

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

**LINDA BOGLE v. TOSHIBA AMERICA CONSUMER PRODUCTS, INC.
AND THE TRAVELERS INSURANCE COMPANY**

Direct Appeal from the Criminal Court for Wilson County at Lebanon
No. 96-0832, Hon. James O. Bond, Judge
August, 2000 Session

No. M2000-00247-WC-R3-CV - Mailed: October 30, 2000
Filed - December 1, 2000

This workers' compensation appeal has been referred to the Special Workers' Compensation Panel in accordance with the Tenn. Code Ann. §50-6-225(e)(3) for hearing and reporting findings of fact and conclusions of law. In this case, the defendant-employer contends (1) that the evidence does not support the trial court's finding that the plaintiff-employee's closed head injury and herniated cervical disc arose out of and in the course of her employment with the defendant, (2) that the trial court erred in determining the plaintiff's permanent partial impairment of 52.5%, and (3) that the trial court erred in determining that the defendant is entitled to an offset for the net short-term disability benefits provided to the plaintiff rather than for the gross amount that was paid by the provider. As discussed below, the Panel concludes that the judgment of the trial court should be affirmed in all respects.

Tenn. Code Ann. §50-6-225(e)(3) Appeal as of Right; Judgment of the Criminal Court Affirmed

JOHN A. TURNBULL, Sp.J., delivered the opinion of the court, in which JUSTICE FRANK F. DROWOTA, III and FRANK G. CLEMENT, JR., Sp.J., joined.

Terry L. Hill, Manier & Herod, Nashville, TN, for the appellant Toshiba America Consumer Products, Inc., *et al.*

M. Reid Estes, Jr., Jennifer A. Lawrence, Stewart, Estes, & Donnell, Nashville, TN, for the appellee Linda Bogle

MEMORANDUM OPINION

On August 18, 1995, the employee-appellee, Linda Bogle ("Bogle"), felt intense pain to her neck and low back while she was stacking pallets for her employer, the employer-appellant Toshiba

America Consumer Products, Inc. (“Toshiba”). Immediately after feeling this pain, she felt nauseous, went to a restroom nearby, and vomited. After leaving the restroom, she had an argument with a supervisor and felt further pain to her neck and back. Bogle passed out and struck her head on the concrete floor. She was taken to an emergency room, where she was treated for a closed head injury accompanied by back pain.

On the morning of the next day, Bogle again felt severe neck pain, including a “popping” noise, and passed out. She fell onto the linoleum floor of her kitchen and was again taken to the emergency room.

On August 22, 1995, Dr. Terry treated Bogle, who complained of back pain extending down into her right leg and up through her neck into her head. The next day, Bogle went to the emergency room for dizziness and bleeding. Dr. Wolfe treated her and diagnosed her with occipital neuralgia, a trauma to the first and second vertebrae at the base of the skull, and a closed head injury. Dr. Wolfe believed Bogle’s neck pain stemmed from the closed head injury.

Bogle continued to have neck pain as well as blurred vision, headaches, and memory problems. In January of 1996, Bogle’s family physician discovered that Bogle had a herniated disc in her neck, and on March 12, 1996, Bogle underwent an anterior cervical discectomy and fusion on C5-6. Bogle returned to work on July 9, 1996, with the permanent restriction of no outstretched overhead lifting. On March 27, 1997, after Bogle further complained of radiating pains in her arms, her treating physician, Dr. Dimick, discovered complications related to the original neck injury that necessitated a C6-7 posterior laminectomy, which he performed on June 26, 1997.

On April 8, 1998, Bogle returned to Toshiba as a tester. Her attendance has been excellent; her job is more mentally challenging but much lighter than the one she held at the time of the August 18, 1995 injury; and her hourly wage has increased at least \$1.15 from the time of the injury. Bogle’s symptoms have improved. She has not seen a physician since her second surgery. Mrs. Bogle maintains that the only job she can perform at Toshiba is her current testing job, and she does not believe she can find suitable employment elsewhere.

Dr. Dimick assigned Bogle a combined 21% permanent medical impairment to the body as a whole from her neck injuries and her closed head injury. Toshiba paid Bogle \$6,222.85 gross temporary total disability benefits out of a private plan, \$2,222.15 of which was withheld for taxes. Toshiba, however, denied her workers’ compensation benefits.

The trial court found that Bogle’s head and neck injuries arose out of and in the course of her employment with Toshiba. The trial court made the following specific finding on credibility: “I believe she told the truth.” After considering Bogle’s age, her impairment rating (21%), her physical restrictions, her education (12th), and her ability to earn a living at jobs available to her, the trial court fixed Bogle’s disability at 52.5%. He noted that since Bogle was back at work earning substantially the same wage her maximum award was capped by Tenn. Code Ann. Section 50-6-241. The award

for the vocational disability was \$49,983.12. The judge also awarded \$15,04.45 in temporary total disability benefits to the plaintiff, but allowed Toshiba to set off the net amount Bogle received from its private plan, or \$4,005.70. Toshiba appealed the findings and judgment of the trial court to this Panel.

In workers' compensation cases, the standard of review is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. §50-6-225(e)(2) (1999 replacement). 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 to the trial court's factual findings. *See Collins v. Howmet Corp.*, 970 S.W.2d 941, 943 (Tenn. 1998).

Causation

In a workers' compensation case, the plaintiff must establish permanency and causation through expert medical evidence. *See Tindall v. Waring Park Assn.*, 725 S.W.2d 935, 937 (Tenn. 1987). The plaintiff, however, is competent to testify with respect to her own physical condition and disability. *See Smith v. Empire Pencil Co.*, 781 S.W.2d 833, 835 (Tenn. 1989). The plaintiff's injuries must have a rational connection to the work and have occurred while she was engaged in the duties of her employment. *See Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991).

From the evidence in the record, the trial court reasonably found that the plaintiff's head and neck injuries arose out of and in the course of her employment with the defendant. Dr. Wolfe testified that the head injuries could have been caused by the plaintiff's activities at work on August 18, 1995, and Dr. Dimick stated that Bogle's neck injuries were consistent with Bogle's description of lifting the pallets and feeling intense neck and back pain. Dr. Dimick also asserted that he believed, based upon Bogle's description of passing out due to pain on August 18, 1995, that the plaintiff's injuries were caused by her work and fall that day at Toshiba.

The plaintiff's own lay testimony, which the trial court found credible, strongly indicates that her injuries stem from her work on August 18, 1995. Bogle claims that she complained of head and neck pain consistently after the August 18th fall. She recounts feeling intense pain along her back and neck and hearing in her neck a "popping" sound, which repeated the following day before she passed out at home. Bogle sought medical attention often from August 18, 1995 onward, and she claims to have complained consistently of both neck and head pain to other Toshiba employees and to her various physicians.

The testimony of Dr. Wolfe, Dr. Dimick, and the plaintiff are sufficient for the trial court to find that Bogle's injuries arose out of and in the course of her employment with Toshiba. A finding of causation based on medical testimony indicating that an incident "could be" the cause of a plaintiff's injury combined with lay testimony which supports that inference is appropriate. *See Long v. Tri-*

Con Industries, Ltd., 996 S.W.2d 173, 177 (Tenn. 1999). In this case, the plaintiff expressed the belief that her injuries occurred on August 18, 1995 at work, and both physicians stated that her lifting and fall on that day could have caused her injuries.

The causation of Bogle's injuries are not pure "speculation" that would invalidate the plaintiff's claim. Toshiba argues that any determination of the causation of Bogle's injuries are speculative because the injuries could just have reasonably occurred when the plaintiff fell at her home on August 19, 1995. It is true that causation of injuries cannot be pure speculation or conjecture. *See Tindall*, 725 S.W.2d at 937. However, the combined testimony of Dr. Wolfe, Dr. Dimick, and the plaintiff allows a reasonable inference that Bogle's injuries more likely occurred on August 18 at work rather than on August 19 at home. In addition, any reasonable doubt regarding causation must be resolved in favor of the employee. *See Long v. Tri-Con Industries, Ltd.*, 996 S.W.2d 173, 177 (Tenn. 1999); *Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483, 487 (Tenn. 1997).

The trial court judge, moreover, was within his discretion in finding the plaintiff's testimony credible. Toshiba argues that Bogle's testimony is so contradictory that this Panel should not find her statements regarding causation believable or at least should not give them great weight. Regarding witness credibility and weight of oral testimony, however, this Panel gives great deference to the trial court. *See Collins*, 970 S.W.2d at 943. Nothing in the trial record preponderates against the trial judge's credibility findings.

Vocational Disability

In determining disability, the trial court is required to consider many factors, including a decrease in the employee's capacity to earn wages in any line of work available to her based on age, education, skills, training, local job opportunities, and capacity to work at types of employment available in the claimant's disabled condition. *See Orman*, 803 S.W.2d at 678.

The record supports the trial court's finding that the plaintiff has suffered substantial permanent partial disability. Bogle permanently retains the restriction of no overhead lifting. Dr. Dimick gave her a 21% medical impairment to the body as a whole because of Bogle's two neck surgeries and because of her closed head injury. The plaintiff stated that her current position is the only one in which she could work at Toshiba. Furthermore, she does not believe she is employable anywhere else.

The trial court acted within its discretion in giving little weight to Toshiba's vocational expert. This expert gave Bogle only a 4% vocational disability and located about twenty jobs of equal or greater pay at which the plaintiff allegedly could find employment. The trial judge, however, did not find the expert's testimony persuasive. Again, this Panel gives great deference to the trial court's estimation of witness credibility, and the trial court is not bound to believe the testimony of expert witnesses. *See Collins*, 970 S.W.2d at 943.

More specifically, the evidence does not preponderate against the trial court's award of 52.5% permanent partial disability to the body as a whole. For any injury from which the employee is eligible for permanent partial disability benefits and where the employer returns the employee to employment at a wage equal to or greater than the employee was receiving at the time of the injury, the maximum permanent partial disability award is two and a half (2 ½) times the medical

impairment rating. Tenn. Code Ann. §50-6-241(a)(1). Toshiba returned Bogle to work at a wage equal to or greater than the wage she received before her injuries. Dr. Dimick, a board certified orthopaedic surgeon, who had performed surgery on the plaintiff, opined that Bogle retained a 21% permanent partial medical impairment rating. We find no error in the award of 52.5% permanent partial disability to the body as a whole.

Set Off

Appellant argues that the trial judge erred in failing to award as a set-off the gross amount that was paid by the employer under an employer funded disability plan. Appellant contends that the set off should have included the amount of \$2,222.15 which was withheld for taxes. The trial court held that the employer is entitled to only set off net payments actually directly made to the employee in the amount of \$4,005.70.

The statute simply states, “[A]ny employer may set off [from workers’ compensation disability benefits] *any payment to an employee* under an employer funded disability plan for the same injury....” Tenn. Code Ann. §50-6-114(b) (emphasis added).

This issue, which is one of first impression, is a question of law involving statutory interpretation. Accordingly, our review is de novo with no presumption of correctness given the lower court’s judgment. *Spencer v. Towson Moving & Storage, Inc.* 922 S.W.2d 508, 509 (Tenn. 1996). In resolving the issue, we are guided by the general rules of statutory construction. The role of this court in construing statutes is to ascertain and give effect to legislative intent. *Cronin v. Howe*, 906 S.W.2d 910, 912 (Tenn. 1995). Legislative intent is to be ascertained whenever possible from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language. *Carson Creek Resorts v. Dept. of Revenue*, 865 S.W.2d 1, 2 (Tenn. 1993). If the legislative intent is expressed in a manner devoid of contradiction and ambiguity, we are not at liberty to depart from the words of the statute. *Id.* Where the language contained within the statute is plain, clear, and unambiguous, the duty of the courts is to obey it. See *Warren v. American Holding Co.*, 205 S.W.3d 621, 623 (Tenn. 1999).

Here, the statutory language is plain, clear, and unambiguous. The payments which are to be set off are those payments made “to an employee.” We are not in a position to re-write the statute to include as set off gross payments paid by an employer funded disability plan where a portion of those payments were not made to the employee, but instead were paid to the government.

We accordingly hold that only the sum actually paid directly to the employee under an employer funded disability plan for the same injury may be set off against the workers' compensation disability benefits under Tenn. Code Ann. Section 50-6-114(b). Sums paid by the plan to other entities, including the government, are not to be set off.

The judgment of the trial court is affirmed in all respects. Costs on appeal are adjudged against appellants, Toshiba America Consumer Products, Inc., and The Travelers Insurance Company.

JOHN A. TURNBULL, SPECIAL JUDGE

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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, Toshiba America Consumer Products, Inc. and The Travelers Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM