IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
(April 26, 2000 Session)

GLENDA FAYE TOLLIVER v. NATIONAL HEALTH CARE CORPORATION

Direct Appeal from the Chancery Court for Knox County
No. 133437-2 Daryl R. Fansler, Chancellor

No. E1999-01017-WC-R3-CV - Filed: July 11, 2000
Mailed: June 5, 2000

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 a hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court found that the plaintiff sustained an accidental injury during her employment with the defendant and that the trial court awarded the plaintiff a twelve and one-half (12-½) percent vocational disability. After a complete review of the record, briefs of the parties and applicable law, we affirm.

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

LAFFERTY, SR. J., delivered the opinion of the court, in which BARKER, J., and PEOPLES, SP. J., joined.

Robert W. Knolton, Oak Ridge, Tennessee, for the appellant, National Health Care Corporation.

William A. Hotz, Knoxville, Tennessee, for the appellee, Glenda Faye Tolliver.

MEMORANDUM OPINION

The plaintiff, age 40, is a licensed practical nurse and a certified nursing assistant instructor. On March 6, 1996, the plaintiff was assisting Tracey Bunch, a nursing assistant trainee, in transferring a patient from a bed to a wheelchair in the defendant's health care center. The plaintiff testified that she felt pain in the right side of her neck, down her shoulders and at the base of her skull. The pain was in the cervical area and the right arm. The pain increased and the following day the plaintiff informed her supervisor. She was referred to Dr. Watson and then to Dr. Uzzle. The plaintiff testified that she had two past injuries, (1) in 1990, she sustained a cervical strain while

working. Her MRI was negative and she returned to work; (2) in 1993, she fell at the Cracker Barrel injuring her elbow, "it stoved up her neck" and she also injured her left knee. She returned to work. After treatment for her injury of March 6, 1996, the plaintiff returned to work on light duty. The plaintiff requested that her return be limited to an instructor, but she was made a supervisor on the three to eleven shift. On the same day that the plaintiff returned to work, she was fired.

At the time of trial, the plaintiff was working two jobs, one as an LPN at the UT hospital and as a supervisor for Helen Ross McNabb, a rehabilitation center. The plaintiff testified that she has problems doing her work, such as giving EKG's, lifting woman's breast, and any computer work, since she must keep her head down. The plaintiff cannot work the floor, lift patients and deliver meal trays.

By deposition, Tracey Michelle Bunch testified that on March 6, 1996, she was working as a nursing assistant trainee, working on her certified nursing assistant certification, when the plaintiff assisted her in moving an elderly patient in and out of bed. The plaintiff did not complain of any injury, but the following day the plaintiff was not available as the instructor. The following Monday, Ms. Bunch saw the plaintiff at work answering calls at the nurse's station. The plaintiff had to make a full body turn instead of just a simple head turn.

Keri Trammell, Director of the National Health Center, testified that she hired the plaintiff as an instructor for the certified nursing assistant program and as an LPN supervisor. She stated that she was familiar with the report of March 6, 1996, and that the plaintiff was referred to see Dr. Uzzle. The plaintiff was allowed to continue to work but on light duty. About May 1, 1996, Dr. Uzzle removed these restrictions. On May 29, 1996, Ms. Trammell called the plaintiff into her office and advised the plaintiff, based upon the medical reports, that she would be returned to a supervisor's position. The plaintiff refused to accept the supervisor's position, stating that she could only work as an instructor.

MEDICAL EVIDENCE

By deposition, Dr. Maren L. Watson, a family practitioner, testified that he saw the plaintiff on March 11, 1996, with a complaint of neck pains as well as headaches. The plaintiff advised Dr. Watson that she was lifting a patient at the National Health Center and that evening the pain got worse. In his examination, Dr. Watson found that the plaintiff's vital signs were normal, she was in no distress and cooperative with the exam. As to the musculoskeletal exam, Dr. Watson palpated the plaintiff's neck, upper back and shoulders and found generalized mild tenderness. Although Dr. Watson found no muscle spasms, he did note that the plaintiff's right shoulder was resting one inch lower than her left shoulder. Dr. Watson opined that the plaintiff certainly sustained a cervical muscle strain due to lifting a patient and this caused some pain in her neck that had radiated to her shoulders and middle back, which warranted a few days off from work. Dr. Watson testified that the plaintiff was unhappy with his recommended course of treatment and he did not see her again. Dr. Watson could not give an opinion as to any assessment for physical impairment for the plaintiff.

Dr. Jeffrey A. Uzzle, a physiatrist, testified that he specializes in the field of physical medicine and rehabilitation, a broad specialty that deals with evaluation, treatment, diagnosis, and rehabilitation of a number of different medical problems. Dr. Uzzle testified that he saw the plaintiff on March 13, 1996. The plaintiff, age 37, was an LPN instructor. She had a cervical strain in 1990, and in 1993 she had an injury to her right shoulder and neck. The plaintiff advised Dr. Uzzle that she strained her right arm and neck while helping a student lift a patient. The plaintiff had seen Dr. Watson, who recommended medications and physical therapy. In his examination, Dr. Uzzle described the plaintiff's cervical range of motion as being limited by pain in all directions, especially right rotation. Also, her lumbosacral range of motion was limited by pain in all directions, especially the right side bending. Dr. Uzzle found soft tissue tenderness to palpation in her neck and back musculature, more pronounced on the right side. Dr. Uzzle opined that the plaintiff, on March 6, 1996, strained her neck and arm helping a student lift a patient in her course of employment and developed pain in her neck, head, back, left lower extremity and both upper extremities. Between March 15, 1995, and March 25, 1996, Dr. Uzzle testified that the plaintiff called him complaining of continued pain and working conditions with her employer, National Health Center.

On March 25, 1996, Dr. Uzzle referred the plaintiff to Dr. Donna McHarge for a neurological consultation. Dr. McHarge ordered an MRI on the plaintiff, which revealed a right paracentral C5-6 disc herniation. Dr. Uzzle was unsure that the disc herniation was caused by the injury of March 6, 1996. Dr. Uzzle opined that the plaintiff had a cervical and arm strain associated with lifting a patient at the nursing home. Also, it was Dr. Uzzle's impression that the plaintiff's subsequent development of chronic pain syndrome was behaviorally motivated and he was unable to directly relate all of her complaints to her injury. Dr. Uzzle was unable to conclude that the plaintiff sustained any permanent physical impairment. The plaintiff reached maximum medical improvement on May 24, 1996.

At the request of plaintiff's counsel, Dr. Stephen E. Natelson, a neurosurgeon, saw the plaintiff on August 7, 1996. Dr. Natelson testified that the plaintiff gave him a history of injuring her neck, arm and shoulder while lifting a patient in the course of her employment on March 6, 1996. The plaintiff brought with her an MRI scan report and an EMG report. The EMG was not helpful. From Dr. Natelson's examination, he opined that the plaintiff had a ruptured disc between cervical 5 and 6. Based upon the history given to him, Dr. Natelson also opined that the disc herniation was caused by the work injury of March 6, 1996. Further, Dr. Natelson determined that the plaintiff sustained a 5 percent permanent physical impairment to the body as a whole, utilizing the AMA Guides. Dr. Natelson stated that he was not told of any past neck injuries to the plaintiff. In cross-examination, Dr. Natelson testified that he could change his mind over the cause of injury, but that he would have to know the exact facts and circumstances and compare any MRI's, myelograms or CT scans.

In a detailed findings of fact and conclusions of law, the trial court found that the plaintiff sustained an accidental injury on March 6, 1996. Further, the trial court found that the two and one-half (2-½) times cap did not apply in this case. However, the trial court awarded the plaintiff twelve and one-half (12-½) percent occupational disability as a result of the accident.

LEGAL ANALYSIS

The defendant asserts, in his first argument, that the evidence does not support the trial court's finding that the plaintiff sustained an accidental injury in the course of her employment, but that the incident merely aggravated a pre-existing condition.

A review of the findings of fact and conclusions of law made by the trial court is *de novo* upon the record, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225 (e)(2); *Stone v. City of McMinnville,* 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to independently weigh more in-depth the factual findings and conclusions of the trial court in a workers' compensation case. *See Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452, 456 (Tenn. 1988). However, considerable deference must be given to the trial court who has seen and heard the witnesses, especially where issues of credibility and weight of oral testimony are involved. *Jones v. Hartford Acc. & Indem. Co.,* 811 S.W.2d 516, 521 (Tenn. 1991).

The Tennessee Workers' Compensation Act defines a compensable injury in pertinent part as:

> an injury by accident arising out of and in the course of employment which causes either disablement or death of the employee…."

Tenn. Code Ann. § 50-6-102(a)(5).

If all three elements are present, the injury is compensable. *Fink v. Caudle,* 856 S.W.2d 952, 958 (Tenn. 1993). It is well established that the plaintiff in a workers' compensation suit bears the burden of proving every element of the case by a preponderance of the evidence, including the existence of a work-related injury by accident. *Hill v. Eagle Bend Mfg., Inc.,* 942 S.W.2d 483, 487 (Tenn. 1997); *See Talley v. Virginia Ins. Reciprocal,* 775 S.W.2d 587, 591 (Tenn. 1989). An injury must both "arise out of" as well as be "in the course of" employment to be compensable under workers' compensation. *Id.* An accidental injury arises out of and is in the course and scope of employment if it has a rational connection to the work and occurs while the employee is engaged in the duties of employment. *Id. See Orman v. Williams Sonoma,* 803 S.W.2d 672, 676 (Tenn. 1991). Except in the most obvious and routine cases, the plaintiff in a workers' compensation suit, must establish causation by expert medical evidence. *Id.* Although causation cannot be based upon speculative or conjectural proof, absolute medical certainty is not required and reasonable doubt is to be construed in favor of the employee. *Id. See White v. Werthan Indus.,* 824 S.W.2d 158, 159 (Tenn. 1992). When medical testimony differs, it is within the discretion of the trial court to determine which expert testimony to accept. *Kellerman v. Food Lion, Inc.,* 929 S.W.2d 333, 335 (Tenn. 1996). However, when the medical evidence is presented by depositions, as in this case, this Court may draw its own conclusions about the weight and credibility of that testimony. *Krick v. City of Lawrenceburg,* 945 S.W.2d 709, 712 (Tenn. 1997).

In its findings of fact, the trial court commented extensively on the medical testimony of all three physicians. The trial court noted that all three doctors found that the plaintiff sustained a

cervical strain to the neck and right arm related to the event of March 6, 1996. An MRI revealed that the plaintiff had a herniated C5-6 disc, which was not present in a prior MRI made in 1991. Dr. Natelson related this disc to the neck injury of March 6, 1996, and believed that the plaintiff sustained a 5 percent impairment to the body as a whole. Also, the trial court commented on the difference of opinion of Dr. Uzzle as to the plaintiff's cause of continued pain, although on light duty. Dr. Uzzle did not feel that the plaintiff's complaints were consistent with a cervical strain or a ruptured disc at C5-6 and, therefore, she did not have any permanent impairment. Based upon this medical testimony and the plaintiff's testimony, the trial court found that she sustained an accidental injury on March 6, 1996. After a complete review of the record, we find no compelling reason to disagree with the trial court's judgment that the plaintiff sustained a work-related injury.

Next, the defendant complains that the evidence does not establish that the plaintiff sustained any permanent vocational disability as a result of the reported incident. Further, the defendant asserts that there is no medical proof to support the trial court's finding that the plaintiff received a residual vocational disability. The defendant cites the testimony of Dr. Natelson. Understanding the plaintiff's occupation of an LPN and CNA instructor, Dr. Natelson stated nothing that would restrict her from her occupation as a CNA instructor. Also, the plaintiff would not be at risk in lifting patients from her herniated disc. Likewise, the defendant cites that the testimony of Dr. Uzzle, from a work standpoint, was unable to set any specific restrictions on the plaintiff because of the self-limited nature of her FCE.

The trial court commented on the inability of Dr. Uzzle to testify as to any work restrictions on the part of the plaintiff due to an invalid functional capacity evaluation on the part of the plaintiff. Likewise, Dr. Natelson placed no work restrictions on the plaintiff. Therefore, the trial court was compelled to weigh the testimony of the plaintiff as to her continued pain in the workplace.

It is well established that the extent of vocational disability is a question of fact to be determined from all the evidence, including any lay and expert testimony. *Collins v. Howmet Corp.*, 970 S.W.2d 941, 943 (Tenn. 1998); *Henson v. City of Lawrenceburg*, 851 S.W.2d 809, 812 (Tenn. 1993). Factors to be considered in determining the extent of vocational disability include the employee's job skills and training, education, age, employee's capacity to work, extent of anatomical impairment, duration of impairment, local job opportunities, and the employee's capacity to work at the kinds of employment available to her in her disabled condition. *Collins v. Howmet*, 970 S.W.2d at 943. The employee's own assessment of her physical condition and resulting disability is competent testimony that should be considered as well. *Id.*

We have examined the testimony of the plaintiff to determine whether the evidence supports a finding of vocational disability. The record reflects that the plaintiff, age 41 at trial, has been employed in the health care field for most of her adult life. The plaintiff testified that although she is working two jobs, she had difficulty in doing computer work which requires her head to be down at an angle. She had difficulty in administering EKG's, even to the extent of lifting a woman's breast will cause pain in her neck. The plaintiff stated that she can no longer work with adult patients or perform any type of medical surgical work where patients have to be lifted or turned. This is the reason she now works in the nursery unit of UT. The plaintiff admits that she put herself

on limited work assignments due to her inability to bend, stoop and lift patients. Since the trial court found that the plaintiff sustained a vocational disability, it is obvious that the trial court found the plaintiff's testimony credible and reasonable as to her continuing problems. We find no reason to quarrel with the trial court's finding and the evidence does not preponderate against the trial court's judgment.

In their third issue, the defendant complains that the trial court erred in ruling that the two and one-half (2-½) times cap did not apply in the facts of this case. The defendant concedes that the trial court's application of two and one-half (2-½) times was probably harmless error. The plaintiff, however, asserts that the defendant failed to return her to meaningful work and, therefore, she is entitled to cap provisions of Tenn. Code Ann. § 50-6-241(b), the six (6) times multiplier. Likewise, the plaintiff submits this assertion may be moot since the trial court applied a two and one-half (2-½) times cap in this case.

Tennessee Code Annotated § 50-6-241(a)(1), in pertinent part provides:

> 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 the injury, the maximum permanent partial disability award that the employee may receive is two and one-half (2-½) times the medical impairment rating determined pursuant to the provisions of the American Medical Association Guides….

We agree with the defendant, in this case, that the two and one-half (2-½) times cap provisions of Tennessee Code Annotated § 50-6-241(a)(1) does apply. The record reflects that the employer offered the plaintiff her old position as an LPN but the plaintiff refused this position and insisted on her position as a CNA instructor only. We determined the plaintiff's request to be unreasonable as to a sole position of a CNA instructor and, therefore, her disability is limited to the two and one-half (2-½) times cap. *Newton v. Scott Health Care Center*, 914 S.W.2d 884, 885 (Tenn. 1995). Both parties are correct, the trial court's determination was harmless error.

The trial court's judgment is affirmed and the costs are taxed against the defendant.

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AT KNOXVILLE, TENNESSEE

GLENDA FAYE TOLLIVER V. NATIONAL HEALTH CARE
Knox Chancery for Knox County
No. 133437-2

No. E1999-01017-WC-R3-CV -Filed July 11, 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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgement of the Court.

Costs on appeal are taxed to the defendant, National Health Care Corporation and Robert W. Knolton, surety, for which execution may issue if necessary.

07/11/00