

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
JUNE 19, 2006 Session

DONNA ROBERTS v. KMART CORPORATION

**Direct Appeal from the Chancery Court, Part III, for Davidson County
No. 03-343-111 Ellen Hobbs Lyle, Chancellor**

**No. M2005-01305-WC-R3-CV - Mailed - January 10, 2007
Filed - April 12, 2007**

This is a workers' compensation appeal referred to and heard by 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 plaintiff contends that the trial court erred in finding that she had failed to demonstrate that she had suffered a permanent injury to her back while in the course of employment for the defendant. We conclude the trial court was correct in its finding, however, and therefore, we affirm the decision of the trial court.

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

CLAYBURN PEEPLES, SP.J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., AND JEFFERY BIVINS, SP.J., joined.

Angus Gillis, III, Nashville, Tennessee, for Plaintiff-Appellant, Donna Roberts.

Hal W. Wilkins, Nashville, Tennessee, for Defendant-Appellee, Kmart Corporation.

MEMORANDUM OPINION

The plaintiff, at the time of her injury, was a 47-year-old woman with a ninth grade education. Prior to her employment at Kmart she held several other jobs, most of them involving physical labor. When initially hired by Kmart, she worked for a short period of time at the customer service desk, but she was then moved to a work crew responsible for stocking merchandise.

At the time of the injury about which she complains, plaintiff was working a shift from 4:00 a.m. until 12:30 in the afternoon. The incident in question occurred on March 2, 2002, a Saturday. Plaintiff claims that as she was helping another worker retrieve a table and chairs from a high shelf the table slipped and fell upon her, knocking her to the floor and landing on her upper legs. At the

time, she was asked by a co-worker if she were all right, and she responded affirmatively, stating that she would walk it off.

According to her testimony, plaintiff then assisted the other worker present in getting the table loaded on a flatbed dolly after which she sat down “for a minute.” She said she felt pain in her abdomen and that she went home and rested the rest of the weekend.

She returned to work the following Tuesday, March 5, 2002, but says she experienced pain about which she complained to a co-worker. She told her supervisor she needed to see a physician and was allowed to leave work in order to do so.

Her regular physician was not available on that date, however, so she went to the Baptist Care Center. There she was told that she was suffering from a bladder infection and that the infection was the source of her pain. She was prescribed medication, which she took, but says the medication did not relieve her pain.

Two days later she saw her regular physician, a Dr. Witherspoon, who felt plaintiff was suffering from a lower back strain and referred her to Dr. Arthur Cushman. Dr. Cushman saw plaintiff one time, on April 1, 2002. At trial, Dr. Cushman testified that he noted what he referred to as stocking numbness that was unexplainable neurologically, finding her condition to be normal from a neurological standpoint. He said that an MRI scan showed only degenerative changes with no significant problems.

He also noted that he did not feel plaintiff was a good candidate for surgery. He expressed the opinion that plaintiff had sustained a low back strain only, and that she suffered from an underlying emotional disorder. Believing that she was suffering from a strain due to the work incident, Dr. Cushman referred her to physical therapy and had no further contact with her.

Plaintiff subsequently underwent physical therapy from April 18 through April 30, 2002, but she found no relief from her pain as a result thereof. Her regular physician then referred her to Dr. Horace E. Watson, whom she saw at various times from June 7, 2002, to December 4, 2002. He performed various tests and ordered more physical therapy, diagnosing her problem as a low back strain from her March 2, 2002, accident accompanied by radicular pain extending into her right leg. Finding no muscle atrophy or weakness and no significant evidence of degenerative disc disease, he recommended that she seek treatment at a pain center.

Plaintiff then was evaluated by Dr. Tarek Eralyly to determine whether or not she was an appropriate candidate for surgery. He found that she was not.

Plaintiff's next sought treatment from Dr. Craig Baird, a neurologist practicing medicine and pain management. She first saw Dr. Berteau on December 17, 2002. He performed numerous diagnostic procedures and attempted several treatment modalities, to include epidural steroid injections, botox injections, medial branch nerve blocks and sympathetic nerve root blocks. None of them being successful, however, Dr. Berteau referred plaintiff to Dr. Vaughn Allen to determine if she were a likely surgical candidate.

She did not see Dr. Allen, but she did see Dr. Greg Lanford, who practiced in the same office with Dr. Allen. Dr. Lanford ordered a myelogram and a post myelogram CT scan, reviewed them, as well as a prior MRI examination, and speculated that plaintiff had some arthritis in her lower back area, but he did not find any operatively correctable problem. He also was of the opinion that the in-store incident of March 2, 2002, was the cause of plaintiff's pain.

Dr. Berteau continued to treat plaintiff and found several causes of her pain, including reflex

sympathetic dystrophy. After treating her unsuccessfully with various pain treatment modalities he referred her to Dr. William Schooley, a neurosurgeon, for consideration of a dorsal column stimulator.

Dr. Schooley first saw plaintiff on January 27, 2004. He and other physicians in his office performed four procedures on plaintiff. A per cutaneous insertion of a spinal cord stimulator showed promise, but when a dorsal column stimulator was installed on March 23, 2004, the plaintiff failed to get satisfactory relief.

Feeling that plaintiff was suffering from reflex sympathetic dystrophy, Dr. Schooley ordered a discogram. As a result, Dr. Schooley recommended removal of the L5-S1 disc with a fusion, thinking that this might relieve plaintiff's pain.

This procedure was done in two stages, both completed in August of 2004. Again the plaintiff failed to obtain satisfactory pain reduction. Believing plaintiff to be suffering from reflex sympathetic dystrophy, Dr. Schooley assigned a 23% to the whole person impairment based on the latest AMA guidelines. By this time, plaintiff was wearing a brace, using a wheelchair and taking pain medications.

Dr. Arthur Cushman testified by deposition that he felt plaintiff's injury was directly caused by the in-store incident of March 2, 2002, but he found her to be normal from a neurologic standpoint. His review of an MRI scan revealed only degenerative changes without any significant problems. At the time of treatment he anticipated full recovery.

Dr. Horace Watson also testified by deposition. An orthopedic surgeon, he said that when he saw her, plaintiffs walked with an awkward stance and gait and had limited flexing and bending ability. His opinion was that she had a low back strain with reticular pain extending into her right lower extremity. He also found, on one of her last visits with him, continued tightness of the peri spinal muscles.

Dr. Watson testified that she had no muscle atrophy or weakness in her lower extremities, that her MRI scan revealed only degenerative disc disease and that x-rays of her pelvis, right femur and right knee were all normal. He found no evidence of any objective finding to support her awkward gait. Finding no objective criteria for plaintiff's complaints, he suggested psychiatric care.

He further testified that her low back strain could be expected to exacerbate her pre-existing degenerative disc disease. He opined that her low back strain resulted from the incident of March 2, 2002. When he last saw her, Dr. Watson felt she had a permanent impairment, but he did not assign a rating to it because he felt she would continue to improve.

Dr. Gregory Lanford testified by deposition also. He said that when he saw plaintiff she had some arthritis in her lower back but did not have an operatively correctable problem. He said he found no indication of reflex sympathetic dystrophy, which he opined would have been manifold in the first year after the accident had it originated from the incident at issue.

Dr. Craig Berteau testified by deposition that plaintiff's leg and back pain was the result of a twisting injury she received on March 2, 2002, and that he believed she tore some of the intervertebral discs in her lower back at the time which subsequently led to nerve inflammation and dystonia, along with the reflex sympathetic dystrophy in the right leg. He said he felt plaintiff will continue to suffer from low back pain, along with right leg pain, and that she will be limited in her ambulation secondary to the pain. He further said he expected she would continue to require oral pain medication indefinitely and that he expected her to continue to need to use a wheelchair.

On cross-examination, he testified that she suffers from depression, which he said is common for people who have chronic pain. He said he did find evidence of Reflex Sympathetic Dystrophy but said his first examination was nine months after she began treatment and 18 months after the incident. He acknowledged that his opinion was heavily weighted by the history provided by plaintiff.

Dr. William Schooley testified that he also believed the incident of March 2, 2002, caused her pain syndrome and that the plaintiff had, as a result, a 23% whole person impairment.

He testified that he expected her future lifestyle to be sedentary, that she would be unable to walk great distances or stand extended periods of time and that she would suffer consistent pain. He also stated that "I'm not sure how much of a psych overlay there is in this." A "psychologic overlay" he said, is a situation in which a patient may get secondary gain which might cause magnification of the pain syndrome. He listed affection in the home or monetary considerations as examples of why this might happen. He also said, however, that degenerative disc disease can cause the pain from which plaintiff was suffering.

The plaintiff testified that she had stomach pain prior to the accident but that afterward she hurt in her back and legs. She was in a wheelchair at the time of trial and said it had been prescribed by one of her physicians. She also wore on a regular basis, she said, a brace around her mid-section. She also said that she uses a walker to some extent in her home. She testified that the various treatments she had received helped her pain "a little bit."

Judy Clinger, one of plaintiff's neighbors, testified that before the incident of March 2, 2002, plaintiff was active, swam in a swimming pool in plaintiff's yard and drove wherever she wished. Afterward, Ms. Clinger testified, plaintiff limped and began using a cane. She stated that plaintiff had begun using a walker, and that she, Clinger, had seen plaintiff in a wheelchair.

Beverly Morris, another of plaintiff's neighbors, testified that prior to March 2, 2002, plaintiff was energetic, hardworking and that she frequently traveled. Before her accident, Ms. Morris testified, the plaintiff did jobs that required significant labor. After the accident, however, Ms. Morris said, plaintiff's condition deteriorated to the point she would be unable to stand longer than 10 minutes and would become winded after walking from one end of the house to the other with the aid of a walker. She said that at one point plaintiff could not even carry on a conversation, but that this condition was corrected by a change of medications.

Bruce Roberts, plaintiff's husband, testified that while plaintiff used her pool the summer she was injured, she did not use it subsequent to that summer. He described her as very active before the accident. He also said that when she attempts to walk without the assistance of a walker she falls.

Mike Wair, an assistant manager at Kmart, and the co-worker who was present at the time of plaintiff's accident, testified that the plaintiff did help him remove a dining room table and chairs from an overhead shelving unit on the day in question, but said that he did not recall seeing her fall. He did notice, however, that she began limping soon thereafter. On cross-examination he stated that he may have been on the opposite side of the shelf at the time of the incident. He also said plaintiff was a good, hardworking employee and that he had always known her to be truthful and honest.

Taking all the evidence into consideration, the trial court concluded that the plaintiff had not carried her burden of causally connecting her pain, medical treatment and disability to the March 2, 2002, incident at the Kmart store. The court, in announcing its ruling from the bench, noted Mr.

Wair's testimony to the effect that he saw no traumatic landing on the floor and that within two weeks following the accident the plaintiff was diagnosed with a urinary tract infection.

The court further found that when she initially sought care, plaintiff did not complain of a fall or a slip or any kind of work related incident thus concluded that whatever back pain plaintiff was experiencing at the time was due to her urinary tract infection. The court noted that Dr. Cushman had opined that the plaintiff had psychological overlay and that neither he nor Dr. Elalayi, a surgeon who examined her, found her an appropriate candidate for surgery. The court noted that Dr. Elalayi also commented on the possible contribution of psychological overlay to her condition.

Dr. Watson, the court noted, who treated plaintiff for approximately six months, found only degenerative disc disease, and noted that her subjective complaints did not match his objective findings.

The court found her demeanor and exaggerated motions while testifying to be consistent with the physician's testimony of psychological overlay, finding her use of a wheelchair to be self-initiated, plaintiff having obtained it from a friend and taken it upon herself to use it.

In evaluating the trial court's findings, we must begin our analysis by acknowledging that for injuries occurring on or after July 1, 1985, 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).

Thus, in reviewing the evidence, we are required to conduct an independent examination of the record to determine where the preponderance lies. *Wingert v. Govt. of Sumner County*, 908 S.W.2d 921, 922 (Tenn. 1995). Where the trial court judge has seen and heard the witnesses, however, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because of the trial court's opportunity to observe witnesses' demeanor and to hear their testimony. *Long v. Tri-Con Ind., Ltd.*, 996 S.W.2d 173, 177 (Tenn. 1999).

With regard to medical testimony presented by deposition, as it was in this case, however, the standard is different. In such situations the reviewing court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Ins. Co. Of N. Am.*, 884 S.W.2d 446, 451 (Tenn. 1994). Even so, when medical testimony differs, it is in the discretion of the trial court to determine which expert testimony to accept. *Story v. Legion Ins. Co.*, 3 S.W.3d 450, 455 (Tenn. 1999)

Under Tennessee law, in order to be eligible for workers' compensation benefits an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." *Tenn. Code Ann.* §50-6-102 (a)(5). The phrase "arising out of" refers to causation, which requires that the injury have a rational, causal connection to the work. *Braden v. Sears, Roebuck*, 833 S.W.2d 496, 498 (1992). An accident arises out of employment when, upon consideration of all the circumstances, a causal connection exists between the conditions under which the work is required to be performed and the resulting injury. *Fink v. Caudle*, 856 S.W.2d 952, 958 (Tenn. 1993).

"Causal connection" does not mean proximate cause as used in the law of negligence, but cause in the sense that the accident had its origin in the hazards to which the employment exposed the employee while doing his or her work. Although absolute certainty is not required for proof of causation, medical proof that the injury was caused in the course of the employee's work must not

be so speculative or so uncertain regarding the cause of the injury that attributing it to plaintiff's employment would be an arbitrary determination or a mere possibility. If, upon undisputed proof, it is conjectural whether disability resulted from a cause operating within petitioner's employment, or a cause operating without employment there can be no award. If, however, equivocal medical evidence combined with other evidence supports a finding of causation, such an inference may nevertheless be drawn by the trial court. *Tindall v. Waring Park Association*, 725 S.W.2d 935, 937 (Tenn. 1987).

The burden of proving every element of his or her case by a preponderance of evidence in a workers' compensation case, of course, lies upon the plaintiff. *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 543 (Tenn. 1992).

With these principles in mind, we conclude that the evidence does not preponderate against the trial court's decision. The proof shows that plaintiff made no complaint to her employer contemporaneously with her complained of injury. Nor did she complain of pain consistent with a back or leg injury three days later when she sought medical attention for what was diagnosed to be a urinary tract infection.

The medical proof establishes that plaintiff was suffering from a pre-existing degenerative disc condition, and that her subjective complaints of pain were not substantiated by underlying objective findings. Thus, the history provided by plaintiff is the primary means of causally connecting her condition and her complaints to the incident of March 2, 2002.

The court below, after hearing the testimony of all witnesses, found the testimony of her neighbors of little value due to their lack of information and close relationship to the plaintiff. As to the plaintiff's testimony, the court concluded that it was not credible, citing specifically her demeanor and exaggerated motions. This, coupled with the subjective nature of her complaints, along with the failure of several medical practitioners to find underlying objective reasons for her complaints led the court to deny her claim.

When reviewing the trial court's factual findings regarding the credibility of witnesses, this court must give considerable deference to the trial court's findings. *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68 (Tenn. 2001). This is because the trial court has been afforded the opportunity to observe the witnesses' demeanor and hear and observe their in-court testimony. *Long. v. Tri-Con Indus.*, 996 S.W.2d 173, 178 (Tenn. 1999). 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 (Tenn. 1987).

After reviewing the record, we find that the evidence does not preponderate against the trial court's denial of benefits. Accordingly, the judgement of the trial court is affirmed. Costs on appeal are taxed to the plaintiff.

CLAYBURN PEEPLES, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

DONNA ROBERTS v. KMART CORPORATION

**Chancery Court for Davidson County
No. 03-343-III**

No. M2005-01305-SC-WCM-CV - Filed - April 12, 2007

ORDER

This case is before the Court upon the motion for review filed by Donna Roberts pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Donna Roberts, for which execution may issue if necessary.

PER CURIAM

APRIL 11, 2007

TO: SANDRA VANCE, DEPUTY CLERK, NASHVILLE
FROM: WILLIAM M. BARKER, CHIEF JUSTICE
RE: DONNA ROBERTS V. KMART CORPORATION
DAVIDSON CHANCERY - NO. M2005-01305-SC-WCM-CV

MOTION FOR REVIEW:

DENIED