

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
September 21, 2009 Session

**ANNEMARIE TUBBS v. ST. THOMAS HOSPITAL**

**Direct Appeal from the Chancery Court for Davidson County  
No. 08-68-III Ellen Hobbs Lyle, Chancellor**

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**No. M2009-00289-WC-R3-WC - Mailed - March 15, 2010  
Filed - April 15, 2010**

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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 Tenn. Code Ann. § 50-6-225(e)(3) (2008) for a hearing and a report of findings of fact and conclusions of law. The employee developed a latex allergy as a result of her employment at a hospital, and the hospital made certain accommodations that enabled the employee to continue working. However, the employee's sensitivity to latex increased over the years, and she eventually left her job. The employee filed a petition seeking workers' compensation benefits in the Chancery Court of Davidson County. Following a bench trial, the trial court awarded the employee 60% permanent partial disability to the body as a whole. On this appeal, the employer contends that the treating physician's impairment rating should not have been admitted into evidence because it was not in accordance with the AMA Guides. The employer also argues that a lower impairment should have been used by the trial court and that the award should have been capped. We affirm the judgment.

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

WILLIAM C. KOCH, JR., J., delivered the opinion of the court, in which JON KERRY BLACKWOOD and DONALD P. HARRIS, SR. JJ., joined.

D. Randall Mantooh, Nashville, Tennessee, for the appellant, St. Thomas Hospital.

James S. Higgins, Nashville, Tennessee, for the appellee, Annemarie Tubbs.

**MEMORANDUM OPINION**

## I.

Annemarie Tubbs worked as an ultrasound technician at St. Thomas Hospital from 1988 until 2007. In June 1992, she had an episode of itching, chest pain, and shortness of breath while at work. Ms. Tubbs lost consciousness and was taken to the hospital's emergency room. It was determined at that time that Ms. Tubbs was experiencing anaphylaxis, a severe allergic reaction. Ms. Tubbs received medications which relieved her symptoms, and consulted Dr. Samuel Marney, an allergist. The tests conducted by Dr. Marney revealed that Ms. Tubbs was allergic to latex. He prescribed medications and recommended that she avoid contact with latex products, such as gloves, in the workplace and elsewhere.

Ms. Tubbs's supervisor attempted to accommodate Dr. Marney's recommendation by replacing latex gloves used by workers in the ultrasound department with vinyl gloves and by otherwise limiting the presence of latex in the department. However, workers from other departments of the hospital continued to use latex products. As a result, Ms. Tubbs occasionally continued to have allergic reactions, such as burning, itching eyes, nasal congestion, and skin rashes. She also had similar reactions to latex exposure outside the workplace, in areas such as dental offices and restaurants where latex gloves were used. In addition, Ms. Tubbs had reactions to bananas and avocados. Dr. Marney testified that such reactions were clinically related to her latex allergy. Ms. Tubbs was generally able to treat these reactions with Benadryl, as well as the prescription medications provided by Dr. Marney. She had no additional episodes of anaphylaxis.

Over time, Ms. Tubbs began to experience episodes of skin rashes, watery eyes, and other less severe symptoms more frequently. Ms. Tubbs testified that, in the first few years following 1992, these sorts of reactions occurred approximately once a month. By 2006 and 2007, she was experiencing allergic reactions almost daily. Her sensitivity was so high that she would develop symptoms by touching an object, such as a telephone or elevator button, that had previously been touched by someone wearing a latex glove. In May 2007, Dr. Marney recommended that Ms. Tubbs work in a latex-free environment. While St. Thomas made some efforts to accommodate this restriction, the hospital was not able to provide a latex-free work environment for Ms. Tubbs. Accordingly, after a six-month leave of absence, the hospital terminated Ms. Tubbs.

Dr. Marney completed a C-32 medical report, which was submitted by Ms. Tubbs in accordance with Tenn. Code Ann. § 50-6-235(c) (2008). St. Thomas exercised its right to conduct a cross-examination deposition. In the C-32, Dr. Marney assigned an anatomical impairment of 50% to the body as a whole. The document states that the rating was based

upon Table 8-2 on page 178 of the applicable (Fifth) edition of the AMA Guides.<sup>1</sup> That table, exhibited to the deposition, is titled “Criteria for Rating Permanent Impairment for Skin Disorders.” During cross-examination, Dr. Marney testified that Ms. Tubbs “doesn’t have a skin disorder, she has anaphylaxis.” He stated that he “didn’t select [Table 8-2], actually that was selected for me.” He agreed with counsel for St. Thomas that, of the examples provided by Section 8.7 of the Guides, the one most similar to Ms. Tubbs was no. 8-4. The rating suggested by the Guides for that example was 5% to the body as a whole.

Dr. Marney explained that his impairment rating was based primarily upon the risk of another episode of anaphylaxis. He stated the basis for his opinion was “outside your book.” He elaborated by saying that he relied upon another, unidentified, book, which he did not have with him. However, during redirect examination by counsel for Ms. Tubbs, he reaffirmed that his impairment was based upon Table 8-2, stating that Ms. Tubbs fell within Class III of that table, which provided a range of impairment from 25 % to 54% to the body as a whole.

Ms. Tubbs was fifty-five years old at the time the trial occurred. She was a high school graduate. She had also completed a two-year training program at Vanderbilt Medical Center to become an x-ray technician and had also received additional training in order to become an ultrasound technician. She became a certified ultrasound technician in 1980 and worked in that field until 2007. While working at St. Thomas, Ms. Tubbs also held part-time jobs at a department store and assisting in the transport of nursing home patients. After her termination at St. Thomas, she worked part-time as an ultrasound technician at an outpatient imaging center.

Ms. Tubbs testified that her allergic episodes became less frequent after she left St. Thomas. She stated that she removed all items containing latex from her home, including hairbrushes, rugs or mats with rubber backing, undergarments containing elastic, and children’s toys. She also stated that she used special soaps and lotions recommended by Dr. Marney. She testified that her dentist agreed to wear vinyl gloves and give her his first morning appointment before latex gloves were used in his office. Ms. Tubbs also testified that she attempted to avoid foods containing avocados, bananas, and sulfites but also that she would be occasionally exposed to these items and to foods prepared by persons wearing latex gloves. Although she had not had an anaphylaxis incident since 1992, Ms. Tubbs testified that on several occasions, she was required to seek treatment in an emergency room after Benadryl did not alleviate her reaction.

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<sup>1</sup>American Medical Association, *Guides to the Evaluation of Permanent Physical Impairment* 178, (Linda Cocchiarella & Gunnar B.J. Anderson eds., 5th ed. 2001).

The trial court determined that Ms. Tubbs had an anatomical impairment of 50%, and awarded 60% permanent partial disability to the body as a whole. St. Thomas has appealed, contending that the trial court erred by admitting Dr. Marney's testimony concerning impairment. Alternatively, it asserts that the trial court erred by finding that the anatomical impairment was more than 5% to the body as a whole and that the award should be capped at one and one-half times the impairment.

## II.

Courts reviewing an award of workers' compensation benefits must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When conducting this examination, Tenn. Code Ann. § 50-6-225(e)(2) requires the reviewing court to "[r]eview . . . the trial court's findings of fact . . . 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." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). However, the reviewing courts need not give similar deference to a trial court's findings based upon documentary evidence such as depositions, *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006); *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004), or to a trial court's conclusions of law, *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

## III.

St. Thomas made a motion *in limine* to exclude Dr. Marney's testimony on the ground that his testimony concerning Ms. Tubbs's impairment was not consistent with the AMA Guides as required by Tenn. Code Ann. § 50-6-204(d)(3)(B). The trial court denied the motion. The hospital renews this argument on appeal and insists that Dr. Marney's testimony concerning Ms. Tubbs's impairment was not admissible because (1) Dr. Marney based the rating on the portion of the Guides applicable to skin disorders even though he testified that Ms. Tubbs did not have a skin disorder and (2) Dr. Marney based his rating on an unnamed book that he did not produce even though he was requested to do so. The hospital also asserted that Ms. Tubbs's impairment should have been 5%, rather than 50%.

In response, Ms. Tubbs points out that Dr. Marney explained his method and reasoning for using Table 8-2 under questioning from her counsel and that St. Thomas did not produce any medical evidence which contradicted that opinion. The trial court found that "Dr. Marney was clear and credible that he applied Class III of Section 8-2 to [Ms. Tubbs]

because her condition is not limited to a cosmetic skin condition.” The court noted that the evidence showed Ms. Tubbs was extremely sensitive to latex, and that latex is ubiquitous, present in hundreds of everyday products.

Rulings on the introduction of evidence are reviewed on an abuse of discretion basis. *Dockery v. Board of Prof'l Responsibility*, 937 S.W.2d 863, 866 (Tenn. 1996). Dr. Marney’s explanation of his use of the AMA Guides to determine Ms. Tubbs’s impairment is not a model of clarity. At various times, he referred to Table 8-2, concerning skin disorders, to an unnamed source, and to a judicial opinion supplied to him by Ms. Tubbs’s attorney. However, as the trial court noted, he was unwavering in his opinion that her sensitivity to latex had advanced to a point where it significantly limited her activities of daily living.

Because of Ms. Tubbs’s limitations, Dr. Marney believed that a Class 3 impairment under Table 8-2 most accurately reflected her condition. The criteria set out in Table 8-2 for a Class 3 impairment are: “Skin disorder signs and symptoms present or intermittently present **and** limited performance of many activities of daily living **and** may require intermittent to constant treatment.” AMA Guides, p. 178. The record contains Ms. Tubbs’s unrefuted testimony that satisfies each of those three criteria. Moreover, St. Thomas presented no affirmative evidence that Dr. Marney’s method was improper or that his conclusion was inconsistent with the Guides.

Accordingly, we conclude that the trial court did not abuse its discretion by admitting Dr. Marney’s testimony concerning Ms. Tubbs’s impairment. For the same reasons, we further conclude that the evidence does not preponderate against the trial court’s finding that Ms. Tubbs sustained an anatomical impairment of 50% to the body as a whole as a result of her work-related latex allergy. In light of those conclusions, it is not necessary to address St. Thomas’s arguments concerning the application of Tenn. Code Ann. § 50-6-241(d).

#### IV.

The judgment of the trial court is affirmed. The costs are taxed to St. Thomas Hospital and its surety, for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., JUSTICE

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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 St. Thomas Hospital and its surety, for which execution may issue if necessary.

PER CURIAM