IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(June 29, 1998 Session)

INGRAM BOOK COMPANY	)	RUTHERFORD CIRCUIT
	)	
Plaintiff-Appellant,	)	
	)	Hon. Robert E. Corlew, III,
v.	)	Judge
	)	
STACEY FITZGERALD	)	
	)	No. 01S01-9712-CV-00268
Defendant-Appellee	)	

For Appellant:

David B. Burrow
Brewer, Krause & Brooks
Nashville, Tennessee

For Appellee:

Herbert M. Schaltegger
Thomas, Henderson & Pate
Murfreesboro, Tennessee

MEMORANDUM OPINION

Members of Panel:
Frank F. Drowota, III, Associate Justice, Supreme Court
William H. Inman, Senior Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED Loser,

Judge

MEMORANDUM 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. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employer, Ingram Book Company, contends the evidence preponderates against the trial court's findings that (1) the employee's injury was one arising out of and in the course of employment, (2) the award is not barred by the last injury rule and (3) the claimant retains a twelve percent vocational disability award. As discussed below, the panel has concluded the judgment should be affirmed.

Twenty-eight-year-old Stacey Fitzgerald was hired as an executive secretary by Ingram Book Company in September of 1994. Between late February and mid March, she told her supervisor, Terry Cook, she was experiencing right arm pain and requested an ergonomic keyboard.

In early June, 1995, a non-work related back injury caused Ms. Fitzgerald to take a temporary leave of absence. Upon her return to work in late August, she requested a part-time position to aid her recovery.

Due to continued pain in her right arm, Ingram Book Company sent Ms. Fitzgerald to the Baptist Occupational Medicine facility on or about October 23, 1995. There, she was treated with anti-inflammatory medicine, a wrist splint, and an elbow band.

In November, 1995, Ms. Fitzgerald missed several days of work due to strep throat, a death in the family, and hospitalization for pneumonia. Ingram Book Company terminated her employment during her hospital stay.

Following her termination, Ms. Fitzgerald was referred to Dr. Arthur Cushman, whom she saw twice. He concluded Ms. Fitzgerald had a zero percent anatomical impairment rating and assigned no permanent restrictions.

Ingram Book Company then arranged for her to receive treatment from Dr. William Jekot. On January 17, 1996, Dr. Jekot diagnosed Ms. Fitzgerald as having mild cubital tunnel syndrome and tendinitis of the right elbow.

During March of 1996, Ms. Fitzgerald obtained employment with the Daily News Journal running a newspaper route. However, she quit three months later claiming her preexisting condition caused problems in executing her duties.

On May 21, 1997, Dr. Jekot requested a reevaluation visit with Ms. Fitzgerald to prepare for his deposition. Dr. Jekot diagnosed chronic

tendinitis and mild cubital tunnel syndrome. He assigned a five percent impairment rating to her right upper extremity.

On May 30, 1996, Dr. Richard Fishbein evaluated Ms. Fitzgerald and diagnosed a problem similar to Dr. Jekot. He rendered a ten percent impairment to the right upper extremity and opined that his diagnosis was consistent with Ms. Fitzgerald's prior work injury.

In July of 1996, Ms. Fitzgerald obtained employment working part-time as a free-lance proofreader for Thomas Nelson Publishing. This job required no repetitive motion and placed no stress on her elbow. Because the free-lance work began to taper, Ms. Fitzgerald sought and gained employment with Kinko's copy center. Her primary duties were working at the touch screen register and taking orders. Ms. Fitzgerald noted that the supervisors at Kinko's made accommodations for her condition, as needed.

On July 29, 1997, Ingram Book Company's independent medical evaluator, Dr. Ensalada, reviewed the findings of the prior doctors. Without actually examining Ms. Fitzgerald, he concluded she suffered from neither cubital tunnel syndrome nor ulnar neuropathy. He opined the elbow injury could not be causally connected to her employment at Ingram Book Company.

The trial judge found that the evidence established that the plaintiff suffered a compensable injury during the course and scope of her employment at Ingram Book Company and that the claimant would retain a twelve percent vocational disability to the arm. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2).

Unless admitted by the employer, the employee has the burden of proving, among other things, that he suffered an injury by accident arising out of and in the course of employment. Oster, a Div. of Sunbeam Corp. v. Yates, 845 S.W.2d 215 (Tenn. 1992). In the present case, the employer contends the employee's injury did not arise in the course of her employment with Ingram Book Company because she never missed work as a result of her gradual injury. We are not so persuaded.

An injury arises out of and is in the scope of employment if it has a rational connection to the work and occurs while the employee is engaged in the duties of her employment. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). Cubital tunnel syndrome is a gradual injury common to the type of work in which this plaintiff was engaged. The trial judge may base an award on medical testimony that a given incident "could be" the cause of an injury if the lay testimony supports such inference. P & L Const. Co., Inc. v. Lankford, 559 S.W.2d 793, 794 (Tenn. 1977). The lay proof before us is without equivocation on the issue of causation. Ms. Fitzgerald complained to her supervisor of pain in her right arm and requested an ergonomic keyboard eight to nine months prior to her dismissal. Her pain continued and her employer, Ingram Book Company,

provided medical care. This care continued even after Ms. Fitzgerald was no longer employed by the defendant. With the sole exception of Dr. Ensalada, who never actually saw Ms. Fitzgerald, each medical provider felt that Ms. Fitzgerald's permanent injury, at the very least, "could be" consistent with her work at Ingram Book Company. Dr. Fishbein even drew a direct line of causation to Ms. Fitzgerald's prior work injury. Therefore, the proof is sufficient to establish the required causal connection between her work at Ingram Book Company and her cubital tunnel syndrome.

Ingram Book Company further argued that Ms. Fitzgerald's claim against them was barred by the last injurious work rule because the claimant never missed a day of work as a result of her injury. The last day worked doctrine was made into an explicit rule to assist injured workers who suffered gradual injuries survive the statute of limitations. See Lawson v. Lear Seating Corp., 944 S.W.2d 340 (Tenn. 1997). This rule is not to be applied to questions of causation. To do so would enact a precedent which would make any worker injured by repetitive stress ineligible for compensation unless they miss work. This is inconsistent with the nature of the Tennessee Workers' Compensation Act. Each day Ms. Fitzgerald worked for Ingram Book Company contributed to her injury. For the reasons discussed, we hold that the last day worked rule has no application to the case at bar and cannot be used to undermine the medical and lay evidence which supports a causal connection between Ms. Fitzgerald's injury and her work for Ingram Book Company.

Ingram Book Company finally asserts that the evidence at trial does not support the trial court's award of a twelve percent vocational disability arising from Ms. Fitzgerald's permanent injury. In determining vocational disability, the trial court considers many pertinent factors, including age, job skills, education, training, duration of disability, job opportunities, and anatomical impairment. Tenn. Code Ann. section 50-6-241(a)(2). Workers' compensation is designed so that a compensatory award is substituted for a loss in earning capacity. See Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452 (Tenn. 1988). The likelihood is small that Ms. Fitzgerald will earn as much income from a non-secretarial job as she would from her previous positions. Further, a medical expert's rating of an anatomical disability, while one of the relevant factors, does not restrict the estimate of the vocational disability. Id. at 459. The medical proof shows that Ms. Fitzgerald suffers from a permanent impairment rating of five to ten percent to her upper extremity. Therefore, we hold that the evidence fails to preponderate against the trial court's disability award of twelve percent to the arm, even in light of Ms. Fitzgerald's return to work.

The judgment of the trial court is affirmed. Costs of appeal are taxed to Ingram Book Company, plaintiff-appellant.

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Joe C. Loser, Jr., Special Judge

CONCUR:

_____
Frank F. Drowota, III, Associate Justice

_____
William H. Inman, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED

October 26, 1998

Cecil W. Crowson
Appellate Court Clerk

INGRAM BOOK COMPANY	}	*RUTHERFORD CIRCUIT*
	}	*No. Below 36921*
Plaintiff/Appellant	}	
	}	*Hon. ROBERT E. CORLEW, III*
vs.	}	*Chancellor*
	}	
	}	*No. 01S01-9712-CV-00268*
STACE FITZGERALD	}	
	}	
Defendant/Appellee	}	*AFFIRMED*

JUDGMENT ORDER

This case is before the Court upon 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, 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 will be paid by Plaintiff/Appellant and Surety, for which execution may issue if necessary.

IT IS SO ORDERED on October 26, 1998.

PER CURIAM