

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

SHIRLEY MOORE v. BEST METAL CABINETS

**Direct Appeal from the Chancery Court for Haywood County
No. 12192 George R. Ellis, Chancellor**

No. W2003-00687-WC-R3-CV - Mailed August 24, 2004; Filed October 7, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 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 argues that the trial court erred in awarding permanent disability benefits to the Employee, in failing to apply the 2.5 cap pursuant to Tennessee Code Annotated section 50-6-241(a), and in failing to make specific findings of fact pursuant to Tennessee Code Annotated section 50-6-241(c). We conclude that the evidence preponderates in favor of the trial court's award of permanent disability benefit; that the evidence fails to preponderate against the trial court's award of benefits that exceed the 2.5 cap; and that the evidence preponderates against the trial court's award of six times the anatomic impairment rating. We, therefore, affirm the trial court's judgment, as modified.

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

ROBERT L. CHILDERS, SP.J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and WILLIAM B. ACREE, SP.J., joined.

Jeffery G. Foster and Zachary C. Luttrell, Jackson, Tennessee, for the appellant, Best Metal Cabinets.

L.L. Harrell, Jr., Trenton, Tennessee, for the appellee, Shirley Moore.

MEMORANDUM OPINION

Factual Background

Appellant, Shirley Moore, ("Employee") was 47 years of age at the time of trial. She is a

high school graduate and is licensed as a private investigator. Her work history is long and varied, including stocking, bookkeeping, cleaning, and day care in addition to her work as a private investigator. In 1997, Employee began working for Best Metal Cabinets ("Employer"). In January 2000, Employee felt her back "catch" while pushing a table with metal material on top of it. Employee reported her injury in a timely manner. Employee continued to work after this incident until she was fired in August 2000.

Employee sought medical treatment after the January 2000 injury at Bells Medical Clinic. Employee complained of pain in the left leg and lower back, but her test results were normal. Employee returned to the clinic where she was treated in April, May and July, but she did not complain further about back or leg pain during these visits. However, in August 2000, Employee came to the clinic with complaints of back pain, leg pain, and numbness, which Employee stated she had been experiencing for two weeks. She made further visits to the clinic, complaining of back/leg pain in October and November 2000.

In December 2000, Dr. Joseph Rowland diagnosed a ruptured disc at L-3 on the left side. He then performed a hemilaminectomy. Dr. Rowland opined that as a result of Employee's disc herniation and surgery, Employee would have a 10% disability. He indicated that there was causation between the January 2000 injury and the disc herniation and that this opinion was based on Employee's reports to him of continually worsening back and leg pain.

Dr. Joseph Boals, an evaluating physician, assigned Employee a 13% impairment rating. Dr. Boals opined that the January 2000 accident caused Employee's injury. However, he did not review the medical records from the clinic where Employee initially sought treatment, and he admitted that his opinion regarding causation was based upon Employee's veracity concerning her continually progressing symptoms.

A co-worker testified that he witnessed Employee's January 2000 injury and that he overheard her complain numerous times to Employer about back and leg pain, up until the date of her termination.

The trial court found that Employee sustained 78% permanent partial disability to the body as a whole; that the 2.5 cap pursuant to Tennessee Code Annotated section 50-6-241(a) did not apply; and the trial court set forth no specific findings of fact pursuant to Tennessee Code Annotated section 50-6-241(c) when applying and awarding the six times the anatomic impairment rating.

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 Industries, Ltd.*, 995 S.W.2d 173, 178 (Tenn. 1999). Where the issues involve expert medical testimony which is contained in the record by deposition, then all impressions of weight and credibility must be drawn from the contents of the depositions and the reviewing court may draw its own impression as to weight and credibility from the contents of the depositions. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 676-77 (Tenn. 1991).

Analysis

Employee argues that she has satisfied the requirement that her injury "arise out of" her employment. In support, Employee denies that there was any incident after her January 2000 injury at work that would have hurt her back or leg. Employee insists that she had constant back and leg pain following her injury at work. A co-worker testified that he witnessed her injury and heard her complain many times to Employer about back and leg pain prior to her termination. Employer argues that the weight of the evidence suggests that Employee's injury was not work-related, and so her claim is not compensable. Employer contends that because Employee did not report any back or leg pain on three subsequent visits to the clinic where she was initially treated for her January 2000 injury, she has not proven causation.

Employee testified at trial that her back and hip just kept hurting and that she called Employer in July 2000, relating that she was "in bad pain." Employee went to the Bells Medical Clinic for routine blood work and was treated there for digestive problems. Ms. Carol Haynes, a nurse practitioner at the clinic, testified her file showed no notations of Employee reporting her work-related back and leg pain during these visits. It was not until August 8, 2000, when Employee advised her that "two weeks ago she [Employee] had back pain." However, on cross-examination, Ms. Haynes testified that there was "an awful lot I don't remember" because her husband had cancer during this time. From this admission, coupled with the testimony of the co-worker of Employee, we conclude that the Employee met the statutory requirement for notice of her work-related injury to Employer.

Employee contends that she was fired because she was claiming a work-related injury and that she was not given a reasonable offer to return to work, so the 2.5 cap is inapplicable. Employer argues that Employee was fired due to her misconduct (insubordination) and, therefore, the 2.5 statutory cap should have been applied pursuant to *Carter v. First Source Furniture Group*, 92 S.W.3d 367 (Tenn. 2002). In *Carter*, the Court stated that for the purposes of the 2.5 cap, the focus is whether the employer made a reasonable offer of re-employment. *Id.* at 371. The Court emphasized that "an employer should be permitted to enforce workplace rules without being penalized in a workers' compensation case." *Id.* In this case, however, Employee testified regarding the reasons for her firing that her supervisor, Mr. Marshall, called Employee into his office on an unrelated interoffice dispute, becoming very loud, cursing her, and finally telling Employee, "You're fired." Apparently the trial court found this as the reason for

Employee's termination, not insubordination as alleged by Employer. We conclude that the evidence does not preponderate against the trial court's finding.

Tenn.Code Ann. §50-6-241(c) sets forth the factors to be considered in awarding maximum benefits under the statute by using a multiplier of up to six times the medical impairment rating. If the award of benefits under the statute is five times the medical impairment rating or greater, the trial court is required to make specific findings of fact detailing the court's reasons for awarding a multiplier greater than four times the medical impairment rating.

Dr. Rowland opined that Employee sustained a 10% anatomical impairment rating, and D. Boals opined that Employee sustained a 13% anatomical impairment rating. The trial court awarded Employee benefits based on a 78% vocational disability rating, apparently using a multiplier of six times the medical impairment rating. In making its ruling the trial court did not set out specific findings of fact justifying an award for six times the medical impairment rating. Employee's attorney later filed a motion for additional findings. Employee's counsel suggested that the trial court make findings consistent with the factors set forth in Tenn. Code Ann. §50-6-241. The trial court responded by saying, "Isn't there also something on that six times based on some kind of previous conduct on the part of the employer?" Later the trial court stated, "It's kind of hard for this Court to realize, but I'm sure there was something that the Court is going with for that six times."

Employee argues that the trial court's findings comply with Tenn. Code Ann. §50-6-241(c). Employer states that the trial court made no factual findings to support its ruling. We have carefully reviewed the record in this case, and we find that the record does not support the trial court's award of six times the medical impairment rating. We therefore modify the trial court's award and reduce it to 52% permanent partial disability to the body as a whole, or four times the medical impairment rating.

Conclusion

We conclude that the evidence preponderates in favor of the trial court's award of permanent disability benefits; that the evidence fails to preponderate against the trial court's award of benefits that exceed the 2.5 cap; and that the evidence preponderates against the trial court's award of six times the anatomic impairment rating. We modify the vocational disability rating for Employee to 52% permanent partial disability to the body. We, therefore, affirm the trial court's judgment, as modified. Costs are taxed to the appellant, Best Metal Cabinets, for which execution may issue if necessary.

ROBERT L. CHILDERS, 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, Best Metal Cabinets, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

