

IN THE COURT OF APPEALS OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
(SEPTEMBER 28, 2000 SESSION)

**MARY E. MILLER, v. NISSAN MOTOR MANUFACTURING  
CORPORATION , USA, and ROYAL INSURANCE OF AMERICA**

**Direct Appeal from the Chancery Court for Rutherford County  
No. 94WC-858 Don Ash, Chancellor**

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**No. M2000-00185-WC-R3-CV - Mailed - April 11, 2001  
Filed - June 13, 2001**

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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 fact and conclusions of law. The plaintiff, Mary E. Miller, appeals the judgment of the Chancery Court of Tennessee for the 16th Judicial District at Murfreesboro, where the trial court found: (1) that Ms. Miller sustained an injury by accident arising out of and in the course and scope of her employment and awarded twenty percent (20%) permanent vocational or industrial disability to the right lower extremity; (2) that the testimony of Ms. Miller's expert witness on reflex sympathetic dystrophy (RSD) and fibromyalgia did not meet the criteria for acceptance of scientific testimony in *McDaniel v. CSX Transportation Inc.*, 955 S.W.2d 257 (Tenn.1997), and therefore excluded his testimony; (3) that her condition of fibromyalgia and resulting psychiatric condition were not work-related and as such were not compensable; (4) that Ms. Miller was entitled to permanent medical care and treatment only for the injury to her right leg arising out of this work-related accident but not for fibromyalgia or any other conditions. Ms. Miller also raises some other procedural and evidentiary issues that will be addressed herein. For the reasons stated in this opinion, we affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e)(2000) Appeal as of Right; Judgment of the Chancery Court; Affirmed.**

WEATHERFORD, SR. J., delivered the opinion of the court, in which BIRCH J., and CATALANO, SP.J joined.

Scott Daniel, Murfreesboro, Tennessee for the appellant, Mary E. Miller

Larry G. Trail and Patrick J. McHale, Murfreesboro, Tennessee for the appellee, Nissan Motor Manufacturing Corporation, USA, and Royal Insurance of America

## MEMORANDUM OPINION

The employee, Mary E. Miller, was 46 years old at the time of trial and has a 12<sup>th</sup> grade education. Prior to working at Nissan, Ms. Miller had worked at a bank, as a waitress and as a secretary. She worked for the defendant, Nissan Motor Manufacturing from August 1984 until February 1998. Ms. Miller worked in various positions at Nissan until her injury on December 13, 1990. At the time of her injury, she had been working in an area called Cab Main for approximately three to four years. She had never had any significant injuries before December of 1990 that had affected her ability to perform physical labor.

On December 13, 1990, while working at Nissan, a dolly hit Ms. Miller's right leg and mashed it against a railing wall. Ms. Miller was treated in the emergency room at Nissan and referred to Dr. Ray Lowery, M.D., an orthopedic surgeon. Dr. Lowery diagnosed Ms. Miller's injury as a "contusion to the right leg." He opined that she had reached her maximum medical improvement around June 10, 1991 and gave her a three percent (3%) permanent impairment rating based on loss of physical function to her right lower extremity due to a soft tissue injury of the gastroc muscle and partial sural nerve deficit. He did not impose any permanent restrictions on Ms. Miller.

On September 25, 1991, Ms. Miller saw Dr. Larry Laughlin, M.D., an orthopedic surgeon, complaining of pain in the calf of her right leg. She was referred to Dr. Laughlin by Nissan. Dr. Laughlin performed a physical examination of her lower extremities; diagnosed a soft tissue injury of the calf muscles; and opined that Ms. Miller would have no permanent physical impairment.

In February of 1992 and later in August of 1995, Ms. Miller saw Dr. Richard Fishbein, an orthopedic surgeon. Dr. Fishbein felt that she had a post-compartment syndrome dysesthesia or "burning of the nerves." He stated that Ms. Miller had reached maximum improvement in June of 1991 and retained a ten percent (10%) permanent impairment of the right lower extremity. He gave restrictions of no excessive standing, avoiding walking, climbing heights, and for every hour spend five minutes with her leg up.

On January 26, 1993, Ms. Miller saw Dr. Thomas E. Tompkins, M.D., an orthopedic surgeon, concerning her leg problem. She had been referred to Dr. Tompkins by Nissan. Dr. Tompkins could not make any objective findings to substantiate her complaints and he diagnosed her leg pain as consistent with shin splints.

Ms. Miller returned to Dr. Tompkins one month later and complained of pain in her right and left leg. Although he still could not make any objective findings to substantiate her complaints, Dr. Tompkins ordered an MRI, a SED rate and a bone scan. On March 3, 1993, Dr. Tompkins reported to Ms. Miller that all of her test results were normal.

On March 18, 1993, Ms. Miller came back to see Dr. Tompkins complaining of the same symptoms and informed him of Dr. Fishbein's diagnosis. Dr. Tompkins examined Ms. Miller;

performed extensive tests and concluded that Ms. Miller did not have either sympathetic dystrophy or compartment syndrome. Dr. Tompkins felt that Ms. Miller had reached maximum medical improvement and that she had not retained any permanent medical impairment based on the AMA Guidelines. Ms. Miller saw Dr. Tompkins again on May 17, 1995, and for the last time on June 21, 1995, with complaints of right leg pain associated with numbness. Dr. Tompkins examined her but did not change his opinion about her impairment or her diagnosis.

On January 30, 1996, Ms. Miller saw Dr. Robert Clendenin, M.D., for an independent medical evaluation at the request of Nissan. Dr. Clendenin has a speciality of physical medicine rehabilitation. Ms. Miller complained to Dr. Clendenin of lower back and leg pain. She stated that this problem began on September 11, 1995, when she bent over to pick up a small tool at work and developed a popping sensation in her right hip and stiffness in her lower back. According to Dr. Clendenin she did not relate anything to him at that time about the leg injury that she had suffered on December 13, 1990.

Dr. Clendenin examined Ms. Miller and reviewed an MRI and a bone scan report. He found that “she had wide-spread tenderness over a large area of her back and legs, not consistent with an injury or pain as you see after an injury but more a pain syndrome where the muscles become sensitized and tender to touch and are painful.” Dr. Clendenin “thought she had a fibromyalgia type muscular pain syndrome” that occurs more commonly in women between the ages of 40 and 50 with no clear cause. Dr. Clendenin stated that fibromyalgia is a controversial and not very well understood disorder. He also stated that she did not have RSD. Ms. Miller saw Dr. Clendenin a total of eight times and while Dr. Clendenin continued to think that Ms. Miller had fibromyalgia and chronic pain syndrome he did not find that these conditions were work-related and did not assign an impairment rating.

In February 1996, Nissan put Ms. Miller on a temporary assignment in the VIN Crib which was an easier and less strenuous job than her previous job. This temporary job was converted into a permanent job for Ms. Miller and paid \$15.42 an hour. Her prior job had paid \$17.72 an hour. She remained on this job until she left Nissan in February 1998. According to Mrs. Miller, she left because she could not continue working due to her injury.

On July 8, 1996, Ms. Miller saw Dr. David Flemming, M.D., an anesthesiologist in Chicago, who operates a pain treatment center which integrates medical treatment for chronic pain with psychology modalities. Ms. Miller had discovered Dr. Flemming on the Internet. He was licensed to practice medicine in Illinois, Wisconsin, Pennsylvania and the United Kingdom. Dr. Flemming is board certified in anesthesia

His clinic has one anesthesiologist, two psychologists, and five massage or myofascial therapists. Dr. Fleming maintains that many patients with RSD and fibromyalgia “can get a cure even though they have not got a cure in other treatment programs.” He views these conditions as having a severe emotional impact which when adequately addressed “then patients seem to be able

to get well.” Dr. Flemming stated: “We train patients essentially to control both the perception of pain and the physiological basis for pain using different techniques within hypnotherapy, hypnosis.” According to Dr. Flemming, 85 to 95 percent of his patients can use hypnosis to “take pain down.”

At the time he saw Ms. Miller, he was practicing mostly pain management and did not do very much anesthesia. Dr. Flemming’s primary diagnosis was reflex sympathetic dystrophy and he stated, “the RSD spread to involve tender points in a distribution suggestive of fibromyalgia syndrome.” He further stated, “Anyway, right now I’m going with reflex sympathetic dystrophy and calling in fibromyalgia because I think that’s more likely what it is.” In explaining the distinction between RSD and fibromyalgia, Dr. Flemming stated, “So the distinction is kind of a little confusing, and it is even more confusing because we don’t really understand what causes these illnesses in the first place.” He further stated, “The medical profession is completely confused about this illness.” Dr. Flemming felt that Ms. Miller’s RSD and resulting fibromyalgia were caused by her leg injury which occurred in 1990 and assigned a seventy-five percent (75 %) permanent impairment to the body as a whole.

On September 6, 1997, Ms. Miller saw Dr. Terry Holmes. Dr. Holmes is a psychiatrist who practiced the specialty of occupational medicine for 15 years prior to starting his psychiatric specialty. He served in the Air Force for 27 years. He is a staff psychiatrist at the Moccasin Bend Mental Health Institute in Chattanooga. At the time of the first deposition Dr. Holmes was also operating Mountain View Mental Health in McMinnville a day and a half a week. Dr. Holmes did not perform a physical examination when Ms. Miller first contacted him, but he did do a mental status or initial examination. He treated Ms. Miller regularly during 1998, and gave a second deposition on November 11, 1998.

According to Dr. Holmes, Ms. Miller had reflex sympathetic dystrophy and fibromyalgia and he felt that the 1990 crush injury was the trigger for both conditions. He also indicated that she had somatoform disorder and major depressive episode. When Dr. Holmes was asked the definition of “fibromyalgia”, he stated, “Actually I would defer the definition of fibromyalgia to Dr. Clendenin and the people that are experts in that field.” He admitted he was not an expert on the length of time it took for fibromyalgia to progress from one part of the body to the other. He also deferred to Dr. Clendenin’s testimony as the accurate testimony on whether Ms. Miller had RSD. Dr. Holmes found Ms. Miller to have an impairment of seventy percent (70%) to the body as a whole.

On August 24, 1998, Dr. Evelyn F. Frye, a board certified clinical psychologist, saw Ms. Miller at the request of Nissan’s attorney. Dr. Frye considered all the applicable and available records, an evaluation consisting of two clinical interviews and extensive psychological testing. Following this procedure, Dr. Frye diagnosed Ms. Miller as having “undifferentiated somatoform disorder.” Dr. Frye defined “somatoform disorder” as when a person develops multiple health problems as a result of underlying personality and emotional issues. In Dr. Frye’s opinion, the cause of the psychological condition suffered by Ms. Miller had to do with “her basic personality structure”, and the reported work injury or injuries “did not cause it at all.”

Nissan's attorney then referred Ms. Miller to Dr. Alisha O. Dunn, M.D., who is board certified in psychiatry and neurology. On October 30, 1998, Dr. Dunn saw Ms. Miller and diagnosed undifferentiated somatoform disorder, hypochondriasis with poor sight, major depression, moderate, and opiate dependence. Dr. Dunn felt that the reported work injury or injuries did not either cause or aggravate Ms. Miller's somatoform disorder.

At the time of trial, Ms. Miller had pain everywhere, mostly in her back and legs, diarrhea, problems breathing, chest pain, and stiffness and must lay down when the pain becomes very severe. She could not sleep at night, walk far or stand or sit long.

The trial in this case started November 23, 1998. The trial was not concluded at the end of that day and the trial court adjourned until 10 a.m. the next day. There evidently was some communication between the trial court and the attorneys between the time court adjourned on November 23, 1998 and 10 a.m. on November 24, 1998. The record contains an order that provided in effect that Ms. Miller's counsel moved the court for a continuance due to his health problems. The order provides, "Plaintiff's counsel agreed that he would pay the charges of Dr. Frye and Dr. Dunn if the Court granted a continuance." This order was not filed until December 13, 1998. It was signed by the trial court and approved for entry by both attorneys.

On March 26, 1999, Ms. Miller saw Dr. William Bernet M.D. Dr. Bernet, a psychiatrist, was the Medical Director of the Psychiatric Hospital at Vanderbilt and Director of Vanderbilt Forensic Psychiatry. Ms. Miller had been referred to Dr. Bernet for a psychiatric disability evaluation by an organization called GENEX Services, which was affiliated with Provident Life and Accident Insurance Co. with whom Ms. Miller had a disability policy.

On May 28, 1999, Ms. Miller's counsel gave notice of taking the deposition of Dr. William Bernet setting the deposition for June 9, 1999. Nissan's counsel responded with a motion for a protective order. The trial court granted the defendant's motion but did allow Dr. Bernet's deposition to take place as an offer of proof.

At the conclusion of the trial in this case on July 26, 1999, the trial court excluded the testimony of Dr. Flemming. Dr. Flemming testified by deposition as well as at trial on November 23, 1998 and on July 26, 1999. The trial court found his testimony did not meet the criteria for acceptance of scientific testimony in *McDaniel v. CSX Transportation Inc.*, 955 S.W.2d 257 (Tenn.1997).

The trial court found: 1) that Ms. Miller sustained an injury by accident arising out of and in the course and scope of her employment and awarded twenty percent (20%) permanent vocational or industrial disability to the right lower extremity; 2) that her condition of fibromyalgia and resulting psychiatric condition were not work-related and as such were not compensable; and 3) that Ms. Miller was entitled to permanent medical care and treatment only for the injury to her right leg arising out of this work-related accident but not for fibromyalgia or any other conditions.

## ANALYSIS

The scope of review of issues of fact is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. *Tenn. Code Ann.* § 50-6-225 (e)(2); *Lollar v. Wal-Mart Stores, Inc.*, 767 S.W.2d 143, 149 (Tenn. 1989). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court's factual findings. *Humphrey v. David Witherspoon, Inc.* 734 S.W.2d 315 (Tenn. 1987).

Fairly stated, Ms. Miller presented the following issues:

1. Did the trial court properly exclude the testimony of Dr. David Flemming?
2. Did the trial court refuse to recognize the medical expertise of Dr. Holmes?
3. Did the trial court correctly determine the issues of the fibromyalgia and the psychiatric or psychological claims in assigning twenty percent (20%) impairment to the right lower extremity?
4. Did the trial court correctly determine the back injury advanced by Ms. Miller?
5. Did the trial court err in not allowing or considering the testimony of Dr. Bernet?
6. Did the trial court err in determining the conditions of the continuance sought by Ms. Miller at the conclusion of the first day of the trial?
7. Did the trial court preclude Ms. Miller from obtaining a fair and impartial trial on the merits of this case?

### **1. Did the trial court properly exclude the testimony of Dr. David Flemming?**

In general, questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court. The trial court's ruling in this regard may only be overturned if the discretion is arbitrarily exercised or abused. *McDaniel*, 955 S.W.2d at 263-64.

At the conclusion of the trial after the trial judge had read Dr. Flemming's deposition and heard his testimony on two occasions, the trial judge excluded Dr. Flemming's testimony basing his ruling on the case of *McDaniel v. CSX, Transportation Inc.*, 955 S.W.2d 257 (Tenn. 1997) and *Tenn.*

*Rules of Evidence*, 702 and 703.

The trial court considered the non-exclusive list of factors set out in *McDaniel* in determining reliability and concluded that Dr. Flemming's testimony should be excluded. The trial court found that no proof had been presented as to whether the scientific evidence had been tested or the methodology in which it was tested, or whether a potential rate of error was known. The trial court found that while Dr. Flemming had published some of his findings and had done some research independent of litigation, very limited proof had been presented in regard to peer review. The trial court did not find sufficient proof to show that the evidence had been generally accepted in the scientific community.

After thoroughly reading the deposition and testimony of Dr. Flemming and the entire record in this case, we find that the trial court did not abuse his discretion in excluding the testimony of Dr. Flemming. This issue is without merit.

## **2. Did the trial court refuse to recognize the medical expertise of Dr. Holmes?**

Ms. Miller complains that the trial court erred in not recognizing Dr. Terry Holmes as an expert in regard to her medical condition and/or in disregarding Dr. Holmes' testimony in regard to her medical condition.

According to Dr. Holmes, Ms. Miller's 1990 crush injury was the trigger for both RSD and fibromyalgia. He also diagnosed Ms. Miller with somatoform disorder and major depressive episode.

In its ruling the court stated as follows: 'And after reading his deposition, a couple of times, I am going to allow him to testify in regard to the psychiatric condition. I do have problems in regard to his testimony in regard to the medical condition.'

The trial court did consider Dr. Holmes' testimony. It is obvious after reading 241 pages of Dr. Holmes' deposition that he was treating Ms. Miller as a psychiatrist. Dr. Holmes admitted he was not an expert or deferred to Dr. Clendenin "and the people that are experts in that field" on aspects of fibromyalgia or RSD on more than one occasion.

The trial court specifically found that the testimony of both Dr. Dunn and Dr. Frye was more credible than that of Dr. Holmes.

We find no error on the part of the trial court in reference to Dr. Holmes' testimony. This issue is without merit.

## **3. Did the trial court correctly determine the issues of the fibromyalgia and the psychiatric or psychological claims in assigning twenty percent (20%) impairment of the right lower extremity?**

The trial court awarded Ms. Miller a twenty percent (20%) permanent vocational or industrial disability to her right lower extremity and further found that Ms. Miller's condition of fibromyalgia and resulting psychiatric condition were not work-related and therefore not compensable..

Concerning the injury to Ms. Miller's right lower extremity, there were two physicians who assessed permanent partial impairment. Dr. Ray Lowery assessed a three percent (3%) permanent impairment and Dr. Richard Fishbein assessed a ten percent (10%) permanent impairment to the right lower extremity and gave permanent restrictions.

Dr. Thomas E. Tompkins treated Ms. Miller for over two years and consistently found that she had not retained any permanent medical impairment based on the AMA Guidelines. Dr. Larry Laughlin opined that Ms. Miller would have no permanent physical impairment.

The court also considered the claimant's age, job skills, job opportunities in the market place and brief attempt to return to work in determining vocational impairment.

After reviewing all the evidence in this case we find that the evidence does not preponderate against the finding of the trial court regarding the injury to Ms. Miller's right leg.

In discussing the issues presented by Ms. Miller concerning the trial court's ruling that Ms. Miller's condition of fibromyalgia and resulting psychiatric condition were not work-related, we will revisit the testimony of the professional witnesses presented in this case. However, as we have upheld the trial court's ruling excluding Dr. Flemming's testimony it will not be considered in this issue.

Dr. Robert Clendenin was the first doctor who saw Ms. Miller that diagnosed her problem as fibromyalgia. This was more than five years after Ms. Miller had injured her right lower leg. However, Dr. Clendenin did not give an impairment rating as he did not think her condition to be work-related.

The trial court considered the testimony of Dr. Terry Holmes, a psychiatrist, Dr. Evelyn F. Frye, a clinical psychologist, and Dr. Alisha O. Dunn, who was board certified in psychiatry, concerning Ms. Miller's psychiatric condition.

Dr. Holmes diagnosed somatoform disorder, RSD, fibromyalgia and major depression. He felt that her 1990 injury caused the RSD and fibromyalgia which led to her psychiatric condition.

Dr. Evelyn F. Frye diagnosed "undifferentiated somatoform disorder" caused by Ms. Miller's "basic personality structure." She was further of the opinion that any reported work injury at Nissan in 1990 or 1995 did not cause the undifferentiated somatoform disorder that she had diagnosed.

Dr. Dunn also diagnosed undifferentiated somatoform disorder and felt that the work injury



or injuries in 1990 and 1995 did not either cause or aggravate Ms. Miller's somatoform disorder.

Dr. Dunn and Dr. Frye testified at trial. Dr. Holmes testified by deposition. The trial court specifically found Dr. Frye and Dr. Dunn to be very credible and found them to be more credible than Dr. Holmes and Dr. Flemming.

When the medical testimony differs, the trial judge must obviously choose which view to believe. In doing so, he is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672 (Tenn. 1991). The trial court has the discretion to accept the opinion of one medical expert over the opinion of another medical expert. *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990).

After a careful review of the record in this case, we find that the evidence does not preponderate against the finding of the trial court that Ms. Miller sustained a twenty percent (20%) vocational or industrial impairment to the right lower extremity and that her condition of fibromyalgia and psychiatric condition were not work-related.

This issue is without merit.

#### **4. Did the trial court correctly determine the back injury advanced by Ms. Miller?**

When Ms. Miller complained about a back injury in 1995, Nissan sent her to Dr. Robert Clendenin. Ms. Miller stated that this problem began September 11, 1995, when she bent over to pick up a small tool at work and developed a popping sensation in her right lower hip and stiffness in her lower back. Dr. Clendenin felt that Ms. Miller had fibromyalgia, but he did not believe that this condition was work-related.

There was no medical evidence presented that gave Ms. Miller an impairment rating attributable to the back and Dr. Clendenin found no impairment for what he characterized as a strain. We found no evidence in the record that would justify the trial court in making any award for the back injury. It is also noted that the back injury as alleged in 1995 and the psychological injury were never pled by Ms. Miller.

This issue is without merit.

#### **5. Did the trial court err in not allowing or considering the testimony of Dr. Bernet?**

The first day of this trial was on November 23, 1998, and the second and last day of this trial was on July 26, 1999.

On March 26, 1999, Ms. Miller saw Dr. William Bernet, a psychiatrist, who was the Medical Director of the Psychiatric Hospital at Vanderbilt and Director of Vanderbilt Forensic Psychiatry.

Ms. Miller had been referred to Dr. Bernet for a psychiatric disability evaluation.

On May 28, 1999, Ms. Miller's counsel gave notice of taking the deposition of Dr. William Bernet setting the deposition for June 9, 1999. Nissan's counsel responded with a motion for a protective order. The trial court granted the protective order but did allow Ms. Miller's counsel to take the deposition as an offer of proof only.

We have read the deposition of Dr. Bernet and have concluded that it is highly unlikely that his testimony would have changed the decision of the trial court.

Dr. Bernet stated that while he knew of RSD and fibromyalgia, he was not an expert on these conditions and he didn't deal frequently with patients who had these conditions. In regard to Ms. Miller's medical diagnosis he stated : "I should say that as a psychiatrist, I cannot say that I arrived at a diagnosis myself of those two conditions. In other words, those are nonpsychiatric medical conditions that I accepted the diagnoses that had been provided by other physicians." Dr. Bernet testified that as far as he could tell her problems started with her 1990 leg injury that eventually resulted in these medical conditions and subsequent to that she developed some psychiatric disorders.

While he testified that the RSD and the fibromyalgia were the results of her injury, Dr. Bernet stated that he was not evaluating for causation issues but was performing a psychiatric disability evaluation:

"Q. Let me ask it this way. Are you telling the Court and me that to connect the dots between the leg injury of 1990, and, first of all, reflex sympathetic dystrophy, you don't believe you're the person to connect those dots?"

A. That's correct.

Q. And are you also telling me and are you telling the Court to connect the dots causally between fibromyalgia and the leg injury of 1990, you're not the person to make that connection?"

A. That is correct.

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Q. ....You said, and I was curious as to some of the language you used, "As far as I can tell, she is correct in thinking that these problems started with the crushing injury to her leg in 1990."

Now, that qualifies your opinion, does it not, by using the

language, quote, "As far as I can tell," unquote?

A. It qualifies it a little bit.

Q. Well, and certainly we've already discussed that you did not have the medical records involving that injury in the immediate period afterwards. Is that correct?

A. That's correct."

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Q. And when I say "so far as you know", again, that's based on the medical information that was provided to you and outlined on page one of your report and no other medical evaluation; is that correct?

A. Yes.

Q. You've told us a number of times, and I just want to make sure I understand it, your task in evaluating Ms. Miller was to provide a psychiatric disability evaluation. Is that true?

A. Yes.

Q. And you did that?

A. Yes.

Q. And you're comfortable with the disability evaluation of her and the diagnoses you made. Is that correct?

A. Yes.

Q. You were not at any time asked to provide an impairment of her until today, correct?

A. Yes, that's correct.

Q. And until today you have not been asked in any fashion to provide any form of medical/legal causation regarding Ms. Miller. Is that correct?

A. That's correct.

Q. And if you had been asked to provide either impairment or a medical/legal causation, you would have accessed some of these other records and other data and information that we've talked about here today in order to bolster your opinion, correct?

A. Certainly in the latter, the second thing you mentioned, if I had been asked to establish causation, I would have been interested in other records.

Q. Such as Dr. Lowery's, who treated her for her original 1990 injury?

A. Yes.

In granting the protective order, the trial court ruled stated:

Citing the length of time the case had been filed; the fact that substantial portions of the trial had been completed; that the proposed expert witness for the Plaintiff had not been disclosed in either written discovery responses or pretrial filings in accordance with Local Rules; and the applicable Tennessee Rules of Evidence and therefore, in the exercise of its discretion, that the Court would not allow the testimony.

We find that the trial court did not abuse its discretion in not allowing Dr. Bernet's testimony.

This issue is without merit.

**6. Did the trial court err in determining the conditions of the continuance sought by Ms. Miller at the conclusion of the first day of the trial?**

The next issue presented by Ms. Miller is whether the trial court erred in holding that after plaintiff's counsel became ill during the first part of the trial, that plaintiff's attorney agreed to pay the fees for the defendant's experts in order to continue the remainder of the trial.

There is nothing in this entire trial court record concerning the continuance in this case except the Order heretofore mentioned which provided that: "Plaintiff's counsel agreed that he would pay the charges of Dr. Frye and Dr. Dunn if the Court granted a continuance."

With nothing more other than the statements contained in Ms. Miller's appellate brief, we find this issue to be without merit.

**7. Whether the trial court precluded Ms. Miller from obtaining a fair and impartial trial on the merits of this case?**

It is regrettable and unfortunate that Ms. Miller's counsel presented this issue in this appeal. For the most part, this was just a rehashing of the issues previously presented. Counsel asserted that "the trial judges predisposition and one-sided rulings" prevented his client from obtaining a fair and impartial trial on the merits. The trial court, on many occasions, allowed counsel to make an offer of proof. These offers of proof have been considered. As to complaints about objections to evidence sustained by the trial court, counsel lists numbers of pages where the trial court's rulings appear without stating the reasons why certain evidence should have been rejected or admitted.

While it is entirely proper for counsel in his brief to show errors, and apply the law to them, he is not permitted to insert matters which are impertinent and disrespectful of the trial judge. A brief in no case can be used as a vehicle for the conveyance of disrespect or professional discourtesy of any nature for the court of review or the trial court, or as a forum for an unsuccessful attorney to vent his spite. *Ward v. University of the South*, 200 Tenn. 412, 418-19, 354 S.W.2d 246, 249 (1962).

After considering the entire record in this case, we are satisfied that Ms. Miller had a fair and impartial trial on the merits in this case.

This issue is without merit.

**CONCLUSION**

After reviewing the record in this case, we find that the evidence does not preponderate against the trial court's finding that Ms. Miller sustained a permanent vocational disability of twenty percent (20%) to the right lower extremity and that Ms. Miller's fibromyalgia condition and psychiatric condition were not work related.

The judgment of the trial court is affirmed. Costs are assessed to the appellant.

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James L. Weatherford, Senior Judge

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

**MARY E. MILLER v. NISSAN MOTOR MANUFACTURING  
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Chancery Court for Rutherford County  
No. 94WC-858

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No. M2000-00185-WC-R3-CV - Filed - June 13, 2001

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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 appellant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM