

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
September 2003 Session

**KIMBERLY CLARK v. HARDEE'S FOOD SYSTEMS, INC., ET AL.**

**Direct Appeal from the Chancery Court for Sumner County  
No. 2001C-135 Tom E. Gray, Chancellor**

---

**No. M2002-02942-WC-R3-CV - Mailed - December 15, 2003  
Filed - January 20, 2004**

---

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeal Panel of the Supreme Court in accordance with Tennessee Code Annotated Section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The appellant, employee, has appealed the trial court's decision in this case, holding the employee had failed to carry the burden of proof as to causation, and denied benefits. As discussed below, the panel has concluded the judgment should be affirmed.

**Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the Chancery Court Affirmed**

ALLEN W. WALLACE, SR.J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J. and JOHN K. BYERS, SR.J., joined.

D. Andrew Saulters, Nashville, Tennessee for appellant, Kimberly Clark

Vanessa L. Comerford, Brentwood, Tennessee for appellee, Hardee's Food Systems, Inc., et al.

**MEMORANDUM OPINION**

ISSUES

The issues in this appeal as stated by the employee and employer are whether or not the trial court erred in ruling the employee failed to carry the burden of proof as to medical causation due to inconsistencies in her trial testimony and history given medical professionals. Employee alleges in this appeal that the inconsistencies in her testimony as well as her history given to medical professionals were caused by confusion on her part, or that the alleged inconsistencies were misinterpretations.



## FACTS

The employee-appellant Kimberly Clark ("employee") is employed by the defendant-appellee Hardee's Food Systems, Inc. ("employer"). At the time of trial, she had been employed by employer for ten years. Employee was hired as a cashier and was promoted to restaurant manager by the time she claims the injury occurred. One of employee's duties was to unload boxes from a supply truck twice a week. These boxes weighed up to fifty pounds. It would normally take employee two hours to unload all of the boxes. This task required her to lift the boxes over her head.

Employee testified that she began to experience sever headaches, muscle aches, and weakness in her arms. She testified that she had not done any lifting at home or "anything outside of work where [she] hurt her neck." Two lay witnesses testified at trial. Brian Durad, a former co-worker, and Dorothy Draper, a co-worker. Both testified that employee had told them that she thought she had injured her neck while unloading boxes off the supply truck. Mr. Durad testified that employee had told him this information around September 2000.

Employee claims that once she made a connection between lifting at work and her neck condition, she reported that connection to her supervisor, Janie Hoskinson. Employee claims that Ms. Hoskinson told employee that she would "take care of the paperwork" and that it was Ms. Hoskinson's job to report the information to the district manager. Since this store did not have a district manager at the time, employee claims that the injury claim was not reported to employer's workers' compensation carrier when it happened. Employee testified at trial that she was told by Ms. Hoskinson to put her medical expenses on her own health insurance.

Employee saw Dr. Jeffrey Hazelwood on September 21, 2000. She complained of pain in the shoulder/neck area and said that the pain had been present for several months with no specific injury or precipitating event. When asked on a form whether she believed that the injury was work-related, she marked "no." Dr. Hazelwood testified by deposition that he could not state with a reasonable degree of medical certainty that employee's injury was related to work. However, he also testified by deposition that lifting fifty-pound boxes could cause a herniated cervical disc. Dr. Hazelwood testified by deposition that employee was very straightforward and he had no reason not to believe what she was telling him.

Dr. Hazelwood referred employee to Dr. Thomas Gautsch in January 2001. An MRI showed a herniated and a bulging disc in the cervical spine. Dr. Gautsch testified by deposition that it was possible that employee had hurt her neck at work, but it was equally possible that she had hurt it outside of work. On paperwork completed before her visit, she chose "other injury" over "work injury" and wrote that the illness began "about six months ago."

On January 31, 2001, Dr. Gautsch performed surgery on employee and released her to return to work eleven weeks later. Dr. Gautsch assessed a twenty-five percent whole person impairment rating.



Employee was examined by Dr. David Gaw in May 2002. On her patient information form, employee stated that the date of injury or when pain began was September 2000. Dr. Gaw testified by deposition, however, that employee related a gradual onset of problems beginning in mid-August. Dr. Gaw testified that employee's condition was related to her work activities, based upon her history and the medical records of Dr. Hazelwood and Dr. Gautsch.

### ANALYSIS

Employee filed her complaint in this cause on April 20, 2001, alleging a specific injury occurring on or about September 2000, stating "specifically, unloading a truck full of food supplies when she sustained an injury to her back and neck. This was immediately reported to her supervisor."

At trial employee's testimony differs, as set forth in the aforesaid facts as shown in the record. On September 21, 2000, she reported to Dr. Jeffrey Hazelwood that pain had been present in her shoulder/neck area for "several months," and gave Dr. Hazelwood no specific injury or precipitating injury.

An employee, in a workers' compensation case, must establish causation and permanency of an injury by testimony from medical experts. *Thomas v. Aetna Life and Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991). The trial court, after hearing testimony, reviewing trial exhibits, and weighing the evidence, determined the employee had failed to prove her injury arose out of the course and scope of her employment as she is required to so do.

Review of the trial court's decision requires a determination of whether the preponderance of the evidence favors the trial court's judgment. The decision of the trial court will be upheld unless upon review it is determined that the evidence preponderates against the trial court's judgment. *Wingert v. Government of Sumner County*, 908 S.W.2d 921, 922 (Tenn. 1995). In this case the trial court made a very detailed findings of fact and pointed out the inconsistencies in employee's proof, in arriving at its decision.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tennessee Code Annotated Section 50-6-225(e)(2). This tribunal is not bound by the trial court's findings, but instead conducts an independent examination of the record to determine where the preponderance lies. *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991). Considerable deference must be given to the trial court's findings of fact, especially where issues of credibility are involved. *Collins v. Howmet*, 970 S.W.2d 941, 943 (Tenn. 1998).

In this case the employee failed to designate her injury as work related on several forms, and in several instances testified differently at trial. As argued by employee, this might have been seen as evidence of confusion or a bad historian. The trial judge has the opportunity to observe the witnesses demeanor and is therefore entitled to considerable deference in its findings regarding

weight and credibility of oral testimony. *Long v. Tri-Con, Ltd.*, 996 S.W.2d 173, 178 (Tenn. 1999).

From this panel's independent examination of the record, giving due deference to the findings of the trial court, we are unable to say that the preponderance of the evidence is otherwise.

### **CONCLUSION**

The judgment of the trial court is therefore affirmed. Costs are taxed to employee-appellant, Kimberly Clark.

---

ALLEN W. WALLACE, SENIOR JUDGE

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

**KIMBERLY CLARK v. HARDEE'S FOOD SYSTEMS, INC., ET AL.**

**Chancery Court for Sumner County  
No. 2001C-135**

---

**No. M2002-02942-WC-R3-CV - Filed - January 20, 2004**

---

**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 employee-appellant, Kimberly Clark, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM