IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
January 13, 2014 Session

SHEILA CAMERON v. MEMORIAL HEALTH CARE SYSTEM, INC. ET AL.

Appeal from the Circuit Court for Bradley County
No. V-12-078 Lawrence H. Puckett, Judge

No. E2013-01225-WC-R3-WC-MAILED-MAY 8, 2014/FILED-JUNE 10, 2014

A registered nurse sustained a compensable injury to her neck. The trial court found that she was permanently and totally disabled as a result of the injury. Her employer has appealed, contending that the trial court erred by failing to cap the award at one-and-one-half times the impairment rating pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A). In the alternative, the employer asserts that the trial court erred by awarding permanent total disability benefits. The appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law in accordance with Tennessee Supreme Court Rule 51. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2013) Appeal as of Right; Judgment of the Circuit Court Affirmed

BEN H. CANTRELL, SR. J., delivered the opinion of the Court, in which SHARON G. LEE, J. and JON KERRY BLACKWOOD, SR. J., joined.

Neil A. Brunetz and Scott E. Simmons, Chattanooga, Tennessee, for the appellants, Memorial Health Care System, Inc. and Indemnity Insurance Company of North America.

R. Jerome Shepherd, Cleveland, Tennessee, for the appellee, Sheila Cameron.

OPINION

Factual and Procedural Background

Sheila Cameron ("Employee") was hired by Memorial Health Care System, Inc. ("Employer") as a hospice nurse in March 2008. She was injured on February 25, 2011 when a psychotic patient grabbed her by her jacket and pulled her, holding her head to a bed rail until security officers were able to release her. She sustained an injury to her cervical spine as a result of the incident. Employer accepted her injury as compensable. She received conservative medical care. After she reached maximum medical improvement, Employer made a written offer to return her to work. She did not return to work for Employer, or seek other employment. The parties were unable to resolve the claim at a benefit review conference, and Employee filed this action in the Circuit Court for Bradley County.

Employee was fifty-three years old on the date of trial. She held an associate's degree in nursing from Cleveland State Community College. She had been licensed as a Registered Nurse since 1987. Prior to being hired by Employer, she had worked as a pediatric intensive care nurse, an adult intensive care nurse, a charge nurse preceptor, clinical manager and hospice nurse for several hospitals and health care providers. She testified that she had no physical limitations prior to the February 25, 2011 injury. She had been able to lift as much as forty pounds without assistance. Her symptoms at the time of the trial included aching in both arms, pain in the back of her head and pain on the right side of her neck.

Employee had been referred to Dr. Steven Dreskin, a pain management specialist, by Dr. Scott Hodges and remained under Dr. Dreskin's care when the trial took place. She regularly took three medications to treat the effects of her injury. She took 750 milligrams of Robaxin, a muscle relaxer. She testified that she had to lie down after taking this medication and that the effects lasted six to eight hours. She also took neurontin, a medication for nerve pain, twice a day. This medication caused drowsiness and "clouded" her judgment. In addition, she took Oxycodone, a narcotic pain reliever, six times per day. Employee believed that these medications made it unsafe for her to drive.

Employee testified that she could not return to any of her previous jobs and knew of no job that she was able to do in her present condition. She acknowledged

that she received a letter from Employer in January 2012 offering her a position as a registered nurse in the patient intake center. The letter stated, "The rate of pay is the same as your prior position and is $26.00/hour." Employee testified that her pre-injury rate of pay was $28.93 per hour. The letter also outlined physical requirements of the proposed job, with certain handwritten modifications made by Dr. Hodges. These included a twenty-pound lifting restriction, an increase over the ten-pound limit he had previously set. Employee testified that she could not fulfill the physical requirements of the job, as described in the letter. She said she was unable to lift twenty pounds, stand or walk for up to two-thirds of a work day, walk for one-third to two-thirds of a workday or sit for two-thirds of a work day. She also felt that she would be unable to get to work because she could not drive due to the effects of her medications.

Employee turned the January 2012 letter over to her attorney. She did not respond to the letter, or make any attempt to contact Employer about the ambiguity concerning the rate of pay or the flexibility of the stated physical requirements. She made no attempt to contact any other potential employers. She stated that she knew of no sedentary jobs in the nursing profession. She described the numerous effects of her injuries. She was only able to sleep a few hours per night, and it was difficult for her to arise from bed in the morning. She no longer cleaned house and did not cook as often as before. Other chores, such as laundry, took much longer than before to complete.

Anthony Cameron, Employee's husband, testified that she was in "great health" before the work injury. He confirmed that she slept less than before the injury. She did not cook as much because it was difficult for her to pick up pots and pans. She was unable to use a vacuum cleaner. Mr. Cameron said that her medications improved her condition somewhat, but not to her pre-injury state.

Patricia Smith testified that she was Employer's workers' compensation specialist. She authored the January 2012 job offer letter. She agreed that the $26.00 per hour pay rate referred to in the letter was incorrect, explaining that she simply made an error while typing the letter. The intent of the letter was, as stated in the letter, to offer a job at the same rate of pay Employee received before the injury. The job did not require patient contact, and its primary function was to assist various units of the hospital with placement of patients in appropriate units. She considered the job to be sedentary and said that there were other sedentary jobs available to registered

nurses, including clinical recruiters and case managers. Ms. Smith testified that the hospital would have attempted to accommodate any restrictions imposed by Dr. Hodges. She did not know if Employee's medications would interfere with her ability to perform the job, stating she would have to rely on Employee's doctor for that information. She did not inquire with any of Employee's doctors about the effects of her medications.

Dr. Hodges testified by deposition. He first saw Employee on March 23, 2011. His initial diagnosis was cervical spondylosis. Employee had pre-existing degenerative disc disease. Dr. Hodges testified that an MRI showed a "rather remarkable, kind of a combination of some disk osteophyte complexes that caused rather marked spinal stenosis, basically C3 to C7." Employee had disc herniations at multiple levels with radiculopathy. Her condition was caused by both her pre-existing condition and her work injury. Dr. Hodges considered it unlikely that surgery would improve her symptoms, so he provided conservative treatment. He placed her at maximum medical recovery on December 1, 2011. He assigned 25% permanent anatomical impairment to the body as a whole, based on the Sixth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment.

Dr. Hodges initially restricted Employee from any overhead lifting, floor to shoulder lifting of no more than ten pounds, pushing or pulling more than twenty pounds, lifting and carrying for more than three hours and standing or walking more than six hours during a workday. He modified the floor to shoulder lifting restriction to twenty pounds when he received the proposed post-injury job description from Employer. He testified that he had not ordered a functional capacities evaluation in this case but based his restrictions on his clinical judgment and experience.

The trial court issued its decision from the bench, finding that Employee did not have a meaningful return to work and her award was therefore not subject to the one-and-one-half times impairment cap set out in Tennessee Code Annotated section 50-6-241(d)(1)(A). The trial court further found that she was permanently and totally disabled as a result of her work injury. Judgment was entered in accordance with those findings, and Employer has appealed.

Analysis

We are statutorily required to review the trial court's factual findings "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2). Following this standard, we are further required "to examine, in depth, a trial court's factual findings and conclusions." Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)). We accord considerable deference to the trial court's findings of fact based upon its assessment of the testimony of witnesses it heard at trial, although not so with respect to depositions and other documentary evidence. Padilla v. Twin City Fire Ins. Co., 324 S.W.3d 507, 511 (Tenn. 2010); Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). We review conclusions of law de novo with no presumption of correctness. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). Although workers' compensation law must be liberally construed in favor of an injured employee, the employee must prove all elements of his or her case by a preponderance of the evidence. Crew, 259 S.W.3d at 664; Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992).

Employer's initial argument is that the trial court erred by finding that Employee did not have a meaningful return to work. It argues in the alternative that the evidence preponderates against the finding of permanent total disability. We address the latter issue first, in accordance with the framework provided by the Supreme Court in Davis v. Reagan, 951 S.W.2d 766 (Tenn. 1997). In that decision, the Court held that a trial court must initially determine if the injury at issue is limited to a scheduled member. Id. at 769. If not, as in this case, the next question to be addressed is:

> Whether the employee is totally incapacitated from working at an occupation that generates an income?
>
> If [that] question . . . is answered affirmatively, the employee is eligible for total disability benefits. If, however, the employee is able to work at an occupation that generates an income, the trial court proceeds to § 50–6–241. If certain conditions are satisfied under § 50–6–241, the trial court may then proceed to § 50–6–242.

* * * *

> Both the procedures established by the Workers' Compensation Act and the plain and ordinary language of Tenn. Code Ann. § 50–6–241 convey a specific legislative intent to limit § 50–6–241's application to awards of permanent partial disability. We, therefore, hold that § 50–6–241 is inapplicable to permanent total disability[.]

Id. The issue presented in Davis is not identical to the issue here, but Davis makes clear that when permanent total disability is alleged, that issue must be determined prior to considering the application of section 50-6-241.

Employer contends that the evidence does not support the trial court's finding of permanent total disability. It points out that Employee did not present expert testimony from a vocational evaluator to support her claim on this issue. Employer also notes that Employee is highly trained and has many years of experience in a skilled profession. Dr. Hodges testified that she was capable of sedentary work, even permitting some limited lifting, pushing and pulling. Ms. Smith also identified several specific nursing positions that were sedentary.

Contrary to Ms. Smith, Employee testified that she did not know of any sedentary positions for registered nurses. However, we must observe that, after being released by Dr. Hodges, she made no attempt to determine if such jobs were available either with Employer or elsewhere. Employee also testified that she considered herself unable to work at any job. Such testimony is admissible and can be considered by the trial court. See Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975) (finding an employee's assessment of his or her own physical condition to be competent testimony, not to be disregarded); Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn. 1972) (same).

It is undisputed that Employee remains under active pain management treatment. She takes three medications to cope with the symptoms caused by her injury. One of those medications, Oxycodone, is a schedule II narcotic. Tenn. Code Ann. § 39-17-408(b)(1)(M). Employee testified as to the effects the medications have on her, including drowsiness, lethargy and poor judgment. She testified that it was unsafe for her to drive while under the influence of these medications. Her experience as a registered nurse gives some additional weight to her testimony on the

subject, and the trial court accredited it. Dr. Hodges did not provide any testimony as to the effects of the medications. Dr. Dreskin, who prescribed the medication, did not testify. Ms. Smith, Employer's workers' compensation specialist, did not know if the medication regimen would interfere with Employee's ability to perform the job she was offered or any other job. She stated that she would have to rely on the judgment of the treating physicians but had not contacted either Dr. Hodges or Dr. Dreskin concerning the matter.

The trial court found that the work injury resulted in very significant physical limitations for Employee, without regard to the effect of her medications. It further found that those medications affected her ability to make "the kind of decisions" that any nursing job would require. Those findings were the basis of its conclusion that Employee is permanently and totally disabled. Both findings are consistent with the evidence, and we are unable to conclude that the evidence preponderates against them. In addition, we conclude that the effects of Employee's medications would prevent her from driving a car and from performing any tasks for more than a short period of time. There is no evidence in this record that any gainful employment is available to a person under such circumstances. Accordingly, based on our ruling that Employee is totally disabled, we need not decide if Employee had a meaningful return to work.

Conclusion

The judgment is affirmed. Costs are taxed to Memorial Health Care System, Inc., Indemnity Insurance Company of North America and their surety, for which execution may issue if necessary.

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Ben H. Cantrell, Senior Judge

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JUDGMENT

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 appeals 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 of this appeal are taxed to Memorial Health Care System, Inc., Indemnity Insurance Company of North America and their surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM