IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL

AT KNOXVILLE
April 26, 2000 Session

VESTAL MANUFACTURING COMPANY VS. TERESA ANDERSON
Direct Appeal from the Chancery Court for Monroe County
No. 10978 Lawrence Howard Puckett, Judge

No. E1999-01470-WC-R3-CV – Mailed September 12, 2000
FILED: October 17, 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 hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The appellant, Vestal Manufacturing Co., appeals an award of thirty-five percent disability to the body as a whole to Teresa Anderson. Appellant contends the trial court erred (1) in finding that Ms. Anderson has a twenty percent medical impairment rather than a five percent medical impairment, (2) in concluding Ms. Anderson has a permanent partial disability of thirty-five percent to the body as a whole, and (3) in construing the phrase, "The employer takes the employee as it finds her." We affirm the judgment of the trial court.

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

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J., and L. Terry LAFFERTY, SR. J., joined.

David Collier Nagle, Chattanooga, Tennessee, for the appellant, Vestal Manufacturing Company

Nestor Eugene Worthington, Madison, Tennessee, for the Appellee, Teresa Anderson

OPINION

Review of the findings of fact made by the trial court in workers' compensation cases is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. T.C.A. § 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 weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988). Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

Teresa Anderson, age 37, began work at Vestal Manufacturing Co., a steel plant, on August 3, 1992. Her work history included employment in construction and masonry work and as a hamburger cook. The parties stipulated that Ms. Anderson was injured in the course and scope of her employment on January 6, 1998. She testified that her job, at the time of her injury, was a "damper assembler", which required her to stand full-time, and to work without air conditioning on an assembly line. The work was production work and she was expected to do 57 dampers per hour, but she was able to do 80 to 90 per hour before the injury. She testified that prior to the injury, "I didn't know I had a pain." She said that the work injury has caused her to have stiffness, catches, swelling, some tingling and pain in her back, and to have trouble sleeping at times. She no longer engages in mowing grass, stretching, bowling, water skiing, or picking up her child. She testified she could pick up one hundred pounds or more before the injury, but would not pick up more than sixty pounds now. She said she has returned to work, but works in pain, and that she is about one-half the person physically that she was before the injury. Vicki Woodby, a cousin of Ms Anderson, verified Ms. Anderson's history of hard labor and physical sports activity.

David F. Fardon, a board certified orthopedic surgeon treated Ms. Anderson. He initially saw her on January 20, 1998. She had spondylolisthesis of the third and fourth lumbar vertebra. He testified this is "thought to be congenital in the sense of an in-born predisposition, though it is not present at birth." His preliminary diagnosis was acute back sprain and spondylolisthesis at lumbar three and four. He treated her with medication and physical therapy and returned her to work with restrictions of lifting no more than twenty pounds and no repetitive stooping and bending. He testified that she reached maximum medical improvement on February 8, 1999, and that she had a permanent lifting restriction of fifty pounds. He later testified that he had written in his records that she could return to work without restrictions, but that it was not a good idea for her to sustain an occupation that requires lifting eighty pounds. He testified that she was twenty percent impaired but that "a substantial part of that, by the AMA Guidelines, relates to the instability created by the spondylolisthesis. And so I think – so I commented that if I tried to isolate the aspect of her permanent impairment that I could relate to the injury that she had sustained, in my opinion it would have been five percent." He testified that the on-the-job injury aggravated the preexisting spondylolisthesis.

Julian Nadolsky, testified as a vocational expert for Ms. Anderson. He has a Ph.D. from Auburn and has been in the vocational field since 1962. He testified that her reading ability was at the third grade level and her arithmetic skills at the fourth grade level. Based on her physical restrictions, he opined that "she would be unable to perform approximately 30 percent of the occupations in the local labor market that she was capable of performing before injuring her lower back at work on January 6th, 1998." He testified that eventually, she would be limited to sedentary and light jobs and that she would have a vocational disability of sixty percent.

Jeffrey Chandler, a physical therapist, testified that he observed Ms. Anderson doing her job and that he would classify it as in the medium or medium-heavy class of occupations.

Terry Pippin, the foundry manager at Vestal Manufacturing Co. for twenty years, described the heavy physical labor involved in Ms. Anderson's job, testified that she was the only female doing that job, and that she was a better assembler and better in a lot of other jobs than some of the men.

We agree with counsel for Vestal Manufacturing Co. that the three issues are intertwined and are resolved by interpreting *Hill v. Eagle Bend Mfg. Co.*, 942 S.W.2d 483 (Tenn. 1997) which held: "An employer takes an employee as he or she is and assumes the responsibility of having a pre-existing condition aggravated by a work-related injury which might not affect a normal person." (citations omitted) The employer argues that the trial court should have used the five percent impairment Dr. Fardon said was directly caused by the injury instead of the entire twenty percent impairment that resulted from the aggravation of the preexisting spondylolisthesis. The Supreme Court in *Bennett v. Howard Johnsons Motor Lodge*, 714 S.W.2d 273 (Tenn. 1986) addressed the issue of whether an employer would only be responsible to an employee with a preexisting condition for the disability caused by the employment instead of the entire resulting disability. The Court held:

> "No apportionment of any kind will be permitted in Tennessee unless the Legislature determines that such a remedy is appropriate. Absent some other rule of law to the contrary, the last successive employer *or* insurance carrier, taking the employee as he is found to be at the time of the accident, will be liable for the entire resulting disability, including all medical expenses arising from the disability and regardless of any pre-existing condition. . . . This rule applies whether the subsequent injury aggravates or merely combines with a previous injury or condition of the employee." 714 S.W. 2d at 279.

The Legislature subsequently adopted T.C.A. § 50-6-207(3)(F) which, as pertinent to this case, provides:

> "If an employee has previously sustained an injury compensable under this section for which a court of competent jurisdiction has awarded benefits based on percentage of disability to the body as

> a whole and suffers a subsequent injury not enumerated above, the injured employee shall be paid compensation for the period of temporary disability and only for the degree of permanent disability that results from the subsequent injury."

This provision limits the recovery for an employee who has sustained a previous injury for which a court has awarded benefits to the body as a whole, but it does not purport to limit or apportion benefits for a preexisting condition for which no court award has been made. As the Supreme Court noted in *Parks v. Mun. League Risk Management Pool*, 974 S.W.2d 677 (Tenn. 1998), "the limitation in the statute merely prevents an injured employee from receiving dual compensation for the same work-related injury." 974 S.W.2d at 679. Teresa Anderson has neither sustained a previous injury nor received prior compensation for her back condition. There is no basis in the workers' compensation statutes to deny her compensation for the entire disability caused by the injury she sustained on January 6, 1998. The award is properly based on the twenty percent impairment assigned by Dr. Fardon.

The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. T.C.A. § 50-6-241(c); *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990). In making determinations of disability, the court must 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. T.C.A. § 50-6-241(c); *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986). The evidence in this case is that Ms. Anderson has a twenty percent medical impairment to the body as a whole, must limit her lifting, reads at the third grade level, does arithmetic at the fourth grade level, is presently unable to perform 30 percent of the occupations she could previously perform before the injury, and will probably be unable to perform sixty percent of the occupations in the future. We find no basis to disturb the determination of the trial court that she has a permanent partial disability of thirty-five percent to the body as a whole.

Conclusion

The judgment of the trial court is affirmed and remanded for any necessary proceedings. The costs of the appeal are taxed to the Appellant, Vestal Manufacturing Company.

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Howell N. Peoples

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VESTAL MANUFACTURING COMPANY VS. TERESA ANDERSON

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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 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 appellant, Vestal Manufacturing Company and David Collier Nagle, surety for which execution issue if necessary.

10/17/00