

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
July 18, 2005 Session

Charlotte McCall v. National Health Corporation, ET AL.

**Direct Appeal from the Circuit Court for Rutherford County
No. 45480 Robert E. Corlew, III, Chancellor**

**No. M2004-00261-WC-R3-CV- Mailed - January 5, 2006
Filed - November 3, 2006**

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 asserts that the trial court erred in finding the employee's injury compensable, awarding the employee workers' compensation benefits, and finding the employee seventy-five (75%) percent disabled as a result of her employment with National Health Corporation. The employee asserts that the trial court erred in not finding the employee totally disabled and that summary judgment should not have been granted with respect to the tort claim brought against employee's supervisor. We conclude that the findings of the trial court should be affirmed with regard to issues relating to workers' compensation benefits. Appellate jurisdiction with regard to the granting of summary judgment on Ms. McCall's tort claim lies with the Court of Appeals and, pursuant to Rule 17, T. R. App. P., the cause is transferred to that court for appropriate review.

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

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, J., and WILLIAM H. INMAN, SR. J., joined.

John W. Rodgers and James P. Barger, Murfreesboro, Tennessee, for appellants, National Health Corporation and Greg Bidwell.

Larry McElhaney, II, Nashville, Tennessee for appellee, Charlotte McCall.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

Charlotte McCall was fifty-two years of age at the time of the trial on the issue of vocational disability.¹ She has a General Educational Development diploma but no other vocational training. She was employed by National Health Corporation ("NHC") for 15 years, starting as a central supply clerk and moving up to the housekeeping and laundry supervisor. Her duties included hiring and terminating employees, keeping records for her department, ordering supplies and being in charge of the safety committee. Her primary overall responsibility was to maintain the cleanliness of the hospital.

On November 23, 2000, Ms. McCall and her supervisor, Greg Bidwell, had an altercation that arose out of her purported failure to properly prepare for a NHC work project. When the work-project was scheduled to begin, Mr. Bidwell discovered that Ms. McCall appeared not to have followed through on her preparations. Mr. Bidwell called Ms. McCall into her office where the confrontation occurred. Ms. McCall testified that Mr. Bidwell grabbed her upper arms, shook her, and with his face approximately six inches away from hers, yelled at her to pay more attention to her duties. Mr. Bidwell shook her again before pushing her out of the way as he exited the office. Ms. McCall stated that she had never felt so scared and terrified at work or at any other time in her life. After she completed the work-project, Ms. McCall contacted the NHC regional director of nursing and informed her of the altercation. She also detailed the incident to the NHC regional vice-president and the NHC vice-president of corporate affairs. The vice-president of corporate affairs sent Ms. McCall a letter, dated December 18, 2000, stating that Mr. Bidwell had been "counseled regarding his need to control his temper and his emotions" and encouraged Ms. McCall to put the incident behind her.

Ms. McCall continued reporting to work for the next two months and, during that time, worked with Mr. Bidwell. After that time, she ceased reporting to work because she had flashbacks of the incident which caused her considerable stress. Prior to the altercation, Ms. McCall did not have any problem performing her job and the job did not cause her substantial stress. However, after the altercation, she testified she could no longer perform her duties at NHC or any other job. Ms. McCall testified that since the altercation, she does not leave her home unless absolutely necessary. She related having nightmares about the event, being unable to complete even simple tasks, lying in bed much of the day, crying uncontrollably and generally being unable to function.

Maryanne Griffin, Charlotte McCall's sister, described her as being reclusive following the incident, afraid of being around people and unable to perform her household duties as she had

¹The trial of this case was bifurcated. The issue of whether the injury was compensable pursuant to the workers' compensation statutes was tried on July 25 and August 15, 2002. The issue of whether Mrs. McCall had sustained a vocational disability was tried on September 29, 2003. The case has also been the subject of an interlocutory appeal, Charlotte McCall v. National Health Corporation, 100 S.W.3d 209 (Tenn. 2003).

previously done. She also indicated Mrs. McCall did not attend to her personal hygiene as well as she did prior to her becoming ill and was unable to follow through and complete housekeeping chores. Ms. Griffin and her husband have assisted Ms. McCall in taking care of her house and yard since the injury and have assisted her financially through loans of money needed to maintain household expenses.

On January 17, 2001, NHC provided a panel of physicians to Ms. McCall from which she chose Dr. Warren Langworthy as the authorized treating physician. Dr. Langworthy was unable to control her mental problems, so he referred Ms. McCall to Dr. Ravi Singh, who diagnosed Ms. McCall with post-traumatic stress disorder ("PTSD") after a series of examinations.

II. EXPERT TESTIMONY

Dr. Ravi Singh testified by deposition. He is a licensed psychiatrist and has spent fourteen years practicing psychiatric medicine in Tennessee. He earned his medical degree from the University of Rajasthan in Jaipur, India, and earned a Master's degree in Public Health from John Hopkins University.

Following her referral by Dr. Langworthy, Ms. McCall first visited Dr. Singh on April 2, 2001, complaining of a decrease in energy, loss of weight, insomnia, difficulty concentrating, and frequent bouts of crying. Dr. Singh diagnosed Ms. McCall with PTSD and pre-existing major depression. Prior to the incident with Mr. Bidwell, Ms. McCall had developed major depression due to the death of her father, the dissolution of her marriage, and a serious illness in her family. Dr. Singh opined that Ms. McCall's confrontation with Mr. Bidwell caused Ms. McCall's PTSD and that her pre-existing major depression was not a contributing factor. Dr. Singh testified that Ms. McCall suffered marked impairment at a level that significantly impeded useful functioning. He could not say, however, that she had an extreme impairment that precluded useful functioning. He also indicated the stress caused by her financial difficulties and the pendency of the legal action contributed to her inability to function.

Dr. Steven Nyquist is a licensed psychiatrist with approximately twenty-four years of experience in private practice. He earned his medical degree from the University of Kansas City and his psychiatric degree from Vanderbilt University.

Dr. Nyquist performed an independent medical evaluation of Ms. McCall. When he initially testified in the first part of the bifurcated trial, he had not examined Ms. McCall personally but based his opinion solely on Ms. McCall's prior medical records. He also testified in person during the second part of the trial. By that time, he had personally interviewed Ms. McCall on one occasion. Dr. Nyquist felt Ms. McCall was misdiagnosed and misled into believing that she had PTSD. He believed the therapy she was receiving for PTSD tended to instill the symptoms of helplessness and the disability attendant to those symptoms. Dr. Nyquist testified that Ms. McCall did not suffer the type of trauma necessary to develop PTSD. He believed she suffered from major depression and had suffered from that condition since 1996. Dr. Nyquist believed the condition began to manifest itself

when she gradually lost her supporting structure. Her father, who she had been close to, died. She was divorced from her husband. She also received support from her job and working environment. When the November 2000 incident occurred, she felt betrayed. She was humiliated and embarrassed by Mr. Bidwell's criticism and affected by her perception that the vice-president of corporate affairs did not respond to her complaint adequately.

Dr. Nyquist believed Ms. McCall was impaired by her mental condition and described that impairment as being mild to moderate. He believed she would have progressed more favorably had she been properly diagnosed and treated.

III. VOCATIONAL EVIDENCE

Gordon Doss testified by deposition. He is a vocational evaluator with a Ph.D. in vocational rehabilitation counseling earned from the University of Alabama at Birmingham. Dr. Doss is a nationally certified rehabilitation counselor and is a member of the Middle Tennessee Mental Health Association's board of directors. He has thirty-five years of experience in medical management and rehabilitation. Dr. Doss performed a vocational evaluation on Ms. McCall. Based on a review of Ms. McCall's records and three meetings, Dr. Doss assessed Ms. McCall to be one hundred (100%) percent vocationally disabled.

Edward Smith is a vocational consultant with a master's degree in vocational rehabilitation counseling with a specialty degree in job placement of the severely disabled earned from the University of Tennessee in Knoxville. He has twenty-seven years of experience as a vocational consultant. He also performed a vocational evaluation on Ms. McCall. He performed a labor market survey and found thirty-three positions where Ms. McCall's skills would transfer. Of those positions, he testified that twenty-one involved minimal contact with other people and were situations where Ms. McCall would not be exposed to pressure from co-workers or pressure from supervision responsibilities. Mr. Smith testified that Ms. McCall was not vocationally impaired.

IV. RULING OF TRIAL COURT

The trial court found Ms. McCall's injury to be compensable and found her to have a seventy-five (75%) percent permanent vocational disability because of the resulting mental condition. The trial court granted summary judgment in favor of Mr. Bidwell on the tort claim.

V. 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. Lollar v. Wal-Mart Stores, Inc., 767 S.W.2d 143, 149 (Tenn. 1989); Tenn. Code Ann § 50-6-225(e)(2). Where credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe

the witness' demeanor and to hear in-court testimony. Long v. Tri-Con Industries, Ltd., 996 S.W.2d 173, 179 (Tenn. 1999). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions and the reviewing court may draw its own conclusions with regard to those issues. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991).

V. ANALYSIS

The present case involves two causes of action: a workers' compensation claim against NHC and a tort claim against Mr. Bidwell, individually.

Workers' Compensation Claim

In making a determination as to whether the employee may receive workers' compensation benefits, the employee must satisfy the requirements detailed in Tenn. Code Ann. § 50-6-201(a) which provides, in part, that the employee must provide notice to the employer of the injury within thirty days after the occurrence of the incident unless the employee makes a reasonable excuse for failure to provide such timely notice. Id. However, notice to the employer is excused where the employer has actual notice of the injury. Id. The appellant/employer incorrectly argues that Ms. McCall failed to provide timely notice of her injury because, while she provided notice of the altercation to her supervisors, she failed to provide notice of her injury. The appellant relies upon Masters v. Industrial Garments Mfg. Co., 595 S.W.2d 811 (Tenn. 1980), which provided that notice to an employer must reasonably convey the idea to the employer that the employee has suffered an *injury* arising out of and in the course of her employment. Id. at 813. After a review of the record, however, we find that Ms. McCall's injury was such that she could not have known she suffered an injury until after she had undergone a medical examination. Thus, it is sufficient that Ms. McCall informed her supervisors of the altercation and told them within thirty days of its occurrence that it was upsetting to her.

The employer maintains that Ms. McCall's mental injury is not compensable. We have consistently addressed the legal framework regarding mental injuries. See, Goodloe v. State, 36 S.W.3d 62 (Tenn. 2001); Clevenger v. Plexco, 614 S.W.2d 356 (Tenn. 1981); Jose v. Equifax, Inc., 556 S.W.2d 82 (Tenn. 1977). A mental injury is compensable under the workers' compensation statute when it is caused by an identifiable, stressful, work-related event producing a sudden mental stimulus such as fright, shock, or excessive unexpected anxiety. Goodloe, 36 S.W.3d at 65. The workers' compensation statute does not cover every degree or type of stress, strain, or undesirable experience encountered in carrying out the duties of an employment contract. Clevenger, 614 S.W.2d at 360; Jose, 556 S.W.2d at 83. Because an amount of emotional stress occurs in any contract of employment, "worry, anxiety or emotional stress of a general nature" and injury resulting from the accumulation of normal job-related stress are not compensable. Gatlin v. City of Knoxville, 822 S.W.2d 587, 591-92 (Tenn. 1991); Allied Chem Corp. v. Wells, 578 S.W.2d 369, 372 (Tenn. 1979). Rather, compensable work-related stress must be "extraordinary and unusual in comparison to the

stress ordinarily experienced by an employee in the same type duty." Gatlin, 822 S.W.2d at 592. Generally, courts have not hesitated to allow compensation benefits for mental or nervous conditions where some "physical" or traumatic injury was proved.² Jose, 556 S.W.2d at 84. There has been a reluctance to permit recovery where only a "mental" stimulus occurring on the job caused the alleged mental or nervous illness. Id. The nature and degree of emotional stress is a question of fact, and the trial court is to be given deference where it has heard and observed the witnesses, especially with regard to issues of credibility. Jones v. Hartford, 811 S.W.2d 516, 521 (Tenn. 1991).

In the present case, the parties agree that a verbal altercation with physical elements occurred. Although the parties disagreed as to whether Mr. Bidwell shook Ms. McCall or simply placed his hands on her shoulders, we infer from the trial court's decision favoring Ms. McCall that the trial court credited her testimony that Mr. Bidwell shook her, yelled in her face and pushed her as she was leaving the room. See, Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733 (Tenn. 2002) (providing that appellate courts can infer findings of credibility and weight of the evidence from the manner in which the trial court resolves conflicts in testimony and decides the case). In cases denying compensability of mental injuries, such as Goodloe, Clevenger, and Jose, no element of a physical injury has been present. Here, the trial court must have found the employee to have been physically assaulted. We believe that being subjected to a physical assault is sufficiently extraordinary and unusual in comparison to ordinary job stresses that a mental injury resulting from such incident is compensable under our existing case law. We therefore affirm the finding of the trial court that Ms. McCall's injury was compensable.

The employer further argues that the trial court's finding of a causal connection between the incident and Ms. McCall's mental condition was contrary to the weight of the evidence. This assertion is largely based upon evidence that Ms. McCall complained of problems coping with stress to her regular physicians prior to the November 2000 incident. The trial court found the November 2000 altercation either caused Ms. McCall's mental condition or sufficiently exacerbated a pre-existing condition to entitle her to workers' compensation benefits. An employer is responsible for workers' compensation benefits, even though the employee may have been suffering from a serious pre-existing condition, if the employment causes an actual progression or aggravation of the prior disabling condition or disease. Sweat v. Superior Indus., Inc., 966 S.W.2d 31, 32 (Tenn. 1998); Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483 (Tenn. 1997); White v. Werthan Indus., 824 S.W.2d 158, 159 (Tenn. 1992); Talley v. Virginia Ins. Reciprocal, 775 S.W.2d 587, 591 (Tenn. 1989). Although experts for the parties may have testified differently with regard to this issue, the trial court has the discretion to accept the opinion of one expert over that of another. Johnson v. Mid Wesco, Inc., 801

²In the case of Buck & Simmons Auto & Electric Supply Co. v. Kesterson, 194 Tenn. 115, 250 S.W.2d 39 (1952), an award of total and permanent disability was allowed where the employee was struck by a vehicle and sustained some injury, including a slight laceration, to his neck. There were no broken bones and no evidence of any other serious physical injury. In Minton v. Leonard, 219 Tenn. 642, 412 S.W.2d 886 (1967) the Court recognized that there could be recovery for traumatic neurosis resulting from a back injury. In Gluck Brothers, Inc. v. Pollard, 221 Tenn. 383, 426 S.W.2d 763 (1968) the Court found sufficient evidence of a causal connection between a mental condition and an industrial accident where the employee had sustained slight physical injuries.

S.W.2d 804, 807 (Tenn. 1990). Opinions of the treating physician may properly be afforded greater weight than those of an examining or non-treating physician. Carter v. First Source Furniture Grp., 92 S.W.3d 367, 369-70 (Tenn. 2002). Prior to November 2000, Ms. McCall was clearly able to work and function normally. After the incident, she just as clearly was unable to do so. Dr. Singh testified the change was caused by the incident. Dr. Nyquist indicated it may have been a contributing factor. After a review of the expert testimony, some live and some by deposition, we agree with the trial court's finding that the confrontation between Ms. McCall and Mr. Bidwell caused mental injury or sufficiently exacerbated her pre-existing mental condition such that the injury is compensable.

Ms. McCall asserts that the trial court erred in failing to find her totally disabled. In making a determination as to vocational disability, the court is required by statute to consider all pertinent factors, including lay and expert testimony; the employee's age, education, skills and training; local job opportunities; and the capacity to work at types of employment available in the claimant's disabled condition. Tenn. Code Ann § 50-6-241(c). Ms. McCall has a high school equivalency and reads at a post high school level. In addition, her work history reveals that she has maintained a variety of skilled and semi-skilled jobs. With her degree of education and experience, the testimony of Dr. Singh that he could not find she suffered such an extreme impairment that would preclude useful functioning and the testimony of Dr. Nyquist that she was mildly to moderately impaired, the evidence presented does not preponderate against the findings of the trial court that Ms. McCall is able to find and hold *some* sort of employment and, thus, that she has sustained a vocational disability of seventy-five (75%) percent.

Tort Claim

The second cause of action involves the tort claim against Mr. Bidwell. Following the finding that Ms. McCall's injury was compensable, the trial court dismissed Ms. McCall's assault and battery claim against Mr. Bidwell. Ms. McCall has challenged the dismissal on appeal.

The parties did not raise the jurisdictional issue on appeal, but as an appellate court, we also consider "whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review." Tenn. R. App. P. 13(b). The parties were invited to submit supplemental briefs on this issue.

Tennessee Code Annotated section 16-4-108(a)(1) provides the jurisdiction of the Court of Appeals "extends to all civil cases except workers' compensation cases . . ." Tennessee Code Annotated section 50-6-225(e)(1) provides that any party to a workers' compensation case may appeal to the supreme court. Tennessee Code Annotated section 50-6-225(e)(3) authorizes the supreme court to refer workers' compensation cases to a special workers' compensation appeals panel. This panel is without jurisdiction to hear and determine the appeal of the trial court's granting a summary judgment in favor of Mr. Bidwell as to Ms. McCall's tort claim. Rule 17, Tenn. R. App. P., provides that "[i]f a case is appealed to the Supreme Court, Court of Appeals, or Court of Criminal Appeals that should have been appealed to another court, the case shall be transferred to

the proper court.” Accordingly, the appeal from the granting of summary judgment on Ms. McCall’s tort claim must be transferred to the Court of Appeals for its consideration and decision. Van Cleave v. McKee Baking Co., 712 S.W.2d 94, 95 (Tenn. 1986).

VI. Conclusion.

The judgment of the trial court in the workers’ compensation action is affirmed. The appeal of the tort claim is transferred to the Court of Appeals.

DONALD P. HARRIS, SR. J.

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
JULY 18, 2005 SESSION

CHARLOTTE McCALL v. NATIONAL HEALTH CORPORATION, ET AL

**Circuit Court for Rutherford County
No. 45480**

No. M2004-00261-WC-R3-CV - Filed - November 3, 2006

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 appeals 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 will be paid by the Appellants, National Health Corp., d/b/a Murfreesboro Health and NHC Insurance Company, n/k/a Premier Group Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM