

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

VALERIE A. LEWIS v. SATURN CORPORATION

**Appeal from the Chancery Court for Davidson County
Irvin H. Kilcrease, Jr., Chancellor**

**No. M1999-00422-WC-R3-CV - Mailed May 4, 2000
Filed - September 6, 2000**

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 of findings of fact and conclusions of law.

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

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

Thomas H. Peebles, IV and K. Suzanne Crenshaw, Columbia, Tennessee, for the appellant, Saturn Corporation.

Lloyd T. Kelso, Nashville, Tennessee, for the appellee, Valerie A. Lewis.

MEMORANDUM OPINION

The trial court found that employee, Valerie A. Lewis, suffered a compensable injury which arose out of the course and scope of her employment with employer, Saturn Corporation. The trial court awarded employee twenty percent (20%) permanent partial disability to the body as a whole, in addition to all medical expenses, and future medical expenses, and temporary total disability benefits.

The trial court held the employer was entitled to a set-off of \$9,762.93 for disability payments in accordance with Tenn. Code Ann. §50-6-114 (b).

The trial court also granted employee discretionary costs in the amount of \$2,846.50.

The employer, Saturn Corporation, raises on appeal two issues: (1) The trial court erred in finding that employee's back injury arose out of the course and scope of employee's employment, and (2) The trial court erred in finding that employee sustained her burden of proof as to the causation of her back injury.

The employee raises on appeal two issues (1) the trial court erred in holding that employer was entitled to a set-off of \$9,762.93, and (2) the trial court erred in awarding employee two (2) times her medical impairment instead of awarding two and one-half (2 ½) times her medical impairment.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. §50-6-225 (e)(2). As discussed below, the panel has concluded that the judgment of the trial court should be affirmed.

Employee was forty-two (42) years old at the time of trial. She left high school in the 12th year prior to graduation. She attended Ross Medical Education Center and obtained a certificate as a medical-dental administrator. Employee was employed as a medical insurance biller for various hospitals and worked for Buick Motor Co. and Fisher Body prior to being employed at Saturn Corporation.

Employee began working for Saturn Corporation on January 16, 1992. Employee did a variety of jobs at Saturn, and in 1995 she was assigned to the "lost foam team" where she met fellow employee, Deborah Leach, who was a member of the same team. Employee and Ms. Leach did not get along well. Ms. Leach complained about employee coming in late, being out on medical, sleeping on the job and having bad work ethics.

On October 8, 1996, employee had a blowout on her way to work and was informed that her tire had been slashed in a way that would cause air to leak out slowly. She thought that Ms. Leach had something to do with this, and she and Ms. Leach had a conversation about the tire. Later on the same day, employee was standing near a table talking to Melvin Brantley, a co-worker, when Deborah Leach, carrying supplies, approached the employee and shoved her with her shoulder. Employee fell back on a table, rolled off the table and landed in a chair. Employee did not feel any pain initially. She first felt pain approximately two hours later when she was at home while trying to use the bathroom.

Employee was out of work on vacation until October 16, 1996. When employee returned to work on October 16, 1996, she went to Initial Care Facility because of pain in her back, and from there she was sent to Dr. Bartsokas. Employee informed Dr. Bartsokas that she had been pushed causing her to twist through her trunk and low back area and developed low back pain. She further revealed that she had experienced back pain previously, apparently two months prior to this incident and had undergone an MRI scan which was entirely normal.

On November 6, 1996, when Dr. Bartsokas saw the employee, he entertained the possibility that she was having some sort of disc damage as a component of her low back. He ordered a lumbar myelogram followed by a CT scan which revealed that employee suffered from disc protusion. On November 18, 1996, Dr. Bartsokas ordered employee to begin physical therapy. As a result of her success with physical therapy, Dr. Bartsokas released employee to return to work on January 3, 1997 with a twenty-five pound (25) lifting restriction.

When Dr. Bartsokas was asked if he had formed an opinion to a medical certainty as to whether or not the employee's low back pain and eventual surgery was caused by a work-related injury, he answered, "I think that that was a reasonable contributing factor in her needing surgery, yes."

Employee consulted Dr. Shannon Curtis, an orthopedic surgeon, at the request of Dr. Bartsokas. Dr. Curtis diagnosed the employee's problem as L5 radiculopathy, right lower extremity.

Dr. Curtis performed surgery on employee on April 7, 1997. The surgery was successful and Dr. Curtis opined that employee reached maximum medical improvement on July 31, 1997. He allowed her to return to work on June 2, 1997, with restrictions. Dr. Curtis gave the employee an impairment rating of ten percent to the body as a whole.

Employer's first issue is whether the trial court erred in finding the employee's back injury arose out of the course and scope of her employment.

The main thrust of employer's argument is that any injury received was the result of an intentional act by a co-employee. The trial court concluded that this was an intentional act by a co-employee. However, the trial court further found that the accident grew out of a work-related disagreement, and therefore compensable.

The Supreme Court has held that an assault growing out of argument over performance of work is compensable. *W. S. Dickey Manufacturing Company v. Moore*, 347 S.W.2d 493 (Tenn. 1961). The record indicates that the alleged assailant, Deborah Leach, disliked the employee because of her poor work performance, constant tardiness, and frequent absenteeism.

Any reasonable doubt as to whether injury arose out of employment, for compensability purposes, is resolved in favor of employee. *Braden v. Sears Roebuck and Company*, 833 S.W.2d 496 (Tenn. 1992).

After reading the entire record, we are satisfied that the trial judge was well justified in finding that the employee sustained a compensable injury.

In its' second issue, the employer contends that the trial court erred in finding that employee sustained an injury as a result of the October 8, 1996 accident. Generally, a compensable injury must be supported by medical proof. Both Dr. Bartsokas and Dr. Curtis were of the opinion that employee

sustained an injury because of the October 8, 1996 accident. Any reasonable doubt as to whether an injury arose out of employment or not is to be resolved in favor of employee seeking worker's compensation benefits. *Hall v. Auburntown Industries, Inc.*, 684 S.W.2d 614 (Tenn. 1985).

We find the evidence does not preponderate against the trial court's finding of a compensable injury to the body as a whole.

Employee argues on her appeal that employer was not entitled to offset of \$9,762.93 for disability payments made to employee from December 17, 1997 through May 12, 1998. At the beginning of the trial, employee's attorney stated, "I think we can agree on the issues of TTD payments and any set-offs as to disability." Nothing else in the entire record contains anything about a set-off. It is improper to raise an issue for first time on appeal. We do not deem this issue appropriate for review.

Employee next argues that the trial court erred in awarding employee a vocational disability of twenty percent (20%) to the body as a whole rather than awarding two and one-half (2.5) times the medical impairment rating (25%).

The record in this case shows that employee has returned to full time work and earns an amount that is at least equal to her earnings at the time of injury.

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 evidence is otherwise. Tenn. Code Ann. §50-6-225 (e)(2).

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).

The judgment of the trial court is affirmed. Costs on appeal are taxed to appellant.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

VALERIE A. LEWIS v. SATURN CORPORATION

No. M1999-00422-SC-WCM-CV - Filed - September 6, 2000

JUDGMENT

This case is before the Court upon motions for review of Saturn Corporation and of Valerie A. Lewis pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review of Saturn Corporation is not well taken and should be denied.

It further appears to the Court that Valerie A. Lewis' Motion for Review should be and is hereby granted solely as to the amount of setoff. The Court concludes that the Special Workers' Compensation Review Panel erred in holding that the issue of the amount of setoff was waived. This case is remanded to the trial court for purposes of conducting a hearing on the issue of the amount, if any, of the setoff to which the defendant, Saturn Corporation, may be entitled under Tenn. Code Ann. § 50-6-114(b).

It further appears to the court that all other issues presented in Valerie A. Lewis' Motion for Review are not well taken and should be denied.

It is, therefore, ordered that the Motion for Review of Valerie A. Lewis is granted as to the issue of setoff, and this case is remanded to the trial court for proceedings in accordance with this order. The remainder of Valerie A. Lewis' Motion for Review and the Motion for Review of Saturn Corporation are denied.

Costs are taxed equally to the parties, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

BIRCH, J., NOT PARTICIPATING