IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
June 19, 2017 Session

ALICIA HUNT v. DILLARD'S INC., ET AL.

Appeal from the Chancery Court for Madison County
No. 73382 James F. Butler, Chancellor

No. W2016-02148-SC-WCM-WC – Mailed September 29, 2017;
Filed December 13, 2017

This appeal challenges (1) the trial court's factual finding that the employee was pressured to resign after incurring an on-the-job injury, and declining to cap her workers' compensation award at one and one half (1½) times the impairment rating on that basis; (2) the total amount awarded as permanent partial disability benefits; and (3) the award of temporary total disability benefits from the date of Employee's surgery on August 14, 2014, until Appellee reached maximum medical improvement on April 27, 2015. 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 of the trial court.

Tenn. Code Ann. § 50-6-225(a) (2014) Appeal as of Right;
Judgment of the Chancery Court Affirmed

RHYNETTE N. HURD, J., delivered the opinion of the court, in which HOLLY KIRBY, J. and JAMES F. RUSSELL, J., joined.

James H. Tucker, Jr., and Travis J. Ledgerwood, Nashville, Tennessee, for the appellants, Dillard's, Inc., and Safety National Casualty Corp.

Andrew C. Clarke, Memphis, Tennessee, for the appellee, Alicia Hunt.

OPINION

Factual and Procedural Background

In 2011, Employer, the Dillard's Department Store at Wolfchase Mall in Memphis, Tennessee, hired Employee, Alicia Hunt, to work as the selling business manager at its Clinique cosmetics counter. Employee is a high school graduate with training in cosmetology and esthetics. During the four years before Employer hired her, Employee worked for Belk, a competing department store, in a similar position. Employee also had experience teaching school, working for contractors and construction companies, and as owner of a flower shop.

Employee was responsible for overall management of the Clinique counter, including stocking the Clinique product, selling the product to customers, doing customer makeovers, and managing other employees. The physical requirements of the job included standing for long periods of time, bending, stooping, and kneeling. Employee's salary was $26,000 per year, plus commission. Prior to her injury, Employee earned $61,286 in 2012 and $99,930 in 2013.

On September 21, 2013, Employee climbed onto a stool to take down signs hanging over the Clinique counter. When a sign slipped, to keep it from hitting the glass countertop, Employee twisted her body causing her to fall off the stool onto her left side. In doing so, she injured her left ankle and left knee. Although she attempted to finish the workday, Employee's pain made it impossible to do so. Employee spoke to her supervisor, Dan Ryan, and showed him her injuries. After helping her complete the workers' compensation forms, Mr. Ryan sent Employee to the emergency room at St. Francis Hospital. The treating physician at St. Francis told her to remain off work for four days. After those four days, Employee returned to work, where she was told that for workers' compensation reasons, she should seek any further treatment at Baptist Minor Medical, an urgent care center.

Baptist Minor Medical referred Employee to an orthopedic physician, Dr. William Fly. Dr. Fly returned Employee to work with limitations on standing, walking, climbing, pushing and pulling, and restrictions on lifting. Although Employee's ankle healed, conservative treatment of corticosteroid injections and physical therapy did not alleviate the pain and swelling in the knee. Employee testified she returned to work and tried to perform her job duties within the restrictions given by Dr. Fly but could not perform her job duties well because of swelling and pain in her knee. In January 2014, Employee was referred to another doctor in the same orthopedic practice, Dr. Peter Lindy. Dr. Lindy gave her another corticosteroid injection in her knee and continued to recommend light duty work. After

conservative treatment did not help Employee's knee, on February 25, 2014, Dr. Lindy recommended arthroscopic surgery.

Despite Employee's failure to improve and Dr. Lindy's recommendation for surgery, Employer failed to authorize the surgery. Employee, however, continued to work. Employee testified that on March 27, 2014, she was called to the office of her new supervisor, Shelton Johnson. According to Employee, Mr. Johnson advised her that, because she was not making any money for the store, she needed to step down as the Clinique counter manager. Mr. Johnson offered to pay her $20.00 per hour, without commission. Employee testified she was "shocked" by the request and, although she did not want to quit, she said to Mr. Johnson, "I'd rather quit first."

In response to her comment, Mr. Johnson sent his assistant to retrieve resignation paperwork. He filled out the forms and had Employee sign them. On a "Separation Data Form," Mr. Johnson marked as the reason for leaving, "030; other." On a "Notice of Resignation" form, under the section listing reasons for the resignation, Mr. Johnson placed a check mark between two boxes, one that stated, "(020) To Accept Other Work — Better Schedule, Pay, or Benefits," and one below it that stated, "(030) To Leave the Area, Go To School, or Other." Below that, under "Comments," he wrote, "Other."[1] Nothing on the form expressly addressed Employee's knee injury, her inability to perform her work duties, or that she was being asked to step down as manager.

Employee testified she loved her job, thought she was doing a good job, had not been looking for other jobs, and did not want to resign. She explained she interpreted the notation "Other" as referring to her knee injury because Employer had, in her view, failed to comply with the work restrictions and authorize the surgery Dr. Lindy recommended. After her meeting with Mr. Johnson, Employee sought the advice of an attorney.

Shelton Johnson's version of the events of March 27, 2014, is inconsistent with Employee's version. He testified Employee came to his office to inform him of her resignation prior to a regularly scheduled Monday managers' meeting.[2] He stated Employee made a comment about finding another job or doing something else. Mr. Johnson conceded he was the one who filled out the Separation Data Form and wrote "other" on the form because he did not know the exact reason Employee was leaving. Contrary to Employee's

[1] Given the ambiguity on the forms and Mr. Johnson's testimony that he did not know the exact reason Employee was leaving, it appears to this Panel that Mr. Johnson's intent was to record "other," as the reason for Employee's resignation.

[2] A 2014 calendar introduced as an exhibit, however, reflected that March 27, 2014, fell on a Thursday, not a Monday.

claim, he testified Employer had accommodated Employee's work restrictions. He conceded, however, he did not arrive at the Wolfchase Dillard's as store manager until February 2014, and he had no personal knowledge whether Employer accommodated Employee's restrictions prior to that date.

After she left Employer, Employee eventually had arthroscopic surgery on her knee on August 15, 2014. During the time following the knee surgery, Employee remained under the same work restrictions limiting her ability to stand, walk, stoop, squat, kneel, etc. She did not work or earn any income during this period. She remained under treatment with Dr. Lindy until April 27, 2015, when Dr. Lindy determined Employee had reached maximum medical improvement. He released her from treatment and assigned 12% impairment to the left leg (5% to the body as a whole), with permanent restrictions of no prolonged standing or walking for longer than five hours and no bending, squatting, or kneeling.

After receiving notice that Employee had reached maximum medical improvement, Employee's attorney contacted Employer's attorney and inquired whether Employer had a position available for Employee within the permanent restrictions Dr. Lindy set. Employer did not offer Employee a position, maintaining she voluntarily resigned her position.[3] Employee attempted to find another position compatible with her experience and her permanent restrictions but was unsuccessful. At the time of trial, Employee was working part time for Clinique as a makeup artist. She had earned a total of about $3,000.00 in this position.

Although there is no dispute about the compensability of the injury or Dr. Lindy's impairment rating, a review of Dr. Lindy's deposition testimony is helpful to provide overall perspective in the case. Dr. Lindy is an orthopedic surgeon licensed to practice in the State of Tennessee. When Dr. Fly, Dr. Lindy's partner, first saw Employee on October 11, 2013, Employee was complaining of aching in her left foot and moderate pain in her left knee, with swelling. Dr. Fly diagnosed her with osteoarthritis of the left leg, a sprain of the left ankle, and a sprain of the left knee. Dr. Fly indicated Employee could return to light duty work. Employee returned to Dr. Fly on October 21, 2013. At that time, Dr. Fly ordered an MRI, which showed arthritic changes without injury to the ligaments or menisci. Dr. Fly recommended physical therapy and prescribed anti-inflammatories for the inflammation and pain. He continued to limit Employee to light duty.

[3] Mr. Johnson denied anyone contacted him about returning Employee to her position after she reached maximum medical improvement. He conceded, however, the position required standing and walking for more than five hours per day, bending, stooping and squatting.

Dr. Lindy saw Employee for the first time on January 29, 2014. He diagnosed her with osteoarthritis of the left knee, sprain of the left knee, and left knee pain. Dr. Lindy administered a cortisone injection to the left knee and recommended continued light work. Employee's knee pain did not subside. On February 25, 2014, Dr. Lindy recommended arthroscopic surgery. He performed that surgery on August 15, 2014. At Employee's post-surgical visit on August 22, 2014, Dr. Lindy released Employee to "sedentary duty." After her next office visit, on October 23, 2014, Dr. Lindy released Employee to light duty work, although at various junctures he imposed restrictions of no bending, squatting or climbing, and no prolonged standing or walking. Following a period of recovery, Dr. Lindy opined Employee had reached maximum medical improvement on April 27, 2015. After performing a functional capacity examination, Dr. Lindy determined Employee could lift a maximum of forty pounds, stand and/or walk a total of less than six hours, and sit a total of six hours. He determined there were no limitations on pushing and pulling. Dr. Lindy released Employee to work, assigning final permanent restrictions of no prolonged standing or walking greater than five hours, and no bending, kneeling or squatting. Dr. Lindy testified the treatment he provided was causally related to Employee's work-related injury of September 21, 2013. He noted there was no history of Employee experiencing any problems with her knee prior to her fall on September 21, 2013. Although Employee had preexisting osteoarthritis, Dr. Lindy testified patients can have underlying and preexisting osteoarthritis without any pain or symptoms. He concluded the fall aggravated Employee's pre-existing condition of osteoarthritis, which necessitated surgery.

Based on Dr. Lindy's undisputed testimony, the trial court determined Employee sustained a compensable injury to her left leg and retained a 12% permanent impairment to her left lower extremity. The court expressly found the injury accelerated her preexisting degenerative osteoarthrosis in the left knee, did not merely increase her pain, and that the injury resulted in permanent restrictions.

Employer argued that Employee's vocational disability award should be capped at one-and-one-half times the applicable permanent impairment rating as a result of her voluntary resignation for reasons unrelated to her injury. It based this argument on the testimony of Shelton Johnson, who testified that Employee met with him and told him she wanted to resign to find another job. The trial court, however, accredited the testimony of Employee that she did not want to resign but she was called into Mr. Johnson's office and informed she needed to step down as Counter Manager and accept a position earning less money than she earned prior to her injury. The court further relied on the notation on the resignation document that the reason for the resignation was "other," which Employee intended to mean because of her injuries and her inability to perform her job within her restrictions. The court expressly found Employee left her job because of her work-related

injury after Employer requested she continue her employment in a different position at a wage less than what she was earning at the time of her injury. Accordingly, the award was not capped. The court found Employee had sustained a significant vocational disability, and, after considering her age, her educational background, her employment history, and her permanent restrictions, awarded 60% permanent partial disability to the left leg.[4] The court entered judgment in accordance with those findings.

The trial court also concluded Employee was entitled to temporary total disability benefits from the date of her surgery on August 14, 2014, until she reached maximum medical improvement on April 27, 2015, for a total of 257 days or 36.7 weeks. Accordingly, the court entered a judgment for Employee and against Employer for temporary total disability benefits in the total amount of $33, 708.95.[5]

Analysis

Standard of Review

The standard of review of issues of fact in workers' compensation cases is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-5-228(e)(2) (2014) (applicable to injuries occurring prior to July 1, 2014). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witnesses' demeanor and to hear in-court testimony. *Madden v. Holland Group of Tenn.*, 277 S.W.3d 896, 900 (Tenn. 2009). A reviewing court may, however, draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *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). For injuries occurring prior to July 1, 2014, the workers' compensation law must be liberally construed in favor of an injured employee. Nevertheless, the employee must prove all the elements of his or her case by a preponderance of the evidence. *Crew v. First Source Furniture Grp.*, 259 S.W.3d 656, 664 (Tenn. 2008).

[4] This amounts to five (5) times the permanent partial impairment rating.

[5] Employee was earning sufficient wages to entitle her to the maximum weekly benefit for temporary total disability benefits of $918.50. $918.50 X 36.7 weeks=$33,708.95.

In this case, Employer/Appellant does not contest causation or challenge the 12% impairment rating assigned by Dr. Lindy. Employer simply contends the trial court erred by finding the Employee did not have a meaningful return to work, by not capping her recovery to one-and-one-half times her impairment rating, by awarding an excessive amount in permanent partial disability benefits, and by awarding excessive temporary total disability benefits.

Meaningful Return to Work

When an employer does not return an injured employee to work at a wage equal to or greater than his or her pre-injury wage, the employee may receive permanent partial disability benefits up to six times the medical impairment rating. Tenn. Code Ann. § 50–6–241(d)(2)(A). It is only "[w]hen the employee has made a 'meaningful return to work,' [that] the lower cap of one-and-one-half times the impairment rating applies." *Williamson v. Baptist Hosp. of Cocke Cnty., Inc*., 361 S.W.3d 483, 488 (Tenn. 2012); *Tryon v. Saturn Corp*., 254 S.W.3d 321, 328 (Term. 2008). "[T]he burden is upon the employer to show, by a preponderance of the evidence, that an offer of a return to work is [made] at a wage equal to or greater than the pre-injury employment and that the work is within the medical restrictions ... for the returning employee." *Ogren v. Housecall Health Care, Inc.*, 101 S.W.3d 55, 57 (Tenn. Workers' Comp. Panel 1998). The touchstone of the meaningful-return-to-work analysis is "reasonableness," *Tryon*, 254 S.W.3d at 328, and the determination of whether an employee has had a meaningful return to work is "highly fact-intensive and 'depends on the facts of each case,' " *Howell v. Nissan N. Am., Inc.*, 346 S.W.3d 467, 472 (Tenn. 2011) (quoting *Tryon*, 254 S.W.3d at 328). Three factors guide this analysis: (1) whether the injury rendered the employee unable to perform the job; (2) whether the employer declined to accommodate work restrictions "arising from" the injury; and (3) whether the injury caused too much pain to permit the continuation of the work. *Tryon*, 254 S.W.3d at 329. Under Tennessee case law, an employee who returns to work following a compensable injury and later chooses to sever the employment relationship to accept a better job offer is nevertheless capped at the one and one half multiplier. *Lay v. Scott Cnty. Sheriffs Dep't*, 109 S.W.3d 293, 299 (Tenn. 2003).

Employer asserts Employee had a meaningful return to work after her injury, made a wage equal to or greater than her wage before the work injury, and voluntarily resigned on March 27, 2014, for reasons unrelated to her work injury. Accordingly, Employer asserts Employee's benefits should have been limited to one and one-half times the anatomical impairment rating, rather than a multiplier of five. Tenn. Code Ann. § 50–6–241(d)(1)(A), (2)(A). In support of this contention, Employer relies upon the testimony of its manager, Shelton Johnson, that Employee voluntarily resigned her job.

As noted above, however, the trial court accredited the testimony of Employee over that of Mr. Johnson, as was its prerogative. It is undisputed that on March 27, 2014, Employee had not yet reached maximum medical improvement; she was still under treatment and awaiting surgery. Employee testified she returned to work after her initial injury and did the best she could to perform her duties, but her physical limitations prohibited her from optimum performance. Contrary to Mr. Johnson's testimony, Employee testified Employer did not accommodate her work restrictions. She asserted she did not want and did not intend to resign until she was called into Mr. Johnson's office and was told she needed to step down from her position and accept a different position earning less money than she made prior to her injury. It was undisputed that Mr. Johnson completed the majority of the resignation documents, noting "other" as the purported reason for Employee's resignation. Employee testified she noted "other" because of her injuries and her inability to perform her job within her restrictions. Mr. Johnson testified he marked "other" as the reason for Employee's resignation because he was unsure of the specific reason for her leaving.

We concur with the trial court's determination that Employee was pressured to resign and did not have a meaningful return to work. Therefore, the trial court did not err in declining to cap Employee's award.

Excessive Award

Employer further contends the trial court erred by multiplying the anatomical impairment by five to arrive at an award of 60% permanent partial disability benefits. It contends Employee sustained only minimal vocational disability and this award was excessive.

The extent of an injured worker's permanent disability is a question of fact. *Lang v. Nissan N. Am., Inc.*, 170 S.W.3d 564, 569 (Tenn. 2005) (citing *Jaske v. Murray Ohio Mfg. Co.*, 750 S.W.2d 150, 151 (Tenn. 1988)). In determining the preponderance of the evidence for the extent of a disability, a court may also consider the extent of the worker's vocational disability. *Id.* at 570. Once causation and permanence have been established by expert medical testimony, to determine the extent of vocational disability, a trial court must consider all the relevant evidence, including both expert and lay testimony. *Id.* (citing *Nelson v. Wal–Mart Stores, Inc.*, 8 S.W.3d 625, 629 (Tenn.1999)). Factors include the employee's age, education, job skills and training, the extent and duration of anatomical impairment, local job opportunities, and the employee's capacity to work at the kinds of employment available to one in the employee's disabled condition. *Id.* (citing *McIlvain v. Russell Stover Candies, Inc.*, 996 S.W.2d 179, 183 (Tenn.1999)). Further, the employee's own assessment of her physical condition and resulting disabilities cannot be disregarded. *Lambdin v. Goodyear Tire &*

Rubber Co., 468 S.W.3d 1, 13 (Tenn. 2015) (citing *Uptain Constr. Co. v. McClain*, 526 S.W.2d 458, 459 (Tenn.1975)).

Employer contends considering Employee's education level, training, and prior employment history, her vocational disability is minimal. Furthermore, Employer asserts that with the restrictions Dr. Lindy imposed, Employee could have actually returned to work performing the same job she had before her injury. However, "[v]ocational disability is 'measured not by whether the employee can return to her former job, but whether she has suffered a decrease in her ability to earn a living.' " *Lang v. Nissan N. Am., Inc.*, 170 S.W.3d at 570 (quoting *Walker v. Saturn Corp.*, 986 S.W.2d 204, 208 (Tenn.1998)). *See also Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 217 (Tenn. 2006).

We note that by the time of trial, Employee was sixty-three years old. Despite her prior training and work experience, almost all that experience was in jobs that would have required extended periods of standing or walking, activities that were severely limited by the permanent restrictions Dr. Lindy imposed. Furthermore, Employee testified she had applied for jobs at several other department stores, spas and other places. None of these employers offered her a job because of her permanent restrictions. Despite the limited employment she had with Clinique as a makeup artist, her knee continued to swell every day. We concur with the trial court's conclusion that the record supports an award of 60% permanent partial disability of the left leg.

Temporary Disability Benefits Award

Finally, Employer disputes the award of temporary total disability benefits. It contends the medical and lay evidence supports a finding that following the August 15, 2014, surgery, Employee could have returned to sedentary duty as soon as August 22, 2014, and light duty work as soon as October 23, 2014. Employer contends that had Employee not voluntarily resigned her position in March 2014, it would have accommodated her work restrictions, and she could have returned to her employment at Dillard's. Again, Employer relies heavily on the testimony of Shelton Johnson to support these contentions. Employer contends that, because Employee was no longer employed with Employer, Employee could have attained another job during this period of time.

To establish a prima facie case of entitlement to temporary total disability benefits, an employee must show: (1) she was totally disabled and unable to work due to a compensable injury; (2) there was a causal connection between the injury and her inability to work; and (3) the duration of the period of disability. *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 776 (Tenn. 2000). Temporary total disability benefits are terminated either by the employee's ability to return to work or the employee's attainment of maximum medical improvement.

Again, there is no dispute concerning compensability. The issue here is duration of Employee's disability. Employer contends Employee could have returned to work, and thus limited temporary total disability benefits, before the date of maximum medical improvement on April 27, 2015. As noted earlier, the trial court accredited the testimony of Employee over that of Shelton Johnson regarding whether Employer accommodated Employee's work restrictions. There is no evidence to indicate Employer would have been any more accommodating to Employee after surgery than it was before it pressured her to resign. As for whether she could have obtained employment elsewhere, Employee testified she made application to several employers, none of whom were willing to accommodate her work restrictions. We conclude the trial court's award of temporary total disability benefits is fully supported by the record.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Dillard's, Inc. and Safety National Casualty, for which execution may issue if necessary.

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RHYNETTE N. HURD, JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

ALICIA HUNT v. DILLARD'S INC., ET AL.

Chancery Court for Madison County
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W2016-02148-SC-WCM-WC – Filed December 13, 2017

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by the Dillard's Inc. and Safety National Casualty pursuant to Tennessee Code Annotated section 50-6-225(a)(5)(A)(ii), 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.

It appears to the Court that the motion for review is not well taken and is, therefore, denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

In addition, the appellee, Alicia Hunt, has asserted that Employer's motion for review is frivolous so as to entitle her to an award of attorney fees and costs pursuant to Tennessee Code Annotated sections 27-1-122 and 50-6-225(a)(5)(B). Upon due consideration, the request is denied.

Costs are assessed to Dillard's Inc. and Safety National Casualty, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

HOLLY KIRBY, J., not participating