IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 5, 2004 Session

LENITA OATSVALL V. BAPTIST MEMORIAL HOSPITAL-HUNTINGDON

Direct Appeal from the Circuit Court for Carroll County
No. 4298 C. Creed McGinley, Judge

No. W2003-02474-WC-R3-CV- Mailed June 15, 2004; Filed July 20, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn.Code.Ann. §50-6-285 (e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The employer, Baptist Memorial Hospital-Huntingdon appeals a judgment awarding the employee benefits based upon a permanent partial impairment of fifty (50%) percent to the body as a whole. The hospital contends that the judgment should be reversed and dismissed because the employee failed to give proper notice of the accident and because her injury was a preexisting condition rather than an injury caused by a job-related accident. Alternatively, the employer insists that the award of fifty (50%) percent permanent partial disability to the body as whole should be modified and reduced. For the reasons stated in this opinion, we affirm the judgment of the trial court.

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

WILLIAM B. ACREE, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and LARRY B. STANLEY, JR., SP. J., joined.

James L. Kirby and Jeffrey L. Griffin, Memphis, Tennessee, for the appellant, Baptist Memorial Hospital-Huntingdon.

Ricky L. Boren, Jackson, Tennessee, for the appellee, Lenita Oatsvall.

MEMORANDUM OPINION

Factual Background

The employee is an LPN and worked at the Baptist Memorial Hospital-Huntingdon

(hereinafter "hospital") from 1997 until October 8, 2000. She worked in labor and delivery. She is 44 years of age and has a high school education.

On October 8, 2000, the employee was assisting in delivering a baby. While the baby was being delivered, the mother pushed her foot into the employee's mid-section, and the employee felt a twinge in her back. The employee's back pain became more severe after she left work. The next day, she was unable to work and called in sick.

The employee did not submit a workers' compensation claim. She testified that her husband, who also worked at the hospital, was afraid he would lose his job if she submitted a claim. However, she contends that the hospital had actual notice of the injury. Shannon Dixon, who was the employee's supervisor, testified on behalf of the employee. Ms. Dixon said that she was not working that day but came to the hospital to complete paperwork. She observed the employee with her back against the wall and was told by the employee that she had injured her back while assisting in delivery. The next day, Ms. Dixon talked to the employee's husband who confirmed what his wife had told her. On a later occasion, Ms. Dixon saw the plaintiff at the hospital for physical therapy. She observed that the employee appeared to be in pain.

Ms. Dixon testified that it is the employee's responsibility to complete an accident report, but, if the employee is unable to do that, the supervisor should do so. Ms. Dixon said the hospital was short staffed at the time, and the employee's accident was not on her mind. She did not fill out an accident report.

Ms. Dixon's direct supervisor was Kathy Howard. Ms. Dixon said that she discussed the employee's injury with Ms. Howard in her office on several occasions. Ms. Howard was not called as a witness.

The employee applied for and received family leave benefits from the hospital. She received those benefits from October 8, 2000 until April 14, 2001.

The hospital called a number of witnesses who testified about the notice and causation issues. Kimberly Ann King is the Human Resources Director at the hospital. On October 21, 2000, Ms. King talked with the employee's husband, who told her that he did not know how his wife was injured, but that she was not going to file a workers' compensation claim. Ms. King talked with the employee on January 8 and January 10, 2001 by telephone. On neither occasion did the employee say anything about a workers' compensation claim or that she had injured her back at work. To the contrary, they discussed the non-work related benefits the employee was receiving.

Sandra Key, the Chief Nursing Officer of the hospital, testified that she observed the employee walking with a limp while en route to physical therapy. The employee told her that she did not hurt herself at work and that she may have pulled something while working at home.

Kristin Davis, the Labor and Delivery Staff Nurse, testified that the employee told her she

was taking care of her mother-in-law who had a stroke, and this was causing her to have difficulty with her back.

Melody Ann Heyduck, the Administrative Receptionist and HR Representative at the hospital, testified that on October 20, 2000, the employee came to her office to fill out the paperwork for her family leave benefits. The employee said that she did not hurt her back at work and thought she may have hurt it at home.

The employee acknowledged that she was familiar with the hospital's policy for a work related injury and that she did not follow that policy.

In January 2001, the employee's husband told hospital officials that his wife wanted to file a workers' compensation claim, and he asked for an employee occurrence report. He was told that the claim had not been timely filed, but that the decision as to whether the claim would be accepted would be made by the insurance company. The employee's husband was given an occurrence report, but the employee did not submit it. The employee testified that she did not think it would do any good.

The employee was treated by her family doctor, Dr. James S. Williamson. Dr. Williamson placed permanent restrictions on the employee which limited her ability to lift, bend, stretch, or stand. The restrictions prevented her from returning to full duty at the hospital. Consequently, she was terminated by the hospital on April 14, 2001.

After her termination at the hospital, the employee worked for a short period of time as a cosmetologist. She had been a cosmetologist before going to work at the hospital. The record is not clear as to the extent of this work or as to whether she received compensation.

The employee has worked two part-time nursing jobs since leaving the hospital. The first was at the Carroll County Sheriff's Department as a jail nurse, and the second was for a Dr. Burger. She was working for Dr. Burger at the time of the trial. Neither job involved physical activity.

The employee testified that she has problems with housework and with any activity that causes a strain on her back. She said that she cannot lift more than five or ten pounds and cannot work as an LPN because it requires lifting and turning patients or as a cosmetologist because it requires too much standing and bending.

The employee's credibility was an issue in the case. In challenging the employee's credibility, the hospital relied upon the testimony of the four hospital employees who said they were told the injury was not work-related and upon false answers she gave during discovery. When she gave her deposition and when she responded to interrogatories, the employee said that she had never injured her back prior to October 8, 2000, nor had she been treated for any such injuries. At trial, she admitted that this was false and also admitted that she had been treated by Dr. Williamson on more than 30 occasions for back injuries. Those visits began in 1991 and continued until October

3, 2000. The employee distinguished her present condition from the condition prior to October 8, 2000. She said that she had never been completely down with a back injury before and was able to do her work.

The medical evidence at the trial was the medical records and reports of Dr. Williamson and Dr. Joseph Boals.

Dr Williamson, in a report dated January 29, 2002, said an MRI indicated a herniated L-5 lumbar disk. He opined that her back pain and herniated disk were caused by the injury she sustained while assisting in labor and delivery at the hospital. In a subsequent report dated April 1, 2002, he said that she was unable to work as a full-time nurse, but that she could continue to fill her requirements as a part-time nurse at the jail. He did not want her lifting anything more than five to ten pounds at a time nor did he want her to engage in bending, stretching or prolonged standing.

Dr. Joseph Boals performed an independent medical evaluation upon the employee at her request. In a report dated November 12, 2001, Dr. Boals opined that she had a small HNP (herniated nucleus pulposus or "slipped disk") at L-5 and rated her at ten (10%) percent impairment to the body as a whole. He suggested that she should avoid prolonged walking, standing, stooping, squatting, climbing, excessive flexion, extension or rotation of the back and not lift more than 25 pounds.

The trial court found that the employee's claim was compensable and that the hospital had actual knowledge of the injury. The trial court also found that the anatomical rating by Dr. Boals of ten (10%) percent impairment to the body as a whole was appropriate and that she was unable to return to her prior job and perform full-time employment. He awarded her fifty (50%) permanent partial disability to the body as a whole.

Standard of Review

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. §50-6-225 (e)(2); Lollar v. Wal-Mart Stores, Inc., 767 S.W.2d 143, 149 (Tenn. 1989). Where the trial judge has seen and heard the witnesses especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be afforded those circumstances on review because it is the trial court which had the opportunity to observe the witness' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., 996 S.W.2d 173, 178 (Tenn. 1999).

Analysis

The hospital first contends that the employee failed to give notice as required by Tenn. Code Ann. §50-6-201. Under this statute, an injured employee must give written notice of an injury to the employer unless the employer had actual knowledge of the accident.

The employee contends that the hospital had actual notice of the injury. She relies upon the testimony of Shannon Dixon, her supervisor, who testified that on the day of the injury, the employee told her she injured her back while assisting in delivery. Ms. Dixon also testified that she was told the same thing by the employee's husband the next day and that she discussed the injury with her direct supervisor, Kathy Howard, on several occasions. The hospital did not call Ms. Howard to refute that testimony.

It is enough that the employee notified the employer of the facts concerning the injury of which the employee is aware or reasonably should be aware. Livingston v. Shelby Williams Ind., 811 S.W.2d 511, 514 (Tenn. 1991); Pentecost v. Anchor Wire Corp., 695 S.W.2d 183, 185 (Tenn. 1985);. For a communication to constitute either written notice or actual notice on the part of the employer, it must be calculated to reasonably convey the idea to the employer that the employee suffered an injury arising out of and in the course of the employee's employment. Jones v. Helena Truck Lines, Inc., 833 S.W.2d 62, 64 (Tenn. 1992); Masters v. Industrial Garments Mfg. Co., 595 S.W.2d 811, 815 (Tenn. 1980). We also observe that the notice statutes, Tenn. Code Ann. 50-6-201 and Tenn. Code Ann. 50-6-202, only require that notice be given of the occurrence of an injury. These statutes do not require the employee to advise the employer that the employee intends to claim workers' compensation benefits.

The hospital attacked the credibility of the employee. Four witnesses testified that either the employee or her husband told them she was not injured at work. In addition, the employee was untruthful during her discovery deposition and when answering interrogatories.

The hospital also attempted to discredit the testimony of Shannon Dixon, the employee's supervisor, by characterizing her as a disgruntled former employee.

Despite the foregoing, the trial judge found that the employee and Ms. Dixon were credible witnesses. He accepted the employee's explanation that she did not apply for workers' compensation benefits at the insistence of her husband who was afraid he would lose his job if she had done so. The trial court observed the witnesses' demeanor and heard the testimony. We cannot say the evidence preponderates against his findings that the employee and Ms. Dixon were credible witnesses and that the hospital had actual notice of the accident. This issue is without merit.

The second issue raised by the hospital is that the employee's alleged injury was a pre-existing injury rather that an injury caused by an accident arising out of and in the course of her employment.

The employee's family doctor and treating physician, Dr. Williamson, reported that an MRI which he had ordered indicated a herniated L-5 lumbar disk. He also reported that he felt her back pain and herniated disk were due to the injury that she sustained while working at the hospital and while assisting in labor and delivery.

The hospital insists that Dr. Williamson's opinion should be disregarded because of the long

history of back pain which the employee had before the accident. The hospital relies upon excerpts of the employee's medical records obtained from Dr. Williamson. While these records reflect that the employee had intermittent back pain for about ten years prior to the accident and that she was treated more than thirty times, the records do not reflect that she had a ruptured disk. Furthermore, the hospital offered no expert medical evidence to refute the opinion expressed by Dr. Williamson. We hold that the trial judge's finding that the accident was the cause of the employee's herniated L-5 lumbar disk is supported by a preponderance of the evidence.

The final issue raised by the hospital is that the evidence does not support the trial court's award of fifty (50%) permanent partial disability to the body as whole.

The employee introduced a report by Dr. Joseph Boals stating that because of her ruptured disk, she qualified for impairment under the AMA Guidelines 5th Edition of ten (10%) percent to the whole person, which the trial court found to be appropriate. The trial court also found that because the employee could not return to her job at the hospital, the multipliers were not applicable, and the court could award benefits not to exceed six times the anatomical rating. The court found the employee was a 44-year-old with a 12th grade education and vocational training in two separate areas. The trial court found that with her restrictions, she was prohibited from any type of full-time employment. Considering all of the factors, the court found the employee had suffered a permanent partial impairment of fifty (50%) percent to the body as a whole.

In challenging the award, the hospital again argues that the employee's condition was preexisting and that she had no new injury, or that if she did, it was not caused by her employment. The hospital again disputes the opinions of Dr. Williamson and Dr. Boals. However, as we observed in addressing the previous issue, the hospital has produced no expert medical opinion to the contrary, and the preponderance of the evidence is that the employee ruptured a disk while working at the hospital.

The hospital also insists that the trial court improperly used a multiplier of five to set the vocational disability rating.

Tenn. Code Ann. §50-6-241 provides that if an employee returns to his employment at wages less than the wages the employee was receiving at the time of the injury, he may receive an award not to exceed six times the medical impairment rating. The statute further provides that if the court awards a multiplier of five or greater, then the court should make specific findings of fact detailing the reasons for awarding the maximum impairment. The court is to consider all pertinent factors including lay and expert testimony, employee's age, education, skills and training, local job opportunities and capacity to work at types of employment available in the claimant's disabled condition.

The trial court found that the restrictions imposed upon the employee by Dr. Williamson are extensive and prohibit her from lifting anything more than five to ten pounds. The restrictions suggested by Dr. Boals are similar. It is undisputed that with her restrictions, the employee could

not return to her job at the hospital or to work as a cosmetologist, the other area in which she was trained. At the time of the trial, the employee was working part-time for a doctor in private practice. That job involved no physical activity.

We find that the trial court's findings of fifty (50%) percent permanent partial impairment to the body as a whole is supported by the preponderance of the evidence.

Conclusion

In conclusion, we hold that the hospital had actual notice of the employee's on-the-job injury; that the injury was caused by an accident arising out of and in the course of her employment; and that the evidence supports the trial court's award of fifty (50%) percent permanent partial impairment to the body as a whole.

The costs of the appeal are taxed to Baptist Memorial Hospital-Huntingdon, for which execution may issue if necessary.

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WILLIAM B. ACREE, JR., SPECIAL JUDGE

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JUDGMENT ORDER

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 on appeal are taxed to the Appellant, Baptist Memorial Hospital-Huntingdon, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM