IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 22, 2008 Session

SUSAN A. STEWART v. KENCO GROUP, INC.

Direct Appeal from the Circuit Court for Hamilton County
No. 05-C-1435 Jeffrey Hollingsworth, Judge

Filed February 12, 2009

No. E2008-00167-WC-R3-WC Mailed December 3, 2008

This 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) (2008). While operating a forklift at her place of employment, an employee injured her back. She subsequently made a claim for workers' compensation benefits. The trial court granted an award of 30% permanent partial disability to the body as a whole. The employer appealed, contending that the trial court erred by (1) basing the award on an impairment rating offered by a physician who was not on the authorized list of the employer and (2) declining to apply the 1.5 multiplier cap described in Tennessee Code Annotated section 50-6-241(d)(1)(A) (2008). The employee sought additional medical expenses, including mileage, and temporary total disability benefits. The judgment of the trial court is affirmed as to the award of benefits and modified to include additional medical expenses. The cause is remanded for a determination of those expenses.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Reversed in Part

GARY R. WADE, J., delivered the opinion of the court, in which WALTER C. KURTZ, SP. J., and DONALD P. HARRIS, SP. J., joined.

David C. Nagle, Chattanooga, Tennessee, for the appellant, KENCO Group, Inc.

J. Taylor Walker, Chattanooga, Tennessee, for the appellee, Susan A. Stewart.

MEMORANDUM OPINION

Facts and Procedural Background

Susan Stewart ("Employee"), who was fifty-three years old at the time of trial, was employed by KENCO Group, Inc. ("Employer") as a forklift operator at a warehouse in Hamilton County. On October 1, 2004, the Employee injured her back while in the course and scope of her employment and reported the incident to her supervisor. Her supervisor scheduled an appointment with Dr. David Schulz, who ordered an MRI for the Employee and eventually made a referral to Dr. Barry Vaughn,

an orthopaedic surgeon. Dr. Vaughn treated the Employee over a five-month period in 2004 and 2005, during which he reviewed the MRI, took x-rays, and prescribed medication, light-duty work and physical therapy. While under treatment, the Employee performed light-duty work for the Employer, checking orders and conducting inventory.

On May 26, 2005, Dr. Vaughn released the Employee to return, with some restrictions, to her regular job at the Employer's warehouse. Dr. Vaughn completed a Form C-32, in which he confirmed that the Employee's back injury more probably than not arose out of her employment, but also expressed the belief that the Employee's "subjective complaints seem[ed] to be out of proportion with significant objective findings." According to Dr. Vaughn, the MRI ordered by Dr. Schulz revealed "[n]o acute changes," "[n]o disc herniations," and "[n]o obvious nerve root impingement"; he believed that "multiple positive Waddell findings"[1] suggested that the Employee may have been malingering. The Employee was displeased with the treatment she received from Dr. Vaughn and accused him of being unprofessional and without compassion. Dr. Vaughn concluded that the Employee did not sustain any temporary total disability but did assign her a permanent impairment rating of 5% to the body as a whole. He noted that the Employee had reached maximum medical improvement as of the date of her release.

In the course of treating the Employee, Dr. Vaughn ordered a Functional Capacity Evaluation ("FCE"), which was conducted on April 15, 2005 by Functional Assessment Systems in Hixson. The certified functional evaluator concluded that the results of the test were a reliable indicator of the Employee's functional abilities and indicated that she did not meet the strength or positional demands of her job as a forklift operator. The evaluator recommended that she return to work with both lifting and carrying restrictions and a positional restriction that limited her only to occasional sitting.

On June 1, 2005, the Employee returned to her job as a forklift operator at the same salary. Dr. Vaughn's medical restrictions included no repetitive bending, stooping, or squatting, and she was directed not to lift or carry more than twenty pounds. Dr. Vaughn did not prescribe positional restrictions of the type recommended in the FCE.

At trial, Mark Poindexter, the general manager at the warehouse, testified that there was work available that fell within the boundaries of the Employee's medical restrictions. He confirmed that there were positions that only involved driving the forklift and did not require the bending, stooping, and lifting of pallets on and off the forklift that often accompanied that position. Poindexter e-mailed the Employee's restrictions to her direct supervisor and instructed him to limit her work accordingly. Because Poindexter did not observe the Employee on the job that day, he was unaware as to whether her supervisor complied with his instructions.

---

[1] "Waddell signs" are five tests performed as part of the examination of the back or lumbar spine to determine whether a patient is exaggerating her symptoms. The tests should not actually reproduce pain, but are designed to elicit a non-organic or non-anatomic pain response. Shore Trucking Co. v. Frashier, No. E2007-00626-WC-R3-WC, 2008 WL 802343, at *3 (Tenn. Workers' Comp. Panel Mar. 26, 2008); Tomlin v. Fed. Reserve Bank of Atlanta/Nashville Branch, No. M2005-01401-WC-R3-CV, 2006 WL 1816157, at *4 (Tenn. Workers' Comp. Panel May 4, 2006).

The Employee testified that upon her return to work on June 1, she was required to perform duties beyond her medical restrictions. In addition to driving the forklift, she also was required to bend, stoop, and squat to take damaged goods off of the forklift as necessary. She also stated that the sitting and constant bouncing in the forklift while it was moving caused her great pain. At the end of her first day back on the job, she informed her Employer of her pain. On the following morning, her supervisor, after discovering that the Employee no longer wanted to be treated by Dr. Vaughn,[2] transported her to a hospital for treatment.

In July 2005, the Employer offered the Employee a second panel of doctors, which included (1) Dr. Vaughn, (2) Dr. Ricky Hutchenson, a doctor of osteopathy in Cleveland (over 100 miles from the Employee's home in Bridgeport, Alabama), and Dr. Timothy Strait, a doctor in Chattanooga. The Employee declined to see any of these doctors, instead seeking treatment from her personal primary care physician, Dr. Christian Cooper, in South Pittsburg. Dr. Cooper referred her to Dr. Peter Boehm, a neurosurgeon who coincidentally practiced in the same office as Dr. Strait. The Employer never approved treatment by Dr. Boehm or otherwise qualified him as the authorized treating physician for the Employee's work injury. While being treated by Dr. Boehm, the Employee did not identify the Employer as the responsible party for medical payments incurred.

Dr. Boehm first examined the Employee on September 1, 2005 and was continuing to treat her as of the date of his deposition, more than twenty-five months later. He was provided with the MRI scan that Dr. Schulz had ordered and Dr. Vaughn had reviewed. Because of the poor quality of the MRI, he ordered another on September 7, 2005. This MRI revealed a small herniation to the focal left lateral disc, which he believed to explain the Employee's pain in her back and lower leg. Dr. Boehm also found evidence of loss of nerve supply in the Employee's back. A second MRI on March 15, 2006 confirmed the herniated disc. Dr. Boehm continued to treat the Employee for her pain with cortisone injections and medication, eschewing surgery because he thought there was an insufficient likelihood of success. While acknowledging that he had no specialized training in the use of the AMA Guidelines to the Evaluation of Permanent Impairment and had terminated his practice of making such assessments, Dr. Boehm assigned the Employee an impairment rating of 10-13% to the body as a whole in compliance with the AMA Guidelines. As a part of his deposition, Dr. Boehm also testified to the medical expenses the Employee incurred during his treatment of her back injury.

While claiming that she neither quit her job with the Employer nor was formally terminated, the Employee never returned to work, explaining that her Employer simply failed to offer her a position that did not cause additional back pain. At trial, she testified that she walked with a cane and had trouble performing everyday chores, taking care of her pets and grandchildren, or sitting for an extended period of time. Although the Employee was involved in an automobile accident in January 2007, she contended that the accident did not aggravate her lower back injury. For that reason, she did not inform Dr. Boehm of the accident. Dr. Boehm did not treat the Employee between the date of the accident and April 13, 2007, when he issued his impairment rating.

[2] The Employee also testified that she sought to schedule an appointment with Dr. Vaughn after her return to work and that he refused to treat her.

The trial court accredited Dr. Boehm's testimony, as well as the lay testimony of the Employee and her son, and assigned an impairment rating of 10% of the body as a whole for the back injury. The court also found that plaintiff was not afforded a meaningful return to work and, in consequence, declined to cap the benefits award at 1.5 times the disability rating. By applying a cap of three times the impairment rating, the trial court granted a permanent partial disability award of 30% to the body as a whole. Because, however, the Employee had chosen her own treating physicians rather than selecting a physician from the Employer's list, Dr. Boehm's medical charges were not made part of the award.

In the appeal, the Employer claims that the trial court erred by (1) basing its award upon the medical impairment rating offered by Dr. Boehm, who was not an authorized treating physician; and (2) finding that the Employee had not made a meaningful return to work, and therefore declining to cap the award at 1.5 times the anatomical impairment pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A). In response, the Employee argues that the trial court erred by (1) failing to award the medical expenses incurred for treatment by Dr. Boehm, including mileage; (2) failing to award temporary total disability benefits to the Employee for the period June 2, 2005 through April 13, 2007; and (3) making an inadequate award of permanent partial disability benefits.

Standard of Review

We review of the judgment of the trial court "de novo upon the record . . . accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (2008). When the trial court has seen and heard the witnesses, considerable deference must be afforded to the trial court's findings of credibility and the weight that it assessed to those witnesses' testimony. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). The same deference need not be extended to findings based upon documentary evidence, such as depositions. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). Indeed, where medical expert testimony is presented by deposition, we may independently assess the medical proof to determine where the preponderance of the evidence lies. Crew v. First Source Furniture Group, 259 S.W.3d 656, 665 (Tenn. 2008). The standard of review for questions of law is de novo without a presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003).

Analysis

I. Application of Impairment Rating

The Employer claims that the trial court erred by assigning an impairment rating at the low end of the 10-13% range offered by Dr. Boehm, because he was not on the list of authorizing physicians. The Employer argues that the trial court should have awarded the 5% impairment rating by Dr. Vaughn, the physician authorized to treat the Employee during the period immediately following her work injury.

There is no rule of law that the medical opinions of authorized treating physicians must be accepted over the testimony of unauthorized physicians. The Employer concedes that. It was, therefore, within the trial court's discretion to accredit Dr. Boehm's testimony, even though he was not on the Employer's list. Our task is to determine whether the evidence preponderates against that

finding. We have set forth several factors to consider when weighing conflicting medical testimony, which include "the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts." Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). In this instance, the first three of these factors are particularly relevant.

The Employer asserts that the first Orman factor "weighs heavily in favor of the use of the rating by Dr. Vaughn and against the use of the rating by Dr. Boehm." The record, however, demonstrates that both are highly qualified physicians. The Employer acknowledges the competence of Dr. Boehm, who because of his inexperience in the application of the AMA Guidelines, expressed an initial hesitance to quantify the impairment rating of the Employee. It is undisputed, however, that the impairment rating Dr. Boehm did issue on April 13, 2007 complied with the AMA Guidelines. Nothing more is required by our workers' compensation law. Tenn. Code Ann. § 50-6-204(d)(3)(A) (2008). We also reject the Employer's suggestion that because the Employee failed to depose Dr. Vaughn, his opinion as to the Employee's disability was left unchallenged. The Employer offers no legal authority for that argument, and we have found none. Although the record confirms that there is no discernible difference in the qualifications of the two medical experts, a further consideration weighing in favor of the Employee is the fact that Dr. Boehm discovered a herniated disc in two separate MRI scans. In contrast, Dr. Vaughn, who reviewed an MRI scan of apparently poorer quality than those ordered by Dr. Boehm, was unable to diagnose the injury.[3] This first factor, therefore, favors the Employee.

The second factor relates to the circumstances of the examinations of the Employee. Dr. Vaughn treated the Employee over a five-month period following the initial accident and before she returned to work, from December 16, 2004 to May 26, 2005. Dr. Boehm first treated the Employee on September 1, 2005, some eleven months after her accident and approximately three months after her last appointment with Dr. Vaughn. His course of treatment extended over a period greater than two years. The Employer did not challenge the Employee's contentions that Dr. Boehm provided more thorough and extensive treatment than that of Dr. Vaughn. Moreover, that Dr. Vaughn reported malingering on the part of the Employee, and yet agreed she had suffered a work-related injury with a 5% disability rating, appears to be inconsistent. This factor also favors the Employee.

The third factor for us to consider is the information available to the experts when they gave their impairment rating. Each doctor was provided identical information regarding the work injury and the Employee's entire medical history. The Employer claims that because Dr. Boehm issued his impairment rating in April 2007, three months after the Employee was involved in a car accident unrelated to her work, his opinion should be discounted. However, the MRI scans that revealed the Employee's herniated disc were performed in September 2005 and March 2006, well before the auto accident. Further, the record indicates that Dr. Boehm did not treat the Employee between the date of the accident and the date on which he issued his impairment rating. The evidence, therefore, does

[3] The Employer suggests that the Employee suffered the herniated disc after Dr. Vaughn released her on May 26, 2005 and prior to the MRI scan ordered by Dr. Boehm on September 7, 2005. It provides no evidence to support this claim, nor does it refute Dr. Boehm's testimony regarding the poor quality of the MRI that Dr. Vaughn reviewed.

not support the Employer's suggestion that the accident affected the accuracy of Dr. Boehm's impairment rating. Further, the Employee swore that the car accident did not aggravate her back injury. There is simply no evidence refuting that assertion. In our view, this factor does not favor the Employer.

Based upon the application of each of the pertinent factors, the evidence supports the trial court's accreditation of the disability rating by Dr. Boehm. An assignment of a 10% disability impairment under these circumstances was not erroneous.

II. Meaningful Return to Work

The Employer further argues that the Employee's one-day return to work on June 1, 2005 constituted a meaningful return to work, and that, in consequence, her award should have been capped at 1.5 times the disability rating. Our workers' compensation statute provides that for most injuries occurring after July 1, 2004 where "an injured employee is eligible to receive any permanent partial disability benefits . . . and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury," the maximum benefits are capped at 1.5 times the medical impairment rating. Tenn. Code Ann. § 50-6-241(d)(1)(A); see also Tenn. Code Ann. § 50-6-241(a)(1) (2008) (prior legislation topping benefits at 2.5 times the medical impairment rating for injuries arising on or after August 1, 1992 and prior to July 1, 2004). In cases implicating either the 1.5 cap of section 50-6-241(d)(1)(A) or the 2.5 cap of section 50-6-241(a)(1), Tennessee courts must inquire as to whether there was a "meaningful return to work" after the injury:

> When determining whether a particular employee had a meaningful return to work, the courts must assess the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to either return to or remain at work. The determination of the reasonableness of the actions of the employer and the employee depends on the facts of each case.

Tryon, 254 S.W.3d at 328.

In determining whether the Employee's return to work on June 1, 2005 was "meaningful," we must, therefore, consider the reasonableness of the actions of both the Employer and the Employee. Poindexter, who acknowledged that there was work available at the warehouse within the restrictions assigned to the Employee, testified that he directed her supervisor to comply with the restrictions. At trial, however, he admitted that he did not know whether his instructions actually were followed by the Employee's direct supervisor. The Employee offered affirmative testimony that her job responsibilities on June 1, 2005, requiring her to climb on and off the forklift and stoop and bend to check orders, violated the restrictions. Moreover, the FCE ordered by Dr. Vaughn indicated that the Employee did not possess the strength to meet the positional demands of her job as a forklift driver. Her testimony that sitting and bouncing in the forklift caused her great pain is consistent with that recommendation. We have repeatedly held that "[i]f the offer from the employer is not reasonable in light of the circumstances of the employee's physical ability to perform the offered employment, then the offer of employment is not meaningful . . . ." Newton v. Scott Health Care Ctr., 914 S.W.2d 884, 886 (Tenn. Workers' Comp. Panel 1995). See also Young v.

Cumberland County Med. Ctr., No. M2005-02550-WC-R3-CV, 2007 WL 439015, at *5 (Tenn. Workers' Comp. Panel Feb. 12, 2007) (holding that return to work was not meaningful where claimant was unable to perform the work she was assigned due to the progressively intense pain she experienced); Morrow v. Int'l Mill Serv., Inc., No. W2003-00410-SC-WCM-CV, 2004 WL 1064299, at *3-4 (Tenn. Workers' Comp. Panel May 12, 2004) (finding no meaningful return to work where the Employee attempted to return to work but quit because he was unable to perform his required duties due to pain from the work-related injury).

In summary, the evidence does not preponderate against the trial court's finding that there was no meaningful return to work. Thus, the trial court did not err in finding that statutory cap on benefits should not apply.[4]

III. Reimbursement for Medical Expenses

As part of this appeal, the Employee claims that the trial court erred by holding that the Employer was not required to compensate her for the medical expenses incident to Dr. Boehm's treatment. This ruling was based on the fact that the Employer provided a list of potential doctors to the Employee in July 2005, but that she refused to choose a physician from that list. Instead, she chose to see Dr. Boehm after a referral from her personal primary care physician.

For an employer's liability for medical expenses to be limited, it is not enough for the employer to simply provide a list of potential doctors to an injured employee. The list must also must comply with the relevant provision of the worker's compensation statute. See Tenn. Code Ann. § 50-6-204(a)(4)(A) (2008) (list must include three or more "reputable physicians or surgeons not associated together in practice, if available in that community, from which the injured employee shall" choose); Tenn. Code Ann. § 50-6-204(a)(4)(B) ("If the injury is a back injury, [the list] shall be expanded to four, one of whom must be a doctor of chiropractic . . . ."). Because one of the proposed physicians, Dr. Hutchenson, was based in Cleveland, over 100 miles from the Employee's home and not within the Chattanooga "community," the location of the Employer's business, that physician may not have qualified for the list. At any rate, even though the Employee's work injury was to her back, the list certainly did not comply with section (a)(4)(B), because it only included three physicians and did not include the name of a chiropractor.

An employer may be liable for an employee's treatment by a doctor not on the employer's panel of authorized physicians when that list does not comply with law. See, e.g., Lambert v. Famous Hospitality, Inc., 947 S.W.2d 852, 854 (Tenn. 1997). In our view, the Employer failed to comply with relevant provision of the workers' compensation statute. Thus, the trial court erred by denying the Employee's request for reimbursement of her medical expenses. This cause is remanded

[4] The Employer argues that the Employee's testimony at trial "that she . . . may still be employed at KENCO" supports application of the benefits cap; however, the Employer also describes that claim as "incredulous." The Employee testified that while she had not gone to work nor received a paycheck since June 2005, she also never received formal notice of termination from the Employer.

for the trial court to determine the appropriate award.[5]

IV. Additional Issues Raised by the Employee

A. Temporary Total Disability Benefits

The Employee claims that the trial court should have awarded her temporary total disability benefits from June 2, 2005, the first day that she was unable to continue with work, through April 13, 2007, which she claims as the date of her maximum medical recovery. In order to establish a prima facie case that she is entitled to temporary total disability benefits, the Employee must show (1) that she was totally disabled and unable to work due to her compensable injury; (2) that her work injury and her inability to work are causally connected; and (3) the duration of her period of disability. Gray v. Cullom Machine, Tool & Die, Inc., 152 S.W.3d 439, 443 (Tenn. 2004). The weight of the evidence favors the Employer as to this issue. The Employee presented both her testimony and the deposition of Dr. Vaughn to show that she had not worked since June 1, 2005 and was unable to return to her job as a forklift operator for the Employer. However, temporary total disability benefits are only appropriate where an employee is "totally disabled and unable to work." Nothing in the Employee's proof contradicts Dr. Vaughn's medical report, which indicates that she was not entitled to total temporary disability benefits and marks her date of maximum medical improvement at May 26, 2005. Indeed, Dr. Boehm stated that the Employee could continue to work with certain restrictions. Thus, the Employee failed to establish a prima facie case that she is entitled to temporary total disability benefits.

B. Adequacy of Partial Permanent Disability Benefits Award

Finally, the Employee claims that the trial court's award of three times the 10% impairment rating was inadequate due to her "substantial and continuing pain and limitations." Our scope of review is limited. The evidence simply does not preponderate against the trial court's award of 30% of the body as a whole. The Employee's claim for additional benefits is, therefore, denied.

Conclusion

The judgment of the trial court is affirmed, as modified, and remanded for determination of the amount of medical costs to which the Employee is entitled to be reimbursed by the Employer. Costs are taxed to the Employer, KENCO Group, Inc. and its surety, for which execution may issue if necessary.

_____

GARY R. WADE, JUSTICE

[5] We note that the Employee also seeks reimbursement from the Employer for the mileage she traveled between her home and Chattanooga while being treated by Dr. Boehm. Because the record contains no proof on this issue, we decline to pass judgment on this claim.

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

SUSAN A. STEWART v. KENCO GROUP, INC.

Filed February 12, 2009

No. E2008-00167-SC-WCM-WC

JUDGMENT

This case is before the Court upon the motion for review filed by Susan A. Stewart pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(A)(ii), 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 KENCO Group, Inc., for which execution may issue if necessary.

PER CURIAM

Wade, J., Not Participating