IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 31, 2000 Session

BRENDA THOMPSON v. AMERISTEEL CORPORATION

Direct Appeal from the Chancery Court for Madison County
No. 53652 Joe C. Morris, Chancellor

No. W1999-01466-WC-R3-CV - Mailed April 23, 2001; Filed June 5, 2001

This worker's 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 trial court determined that the plaintiff suffered a 24% vocational impairment to the whole body. On appeal, the defendant submits that the plaintiff failed to prove by a preponderance of the evidence that she sustained a vocational impairment as the result of her work with the defendant. The defendant also submits that the award of 24% to the whole body is excessive. For the reasons set forth below, we affirm the judgment of the trial court.

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

J. STEVEN STAFFORD, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and WIL V. DORAN, SP. J., joined.

W. Timothy Hayes and Christopher H. Crain, Memphis, Tennessee, for the appellant, Ameristeel Corporation.

George L. Morrison III, Jackson, Tennessee, and Mary Dee Allen, Cookeville, Tennessee, for the appellee, Brenda Thompson.

OPINION

The plaintiff is a 56 year old woman who completed the tenth grade. She has not attained a GED nor has she completed any other formal or vocational training. Prior to her employment with the defendant, she worked at two different grocery stores and ran a drill press at a factory.

The plaintiff went to work for the defendant in 1981 as a scrap crane operator. Her job requires her to operate an overhead crane which runs on a track similar to a railroad track. The crane

moves up and down the track, picks up different kinds of scrap metal and places it in a bucket. The plaintiff sits in a cab and maneuvers the crane the length of the track during this process. She testified that prior to her becoming injured, the track had two or three holes in it which when hit by the crane had the same sensation as hitting a pothole on the highway.

In May 1997, the plaintiff began to have pain in her neck, back and left leg. She complained to her supervisor, David McAlexander, that the crane was rough. In early 1998, improvements were made to the crane. A one piece rail was installed for the crane to run on and a new seat and braces were installed on the crane to reduce the vibration.

Because of her complaints, the plaintiff was seen by Dr. Paul Schwartz, a family practitioner. Dr. Schwartz subsequently referred her to Dr. James Spruill, who became the plaintiff's primary treating physician. During the course of his treatment, Dr. Spruill kept the plaintiff off work from June 1997 until she returned to light duty in late January or early February 1999. The plaintiff ultimately returned to her job as a scrap crane operator and continues to do that job now.

The plaintiff testified that she experiences constant pain in her low back, hip, leg and neck. In order to relieve the pain, she takes hot baths and uses a heating pad. She takes an over the counter medication to allow her to sleep but is still up several times at night.

The plaintiff currently works a twelve hour split shift which allows her rest days between her scheduled work time. She testified that she can bend over and stoop down but that it hurts. She is unable to do much lifting and cannot do any overhead work. The plaintiff testified that she plans on retiring when she completes twenty years with the defendant. But for the pain she is experiencing, she would continue working because she likes her job.

The plaintiff's supervisor, Mr. McAlexander, testified that the plaintiff is a good scrap crane operator and that she is able to do her job. He also testified that she works a great deal of voluntary overtime. William Anthony Kibb, the defendant's human resource manager, testified that between February 28, 1998, and June 20, 1999, the plaintiff worked overtime 40 weeks out of a possible 72 weeks.

MEDICAL EVIDENCE

The depositions of Dr. James Spruill, Dr. D.J. Canale and Dr. Lowell Stonecipher were introduced at trial. Additionally, the reports and medical records of Dr. Robert P. Christopher were also introduced.

Dr. James Spruill, a neurologist, first saw the plaintiff on August 6, 1997. She was complaining of burning in her low back and legs. Prior to seeing Dr. Spruill, the plaintiff had an electromyogram, a nerve conduction study of the left leg and an MRI of the lumbar spine. The results of all these tests were normal. Dr. Spruill ordered x-rays of the plaintiff's left hip and a bone

scan. No abnormality was found in any of these tests. Dr. Spruill subsequently ordered a myelogram which also was normal.

Dr. Spruill diagnosed the plaintiff as suffering from left side sciatica which he explained as being an injured sciatic nerve. He opined that the cause of the sciatica was the repetitive bumping that the plaintiff experienced at work. Dr. Spruill testified that he did not examine the plaintiff at any time with the idea of providing an impairment rating. Dr. Spruill eventually allowed the plaintiff to return to work without any restrictions. He also stated that there was no objective evidence or pathology of any disease. Neurologically he found the plaintiff to have normal strength and reflexes.

The plaintiff was also seen by Dr. Lowell Stoncipher, an orthopaedic surgeon. Upon examination, he thought the plaintiff could be suffering from piriformis syndrome. He prescribed the plaintiff anti-inflammatory medication which did not help. He also placed the plaintiff on Xanax and prescribed a Tens unit which also did not help. He could not anatomically find any basis to provide the plaintiff with an impairment rating. He subsequently advised the plaintiff that he did not know of anything else he could do for her and allowed her to return to work without restrictions.

On February 19, 1998, the plaintiff was seen by Dr. D.J. Canale for purposes of an independent medical examination. The plaintiff complained of pain in her neck and low back going down to her left lower extremity with her left leg getting numb and her left foot burning. Dr. Canale was unable to find any demonstrable evidence of spinal, muscular or nerve injury and allowed the plaintiff to return to her regular duties without restrictions.

On April 9, 1998, the plaintiff was evaluated by Dr. Robert Christopher. Dr. Christopher stated that the plaintiff showed evidence of a chronic cervical myofascial strain and a chronic lumbosacral myofascial strain. He also found evidence of a sciatic irritation on the left. He opined that the plaintiff should avoid any type work that requires constant jolting or vibration as well as work that requires her to sit for more that 15 minutes at a time without being able to stand and walk around. He stated the plaintiff should avoid work that requires frequent bending, crawling, stooping or squatting and stair climbing. Her lifting should be limited to no more than 20 pounds frequently and 25 pounds occasionally. He stated that all these restrictions were permanent. Dr. Christopher opined that the plaintiff had suffered a 10% anatomical impairment to the whole body as the result of her injury.

ANALYSIS

The defendant asserts on appeal that the plaintiff has not shown that she sustained any impairment as a result of her work with the defendant and if so, that an award of 24% to the whole body is excessive. For the following reasons, we find the defendant's position to be without merit.

The plaintiff testified that before 1997 her health was fine and that she believed her physical problems were caused by the constant jolting she endured while operating the crane for the defendant. Both Dr. Spruill and Dr. Christopher were of the same opinion.

The medical evidence introduced in this case consisted of the deposition testimony of Dr. Spruill, Dr. Canale and Dr. Stoncipher as well as the medical records and reports of Dr. Christopher. Both Dr. Canale and Dr. Stoncipher opined that the plaintiff suffered no impairment. Dr. Christopher testified that the plaintiff suffered a 10% impairment to the whole body.

In all but the most obvious cases, the plaintiff must establish the permanency of a work-related injury by expert testimony. *Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452, 458 (Tenn. 1988). When medical testimony differs, it is within the discretion of the trial judge to determine which expert testimony to accept. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. Sp. Workers Comp.1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990).

> [W]here the issues involve expert medical testimony and all the medical proof is contained in the record by deposition, as it is in this case, then this Court may draw its own conclusions about the weight and credibility of that testimony, since we are in the same position as the trial judge. With these principles in mind, we review the record to determine whether the evidence preponderates against the findings of the trial court.

Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); see also *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 544 (Tenn. 1992) (when testimony is presented by deposition, this Court is in just as good a position as the trial court to judge the credibility of those witnesses.) The trial court chose to accredit the testimony of Dr. Christopher regarding the plaintiff's impairment. We find no reason to disagree with the trial court's decision.

The defendant also challenges the amount of vocational disability assessed by the trial court. The extent of an injured worker's disability is an issue of fact. *Jaske v. Murray Ohio Mfg. Co.,* 750 S.W.2d 150, 151 (Tenn. 1988). In *Walker v. Saturn Corp.,* 986 S.W.2d 204 (Tenn. 1998), the Supreme Court discussed the factors to utilize in determining vocational disability and stated in pertinent part:

> The Panel correctly held that a vocational impairment is measured not by whether the employee can return to her former job, but whether she has suffered a decrease in her ability to earn a living. This Court stated in *Corcoran* that a vocational disability results when "the employee's ability to earn wages in any form of employment that would have been available to him in an uninjured condition is diminished by an injury."

> In assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and her capacity to work at the kinds of employment available in her disabled condition. Further, the claimant's own assessment of her physical condition and resulting disabilities cannot be disregarded. The trial court is not bound to accept physicians' opinions regarding the extent of the plaintiff's disability, but should consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability.

Walker, 986 S.W.2d at 208.

Both Dr. Stonecipher and Dr. Canale returned the plaintiff to work with no restrictions. However, before Dr. Stonecipher did so, he tried several courses of treatment to resolve the plaintiff's problem. All of his efforts were unsuccessful. Dr. Spruill diagnosed the plaintiff's problem but did not render an impairment rating nor did he restrict the plaintiff's work activities. Dr. Christopher rendered a 10% impairment to the whole body and placed numerous permanent restrictions on the plaintiff's work activities.

The plaintiff is a 56 year old woman with a 10th grade education. She has worked for the defendant since 1981 and is described by her supervisors as a good employee and as one of the defendant's best scrap crane operators. She testified that she hurts all the time and that the only reason that she continues to work is to be eligible for retirement in the near future. She has difficulty sleeping and is required to take over the counter medication, take hot baths and use a heating pad to obtain any relief. At home, she is unable to sweep, mop, run the vacuum and work in her yard or flower garden. She is unable to do much lifting and can do no overhead work.

We find that the trial court correctly determined that the plaintiff suffered a compensable injury to the whole body. We also find that the trial court properly applied the relevant factors in determining the extent of the plaintiff's vocational disability. We are to presume the correctness of the trial court's findings unless the preponderance of the evidence is otherwise. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315 (Tenn. 1987). We find that the evidence does not preponderate against the trial court's judgment.

The judgment of the trial court is affirmed and the costs are taxed to the defendant, Ameristeel Corporation.

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J. STEVEN STAFFORD, 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 on appeal are taxed to the Appellant, Ameristeel Corporation, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM