

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 26, 2007 Session

MAI GOOCH v. CITY OF MURFREESBORO

**Direct Appeal from the Circuit Court for Rutherford County
No. 45280 Robert E. Corlew, III, Chancellor**

**No. M2006-01264-WC-R3-WC - Mailed - October 11, 2007
Filed - December 13, 2007**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated § 50-6-225(e)(3). The trial court held that (1) Employee's job caused her injuries, (2) Employee's delayed notice did not prejudice Employer, (3) Employee sustained a 60% permanent partial disability to the body as a whole, and (4) Employer should pay Employee's discretionary costs pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure. Employee appeals the award of permanent partial disability benefits, contending she is permanently and totally disabled. Employer contends that the evidence preponderates against the trial court's findings concerning causation and notice, and that sovereign immunity bars the award of discretionary costs. We reverse the trial court's ruling on the assignment of discretionary costs and affirm all of the trial court's other rulings.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2006) Appeal as of Right; Judgment of the Circuit Court Reversed in Part and Affirmed in Part

RICHARD E. LADD, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, C.J., and DONALD P. HARRIS, SR. J., joined.

D. Russell Thomas and Herbert Schaltegger, Murfreesboro, Tennessee, for the appellant, Mai Gooch.

Richard W. Rucker, Murfreesboro, Tennessee, for the appellee, City of Murfreesboro.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

Introduction

Mai Gooch (“Employee”) worked as a janitor for the City of Murfreesboro (“Employer”). Her duties included cleaning bathrooms, mopping, vacuuming, emptying trash cans, moving chairs, and using a floor buffer. Employee claims that her job caused her to injure her neck and to have carpal tunnel syndrome. She has undergone several surgeries for her injuries and is currently on numerous medications, including hydrocodone for pain.

Her injuries first caused her to miss work on May 18, 2001. However, she did not give Employer notice that she was injured on the job until June 20, 2001. She continued to work until July 18, 2001, but she has not worked since that date. She testified that her constant pain and inability to move her neck keeps her from working.

Procedural History

The trial court held a bifurcated trial with the first hearing in 2002, and the final hearing in 2006. The purpose of the first hearing was to determine whether or not Employer should be ordered to pay medical expenses and temporary disability benefits. At that hearing, both sides called witnesses to testify. Depositions and medical records were also placed into evidence. Employer presented, inter alia, the testimony of Employee’s supervisor, Greg Lyles. He stated that Employee told him that her injuries were not work related.

After that hearing the trial court issued its decision in the form of a letter to counsel. The letter states that, although Employee gave notice of her injury three days after the statutory deadline, the delay did not prejudice Employer. It also states that Employee's job caused her injuries. Employer filed a written objection to the trial court’s finding concerning causation. It argued that it was not prepared for the issue to be decided at that time, and therefore it did not submit all of its evidence on causation. An order was entered consistent with the findings of the trial court as outlined in its letter.

Employee received extensive medical treatment and eventually reached maximum medical improvement.

A second hearing was then held on March 21, 2006. Employer again argued that the issue of causation was prematurely decided in 2002 and made an offer of proof on the issue. Employer submitted the following new evidence in its offer: Mary Jo Bryan, a co-employee, would testify that she heard Employee tell Greg Lyles that her injuries were not work-related; and Phil Huddleston, also an employee, would testify that Employee told him that she was upset because Employer denied her a promotion.

The Vocational and Medical Evidence

Employee submitted depositions and C-32 forms from several of her treating doctors,

including Dr. Richard Fishbein, Dr. William Jekot, Dr. Michael Moran, and Dr. Melvin Law. Dr. Fishbein, an orthopaedic surgeon, conducted an independent medical evaluation at the request of Employee's counsel. He assigned Employee a 6% and 7% impairment rating to the left and right upper extremities, respectively, due to her carpal tunnel syndrome. He also assigned her a 27% impairment rating to the body as a whole due to her neck injury. He combined these individual ratings to assign her an aggregate impairment rating of 37% to the body as a whole. Dr. Fishbein also concluded that Employee's job caused her injuries.

Dr. Melvin Law, also an orthopaedic surgeon, performed fusion surgery on Employee's cervical spine in December 2002 and April 2004. He opined that she retained an impairment of 25% to the body as a whole as a result of these procedures. He suggested that Employee lift no more than ten pounds frequently, and should limit sitting, standing and working above shoulder level.

Dr. William Jekot, also an orthopaedic surgeon, performed carpal tunnel release surgery on Employee's right arm in May 2002 and left arm in July 2002. He assigned impairments of 5% to each upper extremity as a result of her carpal tunnel syndrome. He did not assign permanent restrictions.

Drs. Fishbein, Jekot, and Law all testified that Employee's job caused her injuries.

Dr. Sieveking, a vocational evaluator, testified that he performed a "Psychological/Occupational Evaluation" on Employee. On the basis of that evaluation, he opined that Employee was 100% permanently vocationally disabled. His conclusion is based on, among other things, interviews with Employee, Employee's IQ test (which showed that she had an IQ of 64), and Employee's doctors' reports.

Employer introduced a video at the 2006 hearing taken by Stader Richardson, a private investigator. The video shows her walking, using her hands to open doors, turning her head, eating with friends, and driving. Mr. Richardson testified that the only sign of pain he saw was that she "walked very carefully" down a set of steps. The trial court found that this video undermines Employee's testimony about her constant pain and her sedentary lifestyle as well as other witnesses' testimony that she does not move her neck much.

The trial court issued its ruling in the form of a second letter to counsel on March 24, 2006. It awarded 60% permanent partial disability to Employee. In its letter, the court stated that its observation of Employee's ability to "testify fully and competently both on direct and cross examination," was not consistent with Dr. Sieveking's testimony concerning her mental abilities. The court also stated that the surveillance video contradicted Employee's testimony about her ability to move her neck and her lifestyle. Judgment was entered in accordance with these findings on May 22, 2006. Employee filed a motion for an award of discretionary costs of \$9059.00. That motion was granted by an Order dated June 8, 2006.

II. ISSUES

Employee contends that she is permanently, totally vocationally disabled. Employer contends that: (1) sovereign immunity protects Employer, a city, from paying Employee's discretionary costs, (2) the trial court erred when it decided the issue of causation at the first hearing of the bifurcated trial, and (3) the trial court erred when it found that Employee's delayed notice did not prejudice Employer.

III. STANDARD OF REVIEW

In workers' compensation cases this panel reviews the trial court's general findings of fact *de novo*, with a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2006). However, the trial court's findings of fact based on in-court testimony are afforded considerable deference, especially where the finding is one of credibility. *Mahoney v. NationsBank of Tenn., N.A.*, 158 S.W.3d 340, 343 (Tenn. 2005). But we extend no deference to the trial court's findings of fact when reviewing documentary evidence such as depositions. *Id.* As to findings of law, the standard of review is *de novo* with no presumption of correctness. *Id.*

IV. ANALYSIS

A. The Extent of Employee's Vocational Disability

The trial court held that Employee is 60% vocationally disabled. After conducting an independent review of the record, we conclude that the evidence preponderates in favor of this ruling.

Employee argues that she is permanently and totally disabled. Tennessee Code Annotated section 50-6-207(4)(B)(2005) provides that an injured employee is permanently and totally disabled when she is totally incapacitated "from working at an occupation which brings the employee an income."

Employee first contends that the award of 60% permanent partial disability is far less than the maximum award allowable under Tennessee Code Annotated section 50-6-241, (2005) in light of the 37% anatomical impairment assigned by Dr. Fishbein. However, medical impairment is merely one of the factors which is to be considered in determining the extent of permanent disability. *Walker v. Saturn Corp.*, 986 S.W.2d 204, 208 (Tenn. 1998).

Employee also argues that the trial court should have given more weight to Dr. Sieveking's conclusion that Employee was 100% vocationally disabled, because he was the only vocational expert before the court. However, the testimony of such experts is only one of the many factors which must be considered in determining the extent of permanent disability. *Collins v. Howmet Corp.*, 970 S.W.2d 941 (Tenn. 1998). Moreover, Dr. Sieveking's opinions were dependent on Employee's truthfulness to him and to the doctors whose reports he relied upon. The value of his

testimony was, therefore, diminished by evidence undermining Employee's credibility, i.e. the surveillance video, and by the trial court's observation of her ability to comprehend and respond to questions while testifying.

B. The Assignment of Discretionary Costs to Employer, a City

The trial court ordered Employer to pay Employee's discretionary costs pursuant to Rule 54.04(2) of the Tennessee Rules of Civil Procedure. Employer argues that it cannot be assessed these costs because it is protected by sovereign immunity. Its argument raises two subsidiary issues: (1) are cities, like states, protected by sovereign immunity, and (2) if so, does Rule 54.04(2) waive that immunity so as to allow assignment of discretionary costs to it?

The first issue is well-settled. In Tennessee, cities are protected by sovereign immunity. Tenn. Code Ann. § 29-20-201(a); *see also Hawks v. City of Westmoreland*, 960 S.W.2d 10, 14 (Tenn. 1997) (finding that the defendant, a city, waived its immunity).

The second subsidiary issue is less settled. However, a review of cases from our Supreme Court and Court of Appeals leads us to conclude that Rule 54.04(2) does not waive a sovereign's immunity. Although our Supreme Court has never directly addressed the question, it has stated that, for a statute to effectively waive a sovereign's immunity, it must be explicit in doing so. *Cronin v. Howe*, 906 S.W.2d 910, 914 (Tenn. 1995) (“[G]eneral procedural statutes do not apply against the State unless the State is specifically named therein.”), *Automobile Sales Co. v. Johnson*, 174 Tenn. 38, 122 S.W.2d 453, 455 (1938) (“It is a general rule that the State is not bound by the general words of a statute, which, if applied, would operate to trench on its sovereign rights . . . unless the contrary is expressly declared or necessarily implied.”); *State v. Henley*, 98 Tenn. 665, 41 S.W. 352, 357 (1897) (“[A] statute giving costs in general terms . . . will not make the state liable therefor.”). Rule 54.04(2) does not explicitly waive sovereign immunity.

The Court of Appeals has considered the issue in several unpublished decisions. In most of these cases, the Court of Appeals held that Rule 54.04(2) does not waive a sovereign's immunity. *See State v. Wallace*, No. M2004-00846-COA-R3-CV, 2005 WL 3487855 (Tenn. Ct. App. Dec. 20, 2005), *Johnson v. Tenn. Dep't of Correction*, No. M2001-02424-COA-R3-CV, 2003 WL 22794498 (Tenn. Ct. App. Nov. 25, 2003), *Tenn. Small School Sys. v. McWherter*, No. 01-A-01-9211-CH0047, 1993 WL 295006 (Tenn. Ct. App. Aug. 4, 1993) (perm. app. denied March 7, 1994).

Employee cites one case, *Hollifield v. City of Morristown*, No. 03A01-9605-CV-00172, 1996 WL 539766 (Tenn. Ct. App. Sept. 25, 1996), that takes the contrary position. However, *Hollifield* is distinguishable. The city in *Hollifield* was being sued under the Governmental Tort Liability Act (“the GTLA”), not under the Workers' Compensation Act. The GTLA contains a key provision that the Workers' Compensation Act does not. The GTLA provides that, when sued under the act, the sovereign is to be “placed in the position of a ‘private person’.” *Id.* at *1 (quoting Tenn. Code Ann. § 29-20-206). However, there is no such provision in the Workers' Compensation Act. Thus, while *Hollifield* stands for the proposition that sovereigns being sued under the GTLA are subject to Tenn.

R. Civ. P. 54.04(2), it does not address whether sovereigns being sued under the Workers' Compensation Act are subject to that rule.

C. Causation

The trial court held, at the 2002 hearing, that Employee's job caused her injuries. Employer argues that this was error because the 2002 hearing was only a preliminary proceeding and that the trial court should not have made its final decision on causation until the trial. It argues that this error precluded the trial court from considering all of the evidence on causation. Although we agree that the trial court should have admitted the additional evidence, we hold that the error was harmless because it did not affect the outcome of the case.

The declared purpose of holding the 2002 hearing was to decide whether Employer should pay Employee's temporary total disability benefits and medical expenses. The issue was the critical matter before the court at that time. Counsel for Employer recognized this when he stated in his opening: "This case goes to the fundamental issue: Was there any accident at work causing neck pain? Next, repetitive motion leading to carpal tunnel, is there repetitive motion doing it?"

In order to award temporary benefits, the trial court is required to find only that Employee is *likely to succeed* on the merits of the claim. *McCall v. Nat'l Health Corp.*, 100 S.W.3d 209, 214 (Tenn. 2003) (emphasis added). By necessary implication, this leaves the ultimate determination of whether Employee will succeed to the final hearing. Thus, the trial court should have withheld its final decision on causation until the trial. However, this error is harmless because, even considering all of the evidence on causation from both hearings, the preponderance of the evidence supports the trial court's holding.

At the 2002 hearing, Drs. Fishbein, Jekot, and Moran all testified by deposition that Employee's job probably caused her injuries. No contrary medical opinions were presented. In addition, Employee testified that she performed activities at her job, such as using a floor buffer and lifting trash cans, that could have caused her injuries. The only evidence presented by Employer was the supervisor's testimony concerning Employee's statement to him.

Employer's offer of proof at trial in 2006 included testimony of a witness which would corroborate the supervisor's testimony, and the testimony of a witness that Employee was upset because Employer did not give her a promotion. We find that this evidence was cumulative, and that even when it is considered, the evidence in the record preponderates in favor of the trial court's decision.

D. Employer's Prejudice from Employee's Delayed Notice

Employee gave Employer notice of her injuries three days after the thirty day period allowed by Tennessee Code Annotated section 50-6-201. Employer argues that her claim should be barred due to this delay. The trial court held that the delay did not cause prejudice to Employer, and

permitted the claim to proceed.

An employer is prejudiced by late notice if the delay kept it from (1) making an investigation while the facts were still accessible, or (2) providing timely and proper treatment for the injured employee. *Jones v. Sterling Last Corp.*, 962 S.W.2d 469, 471 (Tenn. 1998) (setting forth the purpose of the notice requirement). Employer argues that it was prejudiced under both tests. We disagree.

Employer contends that if Employee had given timely notice, it could have made a videotape of her work activities to refute the claim that they were sufficiently repetitive to cause carpal tunnel syndrome. However, Employee's notice was only three days late. Her notice was required by June 17, 2001. She gave notice on June 20, 2001, and she continued to work until July 18, 2001. Therefore, the "facts were still accessible" for nearly a month after Employer had notice.

Employer also argues that it was prejudiced because the late notice kept it from providing timely and proper treatment. Specifically, Employer asserts that, had Employee given notice three days earlier, it could have "change[d] patterns of movement in her job to avoid advancing her carpal tunnel injury." Given the very short time frames involved, we find this assertion to be without merit. *See Boyle v. Proctor & Gamble Mfg. Co.*, No. W2000-00064-WC-R3-CV, 2001 WL 468649 (Tenn. Workers' Comp. Panel May 3, 2001) (eleven day delay in notice found not to prejudice employer), *Parkwood Health Care Ctr, A Div. of Nat'l Health Corp., L.P. v. Jackson*, 1988 WL 113530 (Tenn. Oct. 31, 1988) (three day delay in notice found not to prejudice employer).

V. CONCLUSION

The trial court's award of discretionary costs to Employee is reversed. Otherwise, the trial court's rulings are affirmed. Costs on appeal are taxed one-half to Mai Gooch and one-half to the City of Murfreesboro, for which execution may issue if necessary.

RICHARD E. LADD, SPECIAL JUDGE

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Circuit Court for Rutherford County
No. 45280

No. M2006-01264-SC-WCM-WC - Filed - December 13, 2007

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Mai Gooch pursuant to Tennessee Code Annotated section 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 one-half to Mai Gooch and one-half to the City of Murfreesboro, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

William M. Barker, C.J., not participating

