IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
January 22, 2001 Session

BOBBIE HICKS v. WAUSAU INSURANCE COMPANIES, ET AL.

Direct Appeal from the Chancery Court for Madison County
No. 54058 Joe C. Morris, Chancellor

No. W2000-01009-WC-R3-CV - Mailed February 22, 2001; Filed May 2, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the Second Injury Fund insists (1) the evidence preponderates against the trial court's finding that the employee suffered a compensable injury on January 14, 1997, (2) the trial court erred in admitting into evidence the testimony by deposition of a vocational expert and (3) the evidence preponderates against the trial court's finding that the employee is permanently and totally disabled. As discussed below, the panel has concluded the judgment should be affirmed.

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

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J. and L. TERRY LAFFERTY, SR. J., joined.

Paul G. Summers, Attorney General & Reporter, and E. Blaine Sprouse, Assistant Attorney General, Nashville, Tennessee, for the appellant, Second Injury Fund.

George E. Morrison, III, Jackson, Tennessee, and Mary Dee Allen, Cookeville, Tennessee, for the appellee, Bobbie Hicks.

R. Dale Thomas and Michael L. Mansfield, Jackson, Tennessee, for the appellee, Wausau Insurance Companies.

MEMORANDUM OPINION

The employee or claimant, Bobbie Hicks, is 59 years old with an eleventh grade education and experience in production, food service, switchboard operating and door to door sales. She was

a debit agent for American General Insurance Company for approximately nine years, until January 14, 1997. On that day, she slipped on ice as she was leaving a customer's house and fell, landing on her backside. She was 56 at the time. Although she has a history of back surgeries in 1968, 1971 and 1996, she was able to return to her job as a debit agent in September 1996.

Ms. Hicks has received two previous workers' compensation awards, one for the 30 percent to the body as a whole and one for 25 percent to both arms. The combination translates into awards totaling 55 percent to the body as a whole.

Through a series of referrals, she saw Dr. Joseph P. Rowland, a neurosurgeon, who told her he had nothing to offer her from a neurological standpoint and referred her back to her family doctor, Keith Kirby, who administered epidural nerve blocks. They did not relieve her pain.

Wausau referred her to Dr. E. B. Wilkinson, an orthopedist, who administered a caudal block. The caudal block relieved the pain only slightly. Wausau then referred her to Dr. Fereidoon Parsioon. Dr. Parsioon ordered a myelogram, which was negative. He returned her to light duty for a period of time and concluded she had no permanent medical impairment. Her pain continued and she was unable to do her work. After four additional visits and additional nerve blocks, Dr. Parsioon told her there was nothing he could do and suggested she see another physician if she thought someone else could find a way to relieve her pain. She resigned from American General on October 6, 1997, because she was not physically able to perform her duties.

At her attorney's suggestion, the claimant visited Dr. Joseph C. Boals, III and Dr. Robert J. Barnett, for independent medical evaluations. Dr. Boals assessed her permanent impairment from the most recent injury at 7 percent and restricted her from lifting or carrying more than ten pounds from waist level only, frequent lifting or carrying, standing or walking more than three hours a day, pushing or pulling, climbing, balancing, stooping, kneeling, crouching, crawling, twisting, and reaching. He said she should avoid temperature extremes, humidity and vibration and perform only sedentary work with a guarantee of position change frequently.

Dr. Barnett assessed her medical impairment from the most recent injury at 12 percent and opined that the injury had aggravated her pre-existing condition. His restrictions were essentially the same as those of Dr. Boals.

The trial court also considered, over the objection of the Second Injury Fund, the testimony by deposition of a vocational expert, David Strauser, who opined that the claimant is 100 percent vocationally disabled. Michelle McBroom, also a vocational expert, opined that the claimant is 39 percent vocationally disabled considering the restrictions imposed by Dr. Boals. She had not seen the deposition or report of Dr. Barnett and did not consider the restrictions resulting from the claimant's pre-existing carpal tunnel syndrome.

The claimant testified that, because her back "tightens up" and hurts, she cannot sit or stand or walk for very long, can't run the vacuum cleaner or clean bathtubs or dust. She said she doesn't

lift anything. Her uncontradicted testimony was that she takes narcotic pain medication, as well as prescription antidepressant and muscle relaxants, and sometimes uses a cane to assist her while walking.

Upon the above summarized evidence, the trial court found the claimant to be permanently and totally disabled, of which 10 percent was chargeable to the January 14, 1997 accident at work. Appellate review of findings of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). This tribunal is not bound by the trial court's findings but instead conducts an independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584 (Tenn. 1991). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173 (Tenn. 1999). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). Extent of vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450 (Tenn. 1999).

The appellant and Wausau first contend that the employee failed to carry the burden of proof of causation and permanency. That issue was resolved by the trial court's findings. Our review, again, is to determine whether the preponderance of the evidence is otherwise.

Except in the most obvious cases, causation and permanency may only be established by expert medical testimony. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452 (Tenn. 1988). In the present case, there is conflicting medical evidence as to both causation and permanency. The trial court chose to accept the testimony of Drs. Boals and Barnett, both of whom testified that the claimant's preexisting conditions were aggravated and advanced by her accidental injury and assigned permanent impairment ratings based on appropriate guidelines. When the medical testimony differs, the trial judge must choose which view to believe. In doing so, he is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672 (Tenn. 1991). Moreover, it is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-7 (Tenn. 1983). The trial court did not abuse its discretion by accepting the persuasive testimony of Drs. Boals and Barnett; and the evidence fails to preponderate against the trial court's finding that the claimant's injury is compensable. The first issue is resolved in favor of the employee.

The appellant next contends the trial court erred in considering the testimony by deposition of Dr. David Strauser, a vocational expert, because the witness was not shown to be unavailable, citing Tenn. R. Civ. P. 32.01(3). That rule provides that, unless the witness is exempt from

subpoena, his deposition may be used as evidence only if the court finds that (1) the witness is dead, (2) the witness is more than 100 miles away from the courthouse, (3) that the party offering the deposition has been unable to procure the presence of the witness by subpoena or (4) such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. The appellee counters that the deposition was taken for use as evidence with the consent of all the parties. Indeed, the caption of the deposition, which was taken approximately six months before trial, states that it was taken, "pursuant to the agreement of the parties, for any and all purposes allowed under the Tennessee Rules of Civil Procedure on behalf of" the claimant. The appellant did not object until the day of trial.

The transcript of the deposition includes almost five pages of questions from counsel for the appellant. Moreover, our independent examination of the record discloses nothing to indicate the witness would have testified differently if testifying orally at trial. For those reasons, the panel concludes that any error in the use of the deposition was harmless and did not affect the judgment or result in prejudice to the judicial process. See TRAP 36(b). The second issue is resolved in favor of the appellee.

Finally, the appellant contends the evidence presented at trial is insufficient to support the trial court's finding of permanent and total disability, as defined by the Workers' Compensation Act and because Dr. Strauser's testimony should not have been allowed. We have already determined that consideration of Dr. Strauser's testimony was not reversible error.

When an injury, not otherwise specifically provided for in the Act, totally incapacitates a covered employee from working at an occupation which produces an income, such employee is considered totally disabled. Tenn. Code Ann. § 50-6-207(4)(B). The definition focuses on an employee's ability to return to gainful employment. Davis v. Reagan, 951 S.W.2d 766 (Tenn. 1997). The fact of employment after injury is a factor to be considered in determining whether an employee is permanently and totally disabled, but that fact is to be weighed in light of all other considerations, including the employee's skills and training, education, age, local job opportunities, capacity to work at the kinds of employment in his or her disabled condition, rating of anatomic disability by a medical expert and the employee's own assessment of his or her physical condition and resulting disability. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770 (Tenn. 2000).

The proof, particularly the testimony of the claimant, supported by Dr. Strauser's expert opinion, is that the injury, superimposed on the claimant's pre-existing disabilities and considered in light of her age, education and lack of transferable skills, renders the claimant unable to return to gainful employment. The employer takes the employee with all pre-existing conditions, and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability far greater than if she had not had the pre-existing conditions. Kellerman v. Food Lion, Inc., 929 S.W.2d 333 (Tenn. 1996). The final issue is resolved in favor of the appellee.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant.

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JOE C. LOSER, JR.

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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 on appeal are taxed to the Defendant/Appellant, Second Injury Fund, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM