

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

December 12, 2011 Session

**RANDALL NORWOOD v. MAYTAG CORPORATION**  
**d/b/a MAYTAG JACKSON DISHWASHING PRODUCTS**

**Appeal from the Chancery Court for Henderson County**

**No. 21332 James F. Butler, Chancellor**

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**No. W2011-01477-WC-R3-WC - Mailed March 27, 2012; Filed April 30, 2012**

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In this workers' compensation action, the employee contended that he struck his head against the casing of a conveyor belt, causing permanent and total disability due to a resulting cervical strain and mental injury. His employer denied that he sustained any permanent disability as a result of the incident. The trial court awarded 95% permanent partial disability benefits. The employer has appealed, contending that the evidence preponderates against the trial court's finding. We affirm the judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;**  
**Judgment of the Chancery Court Affirmed**

DONALD P. HARRIS, SR. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J. and TONY A. CHILDRESS, SP. J., joined.

Art Crews and P. Allen Phillips, Jackson, Tennessee, for the appellant Maytag Corporation d/b/a Maytag Jackson Dishwashing Products.

Steve Taylor, Memphis, Tennessee, for the appellee, Randall Norwood.

**MEMORANDUM OPINION**

**Factual and Procedural Background**

Maytag Corporation ("Maytag") employed Randall Norwood as a production worker from 1994 until August 2002. On May 6, 2002, he was trimming plastic parts when he smelled an unidentified chemical. Mr. Norwood lifted his head and struck it against the

casing of a conveyor belt. He immediately felt pain in his head, neck, and back. Mr. Norwood promptly reported the incident to his supervisor. He was initially referred to Dr. Mary Lynn Scott. Dr. Scott treated Mr. Norwood for chemical inhalation and neck and back pain. Dr. Scott permitted Mr. Norwood to continue working. On May 21, 2002, Dr. Scott released Mr. Norwood from her care.

Mr. Norwood, however, continued to experience neck pain. He was treated by Dr. Jimmy Kamso-Pratt, who initiated physical therapy. Dr. Kamso-Pratt referred Mr. Norwood to Dr. Samuel Chung, a physiatrist, who first saw Mr. Norwood on July 11, 2002. Dr. Chung's examination of Mr. Norwood's neck revealed that Mr. Norwood had a significant restriction in movement on the left side and had a 25% decreased range of motion. Dr. Chung noted a tightness in the trapezius muscle and in the cervical area upon bending and rotating. Dr. Chung diagnosed a cervical strain and recommended continued physical therapy. Mr. Norwood returned to Dr. Chung on July 25, 2002. At that time, his range of motion had improved. Dr. Chung found him to be at maximum medical improvement and released him to full work duty.

Mr. Norwood attempted to return to work. He determined, however, that the pain was too severe to continue working, and he took medical leave. Mr. Norwood consulted his primary care physician, Dr. Michael Smelser. On July 30, 2002, Dr. Smelser noted that Mr. Norwood came to his office, "very angry and emotionally upset." He noted that Mr. Norwood was experiencing "a lot of neck and [trapezius muscle] pain."

On August 6, 2002, Mr. Norwood returned to Dr. Chung, requesting a magnetic resonance imaging test ("MRI") and referral to a neurosurgeon. Dr. Chung declined to order the test or make the referral. Dr. Chung determined Mr. Norwood did not show symptoms of radiculopathy.

Mr. Norwood returned to Dr. Smelser on August 7, 2002. Dr. Smelser ordered an MRI scan of the cervical spine. The scan revealed degenerative changes in Mr. Norwood's cervical spine but no acute injury.

Dr. Smelser referred Mr. Norwood to a neurosurgeon, Dr. Harry Friedman, who examined Mr. Norwood on November 19, 2002. Dr. Friedman noted that Mr. Norwood had a cervical fusion in 1998 as a result of a motor vehicle accident and had been diagnosed with arthritis in his cervical spine in 2000. Dr. Friedman determined that Mr. Norwood had a chronic cervical strain and recommended referral to a pain management clinic. Mr. Norwood filed a complaint in the Chancery Court of Henderson County, Tennessee, on April 5, 2007, for workers' compensation benefits.

At trial, extensive evidence was presented regarding Mr. Norwood's medical history prior to the May 2002 injury. Dr. Smelser's medical records reveal that in April 1997 Mr. Norwood reported having "panic attacks" for which Dr. Smelser prescribed the medication Xanax. Dr. Smelser also treated Mr. Norwood for lumbar pain in January 1998 and prescribed Percocet, Soma, Skelaxin, and Vicodin. In December 1998, Mr. Norwood once again reported anxiety problems, and Dr. Smelser again prescribed Xanax. In October 2000, Dr. Smelser treated Mr. Norwood for neck and lower back pain. Dr. Smelser continued to prescribe Mr. Norwood various pain medications, muscle relaxers, and antidepressants, such as Xanax and Paxil. Mr. Norwood saw Dr. Smelser on April 23, 2002, shortly before his work injury, and complained of "hurting all over, shoulders, elbows and wrists," and "needing a check up on anxiety and tendonitis [sic]."

In October 2002, approximately five months after the May 2002 work injury, Dr. Smelser referred Mr. Norwood to Methodist-LeBonheur Family Counseling Center for evaluation of his "chronic level of anger and agitation." Rodney Williams, a licensed clinical social worker, treated Mr. Norwood at the Methodist-LeBonheur Family Counseling Center on several occasions from October 2002 to March 2003. Mr. Williams diagnosed Mr. Norwood as having a "mood disorder due to neck injury with major depressive-like episode."

Mr. Norwood's attorney requested that West Tennessee Psychological Group evaluate Mr. Norwood's mental status in 2005. The examiner, Sheila Mills, noted that Mr. Norwood's ability to sustain concentration and persistence was mildly limited due to increased depression, anxiety, and a lowered tolerance for frustration. Ms. Mills found Mr. Norwood's ability to interact socially to be mildly to moderately limited due to increased social isolation associated with depression and to a lowered tolerance for frustration. Ms. Mills also found Mr. Norwood's ability to adapt to change to be mildly limited due to a lowered tolerance for frustration. The examiner found Mr. Norwood's ability to understand and remember was not significantly limited.

Dr. Smelser continued to treat Mr. Norwood in 2002 and 2003. Mr. Norwood also received chiropractic treatment from late 2003 into 2004. At the request of his attorney, Dr. Randall Moskovitz, a psychiatrist, evaluated Mr. Norwood on several occasions beginning in March 2005. Dr. Moskovitz testified in person. He testified that, in his opinion, Mr. Norwood had "a mood disorder with major depression-like symptoms due to his neck and head injury and . . . also . . . with anxiety disorder [not otherwise] specified." He stated that the previous work-related injury in 2002 definitely caused Mr. Norwood's mood disorder and a worsening of his anxiety disorder. It also caused a worsening of his physical problems, particularly, his neck pain due to cervical strain or cervical radiculitis. Dr. Moskovitz explained that the failure of Mr. Norwood's cervical strain to improve over time resulted in his deteriorating mental condition. Dr. Moskovitz rated Mr. Norwood's global assessment

of functioning at fifty on a zero to one hundred point scale or, alternatively, within the moderate to serious range. Dr. Moskowitz also assigned a 50% permanent impairment for Mr. Norwood's mental condition. Dr. Moskowitz testified that Mr. Norwood's worsening mental condition rendered him unable to work.

On cross examination, Dr. Moskowitz conceded that the Fifth Edition of the American Medical Association Guidelines ("AMA Guides") "discourages" the assignment of percentage impairments for psychiatric conditions. He explained, however, that the limitation was based upon the need for further research, and since the Fifth Edition of the AMA Guides had been published, the American Psychiatric Association had established the zero to one hundred point objective rating scale. According to Dr. Moskowitz, the Sixth Edition of the AMA Guides would contain an objective rating for psychiatric disorders when it was published in December 2007.

Dr. Moskowitz's opinion that Mr. Norwood's pre-existing physical and mental problems worsened after the May 2002 incident was based upon his review of medical records, including those from Dr. Smelser, Dr. Friedman, Dr. Scott, the Jackson Clinic Professional Association, the Back Pain Relief Clinic, the Methodist-LeBonheur Family Counseling Center, and the West Tennessee Psychological Group, as well as information given to him by Mr. Norwood and Mr. Norwood's wife. Dr. Moskowitz's opined that Mr. Norwood was doing "fairly well" prior to the May 2002 incident despite his pre-existing conditions. He conceded that Dr. Smelser had prescribed Paxil, Xanax, Viagra, Celebrex, Nexium, Ultram, Darvocet, and Decadron to Mr. Norwood approximately two weeks before the accident. Mr. Moskowitz noted that Dr. Smelser prescribed medication for Mr. Norwood periodically but not continuously over several years. Dr. Moskowitz also agreed that Mr. Norwood told him that he had been happy working for Maytag, although he acknowledged that a statement by Mr. Norwood did indicate that he was unhappy or angry with the management at Maytag due to events following his injury.<sup>1</sup>

Dr. John Griffin, a psychiatrist, evaluated Mr. Norwood at the request of Maytag's attorney. Dr. Griffin's diagnosis was that Mr. Norwood had a personality disorder. Dr. Griffin did not believe the personality disorder was caused or aggravated by the May 2002

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<sup>1</sup> This statement was made during an examination at the West Tennessee Psychological Group on January 24, 2005, after the dispute arose between Maytag and Mr. Norwood concerning his injury. The record contains the following statement:

Mr. Norwood describes experiencing depression since [May 6] 2002, when he became unable to work. He states: "I'm upset at Maytag. They changed their policy just to get me. I won a discrimination suit against Maytag. I was wanting to kill somebody. I thought about suicide. I had crying spells."

work incident. Dr. Griffin noted that Mr. Norwood had pre-existing complaints of neck and back pain, and Dr. Griffin interpreted the medical records as indicating that Mr. Norwood had recovered from the work injury. Dr. Griffin testified that Mr. Norwood told him he was “stressed,” but Dr. Griffin did not indicate that he was depressed. He also stated that Mr. Norwood had “a pattern of difficulties . . . going back to the mid 1980s. More prominent in the ‘90s, mid ‘90s but a pattern of . . . I think, behavioral and judgment disturbances going back to his adolescent years.” He considered this pattern to be more consistent with his diagnosis than Dr. Moskovitz’s diagnosis.

Dr. David Strauser, a vocational evaluator, testified that Mr. Norwood was totally disabled. His opinion was based upon Dr. Moskovitz’s opinions. He did not review the records of Dr. Scott, Dr. Chung, or Dr. Friedman. He did not make an assessment of disability based upon Dr. Griffin’s opinion because Dr. Griffin’s report did not provide information he considered necessary.

Mr. Norwood testified that he began experiencing memory loss, nervousness, and hopelessness following his injury. He does not sleep well because of the pain in his neck. He testified that he had problems prior to the accident but that he was able to do his job and perform all his job duties. Following the accident, he was unable to work because of the pain in his neck.

Mr. Norwood’s wife, Debbie Norwood, testified that Mr. Norwood has progressed slowly into a “depressive mood” since his May 2002 injury. At varying times, Mr. Norwood becomes either very agitated or very solemn. When he is under stress, he has difficulty thinking clearly and remembering things. Mr. Norwood had always been able to provide for his family prior to the injury. Ms. Norwood stated that Mr. Norwood’s neck did not improve following the accident. She testified that although Mr. Norwood had anxiety problems prior to the injury, the symptoms were relatively minor compared to his condition after the injury. She stated that Mr. Norwood became non-social, short tempered, more forgetful, and very depressed. She explained that those symptoms became progressively worse.

At the conclusion of the presentation of the evidence on March 1, 2007, Mr. Norwood’s counsel announced that a non-suit would be taken. The action was refiled in April 2007. During the trial of the second action on March 3, 2011, the trial court permitted Mr. Norwood to use the evidence previously presented in the original action, and, in addition, Mr. Norwood introduced the deposition of Dr. Tewfik Rizk. Maytag introduced depositions

of Dr. Samuel Chung and the report of Patsy Bramlett, a vocational evaluator.<sup>2</sup> No additional live testimony was presented.

Dr. Rizk has degrees in rheumatology, physical medicine and rehabilitation, and pain management. He is certified by the American Board of Physical Medicine and Rehabilitation and currently serves as the medical director of The Rehabilitation Hospital of Memphis. Dr. Rizk examined Mr. Norwood on several occasions beginning on June 16, 2005, at the request of Mr. Norwood's attorney. Mr. Norwood complained of chronic headaches, neck pain, memory deficits and behavioral issues. Based upon these symptoms, Dr. Rizk believed that Mr. Norwood had sustained a traumatic brain injury with memory and behavioral changes in addition to chronic headaches. Dr. Rizk also diagnosed Mr. Norwood as having sustained a chronic cervical soft tissue injury as a result of the May 2002 incident. He assigned 10% impairment to the body as a whole in connection with the cervical injury. He did not provide an impairment rating for the brain injury.

On cross-examination, Dr. Rizk verified that the medical records from the physicians who treated Mr. Norwood near the time of his injury did not contain any references to a concussion or traumatic brain injury. Dr. Rizk testified that the history given to him was that Mr. Norwood had no medical problems whatsoever prior to the May 2002 injury. He was aware of Mr. Norwood's 1988 cervical fusion procedure, but he had no other knowledge of Mr. Norwood's medical problems prior to 2002. Dr. Rizk admitted that it would be difficult to determine whether Mr. Norwood's current condition was caused by the May 2002 injury if Mr. Norwood experienced problems prior to the May 2002 injury. He agreed that his opinions were based on the information given to him by Mr. Norwood and his wife. He maintained, however, that the symptoms exhibited by Mr. Norwood indicate that he had sustained a traumatic brain injury. He testified that the May 2002 injury could have aggravated a pre-existing condition.

The trial court found that Mr. Norwood had sustained a compensable injury. It awarded 95% permanent partial disability to the body as a whole, and entered judgment in accordance with the ruling. Maytag has appealed pursuant to Tennessee Supreme Court Rule 51 for a hearing and report of findings of fact and conclusions of law. Maytag contends that the evidence preponderates against the trial court's finding that a compensable injury occurred. The standard of review for issues of fact determined by the trial court is de novo with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). A trial court's conclusions of law are reviewed de novo upon

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<sup>2</sup> The parties agreed to place the report of Patsy Bramlett, a vocational evaluator, into evidence. Ms. Bramlett, who was retained by Maytag's attorney, concluded that Mr. Norwood had a vocational disability of 0%.

the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

### **Analysis**

Maytag contends that the evidence preponderates against the trial court's finding that Mr. Norwood sustained a permanent disability as a result of his work injury. Maytag asserts that none of the physicians who examined Mr. Norwood "demonstrated any anatomic malady by objective evidence." Maytag also asserts that the physicians who treated Mr. Norwood immediately following the accident – Dr. Scott, Dr. Pratt, and Dr. Chung – did not find a permanent injury to the cervical spine. Maytag further argues that Dr. Rizk, who assigned permanent impairment based upon a diagnosis of cervical strain, did not see Mr. Norwood until three years after the accident. Moreover, Maytag asserts that the premise of Dr. Rizk's opinion, that Mr. Norwood had no significant medical problems prior to May 2002, is contradicted by the records of Dr. Smelser. Those records show that Mr. Norwood had been receiving prescriptions for pain medications, anti-inflammatory medications, and muscle relaxers periodically in the years preceding the work injury and continuously in the months preceding that event.

Maytag also points out that Dr. Moskovitz's opinion that Mr. Norwood's pre-existing mental problems were worsened by his work injury was based upon his understanding that Mr. Norwood was doing "fairly well" immediately before the accident occurred. Maytag argues that the records of Dr. Smelser refute Dr. Moskovitz's assumption concerning Mr. Norwood's pre-injury mental state. These records show Mr. Norwood was receiving anti-anxiety and antidepressant medications due to numerous complaints of anxiety, as well as pain medications, in the months prior to May 2002. In response, Mr. Norwood asserts that neither Dr. Rizk nor Dr. Moskovitz retreated from their opinions that his condition was permanently worsened by the work accident, although they were subjected to vigorous cross examination based upon the records of his pre-existing physical and mental problems.

We have reviewed the medical evidence carefully. We note that there are some points on which many of the doctors agree. The doctors generally agree that Mr. Norwood sustained a cervical strain as a result of the injury. Dr. Samuel Chung diagnosed a cervical strain even though he believed there was no permanent impairment. Dr. Harry Friedman diagnosed a chronic cervical strain and recommended referral to a pain clinic. Dr. Rizk diagnosed a chronic cervical strain with permanent impairment. On February 25, 2004, and May 5, 2004, Static Scanning Surface Electromyographies ("sEMGs") were performed on Mr. Norwood at the Back Pain Relief Clinic. These tests revealed high or moderately high muscle tension in the cervical and thoracic spines.

The medical records also reflect that Mr. Norwood began experiencing increased mental problems shortly after the injury. On July 30, 2002, Dr. Smelser excused Mr. Norwood from work for neuro-cervical strain and acute frustration and anxiety. In October 2002, Dr. Smelser referred Mr. Norwood to Methodist-LeBonheur Family Counseling Center for evaluation of his “chronic level of anger and agitation” and Mr. Norwood was diagnosed as having a “mood disorder due to neck injury with major depressive-like episode.” Dr. Moskovitz testified that the persistence of the cervical strain Mr. Norwood sustained aggravated his mental condition. This diagnosis is consistent with the testimony of Mr. Norwood and his wife, which the trial court apparently credited. Thus, the trial court’s ultimate conclusion was based, in large measure, upon its assessment of the credibility of Dr. Moskovitz, Mr. Norwood, and Ms. Norwood, all of whom testified in person.

This court has noted that a de novo standard of review is not appropriate when in-court evidence is evaluated in conjunction with out-of-court testimony. Cunningham v. City of Savannah, No. W2010-02411-WC-R3-WC, 2012 Tenn. LEXIS 145, at \*16 (Tenn. Workers’ Comp. Panel Feb. 28, 2012). A trial judge who has had the opportunity to listen to in-court testimony and to observe the demeanor of the witnesses is given considerable deference in making determinations concerning the credibility of those witnesses and the weight to be given to their testimony. Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 900 (Tenn. 2009). Moreover, as the trial court noted, all reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. Phillips v. A & H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004). On this appeal, we are not called upon to substitute our judgment for that of the trial court, but rather to determine if the evidence preponderates against its decision. Based upon our review of the record and taking into consideration the weight given to the testimony of the witnesses who testified before the trial court, we are unable to conclude that the evidence preponderates against the trial court’s finding on the issue of causation.

### **Conclusion**

The judgment is affirmed. Costs are taxed to Maytag Corporation d/b/a Maytag Jackson Dishwashing Products and its surety, for which execution may issue if necessary.

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DONALD P. HARRIS, SENIOR JUDGE

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

December 12, 2011 Session

**RANDALL NORWOOD v. MAYTAG CORPORATION**  
**d/b/a MAYTAG JACKSON DISHWASHING PRODUCTS**

**Chancery Court for Henderson County**

**No. 21332**

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**No. W2011-01477-WC-R3-WC - Filed April 30, 2012**

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**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 on appeal are taxed to the Appellant, Maytag Corporation, d/b/a Maytag Jackson Dishwashing Products, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM