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

WILLADEAN RICHARDSON v. COFFEE COUNTY BOARD OF EDUCATION ET AL.

Direct Appeal from the Chancery Court for Coffee County
No. 04-0448 Larry Bart Stanley, Jr., Judge

No. M2006-02371-WC-R3-WC - Mailed - January 9, 2008
Filed - April 3, 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 a hearing and a report of findings of fact and conclusions of law. Employee slipped and fell in the course of her employment as a cafeteria worker. She was subsequently diagnosed with fibromyalgia. The trial court found that condition was caused by the work injury, and awarded benefits for permanent total disability. Employer has appealed, contending that the evidence preponderates against the trial court's findings as to causation and also as to the extent of Employee's permanent disability. Employer further contends that the trial court erred in ordering accrued benefits to be paid in a lump sum. Employee contends that the trial court incorrectly based her average weekly wage upon a calendar year rather than a school year. We affirm the judgment in all respects.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2006) Appeal as of Right;
Judgment of the Chancery 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.

James H. Tucker, Jr. and Colin M. McCaffrey, Nashville, Tennessee, for the appellant, Coffee County Board of Education.

Eric J. Burch, Manchester, Tennessee for the appellee, Willadean Richardson.

MEMORANDUM OPINION

Willadean Richardson ("Employee") was a cafeteria worker at an elementary school. She slipped and fell on a wet kitchen floor at work on January 27, 2004. She was briefly unconscious. Her left hip and shoulder struck the floor. She was taken to a local emergency room, examined and released. She was referred to Dr. Michael Moran, a neurosurgeon. Dr. Moran ordered an MRI, which revealed degenerative changes. He determined that she was not a surgical candidate, and referred her to Dr. Jeffrey Hazelwood, a physiatrist, for further treatment.

Dr. Hazelwood testified by deposition. He provided conservative treatment for Employee for approximately two months. By her report, she improved about 75% during that period of time. Dr. Hazelwood's diagnosis was that Employee had a "mechanical low back problem, soft tissue injury." At the time he released her, Employee had normal range of motion and a normal neurological examination. She continued to have pain in her back, hips and other parts of her body. Dr. Hazelwood could not find any objective basis for her continued problems. He considered her to be truthful and believed her complaints. He did not place any permanent restrictions upon her activities. He opined that she retained no permanent impairment as a result of the fall.

Employee was then referred to Dr. Davis Knapp, a rheumatologist. Dr. Knapp also testified by deposition. He followed Employee from August 2004 to February 2006. He ordered additional tests in an attempt to determine the cause of Employee's continued symptoms. None of those tests revealed significant abnormalities. He concluded that she had "fibromyalgia syndrome." Dr. Knapp described fibromyalgia as:

> a term used to denote soft tissue pain that seems to be present out of proportion to any tissue abnormality that can be detected by examination, imaging studies, or even biochemical and electrical studies.
>
> I would think of fibromyalgia in the same context as you would a tension headache. Nobody argues that it's real - not real, but no matter how many MR scans or other tests, you're not going to find anything to explain it.

He also described fibromyalgia as "pain syndrome of unknown cause that is heavily associated with psychosocial issues."

Dr. Knapp further testified that the definition, possible causes, and even the existence of fibromyalgia are "contentious" subjects in the medical profession. Even among those physicians who accept the existence of the condition, there is controversy over the question of whether it can be triggered by a trauma, such as that sustained by Employee.

Dr. Knapp testified as follows concerning the specific cause of Employee's fibromyalgia:

Q. Is it a possibility, Doctor, that the trauma of January 27, 2004, has caused the fibromyalgia sympto

A. Let me say that I cannot say it's not a possibility. It's a possibility [sic], but I can't say it did cause fibromyalgia because this is not really understood well enough. So while anything is possible, I can't say one way or the other. And that's why with a reasonable degree of medical certainty I certainly cannot say the fall caused her fibromyalgia.

* * *

Q. But can you say that this is a reasonable medical possibility?

A. I've never heard that terminology before. I'll just say it is a possibility. And you might want to get another witnesswho might feel differently. Again, I've never heard 'medically reasonable possibility.'

* * *

Q. Are her symptoms real?

A. I can only talk in terms of causality. Her symptoms in my opinion are real. She is not malingering. She is experiencing the symptoms she describes. Who's responsible for those symptoms, I'll leave it to you gentlemen, because it's a person's response to life's adversities that in many ways determines how their body feels and functions.

* * *

Q. Is it possible that the fibromyalgia condition and pain that she's experiencing . . . was caused by th

A. At this time, it's just as possible as not possible.

Dr. Knapp assigned no impairment to Employee. He placed no formal restrictions upon her activities, but stated that persons with fibromyalgia "typically have activity intolerance, poor endurance, easy fat[i]gability, and emotionally get discouraged and upset very easily." As to the permanency of the condition, he testified that:

> This condition tends to wax and wane depending on physical and emotional factors. In this particular case, where there is an adversarial situation, a claim is being made, a person cannot be expected to get well when they have to prove they're sick. So I don't expect much to change while these adversarial proceedings are going on as to

whether she has any entitlement.

Q. Are you stating that she is malingering?

A. No. This is just an observation that a person has to be congruent with how they act and what they say. A person cannot be expected to get well in a condition like fibromyalgia. If they're saying they're sick, they are going to continue to experience those symptoms and claim those symptoms. . .

Q. What about the permanency of the condition?

A. Fibromyalgia is a chronic and persistent condition.

Employee was sixty-three years old at the time of trial. She was a high school graduate. She had no additional schooling or specialized training. Her work history prior to her job with Employer was primarily as a sewing machine operator. She had also been a grocery worker and a secretary for unspecified periods of time. She returned to work for Employer for a brief period of time in the autumn of 2004. She felt she was unable to continue. She had neither worked nor applied for work thereafter.

She testified that she was unable to lift more than ten pounds, and "lost strength" when she attempted to lift objects over her head. She reported difficulty with walking or standing. She testified that, after sitting for more than fifteen minutes, her left hip would begin to ache. If she engaged in garden or yard work for more than a short period of time, she would "start hurting in [her] neck and shoulders and arms and [legs] and everywhere." By the time the trial occurred, Employee had voluntarily retired. She was receiving social security benefits of $535.00 per month[1] and additional retirement benefits from Employer.

The trial court issued a written memorandum decision. It found that Employee's symptoms were caused by the fall at work, and awarded permanent total disability benefits. It ordered that benefits accrued as of the date of trial be paid as a lump sum, and that the remainder be paid periodically. The trial court also ruled that Employee's average weekly wage should be calculated based upon a calendar year, rather than a school year.

Issues Presented

Employer raises three issues on appeal:

(1) Did the trial court err by finding that Employee had sustained a compensable injury?

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[1] It does not appear that the trial court or the parties considered whether Tennessee Code Annotated section 50-6-207(4)(A)(i) (Supp. 2007), which provides for a set-off of a portion of social security retirement benefits, was applicable to this case.

(2) Did the trial court err by finding that Employee was permanently and totally disabled?

(3) Did the trial court err by commuting its award to a lump sum?

Employee raises an additional issue:

(4) Did the trial court err in determining the average weekly wage based upon fifty-two weeks?

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. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2007). When 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. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987). This Court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. Landers v. Fireman's Fund Ins. Co., 775 S.W.2d 355, 356 (Tenn. 1989). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

1. Causation

At the outset, we note that the Workers' Compensation laws should be "liberally construed to promote and adhere to the [purposes of the Workers' Compensation Act] of securing benefits to those workers who fall within its coverage." Martin v. Lear Corp., 90 S.W.3d 626, 629 (Tenn. 2002). Nonetheless, the burden of proving each element of his cause of action rests upon the Employee in every Workers' Compensation case. Long v. Tri-Con Indus., Ltd., 996 S.W.2d 173, 177 (Tenn. 1999). 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 v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997). 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, 938 S.W.2d at 692; accord, Long v. Tri-Con Indus., Ltd., 996 S.W.2d 173, 177 (Tenn. 1999); P and L Constr. Co. v. Lankford, 559 S.W.2d 793, 794 (Tenn. 1978). 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).

In this context, previous Workers' Compensation Appeals Panels have considered the

relationship between fibromyalgia and work injuries on several occasions. Results have varied from case to case. In Thetford v. American Mfrs. Mut. Ins. Co., No. W2003-01904-SC-WCM-CV, 2005 WL 1026577, at *1 (Tenn. Workers' Comp. Panel May 3, 2005), the Panel affirmed a trial court's finding that the employee's fibromyalgia was caused by a work injury. On the other hand, the court in Tomlin v. Federal Reserve Bank of Atlanta/Nashville Branch, No. M2005-01401-WC-R3-CV, 2006 WL 1816157, at *1 (Tenn. Workers' Comp. Panel May 4, 2006) affirmed a lower court's finding that the employee's fibromyalgia was not caused by her work injury. There are additional cases which fall on either side of the question. We take from these decisions the conclusion that the existence of a causal relationship between a work injury and subsequent fibromyalgia must be determined on a case-by-case basis.

Absolute certainty on the part of a medical expert is not necessary to support a Workers' Compensation award. An expert's opinion must always be more or less uncertain and speculative, and, where equivocal medical evidence combined with other evidence supports a finding of causation, such an inference nevertheless can be drawn under the case law. GAF Bldg. Materials v. George, 47 S.W.3d 430, 433 (Tenn. Workers' Comp. Panel 2001).

In this case, the only medical proof which provides support for concluding that Employee's fibromyalgia resulted from her fall at work is the testimony of Dr. Knapp, which is set out at length above. That testimony is undoubtedly equivocal. However, it may be fairly interpreted to satisfy the requirement that the January 2004 fall "could be" the cause of Employee's subsequent symptoms. As the trial court noted, there was no dispute that Employee's symptoms were real, and that they began shortly after her fall at work. Based upon those factors, the trial court found that a causal connection between the event and the symptoms could be inferred. After a careful examination of the entire record, we conclude that, while the evidence does not compel that finding, it certainly does not preponderate against it. We therefore affirm the trial court's ruling on the issue.

2. Permanent Total Disability

An injured employee is permanently and totally disabled when she is totally incapacitated "from working at an occupation which brings the employee an income." Tenn. Code Ann. § 50-6-207(4)(B) (Supp. 2007). In this case, Employee testified that she was unable to work because most activities were painful and exhausting for her. Dr. Knapp testified that these symptoms were consistent with his diagnosis of fibromyalgia. However, neither he nor Dr. Hazelwood placed any specific restrictions upon her activities. Both doctors also agreed that she had no objective anatomical abnormalities. Further, Dr. Knapp's testimony concerning permanency, much like his testimony regarding causation, was ambiguous.

The record contains neither a functional capacity evaluation, nor an assessment of Employee's level of intellectual function. Employee was a high school graduate. Her work was in relatively unskilled positions. As set out above, she testified that she had difficulty sitting, walking or standing for extended periods of time, and was limited in her ability to lift objects. She was able to participate in water aerobics "at least three times a week," which had a therapeutic effect. She was sixty-three

years old at the time of the trial.

The standards applicable to consideration of permanent total disability were recently summarized by Chief Justice Barker in Hubble v. Dyer Nursing Home, 188 S.W.3d 525, 535-536 (Tenn. 2006):

> The determination of permanent total disability is to be based on a variety of factors such that a complete picture of an individual's ability to return to gainful employment is presented to the Court. Vinson v. United Parcel Service, 92 S.W.3d 380, 386 (Tenn. 2002); Cleek [v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000)]. Such factors include the employee's skills, training, education, age, job opportunities in the immediate and surrounding communities, and the availability of work suited for an individual with that particular disability. Cleek, 19 S.W.3d at 774 (citing Roberson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986)). Though this assessment is most often made and presented at trial by a vocational expert, 'it is well settled that despite the existence or absence of expert testimony, an employee's own assessment of his or her overall physical condition, including the ability or inability to return to gainful employment, is "competent testimony that should be considered."' Vinson, 92 S.W.3d at 386 (quoting Cleek, 19 S.W.3d at 774).

We also note that the absence of an impairment rating does not preclude a finding of permanent total disability. See Jones v. Hartford Acc. & Indem. Co., 811 S.W.2d 516, 522-23 (Tenn. 1991). Employee's testimony concerning the difficulties she faced in conducting her activities of daily living was entirely consistent with Dr. Knapp's description of the typical effects of fibromyalgia. That testimony is also consistent with a conclusion that Employee was totally incapacitated from earning an income. We view Dr. Knapp's testimony that the condition was "chronic and persistent" to be sufficient to support a finding of permanency. Based upon those factors, we conclude that the evidence does not preponderate against the trial court's finding that Employee was permanently and totally disabled.

3. Lump Sum

Employer contends that the trial court erred "when it commuted [Employee's] award to a lump sum." The trial court did not commute the entire award to a lump sum. It merely required that the benefits which have accrued since the date of Employee's maximum medical improvement be paid as a lump sum. Remaining benefits were to be paid periodically. This is in accordance with the law. "[P]ermanent disability benefits, whether total or partial, begin accruing on the date that the employee attains maximum medical improvement." Smith v. U.S. Pipe & Foundry Co., 14 S.W.3d 739, 744-745 (Tenn. 2000). The trial court did not err in ordering the payment of accrued benefits in a lump sum.

4. Average Weekly Wage

Employee contends that the trial court incorrectly calculated her average weekly wage. In making its calculation, the trial court divided her total earnings by a calendar year of fifty-two weeks. However, Employee worked only when school was in session, a total of thirty-six weeks. On appeal, she contends that her average weekly wage should have been calculated in accordance with Tennessee Code Annotated section 50-6-102(3)(B) (2005) based upon thirty-six weeks. Employer contends that the employment extended over a full year, and the trial court correctly used fifty-two weeks to arrive at an average weekly wage.

Tennessee Code Annotated section 50-6-102(3)(B) provides:

> Where the employment prior to the injury extended over a period of less than fifty-two (52) weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, that results just and fair to both parties will thereby be obtained[.]

In Goodman v. HBD Indus., Inc., 208 S.W.3d 373 (Tenn. 2006), the Supreme Court held that this section did not apply when a continuous employment relationship existed for more than fifty-two weeks prior to the injury, notwithstanding the existence of a period of weeks during which the employee neither worked nor received wages. Id. at 379-80. In this case, Employee testified that she began working for Employer as a regular full-time employee in 1995. We hold that Goodman is applicable to the facts in this case. The trial court, therefore, correctly used the calendar year, rather than the school year, to calculate Employee's average weekly wage.

Conclusion

The judgement of the trial court is affirmed. Costs are taxed one-half to the appellant, Coffee County School Board, and one-half to the Employee, Willadean Richardson, for which execution may issue if necessary.

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ALLEN W. WALLACE, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

WILLADEAN RICHARDSON v. COFFEE COUNTY BOARD OF EDUCATION ET AL.

Chancery Court for Coffee County
No. 04-448

No. M2006-02371-SC-WCM-WC - Filed - April 3, 2008

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by the Coffee County Board of Education 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 one-half to the appellant, Coffee County Board of Education, and one-half to the employee, Willadean Richardson, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Cornelia A. Clark, J., not participating