

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
(June 19, 2006 Session)

**BETTY S. FLEISHER vs. ROYAL & SUNALLIANCE INSURANCE
COMPANY and M-TEK COMPANY, INC.**

**Direct Appeal from the Chancery Court for Coffee County
No. 02-329, Gerald L. Ewell, Sr., Chancellor**

**No. M2005-01005-WC-R3-CV - Mailed: February 20, 2007
Filed - March 23, 2007**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The trial court found that the employee suffered a 5% medical impairment to the body as a whole and determined that the employee was entitled to a permanent partial disability award of 10% to the body as a whole. The employee contests the adequacy of this award and the failure of the trial court to award the employee additional amounts as a penalty against the employer for the employer's delay in paying temporary total disability benefits. We affirm the trial court in all respects.

Tenn. Code Ann. § 5-6-225(e) (1999) Appeal as of Right; Judgment of the Coffee County Chancery Court Affirmed.

JEFFREY S. BIVINS, Sp. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J, and CLAYBURN PEEPLES, Sp. J., joined.

Rick L. Moore, Moore & Hedges, Tullahoma, Tennessee, for the Appellant, Betty S. Fleisher.

Thomas W. Tucker, III, Glasgow & Veazey, Nashville, Tennessee, for the Appellees, Royal & Sunalliance Insurance Company and M-Tek Company, Inc.

MEMORANDUM OPINION

I. Facts

The Plaintiff, Betty Fleisher (“Fleisher”), was 55 years old at the time of the trial in this action. Fleisher did not graduate from high school, but she did obtain her GED. Fleisher’s previous work history included running a daycare out of her home from 1975 to 1990, working in a hosiery mill sewing socks, working as a cashier, bagging groceries, stocking and cleaning, and working as a desk clerk and housekeeper at a motel. Fleisher also worked in the manufacturing sector through a temporary service at DESA and Calsonic. Her duties at DESA involved some heavy lifting. Her job at Calsonic involved repetitive work on the production lines. For approximately 2 ½ years, immediately before her employment with Defendant M-Tek Company, Inc. (“M-Tek”),¹ she worked at Shoney’s and became a dining room manager. At the time of trial, Fleisher was employed as a waitress at Emma’s, a small family restaurant in Manchester, Tennessee.

Fleisher first worked at M-Tek through Staffmark, a temporary employer, from June 21, 1999, to August 2, 1999. On October 3, 1999, M-Tek hired Fleisher as a direct employee. Fleisher testified that she was diagnosed with right carpal tunnel syndrome in the year 2000. M-Tek sent her to Dr. McInnis who performed surgery on her right arm on March 3, 2000. Fleisher only missed three days of work as a result of this surgery, but she testified that she did not have a good result from this surgery and that she still has problems with carpal tunnel on her right side.

At some point after returning to work at M-Tek, Fleisher’s left hand started to go numb and was tingling. She selected Dr. David Martin from a panel provided by M-Tek. Dr. Martin performed left carpal tunnel surgery in June, 2001, and also repaired problems with a left trigger thumb. Fleisher missed work from June 6 to August 5, 2001, as a result of this surgery. Neither Dr. McInnis nor Dr. Martin issued any permanent restrictions following any of the carpal tunnel surgeries. Fleisher then saw Dr. Richard Fishbein for an independent medical examination on the carpal tunnel claims. Dr. Fishbein did place some permanent restrictions upon Fleisher. He instructed Fleisher to avoid vibrating and percussive tools and torque motion, no reparative lifting greater than ten pounds, occasional lifting of twenty to twenty-five pounds, and avoid intensive handwork, pushing, pulling, and manipulating heavy objects. Fleisher subsequently settled both of these claims with M-Tek.

On September 18, 2001, Fleisher was inspecting door panels near the production line when she experienced a sudden and sharp pop in her right shoulder. Fleisher testified that she reported the injury to her group leader the next day and discussed the injury with the plant nurse at the time. She testified that the plant nurse told her to discuss it with Dr. Martin at a follow-up visit for her carpal tunnel surgery. Dr. Martin issued a request for an MRI scan of her neck at the November 9, 2001 follow-up visit. At that time, Dr. Martin was unable to determine whether Fleisher’s neck and right shoulder complaints were work-related. Fleisher presented the MRI request to Denise Redd, the plant nurse as of November 9, 2001. Redd prepared a Report of Injury on November 9, 2001. M-Tek,

¹ Royal & Sunalliance Insurance Company is also a named defendant in this action. Both defendants will simply be referred to as M-Tek.

however, did not provide Fleisher with a panel of doctors from which she could seek treatment for her neck and shoulder complaints. Howard Tucker, Human Resource Manager of M-Tek, admitted that Fleisher was not presented with a panel of physicians as a result of the November 9, 2001 Report of Injury. Tucker testified that, based on Dr. Martin's opinion, he could not determine if the neck and shoulder problems were work-related. M-Tek filed a Notice of Controversy to place her claim under review as to whether it was a compensable claim. Fleisher testified that she made several requests over a period of months to Redd, but was not allowed to see a doctor for the neck and shoulder complaints.

On January 7, 2002, Fleisher prepared her own Report of Injury and requested a medical panel to treat and evaluate her September 18, 2001 injury. On June 29, 2002, at her own expense, Fleisher was examined by Dr. Ephraim Gammada. Dr. Gammada recommended Fleisher be evaluated by an orthopaedic surgeon. On January 31, 2002, again at her own expense, Fleisher sought treatment from Dr. Fishbein. Dr. Fishbein issued her temporary restrictions. On February 4, 2002, Fleisher provided a copy of these restrictions to M-Tek, along with a request for family medical leave to be effective January 31, 2002.

On January 30, 2002, Fleisher's attorney wrote a letter to Tucker requesting medical treatment for Fleisher's neck and shoulder injury. On March 15, 2002, Fleisher's attorney wrote a second letter to Tucker notifying Tucker that Fleisher had chosen Dr. Fishbein as her treating physician due to the failure of M-Tek to provide authorized medical care. On April 3, 2002, M-Tek's workers' compensation insurance carrier faxed a panel of three orthopaedic groups and directed Fleisher to select one of the groups to treat and evaluate her neck and shoulder injury.

On June 6, 2002, Dr. William Ledbetter, an orthopaedic surgeon with Tennessee Orthopaedic Alliance,² examined Fleisher. Dr. Ledbetter determined that Fleisher's cervical and shoulder symptoms were related to her work at M-Tek. Dr. Ledbetter issued Fleisher temporary restrictions and recommended an evaluation of the cervical spine by a neurosurgeon.

Fleisher then saw Dr. Steven Abram, a neurosurgeon. Dr. Abram ordered a myelogram. Based upon the results of the myelogram, Dr. Abram did not find a "demonstrable pinched nerve and neurological deficit," and issued a light duty restriction for three weeks as of July 15, 2002. After that three week period, Dr. Abram stated that Fleisher could return to full duty. After the June 27, 2002 visit, Dr. Abram next examined Fleisher on September 3, 2002. Dr. Abram ultimately opined that he did not discern a neurosurgical treatment solution for Fleisher. Dr. Abram testified that, based upon a reasonable degree of medical certainty, Fleisher would not sustain any permanent impairment. Therefore, Dr. Abram assigned a 0% medical impairment to Fishbein for the neck and shoulder injury. Dr. Abram, however, did refer Fleisher to Dr. John Nwofia, a pain management physician.

Dr. Ledbetter continued to follow Fleisher after the referral to Dr. Abram. Dr. Ledbetter

² Tennessee Orthopaedic Alliance was one of the three orthopaedic groups designated by M-Tek's workers' compensation insurance carrier to evaluate Fleisher's injury.

released Fleisher from his care on January 3, 2003, with the understanding that she would continue her treatment with Dr. Nwofia. Dr. Ledbetter opined that, as of his release, Fleisher had not attained maximum medical improvement and that she should continue with the temporary restrictions he had issued.

Dr. Nwofia is a certified physical medical and pain management physician. Dr. Nwofia first saw Fleisher on October 21, 2002, upon a referral by Dr. Abram. Based upon his examination and testing, Dr. Nwofia diagnosed Fleisher as follows:

she had cervical radiculopathy, and she had a cervical disc displacement, and, of course, she did have the carpal tunnel syndrome which was residual prior to the injury, and she had a lot of muscle spasms which are called myofascial syndrome.

Dr. Nwofia treated these problems with epidural steroid injections and some trigger point injections. Dr. Nwofia ultimately opined that Fleisher attained her maximum medical improvement as of June 27, 2003. He determined that Fleisher had sustained an 8% medical impairment to the body as a whole as a result of the neck and shoulder injury. He also assigned Fleisher permanent restrictions of no frequent overhead activities, avoid looking up too long, lifting no more than twenty pounds, no heavy pulling, and no fixed positioning.

On January 8, 2004, Fleisher saw Dr. Gray Clark Stahlman for an independent medical evaluation. Dr. Stahlman is a board certified orthopaedic surgeon with a sub-specialty in adult spine surgery. After his examination of Fleisher and his review of her medical records, Dr. Stahlman opined that Fleisher reached maximum medical improvement as of September 19, 2003. He assessed a 5% medical impairment rating. Dr. Stahlman also suggested permanent restrictions of no continuous looking up, no lifting of more than twenty pounds in the overhead realm, no repetitive overhead activities, no heavy pulling, and no computer work.

Fleisher herself testified that she can perform the job duties at Emma's the small family restaurant where she worked as of the date of the trial. She testified that she can perform these duties because she gets to sit down and rest if she needs to do so. She further testified that she can perform her household duties, including house cleaning, laundry, and dishes, but claims that she has problems vacuuming and using her right arm. Fleisher also testified that she did not believe she could stock groceries in a convenience store because of the lifting requirements. Finally, Fleisher testified that she would never be able to do repetitive work again. On cross-examination, Fleisher did admit that any jobs she would not be able to do would be because of her prior carpal tunnel injuries.

The trial court conducted the final hearing in this matter on March 14, 2005. The trial court heard live testimony from Fleisher and Howard Tucker, the Human Resource Manager at M-Tek. The court also considered the deposition testimony of Dr. Abram, Dr. Stahlman, Dr. Nwofia, Dr. Ledbetter, and Dr. Fishbein. A videotape of Fleisher at work at Emma's Restaurant also was introduced. On March 24, 2005, the trial court entered a Memorandum Opinion making detailed

findings of fact and conclusions of law. After considering all of the evidence, the trial court determined that Fleisher had suffered a 5% medical impairment to the body as a whole as a result of the injuries in this case. The trial court also specifically noted that “Ms. Fleisher has exaggerated her symptoms somewhat” The trial court then considered the evidence regarding vocational disability and determined that Fleisher was entitled to an award of 10% permanent partial disability benefits to the body as a whole as a result of this injury.³

II. Issues

Fleisher presents the following issues on appeal:

1. Whether the trial court erred in finding that Fleisher suffered only a 5% medical impairment?
2. Whether the trial court erred in failing to award Fleisher more than 10% permanent partial disability benefits to the body as whole?
3. Assuming, *arguendo*, that Fleisher is entitled an award higher than 10%, did the trial court err in finding that any award would be capped at 2 ½ times the medical impairment rating pursuant to Tenn. Code Ann. § 50-6-241(a)(1)?
4. Whether the trial court erred in failing to assess a penalty against M-Tek pursuant to Tenn. Code Ann. § 50-6-225(j) for M-Tek’s failure to pay temporary total disability payments?

III. Standard of Review

The standard of review in a workers’ compensation case 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). *See also Layman v. Vanguard Contractors, Inc.*, 183 S.W.2d 310, 314 (Tenn. 2006). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers’ compensation cases to determine whether the preponderance of the evidence lies. *Vinson v. United Parcel Service*, 92 S.W.3d 380, 383-84 (Tenn. 2002). When the trial court has seen the witnesses and heard the testimony, especially when issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court’s findings of fact. *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 71 (Tenn. 2001). This Court, however, is in the same position as the trial judge in evaluating medical proof that is submitted by deposition, and may assess

³ The trial court also made additional findings regarding the applicability in this case of the 2 ½ times cap provision of Tenn. Code Ann. § 50-6-241(a)(1). Because of our resolution of the issue of the appropriate permanent partial disability rating for Fleisher, this legal issue is pretermitted. Therefore, we have chosen not to address the underlying factual issues of this argument.

independently the weight and credibility to be afforded to such expert testimony. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002). Questions of law are reviewed *de novo* without a presumption of correctness. *Perrin v. Gaylord Entertainment Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

IV. Analysis

Fleisher first contends that the trial court erred in determining that Fleisher only suffered a 5% medical impairment to the body as a whole. The proof at trial adduced three different medical impairment ratings for Fleisher's injury at issue in this appeal.⁴ Dr. Abram assessed no medical impairment, opining that Fleisher had not suffered any permanent injury. Dr. Nwofia assigned her an 8% medical impairment rating. Dr. Stahlman determined that a 5% medical impairment was appropriate. The trial court clearly considered all of this testimony. The trial court also expressly found that Fleisher somewhat exaggerated her symptoms. The trial judge has the discretion to conclude that the opinion of one expert should be accepted over that of another expert. *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1991). Indeed, the trial court has the discretion to modify the impairment ratings assigned by the testifying experts. The exercise of this discretion does not constitute an improper application of the AMA Guidelines by the trial court. See *Frasier v. Bridgestone/Firestone, Inc.*, 67 S.W.3d 782 (Tenn. 2001). Based upon its consideration of the evidence as a whole, the trial court concluded that a 5% medical impairment rating to the body as a whole was appropriate for this injury. The evidence does not preponderate against this finding.

Fleisher next contends that the trial court erred in not awarding her more than a 10% permanent partial disability to the body as a whole for this injury. The extent of an employee's permanent partial disability is a question of fact. *Dope v. Murray Ohio Mfg. Co.*, 750 S.W.2d 150, 151 (Tenn. 1988). In determining vocational disability, the trial court must consider all the relevant evidence, both expert and lay testimony. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 629 (Tenn. 1999). Factors to consider include the extent and duration of medical impairment, the employee's age, education, job skills and training, local job opportunities, and the employee's capacity to work at the kinds of employment available to one in the employee's disabled condition.

In this case, Fleisher suffered a 5% medical impairment. She was 55 years old at the time of trial. She did not graduate from high school, but did obtain her GED. She has a work history of varied types of employment. Fleisher testified that she could no longer perform factory work, but she admitted that any jobs she could no longer perform were because of her previous carpal tunnel injuries, for which she has already been compensated. The trial court clearly questioned Fleisher's credibility in finding that she somewhat exaggerated her symptoms. The trial court also viewed a videotape of Fleisher working at Emma's Restaurant. Given this evidence, we cannot find that the evidence preponderates against the trial court's award of 10% permanent partial disability benefits

⁴ Fleisher saw more than three doctors for this and other work-related injuries. Only three assigned a medical impairment rating for the injury at issue in this appeal.

to the body as a whole. Accordingly, the trial court's judgment on this issue is affirmed.⁵

Lastly, Fleisher contends that the trial court erred in failing to award her a penalty against M-Tek pursuant to Tenn. Code Ann. § 50-6-225(j) for M-Tek's failure to pay her temporary total disability benefits. Tenn. Code Ann. § 50-6-225(j) provides as follows:

If an employer wrongfully fails to pay an employee's claim for temporary total disability payments, the employer shall be liable, in the discretion of the court, to pay the employee . . . an amount not exceeding twenty-five percent (25%) of such temporary total disability claim; provided, that it is made to appear to the court that the refusal to pay such claim was not in good faith and that such failure to pay inflicted additional expense, loss or injury upon the employee

On this issue, the trial court found that M-Tek's failure to pay did not satisfy the statutory requirement that M-Tek's actions were "not in good faith." The trial court specifically noted that the only information M-Tek had at the relevant time arguably justifying payment of such benefits was Dr. Fishbein's recommendation that Fleisher not work for a period of two weeks. The record also indicates that Fleisher first raised the injury at issue in this case with Dr. Martin in a post-op follow-up visit with him for her left carpal tunnel problems. Dr. Martin could not determine whether Fleisher's neck and shoulder complaints were work related. As a result of Dr. Martin's examination, M-Tek filed a Notice of Controversy of Fleisher's claim.

By the express provisions of Tenn. Code Ann. § 50-6-225(j), the trial court is vested with discretion as to whether to award a penalty under this statute. Based upon the entire record in this matter, we cannot say that the trial court abused its discretion in refusing to award Fleisher a penalty under this provision. Therefore, we affirm the trial court's judgment on this issue.

V. Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed. The costs of the appeal are taxed to the Appellant, Betty S. Fleisher.

JEFFREY S. BIVINS, SPECIAL JUDGE

⁵ As discussed previously in this Opinion, our affirmance of the trial court's award of 10% permanent partial disability benefits to the body as a whole for the injury at issue in this appeal renders moot the issue raised by Fleisher concerning the applicability of the cap provision of Tenn. Code Ann. § 50-6-241(a)(1).

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
NOVEMBER 27, 2006 SESSION

**CHRISTINE PESCE v. AEROSTRUCTURES/VOUGHT AIRCRAFT
INDUSTRIES, ET AL**

**Circuit Court for Davidson County
No. 03C-3354**

No. M2006-00012-WC-R3-CV - Filed - March 23, 2007

JUDGMENT

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 appeals 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 the Appellants, Aerostructures/Vought Aircraft Industries, and AIG Claim Services, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM