IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
December 15, 2005 Session

DONNA G. BLANTON v. CVS TENNESSEE DISTRIBUTION, INC.

Direct Appeal from the Chancery Court for Knox County
No. 159696-2 Daryl R. Fansler, Chancellor

Filed March 20, 2006

No. E2005-01436-WC-R3-CV - Mailed January 30, 2006

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. The trial court awarded plaintiff 100 percent permanent disability. On appeal, the employer contends the evidence does not support a finding of total disability and that the trial court was in error in accepting the testimony of a doctor who looked at the Second Edition of the AMA Guides in an attempt to give a numerical number of impairment for a Class 2 psychiatric injury when the Fifth Edition of the Guides did not contain a numerical rating. We affirm the judgment.

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

ROGER E. THAYER, SP. J., delivered the opinion of the court, in which E. RILEY ANDERSON, J., and THOMAS R. FRIERSON II, SP. J., joined.

Dana S. Dalton, Knoxville, Tennessee, for Appellant, CVS Tennessee Distribution, Inc.

Tony Farmer, Knoxville, Tennessee, for Appellee, Donna G. Blanton.

MEMORANDUM OPINION

The employer, CVS Tennessee Distribution, Inc., has perfected this appeal from the trial court's ruling awarding the plaintiff, Donna G. Blanton, 100 percent permanent disability.

Plaintiff is a fifty-two-year-old high school graduate who had been working for defendant for about nine years. On January 25, 2002 she was working on an assembly line running cigarettes on a machine with rollers when the smock she was wearing became caught in the rollers. She was

quickly pulled down as her clothing tightened around her neck until she was unconscious. She was taken to the hospital and was later released at the emergency room. She has seen a number of doctors for her injuries and finally was seen by Dr. Robert S. Davis for her physical injury and Dr. Edward Workman for her psychiatric injury.

She testified she was in constant pain, cannot sleep at night, has trouble breathing and feels like she is choking all the time. She also stated she is taking a lot of medication for her symptoms and has memory problems. She initially returned to work without any restrictions but found it difficult to perform her work duties. Later medical restrictions were imposed but she said the company did not return her to her job. She said her employer offered several other jobs but she knew that if she could do those jobs she would have been capable of working in her old position.

Prior to working for defendant, she had worked in other factory jobs which she said she was not able to do after the work-related accident. She told the trial court she was not able to work. When asked if she had ever been treated for a psychiatric problem before the accident, she said that she had never been so treated except for some depression which resulted from the diagnosis and treatment of breast cancer. She also stated her condition has adversely affected her relationship with her husband.

Michael Blanton, plaintiff's husband, testified that his wife had changed since the accident; that her physical activity was very limited and that they do not seem to get along and have separated although he still sees her two or three times a week.

Dr. Robert S. Davis, a neurosurgeon, testified by deposition and performed an independent medical examination on February 12, 2003. He found she had a cervical radiculopathy which in layman's terms means an inflammation of a nerve root in her neck. He said that tests indicated she was experiencing degenerative changes and it appeared she had a fairly violent injury resulting from a jerking of her head and neck. Surgery was not warranted. He gave a 6.5 percent impairment to her whole body and indicated that rating was assuming she was back to work without any medical restrictions.

Dr. Edward Workman, a board-certified psychiatrist, testified by deposition and gave two separate depositions. The first deposition was on February 20, 2004 and his diagnosis was post traumatic stress syndrome and chronic pain. At this point in time, the doctor said she had not reached maximum medical improvement and she was also not able to undergo a functional capacity evaluation due to an extremely elevated heart rate every time the examiner began to put her through various activities and the examiner was afraid she might have a heart attack.

Dr. Workman gave a second deposition on January 20, 2005 and indicated she had reached maximum medical improvement on about August 12, 2004. His diagnosis remained the same and he was of the opinion her pain syndrome resulted from torn muscles and scar formation. He said once scar tissue is present, you never get rid of it and she would always be susceptible to reinjury. She was under restrictions of no frequent lifting, no overhead reaching, no sustained squatting and

no ladder climbing. Sometime between the two depositions, the doctor decided she had an impairment of 3 percent for pain and a 3 percent psychiatric impairment which would have to be added to any impairment existing for her physical injury. However, by the time he gave his second deposition, he stated he had changed his mind and concluded she had a 3 percent pain impairment and an 11 percent psychiatric impairment for a total impairment of 14 percent which should be added to the physical injury impairment.

The doctor went on to further testify that he was of the opinion Ms. Blanton had a Class 2 impairment under the AMA Guidelines, Fifth Edition, which is stated to be a mild impairment rating. When he was questioned as to how he reached the 11 percent rating, he said the Fifth Edition of the guidelines do not give numerical numbers for impairment and that since the legal system requires a numerical rating doctors have no guide and that this has resulted in great controversy in his profession without any official solution. He said he and other members of his profession look back to the Second Edition of the guidelines to get some idea about a numerical rating and this edition gave a 10-20 percent impairment for a Class 2 rating and he settled on 11 percent in Ms. Blanton's case. The doctor indicated a functional capacity evaluation was eventually performed and plaintiff qualified for medium type work.

The Chancellor made extensive findings of fact and conclusions of law and awarded permanent total disability. In so holding, the court found plaintiff to be a very credible witness, did not feel she was magnifying her symptoms and found she had sustained very serious physical and psychological injuries. The court stated that either injury standing alone would have probably resulted in an award for permanent partial disability but combined together he found her to be totally disabled.

Standard of Review

The standard of review of factual issues in a workers' compensation case is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the trial court's findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). When the trial court has seen the witnesses and heard the testimony, the appellate court must extend considerable deference to its findings especially where issues of credibility and the weight of testimony are involved. However, when medical proof is presented by deposition the reviewing court may draw its own conclusions about the weight and credibility of the expert testimony since it is in the same position as the trial judge for evaluating such evidence. ***Richards v. Liberty Mut. Ins. Co.***, 70 S.W.3d 729 (Tenn. 2002); ***Seals v. England/Corsair Upholstery Mfg. Co., Inc.***, 984 S.W.2d 912, 915 (Tenn. 1999).

Analysis of Issues

The sole factual issue before the trial court was the extent of plaintiff's permanent disability. The employer has appealed the finding of total disability insisting the court was in error in accepting Dr. Workman's opinion since he was relying on an outdated edition of the AMA Guides and also

in finding the employee was totally disabled. In this respect, defendant contends the award of disability should not exceed six times the impairment rating under Tenn. Code Ann. § 50-6-241(b) as plaintiff would not qualify for a higher award of permanent partial disability under Tenn. Code Ann. §50-6-242.

We first consider the issue of whether the evidence supports a finding that plaintiff is totally disabled. In order to award total disability benefits, the evidence must establish that the disability totally incapacitates the employee from working at an occupation which brings the employee an income. Tenn. Code Ann. §50-6-207(B). Many factors must be taken into consideration in determining whether an employee is totally disabled such as the employee's age, education, work experience, local job opportunities, etc., and this is to be examined in relation to the open labor market. ***Orman v. Williams-Sonoma, Inc.,*** 803 S.W.2d 672, 678 (Tenn. 1991); ***Clark v. National Union Fire Ins. Co.***, 774 S.W.2d 586, 588 (Tenn. 1989). The statutory definition of total disability focuses on an employee's ability to return to gainful employment. ***Davis v. Reagan***, 951 S.W.2d 766 (Tenn. 1997.)

In cases of this nature, it has also been stated that the extent of vocational disability does not depend upon either a medical or vocational expert. The extent of vocational disability is a question of fact for the trial court to determine from all the evidence, including lay and expert testimony. ***Worthington v. Modine Mfg. Co.***, 798 S.W.2d 232 (Tenn. 1990); ***Corcoran v. Foster Auto GMC, Inc.***, 746 S.W.2d 452, 457 (Tenn. 1988).

In our examination of the record, we do not find any conflicting evidence among the several witnesses. The Chancellor was obviously impressed with the credibility of the plaintiff and once causation and permanency of an injury has been established by expert medical testimony, the trial court can accept lay testimony as well as expert testimony in finding a claimant is totally disabled. Thus, it results we cannot say the evidence is insufficient to support the award in question or that the evidence preponderates against it.

The next argument challenges the court's admission and consideration of Dr. Workman's impairment rating because he used an outdated edition of the AMA Guides. The general rule is that a physician testifying in a workers' compensation case is required to use the most recent edition of the AMA Guides in rendering an opinion as to impairment of an employee. Tenn. Code Ann. § 50-6-204(d)(3). However, the statute also states "or in cases not covered by the AMA Guides an impairment rating by any appropriate method used and accepted by the medical community."

The doctor testified he used the Fifth Edition of the guides and determined plaintiff had a Class 2 impairment but said the current edition did not give numerical numbers for an impairment rating and that he referred back to the Second Edition for help in attempting to arrive at a percentage rating.

The employer cites the case of ***Humphrey v. David Witherspoon, Inc.***, 734 S.W.2d 315 (Tenn. 1987) where the Supreme Court reversed the trial court for permitting a young chiropractor

to base his testimony on an old edition of the AMA Guides and held it was error to admit the chiropractor's testimony. However, we take note of the ruling of the Supreme Court in ***Davenport v. Taylor Feed Mill,*** 784 S.W.2d 923 (Tenn. 1990) where it was held the rule announced in ***Humphrey*** was subsequently qualified and that a rating that conforms to the statutory requirements is unnecessary when causation and permanency are already established. See also the case of ***Corcoran***, *supra*, and ***Lyle v. Exxon Corp.***, 746 S.W.2d 694, 699 (Tenn. 1988). In the ***Lyle*** case the court held that the use of the guides was unnecessary, although preferable, where causation and permanency have been established by expert testimony because the issue then becomes the extent of vocational disability not anatomical disability.

In the present case causation and permanency were not issues as the trial court was informed at the beginning of the trial that the sole question was the extent of permanent disability. Therefore, we do not find the reference to the Second Edition by Dr. Workman to be significant in this appeal.

Plaintiff asks that the appeal of this case be considered frivolous. Although we have agreed with plaintiff on the issues in this case, we do not find the questions were of a frivolous nature.

Conclusion

The judgment of the Chancery Court is affirmed. Costs of the appeal are taxed to the employer and its surety.

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ROGER E. THAYER, SPECIAL JUDGE

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JUDGMENT

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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellant, CVS Tennessee Distribution, Inc., for which execution may issue if necessary.