

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 23, 2002 Session

MABLE CALHOUN v. QUEBECOR PRINTING, INC.

**Direct Appeal from the Chancery Court for Sullivan County
No. 29513(M) John S. McLellan, III, Chancellor**

Filed October 28, 2002

No. E2001-00839-WC-R3-CV

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The defendant appeals the trial court's decision to award the plaintiff temporary total disability benefits for the period of May 19, 1999, through January 5, 2000, and to award fifty-five percent permanent partial disability to the body as a whole. We affirm the decision of the trial court.

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

BYERS, SR.J., delivered the opinion of the court, in which ANDERSON, J., and THAYER, SP.J., joined.

Steven H. Trent, of Johnson City, Tennessee, for Appellant, Quebecor Printing, Inc.

Tony A. Seaton, of Johnson City, Tennessee, for Appellee, Mable Calhoun.

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 finding, 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 was fifty-eight years of age at the time of trial. She has completed the tenth grade and also has earned a general equivalency degree. She has no vocational or specialized training. She is married and her husband is retired. They have no dependent children.

The plaintiff began working for the defendant company in 1983. The company, which was then known as Kingsport Press, Inc., is primarily engaged in the manufacture of books. In her seventeen years with the defendant company, the plaintiff worked in a variety of positions. At the time of the injury that is the basis for her claim in this case, she was employed as a sewing machine operator.

The plaintiff testified that on July 27, 1997, she was attempting to move a palate or “skid,” which was part of the duties of her position. While doing so, her foot became caught between two of the palates, causing her to fall and injure her back and right leg. She reported her injury to her supervisor and worked the remainder of her shift. The evening of the accident, the plaintiff went to the emergency room and was diagnosed with a lumbosacral strain.

In the days following the July 27 accident, the plaintiff continued to work but experienced pain in increasing frequency and severity, so her supervisor offered her a panel of three physicians from which to choose a physician to see. The plaintiff chose Dr. John Marshall and first saw him on July 30, 1997, for examination and treatment. Dr. Marshall placed several temporary work restrictions on the plaintiff and returned her to work. The plaintiff continued to see Dr. Marshall throughout 1997. After months of the plaintiff’s continued working under restrictions while receiving treatment, Dr. Marshall determined that she had reached maximum medical improvement on January 26, 1998, and assessed permanent partial disability at ten percent to the body as a whole.

During her course of treatment with Dr. Marshall, the plaintiff also saw Dr. Fred Killeffer, a neurosurgeon. Dr. Killeffer examined the plaintiff and agreed with Dr. Marshall’s assessment of a ten percent impairment to the body as a whole. The plaintiff continued to have severe pain in her back and right leg, but Dr. Marshall and Dr. Killeffer recommended against surgery.

The plaintiff then sought treatment from Dr. Gregory Corradino, a non-panel physician. Contrary to the opinions of Dr. Marshall and Dr. Killeffer, Dr. Corradino recommended surgery be performed on the plaintiff’s back. This surgery was not authorized by her employer. She continued to work for the defendant company until May 19, 1999, when she left work for the unauthorized surgery. On May 27, 1999, Dr. Corradino performed a hemi-laminotomy and discectomy on the plaintiff.

Following the plaintiff’s surgery, she testified that her condition was relatively unchanged, and that the surgery provided no significant improvement in her symptoms. Dr. Corradino found that the plaintiff had reached maximum medical improvement “relative to her surgery”, on January 5, 2000. He assessed her a fifteen percent impairment to the body as a whole. She continued to see

Dr. Marshall, who released the plaintiff to work under restrictions identical to those she was under prior to surgery. The plaintiff, however, testified that working under those restrictions was too painful and she did not return to work for the defendant company.

Medical Evidence

The medical evidence for the purpose of the issues raised in this trial was provided by the deposition testimony of Dr. John Marshall and Dr. Gregory Corradino.

Dr. Marshall, a board-certified physician in the area of physical medicine and rehabilitation, testified that he first saw the plaintiff on July 30, 1997, for examination and treatment. He testified that his initial impression on that visit was that the plaintiff had a probable contusion or sprain of the lower back and right hip area. At that time he ruled out the possibility of a herniated disc or nerve contusion involving the sciatic nerve. He placed her on restrictions and returned her to work.

Dr. Marshall testified that he saw the plaintiff again on August 12, 1997, and, upon review of a magnetic resonance image (MRI) of the plaintiff's back, confirmed his earlier impression that she had not suffered a herniated disc. He testified that he noted at that time that she had returned to work and was working under his initial restrictions. Dr. Marshall testified that he continued to see the plaintiff throughout the fall of 1997 and that he repeatedly recommended against surgery. After continued treatment, Dr. Marshall found the plaintiff had reached maximum medical improvement on January 26, 1998, and, pursuant to the AMA Guidelines to the Evaluation of Permanent Impairment, assessed permanent partial disability at ten percent to the body as a whole.

Dr. Marshall testified that during the course of his examination and treatment of the plaintiff, she was also examined and treated by Dr. Fred Killeffer, a board-certified neurosurgeon from whom the plaintiff had sought a second opinion. Dr. Marshall testified that Dr. Killeffer recommended a second MRI. Dr. Killeffer also recommended that she refrain from surgery and agreed with Dr. Marshall's opinion that pursuant to the AMA Guidelines, the plaintiff had a ten percent impairment to the body as a whole.

Dr. Corradino testified that he first saw the plaintiff on April 23, 1999, when she came to his office seeking a third opinion on her back problems. Dr. Corradino testified that contrary to the opinions of Drs. Marshall and Corradino, he recommended back surgery for the plaintiff. Dr. Corradino performed a hemi-laminotomy and discectomy on the plaintiff on May 27, 1999. He testified that he later noted that the procedure did not provide any significant improvement in the plaintiff's symptoms. Dr. Corradino made no findings as to the plaintiff's ability to function within the requirements of her job, and he did not obtain a Functional Capacity Evaluation. He did, however, find that the plaintiff had reached maximum medical improvement "relative to her surgery" on January 5, 2000, and he assessed her a fifteen percent impairment to the body as a whole.

Vocational Expert

Dr. Norman Hankins, a vocational expert, testified as to the effects of the plaintiff's medical impairments upon her ability to work. Dr. Hankins testified that based on the restrictions on the plaintiff set by Dr. Marshall as well as her age, education, and previous work experience, he found that she could only perform about sixty-three percent of the jobs for which she was qualified. Taking into consideration the plaintiff's testimony about her having to change position every twenty to thirty minutes, Dr. Hankins testified that she was unable to do the job she had prior to the accident, and that she was one hundred percent vocationally disabled. However, when told of the long car and plane trips the plaintiff had taken since her injury, Dr. Hankins testified that it was apparent that she was not totally disabled. Dr. Hankins' testimony was not entirely conclusive as to the extent of the plaintiff's disability.

Discussion

The defendant appeals the trial court's decision on three grounds: that the trial court erred in awarding the plaintiff temporary total disability benefits for the period between May 19, 1999, and January 5, 2000, when the defendant contends the evidence presented at trial demonstrated that the plaintiff was not totally disabled from working, had previously returned to work, and only voluntarily left work to pursue unauthorized medical treatment; that the trial court erred in awarding the plaintiff fifty-five percent permanent partial disability to the body as a whole when the defendant contends the award should have been limited by Tenn. Code Ann. § 50-6-241(a)(1) to two and one-half times the plaintiff's medical impairment rating; and, that the trial court erred in its finding that the plaintiff sustained fifty-five percent permanent partial disability to the body as a whole when the defendant contends the preponderance of the evidence presented at trial indicates that such an award is clearly excessive.

The plaintiff contends that the trial court erred in its finding of fifty-five percent permanent partial disability and that the award should have instead been permanent total disability.

Although we are required to weigh the evidence in a case in depth to determine where the preponderance of the evidence lies, we are required to make such evaluation within the confines of established rules in evaluating the propriety of the trial court.

Regarding the defendant's first issue on appeal, in order to establish a prima facie case of entitlement to temporary total disability an employee must prove: (1) that she was totally disabled to work by a compensable injury; (2) that there was a causal connection between the injury and her inability to work; and (3) the duration of that period of disability. *Simpson v. Satterfield*, 564 S.W.2d 953 (Tenn. 1978). Benefits for temporary total disability are payable until the injured employee is able to return to work or, if she does not return from work, until she attains maximum recovery from her injury, at which time her entitlement to such benefits terminates. *Prince v. Sentry Ins. Co.*, 908 S.W.2d 937 (Tenn. 1995); *Yount v. Henrite Products, Inc.*, 754 S.W.2d 47 (Tenn. 1988); *Fagg v. Hutch Mfg. Co.*, 755 S.W.2d 446 (Tenn. 1988); *Simpson v. Satterfield*, 564 S.W.2d 953 (Tenn. 1978). Such benefits are not recoverable during a period of time when the employee is able to work but remains unemployed after a layoff from a work-related injury. *Vinson v. Firestone Tire and*

Rubber Co., Inc., 655 S.W.2d 931 (Tenn. 1983).

In this case, the plaintiff suffered her original injury on July 27, 1997. Following the injury, she continued to work while being treated by Dr. Marshall, who assessed that she had reached maximum medical improvement on January 26, 1998. However, the plaintiff testified that her attempt to return to work was made impossible by her continued pain from the original injury. The trial court heard the live testimony of the plaintiff and found her testimony credible. 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. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). Thus we will not disturb the trial judge's determination that the plaintiff's testimony at trial was credible.

The record shows that the plaintiff's later "total disability" (as assessed by Dr. Corradino,) and inability to work were causally related to the original compensable injury. While the surgery was not authorized by the defendant and therefore was not compensable itself, it was not unreasonable for the plaintiff to seek such medical treatment outside the panel. Further, the plaintiff and her doctor would never have felt she needed the surgery had there not been an injury in the course and scope of her employment. As there is such "causal connection" between the original injury and the plaintiff's inability to work between May 19, 1999, and January 5, 2000, the trial court was within its discretion in finding the plaintiff should receive temporary total disability benefits from the defendant for that period of time, and therefore we affirm the trial court's decision on that issue.

As for the second issue on appeal, the defendant contends that the plaintiff did indeed have a meaningful return to work and should therefore be limited to an award of two and one-half times her medical impairment rating pursuant to Tenn. Code Ann. § 50-6-241(a)(1). In support of this contention, the defendant argues that the plaintiff in fact *did* return to work following the initial injury, and worked at the same or greater wage for a period of twenty-two months before electing to have unauthorized surgery.

The trial court awarded the plaintiff permanent partial disability benefits in the amount of fifty-five percent to the body as a whole based upon the court's perception that there was no proof in the record that the plaintiff could perform the work that was offered to her by her employer following her surgery. Because the record shows the plaintiff was unable to have a meaningful return to work following the surgery that she and her doctor felt was necessary to enable her to continue working for the defendant, the trial court was within its discretion to award the plaintiff benefits beyond the statutory maximum of two and one-half times her medical impairment rating, pursuant to Tenn. Code Ann. § 50-6-241(a)(1). In the absence of any showing by the defendant that the trial court abused its discretion in making such a finding, we affirm the decision of the trial court.

The defendant's third issue, that the evidence at trial preponderates that an award of fifty-five percent to the body as a whole is excessive, is simply not borne out by the facts in the record. At

trial the plaintiff presented a substantial amount of evidence, through medical and lay testimony, that supported her contention that she can no longer work for the defendant and that she should receive permanent total disability. The defendant of course offered its own evidence in contrast to that point, and the trial court weighed both sides of the issue. It is entirely within the trial court's discretion to determine matters of this nature, and absent evidence in the record that the trial court abused its discretion, we will not disturb the trial court's finding. There is no such evidence here, and we affirm the decision of the trial court to award the plaintiff fifty-five percent permanent partial disability to the body as a whole.

For the foregoing reasons, the judgment of the trial court is affirmed. The cost of this appeal is taxed to the defendant.

JOHN K. BYERS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

MABLE CALHOUN V. QUEBECOR PRINTING, INC.

No. E2001-00839-SC-WCM-CV

JUDGMENT

This case is before the Court upon Applicant's motion for review 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 assessed to Quebecor Printing, Inc., for which execution may issue if necessary.

PER CURIAM

Anderson, J., not participating