IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
JANUARY 16, 2004 Session

JUDY GAY TODD v. CONTINENTAL CASUALTY COMPANY

Direct Appeal from the Chancery Court for Gibson County
No. 15972 George R. Ellis, Chancellor

No. W2003-01019-WC-R3-CV- Mailed September 2, 2004; Filed October 15, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court 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. The trial court determined that the plaintiff suffered a 69% vocational impairment to the body as a whole. The defendant insurer asserts that: 1) that the plaintiff had a meaningful return to work and that the 2.5 times caps should apply; and 2) that if the caps do not apply, the award was excessive and not supported by the evidence. For the reasons set forth below, we affirm the judgement of the trial court.

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

JAMES F. BUTLER, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JAMES L. WEATHERFORD, SR.J.,joined.

P. Allen Phillips, Jackson, Tennessee, for the appellant, Continental Casualty Company.

Art D. Wells, Jackson, Tennessee, for the appellee, Judy Gay Todd.

MEMORANDUM OPINION

Plaintiff was, at time of trial, a 49 year old female. She obtained her GED and a real estate license, but it had expired. Prior to beginning work for Milan Seating Systems ("MSS"), she worked as a sewing machine operator and production worker. She was employed by MSS in 1986 as a sewing machine operator and worked at various other positions with MSS until she became a supervisor. As a supervisor Plaintiff worked as a line leader, production manager in the cutting department, and later as supervisor of the GM jump seat line. MSS makes seat covers for vehicles. It is production line work. As supervisor, Plaintiff was responsible for filling in on the line, helping sew, and assembling seats with an air gun. She injured her shoulder while working on the jump seat

line on June 10, 1999. Proper notice was given to her employer. After her injury, she was moved to the headrest department.

Medical Evidence

Following Plaintiff's injury she was treated by Dr. Twilla for several months and then sent to Dr. Lowell Stonecipher. Dr. Stonecipher treated her conservatively for several months, and did an MRI in November 1999, which indicated Plaintiff may have a rotator cuff tear. Surgery was performed and although a tear of the rotator cuff was not seen, an impingement was present. Dr. Stonecipher did an acromial decompression and distal clavical excision. Plaintiff was sent to physical therapy with good results. In April 2000, Dr. Stonecipher discharged plaintiff with a 10% impairment to the right arm. In August 2000, Plaintiff returned to Dr. Stonecipher with more symptoms, and he injected her shoulder and discharged her again in October 2000. Six months later, Plaintiff returned to Dr. Stonecipher with additional symptoms and another MRI indicated a tear of the rotator cuff, and she was again scheduled for surgery. Again the surgeon did not see a tear of the rotator cuff, but the tendon was degenerative. The degenerative portion was taken out surgically, and Plaintiff did well thereafter and was discharged.

Dr. Stonecipher gave Plaintiff an additional impairment rating of 5% for the second surgery, for a total of 15% impairment to the right arm, which converts to 9% to the body as a whole. Dr. Stonecipher opined that the problems for which he treated the plaintiff could be causally related to the lifting of the 25 pound seats at her job and that she reached maximum medical improvement on May 6, 2001, when he discharged her.

Plaintiff was seen by Dr. Joseph Boals on July 22, 2002, for the purpose of an independent medical evaluation. After examining Plaintiff, testing her range of motion, x-raying her shoulder and reviewing her medical records and history, Dr. Boals diagnosed Plaintiff with residuals from an injury to the right shoulder requiring surgery. He felt she had permanent impairment from the surgeries, more so with the first surgery than the second. Using a diagnosis-based estimate of impairment, Dr. Boals assigned permanent impairment ratings of 10% for the acromioplasty, 10% for the clavicle excision and 5% for the rotator cuff tear, for a combination of an overall 24% to the upper extremity or 14% to the body as a whole. He further opined that Plaintiff should avoid heavy overhead work, work away from the body, work that required repetitive flexion or rotation of the shoulder, and that her one time weight limit should be determined by work trial.

Standard of Review

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings of facts, unless the preponderance of the evidence is otherwise. Tenn. Code. Ann. § 50-6-225(e)(2) (2002 Supp.). 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. Workers' Comp. Panel 1995). The standard governing appellate review of findings of fact by a trial court requires the Special Workers' Compensation Panel to examine in depth a trial court's factual findings and conclusions. *GAF Bldg. Materials v. George*, 47 S.W.3d 430, 432 (Tenn. Workers' Comp. Panel 2001). 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). Where the trial court has seen and heard witnesses, especially where the issues of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court's factual findings. *Humphrey v. David Witherspoon, Inc*., 734 S.W.2d 315 (Tenn. 1987). The extent of an injured worker's vocational disability is a question of fact. *Seals v. England/Corsair Upholstery Mfg.*, 984 S.W.2d 912, 915 (Tenn. 1999).

Meaningful Return to Work

The first issue raised by the defendant is whether the trial court erred in finding that the plaintiff did not make a meaningful return to work. Under the provisions of Tennessee Code Annotated Section 50-6-241(a)(1), an injured employee who returns to her employment at a wage equal to or greater than the wage she was receiving at the time of injury cannot recover an award more than 2.5 times the medical impairment rating found by the medical experts. The language of Tennessee Code Annotated Section 50-6-241(b) provides that an injured employee who does not return to her employment at a wage equal to or greater than the wage she was receiving at the time of injury can recover an award up to six times the medical impairment rating.

To determine which statutory cap applies, we must decide whether the plaintiff made a meaningful return to work. What constitutes a meaningful return to work is a highly fact specific analysis. *See, e.g., Newton v. Scott Health Care Ctr.*, 914 S.W.2d 884, 886 (Tenn. Workers' Comp. Panel 1995).

In this case, the plaintiff was returned to work in November 2001 at the same wage and was subsequently given a raise and bonus. She testified that she planned on continuing her work had she not been terminated. Plaintiff filed her workers' compensation suit on June 3, 2002, and the employer became aware of the suit on June 7, 2002. Plaintiff was terminated on June 10, 2002. She received a severance package. Her application for unemployment was not contested by the employer. Plaintiff claims she was terminated because she filed a workers' compensation claim and therefore she did not have a meaningful return to work. Defendant contends that Plaintiff was terminated for a legitimate reason, i.e., violation of company policy.

The plaintiff testified that she was aware of the employer's open door policy. Her understanding of the policy was that the employees were able to talk to their employee advocate, but she did not think the employee advocate was supposed to come on the production line and interfere with production. The prior employee advocate had her own office and never came down to the line and disturbed people. She said she was not counseled on the employee advocate coming to the line and disturbing production. If an employee wanted to talk to the advocate, she would get someone to take the employee's place on the line.

Plaintiff injured her shoulder at work. She underwent two surgical procedures for her shoulder injury. After the second surgery she was released to full duty in November 2001. She filed her workers' compensation lawsuit on June 5, 2002. Daphne Johnson, Employer's human resource manager, became aware of the lawsuit on Friday, June 7, 2002. The plaintiff was terminated on Monday, June 10, 2002. Plaintiff stated she was terminated by Johnson for showing favoritism and

interfering with the employee advocate, Glenn Bigham. Bigham testified that his full time job was to be the liaison between the hourly associates and the management. Under the open door policy, an employee has the right to talk to the employee advocate. There was an issue as to whether the employee can confer with the advocate while the employee is working on the production line. Plaintiff testified that she did not know the employee advocate could come to the production line and disturb production. Deborah Coleman was an employee under plaintiff's supervision. Concerning Coleman's conversations with the employee advocate, Coleman claimed Plaintiff told her "if I find out that you are double crossing me, you will have hell to pay." Plaintiff denied the statement. Johnson testified that Coleman told her about this statement before Plaintiff was terminated. Coleman testified she did not tell Johnson of this statement until after Plaintiff was terminated. Plaintiff denied violating the open door policy.

Daniel Graves, Plaintiff's co-worker, when testifying about the open door policy, stated, "They change the policies all the time." Gerald Rush, a former employee of MSS, testified that he was terminated for a violation of the open door policy, but denied that was the true reason. He denied having been counseled about the policy prior to his termination. Lisa Yoemans worked at MSS approximately eight years, including work in the Human Resources Department. She confirmed that MSS had an open door policy which provided that an employee could go to any source of management to discuss work problems, but it was not supposed to interfere with the production of the line. Glenn Bigham, the employee advocate at the time of Plaintiff's termination, testified that he often went out into the plant and talked to the employees on the production line. Daphne Johnson, the Human Resources Manager for MSS, testified Plaintiff was terminated for violating a company policy, which entailed the open door policy, which includes company philosophy, charter and constitution of the company. She stated that the employee advocate could talk to employees on the production line when it was operating, but that if it was going to take a lot of time, an appointment would be made for the employee. She testified that she and Plaintiff had talked informally about Plaintiff interfering with the process on several occasions prior to Plaintiff's termination. She testified that other supervisors had been terminated due to violation of the open door policy, none of whom had workers' compensation claims against the company. She denied plaintiff was terminated because of her lawsuit against the company.

The trial judge made a finding of fact that Lisa Yoemans presented the only proof as to the specifics of the open door policy of the employer when she stated that "management could go in where they wanted to but that the employees were supposed to see the employee advocate on their own time and they would not interfere with work." The trial court also found that the defendant presented no proof of what the charter, constitution or any manual stated concerning the open door policy.

A reviewing court must give "considerable deference" to the trial judge with regard to oral, in-court testimony as it is the trial judge who has viewed the witnesses and heard the testimony. *See Houser*, 36 S.W.3d at 71. This is particularly true when the credibility of the witnesses and the weight assigned to their testimony are critical issues. *See Seals*, 984 S.W.2d at 915.

Because there is no requirement that a trial court make express findings of fact regarding a witness's credibility, the absence of such findings does not alter the applicable standard of review. The trial court's findings with respect to credibility and the weight of the evidence, as in the present

case, generally may be inferred from the manner in which the trial court resolves conflicts in the testimony and decides the case. *See Tobitt v. Bridgestone/Firestone, Inc.*, 59 S.W.3d 57, 62 (Tenn. 2001).

Our review indicates that the testimony sharply conflicted with respect to why the plaintiff was terminated from her employment. In such a case, the role of the trial judge, who has seen the witnesses and has heard their testimony first-hand, is to resolve the conflicts. In this case, the trial judge resolved the conflicts by its finding that Plaintiff was terminated because she filed a workers' compensation claim. We therefore conclude that the evidence in the record does not preponderate against the trial court's finding. Accordingly, we affirm the trial court's conclusion that Plaintiff did not have a meaningful return to work.

Vocational Disability

Defendant asserts that even if the caps do not apply, that the trial court's award of 69% to the whole body is excessive. Defendant contends that after reviewing all the pertinent factors the award should have been lower than sixty-nine percent (69%). Defendant contends the plaintiff had worked at many positions that included sewing, assembly and supervision. Further, Plaintiff was able to work in a supervisory position similar to that held at the defendant employer, her termination was not due to her inability to perform the required tasks, and she had been looking for supervisory-type jobs.

Plaintiff contends that although she was a supervisor at MSS for several years, she has tried to find comparable work but all similar jobs now require advanced degrees. She testified that she had taken a real estate course in June 1999 but had never sold anything, and she let her licence expire in December 2001. To renew it, she would have to take the course again and take a test. It was un-rebutted that she would have difficulty in doing any of the previous non-supervisory jobs because it would cause pain in her shoulders secondary to repetitive motion or required lifting. Plaintiff was unemployed at the time of trial. She had applied for and received unemployment but that had run out. Her sole source of income was rental property.

The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990). In making determinations of vocational disability, the court shall 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 claimant's disabled condition. Tenn. Code Ann. § 50-6-241 (a)(1); *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986).

Further, the claimant’s own assessment of her physical condition and resulting disabilities cannot be disregarded. *Uptain Constr. Co. v. McClain*, 526 S.W.2d 458, 459 (Tenn. 1975); *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972). The trial court is not bound to accept a physician's opinion regarding the extent of the plaintiff’s disability, but should consider all the evidence, both expert and lay testimony, to decide the extent of an employee’s disability. *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675, 677 (Tenn. 1983). We are to presume the correctness of the trial court’s findings unless the preponderance of the evidence is otherwise. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315 (Tenn. 1987).

Our review of the lay and expert testimony, as well as the other pertinent factors stated above, reveals that the plaintiff is 49 years old and has a GED certificate. She recounted the problems she would have doing the type of work she had done before she obtained her supervisory job with her last employer. She has sought work in the supervisory field which she can perform, but has been unsuccessful. She is currently unemployed. Dr. Stonecipher rated her anatomical impairment at nine percent (9%) to the whole body, relying more on his thirty plus (30+) years of experience as an orthopedic surgeon than the AMA Guides, Fifth Edition. Dr. Boals rated her anatomical impairment at fourteen percent (14%) to the whole body and opined that Plaintiff should avoid heavy overhead work, work away from the body, work that required repetitive flexion or rotation of the shoulder, and that her one time weight limit should be determined by work trial. While she is an employable person, Plaintiff's ability to compete in the job market has been substantially impaired as a result of her injuries and permanent medical restrictions. The plaintiff's diminished earning capacity is evidenced by her subsequent inability to obtain other employment.

Where the issues involve expert medical testimony and all the medical proof is contained in the record by deposition, as it is in this case, then this court may draw its own conclusions about the weight and credibility of that testimony, since we are in the same position as the trial judge. With these principles in mind, we review the record to determine whether the evidence preponderates against the findings of the trial court. *Krick v. City of Lawrenceburg,* 945 S.W.2d 709, 712 (Tenn. 1997). The trial judge may, when there is a difference in opinion between the experts, accept the opinion of one expert over the opinions of others. *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804 (Tenn. 1990). Where the medical testimony is presented by deposition, this court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. We find that the evidence does not preponderate against the trial court's judgement.

CONCLUSION

For the reasons stated herein, the judgement of the trial court is affirmed. Costs are taxed to the defendant.

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JAMES F. BUTLER, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
January 16, 2004

JUDY GAY TODD v. CONTINENTAL CASUALTY COMPANY

Chancery Court for Gibson County
No. 15972

No. W2003-01019-WC-R3-CV - Filed October 15, 2004

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, Continental Casualty Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM