IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
May 17, 1996

LISA HUGHES,	) HAYWOOD CHANCERY
	) NO. 10761
Plaintiff,	)
	) Hon. George Ellis, Judge
v.	)
	)
MTD PRODUCTS, INC.,	) NO. 02S01-9602-CH-00019
CUB CADET DIVISION,	)
	)
Defendant.	)

For Plaintiff:
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For Defendant:
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MEMORANDUM OPINION

Members of Panel:

LYLE REID, JUSTICE
HEWITT P. TOMLIN, JR., SENIOR JUDGE
CORNELIA A. CLARK, SPECIAL JUDGE

AFFIRMED TOMLIN, SENIOR JUDGE

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supeme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

Lisa Hughes, ("plaintiff") has appealed from the judgment of the trial court denying her claim for workers' compensation benefits on the grounds that she failed to carry her burden of proof as to any permanent partial disability. On appeal, the only issue presented by plaintiff is whether the evidence preponderates against the judgment of the trial court. For the reasons hereafter stated, we find that it does not.

Plaintiff was employed as an assembly line worker for MTD Products, Inc. ("defendant"), which were engaged primarily in building lawnmowers. In December 1992 she injured her neck and shoulder while lifting a lawnmower deck onto an assembly line. She was initially seen by Dr. White and then by Dr. Joseph P. Rowland, a neurosurgeon. Dr. Rowland found that her problems were muscular in origin and returned her to work with no restrictions and no permanent impairment on February 15, 1993. In April 1993, plaintiff claimed to have sustained a work-related injury to her low back while lifting a lawnmower frame onto a motor. At that time, plaintiff received outpatient treatment by Dr. Jack Pettigrew, who also referred her to Dr. Larry David Johnson, a local orthopedic surgeon. Dr. Johnson treated her as an outpatient, performing among other things x-rays, a CT scan, and myelogram, all of which were normal. On June 21, 1993, Dr. Johnson released her to return to work and confirmed that plaintiff could return to work for full duty with no permanent impairment on July 22, 1993.

In June 1993 plaintiff was released temporarily as part of a seasonal plant layoff. In September of that year, she applied for a license to sell bail bonds and begin selling bail bonds in October 1993. She was called back to work at MTD in September 1993, but advised defendant that she would not be returning to work.

On or about December 6, 1993, plaintiff's attorney sent her to Dr. Robert J. Barnett, a local orthopedic surgeon, for a one-time medical evaluation. On December 30, 1993, she filed this workers' compensation claim against MTD and Fireman's Fund Insurance Company ("FFIC"), defendant's insurer.

Prior to trial plaintiff was evaluated by Dr. Ronald C. Bingham at the insistence of defendant's counsel and Dr. Lloyd A. Walwyn, at the insistence of the plaintiff's counsel, who made a one time evaluation examination. The proof produced at trial consisted of the live testimony of the plaintiff and the depositions and medical reports of the doctors involved in her treatment and/or evaluation. At trial the parties stipulated that plaintiff had suffered two injuries, one a soft tissue cervical strain on December 9, 1992, and the other a lumbar strain on April 16, 1993. The parties also stipulated that the injuries were in the course and scope of her employment with the defendant, that she was treated as a compensable injury by defendant and FFIC, and that all medical payments and all temporary total disability benefits had been paid, and that proper notice had been given.

Plaintiff's treating physicians, Dr. Joseph P. Rowland and Dr. Larry David Johnson, both gave the opinion that there was no permanent partial disability as a result of these two accidents. Dr. Ronald C. Bingham concurred with the opinions of Drs. Johnson and Rowland. Drs. Robert J. Barnett and Lloyd A. Walwyn each did a single independent medical

evaluation of the plaintiff. Dr. Barnett was of the opinion that plaintiff had nine (9%) percent permanent partial disability to the body as a whole. Dr. Walwyn gave plaintiff a ten (10%) percent permanent partial disability to the body as a whole.

At the close of all the proof and argument having been presented to the court in dismissing plaintiff's suit, the court stated:

> The Court finds that after evaluating all the proof and the testimony presented in this case and the testimony of the physicians, both treating and the independent medical evaluation, that the plaintiff has failed to carry the burden of proof as to any permanent partial disability. This matter will be dismissed.

On appeal, our standard of review of findings of fact made by the trial court is de novo upon the record of the trial court, accompanied by a presumption of correctness of these findings, unless we find the evidence preponderates against them. T.C.A. § 50-6-225(e).

It is well settled in this state that a plaintiff in a workers' compensation suit has the burden of proving every element of his or her case by preponderance of the evidence. Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992). Medical causation and permanency of an injury must be established in most cases by expert medical testimony. See, e.g., Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991). When the trial court is faced with conflicting medical testimony as to these issues, as is the case before us, "it is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation." Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983) (citing Combustion Engineering, Inc. v. Kennedy, 562 S.W.2d 202 (Tenn. 1978). Because of the presumption of correctness which attaches to the trial court's finding pursuant to T.C.A. § 50-

6-225(e), the rule set out in Hinson remains valid even though Hinson was decided under the "material evidence" standard of review.

This Court has set forth with clarity guidelines to be followed in reviewing findings of fact of the trial court based upon expert testimony. In Humphrey v. David Witherspoon, Inc. 734 S.W.2d 315 (Tenn. 1987), this Court stated as follows:

> [w]here the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances. In the present case, however, some of the issues involve expert medical testimony. All of the medical proof was taken by deposition or was documentary, so that all impressions of weight and credibility must be drawn from the contents thereof, and not from the appearance of witnesses on oral testimony at trial.

Id. at 315-16. While causation and permanency of an injury must be proven by expert medical testimony, such testimony must be considered in conjunction with the lay testimony of the employee as to how the injury occurred and the employee's subsequent condition. See Smith v. Empire Pencil Co., 781 S.W.2d 833, 835 (citing Floyd v. Tennessee Dickel Distilling Co., 225 Tenn. 65, 463 S.W.2d 684 (1971)). With this background, it now becomes our responsibility to evaluate the evidence presented to the trial court to ascertain whether or not it preponderates against the trial court's finding.

Dr. Rowland, who first treated plaintiff for her neck injury, stated that she complained of pain in her left neck and shoulder as a result of the December 1992 accident. Dr. Rowland's impression was that there was no clear cut evidence of neurological disease and felt as though plaintiff was experiencing musculoskeletal and trapezius pain. After an MRI of the cervical spine revealed no abnormalities, Dr. Rowland was of the opinion that he could find nothing wrong from a neurological standpoint and advised plaintiff to return to work.

Dr. Larry David Johnson first treated plaintiff for the back injury in May 1993. At that time, plaintiff complained of pain in her right leg, which radiated into the right hip area and progressed to pain across her back. Initially, Dr. Johnson detected a mild spasm in plaintiff's lower back. Dr. Johnson ordered x-rays and a CT scan of plaintiff's lumbar spine, which revealed no abnormalities. While he noted that straight leg raising was positive at 45 degrees, there was some inconsistency in that plaintiff reported pain with hip flexion and hip rotational movements. After plaintiff's complaints of pain persisted, Dr. Johnson ordered a lumbar myelogram, which failed to show any abnormalities. Dr. Johnson released plaintiff to return to work. He was of the opinion that plaintiff had at most suffered a lumbar strain, but had not suffered any permanent impairment. Dr. Johnson also stated that the more times he treated plaintiff, he begin to notice a tendency on plaintiff's part toward exaggeration and magnification of symptoms.

Following the filing of suit by plaintiff in December 1993, plaintiff returned to Dr. Johnson in May 1994 complaining of neck pain. Dr. Johnson advised her that inasmuch as her examination and MRI revealed nothing abnormal, he had nothing more to offer her.

Dr. Ronald Bingham, a physician specializing in physical medicine and rehabilitation who evaluated plaintiff's back injury at the request of defendant's counsel, testified that he found no evidence of objective abnormality in plaintiff's back and diagnosed plaintiff's condition as chronic complaint of low back pain. He stated that in his opinion plaintiff had suffered no permanent impairment as a result of the injury.

Dr. Robert J. Barnett, an orthopedic surgeon, conducted a one-time evaluation examination of plaintiff's neck and back injuries at the request of

plaintiff's counsel. Based upon plaintiff's complaints of popping and cracking in her neck, and x-rays that revealed some straightening of the cervical curvature, Dr. Barnett diagnosed plaintiff with chronic neck strain. Inasmuch as plaintiff had a medically diagnosed injury with a minimum of six (6) months medically diagnosed pain, Dr. Barnett gave plaintiff a four (4%) percent disability rating to the body as a whole for her neck injury. Dr. Barnett testified that in reference to plaintiff's back injury, based on a medically documented case of lumbar strain for a minimum of six months or more with a relatively normal x-ray and plaintiff's complaints of persistent and stiffness, she was entitled to disability rating of five (5%) percent to the body as a whole for her back injury.

Dr. Lloyd A. Walwyn, another orthopedic surgeon who performed a one-time independent medical evaluation of plaintiff at the request of plaintiff's counsel, diagnosed her injury as chronic strain and pain syndrome of the cervical region, and diagnosed her back injury as chronic strain and pain syndrome of the lumbar region. It was his opinion that plaintiff had an impairment rating of five (5%) to the body as a whole for her neck injury and five (5%) to the body as a whole for her back injury.

Drs. Rowland and Johnson had the opportunity to evaluate and treat plaintiff on a much more extensive basis then Drs. Barnett and Walwyn, who conducted one-time evaluation examinations. It seems both reasonable and logical that the physicians having greater contact with a patient would have the advantage and opportunity to provide a more in depth opinion, if not a more accurate one. It was after treating and evaluating plaintiff on a regular recurring basis that Dr. Johnson noticed that plaintiff had tendency towards symptom magnification and exaggeration.

In sum, our review of this record persuades us that the evidence does

not preponderate against the trial court's finding that plaintiff failed to prove any permanent disability as a result of her work-related accidents.

Defendant has filed a motion as a part of his brief seeking to have this court declare the appeal of plaintiff to be frivolous. We treat this as an issue raised by defendants. Because successful litigants should not have to bear the expense and vexation of groundless appeals, Davis v. Gulf Ins. Group, 546 S.W.2d 583, 586 (Tenn. 1997), T.C.A. § 27-1-122 (1980) empowers the appellate courts to award reasonable damages, including legal expenses, against appellants whose appeals are frivolous or taken solely for delay.

An appeal is frivolous if it is devoid of merit and if it has little chance of success. Liberty Mut. Ins. Co. v. Taylor, 590 S.W.2d 920, 922-23 (Tenn. 1979); Industrial Dev. Bd. v. Hancock, 901 S.W.2d 382, 385 (Tenn. 1995). An appeal has no reasonable chance of success when reversal of the trial court's decision would require revolutionary changes in the established standards of review. Davis, 546 S.W.2d at 586. Accordingly, based on this record, while this is a desperate appeal, we do not decree it to be frivolous.

The judgment of the trial court is affirmed. Costs in this cause are taxed to plaintiff for which execution may issue if necessary.

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HEWITT P. TOMLIN, JR., SENIOR JUDGE

CONCUR:

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LYLE REID, JUSTICE

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CORNELIA A. CLARK, SPECIAL JUDGE