

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
July 2002 Session

**TAMMY BOWMAN v. FLEETWOOD HOMES OF TENNESSEE INC., ET
AL.**

**Direct Appeal from the Criminal Court for Macon County
No. 00-121 J.O. Bond, Judge**

**No. M2001-02188-WC-R3-CV - Mailed - September 24, 2002
Filed - October 30, 2002**

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 to the Supreme Court of findings of facts and conclusions of law. The employer appeals the judgment of the trial court awarding the employee 5% permanent partial disability for a right shoulder injury, even though the parties had stipulated prior to trial that this injury was not at issue. The employer further appeals the trial court's ruling combining a 20% vocational disability rating to the arm, which is a scheduled member, with the 5% anatomical impairment rating for the shoulder, which is to the body as a whole, then multiplying both by the 2.5 maximum pursuant to *Tennessee Code Annotated* § 50-6-241(a)(1). We hold that the trial court erred in awarding permanent partial disability for the right shoulder because both parties had stipulated that it was not at issue and because no expert testimony supported a finding of permanency. Accordingly, we reverse the judgment of the trial court awarding workers' compensation benefits based upon an injury to the employee's shoulder.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Criminal Court
Reversed.**

JAMES L. WEATHERFORD, SR.J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JOE C. LOSER, SP.J., joined.

John R. Lewis, Nashville, Tennessee, for the appellants, Fleetwood Homes of Tennessee Inc., and Kemper Insurance Companies.

B. Keith Williams, Lebanon, Tennessee, for the appellee, Tammy Bowman.

MEMORANDUM OPINION

At the time of trial, Ms. Tammy Bowman, the employee-appellee, was a 34 year old divorced mother of two children. She has an 11th grade education and her primary work experience has been in manual labor. She has worked for Fleetwood Homes of Tennessee Inc. (“Fleetwood”), the employer-appellant, since 1992.

Ms. Bowman first noticed a problem with her right shoulder and arm in March of 2000, while working for Fleetwood. The majority of Ms. Bowman’s work day was spent continuously gripping a caulking gun with her right hand, mopping walls, and cleaning overhead mirrors with her right arm in an overhead position.

On May 11, 2000, Ms. Bowman was referred to Dr. Jeffrey E. Hazlewood, whose examination revealed some tenderness in her anterior shoulder region. However, he found that Ms. Bowman had normal range of motion in her shoulder with no pain, no shoulder impingement, and no swelling or redness. Dr. Hazlewood concluded that the neurological exam “showed no abnormalities with normal strength, sensation, and reflexes.” Dr. Hazlewood’s ultimate diagnosis was right wrist and shoulder tendonitis for which he recommended physical therapy. After further complaints of pain in her shoulder, Dr. Hazlewood performed an EMG nerve test on June 14, 2000, that returned normal results.

Dr. Hazlewood testified in deposition that Ms. Bowman did not have any permanent impairment pursuant to the AMA Guides. Therefore, he did not assign any anatomical ratings for the shoulder or wrist. Dr. Hazlewood testified that Ms. Bowman had legitimate pain in her shoulder, but that she was able to perform at work and home with no restrictions.

On November 14, 2000, Ms. Bowman saw Dr. Francisca Lytle for an independent medical evaluation at the request of Ms. Bowman’s counsel. Dr. Lytle assigned a 10% impairment rating to the right extremity based on decreased grip strength attributed to wrist tendonitis. Dr. Lytle attributed this injury to Ms. Bowman’s repetitive use of a caulking gun while working at Fleetwood. Dr. Lytle testified that she would have recommended permanent restrictions in regards to any activity that required a gripping motion.

In regard to the shoulder, Dr. Lytle performed several tests that revealed mild shoulder tendonitis that she believed Ms. Bowman incurred while working. Dr. Lytle found soreness in the shoulder, but she also found a normal range of motion and no evidence of instability. She also testified that she would recommend not working in an overhead position because that would aggravate the shoulder tendonitis.

Based on her evaluation, Dr. Lytle did not believe that the injury to Ms. Bowman’s shoulder was permanent. She also testified that the overhead restrictions “may actually not” be permanent. She also believed that a change in Ms. Bowman’s sleeping posture would alleviate the shoulder pain.

If Mrs. Bowman were her patient, Dr. Lytle thought that she would be able to “get rid of” Mrs. Bowman’s shoulder problems.

Since the injury, Ms. Bowman has returned to her job at Fleetwood, earning more than her pre-injury wages.

According to the pre-trial stipulations, the dispute was limited to the extent of injury to Mrs. Bowman’s right arm.

The trial court concluded that, “although no physician assigned any impairment to the shoulder...the plaintiff [Ms. Bowman] sustained a 5% permanent partial anatomical disability to the body as a whole based on the AMA Guides.” The court also found a 20% vocational disability to the right arm. The trial court combined the two ratings to conclude that Ms. Bowman’s total anatomical impairment was 11% to the body as a whole. Pursuant to *Tennessee Code Annotated* § 50-6-241(a), the trial court capped the award at 2.5 times the combined rating to find a vocational disability of 27.5% to the body as a whole, which translated to 110 weeks of benefits, or \$37,959.90. Fleetwood paid the trial court’s judgment for the 20% award to the arm and challenges the award based on the shoulder injury in this appeal.

ANALYSIS

Review of findings of fact by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. *Tenn. Code Ann.* § 50-6-225(e)(2); *Walker v. Saturn Corp.*, 986 S.W.2d 204, 207 (Tenn. 1998). When the medical testimony is given by deposition, as it was in this case, this Court independently evaluates the medical evidence to ascertain where the preponderance of the evidence lies. *Cooper v. Insurance Co. of North America*, 884 S.W.2d 446, 451 (Tenn. 1994).

I. Whether the shoulder injury was permanent

A. Stipulation of the Parties

“Legitimate stipulations that are within the range of possibly true facts and valid litigation strategies cannot be ignored or cast aside.” *Mast Advertising & Pub. Inc. v. Moyers*, 865 S.W.2d 900, 903 (Tenn. 1993). These kinds of stipulations are to be rigidly enforced by Tennessee courts. *Id.*; *but see*, *State v. Bragan*, 920 S.W.2d 227, 245 (Tenn. Crim. App. 1995) (holding a pre-trial stipulation allowing admission of evidence unenforceable to the extent that it contradicted a court order ruling certain evidence inadmissible); *State v. Land*, 681 S.W.2d 589 (Tenn. Crim. App. 1984) (holding a stipulation unenforceable because it violated a Tennessee evidentiary rule).

Here, the parties’ pretrial stipulations specifically limited the dispute to the extent of injury to Ms. Bowman’s right arm, which necessarily precluded a judgment on the shoulder. Ms. Bowman’s counsel signed the stipulation, which indicates he was aware of the items stipulated.

The stipulation represents both parties' legitimate attempt to refine the dispute to the right extremity based on the evidence and their respective legal strategies. Parties must be afforded the opportunity to limit the scope of a trial.

In its appellate brief, counsel for Ms. Bowman "concedes that there was no expert medical proof that Ms. Bowman had a permanent shoulder injury." Additionally, counsel provides no argument supporting the circumvention of the stipulation. Furthermore, the stipulation does not seem inappropriate, as it does not contradict a court order or violate an evidentiary rule. Therefore, we must hold the trial court erred in not rigidly enforcing the stipulation.

B. Permanency of Shoulder Injury

The Tennessee Supreme Court has held that a "plaintiff must establish the permanency of his disability by a preponderance of the evidence which must be accomplished through expert medical testimony." *Owens Illinois, Inc. v. Lane*, 576 S.W.2d 348, 350 (Tenn. 1978); *see also Singleton v. Procon Products*, 788 S.W.2d 809, 811 (Tenn. 1990); *Corocan v. Foster Auto GMC, Inc.* 746 S.W.2d 452, 458 (Tenn. 1988). The expert witness "must use language that means that the medical factors that indicate permanency of disability outweigh those to the contrary." *Owens*, 576 S.W.2d at 350.

Here, the expert medical testimony did not establish a finding of permanent impairment of Ms. Bowman's shoulder. Both doctors used language in their testimony that clearly stated the condition was not permanent. Also, both doctors refused to assign an anatomical impairment rating or place permanent restrictions on the use of her shoulder.¹

Most importantly for this appeal, Ms. Bowman's counsel concedes there is no expert medical proof that she sustained a permanent shoulder injury. Because of Ms. Bowman's concession and the lack of expert proof, we hold that the evidence preponderates against the trial court's finding of permanent partial disability to the body as a whole based on the right shoulder injury.

¹ It should be noted that the Tennessee Supreme Court has recognized that a medical expert does not have to assign an AMA Guides anatomical impairment rating in order for a court to award permanent partial disability benefits. *Walker*, 986 S.W.2d at 207; *Corocan*, 746 S.W.2d at 457. However, there at least must be present competent medical evidence that there is a medical probability of permanency. *Kellerman v. Food Lion Inc.*, 929 S.W.2d 333, 335 (Tenn. 1996). Our case law indicates that the assignment of permanent restrictions to a part of the body and the use of descriptive words that indicate permanency are examples of competent medical evidence. *See, Walker* at 207 (holding that the doctor's assignment of permanent restrictions to a patient's wrist and hand and his use of the word "chronic" to describe the condition was sufficient to establish permanency). In this case, there is no such evidence from which permanency could have been implied. As well as not assigning an anatomical rating to the shoulder, both doctors refused to place permanent restrictions on it. Moreover, both doctors testified that Bowman's range of motion was normal under the AMA Guides and that there was no shoulder instability. Also, the EMG exam conducted by Dr. Hazlewood's returned negative results.

II. Whether the award was calculated correctly

Because we hold that the trial court erred in assigning a 5% permanent partial disability to the body as a whole for the shoulder injury, the issue of how the trial court combined this rating with the 20% vocational disability rating for the right arm is moot.

CONCLUSION

The trial court's award of 5% permanent partial disability to the body as a whole is reversed. The costs are taxed to the appellee.

JAMES L. WEATHERFORD, SR. J.

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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 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 the appellee, Tammy Bowman, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM