

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 24, 2001 Session

MAGGIE JEAN HICKS v. KROGER FOOD STORES, INC., ET AL.

**Direct Appeal from the Circuit Court for Anderson County
No. 99LA0055 James B. Scott, Jr., Judge**

**No. E2000-01449-WC-R3-CV - Mailed - July 31, 2001
FILED: SEPTEMBER 6, 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.

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

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J., and WILLIAM H. INMAN, joined.

Stephen E. Yeager, Knoxville, Tennessee, for the appellant, Kroger Food Stores, Inc. et al.

Roger L. Ridenour, Clinton, Tennessee, for the appellee, Maggie Jean Hicks.

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 findings, 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. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

Facts

The plaintiff, age fifty-eight at the time of trial, has an eighth-grade education. She was

injured when she fell on a wet floor. She was off work for five or six weeks after the incident then returned to work. She testified she continues to have pain after returning to work and has others help her with various tasks.

The claim arising from the plaintiff's work-related injury was settled in September of 1998 -----December of 1999—this time never told any supervisor, etcetera. She testified that she was unable to perform her job duties; however, no one told her she was unable to perform her duties.

The plaintiff filed a petition under Tennessee Code Annotated § 50-6-241(a)(2) for reconsideration of her previous workers' compensation award, which was awarded to her by an order dated March 25, 1999 and which limited her to an award of seventeen percent based upon the two and one-half times the medical impairment rating she sustained as a result of an injury on December 12, 1996, because she returned to work at a rate of pay equal to or greater than what she received prior to the injury. The trial judge found the plaintiff could properly file for reconsideration and increased the amount of the plaintiff recovery from seventeen percent permanent partial vocational disability to forty percent partial vocational disability. We reverse the judgment of the trial court.

Facts

At the time of the hearing in this case, the plaintiff was fifty-eight years of age, has an eighth-grade education and had worked for the defendant employer for twenty-three years.

The plaintiff fell on December 12, 1996, and injured her back. She returned to work in approximately five to six weeks doing the same work she did prior to the injury. On September 18, 1998, the plaintiff's workers' compensation complaint was heard and she was awarded seventeen percent partial vocational impairment, which was two and one-half times the medical impairment rating. The plaintiff continued to work at the same job until December of 1998 when she retired. The plaintiff testified she worked with pain the entire two years from the date of her injury until she retired. She testified she was able to keep her job because other employees would do mopping, sweeping, or other tasks that would cause her pain. The plaintiff was eligible to retire two years prior to the time she did retire because she had twenty years of service and was fifty-five years of age. This would have been in December of 1996—the month in which she was injured. She testified she continued to work because she needed to build up her time because she had lost a year in the 1970's and wanted to build up her retirement. This would have made her eligible to retire in December of 1997. The plaintiff testified she never received any complaints about her job performance after she went back to work. Her supervisor likewise testified the plaintiff was able to perform her work and that she first returned to work in a limited capacity. The plaintiff says the doctor released her to work without restrictions because the defendant would not allow her to work with restrictions. The doctor testified he did not place any restrictions on the plaintiff because non were needed for the work she was doing, especially when someone helped her with the back-stressful jobs.

Medical Evidence

Dr. J. Samuel Marcy, an orthopedic surgeon, saw the plaintiff as a result of her injury and treated her over an extended time. He diagnosed the plaintiff as having lumbago (back pain) and coccyx dinia (soreness in the coccyx bone) as a result of the fall of December 12, 1996. Dr. Marcy testified the plaintiff was still having some basic problems she had always had but she was improved the last time he saw her. He was of the opinion she could do the work at Kroger's that she had continued to do during his treatment of her. The doctor testified he thought the plaintiff had to go back to work without restrictions because she out eight weeks before returning to work.

Discussion

The evidence in this case shows the plaintiff never presented to the defendant any medical evidence to show she could only continue to work under certain restrictions. There is nothing in the record to show the defendant would not have accommodated any restrictions for the plaintiff. The plaintiff relies upon the case of *Niziol v. Lockheed Martin Energy Sys. Inc.*, 8 S.W.3d 622 (Tenn. 1999), in support of her right to reopen the previous award. In *Niziol* the employee, along with some twenty-five other employees, was terminated because the defendant contracted with an outside contractor and thus created a reduction in force by this method. Lockheed argued that the termination was not related to the injury that the plaintiff had previously suffered and that this precluded the plaintiff from being able to reopen the case under Tennessee Code Annotated § 50-6-241(a)(1). The *Niziol* Court held the plain meaning of the statute showed the employee need only show that the employee is no longer employed by the pre-injury employer.

The facts in *Niziol* are distinctly different from the facts in this case. In *Niziol*, the employer discharged the employee. In this case, the plaintiff worked for two years after the injury because she wanted to enhance her retirement benefits. The plaintiff's doctor and the plaintiff's supervisor testified the plaintiff was able to do the work she was doing. The plaintiff elected to retire; she was not terminated by the defendant.

We conclude the legislative purpose in enacting Tennessee Code Annotated § 50-6-241(a)(2) to protect a worker whose benefits were limited to two and one-half times the medical impairment rating from being discharged by an employee within the time period of 400 weeks after the award of compensation from being employed only long enough for the employer to reap the benefits of the two and one-half times limit on an award and then discharge the employee and escaping the application of the statutory provision for allowing an award of six times the impairment rating.

We do not believe it was the intent of the legislature to allow an employee to continue to work until the worker decides to retire for reasons unrelated to the injury, especially when the employee has not produced any medical evidence that they cannot continue to do the work they were doing previous to voluntarily leaving the employment.

We reverse the judgment of the trial court and determine the petition for reconsideration of the previous award.

The cost of the appeal is taxed to the plaintiff.

JOHN K. BYERS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

**MAGGIE JEAN HICKS VS. KROGER FOOD STORES, INC., ET
Anderson County Circuit Court
No. 99LA00556**

No. E2000-001449-WC-R3-CV - Filed: September 6, 2001

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 plaintiff, Maggie Jean Hicks, for which execution may issue if necessary.

09/06/01