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

FILED

March 11, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

CORA MOTON,	)	
	)	
Plaintiff/Appellee	)	SHELBY CIRCUIT
	)	
v.	)	NO. 02S01-9803-CV-00023
	)	
KELLOGG USA, INC.,	)	HON. JAMES S. RUSSELL,
	)	JUDGE
Defendant/Appellant	)	

For the Appellant:

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M E M O R A N D U M O P I N I O N

Members of Panel:

Justice Janice Holder
Senior Judge John K. Byers
Senior Judge F. Lloyd Tatum

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 trial court found that the plaintiff did not make a meaningful return to work and therefore that the statutory cap of 2.5 times the anatomical impairment rating did not apply. The trial court awarded the plaintiff benefits based on 3.5 times Dr. Weems' rating of fifteen percent for a total permanent partial disability award of 52.5 percent to the body as a whole.

The defendant raises the following issues:

1. Whether the trial court erred in finding that Plaintiff did not make a meaningful return to work?

2. Whether the trial court erred in relying on the deposition testimony of Dr. Thomas D. Weems rather than the deposition testimony of Dr. James T. Galyon?

3. Whether the trial court erred in awarding Plaintiff a permanent partial disability rating for vocational disability purposes of 52.5%?

We affirm the judgment of the trial court.

BACKGROUND

The plaintiff, age 37 at the time of trial, is a high school graduate. She took over five years of college classes in English, Biology, and Chemistry from various institutions, but she holds no degrees. She is certified as a pharmacy technician and has worked in that field at a rate of $9.50 per hour. She also has work experience as a chemical analyst.

In January 1990, the plaintiff went to work for the defendant as an FMC operator in the manufacturing process of frozen waffles. She earned $11.65 per

hour. On February 7, 1995, the plaintiff fell at work and hurt her neck, shoulder, and back.[1] Following conservative treatment by Dr. James T. Galyon, she returned to work after being off work for one week. Her pain became worse however, so she returned to Dr. Galyon and eventually saw Dr. Thomas D. Weems.

Following surgery by Dr. Galyon and Dr. Weems, the plaintiff returned to work for the defendant on August 2, 1995. Although the plaintiff had some temporary work restrictions, the permanent work restrictions issued by Dr. Galyon included no lifting of more than 20 pounds, no standing of more than three hours, and no overhead work. Upon returning to work, the plaintiff worked as a relief operator, a job that required her to stand ready to relieve workers in 13 different positions, including the FMC operator and case packer positions.[2] The plaintiff testified that the FMC operator and case packer jobs were too strenuous for her to perform but that she could perform the picker, stacker, and inspector jobs because they were within her work restrictions.

Sometime in October 1995, the plaintiff reinjured herself while stacking boxes overhead. She testified that she complained to her supervisor that it was painful for her to stack boxes overhead but that her supervisor said that there was no other position available. The plaintiff saw Dr. Gaylon for this reinjury and was released to return to work the next week. Upon returning to work, she worked as a picker until early December 1995.

Between October and December 1995, the plaintiff was also drafted for overtime work as a case packer. She testified that she complained to a supervisor about this assignment but that she was not allowed to switch with another worker even though the other worker offered to switch. On December 4, 1995, the plaintiff

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[1] The parties stipulated that the plaintiff's injuries to her neck, shoulder, and back on February 7, 1995 were compensable at the rate of $300 per week. They also stipulated that the defendant had actual notice of the injury, that the plaintiff received all temporary total disability benefits, and that the defendant paid all accrued medical bills.

[2] The plaintiff testified that an FMC operator was required to lift more than 20 pounds overhead and that the case packer was required to lift more than 20 pounds. Augusta Gipson, the defendant's Human Resource manager, testified that the FMC operator job would probably create some problems for the plaintiff but that she could have used the mechanical lifting devices. He also stated that none of the jobs require overhead work but that some do require reaching overhead. Steven Taylor, a supervisor, testified that a case packer did not have to lift more than 20 pounds.

was assigned the job of FMC operator. She testified that when she complained to Sandy Tebow, her supervisor, about this assignment, Ms. Tebow said that the plaintiff could go home if she could not perform the job of FMC operator. The plaintiff said that she went home that day and that she has not been back to work for the defendant since that time.

When Ms. Tebow testified, she stated that she never told the plaintiff to go home if she could not do her assigned job and that the plaintiff never complained about her assigned work. Audrey Mayo, a former employee who was called to testify by the plaintiff for rebuttal purposes, testified that she was present on December 4, 1995. Ms. Mayo stated that she heard the plaintiff ask Ms. Tebow to switch her assignment and that Ms. Tebow said that she could not switch her.

According to the testimony of Augusta Gipson, the plaintiff had accumulated enough absences, not related to her workers' compensation injury, by the week of December 5, 1995 that she was subject to voluntary termination under a collective bargaining agreement. The same day, Mr. Gipson received a letter from the plaintiff's psychologist, Elizabeth A. Harris, stating that she was unable to work.[3] On December 18, 1995, Mr. Gipson sent the plaintiff a letter requesting additional medical information that would help him evaluate her situation for making accommodations. He testified that the plaintiff did not respond to this letter.

On January 5, 1996, Mr. Gipson received a letter dated January 2, 1996 from the plaintiff's lawyer stating that the plaintiff could not perform the assigned work because of her medical restrictions. Mr. Gipson testified that he did not respond to this letter and that he did not take the letter as the plaintiff's response that she would return to work if her work restrictions were met. Mr. Gipson also stated that he did not know that the plaintiff had taken a job elsewhere at that time.

On January 12, 1996, Mr. Gipson sent the plaintiff a second letter reminding her of the requested information, informing her of the absences, and explaining that she would be considered voluntarily terminated if she did not respond by the disposition hearing date of January 19, 1996. He testified that the plaintiff did not

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[3] The plaintiff testified that she saw the psychologist for family and job related problems during September, October, November, and December of 1995.

respond to this letter and that she did not attend the disposition hearing. On January 29, 1996, Mr. Gipson sent the plaintiff a letter of termination of employment.

Paula Bologna, a case manager for CRA Managed Care, testified that when she talked to the plaintiff at the end of November 1995 the plaintiff was planning to pursue work as a pharmacy technician. Ms. Bologna stated that the plaintiff did not mention her inability to perform the work for the defendant.

The plaintiff testified that she would have liked to return to work for the defendant in a job within her work restrictions. She explained that she started looking for new work after leaving the defendant's employment on December 4, 1995, when she was assigned a job outside her work restrictions. The plaintiff testified that she applied for jobs that would have yielded an income consistent with what she had been earning with the defendant but that she did not get any of those jobs. For one year and two months after leaving the defendant, she worked as a pharmacy technician for PruCare making $7.00 per hour. Thereafter and through the present time, the plaintiff works in a supervisory position for CCL making $9.50 per hour.

MEDICAL EVIDENCE

_____Dr. James T. Galyon, an orthopedic surgeon, testified by deposition. When Dr. Galyon first examined the plaintiff on February 23, 1995, he determined that she probably had a cervical strain with an injury to the nerve roots radiating into her right shoulder. He restricted her to working only 40 hours a week and placed her on medication. When she returned for further evaluation on March 2, 1995, he ordered an MRI and then referred her to Dr. Weems based on the results of a ruptured disc. On April 21, 1995, surgery to remove and fuse the disc at C5-C6 was performed by both Dr. Galyon and Dr. Weems. Dr. Galyon testified that by August 16, 1995 he felt that she had improved enough to return to work. By August 21, 1995, he believed that the plaintiff had reached maximum medical improvement and assigned her an impairment rating of nine percent to the body as a whole according to the *AMA Guides.* When the plaintiff returned with information that she had reinjured her neck in October 1995 and that her job description had been changed in late November 1995, Dr. Galyon placed the following permanent medical restrictions on her: no

standing for over three consecutive hours, no lifting over 20 pounds, and no overhead work.

_____Dr. Thomas D. Weems, a neurosurgeon, also testified by deposition. Dr. Weems first saw the plaintiff on March 10, 1995 and recorded her history of injury. He performed a myelogram and it showed an abnormality at the C5-C6 disc in the plaintiff's neck. He diagnosed her with a herniation at C5-C6 and performed part of the surgery on April 21, 1995. Within a reasonable degree of medical certainty, Dr. Weems opined that the plaintiff's condition was related to her injury at work on February 7, 1995. He assigned her an impairment rating of 15 percent based on the *AMA Guides* (nine percent for the operated herniated disc, four percent for range motion impairment, and two percent for nerve root impairment). By October 12, 1995, Dr. Weems determined that the plaintiff reached maximum medical improvement and that she could return to work, but he did not place work restrictions on her. He explained that he does not issue restrictions to his patients unless they are in danger of something serious. Dr. Weems did agree, however, that Dr. Gaylon's recommended restrictions were appropriate.

ANALYSIS

Meaningful Return to Work

The first issue raised by the defendant is whether the trial court erred in finding that the plaintiff did not make a meaningful return to work and thus that she was entitled to an award of 3.5 times her medical impairment rating of 15 percent for a total award of 52.5 percent to the body as a whole.

Under the provisions of Tenn. Code Ann. § 50-6-241(a)(1), an injured employee who returns to her employment at a wage equal to or greater than the wage she was receiving at the time of injury cannot recover an award more than 2.5 times the medical impairment rating found by the medical experts. The language of Tenn. Code Ann. § 50-6-241(b) provides that an injured employee who does not return to her employment at a wage equal to or greater than the wage she was receiving at the time of injury can recover an award up to six times the medical impairment rating.

To determine which statutory cap applies, we must decide whether the plaintiff made a meaningful return to work. What constitutes a meaningful return to work is a highly fact specific analysis:

> If 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 and the injured employee may receive disability benefits up to six times the amount of the medical impairment. On the other hand, an employee will be limited to disability of two and one-half times the medical impairment if his refusal to return to offered work is unreasonable. The resolution of what is reasonable must rest upon the facts of each case and be determined thereby.

Newton v. Scott Health Care Ctr., 914 S.W.2d 884, 886 (Tenn. 1995).

_____In this case, the plaintiff testified that the FMC operator and case packer jobs were too strenuous for her to perform because they were not within her work restrictions. Yet, she described how the defendant repeatedly assigned her to jobs that fell outside her work restrictions and how the defendant did nothing to correct the assignments in the face of her complaints to supervisors. In fact, she testified that she was reinjured in October of 1995 when she was required to do overhead work. The plaintiff worked under these conditions until December 4, 1995, when she says that Ms. Tebow told her to go home if she could not perform the FMC operator job.

Indeed, there was evidence to the contrary by the plaintiff's supervisor and the Human Resource manager. Ms. Tebow testified that she never told the plaintiff to go home if she could not do her assigned job and that the plaintiff never complained about her assigned work. Mr. Gipson testified that none of the jobs require overhead work but that some do require reaching overhead.

Regarding the incident on December 4, 1995, the trial court stated that "[Ms. Tebow] denies that it happened, but in rebuttal Ms. Audrey Mayo testified that she was present and she heard the conversation and she basically affirms Ms. Moten's [sic] version of what happened on that occasion." As for the distinction between overhead work and reaching overhead made by Mr. Gipson, the trial court stated that it "believes that this is a distinction perhaps without a difference. Reaching above one's head and dealing with something that weighs any degree in the amounts that have been elicited in the proof is in essence working overhead."

After reviewing all of the relevant facts, we are satisfied that the trial court did not err by finding that the plaintiff did not make a meaningful return to work.

Therefore, the trial court's application of 3.5 times her medical impairment rating of 15 percent was proper. The record is clear that the plaintiff made good faith efforts to return to work by repeatedly trying to perform job duties which violated her medical restrictions.

Reliance on Medical Expert

The second issue presented by the defendant is whether the trial court erred in relying on the deposition testimony of Dr. Thomas D. Weems rather than the deposition testimony of Dr. James T. Galyon.

We note that the trial judge may, when there is a difference in opinion between the experts, accept the opinion of one expert over the opinions of the others. *Johnson v. Midwesco, Inc.,* 801 S.W.2d 804 (Tenn. 1990). In reconciling the difference between the two impairment ratings in this case, the trial court first noted that Dr. Galyon was trained as an orthopedic surgeon while Dr. Weems was trained as a neurosurgeon, and then stated the following:

> the difference can be attributed to Dr. Weems ascribing two percent for nerve root impairment, which is a neurological discipline, and four percent for the range of motion impairment, which would be combined orthopedic and neurologic disciplines. On the other hand, Dr. Galyon's rating the court believes is strictly limited to the herniated disc and the fusion which he performed.

Even so, where the medical testimony is presented by deposition, 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 (Tenn. 1994). After a careful review of the medical evidence, we find that the preponderance of the evidence supports the trial court's decision to rely on the impairment rating of 15 percent given by Dr. Weems.

Vocational Disability

The final issue raised by the defendant is whether the trial court erred in awarding the plaintiff a permanent partial disability rating for vocational disability purposes of 52.5 percent.

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 making determinations of vocational disability, the court shall consider 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)(1); *Roberson v. Loretto Casket Co.,* 722 S.W.2d 380, 384 (Tenn. 1986).

Our review of the lay and expert testimony, as well as the other pertinent factors stated above, reveals that the plaintiff is 37 years old; college educated for five years; and skilled as a pharmacy technician, chemical analyst, and supervisor. However, the plaintiff has been given an impairment rating of 15 percent by Dr. Weems and has been issued several permanent medical restrictions by Dr. Galyon. While she is an employable person, her ability to compete in the job market has been substantially impaired as a result of her injuries and permanent medical restrictions. The plaintiff's diminished earning capacity is evidenced by her subsequent work as a pharmacy technician for $7.00 per hour and then as a supervisor for $9.50 per hour.

This evidence persuades us that the trial judge was correct in finding Dr. Weems' testimony to be most compelling for purposes of the impairment rating and in finding the plaintiff to be a credible witness as to her diminished earning capacity. Therefore, we find the evidence does not preponderate against the trial court's finding that the plaintiff is vocationally disabled at a percentage of 52.5.

The cost of this appeal is taxed to the defendant.

_____
John K. Byers, Senior Judge

CONCUR:

_____
Janice Holder, Justice

_____
F. Lloyd Tatum, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

CORA MOTON,	)	SHELBY CIRCUIT
	)	NO. 74436-2 T.D.
Plaintiff/Appellee,	)	
	)	Hon. James S. Russell,
vs.	)	Judge
	)	
KELLOGG USA, INC.,	)	NO. 02S01-9803-CV-00023
	)	
Defendant/Appellant.	)	AFFIRMED

FILED

March 11, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

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 Appellant, and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 11th day of March, 1999.

PER CURIAM