IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
August 26, 2002 Session

CATHY JUDKINS v. FINDLAY INDUSTRIES/GARDNER MANUFACTURING DIVISION

Direct Appeal from the Chancery Court for Warren County
No. 7251 Charles D. Haston, Chancellor

No. M2001-02560-WC-R3-CV - Mailed - October 11, 2002
Filed - November 12, 2002

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. This complaint was non-specific as to the occurrence of a job-related accident and any compensable injuries. The essential thrust of the appeal by the employer is directed to the issue of whether the purported failure of the employee to reveal pre-existing medical conditions to an independent medical examiner nullifies his testimony.

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

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J. and JOE C. LOSER, SP. J., joined.

Bruce Timothy Pirtle and Mary M. Little, McMinnville, Tennessee, for the appellant, Findlay Industries/Gardner Manufacturing Division.

Barry H. Medley, McMinnville, Tennessee for the appellee, Cathy Judkins.

MEMORANDUM OPINION

The plaintiff is a single forty-year-old female with a seventh-grade education. She has no work skills, and is qualified only for menial jobs. She filed a complaint on February 24, 2000, for workers' compensation benefits alleging that within the course and scope of her employment she "received new injuries, cumulative, consecutive, exacerbations and/or aggravation of injuries, and/or conditions in December 1999."

The defendant sought no factual specificity, but alleged any basis for the claim was a non-compensable, pre-existing condition unrelated to plaintiff's employment.

The plaintiff testified that she had been employed by the defendant for four years when she was injured on December 16, 1999. The details of the nature of her work are skimpy; she testified that:

> [Y]ou go back and get racks, you bring them up there . . . I was squatted down looking through the parts, hunting what I needed when this guy was putting up a die. And he came back with a tow motor, backed up, and hit the racks, which knocked me over.

The plaintiff finished her shift, although her back was hurting; she reported the occurrence and was given the names of three physicians, one of whom was Dr. Rogers whom she saw "two or three weeks later." She saw Dr. Rogers three times, then saw Dr. Zwemer twice, and finally, Dr. Robinson Dyer.

She testified that she had back problems previously, but "that they all got better." She denied having any back problems "immediately before this injury happened." Dr. Zwemer testified, as nearly as can be ascertained, that the plaintiff made no mention of prior back problems; that x-ray examination of her revealed "degenerative disc disease in her lumbar spine," confirmed by an MRI examination, and that "I didn't give her any rating."

Counsel referred her to Dr. Dyer, who reported that, based upon his examination of the plaintiff and a review of available medical records, she had a permanent partial impairment related to her injury of 5 percent to her whole body.

The trial judge 'accepted' the testimony of Dr. Dyer and found that the plaintiff had a 17 percent vocational disability. The defendant appeals, insisting that the evidence preponderates against this finding, which is presented for review. Our review is *de novo* on the record with a presumption that the judgment is correct unless the evidence preponderates against it. Rule 13(d) Tenn. R. App. P.

The essential thrust of the defendant's argument is that the opinion of Dr. Dyer is of no value because it was premised on the false assumption that the plaintiff had suffered no prior back problems. Dr. Dyer submitted a Form C-C2, which does not indicate that his opinion was based upon the absence of prior back problems, and the plaintiff testified that she did not recall whether she related her prior problems to Dr. Dyer or not.

The credibility of the plaintiff was assailed, but we must accord deference to the trial judge, who credited her testimony not only as to how the accident, if any, occurred, but also as to the sustaining of the injury, if any, and the extent of it. ***Kellerman v. Food Lion Inc.***, 929 S.W.2d 333 (Tenn. 1996). The trial judge also 'accepted' the testimony of Dr. Dyer who testified that the

plaintiff had sustained a work-related injury with a resulting 5 percent impairment. We are unable to find that the evidence preponderates against the judgment which is affirmed at the costs of the appellant.

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WILLIAM H. INMAN, SENIOR 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 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, Findlay Industries/Gardner Manufacturing Division, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM