IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
August 27, 2007 Session

ALTHA A. LUCK v. SATURN CORPORATION

Direct Appeal from the Circuit Court for Maury County
No. 11204 Robert L. Holloway, Judge

No. M2006-01650-WC-R3-CV - Mailed - January 17, 2008
Filed - April 8, 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. This action, seeking permanent partial disability benefits attributable to a disputed diagnosis of a permanent lung injury, was dismissed by the trial court. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (Supp(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 CORNELIA A. CLARK, J., and DONALD P. HARRIS, SR. J., joined.

Rocky McElhaney, Nashville, Tennessee, for the appellant, Altha A. Luck

Kenneth M. Switzer, Nashville, Tennessee, for the appellee, Saturn Corporation

MEMORANDUM OPINION

FACTUAL BACKGROUND

Altha Luck ("Employee") is 47 years old. She is a high school graduate who has completed one semester of college. After high school, Employee worked as a cashier for approximately six months before beginning her tenure at General Motors. While at General Motors, Employee has worked at several of its hydromatic plants doing general assembly line work. Employee has had no vocational or technical training, but instead, has received on-the-job training as needed. At the time of trial, Employee had worked at General Motors for twenty-seven years.

In late 1991, Employee transferred from the General Motors plant in Ypsilanti, Michigan,

to Saturn's ("Employer") Spring Hill, Tennessee, manufacturing plant. While with Employer, Employee has worked in several areas of the plant, including materials, quality, special parts, trim, cockpit, chassis, and "door line."

Employee began working "door line" in late 1999 or early 2000. As part of her duties, Employee assisted in the assembly of vehicles by bonding doors to the vehicle frames. Employee squirted Bondmaster, a chemical adhesive, into the hinges of the door frames in order to prevent the doors from loosening.

On March 23, 2000, near the end of a shift, Employee began having chest pains. Believing that she was coming down with a chest cold, Employee went to her doctor for a chest x-ray. Employee was diagnosed with a spontaneous[1] pneumothorax,[2] more commonly known as a collapsed lung.[3] Upon this diagnosis, Employee was admitted to Maury Regional Hospital. The parties agree that this lung collapse was not work-related.

While at Maury Regional, it was discovered that Employee has a mass in her lung. Employee was subsequently transferred to Saint Thomas Hospital in Nashville. On April 6, 2000, Dr. Jonathan C. Nesbitt, with Cardiovascular Surgery Associates, P.C. in Nashville, removed the nonmalignant lung mass and re-inflated Employee's lung by inserting two chest tubes, one anteriorly and one posteriorly, into the right lung. Four days later, the chest tubes were "discontinued" and Employee was discharged with instructions to return in four weeks for a post-operative check-up.[4]

On May 10, Employee saw Dr. Nesbitt for her scheduled check-up. Dr. Nesbitt diagnosed Employee as having a recurrent pneumothorax and observed that there was a decrease in the amount of pleural thickening around the right lung since her last examination on April 10. Following this appointment, on May 31, 2000, Employee returned to work and her position on "door line" without restriction.

On June 9, Employee again saw Dr. Nesbitt. Dr. Nesbitt observed that there had been no definite change in the right lung since the previous examination. The same day, Dr. Nesbitt wrote to Dr. Fady Nassif, a pulmonary disease physician in Columbia, Tennessee, that Employee was

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[1] Spontaneous, in this context, means the onset of a pneumothorax without a known cause. Dorland's Illustrated Medical Dictionary (31st ed. 2007).

[2] Pneumothorax is defined as an accumulation of air and gas in the pleural space of the lung. Dorland's Illustrated Medical Dictionary (31st ed. 2007).

[3] Prior to this diagnosis, Employee had never been treated for lung, or other pulmonary-related, diseases. Employee does admit, however, to smoking one pack of cigarettes a day for approximately eight years, but had stopped smoking more than twelve years prior to her March 23, 2000 pneumothorax.

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

"entirely without problems and states that she feels good. She is back at work full-time and is maintaining her full and usual activity." Dr. Nesbitt encouraged Employee to follow up with Dr. Nassif should the need arise.

On July 26, 2000, while working utility relief for "door line," Employee was refilling empty bottles of Bondmaster for other employees working the line. Supplies of Bondmaster, along with isopropanol 99% alcohol and mineral spirits 66/3, were stored in a cabinet within the plant. When Employee opened the cabinet to obtain the Bondmaster, the "fumes hit [her] so bad [that] it just took [her] breath away." Employee described the event by stating that her lips and mouth went numb and she had shortness or breath.

Employee immediately went to the Saturn medical clinic for treatment. While there, she was monitored by an on-site nurse. Employee was observed as being very anxious. Her blood pressure, heart rate and respiratory rate were high, but her oxygenation level was 99% at room air, and her breath sounds, both anteriorly and posteriorly bilaterally, on both sides, were equal and reactive. As a precaution, Employee was given oxygen to assist in her breathing. After 15 minutes, Employee stated that the oxygen was not helping with her shortness of breath. Employee's heart rate, blood pressure, and respiratory rate, however, had all returned to more normal levels. Her oxygenation level was still 99%. After approximately 30 minutes of observation, Employee, at the request of Employee's primary care physician, was sent by ambulance to see Dr. Nesbitt at Saint Thomas Hospital. Dr. Nesbitt diagnosed Employee as having a right subpulmonic[5] pneumothorax.

Employee was treated as an outpatient and sent home. She returned to work the next day. On August 16, Dr. Nesbitt wrote a letter to Employer requesting that Employee not be required to work around Bondmaster, isopropanol 99% alcohol, and mineral spirits 66/3, as it could "readily worsen her condition." Employer complied with the restrictions. In an August 17 follow up visit, Dr. Nesbitt wrote in an office file that Employee was "essentially asymptomatic" since the July 26 incident. At this time, Dr. Nesbitt and Employee agreed to a surgical procedure for the insertion of a chest tube, which would help to evacuate air from her chest.

On September 11, Dr. Nesbitt surgically re-inflated Employee's lung by inserting a small tube into her chest cavity. On September 16, Employee returned to work. On September 27, Dr. Nesbitt again wrote a letter to Employer, this time requesting that Employee's restrictions be made permanent. Employer again agreed to the restrictions. On September 28, in her first post-operative follow up visit, Dr. Nesbitt observed that Employee was "virtually asymptomatic," continued to work full-time, and remained asymptomatic at work. On October 25, Dr. Nesbitt again observed that Employee has "zero symptoms." After each doctor's visit, Dr. Nesbitt encouraged Employee to contact him if any new problems arose. Employee never contacted Dr. Nesbitt, testifying at trial that no new problems arose after September 11, 2000.

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[5] Subpulmonic is defined as the pleural space "situated or occurring below the lung." Dorland's Illustrated Medical Dictionary (31st ed. 2007).

On February 14, 2001, Dr. Nesbitt wrote a letter to Employer concerning Employee's health. In this letter, Dr. Nesbitt stated that Employee is "capable of performing full duties as her activity level is unlimited." He also continued to request, however, that Employee remain away from *direct* exposure to chemicals. Prior to this letter, in January 2001, Employee was moved from "door line" to SSPO, or service parts. Bondmaster, isopropanol 99% alcohol, and mineral spirits 66/3 are not used in service parts. As of the date of trial, Employee continued to be on restrictions, and thus, not in direct contact with the above-mentioned chemicals.

On August 22, after a final appointment with Employee on August 21, Dr. Nesbitt wrote Dr. Clay Ferguson, Employee's primary care physician, regarding her current pulmonary health condition. In the letter, Dr. Nesbitt stated that Employee's pneumothorax had been very stable for over a year and that Employee "has had some mild shortness of breath in the past with exertion but this has not been a problem of late." Additionally, Dr. Nesbitt stated that a chest radiograph showed some actual improvement of the chronic pneumothorax. No restrictions were mentioned.

Employee did not seek medical attention for any pulmonary-related issues for almost two years. In June 2003, at the request of Employee's attorney, Employee visited Dr. Michael T. McCormack, a pulmonologist intensivist at the University of Tennessee Medical Center, Knoxville Pulmonary Group.[6] According to his subsequent deposition, Employee complained of having difficulty breathing in humid temperatures or when sick. Dr. McCormack suggest a CT scan of Employee's chest, participation in a cardiopulmonary exercise study, and a follow up visit in three months. On November 1, Dr. McCormack ordered tests for reactive airway disease.[7]

On November 24, Employee again saw Dr. McCormack. During the visit, Employee complained of continued symptoms of dyspnea (shortness of breath), and inferior thoracic chest discomfort (chest pain). Dr. McCormack wrote in Employee's medical file that Employee has "been feeling well except for respiratory symptoms." Additionally, Dr. McCormack noted that the cardiopulmonary exercise performed on Employee showed a normal oxygen consumption without abnormal cardiac or pulmonary limitation to exercise. This was the last time that Employee visited Dr. McCormack.

On April 5, 2005, Employee filed a complaint in the Maury County Circuit Court, alleging that the July 26, 2000 chemical exposure was a new, compensable injury under the Tennessee Workers' Compensation Act, or in the alternative, that the exposure aggravated, advanced, or made worse a pre-existing condition, and as such, was a compensable injury under the Tennessee Workers' Compensation Act.[8] Employee pleaded that, as a result of the chemical exposure, she had suffered

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[6]Dr. McCormack is board certified in internal medicine and pulmonary medicine and has been for more than 20 years.

[7]It is unclear from the record whether Dr. McCormack diagnosed Employee with having reactive airway disease, or whether the November 1 tests were to rule out the possibility of reactive airway disease.

[8]Notice is not an issue in this case as Employee filed an injury report with Employer on October 3, 2000.

a vocational disability and therefore, should be awarded permanent partial disability benefits. In its response, Employer denied that Employee had suffered a compensable injury or a permanent partial impairment, and as such, was not entitled to workers' compensation benefits.

Prior to trial, and at Employer's request, Employee visited Dr. James D. Snell, Jr.,[9] a pulmonolgist and professor of medicine at Vanderbilt University School of Medicine, Center for Lung Research, and a pulmonary fellow, Dr. Peter Crossno, on January 21, 2006. After a battery of pulmonary function tests were performed, it was discovered that Employee's forced vital capacity[10] was 12% above the average for a person of similar age and size, and Employee's FEV1[11] was 101% of the average person of a similar age, size, and sex. Further, Employee's diffusing rate[12] was within the normal range.

Based on these pulmonary tests, a review of Employee's medical records, and a personal evaluation of Employee, Dr. Snell subsequently stated in his deposition that Employee's lung function was normal, that, under the AMA Guides, Employee had a zero percent (0%) permanent impairment rating, that this impairment rating correctly reflected Employee's actual impairment, and that there was nothing in Employee's medical history, either in personal examinations or pulmonary function tests, that supported a diagnosis of reactive airways disease.

Further, when specifically asked about whether or not Employee should continue to be placed on Permanent restrictions at work, and thus not be in direct contact with Bondmaster, isopropanol 99% alcohol, and mineral spirits 66/3, Dr. Snell testified that the need for such restrictions had lapsed. Although agreeing that the restrictions were necessary in the time immediately following Employee's July 26, 2000, exposure, Dr. Snell concluded that Employee's resolved pneumothorax negated the need for continued restrictions.

Disagreeing with Dr. Snell's assessment of Employee, Employee offered Dr. McCormack's deposition and the C-32 form completed by him. In the C-32, Dr. McCormack annotated that Employee was permanently restricted from lifting more than ten pounds, from occasionally lifting for more than three hours, from standing and/or walking for more than three hours, and was limited in her ability to push or pull. He also indicated that Employee suffers from environmental restrictions, such as heights, machinery, temperature extremes, dust, fumes, humidity, and vibration. Using the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th edition, however, Dr. McCormack gave Employee a zero percent (0%) impairment rating.

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[9] Dr. Snell is board certified in internal medicine and pulmonary diseases and has been for more than 30 years.

[10] Force vital capacity, or FVC, measures how much air a person can take into his/her lungs.

[11] FEV1 is a measurement of how fast a person can blow out breath from filled lungs.

[12] Diffusion rate is determined by a test that measures how well an individual can get oxygen and other gasses to move from the air sacs into the blood, and vice versa.

When asked about the zero percent impairment rating during his deposition, Dr. McCormick stated that he believed the AMA Guides did not adequately address Employee's medical concerns. When further questioned, Dr. McCormack opined that Employee had a 10-15% overall impairment rating to the body as a whole. Dr. McCormack based his opinion on what he described as "[Employee's] ongoing problems, symptoms, and risks." Dr. McCormack also stated that Employee should be permanently restricted from working with or near Bondmaster, isopropanol 99% alcohol, and mineral spirits 66/3.

On cross-examination, Dr. McCormack admitted that he would have expected, given the medical problems about which Employee complained, that Employee would have seen a doctor in the interim of her last check-up with Dr. Nesbitt in August 2001 and the filing of this lawsuit in 2005.[13] Dr. McCormack stated that he interpreted a December 2003 CT scan to show that Employee's pneumothorax had completely resolved itself, but concluded that Employee still suffers residual effects from the July 26, 2000 exposure to chemicals. Dr. McCormack further admitted that Dr. Snell, having seen Employee later in time, would be in a better position to determine Employee's current prognosis and condition.

Following the admission of the medical expert testimony, Employee testified that she has continued, since the July 26, 2000 exposure to chemicals, to have shortness of breath, that she was restricted in her activities at home, and that she can do some, but not most, of the jobs that she did prior to the exposure. She specifically stated that she can no longer mow the yard and that she had difficulty cleaning the bathroom, due to the chemical fumes emitted from the cleaning agents, and carrying in groceries, due to the strenuous nature of the act. Since her September 11, 2000 surgery and post-operation stay in the hospital, however, Employee has not missed work due to respiratory, or other lung-related, problems.

After reviewing all the evidence, the trial court held that, even though there was a work-related injury[14] on July 26, 2000, Employee did not have a vocational disability, and therefore, could not recover permanent partial disability benefits. In so holding, the trial court found Employer's medical proof more persuasive in determining the correct impairment rating. Accordingly, the trial court dismissed Employee's case.

STANDARD OF REVIEW

We review factual issues in a workers' compensation case de novo upon the record of the

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[13] Employee did see both Dr. McCormack and Dr. Snell, in 2003 and 2006 respectively, but these visits were in preparation of this litigation and were not specifically requested by Employee.

[14] Employee and Employer differ on the exact injury that occurred on July 26, 2000. Employee argues that she suffered another pneumothorax as a direct result of inhaling Bondmaster, isopropanol 99% alcohol, and mineral spirits 66/3. Employer argues that Employee suffered only from a panic attack, brought on by the concern of having another collapsed lung. Because neither party challenged the trial court's holding, that a work-related injury did occur, we need not address either argument on appeal.

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) (2005); 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 court 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 Court, 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. 1997). With 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. The first two prongs, although challenged by the Employer in the trial court, are not challenged on appeal. Therefore, taking as fact that Employee suffered a work-related injury on July 26, 2000, this Court is only concerned with whether Employee suffered a permanent vocational disability from this injury. 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).

The existence of a 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. 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. Snell and McCormack have been board certified in internal and pulmonary medicine for more than twenty years. Each has an impressive resume and has done extensive research and writing on pulmonary-related issues. Based on their extensive knowledge, both doctors agreed that Employee's impairment rating, using the AMA Guides, is zero. Nevertheless, Dr. McCormack opined that Employee's impairment rating is 10-15% to the body as a whole. Dr. McCormack based this conclusion on his opinion that the AMA Guides did not adequately assess Employee's medical concerns.

Employee now urges us to reverse the trial court and adopt Dr. McCormack's individual

impairment rating. We acknowledge, of course, that when the AMA Guides do not cover a particular case, a medical impairment rating may be determined by "any appropriate method used or accepted by the medical community." Tenn. Code Ann. § 50-6-241(a)(1) (2005); see Lynch v. City of Jellico, 205 S.W.3d 384, 398 n.10 (Tenn. 2006) ("The AMA Guides themselves indicate that in situations where impairment ratings are not provided, physicians are to use their clinical experience, training, and skill, in arriving at an impairment rating.").

Nevertheless, the preponderance of the evidence in this case persuades us that Dr. Snell's determination is more reflective of Employee's actual impairment than is Dr. McCormack's individual impairment rating. Dr. Nesbitt noted in the Fall of 2000 that Employee was "virtually asymptomatic" and had "zero symptoms." In early 2001, he observed that she was "capable of performing full duties as her activity level is unlimited." Employee herself testified at trial that she had not sought medical treatment for any pulmonary-related issues since her last visit with Dr. Nesbitt in 2001. In fact, the only doctor that Employee saw for pulmonary-related issues between 2001 and the time of the filing of this suit was Dr. McCormack, and this visit was at the request of Employee's attorney. Finally, the pulmonary tests conducted by Dr. Snell show that Employee has lung function equal to or greater than that of her peers. Employee has not missed work for a lung-related issue since September 2000, and both Drs. McCormack and Snell agree that Employee's pneumothorax has completely healed. Employee has therefore failed to establish by a preponderance of the evidence that she suffered a permanent partial disability arising from her July 26, 2000 work-related injury.

CONCLUSION

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

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ALLEN W. WALLACE, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

ALTHA A. LUCK v. SATURN CORPORATION

No. M2006-01650-SC-WCM-WC - Filed - April 8, 2008

ORDER

This case is before the Court upon the motion for review filed by Altha A. Luck 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 Altha A. Luck, and her surety, for which execution may issue if necessary.

CLARK, J., NOT PARTICIPATING