

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

KARA BARNES v. PINNACLE FOODS GROUP

**Appeal from the Chancery Court for Madison County
No. 65,949 James F. Butler, Chancellor**

No. W2009-01995-SC-WCM-WC - Mailed January 19, 2011; Filed April 13, 2011

In this workers' compensation action, the employee sustained bilateral carpal tunnel syndrome as a result of her employment. She had two surgeries on her left arm to treat the condition. Prior to reaching maximum medical improvement, she voluntarily retired. The trial court found that her retirement was reasonably related to her work injuries, and therefore the statutory limit to permanent partial disability benefits contained in Tennessee Code Annotated section 50-6-241(d)(1)(A) did not apply to her award. The employer, Pinnacle Foods Group, appealed.¹ We affirm the judgment of trial court.

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

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

William B. Walk, Jr., Memphis, Tennessee, for the appellant, Pinnacle Foods Group.

Steven W. Maroney and Matthew R. West, Jackson, Tennessee, for the appellee, Kara Barnes.

¹Pursuant 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

Kara Barnes sustained injuries to both her arms while working for her former employer, Pinnacle Foods Group (“Pinnacle”), and its predecessors. Pinnacle accepted Ms. Barnes’s injuries as compensable. Ms. Barnes filed a complaint seeking workers’ compensation benefits, and the trial court held a hearing to determine the nature and extent of Ms. Barnes’s permanent partial disability and whether Ms. Barnes’s award is subject to the cap provided in Tennessee Code Annotated section 50-6-241(d)(1)(A) (2008).

Ms. Barnes worked for Pinnacle, a food processing and packaging firm, for more than thirty years. Her responsibilities included “factory and production type work” that involved constant use of her hands. In the latter part of 2006, Ms. Barnes developed numbness and tingling in both hands. She reported her condition to Pinnacle, which referred her to Dr. Wren. Dr. Wren referred Ms. Barnes to Dr. David Yakin, an orthopaedic surgeon.

Dr. Yakin testified by deposition. He diagnosed Ms. Barnes as having bilateral carpal tunnel syndrome, and he recommended corrective surgery. A left carpal tunnel release was performed on November 16, 2006. After a short period, Ms. Barnes returned to work with Dr. Yakin’s permission on a restricted duty basis. Her symptoms improved initially but then began to worsen. As a result, a second surgery was performed on her left arm on April 27, 2007. Dr. Yakin testified that, during the procedure, he observed the presence of extensive scar tissue in the area of the previous surgery. That scarring was the cause of Ms. Barnes’s continuing problems.

After the second surgery, Dr. Yakin again permitted Ms. Barnes to return to work on a restricted duty basis shortly after the procedure. Specifically, he restricted her from lifting more than five pounds with her left hand. Pinnacle accommodated that restriction. While she was still under the care of Dr. Yakin, and prior to achieving maximum medical improvement, Ms. Barnes decided to retire from Pinnacle in August 2007.

Dr. Yakin continued to follow Ms. Barnes until May 2008. The condition of her arm did not improve. Because surgery failed to benefit her left arm, she decided against having surgery on her right arm. On May 6, 2008, Dr. Yakin placed Ms. Barnes at maximum medical improvement and assigned an impairment of 24% to her left arm. He did not address the right arm at that time, but during his deposition, he testified that she had a 2% to 5% impairment of the right arm. He placed permanent restrictions of “no heavy gripping, no lifting over five pounds, limited use of handling and fingering and feeling with the hand.”

Dr. Lloyd Walwyn, also an orthopaedic surgeon, performed an independent medical examination at the request of Ms. Barnes's attorney. His opinions were placed into evidence by means of a Form C-32, Standard Form Medical Report for Industrial Injuries. In Dr. Walwyn's opinion, Ms. Barnes had an anatomical impairment of 25% of the right arm. He recommended that Ms. Barnes be restricted to lifting no more than thirty pounds maximum and fifteen pounds frequently, and stated that she would be limited in handling, fingering, and feeling in her right hand.

Ms. Barnes testified that she was sixty-seven years old at the time of trial. She was a high school graduate, but had no additional education or specialized training. Prior to working for Pinnacle, she had worked in the garment industry and at another food processing concern. She had held several jobs during her tenure with Pinnacle, all involving preparing food items to be packaged or operating packaging machines. Ms. Barnes stated that she retired shortly after her sixty-fifth birthday. She testified that it had been her intention to retire at the age of sixty-five years and ten months to receive the maximum social security retirement benefit available to her.

Ms. Barnes was questioned extensively about her reasons for retiring earlier than she had planned. During direct examination, she testified that she decided to retire "[b]ecause I knew I couldn't – I could not go back out there and do a package operator's job." She stated that, although she was working in a restricted duty capacity before she retired, she "didn't figure [Pinnacle] would keep [her] out there ten [more] months on restricted duty." During cross examination, Ms. Barnes implied that she retired ten months earlier than she had originally intended because her "hands got messed up." She agreed that Dr. Yakin permitted her to return to work, that Pinnacle had found jobs within her restrictions, that Pinnacle had not indicated that her work was unsatisfactory, and that Dr. Yakin was still treating her condition as she had not reached maximum medical improvement at the time she retired.

At the time of trial, Ms. Barnes had not worked or sought other employment since her retirement. She had not returned to Dr. Yakin after he released her in May 2008. She reported having difficulty "picking up anything very heavy." She also testified that she had problems removing lids and caps from jars and bottles because of the weakness of her hands.

The trial court found that Ms. Barnes's retirement was reasonably related to her work injury and that she did not have a meaningful return to work. The trial court concluded that her award of permanent partial disability benefits was not subject to the statutory limit of one and one-half times the medical impairment rating on permanent partial disability benefits contained in Tennessee Code Annotated section 50-6-241(d)(1)(A) and awarded 65% permanent partial disability ("PPD") to both arms. The trial court stated that Ms. Barnes's

award would be 36.75% PPD if section 50-6-241(d)(1)(A) was applicable. Pinnacle has appealed, contending that the trial court erred by finding that Ms. Barnes did not have a meaningful return to work. In the alternative, it argues that the award is excessive

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 the 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 the trial court when the trial judge had the opportunity to observe the witness’s demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where 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. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). 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); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

Analysis

(1) Meaningful Return to Work

Pinnacle contends Ms. Barnes’s award should be limited to one and one-half times her impairment rating pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A) and that the trial court erred by finding that Ms. Barnes did not have a meaningful return to work. In support of this contention, it notes that her retirement was entirely voluntary, that she had not reached maximum medical improvement at the time she decided to retire, that it accommodated restrictions placed on her for this and previous injuries, and that there was no evidence it would not continue to do so.

In Tryon v. Saturn Corp., 254 S.W.3d 321 (Tenn. 2008), the Supreme Court undertook a comprehensive review of the case law addressing application of Tennessee Code Annotated section 50-6-241 when an employee voluntarily leaves his or her employment. The Court held that “an employee has not had a meaningful return to work if he or she returns to work by later resigns or retires for reasons that are reasonably related to his or her workplace injury.” Id. at 328-29. If the employee retires or resigns “for personal reasons or other

reasons . . . not reasonably related to his or her workplace injury, the employee has had a meaningful return to work.” Id. at 329. The workers’ compensation benefits for an employee who has made a meaningful return to work are limited to one and one-half times the employee’s medical impairment rating pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A). See Tryon 254 S.W.3d at 327-28.

The Court further observed: “When determining whether a particular employee had a meaningful return to work, the courts must assess the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to either return to or remain at work.” Id. at 328. See also Iacono v. Saturn Corp., No. M2008-00139-WC-R3-WC, 2009 WL 648962, at *5-6 (Tenn. Workers’ Comp. Panel Mar. 12, 2009); Erdman v. Saturn Corp., No. M2008-00281-WC-R3-WC, 2009 WL 1607905, at *5 (Tenn. Workers’ Comp. Panel June 10, 2009). The trial court stated that, after closely examining the facts, it found that Ms. Barnes retired “solely because of the pain, numbness, and inability to do the work she had done for thirty-six years while working for [Pinnacle].” The trial court concluded, “This forms a reasonable basis for not continuing to work in the factory setting, and it is related to her injury while working there.”

Pinnacle contends that Ms. Barnes’s decision to retire was purely voluntary and unrelated to her work injury. It asserts, therefore, that her failure to return to work was “unreasonable,” and in accordance with Tryon, Ms. Barnes’s award of benefits should be capped pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A). In response, Ms. Barnes takes the position that her testimony at trial was sufficient to support the trial court’s conclusion that her retirement was related to her work injury. In that regard, she points to her testimony that her left hand continued to be numb, stiff and painful after the second surgical procedure. Ms. Barnes’s trial testimony included the following:

Q: How did you do with that left hand after that second surgery?

A: Not too good because, like I said, it was still numb and it was stiff. I still couldn’t use it like I should. It was just about like it was after the first one.

* * * *

Q: But getting back to how you were feeling in August of 2007, now, you were on restricted duty, but just so its clear, what job duties were you performing on - - when you were on a restricted basis?

A: I was helping out on the lines. If there was product to open up, I opened it up, and then I put coupons on the pancakes for a while. And then they sent

me to fish, where you had to tuck these bags under with the fish in it so it would go in the carton, just whatever they could find for me to do.

Q: And during that period of time - - let's take the period of time after your second surgery, from April 2007 through the time you retired, when you were performing those duties you've just described, physically how was that work affecting you?

A: It was affecting my hands bad. They hurt.

Pinnacle presented no evidence to rebut her testimony that she was unable to continue to work as a result of that condition.

A recent panel decision addressed a somewhat similar situation. In Blair v. Wyndham Vacation Ownership, Inc., No. E2009-01343-WC-R3-WC, 2010 WL 2943144 (Tenn. Workers' Comp. Panel July 27, 2010), the employee was offered the opportunity to return to her pre-injury job but declined to do so. She testified that she believed that she was unable to perform the job as a result of her injury. However, there was medical testimony and lay testimony that the job was within the restrictions placed upon her. The trial court found that she did not have a meaningful return to work. The panel reversed, noting that there was "no evidence that Employee's decision not to attempt to return to work was based upon any medical advice or opinion. To the contrary, there is medical testimony . . . that the position offered was within Employee's physical capabilities." Id. at *6.

In this case, however, Ms. Barnes attempted to return to work. She worked with significant restrictions for approximately four months. Even working within the significant restrictions following her second surgery, her work was, according to her, "affecting her hands bad" and caused them to hurt. Based in part on this testimony, the trial court found Ms. Barnes's decision to retire was "reasonable."

We are troubled by the fact Ms. Barnes retired while she was still being treated for her injury and prior to reaching maximum medical improvement. In this case, however, the restrictions that Dr. Yakin placed on Ms. Barnes were similar to the temporary restrictions that he had placed on her after her first surgery. There is no evidence that the pain and numbness she was experiencing improved prior to her reaching maximum medical improvement in May 2008. Although there is no evidence that Pinnacle would not have been able to continue to accommodate her restrictions until her projected retirement date in June 2008, working within those restrictions caused Ms. Barnes to have trouble with her hands and to experience pain. Based on the record before us, we are unable to find that the evidence preponderates against the trial court's finding that Ms. Barnes did not have a

meaningful return to work. Accordingly, the award of benefits was not limited to one and one-half times the impairment by Tennessee Code Annotated section 50-6-241(d)(1)(A).

(2) *Excessive award*

Pinnacle also contends that Dr. Yakin's impairment rating for the right arm (2%-5%) is more appropriate than Dr. Walwyn's 25% rating. Ms. Barnes argues that Dr. Yakin's impairment rating was properly disregarded by the trial court because Dr. Yakin had not given a rating to the right arm prior to his deposition and because his explanation for the rating was unclear. It appears from Dr. Yakin's deposition that his impairment rating as to Ms. Barnes right arm was an estimate based on his memory of her condition and the contents of the guidelines. There is no indication that Dr. Yakin evaluated Ms. Barnes to determine the impairment to her right arm.

Dr. Walwyn conducted an examination of Ms. Barnes for the purpose of evaluating her right arm impairment. He determined that she had a grip strength of 7 kilograms. Since the average grip strength for a woman of Ms. Barnes's age is 22.3 kilograms, he estimated that she retained only 31% of the grip strength in her right arm which according to Table 16-32 of the American Medical Association's Physicians Guide to the Evaluation of Permanent Impairment (Fifth Ed.) corresponds to a 20% impairment of the right upper extremity. In addition, Dr. Walwyn examined the results of imaging tests, which revealed moderate right carpal tunnel syndrome. Based upon Section 16.5d of the Guidelines, Ms. Barnes was determined to have an additional 5% impairment. Combining the two impairments, Dr. Walwyn determined her right upper extremity impairment to be 25%. After a de novo review of Dr. Yakin's and Dr. Walwyn's depositions, we conclude that the trial court correctly relied on Dr. Walwyn's evaluation of Ms. Barnes's right arm impairment.

Ms. Barnes sustained a 24% impairment to her left arm and a 25% impairment to her right arm. Applied to both arms, the impairment is 24.5%. In our view, the evidence does not preponderate against the trial court's award of 65% vocational PPD to both arms.

Conclusion

The judgment of the trial court is affirmed. Costs are assessed against appellant, Pinnacle Foods Group, and its surety, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

KARA BARNES v. PINNACLE FOODS GROUP, LLC ET AL.

**Chancery Court for Madison County
No. 65949**

No. W2009-01995-SC-WCM-WC - Filed April 13, 2011

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Pinnacle Foods Group, LLC and Zurich American Insurance Company pursuant to Tennessee Code Annotated section 50-6-225(e)(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.

Costs are assessed to Pinnacle Foods Group, LLC and Zurich American Insurance Company, and their sureties, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Janice M. Holder, J., not participating