IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
(June 20, 2000 Session)

THE KROGER COMPANY, ET AL. v. SARA COOPER

Direct Appeal from the Circuit Court for Davidson County
No. 98C-1035 Walter C. Kurtz, Judge

No. M1999-01120-WC-R3-CV - Mailed - July 26, 2000
Filed - September 1, 2000

The employer has appealed contending the trial court's award of permanent partial disability benefits based on thirty-five percent to the leg for a torn meniscus is excessive.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court Affirmed.

LOSER, SP. J., delivered the opinion of the court, in which DROWOTA, J. joined. TURNBULL, SP.J., not participating.

Clifford Wilson, Gracey, Ruth, Howard, Tate & Sowell, Nashville, Tennessee, for the appellants, The Kroger Company and CNA Insurance Company.

James P. Smith, Jr., Bean & Smith, Crossville, Tennessee, for the appellee, Sara Cooper.

MEMORANDUM OPINION

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) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. As discussed below, the panel has concluded the judgment of the trial court should be affirmed.

The employee or claimant, Cooper, is fifty-one years old and has worked for Kroger for thirty years. On September 11, 1997, she tripped over a customer's walking cane, twisting her left knee and ankle. She was referred to an orthopedic specialist, Dr. Jon Simpson.

Dr. Simpson ordered diagnostic tests, which revealed a grade II tear of the left lateral meniscus, which he repaired surgically on November 17, 1997. Following surgery, the doctor recommended that the claimant return to work on December 8, 1997, but without standing or sitting

more than four hours. On January 28, 1998, the doctor removed those restrictions and assessed a permanent impairment rating of two percent to the leg. The claimant continued to have swelling and pain in the knee, for which the doctor prescribed anti-inflammatory medication on April 22, 1998. The claimant has not worked for Kroger since January 12, 1998, because of her disability. She has a history of chronic pain and other health problems, which pre-existed her injury at Kroger.

The claimant has been a licensed real estate agent for eighteen years. She testified that her ability to work in that field is impaired also because of her injury. She cannot walk boundary lines and has difficulty climbing stairs and driving. She also has difficulty doing housework, cooking, working in the yard and taking care of her horses since the work related accident. From the above evidence, the trial judge, finding the claimant to be a credible witness, awarded permanent partial disability benefits based on thirty-five percent to the leg.

Appellate review of findings of fact by the trial court is de novo upon the record of the trial court, accompanied by a presumption of correctness of those findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). This standard requires the panel to examine in depth a trial court's factual findings and conclusions. The reviewing tribunal is not bound by a trial court's factual 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 (Tenn. 1991). However, where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, Presley v. Bennett, 860 S.W.2d 857 (Tenn. 1993), because it is the trial court which had the opportunity to observe the witness's demeanor and hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173 (Tenn. 1999). The extent of an injured employee's disability is a question of fact. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987).

The employer argues that the award is excessive in light of the relatively low medical impairment rating. The opinion of a qualified expert with respect to a claimant's clinical or physical impairment is a factor to be considered along with all other relevant circumstances, but it is for the court to determine the percentage of the claimant's industrial disability. Worthington v. Modine Mfg. Co., 798 S.W.2d 232 (Tenn. 1990). An injured employee is competent to testify as to her own assessment of her physical condition and such testimony should not be disregarded. McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179 (Tenn. 1999). Additionally, the employer takes the employee with all pre-existing conditions and cannot escape liability when the employee, upon suffering a work related injury, incurs disability far greater than if she had not had the pre-existing conditions. Kellerman v. Food Lion, Inc., 929 S.W.2d 333 (Tenn. 1996).

Given the employee's age and the effect that her work related injury has had on her ability to work and earn an income, and for all of the above reasons, the panel finds that the evidence fails to preponderate against the findings of the trial court. The judgment is affirmed. Costs on appeal are taxed to the appellants.

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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 appellants, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM