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

IDA CUMMINGS v. M-TEK, INC., ET AL.

Direct Appeal from the Circuit Court for Grundy County
No. 7041 Buddy Perry, Judge

No. M2007-00110-WC-R3-WC - Mailed - February 27, 2008
Filed - March 31, 2008

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court 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. On appeal, M-Tek, Inc. ("Employer") contends that the trial court erred in finding that Ida Cummings ("Employee") sustained a compensable permanent partial right shoulder disability. In the alternative, Employer contends that the trial court erred in relying on the evaluating physician's impairment rating instead of the rating given by the treating physician, and in awarding Employee a 27.5% impairment to the body as a whole. Because the evidence does not preponderate against the findings, we affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right; Judgment of the Circuit Court Affirmed

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., J. and JERRY SCOTT, SR. J., joined.

Thomas W. Tucker, III, Nashville, Tennessee, for the appellant, M-Tek, Inc. and Royal & Sunalliance Insurance Company.

Mark Stewart, Winchester, Tennessee, for the appellee, Ida Cummings.

MEMORANDUM OPINION

Factual Background

Employee was 58 years old and divorced at the time of trial. She has an eighth grade education, but has received some training as a nurse technician. Employee's work history includes positions as a seamstress, a nurse's technician, a telemarketer, and an assembly line worker. As of

the date of trial, Employee was not working due to health issues unrelated to this workers' compensation claim.

Employee began her tenure with Employer in May 1999. Employee began working "on the assembly line" but "[she] couldn't keep up." As Employee stated, "[assembly line] is a fast paced job." Given her inability to "keep up," Employee held several different positions before finding her niche "in the spraying group." The "spraying group," as the record reflects, consists of spraying a glue-type substance onto the front and back of pieces of either leather or cloth.[1] The leather and cloth pieces, approximately a square foot in size, were used as "front panels and door panels."

In addition to spraying the panels, another of Employee's job requirements was to make sure that she, as well as the other three employees on the "spraying group" production line, had the necessary number of door panels for each work day. In order to perform this task, Employee had to place either the cloth panels or the leather panels at each working station on the production line before production began each morning. As Employee stated, "If I had 240 [panels] to do in a day" and there were "forty [panels] in a box . . . that would be eight boxes per line."[2] As such, Employee would have to retrieve and lift 24 boxes of panels in an average day.

The cloth panels, as Employee testified, were stored on a rack at or below her shoulder level and were kept in "bundles." The leather panels, however, were stored above Employee's head and were kept in boxes weighing between ten and twenty pounds. Therefore, per Employee's testimony, in the course of an eight hour shift, she would have to reach above her head with one or both hands to grab up to approximately 24 boxes weighing between ten and twenty pounds. Employee testified that depending on how many boxes she had to lift in a given shift, her shoulder "would hurt maybe after four hours - it would start burning."

As early as September 1, 2001, the record indicates that Employee began having shoulder pain.[3] On this date, Employee visited her family doctor, Dr. Christopher D. Dunlap, with complaints associated with "back strain since lifting some things over her head." During this visit, Dr. Dunlap observed that Employee showed "pain to palpation over her right shoulder area consistent with muscle strain." Employee was prescribed an anti-inflammatory medication and released.[4]

In May 2002, Employee again returned to see Dr. Dunlap regarding "some pain in her right

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[1] Employee testified, "It's a glue gun that sprays [glue] out like paint. Just coat it, the back of the - you coat it, flip it to the other side and do a complete job. Back and forth. Same thing over and over.

[2] Although Employee's testimony went unchallenged, if Employee had to spray 240 panels a day and there were 40 panels in a box, only 6 boxes would be necessary per employee.

[3] It is unclear from the record when Employee began working in the "spraying group."

[4] Dr. Dunlap did not testify at trial or give a deposition. We have gleaned the facts pertaining to Dr. Dunlap's treatment of Employee from exhibits entered into the record during the deposition testimony of Employee's and Employer's medical experts.

shoulder." Dr. Dunlap observed that Employee had "difficulty with range of motion of her right shoulder . . . [and] [h]ad difficulty lifting her arm above her head." Dr. Dunlap noted that Employee may have "some bursitis vs impingement." She was treated with "a shot of Depo Medrol 40" and released.

Approximately five months later, on October 7, 2002, Employee was lifting a box filled with leather panels off the rack when she "felt her arm pop." Employee went to see the on-site nurse. She informed the nurse that she "hurt [her] shoulder real bad" and that her "shoulder [w]as burning." The nurse treated Employee with some aspirin for the pain. After an unknown amount of time, Employee returned to the nurse and informed her that "[she] was going to have to go to the doctor because [her shoulder was] really bad." At this time, Employee was sent to see Dr. Robert E. Stein, an orthopaedic surgeon.

Employee visited Dr. Stein on October 28, 2002. In her medical history, Employee described her problem as "pain in the right shoulder blade," associated with "lifting boxes over her head."[5] After taking Employee's past medical history and performing a physical examination, which "revealed pain with passive abduction greater than 60 degrees, pain with passive flexion greater than 120, and pain with forced flexion or forced abduction and external rotation," Dr. Stein ordered x-rays of the right shoulder. The x-rays "revealed an inferior clavicular spur and a Type II acromion." Dr. Stein diagnosed Employee as having degenerative disk disease of the cervical spine and rotator cuff tendinitis. Conservative treatment was provided.

On November 19, 2002, Employee returned to see Dr. Stein for both right shoulder pain and neck pain. At this time, Dr. Stein and Employee discussed possible ways to manage Employee's current symptoms. Employee again received a shot of DepoMedrol for her shoulder and was "started . . . on a course of cervical traction." In his office notes, Dr. Stein opined that "[i]f she fails to improve, then I believe that an MRI of the shoulder would be appropriate here."

On August 19, 2003, Employee again returned to see Dr. Stein for "continued symptomatology." At this time, Employee complained that "she feels that the pain is worse than it was last year." In his office notes, Dr. Stein wrote:

> Given the persistence of her symptomatology, I feel that additional work-up of this work injury[6] is appropriate. Therefore, we will proceed with an MRI to assess the integrity of the right rotator cuff as well as any nerve root impingement within the

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[5] Employee also complained of pain in her scapula. Because this injury is not part of this appeal, further discussion of the injury is purposefully omitted.

[6] Although Dr. Stein wrote in his office notes that Employee's shoulder injury was a "work injury," during his deposition, Dr. Stein Stated:

> [I]t's entirely possible that the repetitive nature of the work at her job is the source of her discomfort. On the other hand, it's entirely possible that other factors, be they on the job or at her home in her regular life, could be equally responsible.

cervical spine. We will disc[uss] further management based upon the results of the upcoming studies.

On August 31, Employee had MRIs of her right shoulder and cervical spine taken. The shoulder MRI revealed three things: (1) degenerative changes in the acromioclavicular joint associated with *impingement* syndrome; (2) findings of tendinosis in the supraspinatus tendon; and (3) a subcortical cyst at the head of the humerus just medial to the insertion of the supraspinatus tendon. Additionally, it was noted in the MRI report that a possible "internal tear of the supraspinatus tendon cannot be excluded."

Following the MRI, Employee returned to Dr. Stein's office. In this final visit on September 10, Dr. Stein concluded that Employee's shoulder pain was associated with cervical disc disease and that she was not "an operative candidate at this point." Dr. Stein did state, however, that Employee "should avoid repetitive work at or above shoulder level but could return to work in a limited capacity in the meantime." Employee, however, did not return to work. In February of 2003, Employee applied for and received Family Medical Leave for congestive heart failure and diabetes.

Finally, on October 20, 2003, Dr. Stein found Employee to be at maximum medical improvement and assigned her an impairment rating of 3% to the upper extremity, or a 2% impairment to the body as a whole.[7] Employee's work restriction against repetitive work at or above shoulder level was also made permanent.

On April 3, 2004, Employee filed a complaint in the Grundy County Circuit Court alleging that she "ha[d] suffered a [compensable] gradual injury to her right shoulder as a result of repetitive work related activities." Employee pleaded that, as a result of her gradual injury, she has a permanent disability and therefore, should be awarded "all temporary total benefits and permanent disability benefits connected with her injury." Employer responded, contesting these allegations.

Prior to trial, and at the request of her counsel, Employee visited Dr. Richard E. Fishbein, an orthopaedic surgeon, on September 7, 2006, for an independent medical evaluation. During this visit, Employee complained of "numbness, tingling, popping, stiffness and tenderness in her right upper extremity." After reviewing Employee's medical records and MRIs, performing a physical examination, and checking her range of motion "utilizing the two-point inclinometer technique," Dr. Fishbein determined that Employee had a 15% permanent impairment to the right upper extremity, or 9% permanent impairment to the whole person, based on significant *weakness* to the right shoulder."[8] Dr. Fishbein also added an additional "2% permanent impairment to the whole person

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[7] It is unclear from the record why Dr. Stein found Employee to be at maximum medical improvement on October 20. It does not appear that Employee visited Dr. Stein on this date.

[8] Although Dr. Fishbein's medical report states that his impairment rating is based on "weakness" in the right shoulder, in his deposition Dr. Fishbein explained that he did not assign the 9% impairment rating based on weakness. Instead, Dr. Fishbein stated that he used "[Table] 16-35 'Impairments [sic] of the Upper Extremity Due to Strength Deficit From Musculoskeletal Disorders . . .'" found in the American Medical Association Guides to the Evaluation of

based on pain, which is mildly aggravated."[9] When asked about this diagnosis, Dr. Fishbein stated:

> [B]asically, she has an irreversible situation called impingement[10] with marked loss of the range of motion and considerable pain associated with the entity which is mildly aggravating her performances of activities of daily living which also is a requirement for some impairment.

Dr. Fishbein also addressed the issue of causation, stating that "the repetitive nature of her work at [Employer]" caused Employee's shoulder condition. For treatment, Dr. Fishbein suggested that Employee would be a good surgical candidate. He also agreed with Dr. Stein's restriction of no repetitive use of the shoulder at or above shoulder level.

After reviewing all the evidence, including Employee's own testimony regarding her current pain levels and ability to perform every day activities like combing her hair and mopping, the trial court found that Employee "suffered an accident [sic] injury during the course and scope of her employment activities with [Employer] on October 7, 2002." Additionally, the trial court concluded that Employee suffered a permanent partial impairment and, as a result, has a 27.5% permanent partial disability. In so holding, the trial court found Employee's medical proof more persuasive in determining the correct impairment rating. Employer timely filed a notice of appeal to this Panel.

Standard of Review

We review factual issues in a workers' compensation case de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. *See* Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2007); *see also Rhodes v. Capital City Ins. Co.*, 154 S.W.3d 43, 46 (Tenn. 2004); *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 825-26 (Tenn. 2003). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the panel on appeal must extend considerable deference to the trial court's factual findings. *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 71 (Tenn. 2001). When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over the other. *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675, 676-77 (Tenn. 1983). This Panel, however, may draw its own conclusions about the weight and credibility to be given to expert medical testimony when it is presented by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1977). With

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Permanent Impairment, Fifth Edition ("the Guides"). The notations in the medical report support this testimony.

[9] In making this determination, Dr. Fishbein relied on Table 18-3 "Impairment Classification Due to Pain Disorders" of the Guides.

[10] Dr. Fishbein defined impingement as

> a progressive condition . . . where as you bring your arm up from the side or forward, the rotator cuff is inflamed and the bursal sac or the bursal fluid over the rotator cuff impinges against the tip of the acromion and the acromiioclavicular joint causing trauma and often an interstitial tear.

these principles in mind, we review the record to determine whether the evidence preponderates against the findings of the trial court.

Analysis

In order to be eligible for workers' compensation benefits, 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(13) (2005). Thus, in order to receive benefits for a permanent partial disability, Employee must show three things: (1) she suffered an injury; (2) the injury was work related; and (3) the injury caused a permanent vocational disability. In this appeal, Employer does not dispute that Employee has suffered an injury but instead argues that her injury was not work related, or in the alternative, that Dr. Stein's impairment rating of 2% more accurately reflects Employee's vocational impairment. Therefore, taking as fact that Employee has suffered a right shoulder injury and suffers a permanent vocational disability, this Panel is only concerned with whether Employee's injury was work related and if so, what her impairment rating should be. Employee has the burden of proving every element of her case by a preponderance of the evidence. *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 543 (Tenn. 1992).

A. Causation

In its first argument, Employer asks this Panel to find that Employee's injury was not caused by her employment at Employer. Instead, Employer argues that Employee "suffers from a degenerative condition in her right shoulder . . . related to ageing, genetics, and usage." To support this argument, Employer argues that Dr. Stein did not relate Employee's shoulder complaints to her work at Employer and that Dr. Fishbein did not have sufficient or accurate information concerning Employee's work activities to credibly relate her shoulder condition to her work at Employer.

The element of causation is satisfied where the "injury has a rational, causal connection to the work." *Braden v. Sears, Roebuck & Co.*, 833 S.W.2d 496, 498 (Tenn. 1992). Our courts have

> consistently held that an award may properly be based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury.

Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997). Absolute certainty with respect to causation is not required, however, and the Panel must recognize that, in many cases, expert opinions in this area contain an element of uncertainty and speculation. *Fritts v. Safety Nat'l Cas. Corp.*, 163 S.W.3d 673, 678 (Tenn. 2005). Nevertheless, all reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the Employee. *Phillips v. A. & H Constr. Co.*, 134 S.W.3d 145, 150 (Tenn. 2004); *Reeser*, 93 S.W.2d at 692; *see* Tenn. Code Ann. § 50-6-102(a)(5) (2005).

Applying these principles to the facts in this case, we agree with the trial court's findings that Employee suffered a work related shoulder injury. Although the facts in this case do not show with absolute certainty that Employee's injury was work related, we do find that her injury could have been caused by the repetitive lifting and moving of boxes during work hours. Dr. Fishbein testified that the repetitive nature of Employee's work caused Employee's shoulder injury. And although Employer questions whether Dr. Fishbein had enough information about Employee's work activities to state with any credibility that the shoulder injury was work related, we find that he did. He admitted to reviewing Dr. Stein's office notes and talking to Employee about her medical and work history. He also admitted that he gave particular attention to the work restriction, given by Dr. Stein, to avoid repetitive use of the right shoulder at or above shoulder level. This, in our estimation, was enough information for Dr. Fishbein to conclude that Employee's shoulder injury was work related. Dr. Fishbein's testimony, coupled with Employee's testimony describing the pain that she felt when having to lift the boxes of leather panels and the "pop" in her shoulder while lifting a box on October 7, 2002, persuade the Panel to conclude that there is a causal relationship between Employee's injury and her work. Moreover, although Dr. Stein wavered during his deposition as to whether Employee's injury was caused by her work at Employer, when pressed on the issue he agreed that, given Employee's truthfulness during her medical visits and her explanation of how she injured herself, it was "certainly plausible" that the overhead lifting at work caused Employee's shoulder injury. Accordingly, the evidence preponderates in favor of the trial court's finding that Employee suffered a work related shoulder injury.

B. Impairment Rating

As an alternative argument, Employer asks this Panel to find that Dr. Stein's 2% impairment rating to the body as a whole is more credible than Dr. Fishbein's 11% impairment rating because Dr. Stein was the treating physician and not merely an evaluating physician. In support of this argument, Employer focuses on the fact that Dr. Stein treated Employee for approximately one year after the "reported right shoulder claim," and Dr. Fishbein did not evaluate Employee until almost four years after the claim arose.

In dealing with the existence and extent of a disability, the disability, generally, must be established through medical testimony, but the extent of the disability may be established through both lay and expert testimony. *See, e.g.*, *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991); *Hinson*, 654 S.W.2d at 677. In this case, Employer is not challenging the existence of a disability, but instead only the extent of that disability. Therefore, we must review the lay and expert testimony to determine whether the evidence preponderates against the findings of the trial court. Since the expert medical testimony in this case was presented by deposition, we are in as good a position as the trial court to evaluate that testimony and draw our own conclusions. *See Krick*, 945 S.W.2d at 712.

Both Drs. Stein and Fishbein are orthopaedic surgeons who have been board certified for more than twenty-five years. Each has an impressive resume and has continued to stay abreast of issues dealing with orthopaedic surgery and evaluation procedures and policies pursuant to the

Guides. Based on their extensive knowledge, both doctors agreed, using the Guides, that Employee has an impairment. Nevertheless, they differ on their assessment of Employee's degree of impairment.

Although, as Employer argues, Dr. Stein was Employee's treating physician, he had multiple visits with Employee, and he got to observe Employee's shoulder symptoms over the course of a year, we are not persuaded that his 2% impairment rating to the whole body more accurately reflects Employee's actual impairment. The facts fail to establish how Dr. Stein determined his impairment rating or what method, either loss of strength or loss of range of motion, he used.

On the other hand, Dr. Fishbein's medical report explains how he determined that Employee had an 11% permanent impairment to the body as a whole. In his medical report, Dr. Fishbein clearly states that he used the Guides, and via a graph, explains that, pursuant to Table 16-35 of the Guides, Employee has upper extremity impairment ratings of: 8% for forward flexion; 5% for abduction; 1% for internal rotation; and 1% for external rotation. Dr. Fishbein additionally opined that, pursuant to page 575 of the Guides, Employee "will retain an additional 2 % impairment to the whole person based on pain." From his office notes, we are able to ascertain, without question, how Dr. Fishbein determined Employee's impairment rating and what charts, tables, and methods he used in making his determination.

Given the expert testimony provided to the trial court and the court's ability to observe Employee and ask her questions about her level of pain and ability to function, the trial court concluded that the extent of Employee's disability was more accurately reflected in Dr. Fishbein's impairment rating. When expert medical testimony conflicts, the trial judge has discretion to determine which to accept. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel 1996). After a review of the medical testimony, we find nothing that preponderates against this finding.

C. Vocational Disability

Finally, Employer argues that the trial court's award of 27.5% permanent partial vocational disability was excessive because the record is void of any proof that Employee's vocational disability prevents her from performing any of the jobs at Employer. As previously mentioned, the extent of a disability may be established by both expert and lay testimony. In this case, the trial court, after hearing all the testimony and specifically asking Employee questions about her shoulder and her limitations since the October 7, 2002 injury, determined that her vocational disability was 27.5%. Where issues of credibility and the weight of testimony are involved, the Court on appeal must extend considerable deference to the trial court's factual findings. *Houser*, 36 S.W.3d at 71. Although this Panel may not have reached the same result as the trial court, under our limited scope of review, we do not find that the evidence preponderates against the findings of the trial court.

Conclusion

For the reasons stated above, we agree with the trial court that the evidence preponderates in favor of the Employee and against Employer. Costs of this appeal are taxed to Employer, and its surety, for which execution may issue if necessary.

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ALLEN W. WALLACE, SENIOR 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 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 Employer, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM