IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
February 12, 2018 Session

SHERILYNE D. DUTY v. EAST TENNESSEE CHILDREN'S HOSPITAL ASSOCIATION, INC.

Appeal from the Chancery Court for Knox County
No. 192370-3 Michael W. Moyers, Chancellor

No. E2017-02027-SC-R3-WC – Mailed 3/15/18 – Filed 04/18/18

Sherilyne Duty ("Employee") was employed by East Tennessee Children's Hospital ("Employer") as a unit secretary. On March 22, 2006, she was assaulted by a visitor in the waiting area of the pediatric intensive care unit ("PICU"). She sustained an injury to her eye and developed post-traumatic stress disorder ("PTSD") as a result of the incident. A settlement was reached as to all aspects of her workers' compensation except the issue of temporary total disability. The settlement was approved by the Department of Labor, and Employee then brought this action seeking temporary disability benefits from July 2007 until November 2015. Employer contended Employee was not entitled to benefits because she was able to work and because she had been terminated for cause. The trial court denied the claim, finding Employee's medical proof was not credible. Employee appeals, contending the evidence preponderates against the trial court's decision. 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 pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (2014) (applicable to injuries occurring prior to July 1, 2014) Appeal as of Right; Judgment of the Chancery Court Affirmed

DON R. ASH, SR.J., delivered the opinion of the Court, in which SHARON G. LEE, J., and ROBERT E. LEE DAVIES, SR.J., joined.

Sam G. Smith, Jr., Knoxville, Tennessee, for the appellant, Sherilyne D. Duty.

Edward U. Babb, Knoxville, Tennessee, for the appellee, East Tennessee Children's Hospital Association, Inc.

OPINION

Factual and Procedural Background

On March 22, 2006, Employee was asked by a physician to summon the parents of an injured child from the PICU waiting area. She entered the area and called the names provided. A large man, described by Employee as being six feet, seven inches tall, shouted "I told you that's not that baby's daddy," and struck Employee twice in the eye. Employee informed the physician and nurse Kelly Rivers[1] of the incident. The assailant was later allowed to see the child. Employee hid in a locked storage closet for about an hour; she was then able to finish her shift. The following day, Employee underwent an x-ray and CT scan. She was referred to an ophthalmologist, who eventually performed surgery. In the following months, Employee continued to work at her regular job. However, she testified she began to experience difficulty concentrating and had outbursts on the job. She was counseled for excessive tardiness; she testified the tardiness was "[b]ecause I was scared to go in." Employee also encountered some disagreements with co-workers and patient families for which she received in-house training.

Paul Bates, who worked in Employer's human resources department, referred Employee to a psychologist who Employee saw using Employer's Employee Assistance Program. The psychologist in turn referred her to psychiatrist Dr. Michael Pool for evaluation and treatment. Dr. Pool followed Employee from September 2007 until June 2013.

In July 2007, Employer terminated Employee. Ms. Rivers, who became Employee's direct supervisor shortly after the March 2006 incident, received information Employee was improperly viewing patient records not connected to her department. Ms. Rivers contacted the information technology department, which used a tracker program to review Employee's patient records access. It determined, during a two-week period in June 2007, Employee, in violation of hospital policy and federal HIPAA law, accessed fifty-six patient records for which she had no business purpose to examine. When confronted with the results of the investigation, Employee did not deny her activity. Instead, she claimed she was being singled out due to her workers' compensation claim, stating "looking at the tracker is something we all do." Employee later provided Ms. Rivers with a list of coworkers who had also allegedly improperly accessed patient records. Tracker investigations of those persons did not substantiate Employee's allegations.

[1] At the time of the incident, Ms. Rivers was known as Kelly Willis. However, she married prior to trial and changed her name to Kelly Rivers. For clarity, we will refer to her as Kelly Rivers throughout this opinion.

After her termination, Employee attended a vocational school, but did not finish the program. She did not work for any employer after July 2007.

Dr. Pool moved out of state in 2013 and Employee was referred to another psychiatrist, Dr. Kelley Walker, for an independent medical examination which occurred on September 26 and October 3, 2013. Dr. Walker diagnosed Employee with PTSD and persistent depressive disorder and recommended additional psychiatric treatment, individual psychotherapy or counseling, and evaluations by a neurologist for seizures.

Dr. Walker became Employee's authorized treating physician and began treatment on November 5, 2014. She declared Employee at maximum medical improvement on November 19, 2015, and opined Employee was not able to return to work. She completed two C-32 medical reports: one assigned Employee a "moderate impairment" according to the Fifth Edition of the American Medical Association Guides; the other assigned 20% impairment pursuant to the Sixth Edition. In both reports, Dr. Walker opined Employee was temporarily totally disabled from March 22, 2006, and continuing through March 15, 2016, the date of the report.

As noted above, Dr. Walker declared Employee had reached maximum medical improvement on November 19, 2015. However, during her deposition, the following exchange occurred:

> Q: Isn't it more likely than not, based upon the definition of [maximum medical improvement] that we looked at of the [American Medical Association Guides] and what she's testified, that she probably actually was at [maximum medical improvement] back even when you did the [independent medical examination in September and October 2013]? You hoped you could get her better, but you couldn't; is that fair?
>
> A: Well, in hindsight, but we can't work that way.

In her deposition, Dr. Walker agreed Employee's reported symptoms in September 2013—prior to beginning treatment with Dr. Walker in 2014—were similar to those reported in November 2016, including fear of crowds, fleeting suicidal thoughts, and depression. She conceded Employee's patient record did not reflect improvement after 2014. She "wouldn't disagree" with Employee's deposition testimony[2] indicating "she's doing worse than she has been at any time previously. . . . [and is in] a gradual slow decline[.]" However, Dr. Walker also testified Employee is "better than what she was

[2] Employee's deposition is not included in the record, and it is unclear when Employee was deposed.

when she first came in" and "[s]he's doing better than what she would be doing if she didn't have her treatment." Ultimately, Dr. Walker stated she was "comfortable" with the date she determined Employee to be at maximum medical improvement—November 19, 2015.

Prior to her deposition, Dr. Walker reviewed Dr. Pool's records. She opined his treatment was appropriate, and she did not believe different treatment would have produced a better result.

The trial court issued its findings and conclusions from the bench. It found Dr. Walker's opinion Employee was disabled even during the fifteen months she continued to work after March 2006 not credible and, therefore, discounted her full testimony. The trial court also noted the absence of evidence indicating Dr. Pool had placed any restrictions on Employee's activities during the years he treated her. In sum, the trial court concluded Employee had failed to sustain her burden of proof and the issue of whether benefits were barred due to for-cause termination was moot. The trial court entered judgment in accordance with those findings. Employee appeals, and the appeal has been referred to this Panel pursuant to Tennessee Supreme Court Rule 51.

Analysis

Our standard of review of factual issues in a workers' compensation case is "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) (2008); *see Kilburn v. Granite State Ins. Co.*, 522 S.W.3d 384, 389 (Tenn. 2017). When the credibility of witnesses and the weight of their in-court testimony are at issue in a case, we afford considerable deference to the trial judge, who "had the opportunity to observe the witness' demeanor and to hear in-court testimony." *Mitchell v. Fayetteville Pub. Utils.*, 368 S.W.3d 442, 447–48 (Tenn. 2012) (citing *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002)). However, this Court draws its own conclusions concerning the weight and credibility of expert testimony when all medical proof is by deposition. *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008) (citing *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006)). Questions of law are reviewed de novo with no presumption of correctness to the trial court's conclusions. *Kilburn*, 522 S.W.3d at 389 (citing *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009)).

An employee in a workers' compensation action bears the burden of proving every element of the case by a preponderance of the evidence. *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 543 (Tenn. 1992) (citing *Talley v. Va. Ins. Reciprocal*, 775 S.W.2d 587, 591 (Tenn. 1989)). To make a "prima facie case of entitlement to temporary total

disability, an employee must prove that he was (1) totally disabled to work by a compensable injury; (2) that there was a causal connection between the injury and his inability to work; and (3) the duration of that period of disability." *Simpson v. Satterfield*, 564 S.W.2d 953, 955 (Tenn. 1978). "Temporary total disability benefits are terminated either by the ability to return to work or attainment of maximum recovery." *Id.*

To support her assertion she was temporarily and totally disabled from July 2007 until November 2015, Employee presented the expert medical testimony of Dr. Walker. The trial court rejected Dr. Walker's testimony; because her testimony was presented by deposition, we are able to conduct an independent review. *See Foreman*, 272 S.W.3d at 571 (citing *Orrick*, 184 S.W.3d at 216).

Dr. Walker testified, *if* she had been treating Employee from March 22, 2006, to July 3, 2007, she would not have recommended Employee return to work following the incident. She stated she "would have taken her out of work immediately. . . . [b]ecause it was a horrible incident, and that whole year that she stayed and worked she was not doing well. . . .[and] she was just gradually getting worse and worse."

However, noting Employee *did* work during this period, the trial court found her opinion "at odds with observable fact." The trial court observed, "a person cannot simultaneously work and claim that they are incapable of working."

Beyond the obvious contradiction, the record further undermines Dr. Walker's opinion, which, in large part, focused on Employee's mental condition beginning seven years before she had any contact with Dr. Walker. As the trial court observed, no evidence was presented to indicate Dr. Pool—who treated Employee from 2007 to 2013—found Employee unable to work or placed any restrictions on her activities. Additionally, although Dr. Walker testified Employee's condition improved after she began treatment in 2014, her records do not reflect this. She described Employee experiencing similar symptoms both pre-treatment and post-maximum medical improvement.

"Trial courts have broad discretion to determine whether to accept or reject the opinion of a proffered expert." *Cobb v. Henry I. Siegel, Inc.*, No. W2000-02656-WC-R3-CV, 2001 WL 1298917, at *2 (Tenn. Workers' Comp. Panel Oct. 24, 2001). We find the trial court did not abuse its discretion in rejecting Dr. Walker's testimony. With no other evidence in the record to support Employee's claim for temporary disability benefits, we affirm the trial court's conclusion Employee did not sustain her burden of proof.

For-Cause Termination

We find it appropriate to address whether Employee is also precluded from receiving temporary disability benefits due to for-cause termination. We conclude she is.

"[E]ven though an employee has a work-related injury for which temporary benefits are payable, the employer is entitled to enforce workplace rules." *Barrett v. Lithko Contracting, Inc.*, Nos. 2015-06-0186, 2015-06-0188, 2015-06-0189, 2016 WL 3401652, at *4 (Tenn. Workers' Comp. App. Bd. June 17, 2016) (citing *Carter v. First Source Furniture Grp.*, 92 S.W.3d 367, 368 (Tenn. 2002)). "Thus, an employee's termination due to a violation of a workplace rule may relieve an employer of its obligation to pay temporary disability benefits if the termination was related to the workplace violation." *Id.* (citing *Marvin Windows of Tenn., Inc. v. Gardner*, No. W2011-01479-WC-R3-WC, 2012 WL 2674519, at *3 (Tenn. Workers' Comp. Panel June 8, 2012)). To make this determination, the court "must 'consider the employer's need to enforce workplace rules and the reasonableness of the contested rules.'" *Id.* (citing *Marvin Windows*, 2012 WL 2674519, at *4). An "employer will not be penalized for enforcing a policy if the court determines '(1) that the actions allegedly precipitating the employee's dismissal qualified as misconduct under established or ordinary workplace rules and/or expectation; and (2) that those actions were, as a factual matter, the true motivation for the dismissal.'" *Id.* (quoting *Durham v. Cracker Barrel Old Country Store, Inc.*, No. E2008-00708-WC-R3-WC, 2009 WL 29896, at *3 (Tenn. Workers' Comp. Panel Jan. 5, 2009)).

As outlined above, Employee was terminated in July 2007 after an investigation revealed she had—without authorization and in violation of HIPAA—accessed numerous patient records. Employee claimed retaliation for her workers compensation claim and insisted other employees also improperly accessed patient records; investigations of other employees did not substantiate Employee's allegations. The evidence overwhelmingly demonstrates Employee was terminated for violating a legitimate workplace rule. Accordingly, we find temporary disability benefits are likewise precluded on this ground.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Sherilyne D. Duty and her surety, for which execution may issue if necessary.

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DON R. ASH, SENIOR JUDGE

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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 are assessed to Sherilyne D. Duty and her surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM