

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON  
August 23, 2010 Session

**DOROTHY MICHAUD v. REHAB CARE GROUP**

**Appeal from the Chancery Court for Gibson County**  
**No. H 5441      George R. Ellis, Chancellor**

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**No. W2009-02152-WC-R3-WC - Mailed December 23, 2010; Filed January 27, 2011**

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The employee sustained a compensable injury to her shoulder. As a result of her medical restrictions, she was unable to return to work at her previous job. The trial court adopted the impairment rating assigned by the physician conducting the employee's Independent Medical Examination over that of the treating doctor and awarded 48% permanent partial disability to the body as a whole. The employer appealed.<sup>1</sup> We affirm the judgment of the trial court.

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

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

Ronald L. Harper and Charles R. Patrick, Memphis, Tennessee, for the appellant, Rehab Care Group, Inc.

Edward L. Martindale, Jr., Jackson, Tennessee, for the appellee, Dorothy Michaud.

**MEMORANDUM OPINION**

**Factual and Procedural Background**

Dorothy Michaud ("Employee"), a licensed physical therapist assistant, began working for Rehab Care Group ("Employer") in July 2006. Employee fell on January 8, 2008, and injured her right shoulder. Employee was diagnosed with a posterosuperior labral

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<sup>1</sup>Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law.

tear, and the parties stipulated that the injury was compensable. Dr. John Masterson surgically repaired the injury on May 30, 2008. After the surgery, Employee completed a lengthy course of physical therapy, after which Dr. Masterson ordered a Functional Capacity Evaluation (“FCE”) followed by a work conditioning program. Dr. Masterson was of the opinion that Employee reached Maximum Medical Improvement (“MMI”) on January 5, 2009. Dr. Masterson imposed permanent activity restrictions limiting Employee to lifting no more than forty pounds and instructed Employee to avoid overhead work. Employer was unable to accommodate those restrictions, and the Employee did not return to work. Dr. Masterson assigned 3% permanent anatomical impairment to the body as a whole.

On January 21, 2009, Dr. Samuel Chung, a physiatrist, performed an IME on Employee. Dr. Chung agreed with Dr. Masterson’s course of treatment and with the restrictions Dr. Masterson placed on Employee’s work activities. Dr. Chung assigned an 8% permanent anatomical impairment to the body as a whole. Both doctors based their impairment ratings upon the Sixth Edition of the American Medical Association Guidelines for the Evaluation of Permanent Impairment. The two ratings differed primarily because Dr. Masterson found that Employee had no loss of range of motion, while Dr. Chung found a loss of range of motion. Dr. Chung agreed that Dr. Masterson’s impairment rating would be correct if Employee had no loss of range of motion.

At the time of the trial, September 1, 2009, Employee was fifty-eight years old. She is a high school graduate and had completed an associate degree program at a community college in Mississippi to become a physical therapy assistant. Employee also had attended another community college and had taken nursing courses at the University of Southern Mississippi. Employee had been employed at various times as a physical therapy assistant. In addition to having worked as a driver for a package delivery service, Employee had worked as an office administrator and sales representative for a business run by her ex-husband. Employee testified that she had applied for numerous jobs, but had not worked since her injury. Most of these job applications were submitted to physical therapy clinics. Employee testified that she knew the restrictions Dr. Masterson had imposed would prevent her from working as a physical therapy assistant, but she applied for employment at the physical therapy clinics with the hope that she might be hired for a managerial position. Employee also had applied for a job outside of the physical therapy field.

The trial court, ruling from the bench, adopted Dr. Chung’s impairment rating and awarded 48% Permanent Partial Disability (“PPD”) to the body as a whole, which was the maximum allowable award. On appeal, Employer contends that the trial court erred by giving greater weight to the opinion of Dr. Chung than it did to the opinion of Dr. Masterson. Employer also contends that the trial court erred by failing to make specific factual findings to support the award of six times the impairment as required by Tenn. Code Ann. § 50-6-241(d)(2)(B) (2008).

## Standard of Review

The standard of review of issues of fact is “de novo upon the record of the trial court, accompanied by a presumption of correctness of the finding, unless the preponderance of evidence is otherwise.” Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness’ demeanor and to hear in-court testimony. Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 900 (Tenn. 2009). “When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues.” Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A trial court’s conclusions of law are reviewed de novo with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

## Analysis

### 1. *Expert Testimony*

Employer first asserts that the trial court erred by adopting the opinion, specifically the impairment rating, of Dr. Chung over that of Dr. Masterson. Both physicians testified by deposition. Employer asserts that Dr. Masterson is better qualified than Dr. Chung. Employer contrasts Dr. Masterson’s qualifications as a medical doctor specializing in orthopaedic surgery with that of Dr. Chung, who is an osteopath with only a speciality in physical medicine. Employer also notes that while Dr. Masterson examined Employee on multiple occasions over the course of several months, Dr. Chung had examined Employee on only a single occasion. The record does not reflect that the trial court provided any direct explanation as to why it adopted Dr. Chung’s opinion over that of Dr. Masterson.

In response, Employee points out that Dr. Chung examined Employee sixteen (16) days after she had been released by Dr. Masterson and that Dr. Chung used a goniometer to measure her range of motion. According to Employee’s testimony, Dr. Masterson did not use any device to measure her range of motion. Employee also notes that Dr. Chung’s measurements were generally consistent with measurements taken during both the FCE and work conditioning program.

We have examined the medical evidence de novo, according no presumption of correctness to the trial court’s findings and we agree that the trial court’s conclusion was supported by a preponderance of the evidence. As observed earlier, the difference between Dr. Masterson’s impairment rating and that of Dr. Chung was based primarily on the results from range-of-motion testing. While Dr. Chung found a mild loss of range of motion, Dr.

Masterson found no loss of range of motion. Loss of range of motion also was observed during the FCE, and Dr. Chung's measurements of range of motion are generally consistent with the measurements taken during the FCE. After an independent assessment of the deposition testimony, we accept Dr. Chung's opinion concerning impairment.

## 2. *Specific Findings*

Employer also asserts that the trial court did not make sufficient specific findings to support an award of more than five times the impairment as is required by Tennessee Code Annotated section 50-6-241(d)(2)(B). Alternatively, Employer contends the award was excessive.

While the trial court did make a series of general findings concerning Employee's age, educational background and work history, it did not specify which factors it relied upon in choosing to give the maximum award. The trial court, however, did state the following:

[Employee] testified that she has an associate's degree and that she's also a licensed physical therapist assistant. She testified that she has been doing the physical therapy assistance since her divorce. That she enjoyed this work and would very much liked [sic] to return, however this seems to be a – not in the cards for [Employee]. She testified that on her work history that these weight restrictions would preclude her from just about anything she's done except work in the business of her former husband. She testified that she made every effort to try . . . to return to work, that after the surgery by Dr. Masterson she underwent about 32 sessions of physical therapy, which improved her use but she always had pain.

. . . .

[A]s a result of the injury she [Employee] still continued to have pain in her shoulder that range [sic] from her shoulder to her wrist and also to [her] back. She has numbness, problems sleeping, she has trouble driving long distances, problems vacuuming, washing and blow drying her hair.

The Court finds that as a result of [the] injury [Employee] sustained while in the course of employment [for] defendant that she had been given a permanent 40 to 45 pound lifting restriction, and a restriction of no overhead work, and had been rendered unable to continue her profession as a licensed physical therapist [sic]. This was underscored by her attempt to reenter

the profession with approximately 20 applications for employment with no success. [Employee], the Court finds, is a 58 year old individual who is a very credible witness with a pleasing personality. And though she has made continuous attempts to obtain employment in other fields she has had not [sic] success.

These findings are consistent with the evidence presented at trial. The findings of fact address the factors of “lay and expert testimony, the employee’s age, education, skills and training, local job opportunities, and capacity to work at types of employment available in [employee’s] disabled condition.” Tenn. Code Ann. § 50-6-241(d)(2)(A). Although the trial court did not specifically state that it was awarding the maximum based on these findings, the findings do reflect that the trial court considered the factors listed in section 50-6-241(d)(2)(A). Also, these facts do, in our view, detail the trial court’s reasons for awarding the maximum PPD. Thus, the trial court complied with the requirements of Tennessee Code Annotated section 50-6-241(d)(2)(B). Moreover, these findings also provide sufficient justification for the amount of the award.

### **Conclusion**

The judgment of the trial court is affirmed. Costs are taxed to the appellant, Rehab Care Group, Inc., and its surety, for which execution may issue, if necessary.

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**TONY A. CHILDRESS, SPECIAL JUDGE**

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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, Rehab Care Group, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM