IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
NOVEMBER 1998 SESSION

FILED

February 9, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

PEGGY WILSON,	)	
	)	
Plaintiff/Appellee,	)	
	)	Shelby Circuit No. 90222-1 T.D.
v.	)	
	)	No. 02S01-9807-CV-00064
UNITED PARCEL SERVICE, INC. OHIO, d/b/a UNITED PARCEL SERVICE and LIBERTY MUTUAL FIRE INSURANCE COMPANY,	)	Honorable John R. McCarroll, Jr., Judge
	)	
Defendants/Appellants.	)	

For the Appellants:

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

Members of Panel:

Justice Janice M. Holder
Senior Judge John K. Byers
Senior Judge F. Lloyd Tatum

AFFIRMED

TATUM, Senior Judge

O P I N I O N

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.

The trial court found that the plaintiff, Peggy Wilson, sustained an injury resulting in a 16 percent permanent partial disability to the body as a whole. The court also ruled all medical bills and charges associated with the treatment of Dr. Rizk be paid by the defendants and that the plaintiff was entitled to temporary total benefits from September 25, 1997 to November 24, 1997, which had not been paid by the defendants. The defendants present issues attacking the judgment of the trial court on these three findings. We will first summarize the evidence.

The plaintiff testified she was 51 years of age at the time of trial. She attended high school, but did not graduate and did not obtain a GED. Her employment history prior to working for United Parcel Service was manual, unskilled labor. She had worked for United Parcel Service as a package delivery driver for the past 22 years. Her employment requires her to lift packages weighing up to 70 pounds.

The plaintiff testified that on July 23, 1997, when she lifted a 62-pound box, her left arm and hand went numb, causing her to lose grip. This jerked her back, causing pain in the back. She testified the pain in her back worsened and she notified her employer. She was told to go to Med Emergency where she saw Dr. Zanone. Dr. Zanone sent her to Dr. Varner, an orthopedic surgeon.

She testified Dr. Varner ordered a nerve block which was done by Dr. Kraus. This helped her for a few days, but within one and one-half weeks the pain was as severe as ever. Dr. Varner sent her back to work on September 8, 1997, but the pain in her back was so severe she was not able to do the work.

Her employer returned her to Dr. Varner who told her there was nothing else he could do for her. He advised her to go back to work or get another job.

Since she was unable to do the work, she contacted the employer's insurance carrier who told her to see Dr. Kellett, a neurosurgeon. Dr. Kellett gave her liquid cortisone

tablets and told her to return to work on September 17, 1997.

She attempted to work on September 17, but could not remain there because of pain. She returned to Dr. Kellett, and he told her that she had no nerve damage and that there was nothing else he could do for her. He again told her to return to work.

Since she was still unable to work, she again contacted the insurance carrier. The insurance carrier, after contacting Dr. Kellett's office, told her there was nothing else they could do for her. It was then that she saw an attorney.

She testified further that her attorney referred her to Dr. Rizk. After considerable testing, Dr. Rizk told her he knew what was wrong with her. He prescribed a back brace, a TENS unit, gave her a cortisone shot, and prescribed medication. He took her off work for two months. She returned to work on November 24, 1997.

Plaintiff testified that she has pain "all the time." If she puts a "lot of pressure" on the right leg, the pain becomes excruciating. In describing activities that cause her pain, she testified:

> A. Everything. I can't go fishing anymore. I went to the mall one day with my daughter-in-law. We got to the mall. I couldn't walk in every store she did. I'd have to sit down and wait on her to come back out, and then we'd walk on a little piece, and it just hurts to walk a lot. It hurts to sit down a lot. I have to get up and down and up and down.
>
> Q. Okay. What about bending and twisting?
>
> A. That hurts. If I twist a certain way or if I bend and stay too long, the burning gets real severe.
>
> Q. Okay. What about walking up and down steps -- any problem there?
>
> A. Okay. Walking down the steps is not too bad. I have to pull up -- I mean, I have to pull on something to get up the steps.

She testified that she is able to do her work only with the help of her customers in lifting heavy packages. She has had the same route for many years and is well acquainted with the customers.

On cross-examination, plaintiff testified that she earned 60 cents per hour more than she earned at the time of her injury due to a collective bargaining contract. She has had numerous other injuries during her lifetime, and some of them were back injuries. There

is no evidence that these back injuries caused permanent disability. She testified that she occasionally had back pain before the accident, but the back pain was cured by Ibuprofen.

Dr. James Varner, an orthopedic surgeon, testified by deposition. Dr. Varner first saw the plaintiff on July 31, 1997 and his examination revealed tenderness over her right sciatic notch and discomfort on bending of the lumbar spine. Dr. Varner's initial impression was that the plaintiff suffered a lumbar strain with right sciatica or inflammation of the right sciatic nerve. His treatment included giving her anti-inflammatory medications, a cortisone shot, and sending her to physical therapy for a few weeks. At that time, Dr. Varner instructed the plaintiff to return to work in a "seated position only."

When he next saw her on August 5, 1997, she had not improved or responded to conservative treatment, so he ordered an MRI which was normal. Dr. Varner testified he sent the plaintiff for an epidural block to be administered by Dr. Alan Kraus, whose report showed that she felt "almost complete relief" after the injection. The plaintiff came back with mild symptoms, so Dr. Varner returned her to transitional work with no prolonged standing or walking and then to regular work nine or ten days later. When she returned for a final visit on September 9, 1997 with pain in her lower back and diffuse symptoms adjacent to the sacroiliac joint, Dr. Varner informed her there was nothing else he could do for her from an orthopedic standpoint. He saw no evidence of permanent impairment based on the accidental injury.

Dr. Gary Kellett, a neurosurgeon, also testified by deposition. Dr. Kellett first saw the plaintiff on September 11, 1997 for pain in the right gluteal area, which suggested a strain in the gluteal area and low back. He gave her liquid cortisone tablets, told her to use heat on her back, and instructed her to do lower back exercises. Dr. Kellett released her to return to work on September 15, 1997 and discharged her from his care. However, she returned with continued complaints on September 19, 1997. Dr. Kellett informed the plaintiff that based on the normal MRI there was no neurological reason why she could not return to work and he could not assist her further.

Dr. Kellett testified his medical records did not indicate that plaintiff experienced numbness and tingling in her right leg, but his office received a call from the plaintiff informing him that this was a mistake because she had experienced those symptoms. Dr.

Kellett was of the opinion that the plaintiff had strained a muscle in her lower back, gluteal area. Dr. Kellett testified that plaintiff's response to the nerve block by Dr. Kraus was objective evidence tending to support her complaints of pain. Dr. Kellett stated there was no permanent impairment rating and no restrictions placed on the plaintiff as a result of the injury on July 23, 1997.

Dr. Tewfik Rizk, a physiatrist, testified on behalf of plaintiff by deposition. He testified the plaintiff was first seen by him on September 25, 1997, after being referred to him by her attorney. Dr. Rizk testified he made an initial diagnosis of right sacroiliac joint chronic sprain. He prescribed medication, gave her a cortisone shot, a back brace, and told her to stay off work for about two months. He also ordered a bone scan.

Dr. Rizk testified the plaintiff returned to his office on October 10, 1997 with intolerable pain. Dr. Rizk injected her with cortisone in the sacroiliac joint, resulting in her feeling "like a new person" for three days and then feeling the pain return. When he saw the plaintiff on November 20, 1997, he felt she could return to work the next week with no restrictions. She saw him again on December 4, 1997 with continued complaints of pain, especially after heavy lifting, so he instructed her to avoid heavy lifting. On December 18, 1997, she returned to Dr. Rizk in tears because she was unable to do her job. He prescribed a TENS unit, but she returned to him on January 19, 1998 with uncontrollable pain. Dr. Rizk administered a second nerve block to her. He confirmed his initial diagnosis.

Dr. Rizk was of the opinion that the plaintiff's injuries were caused by the work accident of July 23, 1997 and that she sustained an eight percent permanent partial impairment to the body as a whole, based on the AMA Guidelines. Dr. Rizk testified that plaintiff is presently eight percent disabled to the whole body, but she should continue to improve to the point when her disability could eventually resolve itself though it would take a long time. The doctor later explained that a person of plaintiff's age could not expect to be healed. He stated, in her case, her condition is permanent.

We now address the first issue which is that the award based on a finding of 16 percent permanent partial disability to the body as a whole is not supported by a preponderance of the evidence. We have reviewed and will consider all of the record,

including the in-court testimony of the plaintiff which was corroborated by the testimony of her son. We have also carefully reviewed all three of the medical depositions. We are also mindful of the following rules stated in Orman v. Williams Sonoma, Inc., 803 S.W.2d 672 (Tenn. 1991):

> These anatomical disability ratings are but one factor to consider in measuring vocational disability, the ultimate issue in all workers' compensation cases. Newman v. National Union Fire Ins. Co., 786 S.W.2d 932, 934 (Tenn. 1990). The test is whether there has been a decrease in the employee's capacity to earn wages in any line of work available to the employee. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 459 (Tenn. 1988). The assessment of this disability is based on all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work at the types of employment available in his disabled condition. Newman, 786 S.W.2d at 934; Corcoran, 746 S.W.2d at 458-59. The claimant's own assessment of his physical condition and resulting disabilities is competent testimony and cannot be disregarded. Corcoran, 746 S.W.2d at 458.

Id. at 677-78.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's finding of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(d)(2). This tribunal is required to conduct an independent examination of the evidence to determine where the preponderance of the evidence lies. Wingert v. Gov't of Sumner County, 908 S.W.2d 921 (Tenn. 1995). Where the trial judge has seen and heard the witnesses, especially when issues of credibility and weight to be given oral testimony are involved, on review considerable deference must still be accorded to those circumstances. Townsend v. State, 826 S.W.2d 434 (Tenn. 1992). However, this tribunal is as well situated to gauge the weight, worth, and significance of deposition testimony as the trial judge. Seiber v. Greenbrier Indus., Inc., 906 S.W.2d 444 (Tenn. 1995).

In considering the oral testimony in conjunction with the deposition testimony of the three doctors, we cannot say that the evidence preponderates against the finding of the trial court that the plaintiff suffered 16 percent permanent partial disability to the body as a whole. All doctors agreed the plaintiff had some pain. Doctors Varner and Kellett discharged the plaintiff while she was still having much pain and difficulty with her work. Though she was disabled at the time of her discharge, both doctors stated she had no

permanent impairment. Dr. Rizk stated she had eight percent permanent partial impairment to the body as a whole. In considering all of the evidence, including the plaintiff's age, education, skills, training, and the other criteria mentioned in the Orman case, supra, we cannot say the preponderance of the evidence does not support the award based on 16 percent permanent partial disability to the body as a whole. The first issue is without merit.

In the second issue, the defendants state the trial court erred in ordering them to pay all medical bills and charges associated with the treatment by Dr. Rizk. The evidence reveals the medical bills and charges associated with Dr. Rizk's treatment of the plaintiff were reasonable and necessary.

The employer is required by Tenn. Code Ann. §50-6-204 to furnish free of charge to the employee all medical expenses. The plaintiff accepted the service of the physicians designated by the defendants. While plaintiff was still having severe pain and was unable to do her work, both Dr. Varner and Dr. Kellett discharged her, telling her there was nothing else they could do for her. Before seeking other medical assistance, the plaintiff contacted the defendant insurance carrier for assistance. The insurance carrier informed the plaintiff there was nothing else they could do for her and refused to give her further medical help. It was not until then that she obtained the services of Dr. Rizk, on recommendation of her attorney who was employed after further medical assistance was denied by the defendants. The question is whether the plaintiff was justified in seeking further treatment. Pickett v. Chattanooga Convalescent & Nursing Home, Inc., 627 S.W.2d 941 (Tenn. 1982).

The facts in this case are similar to those in the unreported opinion of the panel in Janice Bruce v. Tecumseh Products Co., filed at Jackson on January 23, 1997. As in the Bruce case, we find the plaintiff was justified in seeking the services of Dr. Rizk and the defendants are liable for the costs of such services. We will not again state the circumstances under which the plaintiff was denied further medical treatment, but we hold, under those circumstances, she was entitled to seek medical help on her own after the defendants had refused the same. We find this issue in favor of the plaintiff.

In the third and last issue, the defendants state the trial court erred in awarding temporary total disability benefits until November 24, 1997. We find the preponderance

of the evidence establishes the plaintiff was unable to return to work until November 24, 1997. This was the day that Dr. Rizk, who was treating her, released her to return to work and said that she was not able to return to work until that date. We find this issue in favor of the plaintiff.

The plaintiff, by failing to file copies of unreported opinions with her brief or furnishing copies to defendants' attorneys, has not complied with Supreme Court Rule 4. A party takes risk that these authorities will not be considered when the rule is ignored.

It results that the judgment of the trial court is affirmed. Costs are adjudged against the defendants.

_____
F. LLOYD TATUM, SENIOR JUDGE

CONCUR:

_____
JANICE M. HOLDER, JUSTICE

_____
JOHN K. BYERS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

PEGGY WILSON,	)	SHELBY CIRCUIT
	)	NO. 90222-1 T.D.
Plaintiff/Appellee,	)	
	)	Hon. John R. McCarroll, Jr.,
vs.	)	Judge
	)	
UNITED PARCEL SERVICE, INC. OHIO, d/b/a UNITED PARCEL SERVICE and LIBERTY MUTUAL FIRE INSURANCE COMPANY,	)	NO. 02S01-9807-CV-00064
	)	
Defendants/Appellants.	)	AFFIRMED.

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 Appellants, and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 9th day of February, 1999.

PER CURIAM