

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
(April 27, 2000 Session)

PENNY MICHELLE LOVEDAY v. FOOD LION, INC.

**Direct Appeal from the Circuit Court for Anderson County
No. 98LA0345 James B. Scott, Jr., Judge**

**No. E1999-00188-WC-R3-CV - Mailed: August 2, 2000
Filed: October 27, 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 defendant/appellant, Food Lion, Inc., appeals the trial court's award of temporary total disability benefits, permanent partial disability benefits, and five hundred dollars in costs associated with service of process and subsequent default judgment hearings. Specifically, Food Lion contends the plaintiff, Penny Michelle Loveday, failed to adequately serve her complaint and thus it should not be punished for the ensuing costs associated with the setting aside of the default judgment. Food Lion also contends (1) Ms. Loveday failed to carry her burden of proof with respect to showing she suffered an injury during the course and scope of her employment; (2) the medical testimony failed to establish causation; (3) assuming an injury, the trial judge exceeded the 2.5 multiplier; (4) temporary total disability should have been awarded for only twelve days; and (5) the trial judge improperly excluded the plaintiff medical records and deposition testimony. We affirm.

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

BYERS, SR. J., delivered the opinion of the court, in which ANDERSON, C.J., and THAYER, SP. J.,
joined.

J. Ford Little, Knoxville, Tennessee, for the appellant, Food Lion, Inc.

Roger L. Ridenour, Clinton, Tennessee, for the appellee, Penny Michelle Loveday.

MEMORANDUM OPINION

FACTS

The plaintiff, age 35 at the time of trial, has a job history consisting mainly of unskilled, general labor with one semi-skilled job at a sewing factory. The plaintiff began working for the defendant as a deli clerk and later was promoted to deli clerk/baker. Her duties with the defendant included, among other chores, lifting boxes of frozen bread dough from the freezer to be baked and sold in the deli.

During June of 1998, approximately three years after beginning her position with the defendant, the plaintiff began experiencing pain in her right shoulder. The plaintiff attributed the soreness and pain in her right shoulder to her lifting duties in the deli.

On June 30, 1998, approximately three weeks after the initial onset of pain in her right shoulder, the plaintiff was pulling a donut cart filled with donuts for stocking a display when the cart tipped over, fell onto her left bicep area, and pushed her into the display causing her to strike her right shoulder on the edge of the display case. When she attempted to lift the cart upright, she felt a pop in her right shoulder and experienced severe pain.

The plaintiff testified she did not know what made the cart tip over.

The plaintiff notified the store manager immediately after the accident. Despite complaints of significant pain, she was not allowed to leave her duties to see a doctor until the deli manager arrived some two hours later.

The plaintiff was initially seen by Dr. Craig Rylands, M.D. He treated the plaintiff conservatively then referred her to an orthopedic surgeon. Dr. Rylands testified via deposition that although the plaintiff's history concerning how the accident actually occurred was not entirely consistent, the history was consistent with her pathology and with his diagnosis of an acute injury to the right shoulder occurring on June 30, 1998. Dr. Rylands kept the plaintiff on the work restriction that she not use her right arm for 12 days.

When the plaintiff attempted to return to work with the restriction that she not use her right arm, she was told there was nothing for her to do. The defendant then sent her home.

Shortly after being referred to another doctor, the plaintiff discovered that the defendant refused to provide her with further medical care or other benefits. In an August 11, 1998, denial of the claim the defendant stated the plaintiff did not suffer an injury by accident during the course and scope of her employment based mainly on its findings that the plaintiff had an undisclosed pre-existing condition and that nearby co-workers would have heard (but did not hear) the cart falling if indeed it did fall.

After a lapse in medical treatment due to the denial of benefits, the plaintiff was treated by Dr. Geron Brown, an orthopedic surgeon. Dr. Brown agreed the plaintiff's history regarding her job-related injury, albeit "disjointed," could be the cause of her injuries. He diagnosed impingement syndrome of the right shoulder with a possible rotator cuff tear and muscle strain of the cervical spine. Dr. Brown returned the plaintiff to work on December 14, 1998 with restrictions of no more than two hours per eight hour shift of overhead work. Dr. Brown found the plaintiff sustained a nine percent impairment to the right upper extremity or five percent to the body as a whole.

After obtaining a medical release from Dr. Brown, the plaintiff tried to return to work with the defendant a second time; however, she was again refused work and told she must wait until the hearing in the workers' compensation matter was over.

The plaintiff, in desperate financial straits with two children and Christmas approaching, sought and gained employment with another grocery store deli. The work at that job fit within her restrictions and was virtually identical to her duties with the defendant.

The plaintiff filed her complaint on July 31, 1998. She attempted to obtain service of process on the defendant on August 3, 1998, at the defendant's physical location in Anderson County where the plaintiff worked. Service of process was refused at that time and location.

Subsequently, the Commissioner of the Tennessee Department of Commerce and Insurance, pursuant to Tennessee Code Annotated § 56-2-504, sent a copy of the complaint and summons to the defendant at a Nashville post office box address via a certified mail. On August 11, 1998, the certified mail receipt was signed by "some individual"—the record does not identify this person or reveal the person's job title. At a later date (possibly the next day but not entirely clear upon this record), the complaint and summons were returned unopened and marked "Return to Sender" via certified mail to the Commissioner.

On October 1, 1998, the plaintiff filed a Motion for Default judgment which was heard and granted on October 12, 1998. The judgment was later set aside due to mistake, neglect or error on the defendant's part; however, the trial judge did award \$500 in fees to the plaintiff to offset her costs in association with obtaining service of process, the default judgment and the subsequent setting aside of the default judgment.

The matter was set for trial. Approximately ten days before trial, the plaintiff was offered her former position with the defendant. She accepted but stated she could not begin work for two weeks—she felt she needed to give two weeks notice to her current employer. Shortly thereafter, the plaintiff received a Fed Ex letter informing her that she should return to work on a specific date before the two week period had expired; the date set for her return to work also happened to be the date of the receipt of the letter. The plaintiff interpreted the letter to be a termination letter; the defendant claimed it was not.

After hearing seven live witnesses at trial and considering the testimony of three doctors who

testified via deposition, the trial judge awarded the plaintiff 20 percent permanent partial disability to the body as a whole with accompanying temporary disability benefits from the date of injury until the December 14, 1998, release by Dr. Brown.

We affirm the judgment of the trial court with respect to both the \$500 award associated with the service of process/default judgment and the award of disability benefits.

ANALYSIS

Service of Process/Award of Costs Associated With Default Judgment¹

The defendant argues the complaint was never properly served.

The defendant argues that despite the fact “some individual” signed the certified mail receipt, the document was returned to the Department of Commerce and Insurance thereby thwarting effective service. Rule 4.05 of the Tennessee Rules of Civil Procedure outlines the procedure to be used in serving foreign defendants. Rule 4.05(5) states:

When service of summons, process, or notice is provided for or permitted by registered or certified mail, under the laws of Tennessee, and the addressee, or the addressee’s agent, refuses to accept delivery, and it is so stated in the return receipt of the United States Postal Service, the written return receipt, if returned and filed in the action, shall be deemed an actual and valid service for the summons, process, or notice. Service by mail is complete upon the mailing. For purposes of this paragraph, the United States Postal Service notation that a properly addressed registered or certified letter is “unclaimed,” or other similar notation, is sufficient evidence of the defendant’s refusal to accept delivery.

In this case, the Commissioner of the Tennessee Department of Commerce and Insurance served the defendant via certified mail as provided for in Tennessee Code Annotated § 56-2-504. The defendant’s agent signed the return receipt on August 11, 1998. The record shows that at some point, the document was returned to the Commissioner marked “Return to Sender.” Under Rule 4.05(5), service of process against the defendant was made on August 11, 1998.

Furthermore, other than the bare facts of the receipt of the complaint via certified mail from the Commissioner, the return via certified mail marked “Return to Sender” to the Commissioner of same, and the testimony of an employee regarding where “most” service was received and logged

¹ The plaintiff does not dispute the propriety of the setting aside of the default judgment.

(and the absence of any record regarding the complaint at that address), the defendant has provided no account of what transpired regarding the service of process.² Since the defendant filed no transcript of the hearing of the motion to set aside the default judgment, the record is simply devoid of any real facts showing the service was not properly effectuated; the defendant basically proceeds only on the bare argument that service was never properly effectuated.

It is the duty of the appellant to prepare a record which conveys a fair, accurate and complete account of what transpired in the Trial Court with respect to the issues which form the basis of appeal. Tenn. R. App. P. 24(b). In the absence of an adequate record on appeal this Court must presume the trial court's rulings were supported by sufficient evidence. *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. App. 1992). The record presented shows the plaintiff properly served the defendant on August 11, 1998 in accordance with the applicable rule of civil procedure. The evidence does not preponderate against the trial judge's finding with respect to this issue.

The defendant also argues that the award of \$500 to the plaintiff to cover the costs associated with service of process, the default judgment, and the setting aside of the default judgment was "punitive" and should be set aside because the defendant was never properly served with process and therefore had no notice of the complaint against it.

The motion to set aside the default judgment was granted pursuant to Rule 55.02 and in accordance with Rule 60.02 of the Tennessee Rules of Civil Procedure. Rule 60.02 states in relevant part: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . ." Tenn. R. Civ. P. 60.02 (emphasis added). The underlined language vests in the court a broad discretion with respect to the imposition of conditions which must be met by one who seeks relief from a final judgment under Rule 60.02. *Qualls v. Qualls*, 589 S.W.2d 906 (Tenn. 1979). It is recognized that a court in granting a motion to open or vacate a judgment may, within reasonable limits, impose such terms as it deems just and proper to prescribe. *Id*; see also *Morrow v. Morrow*, 1987 WL 15523 (Tenn. Ct. App. 1987) ("The condition of the relief was that defendant should bear the burden of the expenses [attorney fees occasioned by the default judgment] her action had caused"). The condition of relief in this case was that the defendant pay the rather modest amount of fees incurred by the plaintiff with respect to the service of process and the default judgment. Under the facts of this case, the condition is reasonable.

² The defendant did not present any evidence regarding crucial issues such as the identity of the signatory of the certified mail receipt, who sent the complaint and summons back, why the address used was not sufficient, etc. Further, it is curious to note that the defendant executed its denial of claim letter on August 11, 1998—one day after the plaintiff attempted service at the defendant's physical location and the same day it received service from the Commissioner.

Injury During the Course and Scope of the Employment

The review of the findings of fact made by the trial court 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, TENN. CODE ANN. § 50-6-225(e)(2); *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). 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. See *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

In this case the trial judge found the plaintiff "credible and sincere" and found that her claim was supported by the preponderance of the proof. The plaintiff was candid in her testimony regarding the accident and readily admitted she did not know the exact mechanism of the injury; however, certainty in this regard is not mandatory, and the plaintiff gave a plausible account.

The trial judge recognized that the defendant, testifying through its witnesses at trial, denied the injury-causing event ever occurred. However, none of the defendant's witnesses were able to say the accident did not happen—only that they thought they would have heard it if it did. The trial judge obviously found the plaintiff's testimony and proof outweighed that of the defendant. Our examination of the record on this issue leads us to the conclusion that the evidence does not preponderate against the trial court's finding in this respect.

Causation

The defendant argues that even if the donut cart did fall as the plaintiff testified, the shoulder injury for which she was compensated did not occur as a result of the cart falling, but rather was caused by a pre-existing condition not related to her employment with the defendant.³

In order to be eligible for workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." TENN. CODE ANN. § 50-6-102(a)(5). The phrase "arising out of" refers to causation. The causation

³ The medical testimony showed that any pre-existing condition arose as a result of her employment with the defendant; however, were we to assume a pre-existing condition unrelated to the employment, it is equally clear from the medical depositions that the condition was aggravated by the work-related incident. In such a case, the employer remains liable. See *Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483 (Tenn. 1997), citing *Fink v. Caudle*, 856 S.W.2d 952, 958 (Tenn. 1993); *White v. Werthan Indus.*, 824 S.W.2d 158, 159 (Tenn. 1992); *Talley v. Virginia Ins. Reciprocal*, 775 S.W.2d 587, 591 (Tenn. 1989).

requirement is satisfied if the injury has a rational, causal connection to the work. *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997) (citations omitted); *Fink v. Caudle*, 856 S.W.2d 952 (Tenn. 1993).

Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have, thus, consistently held that an award may properly be based upon medical testimony to the effect that a given incident “could be” the cause of the employee’s injury when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997) (citations omitted). Only a medical expert may testify as to whether a given disability is permanent. *Bolton v. CNA Ins. Co.*, 821 S.W.2d 932 (Tenn. 1991).

When the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. INA*, 884 S.W.2d 446, 451 (Tenn. 1994); *Landers v. Fireman’s Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989). Dr. Rylands testified that the plaintiff suffered an acute injury to her right shoulder on June 30, 1998. Dr. Brown testified the injury described by the plaintiff was “very compatible with the pathology that [he] noted or the diagnosis [he made].”

The plaintiff testified that her work duties and the cart incident were the cause of her shoulder injury. In this case, as in all workers’ compensation cases, the claimant’s own assessment of his physical condition and resulting disabilities is competent testimony and cannot be disregarded. *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972). The medical and lay proof adequately support the trial judge’s finding.

Propriety of Multiplier

The defendant argues the trial court erroneously exceeded the 2.5 multiplier set forth in Tennessee Code Annotated § 50-6-241. The defendant’s argument is without merit. The plaintiff attempted to return to work with the defendant twice and was turned away both times. The defendant’s attempt to return the plaintiff to work ten days before trial was a clear attempt to limit its liability by manipulating the system in a way not contemplated or permitted by our case law. *See Gaines v. American Airlines, Inc.*, 1997 WL 531104 (Tenn. 1997). The offer by the defendant in this case was not meaningful and the plaintiff’s actions were not unreasonable.

Temporary Total Disability

Temporary total disability benefits are intended to provide the injured employee with income during the time in which that employee is unable to work due an on-the-job injury. The medical proof in this case shows, and the trial judge found, that the plaintiff was able to return to work as of

December 14, 1998 per Dr. Brown's written release executed on that day. The trial court's finding in this respect is supported by a preponderance of the evidence

Exclusion of Medical Records and Plaintiff's Deposition Testimony

The defendant argues the plaintiff's medical records were erroneously excluded by the trial judge. The defendant bases its argument on the Tennessee Rules of Evidence and statutes regarding admission of medical records. Although the records are indeed hearsay, they may be made admissible under exceptions to the Tennessee Rules of Evidence regarding hearsay. In this case, the records may have been erroneously excluded; however, we need not address that issue in depth because the information contained in the records was already before the court and likewise had been used during the medical depositions.

As to the depositions in this case, they were excluded under Rule 403 as cumulative. The final ground for exclusion of evidence under Rule 403 is "needless presentation of cumulative evidence." This category gives the trial judge discretion to limit repeated efforts to prove the same facts. *See* NEIL P. COHEN ET AL., TENNESSEE LAW OF EVIDENCE § 403.6 (3d ed. 1995); *Doochin v. U.S. Fidelity and Guar. Co.*, 854 S.W.2d 109, 112 (Tenn. App. 1993). Any error by the trial judge in this respect will not be overturned absent a showing of abuse of discretion. *Id.* The defendant made liberal use of the deposition during cross-examination. The trial judge did not abuse his discretion in this respect; therefore, we will not disturb his ruling on this issue.

The judgment of the circuit court is **Affirmed** in all respects. The costs of this appeal are taxed to the defendant.

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AT KNOXVILLE

PENNY MICHELLE LOVEDAY v. FOOD LION, INC.

No. E1999-00188-WC-R3-CV
Filed: October 27, 2000

ORDER

This case is before the Court upon motion for review 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 is not well-taken and should be denied 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 on appeal are taxed to the defendant.

IT IS SO ORDERED this ____ day of _____, 2000.

PER CURIAM

Anderson, C. J. - Not participating.