IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 23, 2010 Session

CAROLYN BERRY v. ARMSTRONG WOOD PRODUCTS

Appeal from the Chancery Court for Madison County
No. 63988 James F. Butler, Chancellor

No. W2009-02070-WC-R3-WC - Mailed January 11, 2011; Filed February 16, 2011

Employee filed a complaint for workers' compensation benefits against her former employer alleging that her work for her former employer advanced pre-existing arthritis in both knees and required her to have joint replacement surgery on her right knee. The employer denied her claim, contending that her condition was unrelated to her employment. The trial court found that she had sustained a compensable aggravation of her arthritis and that she had not had a meaningful return to work. It awarded 78% permanent partial disability ("PPD") to the body as a whole. The employer appealed,[1] contending that the trial court erred by finding the award was not subject to the one and one-half times impairment cap found in Tennessee Code Annotated section 50-6-241(d)(1)(A). We agree with employer that employee is entitled to an award of one and one-half times her impairment rating and decrease the award to 39% PPD to the body as a whole. We affirm the judgment as modified.

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

TONY A. CHILDRESS, SP. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J., and DONALD P. HARRIS, SR. J., joined.

William F. Kendall, III, Jackson, Tennessee, for the appellant, Armstrong Wood Products.

James R. Renis, Jackson, Tennessee, for the appellee, Carolyn Berry.

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[1] Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation 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.

MEMORANDUM OPINION

Factual and Procedural Background

Carolyn Berry ("Employee") worked for Armstrong Wood Products ("Employer") from May 1986 until she was terminated for absenteeism in April 2005. Employer is a manufacturer of hardwood flooring, and Employee alternated between working as a "feeder," a "nester," and an "assembler" during her tenure with Employer. All three positions required standing, some walking, stepping up and down, and generally constant activity. At the time of Employee's termination, she was working as a nester, which involved taking pieces of wood from a moving table and sorting them into boxes. The wood came onto the table by a conveyor, which was prone to jamming. When the conveyor jammed, it was necessary for Employee to climb three or four steps to reach the problem area and free the jam.

In 1999, Employee sought medical treatment for her knees. Dr. Cobb, one of Employee's treating physicians, diagnosed the cartilage in Employee's right knee as having deteriorated to the point that it was described as "bone on bone." Dr. Cobb advised Employee that she would eventually require a total knee replacement. Employee continued to receive treatment for both knees thereafter, and this treatment included anti-inflammatory medication, pain medication, aspiration of fluid buildup, and injections of SynVisc.

Employer terminated Employee in 2005 for excessive absenteeism. Employee received her first written warning concerning her absenteeism on February 9, 2005, after missing work on January 5, 6, and 7, 2005. In early March 2005, Employer suspended Employee without pay for three days – March 4, 7, and 8, 2005 – for allegedly making a derogatory remark to her supervisor. Employer issued Employee a second written warning concerning her absenteeism on March 5, 2005.[2] Employee received her third and final written warning concerning absenteeism for absences on March 21, 2005, through March 25, 2005. Employee filed a complaint against Employer on June 20, 2006, seeking workers compensation benefits for injuries to her knees.

A short time after being terminated by Employer, Employee obtained employment at the Winfrey Center, a nursing home. Employee worked during the third shift, and her job duties included cleaning and assisting residents going to the bathroom as needed. When she worked overtime, Employee also assisted residents into a van to be taken to medical appointments, and she occasionally assisted in serving meals. Employee could perform some of her job responsibilities while remaining sedentary.

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[2] The record at one point indicates that Employer may have issued the second 6% letter on March 3, 2005. This inconsistency is immaterial to our conclusion.

During this time, Employee continued receiving medical treatment for her knees. On August 22, 2006, Dr. John Masterson, an orthopaedic surgeon, performed a right knee replacement procedure on Employee, and Employee was able to return to work at the Winfrey Center. Employee discussed having a left knee replacement procedure with her physicians.

The trial court held a trial on Employee's complaint against Employer on June 22, 2009. The medical evidence was presented by deposition and taken from medical records. Employee relied on the deposition of Dr. Bruce Randolph, an occupational medicine physician who had examined her on January 22, 2007, and on November 24, 2008. Employer relied on the deposition of Dr. Mark Harriman, an orthopaedic surgeon who examined Employee on February 25, 2009. Both doctors reviewed Employee's prior medical records and conducted a physical examination of Employee.

Dr. Randolph testified that "although [Employee's] osteoarthritis was not completely caused by prolonged standing and walking and work, it is my opinion that it was aggravated by working on the job for twenty years, which involved prolonged standing and walking." Asked to explain that conclusion, he stated: "It's my opinion that twenty years her job [sic], which involved over the course of twenty years standing, walking, even in her history squatting and climbing stairs aggravated to the progression of the disease. Not just the symptoms, but actually the progression . . . ." Dr. Randolph assigned Employee a permanent impairment of 20% to the body as a whole for the right knee injury and knee replacement surgery, and an 8% permanent impairment to the body as a whole for the left knee injury, which combined to 26% anatomical impairment to the body as a whole under the *American Medical Association Guides* ("*AMA Guides*"). Dr. Randolph recommended that Employee avoid prolonged standing, walking, squatting, and climbing stairs. On cross-examination, Dr. Randolph stated that the repetitive performance of activities associated with Employee's job at the Winfrey Center could worsen the condition of her knees.

Dr. Harriman testified that Employee had mild to moderate arthritis throughout her left knee. He considered the right knee replacement surgery to be successful. He stated that "based on the records, she has had osteoarthritis for probably 27 years or more." Dr. Harriman also concluded that Employee had "psoriatic arthritis at least for several years but we don't know how long." Dr. Harriman opined: "These are two progressive diseases and I don't personally believe that anything she did at work has caused – has changed the natural history of these two progressive diseases." In support of his opinion, Dr. Harriman cited a 1991 study from the *Journal of Rheumatology*, which he referred to as the "Framingham study." According to Dr. Harriman, the Framingham study was "a large study to try to help those of us in the medical field decide is there a relationship between work or certain type [sic] of work activities and the development of osteoarthritis." Dr. Harriman also referred

to a second study which was published in the *Annals of Internal Medicine* in 2000. He testified that these studies found that

> the one activity that seemed to consistently cause a problem in knees in particular was repetitive squatting and stooping associated with heavy lifting. . . . [B]ut most of the other activities at work were not found to have a significant relationship to the development or significant aggravation of osteoarthritis including weight bearing.

In reaching his conclusion, Dr. Harriman noted that Employee said that her work for Employer did not require heavy lifting and only occasional stooping and squatting. On cross-examination, Dr. Harriman testified that physical activity aggravates the symptoms of arthritis but does not change the natural history of the disease. Dr. Harriman was not asked to, and he did not, express an opinion concerning impairment.

At trial, Employee testified that she was fifty-six years old and a high school graduate. Prior to being hired by Employer, Employee had worked at textile factories and briefly at a florist business. Employee continued to be employed at the Winfrey Center at the time of the trial. Employee testified that, because she worked the third shift at the Winfrey Center, her current job was primarily sedentary. Employee also testified that she often worked overtime, and during those overtime periods, her work required physical exertion. Employee, who had earned more than $12.00 per hour when working for Employer, was earning slightly more than $8.00 per hour from the Winfrey Center.

Employee testified that she told her supervisor at Employer, Greg Vires, that she was having pain in her knees. She said that Mr. Vires told her "You are going to have to work." She also testified that Mr. Vires told her she was going to be fired for absenteeism, but her testimony as to when that conversation occurred was inconsistent. At one point, Employee said that Mr. Vires told her in 2000 she would be fired for absenteeism, and at a later time, she stated that the conversation occurred shortly before her termination in 2005. Employee testified that she missed time from her job in January 2005 as a result of knee problems. Although Employee conceded that she had received a warning in March 2005 over a remark made to a supervisor, she denied making the remark. Employee did not recall whether or not she took vacation days after receiving her first warning for absenteeism. Employee agreed, however, that she had applied for her job at the Winfrey Center before being terminated by Employer.

The trial court found that Employee had sustained compensable injuries to both knees as a result of her work for Employer, crediting "the testimony of [Employee] and Dr. Randolph, who was unwavering in his opinion on causation of [Employee's] knee injuries."

The trial court further found that Employee's award of benefits was not limited to one and one-half times the impairment by Tennessee Code Annotated section 50-6-241(d) (2008), and it awarded 78% permanent partial disability ("PPD") to the body as a whole.

Employer has appealed, contending that the trial court erred by considering the testimony of Dr. Randolph, by giving greater weight to the opinion of Dr. Randolph over that of Dr. Harriman, by failing to find that Employee's subsequent employment at the Winfrey Center aggravated her pre-existing arthritic condition, and by finding the award was not subject to the one and one-half times impairment cap.

Standard of Review

The standard of review of issues of fact is "de novo upon the record of the trial court, accompanied by a presumption of correctness of the finding, unless the preponderance of evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given to the trial court when the trial judge had the opportunity to observe the witnesses' demeanor and to hear in-court testimony. *Madden v. Holland Grp. of Tenn., Inc*, 277 S.W.3d 896, 900 (Tenn. 2009). "When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues." *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

(1) *Dr. Randolph s deposition*.

Employer contends that Dr. Randolph's deposition was not placed into evidence and that the trial court erred in relying on its contents. Dr. Randolph's deposition was submitted to the court prior to the trial. Employee moved to have the deposition entered into evidence prior to opening statements. After Employee moved to have the deposition entered into evidence, Employer's counsel stated that he would "like to renew my objection to his deposition." The trial court then inquired as to the objection, and Employer's counsel pointed out numerous objections he had made during the deposition of Dr. Randolph. The trial court ruled on these objections.

It appears that the deposition may not have been formally marked as an exhibit. After the clerk of the trial court filed the appellate record, however, Employee filed a motion in the trial court wherein she requested that the appellate record be corrected to include Dr. Randolph's deposition. The trial court approved an agreed order, which states in part: "[T]he Appellate Record is amended to include the Deposition of Dr. Bruce Randolph because Dr. Bruce Randolph's deposition is a paper related to discovery and was offered into evidence by the Plaintiff, and it is therefore properly includable as part of the record." Employee subsequently filed a supplemental record containing Dr. Randolph's deposition.

As evidenced by the agreed order, Employer agreed that Dr. Randolph's deposition was offered into evidence by the Plaintiff. In light of this agreed order, we conclude that Dr. Randolph's deposition was part of the trial record and that the trial court did not err in relying on it in reaching its decision.

(2) *Medical testimony*.

Employer argues that the trial court erred by giving greater weight to the opinion of Dr. Randolph than that of Dr. Harriman. In support of this argument, Employer points out that Dr. Harriman is an orthopaedic surgeon while Dr. Randolph is an occupational medicine specialist; that Dr. Randolph's opinion was based on a more limited set of medical records than that of Dr. Harriman; and that Dr. Harriman based his opinion on published studies while Dr. Randolph did not.

In response, Employee contends that the trial court properly gave greater weight to Dr. Randolph because his opinion on causation was based upon her description of her job duties. In his testimony, Dr. Randolph explained that because of the near-total loss of cartilage in Employee's knees, documented in 1999, Employee's work activities of standing, walking, squatting, and climbing stairs would necessarily cause the bony surfaces of the joint to rub against each other. Employee's work activities thus changed the anatomy of the joint and advanced Employee's arthritic condition. Dr. Randolph contrasted Employee's work activities at Employer with sedentary work and observed that a person performing sedentary work would experience a less severe degree of degeneration because of the absence of weight bearing and because the bony surfaces would rub against each other less often.

We find Dr. Randolph's testimony plausible, and when viewed with Employee's own testimony concerning her activities, this evidence satisfies the requirement that "an award may properly be based upon medical testimony to the effect that a given incident 'could be' the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury." *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997).

(3) *Aggravation by subsequent employment*.

Employer contends that the trial court erred by failing to find that Employee's job activities at the Winfrey Center advanced her underlying arthritic condition after she no longer worked for Employer. This contention is based on Dr. Randolph's response to a hypothetical question that characterized Employee's activities at the Winfrey Center as repetitive. Employee's own testimony, and the testimony of her supervisor at the Winfrey Center, however, are not consistent with that description. Further, Dr. Randolph also opined that non-repetitive activities would not have advanced her arthritis. Because the assumptions outlined in the hypothetical were not borne out by the evidence at trial, Dr. Randolph's response to the question does not provide a basis for the conclusion urged by Employer. Dr. Harriman's testimony does not aid Employer on this issue, as he opined that Employee's condition would have progressed without regard to the activities present in this case.

(4) *Impairment Rating*.

Employer argues that Dr. Randolph's impairment rating was not correct. Employer, however, presented no evidence at trial concerning impairment. Thus, Dr. Randolph's opinion is the only evidence in the record on the subject. Dr. Randolph's testimony is sufficient to support the trial court's finding of 26% impairment.

(5) *Application of one and one-half times impairment cap*.

Employer also asserts that the trial court erred by failing to cap the award pursuant to Tennessee Code Annotated section 50-6-241(d) at one and one-half times the impairment rating. In support of this assertion, Employer points out that Employee was terminated for absenteeism in April 2005, prior to the date on which she made her claim for workers' compensation benefits. In support of its contention, Employer relies on the testimony of its Human Resources Manager, Ms. Saiauski, concerning the circumstances of the Employee's termination.

Employee responds by pointing to her own testimony that some of the absences for which she was terminated were related to her knee problems. The medical records of the Jackson Clinic, which are contained in the record, indicate that Employee was at a doctor's appointment on one of the dates at issue. The evidence also indicates, however, that Employee did not provide Employer with documentation that she had been to the doctor on that date.

Employee also argues that the Employer's reason for her termination was pretextual. She states that she had settled a workers compensation claim with Employer for a broken arm

approximately three months before she received her first absenteeism warning. The record, however, indicates that she had received warnings for absenteeism and other reasons in the years preceding 2005.

The trial court stated: "Plaintiff is no longer working for Defendant, because she can no longer do factory-type work. Even if she had been offered re-employment, she could not have returned, which was clear from her testimony and the medical proof. Plaintiff's award is therefore not capped under the circumstances." Employee testified that she could not return to her previous job, and there is no evidence whether or not Employer would have been able to otherwise accommodate her after her knee surgery.

Employer argues that the trial court erred in not limiting the award to one and one-half times the impairment rating because an employer is not obligated to offer employment to an injured employee who has been terminated for misconduct. Pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A), an employee's workers' compensation benefits are capped at one and one-half times the employee's medical impairment rating, as determined by statute, if "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." On the other hand, Tennessee Code Annotated section 50-6-241(d)(1)(A) does not apply if the pre-injury employer does not provide the employee with a meaningful return to work. See Tenn. Code Ann. § 50-6-241(d)(B)(i). The Tennessee Supreme Court has held, however, that an employer is not required to offer to return the injured employee to work if the employee was "previously fired for violating workplace rules." *Carter v. First Source Furniture Grp.*, 92 S.W.3d 367, 371 (Tenn. 2002).

The trial court found that the lower statutory cap did not apply because Employee was no longer capable of doing factory work even if such employment had been offered by Employer. We find it unnecessary, however, to speculate as to whether Employee could work in Employer's factory or if Employer would have been able to accommodate Employee if the opportunity had presented itself. Employer was not required to offer Employee re-employment because Employee was discharged for violating workplace rules. *Id.*

Instead, in cases such as this, in which an employee has been terminated for an alleged violation of workplace rules, the courts are required to examine the reasons for an employee's discharge and evaluate the reasonableness of the employer's action. *Durham v. Cracker Barrel Old Country Store, Inc.*, No. E2008-00708-WC-R3-WC, 2009 WL 29896 * 3 (Tenn. Workers' Comp. Panel Jan. 5, 2009). The "courts must determine (1) that the actions allegedly precipitating the employee's dismissal qualified as misconduct under established or ordinary workplace rules and/or expectations; and (2) that those actions were, as a factual matter, the true motivation for the dismissal." *Id.* In this case, the record does

not indicate that the trial court examined the reasons for Employee's discharge or made determinations regarding Employer's actions when it found that the lower statutory cap did not apply.

The evidence in the record supports that Employer had a well-established and reasonable workplace rule involving absenteeism. Specifically, Ms. Saiauski testified that Employer's attendance policy

> was an excused-unexcused type system. If an employee had unexcused absences and they received four write-ups in 12 months, they were terminated. In addition, there was a percentage factor. If there [sic] average attendance record was over 6%, they received a 6% letter. And if they received three in 12 months, there was termination.

Further, the record includes evidence establishing that Employer received three 6% letters in 2005 and that Employee's absences were the reason Employee received these 6% letters. Specifically, Ms. Saiauski testified that Employee was absent from work on January 5, 6, and 7 of 2005, and on March 4, 7, 8, 21, 22, 23, 24, and 25 of 2005. Ms. Saiauski also testified that Employee received 6% letters on February 9, 2005, March 5, 2005, and April 1, 2005, and that Employee was terminated because she received three 6% letters in a twelve month period of time.

Employee contends that she was terminated because of a prior worker's compensation claim she had filed against Employer and that her absenteeism therefore was a pretext. The evidence presented in this case, however, does not support a conclusion that Employee was terminated for any reason other than absenteeism.[3] After our independent review of the evidence, we respectfully conclude that the evidence preponderates against the trial court's finding that the lower cap provided in Tennessee Code Annotated section 50-6-241(d)(1)(A) does not apply.

(6) Permanent partial disability award.

Having concluded that the evidence preponderates against the trial court's finding that the lower statutory cap does not apply, we must now determine Employee's vocational disability. After our review of the evidence and after consideration of all relevant factors, we set Employee's permanent partial disability at 39% to the body as a whole, which is the

[3] Employee would be protected under the law of retaliatory discharge if she was terminated in retaliation for filing a prior worker's compensation claim. *See Carter*, 92 S.W.3d at 372.

maximum award permitted pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A).

Conclusion

The judgment of the trial court is affirmed as modified herein. Costs of this appeal are assessed equally against appellee, Carolyn Berry, and appellant, Armstrong Wood Products, and its surety, for which execution may issue if necessary.

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TONY A. CHILDRESS, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 23, 2010

CAROLYN BERRY v. ARMSTRONG WOOD PRODUCTS

Chancery Court for Madison County
No. 63988

No. W2009-02070-WC-R3-WC - Filed February 16, 2011

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 on appeal are taxed equally to the Appellant, Armstrong Wood Products, and to the Appellee, Carolyn Berry, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM