IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
(September 28, 2000 Session)

MICHELLE ESTES v. TOSHIBA AMERICA CONSUMER PRODUCTS, INC. and TRAVELERS INSURANCE CO.

Direct Appeal from the Criminal Court for Wilson County
No. 98-2290 J. O. Bond, Judge

No. M2000-00546-WC-R3-CV - Mailed - March 14, 2001
Filed - April 16, 2001

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 defendants, Toshiba America Consumer Products, Inc. and Travelers Insurance Co. appeal the judgment of the Criminal Court of Wilson County, where the trial court found: (1) the plaintiff, Mrs. Michelle Estes, had sustained a five percent (5%) permanent partial disability to the body as a whole due to her work-related injuries; (2) Mrs. Estes had a twelve and one-half percent (12½ %) vocational disability and was limited to a recovery of two and one-half (2 ½) times her impairment rating pursuant to *Tennessee Code Annotated* § 50-6-241(a)(1); and (3) defendants liable for payment of $1,286.00 for chiropractic treatment rendered to Mrs. Estes by Dr. Frank C. Etlinger, D.C.. The defendants submit that the trial court erred in determining that Mrs. Estes is vocationally impaired as a result of her work-related injury and in determining that the defendants were liable for payment for the unauthorized treatment of Dr. Etlinger. For the reasons discussed in this opinion we find that the judgment of the trial court should be reversed and the cause dismissed.

Tenn. Code Ann. § 50-6-225(e)(2000); Judgment of the Criminal Court Reversed and Dismissed.

WEATHERFORD, SR. J., delivered the opinion of the court, in which BIRCH, J., and CATALANO, SP.J., joined.

Terry L. Hill, Nashville, Tennessee for the appellants, Toshiba America Consumer Products, Inc. and Travelers Insurance Co.

Frank Lannom and B. Keith Williams, Lebanon, Tennessee for the appellee, Michelle Estes.

MEMORANDUM OPINION

Mrs. Michelle Estes is a 32 year old mother of four children who is currently in her fourth marriage. She completed the eleventh grade in highschool and earned her GED in 1987. She estimated that she has had 30 to 35 jobs in her lifetime. Most of these jobs involved working as a waitress in restaurants or fast food establishments. She has held factory jobs and worked in retail as a cashier, salesperson and inventory worker. She has used a computer to manage inventory for a retailer and worked for a security firm as a dispatcher. In the past she has had a commercial drivers' license (CDL) and worked as an over-the-road truck driver and has driven a local delivery truck. Mrs. Estes owns five horses and rides them around her ten-acre property.

On October 28, 1998, Mrs. Estes injured her back while working at Toshiba unloading boxes containing plastic backs for televisions and placing the parts on a conveyor belt. She and another employee were lifting an 87 pound box of television parts, when Ms. Estes " twisted backwards and went down to the floor. I kind of shoved it as I moved it away so the box didn't land on top of me. But I experienced a real sharp pain immediately." She reported the injury to assistant line supervisor and took some "pain pills" she received from the safety director's office. When this did not provide any relief and she could not keep up with her work, her assistant line supervisor told her to go to the safety director's office or to go home.

Mrs. Estes reported the injury to the safety director and was given a list of three physicians from which she chose Dr. Jeffrey E. Hazlewood, M.D. She first saw Dr. Hazlewood on October 29, 1998, and described a dull aching pain in the lower thoracic and upper lumbar regions which had improved somewhat since the day before. Dr. Hazlewood, board certified in physical medicine and rehabilitation, described the results of his exam as follows:

> I saw some postural deficits. I felt that there was maybe a little mild spasm, but I wasn't convinced of that . She had some decreased range of motion and flexion, but had good extension in the lumbar spine. She complained of tenderness to palpation over the L4 to 5 region, and also around T-10 in the spine. She had some tenderness in the muscles around that area. Neurologically, I did not get any definite neurologic or focal deficits.

Dr. Hazlewood diagnosed lower thoracic and upper lumbar strain which he described as a muscular soft-tissue type injury. He prescribed physical therapy and medications and placed her on bending and lifting work restrictions. At her next visit on November 10, 1998, she reported that she was completely pain-free and had discontinued her pain medication. Dr. Hazlewood discharged her from physical therapy and released Mrs. Estes to return to work without restrictions.

On November 17, 1998, she returned to Dr. Hazlewood and reported that she had experienced a flare-up that was not as severe as the initial injury. She stated the flare-up had

happened when she tried to lift a 67 pound box of television parts. On examination Dr. Hazlewood noted no definite focal deficits and that she seemed to be neurologically intact. He diagnosed recurrent thoracic lumbar strain and expressed some concern about possible symptom magnification. He sent Mrs. Estes back to physical therapy and placed her on bending and lifting restrictions. He also limited standing to no more than 10 to 15 minutes but felt she could perform sedentary work.

On December 1, 1998, Mrs. Estes reported that while she still had some tenderness in the left lower thoracic region, she was 75% improved and was working full time on light duty. Dr. Hazlewood gave her a trigger-point injection to help with the pain. She returned the next day complaining of increased pain, nausea and tingling after the injection and Dr. Hazlewood concluded that she had probably had an allergic reaction to the steroid medication. He also noted apparent symptom magnification with complaints of significant pain on very superficial palpation.

On December 15, 1998 she reported that she was 80% improved but still had mild tenderness and had back pain when lifting objects over ten pounds. The physical therapist also indicated that Mrs. Estes complained of pain when she lifted more than 25 pounds. Dr. Hazlewood found no significant muscle spasm and that she was able to walk on her heel and toes without difficulty. Although still concerned about symptom magnification and an emotional overlay, Dr. Hazlewood continued her restrictions through the holidays with instructions that she return to full duty work with no restrictions on January 4, 1999. Toshiba has a two week break through the Christmas and New Year Holidays. Dr. Hazlewood also gave her instructions to call if she had any increase in pain.

Mrs. Estes cancelled a follow up appointment for January 12, 1999, and never returned to Dr. Hazlewood for treatment. Dr. Hazlewood testified that based upon his assessment of Mrs. Estes at her last appointment, she did not qualify for an impairment rating.

On December 22, 1998, Mrs. Estes filed a complaint for workers' compensation benefits in the Criminal court of Wilson County. By referral from her attorney, Mrs. Estes saw Dr. Frank C. Etlinger, D.C., a Gallatin chiropractor on January 4, 1999. He found that she had pain and swelling in her spinal and paraspinal tissues; and a severe amount of muscle tension and stiffness in the left upper and mid thoracic muscles. He diagnosed her as having thoracic enthesopathy– a jammed spine with chronic swelling or a soft tissue injury. Mrs. Estes saw Dr. Etlinger a total of 20 times for spinal manipulation and electric muscle stimulation treatments. Dr. Etlinger concluded that the treatments provided relief and improvement but that bending, lifting and prolonged sitting would aggravate her condition, and advised her to limit those type of activities.

Dr. Etlinger acknowledged that often soft tissue injuries completely heal. He did not place any restrictions on the type of work Mrs. Estes could do and admitted that, in his opinion, she was capable of working as a truck driver, working with horses and working as a waitress.

Dr. Etlinger assigned a permanent impairment of five percent (5%) to the body as a whole, finding that she had a Cervicothoracic Category II minor impairment according to the AMA Guidelines due to continual muscle guarding and non-uniform loss of range of motion.

On or about January 6, 1999, Mrs. Estes was terminated for excessive absenteeism unrelated to her injury. When she left Toshiba Mrs. Estes was earning $8.75 per hour.

On January 28, 1999, Mrs. Estes' attorney was provided a second panel of three physicians from whom she selected Dr. Jack M. Miller, M.D., an orthopedic surgeon. On February 23, 1999, Dr. Miller performed an orthopedic examination and noted that Dr. Hazelwood's notes referenced episodes of muscle strain pattern in her mid-back. However on his examination, Dr. Miller detected no evidence of any muscle strain pattern. He found that she had normal range of motion of her lumbar and thoracic spine, walked and moved normally displaying no evidence of pain, and she exhibited no neurologic deficits. He did not think further treatment was indicated and released her to return to work with no restrictions. Dr. Miller opined that Mrs. Estes did not have an anatomical impairment.

On November 8, 1999, Mrs. Estes was hired by Tycon, Inc. after initially working there through a temporary placement agency beginning in July or August of 1999. She worked as a "wrapper" lifting rolls of Typar, a geotextile fabric of varying weights and sizes, as they come off a machine and putting them on a pole. The essential functions of that job included: 30% stooping and bending; 5% reaching vertically; 40% reaching horizontally; 5% lifting; 10% pushing; 5% percent pulling and 5% climbing. In the wrapper position, she lifts up to forty-five (45) pounds by herself on a continuous basis. Mrs. Estes has not missed any work at Tycon due to back or neck problems and has performed this job to her employer's satisfaction.

At the time of trial held on December 13, 1999, she was earning $10.55 per hour plus an eight percent (8%) shift differential. At Tycon, she is currently undergoing extensive training for a new position as a machine operator. The essential job functions of that position include: 20% stooping and bending; 15% reaching vertically; 2% reaching horizontally; 20% lifting; 5% pushing; 15% pulling and 5% climbing. Mrs. Estes has not demonstrated any problems performing these essential functions during her training for this position.

Mrs. Estes stated that today she could not work as a waitress because she could not spend that much time on her feet and could not lift the serving trays onto her shoulder. She also testified that she would not be able to return to a factory job she had held in the past that required bending two times per minute for eight hours per day. She stated that she can no longer work as a truck driver because it involves long periods of sitting and a lot of bouncing and jarring. She can no longer stack hay bales for the horses she owns and only rode them around her property four or five times last year. Mrs. Estes concluded "as long as I don't do a bunch of strenuous activities, or a bunch of lifting, or anything like that, I'm pretty much pain-free."

The trial court found that Mrs. Estes had sustained a five percent (5%) permanent partial disability to the body as a whole and a twelve and one-half percent (12½ %) vocational disability. The trial court also found the defendants liable for payment of Dr. Etlinger's chiropractic treatment.

ANALYSIS

Review of findings of fact 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).

Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to those circumstances. *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. Insurance Co. of North America*, 884 S.W.2d 446, 451 (Tenn. 1994).

The defendants have presented two issues on appeal.

I. Whether the trial court erred in determining that Mrs. Estes was vocationally impaired as a result of her work-related injury.

II. Whether the trial court erred in requiring the defendants to pay for Mrs. Estes' unauthorized chiropractic treatment from Dr. Frank C. Etlinger.

I. Whether the trial court erred in determining that Mrs. Estes was vocationally impaired as a result of her work-related injury.

The employee has the burden of proving every essential element of his claim. *White v. Werthan Industries*, 824 S.W.2d 158, 159 (Tenn. 1992).

In all but the most obvious cases, permanency of an injury must be established by expert medical testimony in workers' compensation cases. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452 (Tenn.1988).

Dr. Hazlewood, board certified in physical medicine and rehabilitation, diagnosed Mrs. Estes as having a soft tissue injury, treated her and released her without restrictions effective January 4, 1999. He opined that her condition did not qualify for any impairment rating or restrictions.

On January 4, 1999, Dr. Etlinger also diagnosed Mrs. Estes as having a soft tissue injury and assigned a five percent (5%) impairment rating based upon continual muscle guarding and

loss of range of motion. Dr. Etlinger acknowledged that soft tissue injuries often heal completely and did not place any restrictions on the type of work she could do. He did state that bending lifting and prolonged sitting could aggravate her condition.

When Dr. Miller, an orthopedic surgeon, saw Mrs. Estes on February 23, 1999, he noted after his examination that she had normal range of motion of her lumbar and thoracic spine and she exhibited no neurologic deficits. Dr. Miller testified that when he saw Mrs. Estes she no longer exhibited signs of the muscle strain that had been noted by Dr. Hazlewood. He concluded that she could return to her regular work without restrictions, had no anatomical impairment, and dismissed her from medical care.

The claimant's own assessment of her 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).

Mrs. Estes maintains that she could no longer work as a waitress, truck driver or in a factory job that required bending two times per minute. However, she is currently gainfully employed at Tycon Inc., earning two dollars more per hour than she was earning at the time of her injury at Toshiba. Both of the positions Mrs. Estes has held at Tycon involve bending, lifting and stooping and she has not missed any work due to back or neck problems.

The medical evidence in this case is conflicting, a common occurrence in workers' compensation cases. From our independent examination of the medical proof in this case, we are of the opinion that the evidence preponderates against the finding of the trial court that Mrs. Estes sustained a permanent injury to her back resulting in a finding that she had a vocational disability due to her work-related injury.

II. Whether the trial court erred in requiring the defendants to pay for Mrs. Estes' unauthorized chiropractic treatment from Dr. Frank C. Etlinger.

At the time of this case, *Tennessee Code Annotated* § 50-6-204(a)(4) provided:

> The injured employee shall accept the medical benefits afforded hereunder; provided, the employer shall designate a group of three (3) or more reputable physicians or surgeons not associated together in practice, if available in that community, from which the injured employee shall have the privilege of selecting the operating surgeon or the attending physician....

Tenn. Code Ann. § 50-6-204(a)(4)(amended 2000).

Toshiba complied with the statute on the date of the injury, October 28,1998, by providing Mrs. Estes with a panel of three physicians from which she selected Dr. Hazlewood.

Dr. Hazlewood released her effective January 4, 1999, with instructions to call him if she had any increase in pain.

The employee has a duty to consult with one of the designated physicians: "If thereafter unsatisfied with that physician's findings, petitioner may, generally speaking, (1) move the court to appoint a neutral physician . . . (2) consult with his employer and make other arrangements . . . or (3) go to a physician of his own choice, without consulting with the employer, and thus be liable for such services." *Consolidation Coal Co. v. Pride*, 224 Tenn. 188, 199, 452 S.W.2d 349, 354 (1970).

There is no proof in this record that Mrs. Estes consulted with Toshiba or had sought to change doctors and was denied prior to the time she began treatment with Dr. Etlinger on January 4, 1999. Mrs. Estes cancelled an appointment set for January 12, 1999, with Dr. Hazlewood, the authorized treating physician and never returned to him for treatment.

The trial court based its decision on its finding that the defendants had not complied with *Tennessee Code Annotated* § 50-6-204(a)(4) when it provided the second panel of three on January 28, 1999 because some or all of the physicians were located in Nashville and not Wilson County.

Even in cases where there has been a violation of these statutory requirements the employer is not automatically liable for medical expenses incurred by the employee on his own. *See Buchanan v. Mission Insurance Co.*, 713 S.W.2d 654, 658 (Tenn. 1986). "The liability of the employer turns on the issue of whether, under the circumstances, the employee was justified in obtaining further medical service without first consulting the employer. *Pickett v. Chattanooga Convalescent and Nursing Home*, 627 S.W.2d 941, 944 (Tenn. 1982).

An employee who is dissatisfied with the medical care provided by an employer must show that he had a reasonable excuse for not consulting with the employer before incurring alternative medical treatment. *Harris v. Kroger Co. Inc.*, 567 S.W.2d 161, 163-64 (Tenn. 1978).

There is nothing in this record to indicate that Mrs. Estes expressed any dissatisfaction with the medical treatment provided by the defendants. She has not provided any excuse for her failure to notify the defendants before she sought treatment from Dr. Etlinger.

We find that Mrs. Estes has not provided sufficient justification for obtaining further medical services without first consulting her employer. We find that the evidence preponderates against the finding of the trial court that defendants should pay for the unauthorized chiropractic treatment provided by Dr. Etlinger.

CONCLUSION

The judgment of the trial court is reversed and the cause dismissed. Costs are taxed to Mrs. Estes.

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James L. Weatherford, Senior 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 Michelle Estes, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM