

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

September 30, 2004 Session

JACQUELINE YARBROUGH v. ACH FOODS

**Direct Appeal from the Chancery Court for Gibson County
No. H 4727 George R. Ellis, Chancellor**

No. W2004-00310-WC-R3-CV - Mailed February 23, 2005; Filed March 31, 2005

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 erred (1) in awarding temporary total disability benefits, (2) in finding the employee suffered an injury by accident, and (3) in awarding permanent partial disability benefits based on 25 percent to the body as a whole. As discussed below, the panel has concluded the judgment should be modified by omitting the award of temporary total disability benefits.

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

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.

Alex C. Elder, Memphis, Tennessee, for the appellant, ACH Foods

T. J. Emison, Jr., Alamo, Tennessee, for the appellee, Jacqueline Yarbrough

MEMORANDUM OPINION

The employee or claimant, Ms. Yarbrough, initiated this civil action to recover workers' compensation benefits for an alleged accidental work related injury to her back. The employer, ACH Foods, specifically denied that the claimant suffered an injury by accident and asserted the claimant merely had an episode of pain from her pre-existing arthritic condition. After a trial on the merits, the trial court awarded future medical benefits, temporary total disability benefits for the period of September 17, 2002 through November 26, 2002, and permanent partial disability benefits based on 25 percent to the body as a whole. The employer has appealed.

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 employer manufactures cheese products. The claimant works as a lab attendant in the employer's manufacturing facility in Humboldt. One of her duties is to evaluate blocks of cheese weighing from five to forty-seven pounds. In order to perform her job, she pulls the blocks from a refrigerator onto a cart, rolls them into a lab, evaluates them and either returns the cheese blocks to the refrigerator or dumps them into fish bait barrels. On or about Saturday, October 13, 2001, the plastic liner covering one of the larger blocks of cheese hung in the barrel. While lifting the cheese and pulling the liner, the claimant felt pain in her back and down her leg. Although she had suffered dull back pain in the past, the pain she suffered on this occasion was different in that it included a burning sensation, pain in her buttocks and excruciating pain down her leg to her foot.

The claimant immediately reported the injury to the employer and finished her day's work. When the pain persisted over the weekend, she reported it again on Monday. The employer had its plant nurse examine her. There is conflicting evidence in the record as to whether the employer provided the claimant with a list of prospective treating physicians. The claimant testified that she "was told that I was going to see Dr. Warren". The Employer's First Report of Injury reflected that she was provided such a list, but the testimony of the plant manager was that she "was told that a doctor's appointment would be set up...". She first saw Dr. Kenneth Warren and, through referrals from Dr. Warren, a number of other doctors, who could not help her. When she expressed her frustration to the employer's personnel manager, she was told there was "not any more workers' comp".

Under the Tennessee Workers' Compensation Law, injuries by accident arising out of and in the course of employment which cause either disablement or death of the employee are compensable. Tenn. Code Ann. § 50-6-102(a)(12).

The employer first contends the claimant did not suffer an injury by accident. An accidental injury is one which cannot be reasonably anticipated, is unexpected and is precipitated by unusual combinations of fortuitous circumstances. It is the resulting injury which must be unexpected in order for the injury to qualify as one by accident. "Injury" has been defined as including "whatever lesion or change to any part of the system (that) produces harm or pain or lessened facility of the natural use of any bodily activity or capability." See Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993). The claimant, whose testimony the trial court found credible, testified that she suffered immediate pain on that day. The employer insists her pain was a manifestation of a pre-existing condition. The preponderance of the medical proof is that the claimant has a bulging disc in her lower back and that the accident at work either caused the bulge or aggravated a pre-existing, but asymptomatic arthritis. An injury is compensable, even though the claimant may have been suffering from a serious pre-existing condition or disability, if a work-connected accident can be fairly said to be a contributing cause of such injury. 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. See Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993) and authorities cited therein. The evidence fails to preponderate against the trial court's finding that the claimant suffered a compensable injury by accident at work.

The employer next contends the award of benefits based on 25 percent to the body as a whole is excessive. Dr. Joseph Boals estimated her medical impairment from the injury to be 10 percent to the whole person and advised her to avoid prolonged walking, standing, stooping, squatting, climbing, bending, excessive flexion, extension or rotation of the back and heavy lifting. Dr. Glen Barnett prescribed a weight lifting restriction of 25 pounds. The claimant testified that she cannot perform any exercise or work at any of her previous jobs because of the pain it causes. She takes pain and anti-inflammatory medication.

The opinion of a qualified expert with respect to a claimant's clinical or physical impairment is a factor which the court will consider along with all other relevant facts and circumstances, but it is for the court to determine the percentage of the claimant's industrial disability. Pittman v. Lasco Industries, Inc., 908 S.W.2d 932 (Tenn. 1995). An injured worker's own assessment of her injury and resulting disability is competent testimony and cannot be disregarded. Thomas v. Aetna Life & Casualty Co., 746 S.W.2d 278 (Tenn. 1991). From our independent consideration of the relevant factors, we cannot say the evidence preponderates against the trial court's award of permanent partial disability benefits.

The employer next contends the trial court erred in awarding medical expenses for care not authorized by it. An employer who denies liability for an injury claimed by an employee is in no position to insist upon the statutory provisions respecting the choosing of physicians. GAF Bldg. Materials v. George, 47 S.W.3d 430, 433 (Tenn. 2001). When the employer told the claimant there

was “not any more workers’ comp,” it effectively denied liability. Accordingly, the trial court did not err in its award of medical benefits.

The employer finally contends the trial court erred in awarding temporary total disability benefits because (1) the claimant’s periods of temporary total disability were not prescribed by any authorized treating physician and (2) the parties stipulated at the beginning of trial that there would be no claim for temporary total disability benefits. The claimant did not work during the period from September 17, 2002 until November 26, 2002 following an epidural block for treatment of her pain, on the advice of Dr. Benny Houston.

The law does not require prescription of total disability by an approved physician. The first part of the issue is thus without merit. However, under the circumstances, the claimant is bound by the stipulation. The judgment is accordingly modified by disallowing the award of temporary total disability benefits.

As modified, the judgment is affirmed. Costs are taxed to the appellant.

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, ACH Foods, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM