

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKER'S COMPENSATION APPEALS PANEL
AT KNOXVILLE

(January 27, 2000 Session)

**ELSIE ANNE BULLOCK v. MEDICAL PROFESSIONAL, INC., AND
CIGNA.**

**Direct Appeal from the Circuit Court for Anderson County
No. 96 LA0257 James B. Scott, Jr., Judge
FILED: JANUARY 18, 2001**

No. E1998-00315-WC-R3-CV - Mailed December 12, 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, Elsie Bullock, appeals the dismissal of her claim for workers' compensation benefits. The trial court found that she had "failed to meet her burden of proof that the conditions of which she complains are related to work-related accident of February 14, 1996." Ms. Bullock contends the trial court (1) erred in finding that she did not have a compensable injury to her back, and (2) erred in finding she did not have a compensable mental injury as a result of the injury she sustained at work. We affirm in part and reverse in part.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court is Affirmed in Part; Reversed in Part; and Remanded

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

Ralph M. Maylott, Knoxville, Tennessee for the appellant, Elsie Ann Bullock

Robert M. Shelor, Knoxville, Tennessee, for the Appellee, Medical Professional, Inc., and CIGNA.

MEMORANDUM OPINION

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). 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).

Elsie Bullock was employed by Medical Professionals, Inc. (hereafter "MPI") as a licensed practical nurse. On February 14, 1996, she experienced a "pop" and pain in her back while lifting a patient. She has not worked since that date. Following the incident, Ms. Bullock initially saw her personal physician, Dr. Pamela Bridgeman. She was referred to Dr. George Stevens, orthopedic surgeon, whom she selected from a panel provided by Cigna Property & Casualty Insurance Company, MPI's carrier. Dr. Stevens saw her five times and referred her to Dr. Eugenio Vargas, a neurosurgeon. Dr. Vargas saw her on June 6, 1996, and referred her to Dr. Jeffrey Uzzle, a psychiatrist. Dr. Vargas also saw her on August 20, 1996, and on January 14, 1997. Dr. Uzzle first saw Ms. Bullock on June 13, 1996. In June 1996, she also began seeing Dr. Jane Arwood, a psychiatrist, who had seen her more than twenty-seven times at the time of the trial. Dr. Arwood referred her to Pamela Whitworth, Ph. D., for counseling. Dr. Arwood also referred her to Dr. David Hauge, a neurosurgeon, who began treating her on February 18, 1997, and performed surgery on her back.

At the commencement of the trial, the attorneys for the parties discussed the issues for the court to decide. It was undisputed that an event occurred in the course and scope of employment. Ms. Bullock's counsel stated that she had a pre-existing lumbar stenosis, without symptoms, which was aggravated by the event of February 14, 1996, and the issue is whether that is compensable. The second issue concerned mental injury. The following colloquy occurred:

Mr. Maylott (Bullock's counsel): "And there has been an admission that there is, at least partially caused by this event, this depression partially results – they're saying there are other factors involved also. But they are saying that they do believe she does have some psychiatric impairment, which is related to this event.

The Court: If there's a psychological component, you're saying that it is work related to a degree?

Mr. Shelor (MPI's counsel): We admit that, your Honor."

Following a trial at which Ms. Bullock and a friend testified and numerous medical depositions were introduced, the trial court issued a brief written opinion which stated: "The plaintiff has had myelogram, C.T. scans, X-rays, physical examines by several physicians including several specialist but the conditions for which she complains are overwhelming opined to be unrelated to the incident at work." (sic)

Where the trial judge has made a determination based upon the live 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). 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).

Aggravation of Pre-existing Back Condition

Ms. Bullock contends that her pre-existing back condition was aggravated and made symptomatic by the incident at work on February 14, 1996. She relies on the testimony of Dr. David Hauge who testified that she appeared to "have a pre-existing asymptomatic lumbar stenosis at right L4-5, which when she injured herself resulted in significant nerve root trauma to the right L5 root, which resulted in the development of a clinical right L5 radiculopathy, which has responded partially to surgical decompression at the right L4-5 level." He testified that the changes were attributable to the work injury and that she had a 15 percent impairment to the body as a whole. Contrary to Dr. Hauge's assertion that Ms. Bullock improved after surgery, she testified that her back pain increased and that she was "worse off" after surgery.

Dr. Eugenio Vargas found spinal stenosis, but testified it did not develop as a result of the injury on February 14, 1996. He testified that her complaints and responses during physical examination were inconsistent. He testified that he had reviewed Dr. Hauge's deposition and the history Ms. Bullock gave Dr. Hauge --that she had right L5 radiculopathy for at least 2-3 months -- was contrary to Dr. Vargas's findings a month or two before Dr. Hauge's examination. He also testified that if she had surgery and there was no improvement, the lesion that was corrected surgically probably was not the cause of her complaints.

Dr. Jeffrey A. Uzzle testified that he saw Ms. Bullock on June 13, 1996, and she demonstrated five out of five Waddell signs, which suggested that an organic injury was not the problem. He noted numerous inconsistencies and pain behaviors which made it difficult to examine her. He testified: "She had been having anxiety attacks and emotional difficulties, and it was clear to me that she saw herself as disabled and saw herself as a victim of her injury."

Dr. Frederick A. Killefer testified he saw Ms. Bullock on October 16, 1996, and "the symptoms she was complaining of when she saw me weren't caused by, nor were they related to, her injury in February, 1996." He opined that the injury she sustained caused "some temporary pain and that she focused on that and she became convinced in her mind that she was going to be disabled as a result of that." He also testified that

"her manifestations of disability and pain were far out of proportion to any demonstratable (sic) findings either on physical examination or her diagnostic studies by both myself and half a dozen people prior to the time I saw her. So I don't think they were realistic symptoms as a result of the

injury. So I think one would not expect that surgery to correct them would be – would produce any prolonged benefit.”

With the exception of Dr. Hauge, the physicians testified that her subjective complaints were inconsistent with their physical findings. Dr. Hauge did surgery based upon her complaints, but the plaintiff said her back condition was worse after the surgery. Upon this evidence, we agree with the trial court that Ms. Bullock has failed to carry the burden of proof that any permanent physical injury was caused as a result of the incident on February 14, 1996.

Aggravation of Pre-existing Psychological Condition

Ms. Bullock also contends that she had a pre-existing psychological condition which had not prevented her from working but which was aggravated and made disabling by her incident on February 14, 1996. Dr. Jana Arwood testified that the work injury caused the depression and that Ms. Bullock had a 45 percent mental/psychiatric impairment based on the American Medical Association Guides, 4th Edition. Dr. Arwood was unaware that the Guides suggested that numerical percentages should not be used to state psychiatric impairment, but said she derived the numerical percentages from other sources than the Guides. She opined that Ms. Bullock “should avoid large groups of people and high levels of activity around her, which increases her anxiety and thereby increases her pain. She is not able to function in a work setting. She cannot respond appropriately to demands of supervisors and to changes in the workplace.”

Dr. Donald Gibson Catron did a psychiatric evaluation for the employer. He diagnosed Ms. Bullock with somatoform disorder, which means “physical complaints with some emotional overlay”, and depressive disorder. Regarding the aggravation of her pre-existing psychological condition, he testified, “there is some causal link between the injury and her depression.” He noted that before the injury she functioned and after the injury, she has not functioned; thus, he stated: “I think there should be some impairment awarded here.” Even though the American Medical Association Guides, 4th Edition, discourages the use of percentages, and the second edition was the last to use percentages, he opined that she had 12 percent medical impairment “in view of the pre-existing events that had happened in her life.” He testified, “her thinking was not severely affected. Some of her behavior was not severely affected, and her potential for rehabilitation was reasonable.” He also felt she should not be subjected to unduly harsh criticism from supervisors, or unrealistic production quotas. She could engage in most jobs from a psychiatric standpoint, but should not do shift work.

“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. This rule applies as well to the aggravation of a pre-existing “nervous” condition by a physical injury. *Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483 (Tenn. 1997) (citing *Batson v. Cigna Property & Cas. Companies*, 874 S.W.2d 566, 570 (Tenn.1994); *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278, 284 (Tenn. 1991); *Gluck Brothers, Inc. v. Pollard*, 221 Tenn. 383, 426 S.W.2d 763 (1968); *Minton v. Leonard*, 219 Tenn. 642, 412 S.W.2d 886 (1967)). The trial court likely was under the impression that *Hill* would not permit compensation for psychological disorders when there was no permanent work-related physical injury. We do not believe that

Hill is so limited. The Supreme Court recently held that a physical injury was compensable for the purpose of future medical benefits even though no permanent impairment resulted. *Stephens v. Henley's Supply and Industry*, 2 S.W.3d 178 (Tenn. 1999). In the present case, there was a physical injury; even though it resulted in no permanent injury to Ms. Bullock's back, it aggravated her pre-existing psychological condition.

Upon MPI's concession at the commencement of the trial that the psychological component was work-related and the testimony of the two psychiatrists, we conclude that the aggravation of Ms. Bullock's pre-existing psychological condition is compensable. Mental injuries are compensable as scheduled-member injuries. T.C.A. § 50-6-207(3)(A)(ff); *Ivy v. Trans Global Gas & Oil*, 3 S.W.3d 441 ((1999). In this case we find Dr. Catron's testimony more persuasive and assess Ms. Bullock's vocational disability at 30 percent, or 120 weeks of compensation.

The judgment of the Circuit Court is **Affirmed** as to the physical injury and **Reversed** as to the psychological injury, and this matter is **Remanded** to the trial court for any necessary proceedings. The costs of the appeal are taxed to the Appellee.

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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 Judgment of the Court.

Costs on appeal are taxed to the appellee, Medical Professional, Inc and Cigna, for which execution may issue if necessary.

01/18/01