IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
October 9, 2001 Session

TAMATHA MARIE HOWE v. JONES PLASTIC AND ENGINEERING COMPANY, LLC, d/b/a CAMDEN PLASTICS

Direct Appeal from the Circuit Court for Benton County
No. 99CCV-301 Julian P. Guinn, Judge

No. W2001-00555-WC-R3-CV - Mailed December 7, 2001; Filed March 6, 2002

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel 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. In this appeal, Defendant asserts: (1) the trial court erred in not limiting Plaintiff's permanent partial disability award to two and one-half (2-1/2) times her medical impairment rating of ten percent (10%) as provided by Tenn. Code Ann. § 50-6-241(a)(1); (2) the trial court's award of seventy-five percent (75%) disability, a multiple of seven and one half (7-1/2) times her impairment rating, should be reduced when there are no specific findings supported by clear and convincing evidence of at least three of four factors contained in Tenn. Code Ann. § 50-6-242; and (3) the trial court erred in granting Plaintiff temporary total disability benefits from May 20, 1999 until November 30, 1999. After a review of the entire record, applicable law and as discussed below, the Panel affirms in part, reverses in part, and remands to the trial court for specific findings with respect to permanent partial disability benefits.

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.

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

John D. Burleson and V. Latosha Mason, Jackson, Tennessee, for the appellant, Jones Plastic and Engineering Company.

Charles L. Hicks, Camden, Tennessee, for the appellee, Tamatha Marie Howe.

MEMORANDUM OPINION

Plaintiff, Tamatha Marie Howe, was thirty-one years old at the time of her injury and had worked for the employer, Camden Plastics, for three months. Plaintiff completed the 10th grade and has been attempting to obtain her GED. Her prior work history consisted of dishwashing, cooking and building furniture. Plaintiff worked for Defendant as a machine operator. On April 19, 1999, Plaintiff slipped on some grease at work and injured her back when it struck a metal bar. On April 20, 1999, x-rays at the Camden General Hospital emergency room reflected no fracture, subluxation or bony destruction. No significant degenerative changes were noted. Plaintiff was given pain medication and referred to her primary doctor. On April 21, 1999, Plaintiff was seen by Dr. Jesse Sewell with complaints of pain in her lower back radiating down her right thigh and leg. Plaintiff was seen by Dr. Sewell several times between April 21, 1999 and May 17, 1999. Dr. Sewell performed an MRI and treated Plaintiff conservatively. Plaintiff was treated by Dr. Sewell until June 2000, when she was seen by other doctors. According to company policy, Plaintiff provided Defendant with Dr. Sewell's certificates for return to work/appointments. Plaintiff acknowledged that she did not return to work after receiving a letter from Defendant one day stating, "no show, no call, she was fired."

At time of trial, Plaintiff stated that she has not worked since her accident, her back hurts, she cannot lift, bend or hardly walk and is currently on pain medication prescribed by her doctor. Plaintiff's husband corroborated his wife's testimony concerning her difficulties in performing her housework and physical complaints. Plaintiff has attended a school offering vocational assistance, but she complained that the jobs all required lifting. Plaintiff acknowledged that she did not see a doctor after May 20, 1999, because she had been fired and assumed her medical treatment would not be covered.

Stacy King, a receiving clerk and Plaintiff's supervisor, testified on behalf of Defendant. She recalled Plaintiff's injury in April 1999, as Plaintiff reported the injury to her. Ms. King was also aware that Plaintiff was terminated. Ms. King testified that she saw Plaintiff one time between April 19, 1999, and her termination date. She stated she was driving along a highway in Bruceton, Tennessee, passing a factory outlet store, when she observed Plaintiff either climbing in or out of a car door window. Plaintiff denied that she could climb in and out of a car window.

Sylvia Page, Human Resource Manager, testified that she handles workers' compensation claims for Defendant. Ms. Page identified off-work slips from a doctor's office indicating appointments, return to work, or if the employee is on restricted duty. After Plaintiff's first visit, she was to return to work on April 27. Ms. Page stated that she advised Plaintiff, "When you go for your doctor's appointment, whatever paper work is given to you at the doctor's office, please come back by our office and leave it with us so that we know whether you're on restricted duty or off work." Ms. Page testified that she made the decision to terminate Plaintiff. On the last page of Exhibit 1, Ms. Page identified a doctor's slip which indicated that Plaintiff could return to work on May 20, 1999. Also, above these words were the words "next appointment." To Ms. Page, this indicated that Plaintiff had both an appointment and a return to work on the same day. Plaintiff was scheduled to

work May 21, 1999, but she failed to report and never called in. Ms. Page stated that Plaintiff signed a statement during her employee orientation that Plaintiff was aware of the company's policy on missing work and the consequences. In cross-examination, Ms. Page testified that she had not seen Dr. Sewell's report of November 30, 1999, returning Plaintiff to work, nor had she seen Dr. Sewell's request for physical therapy. Ms. Page stated that she did not advise Plaintiff that her medical treatment would continue after termination. When Plaintiff failed to report for work, Ms. Page called her on the date of separation, but was unable to talk to Plaintiff.

Christy Cranford, a claims adjuster for Defendant, testified that she was responsible for Plaintiff's claim for benefits. Ms. Cranford stated that she had not denied any medical treatment for Plaintiff. Ms. Cranford was contacted about approving physical therapy for Plaintiff, which treatment was authorized. This occurred in September and October of 1999. Ms. Cranford testified that she was contacted by Dr. Sewell's office regarding Plaintiff's failure to keep her appointment. Ms. Cranford was unable to contact Plaintiff, but advised Sylvia Page that an appointment had been scheduled for August 30, 1999, for Plaintiff. Plaintiff made her appointment for August 30, 1999, with Dr. Sewell. Ms. Cranford stated that Dr. Sewell released Plaintiff on November 30, 1999, as Plaintiff had reached maximum medical improvement.

MEDICAL EVIDENCE

The medical evidence in this record considered by the trial court includes two C-32 Forms, Tennessee Department of Labor Standard Form Medical Report for Industrial Injuries submitted by Drs. Robert J. Barnett and John D. Brophy. Also, included in the record are the medical reports of Dr. Jesse Sewell and the Emergency Room record of the Camden General Hospital. All the medical records established that Plaintiff injured her back at work.

Plaintiff was seen on April 20, 1999, at the emergency room for her back injury. She was given an x-ray examination and medication for back pain. Plaintiff was referred to her primary physician.

On April 21, 1999, Dr. Sewell examined Plaintiff for back pain due to a work-related injury on April 19, 1999. Plaintiff complained of pain in her lower back, radiating down her right thigh and into her right foot. An MRI performed on April 26, 1999, by Dr. J. R. Allison, indicated that Plaintiff had degenerative disc disease at L3-4, with degenerative annular bulging at L3, L4, and L5. Dr. Sewell saw Plaintiff on April 27, May 4, and May 17, 1999, for continuing back and right leg pain. Dr. Sewell's records indicated that he furnished Plaintiff four certificates for return to work beginning April 21, 1999, through May 17. Each certificate indicated that Plaintiff was capable of returning to work, April 27 (also appointment date), May 5 (appointment date May 4), and May 15, (under care on May 14). On May 17, 1999, Dr. Sewell signed a certificate for return to work for Plaintiff stating: "able to return to work on 5-20." Immediately above the words "able to return to work" is written "next appt." Plaintiff did not keep the appointment on May 20, 1999.

On August 30, 1999, Dr. Sewell signed a C-32 Form, stating that Plaintiff had not returned to work, that Plaintiff's impairment was unknown, that he had requested physical therapy twice with no response from the carrier, and that no similar report would be furnished until PT was accomplished. Between August 30, 1999, and June 21, 2000, Dr. Sewell saw Plaintiff for back pain and numbness radiating into the right leg. Included in Dr. Sewell's medical records are a number of patient contacts, which are not in chronological order. A contact report dated January 11, 2000, indicated that Dr. Sewell released Plaintiff for work on November 30, 1999. In August and November 2000, Plaintiff was seen by two other doctors for back pain.

At the request of Defendant, Dr. John D. Brophy, an orthopedic surgeon, examined Plaintiff on June 14, 2000. After obtaining Plaintiff's work history and medical history and treatments, Dr. Brophy opined that Plaintiff had sustained mechanical back pain associated with lumbar spondylosis without clinical evidence of radiculopathy or radiographic evidence of nerve root compression. According to Dr. Trophy, Plaintiff was cleared to return to work at full duty without restriction, and her options included seeking alternative employment or another medical opinion. On October 30, 2000, Dr. Brophy opined that Plaintiff sustained a work-related injury, but sustained no permanent impairment utilizing the AMA Guidelines, Table DRE I, Page 102.

At the request of counsel, Dr. Robert J. Barnett, an orthopedic surgeon, examined Plaintiff on July 17, 2000. Plaintiff complained of numbness and limping in her left leg as a result of a work-related injury in April of 1999. Dr. Barnett noted that Plaintiff was seen by Drs. Smith, Sewell, and Brophy. An MRI showed degenerative disc disease at L3-4 with some bulging at L3, L4, and L5. Dr. Barnett concluded that Plaintiff has a documented medical injury with persistent pain and stiffness. According to Dr. Barnett's evaluation, Plaintiff has extremely limited motion. Dr. Barnett opined that Plaintiff sustained a ten percent (10%) permanent physical impairment to the body as a whole, utilizing Table 75, Page 113, AMA Guidelines. Dr. Barnett stated that Plaintiff is "certainly no candidate for any appreciable lifting, bending, stooping, squatting, long standing, and long sitting.

LEGAL ANALYSIS

In this appeal, Defendant asserts that the trial court erred in: (1) exceeding the two and one-half (2½) times cap limit, Tenn. Code Ann. § 50-6-241(a)(1), in awarding Plaintiff permanent partial disability; (2) failing to set forth specific findings by clear and convincing evidence of at least three of the four factors contained in Tenn. Code Ann. § 50-6-242; and (3) awarding Plaintiff temporary total benefits from May 20, 1999, to November 30, 1999.

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 standard requires this Panel to conduct an independent examination of the record to determine where the preponderance lies. *Story v. Legion, Ins. Co.*, 3 S.W.3d 450, 451 (Tenn. Sp. Workers Comp. 1999); *Galloway v. Memphis Drum Service*, 822 S.W.2d 584, 586 (Tenn. 1991). Where the trial court has seen and heard the witnesses, especially where issues of credibility are involved, a reviewing court must give considerable

deference to the trial court's findings. *Ferrell v. Cigna Property & Cas. Ins. Co.,* 33 S.W.3d 731, 734 (Tenn. 2000). No such deference is warranted in reviewing documentary proof. *Wells v. Tennessee Bd. of Regents,* 9 S.W.3d 779, 783-84 (Tenn. 1999). The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony, if any. *Nelson v. Wal-Mart Stores, Inc.,* 8 S.W.3d 625, 629 (Tenn. 1999) (citing *Collins v. Howmet Corp.,* 970 S.W.2d 941, 943 (Tenn. 1998)). Factors to be considered in determining the extent of vocational disability include the employee's job skills and training, education, age, extent of anatomical impairment, duration of impairment, local job opportunities, and the employee's capacity to work at the kinds of employment available to her in her disabled condition. *Id.* The employee's own assessment of her physical condition and resulting disability is competent testimony that should be considered as well. *Id.*

A. RETURN TO WORK

Defendant contends that Plaintiff is entitled to only the two and one-half (2½) multiplier, pursuant to Tenn. Code Ann. § 50-6-241(a)(1), in that she unreasonably failed to return to work as of May 20, 1999. The trial court criticized Defendant's handling of Plaintiff's workers' compensation claim, finding that it delayed Plaintiff's rehabilitation and return to gainful employment. Thus, it is apparent the trial court rejected Defendant's argument.

This Panel must consider whether the record supports Defendant's assertion, that Plaintiff unreasonably failed to return to work. Section 50-6-241(a)(1) governs awards where there has in fact been a "meaningful return to work." *Nelson v. Wal-Mart Stores, Inc.,* 8 S.W.3d 625, 629 (Tenn. 1999); *Newton v. Scott Health Care, Ctr.,* 914 S.W.2d 884, 886 (Tenn. Sp. Workers Comp. 1995). Subsection 241 (a)(1) states in pertinent part:

> [W]here an injured employee is eligible to receive any permanent partial disability benefits, . . . and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is two and one/half (2½) times the medical impairment rating. . . .

Subsection 241(b), however, governs awards in cases in which there has been no "meaningful return to work." This subsection states in pertinent part:

> [W]here an injured employee is eligible to receive permanent partial disability benefits, and the pre-injury employer does not return the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is six (6) times the medical impairment rating.

Nelson v. Wal-Mart, Inc., 8 S.W.3d at 629-30. To determine whether there has been a meaningful return to work, this Panel's inquiry must focus on "the reasonableness of the employer in attempting

to return the employee to work and the reasonableness of the employee in failing to return to work." *Id.* *Newton v. Scott Health Care Ctr.*, 914 S.W.2d at 886. The resolution of what is reasonable must rest upon the facts of each case and be determined thereby. *Id.*

In this case, a determination of "reasonableness" rests on the controversial date of May 20, 1999. Prior to this date, Plaintiff had complied with company policy in furnishing doctors' appointments and certificates for return to work to Defendant. Needless to say, Dr. Sewell's certificate to return to work is confusing. The certificate could be interpreted to mean an appointment for May 20, or that Plaintiff could return to work on May 20, or both. It is clear that Plaintiff did not return for her appointment with Dr. Sewell nor report for work on May 20 or May 21. Therefore, in compliance with company policy, Plaintiff was terminated May 24. The record is silent as to why Plaintiff failed to keep her appointment for May 20. However, the record established that Dr. Sewell did not release Plaintiff from medical treatment until November 30, 1999. This is corroborated by Underwriters Safety and Claims, Incorporated, carrier for Defendant, who was contacted by Dr. Sewell's office regarding the status of Plaintiff's treatment. The trial court, in assessing the testimony of Plaintiff, Defendant's witnesses and the medical evidence, determined that Defendant did not make a reasonable offer to Plaintiff to return to work upon her medical release in November 1999. Thus, the multiplier of two and one-half (2½) times did not apply. From our *de novo* review of the record, we do not disagree with the trial court's findings.

B. TENN. CODE ANN. § 50-6-242 FACTORS

Defendant asserts that Plaintiff's award of seven and one-half (7½) times the medical impairment rating should be reduced in that the trial court failed to set forth specific findings that at least three of the four factors, set out in Tenn. Code Ann. § 50-6-242, have been established by clear and convincing evidence.

Notwithstanding the limitations in Tenn. Code Ann. § 50-6-241(a)(2) and (b), a trial court may award employees permanent partial disability benefits, not to exceed four hundred (400) weeks, in appropriate cases where permanent medical impairment is found and the employee is eligible to receive the maximum disability award under Tenn. Code Ann. § 50-6-241(a)(2) or (b). In such cases the trial court must make a specific documented finding, supported by clear and convincing evidence, that on the date of maximum medical improvement at least three (3) of the following four (4) circumstances existed:

> (1) The employee lacks a high school diploma or general equivalency diploma or the employee cannot read or write on a grade eight (8) level;
>
> (2) The employee is fifty-five (55) years of age or older;
>
> (3) The employee has no reasonably transferrable job skills from prior vocational background and training; and

(4) The employee has no reasonable employment opportunities available locally considering the employee's permanent medical condition.

Peace v. Easy Trucking Co., 38 S.W.3d 526, 532 (Tenn. 2001); *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 630-31 (Tenn. 1999); *Ingram v. State Industries, Inc.*, 943 S.W.2d 381, 383-84 (Tenn. Sp. Workers Comp. 1995). The documented finding, based on clear and convincing evidence must be made by the trial court, not by this tribunal. *Peace*, 38 S.W.3d at 532; *Ingram*, 943 S.W.2d at 383. "Clear and convincing evidence" means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. *Ingram*, 943 S.W.2d at 383 (citing *Middleton v. Allegheny Electric Co., Inc.*, 897 S.W.2d 695 (Tenn. 1995)).

In this case, the trial court found "Plaintiff completed only the 10th grade, is attempting to obtain a GED, with obvious intellectual limitations . . . this Court further finds that this employee has no reasonably transferrable job skills from prior vocational background or training. She has no skills whatsoever other than a willingness to perform manual labor when physically able. She has no employment opportunities with this health history in this portion of the state of Tennessee." Our review of the record supports the trial court's conclusion that Plaintiff has limited intellectual abilities. As to factors (3) and (4), however, the trial court did not make the documented findings required by Tennessee Code Annotated § 50-6-242. Thus, from our *de novo* review it is impossible to determine if the trial court's decision is correct. The trial court may be in the enviable position of knowing the employment and job opportunities available in its portion of the state of Tennessee. We agree with the trial court's finding that Plaintiff has a physical disability, therefore we remand to the trial court for further consideration to determine whether three of the above enumerated circumstances have been established by clear and convincing evidence. On remand, the trial court may permit both parties to take and offer additional proof as to the enumerated circumstances. *See Peace*, 38 S.W.3d at 532; *Ingram*, 943 S.W.2d at 383.

In making this determination, we hold that the opinion of a vocational expert is necessary to establish that the employee had "no reasonably transferable job skills from prior vocational background and training" or that "the employee had no reasonable employment opportunities available locally considering the employee's permanent medical condition," or both. *See Ingram v. State Industries, Inc.*, 943 S.W.2d at 383. If the trial court, upon consideration of all the evidence, finds from clear and convincing evidence that at least three of the enumerated circumstances existed on the day Plaintiff reached maximum medical improvement, and if the trial court documents such findings, then the award of permanent partial disability benefits may exceed six times the medical impairment. If the trial court cannot find or if the trial court does not document such findings, then the award may not exceed six times the medical impairment. Further, we are persuaded that such vocational expert's fee should be allowed as discretionary costs in those cases where the trial court, based on the vocational expert's testimony, makes the required findings and awards more than six times the medical impairment, and the trial court finds her vocational expert's testimony necessary to such findings. *Id.* We believe an equitable construction of Tennessee Code Annotated § 50-6-226(c)(1) requires such conclusion. *Id.*

C. TEMPORARY TOTAL BENEFITS

Defendant contends that Plaintiff is not entitled to temporary total disability benefits on the basis that she cannot prove she was totally disabled for the duration of her disability. Further, Plaintiff abandoned her medical care by failing to make her May 20 appointment with Dr. Sewell.

In order to establish a "prima facie case of entitlement to temporary total disability, an employee must prove that he or she was (1) totally disabled to work by a compensable injury; (2) that there was a causal connection between the injury and his or her inability to work; and (3) the duration of that period of disability." *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 776 (Tenn. 2000) (citing *Simpson v. Satterfield*, 564 S.W.2d 953, 955 (Tenn. 1978)). Because "there is a time when temporary total disability ends, and a determination can be made with reasonable certainty as to whether the condition of Petitioner would respond to further treatment or whether his or her disability is permanent," *Insurance Co. of North America v. Lane*, 215 Tenn. 376, 392, 386 S.W.2d 513, 520 (1965), temporary total disability benefits "are terminated either by the ability to return to work or attainment of maximum recovery." *Cleek*, 19 S.W.3d at 776.

Defendant acknowledges that Plaintiff was entitled to temporary total disability benefits between April 20 and May 20, 1999, and such benefits were paid to Plaintiff. However, Defendant takes issue with the trial court finding that Plaintiff suffered a second period of temporary total disability which remained unpaid from May 20 through November 30, 1999. In *Cleek*, supra, the Supreme Court addressed the question if temporary total disability benefits can be revived under any set of circumstances. Although the Supreme Court found no reported Tennessee cases holding that an employee may be entitled to a second period of temporary total disability benefits, there were two such cases issuing from the Special Appeals Panel. In *Williams v. Witco Corp.*, No. 02S01-9302-CV-00013, 1993 WL 835601 (Tenn. Sp. Workers Comp. 1993), the Panel awarded Plaintiff a second period of temporary total disability benefits after the employee had returned to work but had to quit because of pain from the original back injury. Citing the standard in *Simpson v. Satterfield*, 564 S.W.2d 953 (Tenn. 1978), similarly, in *Wise v. Murfreesboro Health Care Center*, No. 01S01-9404-CH-00034, 1994 WL 902477 (Tenn. Sp. Workers Comp. 1994), the Panel held that Plaintiff was entitled to a second period of temporary total disability benefits, although Plaintiff had returned to work when she again became totally unable to work because of the original injury. The Supreme Court recognized that other states also permit a revival of temporary total disability benefits under certain circumstances.

From our *de novo* review of the record, we agree with the trial court that Plaintiff is entitled to a second period of temporary total disability benefits based on the facts. It is clear that Plaintiff did not return to work on or about May 20, 1999, and the reason may be the uncertainty of Dr. Sewell's certificate to return to work. Also, Plaintiff's explanation for missing her appointment is not apparent in this record. The trial court's assessment of her demeanor and credibility would support Plaintiff's belief that future doctor visits were not to be paid, since her termination. The record reflects that between May 20 and November 30, 1999, Plaintiff continued medical treatment for her injury of April 19, 1999. She did not reach maximum medical improvement until November

30, when she was released by Dr. Sewell. We find the evidence does not preponderate against the trial court's finding that Plaintiff is entitled to a second period of temporary total disability benefits.

CONCLUSION

We affirm the trial court's finding that Plaintiff did not have a meaningful return to work and further, we affirm the trial court's finding that Plaintiff is entitled to a second period of temporary total disability benefits. However, we remand to the Circuit Court for Benton County for further consideration of an appropriate award, if any, pursuant to Tenn. Code Ann. § 50-6-242.

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L. TERRY LAFFERTY, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

TAMATHA HOWE v. JONES PLASTIC AND ENGINEERING COMPANY, LLC, d/b/a CAMDEN PLASTICS

Circuit Court for Benton County
No. 99CCV-301

No. W2001-00555-SC-WCM-CV - Filed March 6, 2002

ORDER

This case is before the Court upon motion for review filed on behalf of Jones Plastic and Engineering Company, LLC, d/b/a Camden Plastics pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well taken and should be denied; 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 the appellant, Jones Plastic and Engineering Company, LLC, d/b/a Camden Plastics, for which execution may issue if necessary.

PER CURIAM

HOLDER, J. - NOT PARTICIPATING