as well as medicines. Reiterating the restriction that she should not lift over 20 pounds, he testified that there was no reason that she could not work.

The plaintiff, along with four other employees, was terminated on August 8, 1994. She was given 12 weeks of severance pay. Her supervisor, Judy Vandever, testified by deposition that she knew nothing of the alleged new back injury of July 1994 that brought on the second surgery. She said that she never asked the plaintiff to do anything other than operate the cash register. After leaving this job, plaintiff worked for a brief period on a production line making rubber stamps. She has applied for other jobs within her capabilities.

Plaintiff's counsel had Dr. David Gaw, M.D., to perform an evaluation examination of the plaintiff, and a review of her medical records. He concurred with the opinion of Dr. Blumenkopf, that Ms. Heidel sustains a 10% permanent partial impairment from her 1993 disc herniation and surgery, and an additional 2% permanent partial impairment rating resulting from the second lumbar disc surgery. However, he assigned an additional 11% impairment for loss of range of motion. He was unable to say how much disability she retained from loss of range of motion following the 1993 surgery.

The trial of this case was unique. The parties stipulated that the plaintiff has a 50% vocational disability to the body as a whole. The problem is that counsel for the defendant perceived this to be the aggregate sum of her disabilities from all three of her back injuries, while plaintiff's counsel deemed the stipulation to be that Ms. Heidel sustained a 50% anatomical and vocational disability form the third back injury. With the stipulation, the parties asked the court to determine:

> Whether defendants are liable for the totality of plaintiff's present 50% permanent partial disability to which the parties stipulated.

The trial court found, as a matter of law, that the defendants are liable for the entire stipulated 50% permanent partial disability.

It is the position of the defendants that they should be credited with the prior 31% paid for the first two injuries, leaving them liable for 19%.

When, during the course of the initial hearing and two subsequent telephonic hearings, the absence of mutual agreement as to the meaning of the stipulation became apparent, the trial court offered the parties a trial on the facts without the stipulation. This was declined. Under the circumstances, the trial court proceeded to judgment. Since 50% permanent partial vocational disability was found, it is fair to assume that the trial court felt bound by the stipulation.

Under the totality of the circumstances, we are of the opinion that there was no binding stipulation. If the 50% represented nothing but disability resulting from the third injury, as the plaintiff contends and had consistently contended, then the issue submitted to the court was meaningless, as certainly the plaintiff would have been entitled to fully recover for the disability generated alone by the third injury. It is equally obvious that the defendants would not have stipulated to a recovery for 50%, without hope of credit.

The result was that the trial judge was misled into an acceptance at face value of a stipulation that was never agreed to. We, therefore, review the result with a view to determine if in fact and law the judgment should be affirmed or modified. We have before us the deposition evidence of the necessary witnesses to the relevant facts.

Our review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings below, unless the preponderance of the evidence is otherwise. T.C.A. Sec. 50-6-225 (3)(2)(1991). This standard of review requires this court to weigh in depth the factual findings and conclusions of the trial court. Humphrey v. David Witherspoon, Inc., 734 S.W. 2d 315 (Tenn. 1987).

The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. Worthington v. Modine Mfg. Co., 798 S.W. 2d 232, 234 (Teen 1990).

A medical expert's rating of anatomical disability is one of the relevant factors, but the vocational disability is not restricted to the precise estimate of anatomical disability made by a medical witness. Corcoran v. Foster Auto GMC, Inc., 746 S.W. 2d 452, 458 (Tenn. 1988).

When the medical testimony is presented by deposition, as it was in this case, this court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. Landers v. Fireman's Fund

Ins. Co., 775 S.W. 2d 355, 356 (Tenn. 1987); Henson v. City of Lawrenceburg, 851 S.W. 2d 809, 812 (Tenn. 1993).

We conclude that Ms. Heidel never recovered from her initial laminectomy, for which she was adjudged to be 25% permanently partially disabled. She was restricted in what she could do and had chronic back pain. A substantial part of her present disability has its genesis in the first disc rupture. Her restrictions now are substantially the same, but with new appreciation of the necessity to abide by them.

It is our judgment that the recurrent disc herniation that is the basis for this lawsuit has resulted in a 25% new vocational disability to the plaintiff. We reduce the 50% found by the trial court to 25% disability to the body as a whole. As so modified, the judgment is affirmed.

We overrule the contention that the trial judge should not have awarded discretionary costs, and affirm that award.

Costs on appeal are assessed to the appellants.

WILLIAM S. RUSSELL, SPECIAL JUDGE

CONCUR:

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FRANK F. DROWOTA, III,
ASSOCIATE JUSTICE

_____

JOHN K. BYERS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

VICKIE SUE HEIDEL,	}	PUTNAM CIRCUIT
	}	No. NJ-6122 Below
Plaintiff/Appellee	}	
	}	Hon. John J. Maddux, Jr.
vs.	}	Judge
	}	
BARNES & NOBLE BOOKSTORES,	}	
INC. and ROYAL INSURANCE CO.,	}	No. 01S01-9709-CV-00195
	}	
Defendants/Appellants	}	AFFIRMED, AS MODIFIED.

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 Barnes & Noble Bookstores, Inc. and Royal Insurance Company, Principals, and Glasgow & Veazey, Surety, for which execution may issue if necessary.

IT IS SO ORDERED on July 30, 1998.

PER CURIAM