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

MARY ZELEK v. FLAGSTAR SYSTEM, ET AL.

Criminal Court for Wilson County
No. 95-840

No. M1999-00269-WC-R3-CV - Filed - July 28, 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 appellants, 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

MARY ZELEK v. FLAGSTAR SYSTEM, ET AL.

Direct Appeal from the Criminal Court for Wilson County
No. 95-840 J. O. Bond, Judge

No. M1999-00269-WC-R3-CV - Mailed - June 27, 2000
Filed - July 28, 2000

The employer contends the trial judge erred by accrediting the expert medical testimony of a non-approved physician chosen by the employee, or her attorney, and that the award of permanent partial disability benefits is excessive.

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

LOSER, SP. J., delivered the opinion of the court, in which BIRCH, J., and KURTZ, SP. J., joined.

William Lane Abernathy, Jr., Nashville, Tennessee, for the appellants, Flagstar Systems, Inc. and Transportation Insurance Co.

Michael R. Jennings, Lebanon, Tennessee, for the appellee, Mary Zelek.

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 should be affirmed.

On August 8, 1993, the employee or claimant, Mary Zelek, was employed as breakfast manager for a Hardee's restaurant in Lebanon, owned by the employer, Flagstar System, Inc. She arrived at work that day at approximately 3:30 a.m. As she attempted to open the safe, she slipped on a wet floor and fell backwards, injuring her back. The resulting pain was such that she was taken to the nearby emergency room and referred to Dr. John McGinnis, who treated her.

She continued trying to work but her back problems worsened. She ultimately quit because,

as she put it, "they were giving me a hard time." The employer transferred her to another store, reduced her working hours by five to ten per week and changed her duties from those of a manager to those of a front line cashier. They did not reduce her hourly wage.

Dr. McInnis did not testify, but the trial court had before it the depositional testimony of two physicians who examined and evaluated the claimant. Dr. Larry Laughlin, chosen by the employer, saw her once and noted that "she had a fracture of the distal sacrum and Dr. McInnis assigned a three percent impairment," which he did not dispute. Dr. S. M. Smith, chosen by the employee, saw her on three or four occasions and estimated her permanent impairment at five percent to the whole body from the fracture and an additional one percent from a low back strain, for a total of six percent.

From the above summarized evidence, the trial judge found that the claimant would retain a permanent partial disability of thirty-six percent, or six times Dr. Smith's impairment rating, to the body as a whole, for which he awarded benefits. 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 the 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 panel is not bound by a trial court's factual findings but instead conducts an independent examination to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584 (Tenn. 1991). The extent of an injured worker's vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450 (Tenn. 1999).

When the medical testimony differs, the trial judge must choose which view to believe. In doing so, he is allowed, among other things, to consider the qualifications of experts, the circumstances of their examination, and the information available to them and the evaluation of the importance of that information to other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672 (Tenn. 1991). Moreover, it is within the discretion of the trial judge to conclude that the opinion of one expert should be accepted over that of another expert and that it contains the more probable explanation. Story v. Legions Ins. Co. supra.

Dr. Smith is an orthopedic surgeon, licensed to practice in Tennessee. His opinion of permanency was based on information provided by the treating physician and his physical examination of the claimant. The trial judge did not abuse his discretion by accepting Dr. Smith's opinion.

The appellant contends the employee should be limited to an award not exceeding two and one-half times the medical impairment rating because the claimant was returned to work without a reduction in her hourly wage. Where an injured worker is entitled to permanent partial disability benefits to the body as a whole 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 times the medical impairment rating. Tenn. Code Ann. § 50-6-241(a)(1). If, however, the offer to return to work is not reasonable in light of the circumstances of the employee's physical disability 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 medical impairment. Newton v. Scott Health Care Center, 914 S.W.2d 884 (Tenn. 1995). On the other hand, an employee will be limited to disability benefits of not more than two and one-half times the medical impairment rating if her refusal to return to offered work is unreasonable. The determination of what is reasonable must rest on the facts of each case and be determined thereby. Id.

The trial court implicitly found that the claimant's refusal to return to offered work was reasonable. We cannot say that the evidence preponderates against that finding.

In determining the extent of an injured worker's permanent vocational disability, the courts are to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities for the disabled and the capacity to work at types of employment available in the claimant's disabled condition. Tenn. Code Ann. § 50-6-241(a)(1). The trial judge found the employee to be unable to read. The proof is that she has less than an eighth grade education and possesses few working skills. From a consideration of all of the appropriate factors, we cannot say the evidence preponderates against an award based on thirty-six percent to the body as a whole.

For the above reasons, the judgment of the trial court is affirmed. Costs on appeal are taxed to the appellants.