

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

September 30, 2004 Session

EVELYN PENNY CORBIN v. NHC HEALTHCARE/MILAN, LLC

Direct Appeal from the Chancery Court for Gibson County

No. 16161 George R. Ellis, Chancellor

No. W2003-02921-WC-R3-CV - Mailed December 6, 2004; Filed January 25, 2005

This workers' compensation appeal has been referred to this panel in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employer insists the award of 15% whole body disability is against the preponderance of the evidence since the treating physician found no impairment. We conclude that the evidence does not preponderate against the award and affirm the judgment of the trial court.

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

John A. Turnbull, Sp.J., delivered the opinion of the court, in which Janice M. Holder, J., and Joe C. Loser, Sp. J., joined.

Charles H. Barnett, III, Beth Belew and Sara E. Barnett, Jackson, Tennessee, for the appellant, NHC Healthcare/Milan, LLC.

Peter J. Dauster, Jackson, Tennessee, for the appellee, Evelyn Penny Corbin.

MEMORANDUM OPINION

Facts

The employee, Evelyn Penny Corbin, is a fifty-nine-year-old high school graduate who suffered an injury to her back in the course and scope of her employment with NHC Healthcare/Milan, LLC (NHC) on March 11, 2002. Ms. Corbin was leaning over and reaching across while changing a soiled pad under a patient who weighed approximately 225 pounds when Ms. Corbin felt a stabbing pain in her low back which took her breath away. When the pain continued into the next day, Ms. Corbin reported her injury, and an appointment was made by NHC with the company doctor, Dr. Jerry P. Wilson. Dr. Wilson treated Ms. Corbin with medication, flexion exercises and physical therapy, and returned her to limited duty on March 18, 2002, and regular duty on April 1, 2002. Because her pain continued with the work activity, Dr. Wilson put her back on restricted duty and prescribed further physical therapy. For the next year, Ms. Corbin continued under the treatment of Dr. Wilson, alternating regular and light duty, courses of physical therapy, and finally work hardening. Ms. Corbin's reported symptoms of pain would increase when she attempted the more strenuous tasks required in her work as a certified nursing assistant. Finally, Dr. Wilson returned Ms. Corbin to regular duty without restrictions on April 4, 2003, and expressed the opinion that she retained no permanent impairment.

Because she was still complaining of significant pain on strenuous work activity, Ms. Corbin and the NHC Administrator agreed that the nursing home did not have light duty available, at that time, and her employment was amicably ended with the understanding that Ms. Corbin would be called back if a light duty job opened up. She has not been called back to work by NHC and, despite filing work applications, had not found a job as of the November 17, 2003 trial. Ms. Corbin's CNA certification had expired, and she did not intend to renew it because she did not feel physically able to "lift those people without hurting." She was scheduled to enter technical school in December, 2003, to train for lighter work. Ms. Corbin's past work experience includes driving a truck, for which she retains certification. She also had twenty years work experience at K-Mart where she worked as a cashier, floor person, and stocker. In addition, Ms. Corbin has previous employment as a cook in a school cafeteria.

Dr. Joseph C. Boals, III, saw and examined Ms. Corbin one time, on April 17, 2003, at the request of her attorney. On x-ray, Ms. Corbin was found to have multi-level facet arthritis. Dr. Boals opined that the lumbar strain superimposed on that arthritis resulted in a chronic strain syndrome. He noted limited range of flexion/extension motion. Dr. Boals placed Ms. Corbin in Lumbar Category II, Table 15-3, page 384, of the AMA Guides Fifth Edition, and was of the opinion that she retained a 5% permanent partial impairment to the body as a whole. Dr. Boals suggested Ms. Corbin should avoid prolonged walking, standing, stooping, squatting, bending, and that lifting should be determined by her ability or by trial. Dr. Boals confirmed that his opinion was based on Ms. Corbin's subjective complaints.

The Chancellor fixed her disability at 15% to the body as a whole, implicitly finding that Ms. Corbin had not had a meaningful return to work. The Chancellor accepted the medical opinion of Dr. Boals, accrediting the symptoms reported by Ms. Corbin. NHC appeals, insisting the Chancellor erred in accepting the opinion of Dr. Boals.

Scope of Review

The extent of vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn. 1999). We review factual questions anew, but with a presumption that the trial court's factual findings are correct, unless the evidence preponderates against those findings. See Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2002). Where the trial court has seen and heard the witnesses, the trial court's determination of issues of credibility and the weight to be given to oral testimony must be accorded considerable deference on review because the trial court had the opportunity to observe the demeanor of the witness. Long v. Tri-Con Indus., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999); McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. 1995). The trial court's findings with respect to credibility may generally be inferred from the manner the court resolves conflicts in the testimony and decides the case. Richards v. Liberty Mutual Ins. Co., 70 S.W.3d 729, 733-34 (Tenn. 2002). Where, as here, the medical testimony is presented by deposition or other written evidence such as a C-32 medical report, the reviewing court may make an independent assessment of that written evidence to determine where the preponderance of that evidence lies. See Bridges v. Liberty Ins. Co. of Hartford, 101 S.W. 3d 64, 67 (Tenn. Workers' Comp. Panel 2000).

Analysis

Ms. Corbin's uncontradicted testimony was that she was unable to perform her regular duty tasks as a certified nurse assistant without significant pain for a period of more than a year after her injury. She claimed she gave every effort to return to full duty but was unsuccessful over the long haul. Her reported subjective symptoms were accepted by Dr. Boals. Her testimony regarding her subjective symptoms, her pain, and inability to successfully perform the tasks of her employment were implicitly found to be credible by the trial court when the Chancellor accepted as more persuasive the medical opinion of Dr. Boals. We are fully aware that the Chancellor was viewing the written medical evidence through the prism of his credibility findings. If he had not accepted as true the complaints of pain and disability of Ms. Corbin, he could have accepted the opinion evidence of Dr. Wilson as more persuasive. Instead, since Dr. Boals had based his impairment rating opinion on the subjective symptoms of Ms. Corbin, symptoms which the Chancellor accepted as valid, the Chancellor gave more weight to Dr. Boals' opinion on impairment and restrictions. "The significance of the trial court's view of the plaintiff's credibility is the effect it has on the weight of medical evidence in this case." See Clarke v. Prot. Services, Inc., 100 S.W.3d 197, 200 (Tenn. Workers' Comp. Panel 2001). We must give considerable deference to the trial judge's credibility findings regarding live witnesses. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 61 (Tenn. 2001).

Relying upon Carter v. First Source Furniture Group, 92 S.W.3d 367, 373 (Tenn. 2002), and Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 677 (Tenn. 1991), Appellant contends that, since Dr. Wilson, the treating physician, had greater contact with Ms. Corbin and saw her over a long period of time, he had more opportunity to arrive at an in-depth and accurate opinion. The trial court is required to take into consideration such factors, but the trial court is not required to give greater weight to the opinion of a treating physician. It is within the discretion of the trial

judge to determine which expert testimony to accept. See Story, 3 S.W.3d at 455. Here, we cannot say that the evidence preponderates against the factual findings of the trial court, or the trial court's acceptance of the opinion of Dr. Boals as more persuasive. The trial judge believed the live testimony of Ms. Corbin.

Considering the 5% impairment, Ms. Corbin's age, and job experience, the reasonable restrictions on her activities, and her considerable efforts to successfully return to her employment at NHC, we affirm the judgment of the trial court in awarding 15% permanent partial disability to the body as a whole. Costs are assessed against the defendant/appellant NHC.

JOHN A. TURNBULL, 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, NHC Healthcare/Milan, LLC, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM