

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

FILED

July 8, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

PEGGY S. MALLICOAT,)
)
Plaintiff/Appellant)
)
v.)
)
C.R. DANIELS, INC., and)
NORTHBROOK NATIONAL)
INSURANCE COMPANY,)
)
Defendants/Appellees)

KNOX CHANCERY
NO. 03S01-9708-CH-00100
HON. FREDERICK D. McDONALD,
CHANCELLOR

For the Appellant:

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For the Appellees:

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MEMORANDUM OPINION

Members of Panel:

Special Judge Charles D. Susano, Jr.
Senior Judge John K. Byers
Special Judge Joe C. Loser, Jr.

AFFIRMED

BYERS, Senior Judge

OPINION

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.

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial court in a workers' compensation case. See *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

The plaintiff filed a complaint seeking reconsideration of her industrial disability under Tenn. Code Ann. § 50-6-241(a)(2). She had previously entered into a court-approved settlement agreement that awarded her 25 percent permanent partial disability to the body as a whole. After a hearing, the trial court dismissed the plaintiff's complaint because she failed to prove any increase in her disability.

The plaintiff appeals and raises the following issue:

“Did the trial court err in its refusal to reopen and reexamine the vocational disability of the Plaintiff/Appellant pursuant to T.C.A. § 50-6-421 [sic] when its refusal was based solely on the fact that there was no additional medical testimony in support of such claim of further disability.”

We affirm the judgment of the trial court.

BACKGROUND

The plaintiff, age 46 at the time of trial, left high school in the twelfth grade and had no vocational training. Her employment history includes working in furniture factories, working as a cook and waitress in restaurants, and working on a farm. In February 1993, the plaintiff began working for the defendant in the stenciling department. In a short time, she was transferred to working on an upright sewing machine, which required her to stand on one foot while pressing a pedal with the other foot during the length of her eight hour shift.

The plaintiff testified that she injured her back while working for the defendant on September 1, 1993. She said she bent over to pick up a hamper, which weighed 15 to 20 pounds, felt and heard a “pop” in her back, and could not straighten up.

The plaintiff tried to continue operating her sewing machine, but she was unable to work because of the pain in her back. She sought immediate medical attention from the company doctor. The plaintiff testified that she developed pain in her left leg a few days after this work injury.

Thereafter, the plaintiff saw a series of doctors and underwent several methods of conservative treatment, including rehabilitation which she said caused her more pain. Eventually, the plaintiff was referred to a neurosurgeon named Dr. Robert S. Davis, whom she saw for the first time on February 22, 1994. At that time, she complained of lower back pain, bilateral hip pain, thigh pain, and calf pain, with the leg pain being worse on the left side. Dr. Davis testified by deposition that the plaintiff related this pain to her work injury on September 1, 1993.

Dr. Davis reviewed a lumbar M.R.I., which had been done on October 8, 1993, and determined she had degenerative disc disease at L4-L5 and L5-S1 with some bulging in both discs. He also reviewed x-rays which revealed that she had thoracolumbar scoliosis convex to the right. Dr. Davis ordered a second lumbar M.R.I. on February 24, 1994 and found she had no significant changes from the first one. He proceeded to treat her conservatively.

On June 28, 1994, Dr. Davis opined that the plaintiff had a ten percent impairment to the body as a whole based upon the *AMA Guides*. At this time, he also determined she should return to work with some restrictions, such as limited bending and stooping and not lifting more than 30 pounds.

With the assistance of former counsel, the plaintiff and the defendants entered into a settlement agreement that awarded her 25 percent permanent partial disability to the body as a whole, which was based upon a cap of 2.5 times the medical impairment rating. The settlement agreement was approved by way of a court order on February 2, 1995. The order made no mention of whether the plaintiff was able to return to work at that time.

The plaintiff did return to work doing various jobs within her restrictions. However, the plaintiff testified that she experienced an increase in her leg and back pain which caused her to be unable to perform her restricted duties and to miss a great deal of work. The plaintiff explained that performing her work while sitting or standing for hours at a time made her pain unbearable. Two supervisors of

the defendant testified that the plaintiff was given jobs within her restrictions and that she performed them to the best of her ability, despite her complaints of pain. Due to these problems, the plaintiff stopped working for the defendant on August 24, 1995 and eventually resigned on December 1, 1995.

Prior to and during this interim, the plaintiff returned to Dr. Davis with complaints of increased leg and back pain. Dr. Davis ordered a third lumbar M.R.I. in October 1995 and determined she was a candidate for surgery. Until the third M.R.I. was performed, he had encouraged the plaintiff to return to work on several occasions. On February 19, 1996, Dr. Davis performed surgery on the plaintiff to relieve pressure on a nerve root. He explained that this surgery was intended only to help the pain in her left leg and that "it really should not significantly affect the back pain and may not necessarily change any numbness or tingling or any weakness." The plaintiff testified that the surgery alleviated some of her symptoms, such as numbness and cramps in her left leg, but that she continues to experience significant pain in her back.

On March 11, 1996, Dr. Davis found postoperative improvement based upon further examination and the plaintiff's statement that the numbness had resolved in her left leg. On April 12, 1996, he determined her impairment would remain at ten percent and she could work under the same restrictions. He found the plaintiff reached maximum medical improvement on August 5, 1996, approximately six months after surgery. Dr. Davis further testified that the condition he corrected by surgery was due to a change over time and not a result of the plaintiff's lifting incident at work on September 1, 1993.

After the surgery, a supervisor contacted the plaintiff about jobs available within her restrictions, but she never contacted the defendant about returning to work. The plaintiff testified that she enjoyed working and would work if she were able but that she is in too much pain to work since the surgery.

The plaintiff further testified that she cannot do her own housework and that her daughter has to do it for her. She said she has tried to do housework but she always ends up having more pain after doing so. The plaintiff said she had never experienced problems with her back prior to the injury at work.

On December 22, 1995, the plaintiff, with new counsel, filed a complaint for reconsideration of her industrial disability under Tenn. Code Ann. § 50-6-241(a)(2). The trial was held on July 11, 1997. At the end of hearing the evidence and considering the deposition testimony of Dr. Davis, the trial judge dismissed the plaintiff's complaint because she failed to prove any increase in her disability. The trial court's order dismissing the complaint was filed on July 14, 1997.

DISCUSSION

Under the provisions of Tenn. Code Ann. § 50-6-241(a)(2), an injured employee can file a new cause of action seeking reconsideration of the issue of industrial disability. The statute explains that "such reconsideration shall examine all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition." Tenn. Code Ann. § 50-6-241(a)(2).

Further, the extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990). In determining whether the plaintiff had an increase in her disability, the trial court heard the testimony of the plaintiff and two supervisors and considered the deposition testimony of Dr. Davis.

The plaintiff testified that she experienced an increase in her leg and back pain which prevented her from performing her restricted duties and caused her to miss a great deal of work. She explained that performing her work while sitting or standing for hours at a time made her pain unbearable. The plaintiff also testified that she enjoyed working and would work if she were able but that she is in too much pain to work since the surgery. Further lay testimony by two supervisors of the defendant showed that the plaintiff was given jobs within her restrictions and that she performed them to the best of her ability, despite her complaints of pain.

In this case, as in all workers' compensation cases, the claimant's own assessment of her physical condition and resulting disabilities is competent testimony and cannot be disregarded. *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972). However, where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great

deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. See *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

The expert testimony of Dr. Davis revealed that the plaintiff's impairment would remain at ten percent to the body as a whole and that she could work under the same restrictions he had previously issued -- limited bending and stooping and not lifting more than 30 pounds. Dr. Davis further testified that the condition he corrected by surgery was due to a change over time and not a result of the plaintiff's lifting incident at work on September 1, 1993.

When the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. INA*, 884 S.W.2d 446, 451 (Tenn. 1994); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989).

After a careful review of the lay testimony in this case, we find the evidence does not preponderate against the decision of the trial judge to dismiss the plaintiff's complaint. In reviewing the expert testimony, we have determined that the preponderance of the evidence lies in favor of the defendant that (1) the plaintiff had no increase in impairment according to Dr. Davis, (2) she was able to return to work with restricted duties according to Dr. Davis, and (3) the condition Dr. Davis corrected by surgery was due to a change over time and not a result of the plaintiff's lifting incident at work on September 1, 1993.

In arguing that the trial court erred in failing to increase her award of disability, the plaintiff says the trial judge "should have made a determination of whether [her] return to work in January 1995, was meaningful, basing his determination on all of the testimony presented rather than foregoing a review of her vocational disability because she lacked an additional medical impairment from a medical expert." Because we find, as the trial judge did, that the plaintiff failed to prove an increase in her disability, we do not reach the issue of whether her return to work was meaningful under Tenn. Code Ann. § 50-6-241(a)(1).

The judgment of the trial court is affirmed and the cost of this appeal is taxed to the plaintiff.

John K. Byers, Senior Judge

CONCUR:

Charles D. Susano, Jr., Special Judge

Joe C. Loser, Jr., Special Judge

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PEGGY S. MALLICOAT)
EDUCATION) KNOX CHANCERY
Plaintiff/Appellant,)
) No. 128743-1
vs.)
)
) Hon. Frederick D. McDonald
) Chancellor
C. R. DANIELS, INC., and)
NORTHBROOK NATIONAL)
INSURANCE COMPANY.) No. 03S01-9708-CH-00100
Defendant/Appellee)

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; 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 made the Judgment of the Court.

Costs on appeal are taxed to the plaintiff/appellant, Peggy S. Mallicoat and James L. Milligan, Jr., surety for which execution may issue if necessary.

07/08/98

