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

GLADYS WILLIS v. MOUNTAIN STATES HEALTH ALLIANCE d/b/a JOHNSON CITY MEDICAL CENTER HOSPITAL

Direct Appeal from the Chancery Court of Washington County
No. 33313 G. Richard Johnson, Chancellor

Filed September 3, 2002

No. E2001-01404-WC-R3-CV

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 appeals a finding that the employee is totally disabled. We affirm.

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

M. Stanley Givens, Anderson, Fugate & Givens, Johnson City, Tennessee, for the Appellant, Mountain States Health Alliance d/b/a Johnson City Medical Center Hospital.

Howell H. Sherrod, Sherrod, Goldstein & Lee, Johnson City, Tennessee, for the Appellee, Gladys Willis.

MEMORANDUM OPINION

Facts

Gladys Willis is a college graduate with a major in nursing. She has been a registered nurse since 1982. Before that time, she was a licensed practical nurse for five years. She started working for Mountain States Health Alliance d/b/a Johnson City Medical Center Hospital ("Medical Center") in the intensive care unit in 1982. In 1990, she transferred to the emergency department where she was working when she slipped on ice in her employer's parking lot and fell forcefully to the pavement on March 16, 1999.

She was subsequently treated by two physicians at the Medical Center's emergency room, and by Drs. H. J. Williams, Ted Sykes, Mark McQuain, Turney Williams, Richard Duncan, and seen for evaluation by Dr. Dan M. Spengler, Chairman of the Department of Orthopedics at Vanderbilt University Hospital. She returned to work in May 1999 and worked full-time in triage until she missed two days of work on September 8 and September 9, 1999 due to symptoms from her injury. On September 10, 1999, Dr. Turney Williams ordered her off work again.

She returned to work on light duty on January 4, 2000, with a goal of working four hours, which she only accomplished one day before she stopped work on January 19, 2000. She was determined to have reached maximum medical improvement on January 13, 2000 by Dr. Mark McQuain and her temporary total disability benefits were terminated on January 30, 2000.

At trial, the parties stipulated that Ms. Willis sustained an injury in the course and scope of her employment and that the issues were vocational impairment and the application of the AMA Guides, Fifth Edition by one of the physicians who testified. Ms Willis, her husband, Gary W. Willis, testified in open court and the record supports the following findings of fact made by the trial judge in his bench opinion:

> Plaintiff is unequivocal that she could not perform any of the duties that she performed in those 17 years as a RN, nor could she perform any of the so-called or characterized light work duties that she attempted on the two occasions when she returned to work.
>
> The plaintiff testified that since her fall in March of '99 she has had just about constant back pain she relates that she is never completely free of pain in her back. She testified that the injections given to her, as I have noted, by the physician helped her temporarily and made her pain bearable for a temporary period of time. Plaintiff has difficulty sitting for any length – period of time. She cannot drive a vehicle as she did before the accident. She cannot stand in one place for very long. She cannot walk very far without stopping or resting. She walks slower. Indeed, she was late getting back to court today from lunch because of her slowness in walking that she did not have before. She can no longer work around the house, moving furniture and stripping wallpaper, painting, and weed eating, lawn mowing, and cleaning the vinyl siding. Indeed,

> Plaintiff's condition is such that she must carry a pillow with her everywhere she goes which gives her some relief while sitting.
>
> She testifies that she has been and still is on various medications, including narcotics for pain. She testifies without contradiction that these medications help her but they do not give her entire relief. She testifies that these medications contribute to her decreased concentration. She testifies that she has difficulty concentrating now because of the pain. And that's also the reason that she has had to give up her hobbies of sewing, cross stitching, camping, horseback riding, hiking, wrestling with her son.
>
> She even has difficulty now reading. She testified she was a prolific reader, reading a book a weekend, and through the week, various other readings. Not only her professional journals but pleasure reading. That now the book that she could read in a weekend takes her several weeks.
>
> She cannot participate in activities with her family, her husband and her son, going to Dollywood. And she can – cannot even meet with her colleagues, doctors and nurses, for what I understand is a once a month meeting they have where they have dinner and talk. She can no longer attend her son's various activities. He's involved in sports at his school and plays a violin, and is a 16-year old that appears to be active. And because of her condition she can no longer observe her son's extracurricular activities. She has difficulty doing the regular shopping. She cannot attend church because she can't sit that long.

The trial judge also described at length his observations of Ms. Willis in the courtroom and during her testimony. He stated that he noted a pronounced limp as she walked in the courtroom to and from the witness stand, that she sometimes spoke haltingly as a person in pain would do, that she continually changed her position while testifying, staying in the same position for only one or two minutes, and that the longest she sat without standing was six minutes, but most of the time it was three minutes. He found her to have the "highest credibility" and that he was "unequivocally convinced that the plaintiff is still in severe pain from her injury she suffered in that fall of March, '99."

The depositions of Drs. Turney Williams, Mark McQuain, and Ted Sykes were introduced along with voluminous medical records and reports. Dr. Turney Williams, board certified in anesthesiology and in pain medicine, testified that he does not do impairment ratings, but he characterized Ms. Willis as significantly incapacitated by persistent pain rendering her ability to maintain gainful employment as minimal to non-existent. Dr. McQuain, board certified in physical medicine/rehabilitation as well as electrodiagnostic medicine, testified that surgery to address her problem would likely create additional problems leaving only nonsurgical methods. Based on the AMA Guides, 4th Ed., Dr. McQuain rated Willis with a five percent impairment and imposed lifting limitations of 20 pounds maximum, 10 pounds occasionally, and 0-5 pounds frequently, and testified that she should avoid squatting, crouching, stooping, be able to change positions frequently, and to sit or stand as needed for comfort. After reviewing the AMA Guides, 5th Ed., during his deposition, he determined that her impairment rating would

increase to 16 percent to the body as a whole. Dr. Sykes, board certified orthopedic surgeon, testified that he agreed with the 16 percent impairment rating for her lumbar spine and antalgic gait. He indicated that he was not that familiar with the new Guides and that she would also fall in the moderately severe classification the AMA has for pain, but he was not qualified to express an opinion as to the effect of pain on her rating.

Norman Hankins, Ed.D, a vocational expert, testified by deposition that Ms. Willis is 100 percent vocationally disabled as a result of her physical limitations.

Jamie Beth Brown, compensation and benefit specialist for the Medical Center, testified that the Medical Center tries to accommodate an injured employee with light duty until they return to regular duty. In June 2000, Ms Brown sent a letter to Ms. Willis that the Medical Center could accommodate her restrictions and had work available for her, and that if she did not respond, she would be terminated. Ms. Brown testified the letter referred to light duty work paying $8.00 per hour, and that no permanent full-time job was available. Ms. Willis responded, by letter, that because no one could tell her the job title, the hours required, or a description of the job, she was physically unable to accept the position.

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 more 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. G*anzevoort 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.W.2d 315 (Tenn. 1987). When the medical testimony is presented by deposition, 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).

Issues

The Medical Center presents the following issues for review:

"1. Whether the trial court record contained sufficient evidence to warrant a holding that the Plaintiff was totally disabled within the meaning and intent of the Workers' Compensation Law?

2. Whether the trial court actually found that the Maximum Permanent Partial Disability Multipliers set out in Tennessee Code Annotated Section 50-6-241 are not applicable and, if the Court so held, was there sufficient evidence in the record to do so?
3. Whether the trial court erred in allowing three different physicians to testify about anatomical ratings in edition of AMA Guides when they all testified that they were not familiar with the new edition of those guidelines?

4. Whether the trial court erred in awarding a lump sum payment to the plaintiff pursuant to Tennessee Code Annotated Section 50-6-229?

5. Whether the trial court actually awarded a fee to Plaintiff's counsel according to law and, if the Court so held, was that fee reasonable and in accordance with the law?"

6. Whether the trial court actually held that the commutation of the award recited in the Final Decree is a "net compromise payment of weekly indemnity benefits" over the Plaintiff's life and, if the Court so held, was that commutation according to law?

Discussion

I.

Because the first two issues are interrelated, we discuss them together. Counsel for Medical Center asserts (1) that the evidence is insufficient to warrant a holding that Ms. Willis is totally disabled within the meaning and intent of the Worker's Compensation Law, and (2) that the trial court failed to make a finding that the permanent partial disability multipliers were not applicable and that the evidence would not support such a finding. In *Davis v. Reagan*, 951 S.W.2d 766 (Tenn. 1997), the Supreme Court made clear that a trial court is to first ascertain whether a disability is to a scheduled member. If it is not, then the trial court determines if the injury totally disables the employee from working at an occupation that generates income. If it does not, then the court proceeds to an inquiry under Tenn. Code Ann. § 50-6-241 using the listed factors to determine permanent partial disability and applying the limitations on such awards. *Id., 951 S.W.2d at 769.*

In the present case, our first inquiry is whether the evidence preponderates against the trial court's determination that Ms. Willis is totally disabled. In making this determination, "the extent of disability is a question of fact for the trial court to determine from all the evidence, including lay and expert testimony." *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 458 (Tenn. 1988). Ms. Willis and her husband testified in detail about her inability to engage in ordinary and routine daily activities of living. Dr. Turney Williams testified that persistent pain suffered by Ms. Willis rendered her ability to maintain gainful employment minimal to non-existent. The only vocational expert to testify stated that Ms. Willis is permanently totally disabled. Even after Ms. Willis reached maximum medical improvement, the Medical Center only offered some non-descript type of light duty to see if she might eventually be able to return

to work at a regular position on a full-time basis. After a careful review of the lay and expert testimony, we find that the evidence does not preponderate against the award of total disability. Therefore, the trial court properly did not reach the issue of permanent partial disability under Tenn. Code Ann. § 50-6-241.

II.

The Medical Center next contends that the "trial court erred in overruling objections to medical testimony concerning the Plaintiff's impairment rating based on the 5th Addition (sic) of the AMA Guidelines." When medical depositions were taken in this case, the AMA Guides, 5th Ed., had just been published and Medical Center's counsel objected to the doctors, who had given opinions based on the earlier edition, stating opinions based on new Guides. A physician giving an impairment rating is required to use the most recent edition of either the American Medical Association Guides to the Evaluation of Permanent Impairment or the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment. Tenn. Code Ann. § 50-6-204(d)(3); *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 317 (Tenn. 1987). While a rating of anatomical disability by a medical expert is a relevant factor, vocational disability is not restricted to a precise or exact estimate of anatomical impairment made by a medical witness. *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000). In this case, the physical limitations are of more significance in determining vocational disability than numerical ratings. We find no error in the trial court's evidentiary rulings.

III.

The Medical Center complains that the record contains insufficient evidence to warrant a lump sum payment. We note that Ms. Willis testified that she kept up with the family finances before and after she got hurt; that they have a joint checking account, a joint savings account, two accounts at the credit union, a couple of IRAs, a certificate of deposit, three tax shelter annuities, her son's savings account and her son's certificate of deposit that she manages, even though it now takes her longer to do so because of problems with her concentration. There is no evidence that Ms. Willis could not wisely manage a lump sum award. We find nothing in the record to indicate that a lump sum award would not be in the best interest of Ms. Willis. The decision of the trial court to commute a workers' compensation award to a lump sum is discretionary and will not be disturbed on appeal unless it is shown to amount to an abuse of discretion. *Edmonds v. Wilson County*, 9 S.W.3d 106, 109 (Tenn. 1999).

IV.

The Medical Center complains that the trial court mentioned nothing concerning attorney fees in its Memorandum Opinion and that it was an error to award a fee in excess of $10,000 without "making specific findings as to the factors which justify such a fee". Tenn. Code Ann. § 50-6-226. The Final Decree entered by the trial court in this case recites:

> "That Plaintiff's attorney, Howell H. Sherrod, Jr., is awarded a fee equal to twenty percent (20%) of the recovery based upon Four Hundred (400) weeks which is commuted and shall be paid as a partial lump sum pursuant to T.C.A. § 50-6-229, said fee having been approved pursuant to T.C.A.§ 50-6-229(a)(c) (sic) in the amount of Forty-one Thousand and Two Hundred Dollars ($41,200.00)."

The Bench Opinion of the trial court did not address attorney fees. We could remand the case for the trial court to make the specific findings required by the statute, however we deem that to be a waste of judicial resources and counsel's time. Based upon our consideration of the issues raised at the trial, review of the oral evidence presented and the voluminous medical depositions and medical reports and records introduced by the parties, and the amount involved in the litigation, the result achieved, the skill with which plaintiff's counsel presented his client's case, fees customarily charged in such cases, and the fact that the fee was contingent on the results obtained, we deem the fee to be reasonable.

V.

Finally, Medical Center asserts that there was no holding by the trial court regarding Social Security language and insufficient evidence in the record to so hold. A court can make a finding that the payment of workers' compensation benefits in a lump sum "represents a payment to the individual to be distributed over the individual's lifetime based upon life expectancy as determined from mortality tables from Tennessee Code Annotated." Tenn. Code Ann. § 50-6-207(6). This provision inures to the benefit of the employee without any corresponding detriment to the employer, and is regularly used in total disability cases where the employee may also be eligible for Social Security disability benefits. With no reason stated other than the failure of the trial judge to articulate the finding in his bench opinion, Medical Center objects to inclusion of the language in the Final Decree. We note the well-settled rule that "(a) court speaks only through its written judgments, duly entered upon its minutes. Therefore, no oral pronouncement is of any effect unless and until made a part of a written judgment duly entered." *Environmental Abatement, Inc. v. Astrum R.E. Corp.*, 27 S.W.3d 530, 536 (Tenn. App. 2000). The trial judge signed the Final Decree submitted by the employee's counsel. Medical Center could have filed a motion to alter or amend pursuant to Tenn. R. Civ. P. 59 if it believed the decree contained erroneous findings not intended by the trial judge. *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 786-7 (Tenn. 1999). We find no error in the judgment entered by the trial court.

VI.

Counsel for the employee has requested that the appeal be deemed frivolous and that the case be remanded for the purpose of assessing costs. Under the *de novo* review standard, our Supreme Court has consistently denied motions for frivolous appeal where the appeal presents issues of factual dispute. *Boruff v. CNA Ins. Co.*, 795 S.W.2d 125, 128 (Tenn. 1990). We do not

find all of the issues raised by the employer to be without merit or that the employer instituted this appeal solely for the purpose of delay.

Disposition

The judgment of the trial court is affirmed, and the case is remanded to the trial court for any necessary proceedings. Costs of the appeal are taxed against the Appellant.

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Howell N. Peoples, Special Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

GLADYS WILLIS V. MOUNTAIN STATES HEALTH ALLIANCE d/b/a JOHNSON CITY MEDICAL CENTER HOSPITAL
Washington County Chancery Court
No. 333-13

Filed September 3, 2002

No. E2001- 01404-SC-WCM-CV

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, Mountain States Health Alliance d/b/a Johnson City Medical Center Hospital and its surety, for which execution may issue if necessary.