IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(July 12, 1999 Session)

FILED

October 29, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

VIRGINIA MCCONNELL,	)	
	)	
Plaintiff/Appellee,	)	
	)	LAUDERDALE CHANCERY
v.	)	
	)	NO. 02S01-9810-CH-00098
TRAVELERS INSURANCE COMPANY,	)	
	)	HON. CHARLES MCPHERSON
Defendant/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 M. Holder
Senior Judge F. Lloyd Tatum
Special Judge C. Creed McGinley

MODIFIED AND AFFIRMED

F. LLOYD TATUM, SENIOR JUDGE

OPINION

This workers' compensation appeal was referred to the Special Workers' Compensation Appeals Panel of the Supreme Court pursuant to Tennessee Code Annotated § 50-6-225(e)(3) (Supp. 1998) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

This case arises from a back injury that plaintiff sustained on the job. The court found that plaintiff made a meaningful return to work and gave her the maximum award of six (6) times the anatomical rating (60 percent vocational disability to the body as a whole) pursuant to Tennessee Code Annotated § 50-6-241(b), rather than limiting the award to the two and one-half (2½) times cap found in § 50-6-241(a). The defendant appealed to this Court on three issues: (1) whether the evidence presented at trial preponderates against the trial court's finding that Anderson Hickey did not return the plaintiff to her employment at wage equal to or greater than the wage plaintiff was receiving at the time of the injury as required by Tennessee Code Annotated § 50-6-241(b); (2) whether the evidence preponderates against the trial court's finding that plaintiff sustained a 60 percent vocational impairment rating; and (3) whether the trial court erred in failing to make specific findings of fact and conclusions of law as required by Tennessee Code Annotated § 50-6-241(c) when awarding plaintiff a vocational impairment rating of six (6) times the anatomical rating?

We find that plaintiff's award is not limited by the two and one-half (2½) times cap found in Tennessee Code Annotated § 50-6-241(a); however, plaintiff's award is reduced to four (4) times the medical impairment rating pursuant to Tennessee Code Annotated § 50-6-241(b) and (c). We, therefore, modify and affirm the judgment of the trial court.

Our standard of review on appeal in workers' compensation cases is *de novo* on the record with a presumption of correctness of the trial court's findings, unless the evidence presented preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 1998); *Henson v. City of Lawrenceburg*, 851 S.W.2d 809, 812 (Tenn. 1993). Under this standard of review, we are required to conduct an in-depth examination of the trial court's findings of fact and conclusions of law to determine where the preponderance of the evidence lies. *See Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278, 282 (Tenn. 1991) (quoting

Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987)); *King v. Jones Truck Lines*, 814 S.W.2d 23, 25 (Tenn. 1991). When oral testimony is presented at trial, we must give particular deference to the trial court's assessment of such live testimony; however, when medical testimony is presented by deposition, this Court may draw its own conclusions about the weight, credibility, and significance of such testimony. *Seiber v. Greenbrier Indus., Inc.*, 906 S.W.2d 444, 446 (Tenn. 1995); *Townsend v. State*, 826 S.W.2d 434, 437 (Tenn. 1992); *Thomas*, 812 S.W.2d at 283. With these principles in mind, we turn to the facts of this case.

Plaintiff, Virginia McConnell, testified at trial on August 18, 1998, that she was a 48 year old high school graduate with an extensive work history of unskilled jobs, such as fast food service, factory assembly work, and assorted part-time positions. She began working for defendant's insured, Anderson Hickey Company, on July 24, 1987, in the brake press department but was later moved to the welding department. Plaintiff's duties, which she described as physically demanding, included picking empty cabinet drawers off of a conveyor belt, one or two at time, and placing them on a pallet. Plaintiff estimated the weight of the cabinet drawers as twenty pounds each. When the pallet was full of drawers, plaintiff pushed the pallet down her line to a different line.

On April 18, 1997, plaintiff felt pain and a pulling sensation in her back after lifting a cabinet drawer off of the line and twisting to place it on a pallet. Plaintiff was treated conservatively by Dr. Robbins, a company doctor, and was ultimately sent to Dr. D.J. Canale, who performed surgery on her back to remove a ruptured disk. On September 8, 1997, plaintiff returned to work in the lightest position available at Anderson Hickey, that of folding and stacking eight inch tall box tops and bottoms used in shipping filing cabinets. She estimated that each box weighed only a few pounds, but she was also required to drag approximately twenty boxes of liners, weighing fifty to seventy pounds each, across thirty or forty feet of concrete flooring to her work table for use in the assembly process. Plaintiff estimated that she made a thousand box tops or bottoms per day. Plaintiff testified that she had difficulty standing up, twisting, turning, bending, and stooping after her surgery. Her back, legs, and hip were constantly hurting, and she told her supervisor, Johnny Jones, that she would have to quit. Plaintiff's last day at Anderson Hickey was April 23, 1998.

She subsequently obtained a job as a part-time bank teller, which she described as a much easier job physically, but she still has pain in her back, hips and knee. She has difficulty lifting twenty pounds and cannot twist or bend without difficulty.

Plaintiff's supervisor for the four months before she left Anderson Hickey, Johnny Jones, testified on behalf of the defendant. He stated that plaintiff's job during that time was to build the cardboard pads that fit on the tops and bottoms of filing cabinets. Jones stated that each pad was six inches long and weighed approximately seven or eight ounces. He remembered plaintiff complaining about having problems standing. He contradicted plaintiff's testimony that she was working on the portion of the assembly line that involved dragging fifty to seventy-five pounds of liners to her work station. Jones recalled the conversation in which plaintiff told him she was quitting, but the reason she gave Jones was that her doctor instructed her to do so. He testified that he told plaintiff to go to Human Resources, but she never did so before quitting.

Dr. D. J. Canale, plaintiff's treating neurosurgeon, testified by deposition that he removed a large herniated disk from the L-3 region of plaintiff's back in June of 1997. On September 4, 1997, Dr. Canale felt plaintiff could return to work with a twenty pound lifting restriction for six weeks. He rated her permanent physical impairment at 10 percent to the body as a whole, according to the fourth edition of the AMA Guides. He restricted her from heavy lifting over twenty pounds. During visits in October, November, and December, plaintiff complained of pain in her lower back, right side of the back, both knees, and left hip. She was working regularly but complained that standing all day aggravated her symptoms. A small herniated disk was discovered in the L-2-3 region of plaintiff's spine, but Dr. Canale did not feel it was connected to the work injury or that plaintiff needed additional surgery to remove it. As to plaintiff's return to her job at Anderson Hickey, Dr. Canale stated:

> [H]er husband indicated that they are considering changing jobs to one such as possibly a bank teller where she doesn't have to stand all day. I explained to the patient that she does have some other degenerative changes in the lumbar spine and that this may be in part responsible for her persistent symptoms.
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> ***
>
> It may be necessary for her to change jobs because she has to stand all day and do a lot of turning, making boxes, but that's going to be up to her husband.
>
> ***

> I don't think Mrs. McConnell really wanted to go back to that job. She and her husband -- in fact, they both expressed to me that they felt she would be better off in a job such as a bank teller, and I encouraged them to seek that job if she could.

Dr. Joseph C. Boals, III, orthopedic surgeon, evaluated plaintiff April 20, 1998. Dr. Boals reviewed plaintiff's MRI and medical records from Dr. Canale's office and conducted a physical examination in addition to taking x-rays. His diagnosis was that plaintiff had residuals from the disk surgery, related to the incident at work, along with degenerative changes at L 2-3 and L 4-5. Using the AMA Guides, Dr. Boals rated plaintiff's permanent partial disability at 15 percent to the body as a whole, 10 percent due to residuals from the disk surgery and 5 percent due to the loss of the left knee jerk response. He testified that plaintiff would be rated as having a 20 percent impairment under the *Orthopedic Manual for Evaluating Impairment.* Dr. Boals would also restrict plaintiff from heavy lifting, twisting, prolonged standing, walking, stooping, climbing, and crawling.

I.

Defendant argues that the trial court erred in finding that Anderson Hickey did not return plaintiff to employment at a wage equal to or greater than her pre-injury wage, and, thus, the court erred in not capping plaintiff's award at two and one-half (2 ½) times the anatomical impairment rating. After a careful review of the record, we find that the trial court correctly found that the plaintiff's award was not limited by the two and one half (2 ½) times cap.

The two and one-half (2½) times cap only applies if the employee has a meaningful return to work after an injury. *See Newton v. Scott Health Care Ctr.*, 914 S.W.2d 884, 886 (Tenn. 1995). The pertinent portion of Tennessee Code Annotated § 50-6-241(a)(1) imposing the cap reads as follows:

> For injuries arising on or after August 1, 1992, in cases where an injured employee is eligible to receive any permanent partial disability benefits, pursuant to § 50-6-207(3)(A)(i) and (F), and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is two and one-half (2 ½) times the medical impairment rating determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment (American Medical Association), the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community. In making determinations, 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.

When the employee is not returned to employment at the same or greater wage by the employer, § 50-6-241(b) allows an award up to six (6) times the impairment rating as follows:

> [T]he maximum permanent partial disability award that the employee may receive is six (6) times the medical impairment rating determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment (American Medical Association), the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community. In making such determinations[,] 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.

The Tennessee Supreme Court adopted the decision of the Special Workers' Compensation Appeals Panel which construed the words "and the pre-injury employer returns the employee to employment" in Tennessee Code Annotated § 50-6-241(a)(1) to mean that the employer has made a reasonable attempt to return the employee to work, and the employee has made a reasonable attempt to return to work. *Newton*, 914 S.W.2d at 886. Senior Judge Byers, writing for the Panel, explained:

> 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.

Id. In other words, a return to work in a position that the employee is unable to perform because of his or her injuries is not a meaningful return to work, and the employee may receive benefits for up to six (6) times the medical impairment rating rather than being limited by the two and one-half (2 ½) times cap. *Id.; see also Brown v. Campbell County Bd. of Educ.*, 915 S.W.2d 407, 419 & n12 (Tenn. 1995).

In the case before us, we agree with the trial court that the plaintiff's return to work was not meaningful. Plaintiff testified that she returned to work after her surgery in the lightest job she knew of at the plant, which was folding and stacking end cap boxes for

filing cabinets. Although heavy lifting was not involved, plaintiff was required to stand, twist, and pull, which caused her back to hurt. Her supervisor, Mr. Jones, also testified that plaintiff complained of back pain from standing. Plaintiff made the same complaints to Dr. Canale throughout the fall of 1997. Dr. Canale felt that plaintiff could do the lighter job but also testified that he encouraged plaintiff to take a less physically demanding job if she could get it. In weighing the testimony, the trial court concluded:

> And the court has to find that Mrs. McConnell did, in the court's opinion, make a reasonable stab at returning to work. She worked there for 7 months. She, by her own supervisor's statement, she did complain on a regular basis that her back was hurting, that the standing was hurting her back. And, I think 7 months is a reasonable time to try something. So, the court finds that there is evidence that the plaintiff did make a reasonable attempt to return to work.

In drawing its conclusions, the trial court heard and assessed the live testimony of plaintiff and her supervisor, and we must give considerable deference to the court's findings related to this testimony. The evidence does not preponderate against the findings of the trial court that plaintiff's return to work was not meaningful, and the two and one-half (2½) times cap is inapplicable.

II.

Defendant further argues that the record establishes that plaintiff's vocational impairment was not as significant as the trial court found and should be reduced. In addition, defendant alleges that the trial court failed to make specific findings of fact to justify the maximum award of six (6) times the anatomical rating as required by Tennessee Code Annotated § 50-6-241(c), which states:

> The multipliers established by subsections (a) and (b) are intended to be maximum limits. If the court awards a multiplier of five (5) or greater, then the court shall make specific findings of fact detailing the reasons for awarding the maximum impairment. In making such determinations, 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.

In awarding plaintiff the maximum benefits of six (6) times the medical impairment rating, the trial court calculated the award using the medical impairment rating in evidence given by plaintiff's treating physician, Dr. Canale. The court found:

> The six caps apply. Now, where the court -- Dr. Canale, the treating physician -- he treated this lady for some months. And his explanation of how he arrived at the 10

> percent rating is, the court finds, a very reasonable explanation. Dr. Boals saw her one time, total, including the reviewing of the -- all of the reports and everything, for less than an hour, he said, or not more than an hour, I believe he said. And so, the court must give greater weight to Dr. Canale's testimony as to the disability rating. And, the court will accept Dr. Canale's testimony and will make an award of 60 percent to the body as a whole.

While we agree with the trial court that the medical evidence supports a finding of 10 percent anatomical impairment, the record reveals that the trial court did not make specific detailed findings of fact as required by Tennessee Code Annotated § 50-6-241(c) in order to give an award of five (5) or more times the medical rating. *See generally Pitmon v. Reliance Ins. Co.*, No. 01S01-9801-GS-00011, 1999 WL 86975, at *1-2 (Tenn. Feb. 22, 1999) (award of five (5) times rating modified to four (4) times when required findings of fact absent from trial record). The trial court merely discussed the doctors' testimony in deciding which anatomical rating to use without addressing the other factors specifically mentioned in the statute.

However, even if the trial court did not make the required findings, under a *de novo* review, this Panel can modify a judgment to give an appropriate award as long as the record supports the requirements of the statute. *See Duncan v. Hartford Accident & Indem. Co.*, No. 03S01-9502-CV-00022, 1995 WL 605557, at *3 (Tenn. Oct. 4, 1995). The record reveals that plaintiff has a high school education and job experience mainly in unskilled positions that appear to require a significant amount of standing. She testified at trial that she was almost illiterate and was not used to working on a computer when she began training for a part-time teller position. Even though the teller position is not as physically demanding as her assembly work at Anderson Hickey, plaintiff testified that she continues to have some problems with her back, hips, and knee, as well as difficultly bending. However, Dr. Canale testified that her persistent symptoms may be related to degenerative changes in her back rather than to the work related injury and that there was no medical reason why plaintiff could not do light assembly work.

In reviewing the record, we find that the evidence preponderates against the findings of the trial court that the maximum award of 60 percent is appropriate in this case. Therefore, we modify the award to four (4) times the anatomical rating, or 40 percent to the body as a whole. This modification is in conformity with the preponderance of the evidence.

III.

As modified, the judgment of the trial court is affirmed. The parties will each share one-half the costs of this appeal.

F. LLOYD TATUM, SENIOR JUDGE

CONCUR:

JANICE M. HOLDER, JUSTICE

C. CREED MCGINLEY, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

VIRGINIA MCCONNELL,	)	LAUDERDALE CHANCERY
	)	NO. 10,816
Plaintiff/Appellee,	)	
	)	Hon. Charles McPherson,
vs.	)	Chancellor
	)	
TRAVELERS INSURANCE COMPANY,	)	NO. 02S01-9810-CH-00098
	)	
Defendant/Appellant.	)	MODIFIED AND 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 assessed one-half to the parties, for which execution may issue if necessary.

IT IS SO ORDERED this 29th day of October, 1999.

PER CURIAM