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

SHIRLEY DALE REEVES v. WAL-MART, INC., ET AL.

Chancery Court for Lewis County
No. 3589

No. M1998-00879-WC-R3-CV - Decided - April 10, 2000

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 Plaintiff, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
(September 23, 1999 Session)

SHIRLEY DALE REEVES,	)	
	)	
Plaintiff/Appellee,	)	**LEWIS COUNTY CHANCERY**
	)	
v.	)	**M1998-00879-WC-R3-CV**
	)	
WAL-MART STORES, INC. and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,	)	**HON. CORNELIA A. CLARK**
	)	
Defendant/Appellant.	)	

FOR THE APPELLEE:

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M E M O R A N D U M O P I N I O N
Mailed - March 8, 2000
Decided - April 10, 2000

Members of Panel:

Justice Adolpho A. Birch, Jr.
Senior Judge F. Lloyd Tatum
Special Judge Carol L. McCoy

MODIFIED AND REMANDED

F. LLOYD TATUM, SENIOR JUDGE

OPINION

This workers' compensation appeal has been referred to the Special Worker's Compensation Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e) for a hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

This is an appeal by the defendants, Wal-Mart Stores, Inc. and its workers' compensation insurance carrier, Insurance Company of the State of Pennsylvania, from a judgment of the trial court granting the plaintiff, Shirley Dale Reeves, an award based upon a finding of 40 percent permanent disability to the body as a whole. The defendants present two issues: (1) that the trial court erred in finding that plaintiff has a 10 percent permanent medical impairment, and (2) that the trial court erred in finding that the two and one-half (2½) times cap as found in Tennessee Code Annotated § 50-6-241(a) does not apply in this case.

The plaintiff is a 43 year old lady with a GED but no vocational training. She had previous work experience sewing at an H.I.S. factory and also worked as a cashier and cook. She began working for Wal-Mart in 1988 as a cashier. In addition, she worked at Wal-Mart as a layaway clerk and subsequently worked in the receiving department, where she was injured in 1995.

The plaintiff testified that in 1988, she was involved in a non-work related automobile accident and sustained a back injury. Surgery was performed by Dr. David Gaw and the plaintiff went back to work with no restrictions. On November 29, 1995, she again injured her back when she lifted a case of oil at Wal-Mart. According to the plaintiff, she has been unable to work since she last injured her back.

Dr. Paul McCombs, performed surgery for the work-related injury in 1995. The plaintiff testified that Dr. McCombs placed the following restrictions on her activities:

> no lifting over 8-10 pounds, no bending, twisting or stooping, no standing for a period more than 15 fifteen minutes and no sitting for a period more than one hour.

The plaintiff testified that when she returned to work for Wal-Mart after the accident, she was given a job as a door greeter. She testified that she was forced to stand to do this work, although a stool had been furnished for her to sit when she needed to. Her duties

required her to stand on a hard surface to check the receipt of customers leaving the store. The plaintiff testified that she had an allergy to certain chemicals and smoke which caused her to lose her voice. After working two and a half hours as a door greeter, she left work and told Kay Gordon that she was going home. She testified that she was unable to work because of her allergy condition and back pain. The plaintiff testified that she could not use the stool in her greeter position, because she had to stand to check receipts. She told Mrs. Seaton, an assistant manager at Wal-Mart, that she was leaving because her back was hurting, and she lost her voice because of the smoke in the vestibule. She was unable to talk with customers about checking receipts, which was part of her job duties. Wal-Mart did not offer her a different position, and she applied for work at twenty-seven (27) or twenty-eight (28) places without success.

The plaintiff testified that Dr. David Cross treated her for allergies, and she had asked Dr. Cross to provide Wal-Mart with a statement of the reason that she could not go back to work. She testified that "he (Dr. Cross) said if I was away from all the chemicals and stuff that caused my allergies, you know, that I could do it." She testified that she told Mr. Lockmiller, the store manager, that she could not work because of her allergies and her back.

The plaintiff testified that she had applied to the Department of Employment Security for unemployment benefits and advised the Department that she left work because of her allergies and her back. She testified that she gave "a thing from Dr. Cross and I took my thing from Dr. McCombs with my restrictions" to the Department of Employment Security.

There was an exhibit, which was a decision dated 9-23-96 of the Tennessee Department of Employment Security in favor of the plaintiff, that contained the following finding by the Department:

> Claimant was forced to leave most recent employment due to an illness or injury which was not work-related. Claimant has provided medical evidence of injury or illness not related to work, notified employer of condition and returned to employer to request re-employment as soon as again able to perform former duties. Since former work is not currently available, claim is approved under T.C.A. § 50-7-303.

Melissa Reeves, the plaintiff's daughter, testified that she lived with her mother and father. She testified that since the industrial accident, the plaintiff can do no sweeping, mopping, cannot lift heavy objects, cannot bend, cannot wash cars, cannot dance, cannot

walk over one mile, and cannot go to archery shoots. The plaintiff could not drive, could not sit in one position over seven minutes, and could not "get out and move around, [or] run errands." The witness testified that her mother had "no problems" before the accident.

The witness also testified that the plaintiff was allergic to smoke and chemicals and that the allergy takes her voice away for "months on end." The allergy also causes plaintiff to lose her breath.

Janice Seaton, testified that she was the assistant manager at Wal-Mart and knew that the plaintiff suffered with allergies. After the plaintiff was released to return to work, she was given the job as an exit greeter, with pay equal to that she had earned at the time of the industrial accident. The witness testified that as an exit greeter, the plaintiff was required "to be at the exit doors, thank customers for shopping, check random receipts marked with security tape …" and "[j]ust basically being there for the customers." The plaintiff was furnished a stool and was told to make herself comfortable. The witness testified that the plaintiff was told that she was not required to stand if she felt that she could not.

There was a written job description for an exit greeter. The job description described some duties such as "keeping the front entrance clean" and "cleaning up front entrance spills promptly." Mrs. Seaton testified that this work was done by a stockman and that the greeter's duty was merely to notify the stockman. This job description provides "reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions." Under the heading "Physical Demands," it is stated that "the person is required to stand regularly." As previously indicated, the plaintiff was furnished a stool and told that she should use it when necessary.

The witness testified that the plaintiff left the greeter job after approximately two hours. The plaintiff told Mrs. Seaton that "she was losing her voice because of smoke from the vestibule coming into the store." Mrs. Seaton testified that the plaintiff gave no other reason for leaving. The plaintiff was to return to work the next day at 11:00 a.m. The plaintiff telephoned the witness and told her that her throat was no better, that she could not talk, and that she was not able to come to work. The plaintiff gave no other reason for not working on that day. Mrs. Seaton testified that on the following Friday, the plaintiff

came into the store for her paycheck and said that she was not able to work at the front of the store due to her allergies. The plaintiff gave no other reason for her inability to work.

Mr. Matt Lockmiller, the store manager, testified that he did not know that the plaintiff had allergies before giving her the greeter job. Mr. Lockmiller testified that after receiving the plaintiff's medical restrictions, he discussed with the plaintiff what position she could be placed in. His testimony was substantially the same as Mrs. Reeves as to the plaintiff's duties. He testified that:

> [W]e informed Ms. Reeves we wanted to do anything we could to make her comfortable. We offered her a stool to take care of her, for her to sit on or whatever. Even offered her frequent breaks if she needed them, basically anything she needed to be comfortable doing the position.

In an "exit interview" document, the "information on termination" was "voluntary, unable to perform job due to restrictions on back and allergies."

The deposition of Dr. Paul Raymond McCombs, a neurosurgeon, was introduced into evidence. Dr. McCombs testified that he first saw plaintiff on December 17, 1988, for a second opinion from Dr. David Gaw. After examining the plaintiff, Dr. McCombs concurred with Dr. Gaw, that a percutaneous diskectomy at the L5-S1 level was indicated. Dr. McCombs testified that he next saw the plaintiff in February, 1996, when a CAT scan revealed a rightward disc protrusion of L5-S1 and lateral recess stenosis on that side. He performed surgery on April 16, 1996, from which there were no complications.

On July 31, 1996, Dr. McCombs released the plaintiff to do sedentary work with no lifting in excess of eight (8) pounds and no repetitive bending or stooping. Dr. McCombs saw the plaintiff again on April 9, 1997, because she was having pain in her back and down into her legs as a result of standing for a protracted period in her employment. He recommended sedentary labor with the following restrictions:

> [S]he should not lift more than in excess of 8 pounds. I feel she should not stand for more than 15 minutes at a time without a break. [S]he should also avoid repetitive twisting, bending and stooping ….

Dr. McCombs testified that the plaintiff had 5 percent impairment to the body as a whole as a result of the surgery performed by him. He testified that the plaintiff already had 5 percent impairment as a result of the surgery previously performed by Dr. Gaw; hence, the plaintiff had a total of 10 percent impairment to the whole body, according to the AMA Guidelines, after the second surgery. Dr. McCombs testified that section 3.3(f)

of the AMA Guides, 4th Edition, paragraph 9, provided:

> "From historical information and previously compiled medical data, determine if there was a preexisted [sic] impairment. If the previously compiled data can be verified as being accurate, they may be used in apportionment. The percentage based on the previous findings would be subtracted from the percentage based on the current findings."

The deposition of Dr. David W. Gaw, an orthopedic surgeon, was introduced in evidence. Dr. Gaw testified that he examined the plaintiff on February 23, 1998, and also examined the plaintiff's medical records, history, and performed a physical examination. He testified that he performed a percutaneous diskectomy at L5-S1 in 1988. He gave the plaintiff no specific restrictions after the 1988 surgery but elected to permit plaintiff to be guided by her pain as to what she was able to do. It was Dr. Gaw's opinion that, according to the AMA Guidelines, the plaintiff had a total of 16 percent impairment to the body as a whole after the second surgery. One half, or 8 percent, of this impairment was attributable to the 1988 surgery. Dr. Gaw affirmed the section 3.3(f), AMA Guidelines, concerning the above quoted provision of reduction for pre-existing impairment.

Dr. Gaw testified that the plaintiff could lift twenty (20) pounds occasionally and five (5) to ten (10) pounds frequently. She should not remain in any one static position, and she would be unable to sit for more than one hour. The plaintiff would have trouble with frequent twisting, bending or standing in awkward positions. Dr. Gaw testified that the plaintiff could do light work and could work eight (8) hour shifts. The plaintiff could stand for six (6) hours or sit for six (6) hours, but would be required to alternate positions during these periods.

The trial judge found the plaintiff to be "generally" a credible person, but she expressed "concern" about the plaintiff stressing to her employer and to the Tennessee Department of Employment Security that her inability to return to work was because of her non-work related allergies. This served her interest in her successful attempt to procure unemployment benefits. In the later workers' compensation proceeding, she stressed her back condition as the cause of her inability to return to work, which served her interest in her successful attempt to procure workers' compensation benefits. The findings of the Department of Employment Security are wholly inconsistent with plaintiff's theory and testimony in this case. The defendant made no defense of estoppel based on the plaintiff's

obvious inconsistent positions in these two proceedings and stipulated that the accident complained of was compensable. This leaves no questions of estoppel for determination, although this conduct seriously discredits her testimony. We share the trial judge's "concern" about these inconsistencies in the two proceedings.

We now address the first issue, stating that the trial court erred in finding that plaintiff sustained a 10 percent permanent medical impairment to the body as a whole and basing the award upon this finding. We accredit the testimony of Dr. Gaw, the first treating physician, with regard to the extent of the plaintiff's medical impairment rating. As above indicated, both Dr. Gaw and Dr. McCombs were familiar with plaintiff's condition after both the 1988 automobile accident and the industrial accident in 1995. While the doctors did not concur as to the extent of her impairment, they both testified that one-half of the impairment was from the 1988 accident, and the remaining one-half was from the 1995 accident. Tennessee Code Annotated § 50-6-241 provides in part as follows:

> **Maximum permanent partial disability award for causes arising on or after August 1, 1992 - Reconsideration of industrial disability issue. -** (a)(1) For injuries arising on or after August 1, 1992, in cases where an injured employee is eligible to receive any permanent partial disability benefits, pursuant to § 50-6-207(3)(A)(i) and (F), and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is two and one-half (2½) times the medical impairment rating determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment (American Medical Association), the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community. In making determinations, the court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition.
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> * * *
>
> (b) Subject to factors provided in subsection (a) of this section, in cases for injuries on or after August 1, 1992, where an injured employee is eligible to receive permanent partial disability benefits, pursuant to § 50-6-207(3)(A)(i) and (F), and the pre-injury employer does not return the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is six (6) times the medical impairment rating determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment (American Medical Association), the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community. In making such determinations, the court shall consider all pertinent factors,

> including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition.

The previously quoted section 3.3(f) of the AMA Guides are a part of the Guides and must be considered by us in accordance with the legislative mandate of Tennessee Code Annotated § 50-6-241. We note that section 3.3(f) of the Guides has a basis in case law. In Riley v. INA/Aetna Ins. Co., 825 S.W.2d 80 (Tenn. 1992), the Court held as follows:

> We hold that the last injurious injury rule does not apply to the instant case because, unlike the situation in Baxter, Bennett, and McCormick, there was an assessment of Plaintiff's first-injury permanent disability before the occurrence of the second injury.

Id. at 82.

We also note that the exception was recognized in an unreported opinion of a Special Workers' Compensation Appeals Panel in Lamb v. T.C.S.A., No. 01S01-9303-CV-00050, 1993 WL 835548 (Tenn. Dec. 8, 1993), wherein it was stated:

> We are of the opinion that appellant's reliance upon the last injurious injury rule is inapplicable in the instant case. We are of the opinion that Riley v. INA/Aetna Ins., 825 S.W.2d 80 (Tenn. 1992), is controlling here. In Riley the court carved an exception to the last injurious injury rule where, prior to the second injury, there was "an assessment of permanent disability properly attributable to the first injury." Id. [at] 82. The court held that this was sufficient to avoid the application of the rule and held that the first employer was liable for that portion of the plaintiff's injuries it caused. See [i]d.

The plaintiff cites the rule that an employer takes an employee as he is and cannot escape liability when the employee, upon suffering a work-related injury, incurs greater disability because the new injury is superimposed upon a pre-existing injury or disability. In support of this rule, the plaintiff cites Baxter v. Smith, 364 S.W.2d 936 (Tenn. 1962), and its progeny, wherein the court found that the doctrine of contribution and apportionment is inconsistent with the above stated rule and rejected as "mere speculation" any effort to apportion the disability of a worker who became disabled as a result of the succession of injuries. We note that section 3.3(f) of the AMA Guides is applicable only when the existence of a pre-existing impairment can be accurately determined, eliminating speculation, as in the present case. We hold and find that the medical impairment rating upon which the plaintiff's award may properly be based is 8 percent permanent partial disability to the body as a whole.

We now turn to the second issue in which the defendant says that the two and one-

half (2½) times cap as provided in Tennessee Code Annotated § 50-6-241(b) applies to this case. The pertinent portions of Tennessee Code Annotated § 50-6-241 are above quoted. It is insisted by the plaintiff that her injuries prevented her from a meaningful return to work, and the two and one-half (2½) times cap does not apply.

The defendant offered the plaintiff a position at the Wal-Mart store as the exit door greeter at a wage equal to or greater than that which she was receiving at the time of her injury. When the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, Tennessee Code Annotated § 50-6-241(a)(1) limits the maximum permanent partial disability award that the employee may receive to two and one-half (2½) times the medical impairment rating determined pursuant to the guidelines mentioned in the statute. The statute requires a court to consider certain pertinent factors set out therein in making a determination of disability.

In Newton v. Scott Health Care Ctr., 914 S.W.2d 884 (Tenn. 1995), it was held that "a return to work that the employee is unable to perform because of his injuries is not a meaningful return to work." The Newton court also held:

> In the case of Joe Bailey v. Krueger Ringier, Inc., d/b/a Ringier America, (Weakly County, No. 02S01-CH-00061, filed at Jackson May 17, 1995, adopted by the Supreme Court per curiam), a Workers' Compensation Panel approved a ruling by the trial judge who construed the meaning of the words "and the pre-injury employer must return the employee to employment …" in Tenn. Code Ann. § 50-6-241(a)(1). The court held that a return to work that the employee is unable to perform because of his injuries is not a meaningful return to work (emphasis added).
>
> * * *
>
> If the offer from the employer is not reasonable in light of the circumstances of the employee's physical ability to perform the offered employment, then the offer of employment is not meaningful and the injured employee may receive disability benefits up to six times the amount of the medical impairment. On the other hand, an employee will be limited to disability of two and one-half times the medical impairment if his refusal to return to offered work is unreasonable. The resolution of what is reasonable must rest upon the facts of each case and be determined thereby.

Id. at 886.

The preponderance of the evidence establishes that the door greeter job offered to plaintiff by the defendant met the restrictions imposed upon the plaintiff by both Dr. McCombs and Dr. Gaw. The preponderance of the evidence establishes that the plaintiff was required, as door greeter, to thank customers for shopping, to randomly check receipts

of customers leaving the store, and "[j]ust basically being there for the customers." The plaintiff was furnished a stool and told to make herself comfortable; she was not required to stand or sit for any particular length of time. She was offered frequent breaks if needed. After working two hours, she told the assistant manager that she was leaving because of her allergies and repeated this statement on subsequent occasions. The plaintiff applied for unemployment benefits with the Tennessee Department of Employment Security in which she submitted sufficient evidence to convince the department that she "was forced to leave most recent employment due to an illness or injury which was not work-related."

For the foregoing reasons, we find merit in the second issue and find that the plaintiff is entitled only to the maximum permanent partial disability award of two and one-half (2½) times the medical impairment rating of 8 percent.

The judgment of the trial court is modified so as to award plaintiff compensation based upon a 8 percent medical impairment and we find that the two and one-half (2½) times cap is applicable. The plaintiff is, therefore, entitled to receive benefits for 20 percent permanent partial disability to the whole body. The case is remanded to the trial court for such further proceedings as may be necessary consistent with this opinion.

Costs are adjudged against the plaintiff.

F. LLOYD TATUM, SENIOR JUDGE

CONCUR:

ADOLPHO A. BIRCH, JR., JUSTICE

CAROL L. MCCOY, SPECIAL JUDGE