

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

FILED

March 30, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

PAMELA D. SMITH,)	SHELBY CIRCUIT
)	
Plaintiff/Appellant)	NO. 02S01-9611-CV-00099
)	
v.)	HON. KAY S. ROBILIO,
)	JUDGE
HEALTH TECH AFFILIATES, INC.)	
d/b/a MEMPHIS PATHOLOGY LAB,)	
)	
Defendant/Appellee)	

For the Appellant:

Steve Taylor
6263 Poplar Avenue
Suite 601
Memphis, TN 38119

For the Appellee:

James L. Kirby
Harris, Shelton, Dunlap & Cobb, L.L.P.C.
One Commerce Square, Suite 2700
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MEMORANDUM OPINION

Members of Panel:

Justice Janice Holder
Senior Judge John K. Byers
Judge Robert L. Childers

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED

BYERS, Senior Judge

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme 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.

The plaintiff filed suit on February 10, 1995 and alleged she had sustained an injury to her foot when a portion of a wall fell upon her as she was working for the defendant. On December 13, 1995, the plaintiff amended her complaint to allege she had suffered psychological injury as a result of the accident.

On August 13, 1996, the trial judge entered a judgment dismissing the complaint. The pertinent portion of the judgment is as follows:

After duly considering the testimony and the evidence and considering the credibility of the persons who testified, the court finds that the plaintiff failed to carry her burden of proof; that the alleged psychiatric or psychological injuries were not caused by the plaintiff's work accident; that the plaintiff is not entitled to any workers' compensation benefits for her alleged psychiatric or psychological injuries; that with regard to the injury to her foot or toe caused by the accident, the defendant paid all the plaintiff's medical expenses to which the plaintiff was entitled; that the plaintiff lost time from work from January 13, 1995 to March 13, 1995 as the result of the injury to her foot and she was paid temporary total disability benefits at the rate of \$198.40 per week for this period of time; that the plaintiff was paid all the temporary total disability benefits to which she was entitled; and that the plaintiff is not entitled to any additional temporary total disability or other workers' compensation benefits as the result of the accident on January 12, 1995.

The determination of the credibility of the witnesses who testified before the trial judge was solely within the judge's discretion. The finding of the credibility of the witnesses is not reweighed on appeal. *State, ex rel. Balsinger v. Town of Madisonville*, 435 S.W.2d 803 (Tenn. 1968). We note, however, that there were many inconsistencies in the record, both in oral testimony, in deposition testimony, and in other documents filed, showing the plaintiff had made different statements at different times concerning the accident. For example, she stated at one time a wall fell upon her and a patient leaving them covered in debris. At another time, she said a portion of the wall fell upon her. The evidence shows a piece of wood which was approximately 2 feet long and 6 inches wide fell and struck her toe. During the time the plaintiff was drawing temporary total disability, she took a job with another company. The plaintiff's deposition was taken on September 7, 1995, and she testified then that she had not worked anywhere since her accident. At trial, the plaintiff admitted working while she drew disability. The plaintiff testified she knew she could not work but that she needed the money.

The medical evidence on the issue of a psychological disorder as a result of the injury is practically non-existent. The experts first found the plaintiff was suffering psychological disability primarily because of post-traumatic syndrome based upon the catastrophic nature of the accident -- a wall falling upon her as reported by the plaintiff. When these people were apprised of the nature of the accident and the fact that the plaintiff worked while claiming to be unable to do so, all of them, except one, revised their opinions to find there was no causal relationship between the accident and the psychological problems suffered by the plaintiff.

The plaintiff had a rather tragic life, the details of which we need not set out. The one expert who connected the accident to the psychological problem was Dr. Melvin Levitch who only evaluated the plaintiff. When Dr. Levitch found the history given to him by the plaintiff was false, he testified his original opinion of the plaintiff's condition was wrong. Nevertheless, he was of the opinion the accident, when considered along with the other stressful events in the plaintiff's life, was the "last straw" and precipitated the plaintiff's psychological problems.

The evidence in the case does not preponderate against the finding by the trial judge that the plaintiff had failed to carry her burden of proof of showing the accident caused her psychological problems.

The plaintiff says the trial court improperly computed her average weekly wage for purposes of temporary total disability because only the wages paid her by Health Tech Affiliates, Inc. d/b/a Memphis Pathology Lab ["Health Tech"] were included in reaching her average weekly wage. The plaintiff also worked for Baptist Memorial Hospital at the time of the injury to her foot. The hours she worked at Baptist Memorial Hospital were listed and paid as overtime hours. If the wages had been included as a part of the plaintiff's average weekly wage, she would have been entitled to \$382.79 per week for temporary total disability rather than \$198.40 per week as ordered by the trial court. The evidence shows the plaintiff worked 40 hours for the defendant and extra hours at Baptist Memorial Hospital. The 40 hours worked for defendant were paid as regular hours. The hours worked at Baptist Memorial Hospital were paid as overtime hours.

It appears from the evidence in this case that the defendant was a part of an overall corporate operation involved in the health care business. As we view the

record, Baptist Memorial Health Care Systems [hereafter "Systems"]¹ was at the top of a corporate structure which had as affiliates Health Tech and Baptist Memorial Hospital. Payroll checks were written by Systems to pay employees who worked for the defendant or Baptist Memorial Hospital. There was an accounting entry and an accounting system which charged the employee costs back to the defendant or Baptist Memorial Hospital, depending upon from which of these an employee had earned wages.

Employees who worked for Health Tech or for Baptist Memorial Hospital were issued payroll checks by Systems. The amount an employee was paid was charged by Systems to either Health Tech or Baptist Memorial Hospital, according to where the wages were earned. In the case of the plaintiff, one check was written to her by Systems. Forty hours of work were charged back to Health Tech and all overtime hours were charged to Baptist Memorial Hospital.

The personnel director of Health Tech, who issues payroll checks, testified the checks were written by Systems, that Systems owns Health Tech and Baptist Memorial Hospital, and that only one check is issued to an employee for work. When asked why overtime would be paid if there were three companies, the personnel director responded "Well, they're under all the same system. They pay overtime for anything over 40 hours in the whole system."

The senior vice president of Systems testified that Systems establishes policy, general guidance, and direction for the entities that comprise Systems. The evidence shows Baptist Memorial Hospital and Health Tech were affiliates of Systems and "reported up" to Systems. If an employee worked in either of the entities and wished to transfer to another in the group, no application for employment with another of the group was required. The move from one to another one of the group was done by corporate transfer. Systems, Baptist Memorial Hospital, and Health Tech are separately incorporated and have separate boards of directors. The record shows that Systems appoints to board of directors for Health Tech. There is nothing in the record to show how the board of directors for Baptist Memorial Hospital is selected.

¹ The name of Baptist Memorial Health Care Systems was changed to Baptist Memorial Health Care Corporations after the accident involved in this suit.

It is our view that the structure of the three groups in this case indicates for all practical purposes that there is one corporate entity for our purpose in computing plaintiff's average weekly wage.

If the plaintiff were working for two separate employers as claimed by the defendant, it is inexplicable why the hours beyond 40 worked each week would be paid as overtime hours by Systems and charged to Baptist Memorial Hospital. If the plaintiff worked for two different employers, there would be no overtime hours involved. Under the operation revealed in the record, we conclude the evidence preponderates against the finding that the defendant, Systems, and Baptist Memorial Hospital were separate employers for purposes of computing the average weekly wage of the plaintiff. See *Stigall v. Wickes Machinery*, 801 S.W.2d 507 (Tenn. 1990).

We affirm that portion of the judgment finding the plaintiff had failed to show any causation between the industrial accident and her psychological problems. We reverse that portion of the judgment that finds the plaintiff's average weekly compensation rate is \$382.79 and she should be paid at that rate for the time of her temporary total disability. In all other matters, we affirm the judgment of the trial court.

This case is remanded to the trial court for entry of such orders as are necessary to carry out the judgment. The cost of the appeal is taxed to the defendant.

John K. Byers, Senior Judge

CONCUR:

Janice Holder, Justice

Robert L. Childers, Judge

THE STATE OF TEXAS,

Appellee,

v.

THE UNIVERSITY OF TEXAS AT AUSTIN, INC.,

Appellant.

THE COURT COMPOSED OF:

Justice Tom R. Phillips

Justice David J. Nye

Justice

Justice

Justice

Justice

Justice

OPINION

This case is before the Court upon a motion for review of the decision of the Special Court of Conciliation Appeals Panel, and the Panel's Decision on Appeal setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Moreover, it appears to the Court that the motion for review is not well-taken and should be denied; 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 and the judgment of the Court.

Costs on appeal are assessed to the appellant.

IT IS SO ORDERED this _____ day of March, 1998.

Clerk

Followed by participating.

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