IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 22, 2011 Session

MELISSA HAMLIN v. WINDSOR FORESTRY TOOLS, INC. ET AL.

Appeal from the Chancery Court for Gibson County
No. 19147 George Ellis, Chancellor

No. W2011-00024-WC-R3-WC - Mailed November 17, 2011
Filed December 20, 2011

The employee injured her back at work and the injury required surgical treatment. The employee returned to work but was later terminated for violation of her employer's attendance and absenteeism policy. The trial court found the employee did not have a meaningful return to work. The trial court, however, adopted the impairment rating that the employee's evaluating physician expressed and awarded 90% permanent partial disability benefits, the maximum award permitted by Tennessee Code Annotated section 50-6-241(d). The employer has appealed, contending that the trial court erred by adopting the evaluating physician's impairment rating, by its use of the six-times multiplier on the basis of facts not in evidence, and by finding that the employee did not have a meaningful return to work. We agree that the evidence preponderates against the trial court's findings concerning employee's impairment and the six-times multiplier. Accordingly, we modify the award.[1]

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

WALTER C.KURTZ, SR. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J., and TONY A. CHILDRESS, SP. J., joined.

Thomas P. Cassidy, Jr. and Mary Louise Wagner, Memphis, Tennessee, for the appellants, Windsor Forestry Tools, Inc., Blount, Inc., and Liberty Mutual Insurance Company

Floyd S. Flippin, Humboldt, Tennessee, for the appellee, Melissa Hamlin

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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

Melissa Hamlin ("Employee") injured her lower back on November 7, 2005, during the course of her employment as a machine operator for Windsor Forestry Products, Inc. ("Employer"). Employer was a manufacturer of chains for use in chainsaws.[2] The injury occurred when Employee was attempting to move a skid containing completed chains. Employee filed a complaint for workers' compensation benefits in the Chancery Court for Gibson County. The court conducted a trial on July 21, 2010.

Employee was forty-six years old when the trial took place in July 2010. She was a high school graduate with no additional education or specialized training. Employee worked for Employer from June 2004 until her termination in October 2008. Her prior work experience included holding the positions of telephone circuit board assembler, floor coordinator at a sporting goods manufacturer, and office manager for a phone or cell phone company. Employee had limited experience working on a computer. Since her termination by Employer, Employee has worked intermittently as a substitute teacher but has not applied for other jobs.

Employee sought treatment for her back injury from Dr. Lowell Stonecipher, an orthopaedic surgeon in Jackson, Tennessee, who testified at trial by deposition. An MRI taken before Employee first saw Dr. Stonecipher revealed a "small midline herniated disk" at the L5-S1 level. Dr. Stonecipher was reluctant to perform surgery because of the small size of the defect. However, because of Employee's continuing symptoms, he ultimately performed a bilateral laminectomy at the L5-S1 level on May 24, 2006.

Dr. Stonecipher testified that Employee initially did well after the surgery. Difficulties arose, however, when Employee was permitted to return to work. Employee returned to work for short periods of time but subsequently developed additional back pain. Dr. Stonecipher restricted Employee's work hours and activities and imposed lifting limitations while attempting to determine the work that Employee was capable of performing on a regular basis. On January 3, 2007, Dr. Stonecipher released Employee to return to "regular duty" work. Dr. Stonecipher testified that Employee reached maximum medical improvement on January 25, 2007. He opined that Employee retained a 10% permanent anatomical impairment to the body as a whole for the injury and subsequent surgery, placing her in category three of the diagnosis-related estimate (DRE) section of the Fifth Edition of

[2] Employee worked at Employer's Milan, Tennessee facility, which closed for economic reasons in 2009.

the AMA Guides to the Evaluation of Permanent Impairment. Dr. Stonecipher treated Employee through July 31, 2008.

At the request of Employer, Dr. Carl Huff, an orthopaedic surgeon, conducted a medical evaluation on June 7, 2007 of Employee concerning her ongoing medical treatment and restrictions. Dr. Huff reviewed medical records, examined Employee, took x-rays, and conducted an electromyogram ("EMG"). Based upon this information, Dr. Huff concluded that Employee received appropriate medical treatment for her injury. He opined that the duties of Employee's regular job for Employer were "beyond the functional capacity of her current condition." Dr. Huff recommended that Employee limit her lifting to ten pounds frequently and twenty pounds occasionally. He also recommended that overhead lifting be limited to once per hour, pushing and pulling should be limited to fifty pounds occasionally and twenty-five pounds frequently, and that bending should be limited to twelve times per hour. Dr. Huff did not express an opinion concerning impairment.

Dr. Apurva Dalal, an orthopaedic surgeon, conducted a medical evaluation of Employee on January 11, 2008 at the request of her attorney. He opined that Employee retained a 15% impairment to the body as a whole due to her injury and surgery. Like Dr. Stonecipher, Dr. Dalal found Employee to be in category three of the DRE section of spinal impairments. Dr. Dalal gave Employee the maximum 13% rating within the category, and added an additional 2% based upon her continuing symptoms of severe pain. He agreed that Employee had received appropriate medical treatment and did not require additional treatment.

Employee returned to work for Employer before being released by Dr. Stonecipher in January 2007. She continued to work for Employer until October 30, 2008. At that time, Employee was terminated for a violation of Employer's absenteeism policy. Mark Gilmour, Employer's General Manager at the time, testified that the policy required termination of employees who had a "casual" absenteeism rate of more than 3% over a two-year period. Absences arising from work injuries were not included in the calculation. Such absences were significant, however, because they did count against an employee's Family and Medical Leave Act ("FMLA") leave. Absences in excess of the permitted amount of FMLA leave, other than those caused by work injuries, were considered "casual" absences and were used to determine an employee's absenteeism rate.

Mr. Gilmour testified that he and Sandy Dabbs, a Human Resources generalist, met with Employee on October 23, 2008, to discuss her absenteeism. At that time, Employee was given two weeks to provide documentation for any absences that she believed should not be counted as "casual." A second meeting took place on October 28, 2008, during which Employee produced documentation from a nurse practitioner that some absences were related

to an illness. Employee's absenteeism rate still exceeded 3% even if those dates were not considered. Employee was unable to provide documentation for other absences. Mr. Gilmour and Ms. Dabbs gave Employee additional time to document any absences that she thought should be excused. Employee did not return to work after that date and did not provide additional documentation. Employee was terminated on October 30, 2008. Mr. Gilmour confirmed that some of the instances of casual absenteeism in Employee's case occurred during weeks that she worked forty or more hours.

Employee testified that she had back pain and leg pain "[j]ust about every day." She reported that she was only able to lift, stand, or sit for short periods of time without experiencing pain. She had difficulty sleeping, performing housework, driving, and playing with her child. She testified that she was unable to perform her job for Employer or work in a factory setting. Employee also testified that many of the absences that led to her termination were caused by back pain from her work injury.

The trial court issued its decision in a ten-page written memorandum. The Chancellor found that Employer had failed to sustain its burden of proof demonstrating that Employee's termination was "proper." In light of this, the trial court did not apply Tennessee Code Annotated section 50-6-241(d)(1) (2008) to limit Employee's award of permanent disability benefits to one and one-half times the impairment rating. The trial court made specific findings to support an award of six times the impairment rating and adopted the 15% impairment rating assigned by Dr. Dalal so as to award permanent partial disability benefits of 90% to the body as a whole. Judgment was entered in accordance with the court's findings.

Employer has appealed, contending that the trial court erred by adopting Dr. Dalal's impairment rating, by awarding five times the impairment rating using facts not contained in the record, and by finding that Employee did not have a meaningful return to work.

Standard of Review

The standard of review for factual issues is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When the trial court has heard in-court testimony, considerable deference must be afforded to the trial court's findings of credibility and assessment of the weight to be given to in-court testimony. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence should 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). We review a trial court's conclusions of law de novo upon the record with no presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Impairment Rating

Employer's first contention is that the trial court erred by basing its award on the 15% impairment rating assigned by Dr. Dalal. In its findings and conclusions, the trial court stated that "the impairment rating of 15% testified by Dr. Dalal is the correct impairment rating under the facts and circumstances of this case." The court did not elaborate further on its reason for choosing that impairment over the 10% rating assigned by Dr. Stonecipher.[3]

Dr. Stonecipher explained the method he used as follows:

> I did give [Employee] an impairment rating, an anatomical impairment rating, 10% to the body as a whole secondary to the herniated disk. Normally you would have an 8% for that. She did have it bilaterally which probably increases their residuals a little bit because of the scar tissue, and she did have some residuals, and so I gave her a 10% impairment to the body as a whole.

He was not cross-examined on the subject.

During direct examination, Dr. Dalal described the method he used to determine Employee's physical impairment using the AMA Guidelines. He testified that 15% impairment was appropriate. On cross-examination, he explained:

> Q. Do you then agree that according to the Fifth Edition Guide and the table that you used, which is not the range of motion, that the most impairment you can assign to Ms. Hamlin is 13% using that guide?

[3] Dr. John Brophy, a neurosurgeon who saw Employee on one occasion prior to surgery, also expressed the opinion that a 10% impairment is normally assigned for a surgically treated herniated disk. Because of the timing of his examination of Employee, we find his opinion on this subject to be of limited value.

> A. Using that guide -- and I'm glad that you mention it. It's a guide, and it's not a basketball game or a speed limit. That is why it is a guide. Because what it does not mention is the people with bilateral problem. What it does not mention is people who have significant laminectomy done bilaterally. So if going by the AMA Guideline Fifth Edition on Chapter One, a physician has to use their clinical judgment and experience and then assign an impairment. And that is the difference between a guide and making a judgment. And that is what the guide allows you to do. And that is exactly what I have here done in this particular case.
> Q. Where did you get the 2%?
> A. There is no specific place in the Guide. The Guide does allow for chronic pain without going to a pain chart to assign maximum of 3%.
> Q. Is somebody supposed to use the DRE, Diagnostic Related Evaluation Tables, and the pain assessment?
> A. Yes. You can combine DRE and pain assessment up to 3% if you expect a maximum of 3% without going to the pain chart. So that has been used as an analogy in my opinion.

The trial court was presented with conflicting expert medical opinions on impairment. A trial court generally has the discretion to choose which expert to accredit when there is a conflict in expert testimony. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. 1996). This Court reviews the trial court's factual findings de novo but grants the trial court's findings a presumption of correctness unless the evidence preponderates otherwise. Tenn. Code. Ann. § 50-6-225(e)(2).

In this case the Court must consider the medical deposition testimony in the context of the AMA Guidelines. Dr. Stonecipher was Employee's treating physician for more than two years. The Supreme Court has recognized that often the treating physician's opinion is entitled to greater weight than a physician who has examined the employee at the request of one of the parties. *Carter v. First Source Furniture Group*, 92 S.W.3d 367, 373 (Tenn. 2002); *Orman v. Williams Sonoma*, 803 S.W.2d 672, 677 (Tenn. 1991).

Dr. Stonecipher observed the internal anatomy of Employee's spine during surgery and oversaw Employee's efforts to recover and return to work thereafter. He testified that he considered 8% to be the appropriate starting point for assessing impairment for a surgically corrected herniated disk. The relevant section of the Fifth Edition of the AMA Guides, discussed in Dr. Dalal's deposition, sets a range of 10% to 13% permanent

impairment for a person who has undergone disk surgery. Dr. Dalal conceded that Employee's case came within the criteria applicable to the 10% to 13% range, and then he simply added additional impairment based upon his assessment of her level of pain without providing any objective standards or other explanation for that assessment. Both doctors appeared to agree that because Employee's surgery was bilateral, more than the minimum impairment should be assessed.

Taking these factors into consideration, we conclude that the evidence preponderates against the 15% impairment assigned by Dr. Dalal. The evidence supports the finding that Employee's case fell within the AMA criteria for an impairment of 13%, the maximum permitted by the section of the AMA Guides. We conclude the 13% impairment rating should have been used.

Findings to Support Six Times Impairment Multiplier

Tennessee Code Annotated section 50-6-241(d)(2)(B) (2008) states: "If the court awards a permanent partial disability percentage that equals or exceeds five (5) times the medical impairment rating, the court shall include specific findings of fact in the order that detail the reasons for awarding the maximum permanent partial disability." The trial court in this case made the maximum permissible award of six times the anatomical impairment. To support that award, it included the following findings in paragraph twenty-seven of its order:

> The Court makes the following findings of fact relative to TCA 50-6-241:
> A. The June published unemployment rate of Gibson County is 13.5%.
> B. There have been many plant closures in the area (such as Windsor) in and around Gibson County and significant reductions in the workforce.
> C. At the present time, the job market for individuals with a High School Education, with Melissa Hamlin's training and experience is very poor in Gibson County and the surrounding areas.
> D. Moreover, Melissa Hamlin's injury is such that her ability to work in the jobs she has worked in the past would be difficult at best, she has loss of sleep as a result of this injury and pain associated with activity that would render her prospects of returning to the former jobs she had very difficult. With her ability to perform the jobs she has done in the past significantly

> affected, coupled with the very poor prospects for employment in this area and the plant closures and reductions in workforce at other plants make the 6X multiplier the appropriate multiplier in the case.

It is undisputed that neither party presented evidence at trial to support the findings designated in parts A, B, and C. Employee asserts that the trial court permissibly took judicial notice of the facts underlying these findings. Employer argues that unemployment rates, plant closures, and employment prospects for persons with specified education and work experience are not matters that Tennessee Rule of Evidence 201 permits for judicial notice.

Tennessee Rule of Evidence 201(b) describes the kinds of facts that may be judicially noticed: "A judicially noticed fact must be one not subject to reasonable dispute, in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The Advisory Commission Comments to the rule state, "Part (b) limits judicial notice to a relatively small class of adjudicative facts."

Our courts have permitted taking judicial notice of facts such as the contents of a court's own records, *Harris v. State*, 301 S.W.3d 141, 147 n.4 (Tenn. 2010), the location of public institutions such as state prisons, *Smith v. State*, 607 S.W.2d 906, 907 (Tenn. Crim. App. 1980), "that chronic alcoholism can carry with it an irresistible and uncontrollable desire to drink alcohol, and that a substantial school of thought supports the proposition that alcoholism is a disease," *Wheeler v. Glens Falls Ins. Co.*, 513 S.W.2d 179, 183 (Tenn. 1974), and that a particular calendar date fell upon a Sunday, *Modern Upholstered Chair Co. v. Russell*, 518 S.W.2d 519, 520 (Tenn. 1974). In contrast, it has been held that judicial notice may not be taken of facts such as those gathered from the trial court's extrajudicial observation of a party, *Vaughn v. Shelby Williams of Tennessee, Inc.*, 813 S.W.2d 132, 133 (Tenn. 1991), location of streets within a city, *State v. Young*, 617 S.W.2d 661, 664 (Tenn. Crim. App. 1981), or "the effects upon a beholder of an unseemly display of affection," *Highfill v. Baptist Hosp., Inc.*, 819 S.W.2d 436, 439 (Tenn. Ct. App. 1991). *See generally,* Cohen, Sheppeard and Paine, *Tennessee Law of Evidence* § 2.01[4] (5th ed. 2005).

In the case before us, the unemployment rate of a county on a particular date is not, in our view, a matter generally known within a given community. Such information may be ascertainable through various private or governmental sources. However, without knowledge of the source, neither the parties nor a reviewing court can determine whether that source "can be reasonably questioned." Tenn. R. Evid. 201(b); *see also* Tenn. R. Evid. 803(8) & 803(17). The closing or opening of individual businesses in a particular geographic area or

the qualifications for employment in that area are not matters of such general and accepted knowledge to permit application of judicial notice. Thus, we conclude that the trial court's findings set out in paragraph twenty-seven, parts A, B, and C, are impermissibly admitted and therefore cannot be used to support the court's findings.

Paragraph twenty-seven, part D does include some findings that are supported by the evidence. Elsewhere in its decision, the trial court discussed the significant physical limitations caused by Employee's injury, as described by Dr. Huff and Dr. Dalal. Those limitations exclude Employee from jobs, including most of the jobs she has held in the past. The trial court also took note of Employee's medically documented symptoms and their effects on her daily life. The trial judge, however, in part D also found that this work disability "coupled" with the low unemployment and plant closures made the "[six-times] multiplier the appropriate multiplier in the case." Thus, Employee's work disability was not a stand-alone finding supporting part D.

We must conclude that, given our ruling to exclude the findings in parts A, B, and C, the findings in part D must also be excluded. The record simply does not support the use of a multiplier greater than four.

Meaningful Return to Work

Employer's final contention is that the trial court erred by finding that Employee did not have a meaningful return to work, thereby permitting an award in excess of one and one-half times the anatomical impairment. This contention is based upon the premise that Employee was terminated for misconduct associated with her employment, i.e., excessive absenteeism. The evidence submitted by Employer establishes that it had a policy of terminating workers who exceeded 3% "casual" absenteeism over a two-year period. Further, Employer's records demonstrate that Employee's absenteeism exceeded that limit. However, Employee testified that the majority of her absences were caused by back pain arising from her work injury. She further testified that she made requests to be permitted to see her treating physician for these problems but that her requests were denied by Employer's insurer. Employer did not present evidence to refute these assertions. We therefore conclude that the evidence does not preponderate against the conclusions reached by the trial court that Employee's termination was related to her work injury and that she did not have a meaningful return to work.

Conclusion

The judgment of the trial court is modified to find that Employee sustained an anatomical impairment of 13% to the body as a whole and to award 52% permanent partial

disability benefits. It is affirmed in all other respects. Costs are taxed one-half to Windsor Forestry Tools, Inc., Blount, Inc., Liberty Mutual Insurance Company and their surety, and one-half to Melissa Hamlin, for which execution may issue if necessary.

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SENIOR JUDGE WALTER C. KURTZ

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
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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 on appeal are taxed one-half to Appellants, Windsor Forestry Tools, Inc., Blount, Inc., Liberty Mutual Insurance Company and their surety, and one-half to the Appellee, Melissa Hamlin, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM