IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 29, 2012 Session

TINA KELLEY v. D & S RESIDENTIAL HOLDINGS, LP[1]

Appeal from the Circuit Court for Loudon County
No. 2010CV214 Russell E. Simmons, Jr., Judge

No. E2011-02392-WC-R3-WC-Mailed-Aug. 3, 2012 / Filed-Sept. 4, 2012

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. The employee, a human resources director, slipped and fell while performing her job responsibilities. The employee did not return to work following the incident and was subsequently terminated. Although the employee received temporary total disability benefits, she filed suit alleging that she was entitled to additional temporary total and permanent partial disability benefits. While concluding that the employee had sustained a 19% permanent partial disability to the body as a whole, the trial court capped the award at one and one-half times the medical impairment rating because the employee was not denied a meaningful return to work. The employee has appealed, contending that the evidence preponderates against the trial court's finding that she had a meaningful return to work. She also contends that she is entitled to temporary partial disability benefits. In response, the employer asserts that the 19% impairment rating is excessive. Because the evidence does not preponderate against the findings of the trial judge, the judgment is affirmed.

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

GARY R. WADE, J., delivered the opinion of the court, in which JERRI S. BRYANT, SP. J., and E. RILEY ANDERSON, SP. J., joined.

---

[1] The notice of appeal in this case lists the Employer as "D & S Residential Holdings, LP." The name listed on the Employer's brief, however, is "D & S Residential Services, Inc." Still other documents within the record list the Employer as "D & S Residential Services, LP." This discrepancy in no way affects our decision, and the Employer has not sought to correct it. Accordingly, we will simply refer to the Employer as it is listed on the notice of appeal.

Joseph R. Ford, Loudon, Tennessee, for the appellant, Tina Kelley.

Daniel W. Starnes, Knoxville, Tennessee, for the appellee, D & S Residential Holdings, LP.

MEMORANDUM OPINION

Factual and Procedural Background

On January 5, 2009, Tina Kelly ("the Employee"), a human resources director for D & S Residential Holdings, LP ("the Employer"), slipped and fell after depositing the mail into the mailbox in front of the Employer's office building in Alcoa. As she reached for the door, the Employee lost her footing and fell into a brick wall, scraping the sides of her face, her hands, and her arms. While bleeding from her head and hands, she immediately experienced stiffness in her body, particularly in her lower back and shoulder. The Employee was initially treated at the Fort Loudon Emergency Room, and later saw Dr. James Wells—an approved treating physician—for followup treatment. Dr. Wells prescribed a course of physical therapy, but ultimately referred the Employee to Dr. Glenn Holloway, an orthopaedic surgeon who specialized in shoulder injuries.

In April of 2009, Dr. Holloway discovered a partial tear of the rotator cuff and treated the injury with a cortisone shot and physical therapy. The Employee was restricted from climbing, pushing, pulling, or lifting of more than five to ten pounds. Because the cortisone provided only temporary relief, Dr. Holloway later decided that surgery was the best option to repair the tear. After the surgery on July 14, the Employee was unable to work for three to four weeks, but thereafter, could have performed her job within the restrictions as previously prescribed, according to Dr. Holloway. Dr. Holloway further stated that the Employee's injury would likely be aggravated if she were to be pulled or twisted in any way.

Following the surgery, the Employee, who continued to experience stiffness and a limited range of motion in her shoulder, remained in physical therapy and received additional cortisone injections. In an effort to relieve the stiffness, Dr. Holloway performed a second surgery in January of 2010, cutting away the scar tissue which had formed after the initial procedure. Within two months, the Employee demonstrated a significant improvement in her mobility. Afterward, however, the Employee missed several appointments designed to establish an impairment rating. It was not until August 4, 2010, that Dr. Holloway was able to examine the Employee and determine that she had reached maximum medical improvement. At that time, he released the Employee to return to work without any restrictions. In his opinion, the Employee had impairment ratings of 12% to the upper extremity and 7% to the body as a whole based upon the Sixth Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment ("AMA Guides

Sixth Edition").

In March of 2009, the Employee saw Dr. James Maguire, an orthopaedic surgeon specializing in spinal surgery, for pain in the right side of her lower back which radiated into her right leg. Although a magnetic resonance imaging test ("MRI") showed degenerative changes at the lumbar five and sacral one level and a disc protrusion on the left side of the Employee's back—the side opposite of where the Employee was experiencing symptoms—Dr. Maguire could not find any explanation for the symptoms in her right lower extremity. As a result, Dr. Maguire advised against surgery but recommended an epidural steroid block injection to help with the pain. The Employee missed several appointments, however, and did not receive the recommended injection. During a subsequent appointment in September of 2009, Dr. Maguire ordered a functional capacity evaluation ("FCE"). Dr. Maguire further observed that someone experiencing the level of pain claimed by the Employee would not likely have gone for those several months without seeing a physician.

When Dr. Maguire saw the Employee in October of 2009, he learned that she had not undergone the FCE and that she planned to have an evaluation which incorporated her shoulder injury. Based on the Employee's continuing complaints of pain, Dr. Maguire restricted her lifting to no more than twenty-five pounds. After she completed the FCE, he restricted her to lifting no more than forty pounds occasionally and twenty pounds frequently. After reading the Employee's job description, Dr. Maguire stated that she should have been able to perform her duties throughout the period he treated her and that she could have driven her stick shift vehicle. Although Dr. Maguire never actually assigned an impairment rating or ascertained a date of maximum medical improvement, it was his opinion that the Employee had a 5% impairment to the whole body based solely on her complaints of pain, and that, retrospectively, he would have placed her at maximum medical improvement on November 23, 2010, the date of the Employee's last appointment.

On January 8, 2009, three days after the Employee's fall, Jim Burgess, the Employer's Executive Director, offered the Employee a "consulting position," which would have allowed her to sit or stand at her leisure and simply give verbal commands to others. The Employee, the Employer's only human resource officer, did not accept the consulting position but communicated with Kevin Limburg, a co-worker who performed her duties. During this period, she instructed Limburg on the various duties of her job. On April 13, 2009, the Employee received a letter from Burgess explaining that if she failed to return by April 17, he would conclude that she had abandoned her employment, resulting in her termination. When the Employee did not respond by the deadline, she was terminated.

The Employee received temporary total disability benefits following each of her surgeries; for February 5, 2009 through April 7, 2009 and for July 14, 2009 through August

24, 2009, she was paid the total amount of $6,847.08. Following an impasse at the benefit review conference, the Employee filed suit in December of 2010, claiming that she was permanently and partially disabled as a result of an injury and, in the alternative, alleging that she had suffered a gradual injury to her shoulder and lower back as a result of her work. In its response, the Employer acknowledged that the Employee was injured in a fall related to her employment.

Dr. William Kennedy performed an independent medical evaluation of the Employee in February of 2011 and concluded that she had suffered a tear in the rotator cuff and post traumatic osteoarthritis of the acromioclavicular ("AC") joint in her right shoulder. In his opinion, the same accident caused a sprain of the Employee's cervical spine and "permanently aggravated and advanced the pre-existing, underlying degenerative disc disease of the cervical spine." As a result of the injuries to the AC joint and the rotator cuff, Dr. Kennedy assessed 11% and 5% impairment ratings, respectively, which resulted in a combined 15% permanent physical impairment to the right upper extremity and a 9% impairment to the body as a whole based upon the AMA Guides 6th Edition. Because he also assessed 2% and 9% impairment ratings to the body as a whole for the cervical spine and lumbar spine injuries, Dr. Kennedy concluded that the Employee had a 19% permanent physical impairment for the injuries sustained in the fall. Based on his observations and the Employee's physical limitations, Dr. Kennedy recommended that the Employee permanently refrain from rapid, repeated hand motions; hammering or jerking motions with either hand; working with her hands elevated above her shoulders; and bending, stooping, or squatting. He further recommended that she refrain from climbing ladders; working or crawling on her hands and knees; or lifting, carrying, pulling, or pushing twenty pounds occasionally or ten pounds frequently with both hands, or five pounds occasionally with the right hand. After reviewing the Employee's job description, Dr. Kennedy expressed the belief that the Employee would have been able to perform all of the duties of her job except for sitting for prolonged periods of time and lifting up to thirty pounds. In his opinion, the Employee would have been able to return to her job in April of 2009, some four months after her fall, so long as she was allowed to either sit or stand.

At the time of trial, the Employee was forty-seven years old, had an associate's degree in liberal arts, and had previous employment as a waitress, receptionist, maid, data processor, security guard, and administrative assistant. She had worked for the Employer for over four years as the human resources coordinator. Her duties included filing, conducting interviews, training employees, maintaining employee files, and payroll. The Employee testified that she was still experiencing some range of motion problems in her shoulder, which limited her ability to engage in certain activities such as throwing a ball. She also claimed continuing lower back pain, stating "If I exercise more or do more walking, do more sitting, then I'm going to know it that night." The Employee explained that she did not return to work

because of Dale Troutman, an intellectually disabled janitor, who was described as a "consumer" of the Employer.[2] She claimed that Troutman, whose disability resulted from a traumatic brain injury, was "out of control" and a danger to her physical and emotional well-being because he would regularly run the hallways, scream, beat on doors, touch, hug, and kiss people, and sometimes "grope" the breasts of female employees. The Employee stated that she regularly had to defend herself from advances by Troutman by moving, pushing, or blocking him. She further testified that Troutman's behavior was often brought up in weekly meetings with the entire office staff. She claimed that she had made numerous complaints to Burgess, her direct superior, but that Troutman was allowed to continue his work as a janitor for the Employer. The Employee also claimed that she was unable to drive her stick shift vehicle to work as a result of her injuries.

On cross-examination, the Employee conceded that even though she had regular communication with Limburg and occasional communication with Burgess and other employees after her injury, she had never blamed the antics of Troutman as a reason for not to returning to work. She also acknowledged that she did not communicate her fears of Troutman to the Employer at any time after her termination on April 17, 2009.[3] The Employee testified, however, that she would have been able to return to work had she been allowed to sit or stand at her leisure and had Troutman been removed from the office area. After her termination, the Employee spent three or four weeks working for her brother's company, Howard Electric, but did not receive a paycheck. While she had interviewed with the local school system for a substitute teaching position and applied for numerous jobs posted in the Lenoir City newspapers and on internet websites, she had been unemployed from the time she was terminated by the Employer until the time of trial in August of 2011.

Summer Bowers, a receptionist for the Employer between March of 2005 and December of 2008—one month prior to the Employee's injury—testified on behalf of the Employee. She attested to Troutman's inappropriate behavior, describing him as six-feet two-inches tall and weighing approximately 280 pounds. Asserting that she had also been subjected to Troutman's misconduct, she confirmed she had frequently witnessed Troutman touch, hug, and rub the Employee. Ms. Bowers testified that she often complained about Troutman's behavior, and that his behavior was regularly addressed in weekly office meetings. She described the typical response by management to the complaints as "that's just

---

[2] The Employer provides direct care services for persons with intellectual disabilities, whom the Employer refers to as "consumers." The Employer provides its consumers with 24/7 support at whatever level they need.

[3] The Employee later filed a claim with the Equal Employment Opportunity Commission ("EEOC") involving Troutman, which was settled prior to the present action.

Dale."

John Morgan, who worked for the Employer as a direct care staff person and was Troutman's personal caretaker for two years, was employed to shadow Troutman "everywhere he went" and to ensure not only Troutman's safety but also that of everyone around him. He testified that Troutman typically worked "for like two minutes and then just aggravated everybody the rest of the time." Morgan witnessed Troutman attempt to kiss, touch, and grab numerous females in the office. Because of his misbehavior, Morgan eventually stopped taking Troutman to the administrative office.

Executive Director Burgess confirmed that the Employee, as well as everyone else in the office, expressed concerns about Troutman's actions, including his inappropriate touching of female employees. He testified that while Troutman's inappropriate behavior was often discussed in the office, the Employee had never mentioned Troutman's behavior or any other reason for her refusal to return to work. Burgess had to verbally reprimand Troutman on several occasions and explain to him that he was not allowed to touch other employees. He stated that no formal complaint had ever been made against Troutman until the Employee filed the EEOC claim, after which Troutman was discharged from his duties. Burgess, who did not sense that anyone else in the workplace was fearful of Troutman, testified that if the Employee had informed him that she was afraid of him, he would have "found some way to protect her." Although he had little knowledge of the Employee's actual injuries, Burgess was aware of the restrictions placed on her by her physicians. He stated that he "needed" the Employee because she was the only human resources employee and was willing to accommodate her physical restrictions. He testified that the purpose of the April 13, 2009 letter was to inform the Employee that the job continued to be available within the restrictions.

At the conclusion of the trial, the court found that the Employee, who received total disability benefits for over fourteen weeks during the periods after her two surgeries, was not entitled to additional temporary total disability benefits, citing the testimony of Drs. Holloway and Maguire that she was able to perform her job for all but the first three or four weeks after each of the procedures. While recognizing the issue pertaining to Troutman, the trial court further found that because the Employee had acted unreasonably by not attempting to return to her work and by failing to inform the Employer of her reasons for not returning, she had a meaningful return to work, thus capping her permanent partial disability benefits at one and one-half times the impairment rating:

> Complaints of [Troutman's] actions were taken to responsible persons but there was a problem of the administration in differentiating between how to handle the actions of a consumer and the actions of a co-worker. The policy

> for handling a consumer was to not fight back but to try to control them by talking to them. Although there were numerous discussions, there was no formal complaint about [Troutman's] actions until after Plaintiff's injury. . . . On January 8, 2009 Plaintiff indicated she was released with only two restrictions[:] no prolonged sitting and no use of the computer . . . . Plaintiff requested [personal time off] for a week with a return to work on January 12, 2009. Plaintiff never returned to work to see if she could handle the work while accommodating her restrictions, and Plaintiff never informed Defendant why she would not come back to work. Plaintiff testified that she never talked with Jim Burgess about her problems with the co-worker after the accident. . . . The Court finds that the only competent proof [that] she could not drive a straight shift car was due to her surgery on July 14, 2009, and . . . for approximately ten weeks after surgery. The Court does not find this to be a legitimate reason for not returning to work from January 5, 2009 to April 2009 when she [chose not to return to] work. . . . Employer was willing to have her back on the job whatever her restrictions were . . . [and] was reasonable in its attempt to return [E]mployee to work.
>
> Plaintiff on the other hand never attempted to return to work, and did not inform Employer what her real reasons were for not returning to work. There is no way an employer can return an employee to work if the employee does not reveal why she will not return. The Court finds no medical restrictions due to her work[-]related injury that kept Plaintiff from returning to work. Therefore, the Court finds that . . . Employee's failure to return to work was not reasonable under the circumstances . . . . Plaintiff had a "meaningful return to work," and Plaintiff's permanent partial disability benefits are capped at one and one-half times her medical impairment rating.

Adopting Dr. Kennedy's impairment rating of 19% to the whole body, the trial court awarded a 28.5% permanent partial disability to the body as a whole, which amounted to $52,538.04.

In this appeal, the Employee argues that the trial court erred by finding that she had a meaningful return to work and by failing to award temporary partial disability benefits. In response, the Employer submits that the trial court properly ruled that the Employee had a meaningful return to work and correctly denied further temporary partial benefits. The Employer does, however, contend that the impairment rating by Dr. Kennedy was excessive.

Standard of Review

The trial court's findings of fact must be reviewed "de novo upon the record . . . 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). This standard of review requires a careful examination of the factual findings and conclusions made by the trial court. Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008); Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). When credibility and weight to be given testimony are involved, considerable deference must be given the trial court when the trial judge had the opportunity to observe the witnesses' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). However, "where medical testimony is presented by deposition, this Court may independently assess the medical proof to determine where the preponderance of the evidence lies." Trosper v. Armstrong Wood Prods., Inc., 273 S.W.3d 598, 604 (Tenn. 2008). The interpretation and application of our workers' compensation statutes are questions of law, and questions of law must be reviewed de novo with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009). Our primary objective when engaging in statutory construction is to carry out the intent of the legislature without unduly broadening or restricting the statute. Arias v. Duro Standard Prods. Co., 303 S.W.3d 256, 260 (Tenn. 2010).

Analysis

Meaningful Return to Work

Our first workers' compensation statutes were enacted in 1919 with the goal of shifting the burden of compensating injured workers from the public to the employers. Lynch v. City of Jellico, 205 S.W.3d 384, 390 (Tenn. 2006). In 1992, the legislature placed a cap of two and one-half times the medical impairment rating on the permanent partial disability benefits an employee could recover in the event the employee was returned to work at a wage equal to or greater than his or her pre-injury wage. Workers' Compensation Reform Act of 1992, ch. 900, § 16, 1992 Tenn. Pub. Acts 859, 870 (codified at Tenn. Code Ann. § 50-6-241(a)(1) (2008)). The purpose of the recovery cap was to encourage employers to retain injured employees at their same wage in return for a limited workers' compensation recovery. Dowd v. Cassens, No. M2005-2632-WC-R3-CV, 2007 WL 715518, at *6 (Tenn. Workers' Comp. Panel Mar. 8, 2007). In 2004, the legislature further reduced this cap to one and one-half times the medical impairment rating in an effort to reduce employers' expenses of providing workers' compensation benefits. See Act of May 20, 2004, ch. 962, § 42(a), 2004 Tenn. Pub. Acts 2346, 2372; Lynch, 205 S.W.3d at 390.

The Employee's first contention is that the trial court erred by finding that she had a meaningful return to work, thereby limiting her award of disability benefits to one and one-half times the medical impairment rating. See Tenn. Code Ann. § 50-6-241(d)(1)(A) (2008). The concept of a meaningful return to work "provides guidance in the determination of whether statutory provisions apply to a claim." Williamson v. Baptist Hosp. of Cocke Cnty., Inc., 361 S.W.3d 483, 488 (Tenn. 2012). If an employee has made a meaningful return to

work, his or her permanent partial disability benefits are capped at one and one-half times the rating. Tenn. Code Ann. § 50-6-241(d)(1)(A). If an employee has not made a meaningful return to work, then he or she may recover up to six times the medical impairment rating. Tenn. Code Ann. § 50-6-241(d)(2)(A) (2008). In order for an employee to meaningfully return to work, an employer must attempt to "return[] the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury . . . ." Tenn. Code Ann. § 50-6-241(d)(1)(A). In determining whether there has been 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." Tryon v. Saturn Corp., 254 S.W.3d 321, 328 (Tenn. 2008). The application of this concept is "remarkably varied and complex," id., requiring a fact-intensive analysis. Williamson, 361 S.W.3d at 489. In Williamson, our Supreme Court laid out three factors that should guide a court's meaningful return to work analysis: "(1) whether the injury rendered the employee unable to perform the job; (2) whether the employer refused to accommodate work restrictions 'arising from' the injury; and (3) whether the injury caused too much pain to permit the continuation of the work." Id. at 488 (quoting Tryon, 254 S.W.3d at 329).

The Employee argues that because she reasonably refused to return to work and because the Employer unreasonably sought her return, she was denied a meaningful return to work and should not be limited by the one and one-half times cap. The trial court, however, found that the Employer acted reasonably because he had a "desperate" need for his only human resource employee. The trial court accredited the testimony of the Employer, who expressed the willingness to employ her "whatever her restrictions were," and further concluded that the Employee "never attempted a return to work, and did not inform [the] Employer what her real reasons were for not returning."

In Blair v. Wyndam Vacation Ownership, Inc., No. E2009-01343-WC-R3-WC, 2010 WL 2943144 (Tenn. Workers' Comp. Panel July 27, 2010), a Panel addressed the reasonableness of an employee's failure to return to work. The employee expressed the belief that her pain would prohibit her from performing her job as a salesperson, climbing the stairs, or working the requisite hours even though the position only required her to be able to lift and hold a clipboard. Id. at *5. Her doctor confirmed that the position she was offered was within her physical capabilities. Id. The human resources director for the employer testified that while salepersons did often work long hours during the spring and summer, they also worked less than five days per week during slower sales periods. Id. Elevators were available as an alternative to the stairs. Id. From the testimony, the Panel determined that the employee's refusal to return was unreasonable and, therefore, she was not denied a meaningful return to work:

> It is possible that, if Employee had attempted to return to work, her injuries would have interfered with her ability to do her job, and Employer would have been unable to accommodate her limitations . . . . However, Employee did not attempt to return to work. Any conclusion about what might have happened is mere speculation.

Id. at *6; see also Iacono v. Saturn Corp., No. M2008-00139-WC-R3-WC, 2009 WL 648962, at *6-7 (Tenn. Workers' Comp. Panel Mar. 12, 2009) (holding that the employee had a meaningful return to work where he decided to retire early based on a subjective belief that he would be unable to perform his job); Douglas v. Duracraft Millwork, Inc., No. M2008-02010-SC-WCM-WC, 2009 WL 3108740, at *4-5 (Tenn. Workers' Comp. Panel Sept. 29, 2009) (holding that the employee's failure to accept a different job for the same wage was unreasonable); Dowd, 2007 WL 715518, at *6 (holding that the employee was unreasonable in retiring because he feared re-injury, even though he was permitted to work within his medical restrictions).

In our view, the trial court properly ruled that the Employee had a meaningful return to work.[4] The testimony illustrates that the Employer gave the Employee every opportunity to return to her employment for the same wage and under optimum circumstances. She was offered a consulting position in which she would be allowed to sit or stand at her leisure and simply give others verbal commands, but the Employee rejected the offer. Although unaware of the specific nature of her injuries, the executive director of the Employer was cognizant

---

[4] Because the employee had a meaningful return to work and was therefore capped at one and one-half times the impairment rating, we need not address the Employee's argument that she is entitled to additional vocational disability benefits. Tennessee Code Annotated section 50-6-242(b) states that:

> [f]or those injuries that occur on or after July 1, 2004, and notwithstanding any provision of this chapter to the contrary and in appropriate cases where the employee is eligible to receive the maximum permanent partial disability award under § 50-6-241(d)(1)(B) or (d)(2), the employee may receive disability benefits not to exceed the appropriate maximum number of weeks as set forth in § 50-6-207 for the type of injury sustained by the employee.

She is not, therefore, eligible to receive anything above one and one-half times the medical disability to the maximum multiplier under Tennessee Code Annotated section 50-6-241(d)(1)(B) and cannot recover under Tennessee Code Annotated section 50-6-242. See Nelson v. Wal-Mart Stores, 8 S.W.3d 625, 631 (Tenn. 1999) (referring to the predecessor of Tennessee Code Annotated section 50-6-241 and stating that "[b]y its plain language, § 242 makes clear that it only applies to an award under § 241(a)(2) or (b) where there has been a loss of employment or no meaningful return to work"); Davis v. Reagan, 951 S.W.2d 766, 768 (Tenn. 1997); Aerostructures Corp. v. York, No. M2006-01362-WC-R3-WC, 2008 WL 182242, at *6 (Tenn. Workers' Comp. Panel Jan. 18, 2008) (declining to review the trial court's findings regarding vocational disability after holding that the employee had a meaningful return to work).

of the restrictions placed on the Employee by her physicians and was willing to accommodate these restrictions. Instead of either attempting to return to her job or offering an explanation as to why she chose not to do so, the Employee simply chose not to respond at all.

At trial, the Employee contended that she could not return to work because of her fear of another employee. She claimed that the Employer was either "incapable or unwilling" to address the improprieties of the other employee. While the behavior at issue was entirely inappropriate, the Employee never complained to the Employer that the misbehavior of the other employee was the reason for her refusal to return to work. Burgess, whose testimony was accredited by the trial court, testified that he would have removed the offending employee from the office had the Employee notified him of her fears. "Any conclusion about what might have happened is mere speculation" and does not serve as a reasonable basis for the Employee's refusal to return to work. Blair, 2010 WL 2943144, at *6.

The Employee also argues that she did not return to work because she was physically incapable of driving a stick shift vehicle, the only vehicle regularly available to her. Dr. Maguire, however, testified that the injuries he treated would not have prevented the Employee from being able to drive the vehicle. Similarly, Dr. Holloway stated that the Employee would have been able to drive a stick shift vehicle from the time of the injury until her first surgery on July 14, 2009—approximately three months after her termination—and then again within twelve weeks following surgery. There was no medical evidence to the contrary. Thus, the Employee's subjective belief that she could not return to work due to her perceived inability to drive her vehicle was not "based upon any medical advice or opinion." Blair, 2010 WL 2943144, at *6; see also Douglas, 2009 WL 3108740, at *4-5. Her testimony does not, therefore, preponderate against the finding of the trial court.

Temporary Partial Disability Benefits

The Employee next asserts that the trial court erred by failing to award temporary partial disability benefits during the period before she reached maximum medical improvement.[5] There is insufficient proof in the record to demonstrate any partial disability during the period before the Employee reached maximum medical improvement. Where the disability is not total, an employee may recover temporary partial benefits if he or she is "able to resume some gainful employment but has not reached maximum recovery." Williams v. Saturn Corp., No. M2004-01215-WC-R3-CV, 2005 WL 3059459, at *3 (Tenn. Workers'

[5] The Employee argues that she is entitled to temporary partial disability benefits for the period of time between April 7, 2009 to July 14, 2009 and August 24, 2009 until her final release to maximum medical improvement by Dr. Maguire on November 23, 2010. The parties stipulated that the Employee was paid the proper temporary total disability benefits from February 5, 2009 to April 7, 2009 and from July 14, 2009 to August 24, 2009.

Comp. Panel Nov. 15, 2005). Tennessee Code Annotated section 50-6-207(2) (2008) provides that "[i]n all cases of temporary partial disability, the compensation shall be sixty-six and two-thirds percent (66 2/3%) of the difference between the average weekly wage of the worker at the time of the injury and the wage the worker is able to earn in the worker's partially disabled condition." In Williams, a Panel applied this statute where an employee did not return to work prior to reaching maximum medical improvement. See Williams, 2005 WL 3059459, at *3. The employee worked on an assembly line for an automobile manufacturer, where she regularly was required to have her arms above her shoulders. Id. at *1. Over the years, problems began to develop in both of her shoulders, ultimately leading to multiple surgeries. Id. Afterward, the employee was released to work but with the restriction that she refrain from working with her arms above her shoulders. Id. While she was unable to return to her previous position on the assembly line due to this restriction, she continually applied for other jobs within the company that she could perform. Id. A few months after reaching maximum medical improvement, the employee was able to find a position within her medical restrictions as an automobile test driver. Id. Finding that the employee made a "good faith effort" to return to her job but was unable to return due to her medical restrictions, the Panel awarded the employee temporary partial disability benefits for the time before she reached maximum medical improvement. Id. at *3. The Panel found that the weekly wage she was able to earn was zero and awarded her 66 2/3% of her pre-injury wage. Id.; see also Cohea v. Thaxton, No. M2004-01611-WC-R3-CV, 2005 WL 1937012, at *5 (Tenn. Workers' Comp. Panel Aug. 15, 2005) (imputing the minimum wage for calculating temporary partial disability benefits where the employee was able to work, yet chose not to do so); Lindbloom v. Metro 8 Sheet Metal, Inc., No. E-1998-00495-WCR3CV, 2000 WL 233290, at *5 (Tenn. Workers' Comp. Panel Feb. 28, 2000) (disallowing temporary partial benefits where the employee returned to work within all medical restrictions).

Here, the Employee relies on the holding in Williams, arguing that she is entitled to temporary partial disability benefits. Unlike the employee in Williams, however, the Employee did not make a "good faith effort" to return to work only to be prevented from doing so because of her medical restrictions. Instead, the testimony establishes that the Employee was fully capable of performing the same job for the same wage within each of her physical restrictions at all relevant times, yet she made no attempt to return. Drs. Holloway, Maguire, and Kennedy all testified that the Employee would have been able to perform her job despite her restrictions. Furthermore, the Employer's executive director offered to honor each of the restrictions. There is no indication in the record, nor does the Employee contend, that this offer was made for a lower wage than what she had received prior to her injury. The evidence establishes that the Employee's ability to return to work and earn the same wage was not foreclosed by a partial disability. Rather, it was foreclosed by her subjective belief that she could not perform the job. As stated, a subjective belief is not

a reasonable basis upon which to award disability benefits:

> We fully recognize that the [Employee] was continuing to recover from her injury, and continuing to recover from her surgery. Nonetheless, she [was] released to return to work, and the testimony of her doctor[s] show[] she was able to work. There is no basis for any award of further temporary disability, total or partial, after a worker returns to full duty or after [s]he reaches maximum medical improvement, whichever first occurs.

Lindbloom, 2000 WL 233290, at *5. Thus, because her average weekly wage at the time of her injury and the wage she was able to earn in her partially disabled condition were the same, there is no "difference" of wages in which temporary partial disability benefits may be calculated and awarded to the Employee. Tenn. Code Ann. § 50-6-207(2).

Moreover, it is well established that "issues not raised in the trial court cannot be raised for the first time on appeal." Simpson v. Frontier Cmty. Credit Union, 810 S.W.2d 147, 153 (Tenn. 1991). Our workers' compensation act places "compensable occupational disabilities into four distinct classifications . . . (1) temporary total disability; (2) temporary partial disability; (3) permanent partial disability; and (4) permanent total disability." Davis, 951 S.W.2d at 767; see also Tenn. Code Ann. § 50-6-207(1)–(4). Each statutory classification "is independent and serves a specific compensation goal." Davis, 951 S.W.2d at 767. A claim for temporary partial disability benefits should be first raised at trial, not on appeal. The Employee does not make any reference to the record as to any claim of temporary partial disability. This Panel has been unable to find such a claim. To the contrary, counsel for the Employee agreed with the trial court's understanding that the issues for trial were "any additional temp[orary] total time to be paid, which multipliers to be used, and the permanent [partial] disability."

Impairment Rating

The Employer asserts that the trial court erred by basing its award of permanent partial disability benefits on the impairment rating assigned by Dr. Kennedy, the Employee's evaluating physician. The Employer specifically contends that the evidence preponderates against his opinion that the Employee sustained a 2% impairment of the cervical spine from her work injury.

Trial courts generally have the discretion to choose which expert to accredit when there is a conflict of opinions. Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990); Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel 1996). However, where as in this case, the medical testimony is presented by deposition, this Panel "may independently assess the medical proof to determine where the preponderance

of the evidence lies." Trosper, 273 S.W.3d at 604; see also Crew, 259 S.W.3d at 665. After reviewing the evidence, we adopt the assessment by Dr. Kennedy and conclude that the proof presented supports his conclusion that the Employee sustained a cervical spine injury in the fall. Dr. Kennedy based his opinion on a review of the Employee's medical records as well as a physical examination, finding that the character and distribution of her pain was consistent with a sprain of the cervical spine. Additionally, this diagnosis was supported by a physical examination of the Employee, which revealed muscle spasms and a loss of motion. Although only normal, age-related changes were apparent on the diagnostic imaging studies of the Employee, Dr. Kennedy testified that she had sprained her cervical spine and thereby advanced the pre-existing underlying degenerative disc disease. See Trosper, 273 S.W.3d at 607 (stating that "if the work injury advances the severity of the pre-existing condition, or if, as a result of the pre-existing condition, the employee suffers a new, distinct injury other than increased pain, then the work injury is compensable").

The Employer points to Dr. Holloway's testimony suggesting that the Employee did not suffer a cervical spine injury. Dr. Holloway did not assess an impairment rating to the cervical spine and opined that the Employee's neck pain was "coming referred from her shoulder."[6] He based his opinion on his own findings that no injury was visible from the MRI, and a cortisone injection to the Employee's shoulder gave her temporary relief of her neck pain. He additionally stated that he did not assign an impairment rating to the cervical spine, because he did not remember it being an issue when conducting the final impairment rating. Dr. Holloway, however, is a shoulder specialist who does not perform neck impairment ratings. He testified that his practice was limited to shoulders and that he refers patients to one of his partners if he feels that a patient has sustained a neck injury. As a result, Dr. Holloway did not perform any evaluations of the Employee's neck beyond its relation to his treatment of her shoulder injury. We therefore find more persuasive Dr. Kennedy's testimony that the Employee sustained a cervical spine injury.

Conclusion

Because the Employee was not denied a meaningful return to work, she is limited to an award of one and one-half times the medical impairment rating. No additional award for temporary partial disability is warranted. In addition, the evidence supports a permanent impairment rating of 19% to the body as a whole. Costs shall be taxed one-half to Tina Kelley and her surety and one-half to D & S Residential Holdings, LP, for which execution may issue if necessary.

[6] When used in this context, "refer" means "to regard as coming from or localized in a certain portion of the body or of space." Webster's Third New International Dictionary 1907 (1993).

____

GARY R. WADE, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
May 29, 2012 Session

Tina Kelley v. D & S Residential Holdings, LP

Circuit Court for Loudon County
No. 2010CV214

No. E2011-02392-WC-R3-WC

JUDGMENT

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 appeals 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 of this appeal are taxed one-half to Tina Kelley and her surety and one-half to D & S Residential Holdings, LP, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM