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

FILED

November 3, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

MELISSA COOPER,	)	
	)	
Plaintiff/Appellee	)	SHELBY CHANCERY
	)	
v.	)	NO. 02S01-9710-CH-00091
	)	
XEROX CORPORATION,	)	HON. FLOYD PEETE,
	)	CHANCELLOR
Defendant/Appellant	)	

For the Appellant:

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For the Appellee:

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M E M O R A N D U M O P I N I O N

Members of Panel:

Senior Judge John K. Byers
Special Judge F. Lloyd Tatum
Special Judge Paul R. Summers

REVERSED and DISMISSED

BYERS, Senior Judge

OPINION

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.

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Stone v. City of McMinnville,* 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial court in a workers' compensation case. *See Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452, 456 (Tenn. 1988).

The trial court awarded the plaintiff ten percent permanent partial disability to the body as a whole, half of certain medical expenses, and discretionary costs.

The defendant appeals and raises the following issues for our review:

I. Whether or not the preponderance of the evidence supports the Trial Court's finding that the Plaintiff sustained a 10% permanent partial disability to the body as a whole as a result of this injury.

II. Whether or not the preponderance of the evidence supports the Trial Court's award of ½ of the medical expenses incurred by Plaintiff as a result of the medical expense of chiropractor Joseph Lipkowitz.

III. Whether or not the Trial Court abused its discretion in awarding discretionary costs to Plaintiff in the above matter.

We find that the award of ten percent is contrary to the weight of the evidence and that the judgment of the trial court should be reversed and dismissed. Because of this decision, we do not reach the last two issues on appeal.

FACTS

The plaintiff, age 30 at the time of trial, graduated from high school and attended college for one and a half years. From 1987 to 1991, she worked in clerical positions for the Shelby County public records office and the Shelby County court clerk's office. In March 1991, she began working for the defendant as a production operator.

During the week of August 9, 1993, while making copies of documents, the plaintiff carried between seven and 12 cartons of paper, each weighing 35 to 50 pounds, from a downstairs supply room to an upstairs copy room. By Friday, August

13, 1993, she said she had developed a severe pain in her back from her neck down to the bottom of her spine. During that weekend, the plaintiff stayed in bed and applied a heating pad to her back. When she returned to work on Monday, she reported the injury to her supervisor. The plaintiff continued to work in a lighter capacity during this week even though she was in pain and slow.

The next week the plaintiff saw Dr. Ronald Terhune, a family doctor who placed her on bed rest for two weeks, prescribed muscle relaxers and pain medications for her, and later sent her for a CAT scan. During the time she was off from work, she received a call from the defendant and was offered a list of three doctors. Thereafter, the plaintiff saw all three doctors on the list for her back pain, which included Dr. James Rodney Feild, Dr. Joseph Buchignani, and Dr. R. Riley Jones.

The plaintiff testified that the traditional treatment offered by these doctors did not seem to help her back pain and that physical therapy even made her back pain worse. Although she was released from the care of Dr. Jones in February 1994, she stated that she was still having shooting pain in her low back and down her leg, right shoulder, and arm. Beginning in March 1994, the plaintiff went to Dr. Joseph Lipkowitz, a chiropractor. She testified that she received some relief from her symptoms as a result of Dr. Lipkowitz' treatment.

The plaintiff continued to work for the defendant intermittently until July 1994, at which time she resigned because she could not perform the lifting, squatting, bending, and prolonged standing. In August 1994, she became president of her father's marketing company. She stated that she took this job because it gives her the flexibility of resting when she is in pain. Earning a salary of $47,000, the plaintiff's job duties include bookkeeping, handling personnel and payroll records, contract implementation, contract negotiation, and recruitment. She also travels by car in this position but explained that she stops frequently to get out and move around.

From August 1994 to April or May 1995, the plaintiff also ran a second company as the executive director and made $21,000 a year. She explained that the two jobs were related and that she worked out of the same office. During the time she held both jobs, the plaintiff testified that she worked an average of six to eight

hours a day but that she worked up to 12 hours on some days and sometimes six days a week.

The plaintiff testified that in her current job as president of the marketing company she cannot sit at the typewriter for long periods without getting up to move around. She also said she cannot vacuum, carry heavy grocery bags, or participate in sports or recreation because of the pain. Now, she uses heating pads, ice packs, a massage pillow, and B.C. Powders for the pain. Beginning in April 1994, she also sought treatment from a massage therapist.

Prior to the plaintiff's injury at work, she saw an osteopath named Dr. Calandruccio for a pulled muscle in her back, which she explained turned out to be the flu. The plaintiff testified that she had never experienced back problems prior to this work injury.

MEDICAL EVIDENCE

_____Dr. James Rodney Feild, a neurosurgeon, testified by deposition. Dr. Feild first saw the plaintiff on September 1, 1993 and recorded a present history of low back pain after lifting boxes at work on August 13, 1993. On the day previous to this visit, the plaintiff experienced pain radiating into her hips, thighs, and calves, which was made worse by twisting, bending, coughing, sneezing, standing, and walking. She also felt numbness and tingling in her shoulder blades. Dr. Feild diagnosed her with musculoskeletal pain, recommended that she not lift except when necessary, and gave her a prescription for Vicodin and a back support. He returned her back to light duty work.

Dr. Feild next saw her on September 15, 1993 for complaints of low back pain and some pain between her shoulders that led to the base of her neck and into her arms. At that time, her motion was limited to 50 percent on forward bending so he sent her to physical therapy. On September 28, 1993, he received a phone call from the physical therapist, who said that she tried many treatments on the plaintiff but that the plaintiff maintained that nothing seemed to help her. On that date, he discontinued all treatment, determined that she could continue working, and assigned no permanent anatomic impairment rating. He last saw her on October 1, 1993 for continued complaints of low back pain, but he still found no disability.

_____Dr. R. Riley Jones, a board certified orthopedic surgeon, also testified by deposition. Dr. Joseph Buchignani, a neurosurgeon, had referred the plaintiff to Dr. Jones after he could not find anything wrong with her from a neurological standpoint. Dr. Jones first saw the plaintiff on October 13, 1993 for complaints of back pain and recorded a history of her injuring her back while lifting boxes at work on August 13, 1993. At that time, he reviewed a CT scan of her lower back which showed a mild bulge at L5-S1. He also found the following: no muscle spasm; no abnormalities in her x-rays; and Waddells signs (symptom magnification signs). He diagnosed her with a lumbosacral strain and made arrangements for her to attend physical therapy. When she next returned on October 29, 1993, Dr. Jones found that she had made no progress in physical therapy and that she had markedly positive Waddells signs.

On November 5, 1995, Dr. Jones found that the plaintiff had better range of motion, had progressed in physical therapy, and had milder Waddells signs. At this point, he returned her to light duty work and continued her in physical therapy. On November 19, 1993, the plaintiff returned with positive Waddells signs and no muscle spasms. By December 6, 1993, Dr. Jones had received normal results on a bone scan and an M.R.I. Dr. Jones saw her throughout January and felt that most of her problems were nonphysiological, determining that there was no reason why she could not return to work for the defendant as of January 28, 1994. On February 25, 1994, she returned to him with complaints of upper back pain and lower back pain in a specific area. He continued to see her until March 18, 1994 and refilled her prescriptions for Toradol until July 28, 1994. During the time she saw Dr. Jones, he said that she never complained specifically about headaches or neck pain but that she did write these symptoms on her initial intake sheet. Dr. Jones opined that she had no permanent partial impairment from an orthopedic or neurological standpoint as a result of her work injury. In order for a person to have a 43 percent impairment to the body as a whole, he stated that there would have to be an amputation.

_____Dr. Joseph Lipkowitz, a chiropractor with a master's certification in the *AMA Guides*, testified by deposition. Dr. Lipkowitz first saw the plaintiff on March 8, 1994 for complaints of "pain in the neck area with radiation into the head and shoulders, as well as headaches . . . upper back pain, mid-back pain, low back pain with radiation into the hips and into the right leg." He recorded a history that these

symptoms began after she injured her back while lifting boxes at work on August 13, 1993. On October 25, 1994, she returned with complaints that her low back, upper mid-neck, and shoulders were tight and that she had a low energy level, was working long hours, was under a lot of stress, and had stress related headaches. Dr. Lipkowitz opined that there was a causal relationship between her work accident and the injuries she sustained.

On January 17, 1995, he performed a number of tests to determine whether she had sustained any permanent partial impairment. He saw and felt muscle spasms in her back and neck, took x-rays of her spine, and found disc damage in the form of a tear. His final diagnoses were post-traumatic headaches and loss of motion segment integrity in the cervical, thoracic, and lumbar spinal areas. He assigned her a 43 percent permanent partial impairment to the body as a whole according to the *AMA Guides*. For this determination, he did not send her for an M.R.I., C.T., or bone scan because he said flexion and extension x-rays were the only way to assess loss of motion segment integrity according to the *AMA Guides.*

Dr. Lipkowitz was not authorized by the defendant so he took an assignment of benefits. His bill amounted to $5,459 of which $500 was for the impairment rating assessment and report. He testified that his treatment was medically necessary to a reasonable degree of medical certainty and that his bill was reasonable. Further, Dr. Lipkowitz stated that the plaintiff would require medical care throughout her life because her condition is permanent and would not improve.

ANALYSIS

In all but the most obvious cases, the causation and permanency of a work injury must first be established through expert medical evidence. *Tindall v. Waring Park Ass'n,* 725 S.W.2d 935, 937 (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 (Tenn. 1990).

Our review of the expert testimony reveals that Dr. Feild and Dr. Jones treated the plaintiff extensively, determined that she had no permanent impairment based on normal test results, and released her back to work. Both Dr. Feild and Dr. Jones also found that the plaintiff exhibited markedly positive Waddells signs. In addition, the record reveals that Dr. Buchignani could not find anything wrong with the plaintiff

from a neurological standpoint. In contrast, Dr. Lipkowitz assigned the plaintiff a 43 percent permanent partial impairment based upon x-ray results alone.

Clearly, the trial judge relied upon the findings of Dr. Lipkowitz for his award of ten percent permanent partial disability. We recognize the following two rules of law: (1) a chiropractor is competent to testify as a medical expert, *Smith v. Hale,* 528 S.W.2d 543, 545 (Tenn. 1975), and (2) the trial court has the discretion to accept the opinion of one medical expert over another medical expert, *Johnson v. Midwesco, Inc.,* 801 S.W.2d 804, 806 (Tenn. 1990). However, when the medical testimony is presented by deposition, as it was in this case with the exception of Dr. Buchignani, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. INA,* 884 S.W.2d 446, 451 (Tenn. 1994); *Landers v. Fireman's Fund Ins. Co.,* 775 S.W.2d 355, 356 (Tenn. 1989).

Regarding the lay testimony, the plaintiff testified that she stopped working for the defendant because she could no longer perform the lifting, squatting, bending, and prolonged standing and that she took a job with her father's marketing company because it gives her the flexibility of resting when she is in pain. She testified that in her current job as president of the marketing company she cannot sit at the typewriter for long periods without getting up to move around. The plaintiff testified that she cannot vacuum, carry heavy grocery bags, or participate in sports or recreation because of the pain. Further, she testified that she uses heating pads, ice packs, a massage pillow, and B.C. Powders for the pain. Finally, the plaintiff testified that she had never experienced back problems prior to this work injury.

In this case, as in all workers' compensation cases, the claimant's own assessment of her physical condition and resulting disabilities is competent testimony and cannot be disregarded. *Tom Still Transfer Co. v. Way,* 482 S.W.2d 775, 777 (Tenn. 1972). Considering this principle of law in turn, this Court must not disregard the plaintiff's testimony that she ran two companies from August 1994 to April or May 1995, during which she worked an average of six to eight hours a day and occasionally worked up to 12 hours a day and six days a week. During this same period of time, we note that the plaintiff complained to Dr. Lipkowitz of intense and constant back pain and frequent headaches.

In making determinations of vocational disability, the court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition. Tenn. Code Ann. § 50-6-241(a)(1); *Roberson v. Loretto Casket Co.,* 722 S.W.2d 380, 384 (Tenn. 1986). Our review of these relevant factors shows that the plaintiff is 30 years old, educated, skilled, and not permanently restricted by any medical expert. In addition, she is able to work as the president of a marketing company and to earn $47,000 a year.

After a careful review of the record, we find that the evidence preponderates against the finding of the trial court that the plaintiff is entitled to the award of ten percent permanent partial disability to the body as a whole.

The judgment of the trial court is reversed and the case is dismissed. The cost of this appeal is taxed to the plaintiff.

_____
John K. Byers, Senior Judge

CONCUR:

_____
F. Lloyd Tatum, Special Judge

_____
Paul R. Summers, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

MELISSA COOPER,	)	SHELBY CHANCERY
	)	NO. 104510-2
Plaintiff/Appellee,	)	
	)	Hon. Floyd Peete,
vs.	)	Chancellor
	)	
XEROX CORPORATION,	)	NO. 02S01-9710-CH-00091
	)	
Defendant/Appellant.	)	REVERSED & DISMISSED.

FILED

November 3, 1998

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 Appellee, for which execution may issue if necessary.

IT IS SO ORDERED this 3rd day of November, 1998.

PER CURIAM