IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT KNOXVILLE
FEBRUARY 28, 2002 Session

PAMELA HARVEY V. AZTEX ENTERPRISES

Direct Appeal from the Chancery Court Roane County
No. 13,533 Frank V. Williams, III, Chancellor

Filed May 24, 2002

No. E2001-01262-WC-R3-CV
Decided

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e) for hearing and reporting of findings of fact and conclusions of law. The employer contends the trial court erred in refusing to cap the award at two and one-half times the medical impairment and that the award is excessive under the facts. We affirm the judgment of the trial court.

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

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, JUSTICE, and JOHN K. BYERS, SR. J., joined.

J. Scott Wesson and B. Chadwick Rickman, Allen, Kopet & Boyd, Knoxville, Tennessee, for the Appellant, Aztex Enterprises.

Garry Ferraris, Farmer and Ferraris, Knoxville, Tennessee, for the Appellee, Pamela Harvey.

MEMORANDUM OPINION

Facts

Pamela Harvey was employed by Aztex Enterprises ("Aztex") when she slipped in cleaning solution and fell on December 9, 1998, sustaining a work-related injury to her right shoulder. Following surgery on her right shoulder by Dr. Marty Gagliardi and a second surgery on the same shoulder by Dr. Paul Naylor, she was given a seven percent whole body impairment. In March 2000, Ms. Harvey returned to her pre-injury position as a store manager at the same store she previously managed at a wage equal or greater than her pre-injury wage.

In October 2000, Aztex sold the store to Pilot Company ("Pilot"). Ms. Harvey applied for employment with Pilot, was interviewed, hired, sent for training for her new job at Pilot University to learn the new system of her new employer, and then assigned to manage the store in the same location she worked when she was injured. She received the same base salary as when she worked at Aztex, but her total compensation package, with respect to bonuses, retirement and sick leave, was not as advantageous.

Ms. Harvey, age 37, is a high school graduate. She has worked at Family Dollar unloading trucks and stocking shelves, at Harrell's IGA as a produce manager unloading trucks and packaging and displaying food, and for Roane County Food Services cooking, lifting pots and pans and waiting on children. Ms. Harvey is unable to lift her right arm above her head and is now unable to do the lifting required by those jobs. She is no longer able to perform certain work activities she previously performed at Aztex such as pressure washing the parking lot, stocking coolers, changing light bulbs, and weeding flower beds. She can no longer engage in activities such as mowing her lawn, riding horses, riding four-wheelers, bailing hay, vacuuming, and washing dishes.

The trial court determined that Ms. Harvey did not have a meaningful return to work at Aztex and awarded her benefits for a 35 percent vocational disability.

Standard of Review

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 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). Conclusions of law are subject to *de novo* review with no presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293 (Tenn. 1997). Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. *Humphrey v. David Witherspoon, Inc.*, 734 S.W2d 315 (Tenn. 1987). When the medical testimony is presented by deposition or on written reports, 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. INA*, 884 S.W.2d 446, 451 (Tenn. 1994).

Issue

Aztex Enterprises contends that the award should be modified because:

1. The trial court erred by failing to cap the award at two and one-half times the medical impairment as provided by Tenn. Code Ann. § 50-6-241(a)(1); and

2. The trial court erred by failing to make special findings of fact detailing the reasons for awarding a multiplier of five as provided by Tenn. Code Ann. § 50-6-241(c).

Discussion

I.

Aztex seeks to limit the award of workers' compensation benefits to Ms. Harvey based on Tenn. Code Ann. § 50-6-241(a)(1) which provides that when

> "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 the injury, the maximum permanent partial disability award that the employee may receive is two and one-half (2 1/2 times the medical impairment rating . . . ."

In this case, Aztex initially returned Ms. Harvey to her former job at the same or greater pay, but then Aztex sold that store and Ms. Harvey's employment with Aztex terminated. She was fortunate to apply for and obtain new employment with Pilot, which purchased the store, and she was then trained by Pilot to manage the store in accordance with Pilot procedures and policies. While her basic wages with Pilot remained the same or greater than she earned working for Aztex, there were some differences and her job duties also changed. Pilot is not her "pre-injury employer." When Aztex sold the store to Pilot, it made no collateral agreement with Pilot to ensure that Ms. Harvey would be afforded continued employment at a "wage equal to or greater than" the pre-injury wage she was paid by Aztex. Under these facts, Aztex is not entitled to the limitation on the award of benefits granted by T. C. A. § 50-6-241(a)(1).

II.

In this case, the trial court awarded five times the medical impairment. Aztex complains that the court failed to make the specific findings of fact required by Tenn. Code Ann. § 50-6-241(c). While the trial court did not address each of the factors delineated by the statute, on our *de novo* review, the record establishes that Ms. Harvey, age 39, has a high school degree and no

significant other training except for a computer literacy class at a vocational school. She has a work history limited to food services, grocery and convenience stores. In all of these positions, she has been required to do lifting and bending. She is right-hand dominant and she injured her right shoulder. As a result of the injury, she can no longer perform all of the physical requirements of any of the jobs she had before the injury. We find the award of 35 percent disability to the body as a whole to be supported by a preponderance of the evidence.

CONCLUSION

The judgment of the trial court is affirmed. Costs of the appeal are taxed to the Appellant, Aztex Enterprises, and its surety.

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Howell N. Peoples, 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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the Appellant, Aztex Enterprises, for which execution may issue if necessary.