IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
September 30, 2004 Session

BRENDA McILROY v. MEDICAL SPECIALTY CLINIC, P. C.

Direct Appeal from the Chancery Court for Madison County
No. 59,500 James F. Butler, Chancellor

No. W2003-02910-WC-R3-CV - Mailed November 1, 2004; Filed December 6, 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. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the employer insists the trial court's award of disability benefits based on 24 percent to the body as a whole is excessive under the circumstances. As discussed below, the panel has concluded the evidence fails to preponderate against the findings of the trial court.

Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the Chancery Court Affirmed

JOE C. LOSER, JR, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JOHN A. TURNBULL, SP. J., joined.

John R. Cannon, Jr., Memphis, Tennessee, for the appellant, Medical Specialty Clinic, P. C.

Jay E. DeGroot, Jackson, Tennessee, for the appellee, Brenda McIlroy

MEMORANDUM OPINION

The employee or claimant, Brenda McIlroy, initiated this civil action to recover permanent disability benefits from her employer, Medical Specialty Clinic, P. C., for a work related injury The employer denied liability. After a trial on the merits, the trial court found the employer liable under the Workers' Compensation Act for permanent partial disability benefits based on 24 percent to the body as a whole. The employer has appealed. The employer does not question the trial court's finding that the employee suffered a compensable injury by accident, but contends the preponderance of the evidence is that the employee was not permanently injured or the award should be limited to either 7 ½ percent or 15 percent to the body as a whole.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. 1995). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Hill v. Wilson Sporting Goods Co., 104 S.W.3d 844 (Tenn. Workers' Comp Panel 2002). Issues of statutory construction are solely questions of law. Id. 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 accorded those circumstances on review, McCaleb v. Saturn Corp., 910 S.W.2d 412, 414 (Tenn. 1995), because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 61 (Tenn. 2001). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). Extent of vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn. 1999). Where the medical testimony in a workers' compensation case is presented by deposition, the reviewing court may make an independent assessment of the medical proof to determine where the preponderance of the proof lies. Bridges v. Liberty Mutual Ins. Co. of Hartford, 101 S.W.3d 67 (Tenn. Workers Comp Panel 2000).

The claimant was employed as a receptionist. As such, she would greet and register patients and pull their charts for the doctors. At the end of the day, it was her duty to pull stacks of charts, clean-sheet them and place them on a ledge in preparation for the next day. On February 21, 2001, she lost her balance and twisted her body while placing charts on the ledge, straining her neck and lower back. She left work after clocking out. The next day, she reported her injury and, from a list provided by the employer, chose to see a doctor across the street from the employer's office. That doctor prescribed muscle relaxants, rest and a weight lifting restriction of fifteen pounds. Since that time she has seen and been treated by a number of doctors, including Dr. Lowell Stonecipher, Dr. Keith Nord and Dr. Ronald Teddleton, all of whom testified by deposition.

Dr. Stonecipher, an orthopedist, diagnosed cervical and lumbar strain. He administered a cortisone shot, prescribed physical therapy and ordered a nerve conduction test by Dr. Ron Bingham. The test results were normal. After a few visits, Dr. Stonecipher released the claimant from his care. He opined in his deposition that the claimant would probably retain no permanent medical impairment.

Dr. Teddleton, a chiropractor, treated the claimant during March and April 2001. His diagnosis was essentially the same as that of Dr. Stonecipher, except that he noted the injury was superimposed on and aggravated the claimant's pre-existing arthritis. Dr. Teddleton testified unequivocally that the injury both aggravated and advanced the claimant's pre-existing condition,

and he estimated her permanent medical impairment to be 20 percent to the body as a whole.

Dr. Nord, another orthopedist, treated the claimant for more than a year, beginning on November 28, 2001, when he diagnosed cervical thoracic strain, degenerative disc disease and right shoulder impingement. Further diagnostic testing revealed tendinitis and a possible torn rotator cuff in the right shoulder, which he treated with manipulation. Although Dr. Nord agreed that the claimant's injury aggravated her pre-existing arthritis and affected her ability to work, he estimated her permanent impairment to be only 3 percent to the whole person.

All three medical impairment ratings were based on AMA Guides.

Even before the injury occurred, the claimant was not a particularly good worker. Her supervisor testified she was slow and made mistakes. Nevertheless, she was not fired. After the injury, she became even slower and, in May 2002, was fired for poor performance. The only proof as to why the claimant performed even more poorly after the injury was the claimant's own testimony that she performed poorly because of pain from her work related injury. She has since obtained a lighter duty job with another employer.

The trial court found the claimant did not make a meaningful return to work and that her medical impairment was 6 percent to the whole person. The award of permanent partial disability benefits based on 24 percent to the body as a whole was obtained by multiplying that medical impairment rating times four.

The employer's first contention is that the trial court erred by applying a multiplier greater than two and one-half because the claimant made a meaningful return to work after her injury. For injuries arising after August 1, 1992 and before July 1, 2004, in cases where an injured worker is entitled to permanent partial disability benefits to the body as a whole and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is two and one-half times the medical impairment rating pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment. Tenn. Code Ann. § 50-6-241(a)(1). If the offer from the employer is not reasonable in light of the circumstances of the employee's physical disability to perform the offered employment, then the offer of employment is not meaningful and the injured employee may receive disability benefits up to six times the medical impairment. On the other hand, an employee will be limited to disability benefits of not more than two and one-half times the medical impairment if the employee's refusal to return to offered work is unreasonable. Newton v. Scott Health Care Center, 914 S.W.2d 884 (Tenn. 1995). The resolution of what is reasonable must rest on the facts of each case and be determined thereby. Id.

Both Sandy Morris, the Specialty Clinic Practice Manager, and Nancy Morris, the claimant's immediate supervisor, testified that her work was probably even slower in performing her duties after the injury. She was fired as a result of this poor performance. The claimant testified that her ability

to work was limited by the pain from the work-related injury. The trial court apparently accredited that testimony. We cannot say the evidence preponderates against the trial court's finding that her return to work was not meaningful. Thus, the two and one-half times multiplier is not applicable.

The employer next contends the trial court erred in finding the claimant's medical impairment to be 6 percent to the whole person because none of the medical experts assigned that percentage to her. A trial court is not required to reject the opinions of all medical opinions except one in determining the extent of an injured worker's medical impairment, but may weigh and evaluate all such available medical opinions. In the present case, the trial court rejected Dr. Stonecipher's opinion that the claimant was not permanently impaired and gave more weight to the opinion of Dr. Nord than to that of Dr. Teddleton, as it had the discretion to do, but gave some weight to both opinions, considering both the impairment resulting directly from the injury and the aggravation of the injured worker's pre-existing condition. An employer takes an employee as the employee is, with all defects and diseases, and assumes the risk of having a weakened condition aggravated by an injury which might not affect a normal person. Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993).

The evidence thus fails to preponderate against the trial court's findings and the trial court did not abuse its discretion by giving some weight to the opinion of Dr. Teddleton and applying a multiplier of four times 6 percent. For those reasons, the judgment of the trial court is affirmed. Costs are taxed to the appellant.

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JOE C. LOSER, JR.

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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, Medical Specialty Clinic, P.C., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM