

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT KNOXVILLE
OCTOBER 9, 2002

BILLIE JO LENEAR V. REHAB CARE GROUP, INC.

**Direct Appeal from the Chancery Court for Union County
No. 3521 Billy Joe White, Chancellor**

Filed December 20, 2002

No. E2001-02935-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 appellant claims that the trial court erred in finding that she was not an employee and, thus, not entitled to worker's compensation benefits. We affirm.

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

Maurice S. Briere, Jr., Ralph Brown & Associates, Knoxville, Tennessee, for the Appellant, Billie Jo Lenear.

Robert R. Davies, Stokes, Rutherford, Williams, Sharp & Davies, Knoxville, Tennessee, for the Appellee, Rehab Care Group, Inc.

MEMORANDUM OPINION

Facts

This case was tried on joint stipulations and the oral testimony of the claimant, Billie Jo Lenear. On March 11, 1998, Ms. Lenear applied for employment as a nursing assistant with Rehab Care Group, Inc. She filled out a written application and was personally interviewed by Terry Willis. She testified that she "was told by Terry Willis that if I passed all the physical

exams that I would be hired and paid \$6 an hour, 37.5 hours per week.” Ms. Lenear also testified that she was told that she had the job on the day that she saw Ms. Willis for the interview. Ms. Lenear had a physical examination at St. Mary’s East Town Rehabilitation Service on March 13, 1998. As a requirement of the examination, she was attempting a 100-pound lift when she felt sudden pain in her back. On March 26, 1998, she was seen by Dr. Sidney L. Wallace, who noted the following history:

“She injured her back on 3-13-98. She was performing a pre-employment test to work as a physical therapy technician. She states that she was required to lift a 100-pound object. As she lifted it, she heard a loud audible pop in her back and had an immediate onset of pain. . . .” (emphasis supplied)

Dr. Wallace subsequently diagnosed a minimal compression fracture of L3 that he attributed to the attempt to lift 100 pounds, and he opined that Ms. Lenear sustained a permanent impairment of 5 per cent to the body according to the AMA Guide to the Evaluation of Permanent Impairment, Fourth Edition.

On cross-examination, Ms. Lenear testified that she did not expect to be, and was not, paid: (1) for having a walk-through to see what the job duties were, (2) for filling out the job application, (3) for having TB test, blood test and drug test, nor (4) for the physical test where she injured her back. She testified she understood that before she could work Rehab Care Group had to send her through testing to make sure she could perform the physical requirements of the job.

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). *Mannery v. Walmart Distrib. Center*, 69 S.W.3d 193, 196 (Tenn. 2002). 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. *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.W.2d 315 (Tenn. 1987).

Issue

The issue is whether the trial court erred in finding that Ms. Lenear was not an employee of Rehab Care Group, Inc., and therefore, that her injury did not arise out of and was not in the course of employment.

Discussion

An action for an award of worker's compensation benefits is a suit upon a contract, and "no obligation can arise, and no action will lie, unless the parties are bound by contract, express or implied." *Cornett v. City of Chattanooga*, 165 Tenn. 563, 56 S.W.2d 742 (1933). In order for Ms. Lenear to recover, she must establish that the contractual relationship of employer and employee exists with Rehab Care Group, Inc. A contract of employment requires consideration, i.e. the right, express or implied, to be paid for services performed by the employee for the employer. "The ordinary and usual meaning of the word 'employee' (sic) is one who is employed by another and works for wages or salary without regard to whether the employment be legal or illegal." *American Surety Co. of N.Y. v. City of Clarksville*, 204 Tenn. 67, 315 S.W.2d 509, 513 (1958). In *Black v. Dance*, 643 S.W.2d 654 (Tenn. 1982), the Supreme Court held: "In order for one to be an employee of another for purposes of our Worker's Compensation Law, it is, therefore, required that there be an express or implied agreement for the alleged employer to remunerate the alleged employee for his services in behalf of the former." *Id.* at 657. In light of the testimony of Ms. Lenear that she did not expect to be paid by Rehab Care Group, Inc. for the physical examination where she sustained her injury, and that she was told that she would be hired if she passed all the physical exams, we must conclude, as did the trial court, that no contract of employment existed at the time Ms. Lenear sustained her back injury.

Disposition

The judgment of the trial court is affirmed. Costs of the appeal are taxed against the Appellant.

Howell N. Peoples, Special Judge

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AT KNOXVILLE, TENNESSEE

BILLIE JO LENEAR V. REHAB CARE GROUP
Union County Chancery Court
No. 3521

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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, Billie Jo Lenear, and its surety, for which execution may issue if necessary.