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

VONETTA MOUSSEAU v. DAVITA, INC.

Appeal from the Chancery Court for Hardeman County
No. 16963 William C. Cole, Chancellor

No. W2010-02612-SC-WCM-WC - Mailed November 17, 2011
Filed February 21, 2012

The employee, a registered nurse, injured her neck and lower back when she slipped and fell in a pool of water. She had surgical fusions of the cervical and lumbar spine. She continued to have serious symptoms for which she received numerous medications. Her treating physician testified that she was incapable of performing any nursing functions, including those that required only sedentary work. The trial court found her to be permanently and totally disabled. Her employer has appealed, contending that the evidence preponderates against the trial court's finding on disability and that the employee should be held to have been offered a meaningful return to work. We affirm the judgment of the trial court.[1]

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

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

Fetlework Balite-Panelo, Nashville, Tennessee, and Stephen W. Elliott, Nashville, Tennessee, for the appellant, Davita, Inc.

Edward L. Martindale, Jr., Jackson, Tennessee, for the appellee, Vonetta Mousseau.

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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

Vonetta Mousseau ("Employee") worked for Davita, Inc. ("Employer") as a registered nurse, supervising three dialysis clinics in West Tennessee. She was injured on April 24, 2007, when she slipped in a pool of water and landed on her tail bone. She reported the incident to her supervisor the next day.

Employee filed a complaint in the Chancery Court for Harden County alleging that she sustained injuries while performing her duties during her employment. A trial was conducted on November 23, 2010. At issue was the extent of Employee's permanent disability and whether or not Employee had a meaningful return to work.

In October 2007, Employee was referred to Dr. Timothy Schoettle, a neurosurgeon in Nashville. Based upon his examination of Employee and MRI scans, Dr. Schoettle determined that Employee had sustained injuries to her neck and lower back. He considered the neck injury to be much more significant and recommended that another MRI be performed. The MRI showed bone spurring in the cervical spine, including spinal cord compression at the C6-C7 level. This finding was consistent with the symptoms reported by Employee, which included pain radiating downward from her neck, clumsiness, and diminished sensation in her lower body. Dr. Schoettle recommended a cervical discectomy and fusion at the C6-C7 level, which he performed on November 2, 2007.

Initially, many of Employee's symptoms improved following the surgery. After several months, however, her symptoms of arm and leg clumsiness and numbness in her lower body returned. Employee also began having episodes of urinary incontinence.

Dr. Schoettle referred Employee to a neurologist and a urologist for additional treatment. Employee's ongoing neurologic symptoms also caused emotional problems. Because of those issues, Dr. Schoettle deferred surgery on her lower back, although tests showed Employee's back injury to be worsening. By March 2009, Employee's mental condition had improved enough to permit Dr. Schoettle to perform a lumbar fusion at the L4-L5 level.

On February 1, 2010, Dr. Schoettle determined that Employee had reached maximum medical improvement. Dr. Schoettle believed that Employee's fall on April 24, 2007, was the cause of her neck and back injuries and he assigned a 44% permanent anatomical impairment based on the spinal injuries, and two subsequent surgeries. Dr. Schoettle also referred Employee to a pain management clinic for additional treatment. In his deposition,

Dr. Schoettle testified that he did not think that Employee would be able to return to gainful employment as a registered nurse, stating:

> I think with the combination of the neurologic symptoms and then the medication she takes for those, which a lot of antiseizure medications and muscle relaxants, they cause drowsiness. And then the pain clinic has her on narcotics that would cause drowsiness, I think it would not have her in a position where she could do the critical-type work than an RN has to do, particularly in a dialysis clinic situation.

When asked whether Employee could return to work in a sedentary position, Dr. Schoettle responded that "[he] would be more concerned about [Employee's] capability of functioning and making important decisions while on that type of medication."

Employee testified that she had difficulty maintaining her balance due to vertigo and weakness in her legs. Her husband or daughter stayed in the bathroom with her when she showered because she had fallen on several occasions. She estimated that she could stand only for fifteen to twenty minutes at a time before having to sit down. Similarly, she could sit for about fifteen minutes before having to stand up. Employee was able to walk from her house to her mailbox and back. She continued, however, to have urinary incontinence. As a result, she was reluctant to leave her home for fear of having an episode of incontinence in public.

Employee's attempt to drive her son to school resulted in an arrest for DUI. Employee testified that her erratic driving had been caused by the effects of the various medications she was prescribed. Those medications included: Antivert, an antiseizure medication, Soma, a muscle relaxer, Lyrica, for neurologic symptoms, Percocet, a pain medication, Klonopin, an antianxiety medication, and, Cymbalta, an antidepressant. Employee had also been taking Methadone but had discontinued that medication after the DUI incident. She took additional medications for pre-existing thyroid and high blood pressure problems and to treat her incontinence.

Employee was forty-two years old when the trial occurred. She had a GED, an associate's degree in nursing, and she was a licensed registered nurse. Employee had received a certification in nephrology in 1999 and had worked in dialysis-related care both before and after that time. She had been a facility administrator with responsibilities for as many as thirty-two dialysis clinics in California. Employee moved to Tennessee in 2005 where she supervised three dialysis clinics. Employee's job duties required bending, stopping, pushing and pulling while administering medications, setting up and tearing down different machines, and carrying jugs weighing twenty-five pounds.

Employee has not worked or sought employment since her first appointment with Dr. Schoettle in October 2007. Since being released from Dr. Schoettle's care, Employee had not contacted Employer to see if any non-nursing positions were available. Employee testified that did not consider herself capable of working in the medical field nor did she believe she was capable of driving to work because of the effect of her many medications.

Dr. Robert W. Kennon, a licensed clinical psychologist, performed a vocational evaluation of Employee at the request of her attorney. He testified that the skills she had obtained as a registered nurse could be transferred to 133 other job positions. Based upon his understanding of the restrictions placed upon Employee by Dr. Schoettle,[2] however, Dr. Kennon opined that Employee was excluded from all but two of those positions: a holter scanning technician and a cardiac monitor technician. Neither of these jobs was available in Perry county, where Employee lived, or in any contiguous counties. Dr. Kennon also stated that while Employee might meet the physical demands required of the two positions, she would not be able to do so given the impact of her depression and the medications she was taking.

Michelle Weiss, a vocational consultant, performed a transferable skills analysis of Employee at the request of Employer's attorney. Ms. Weiss found Dr. Schoettle's testimony and records concerning Employee's work restrictions unclear. Ms. Weiss opined that if Dr. Schoettle would permit Employee to return to supervisory positions, Employee's vocational disability would be 85%. If supervisory positions were not allowed, Employee's disability would be 95%. If Dr. Schoettle considered Employee to be incapable of even sedentary work, Ms. Weiss opined that Employee's disability would be 100%.

At trial, Employee testified that she never reported back to work with Employer because Dr. Schoettle never advised her that she could return to that type of work. Employer did not call any witnesses nor did it offer evidence that Employer had any type of work for Employee either at the clinics or outside Employee's work as a nurse and administrator. Employer presented no evidence that it could offer Employee a job that paid her the $100,000.00 salary that she was earning at the time of her fall.

The trial court announced its findings from the bench. It found that Employee was permanently and totally disabled. The Chancellor stated:

> I found [Employee] to be a very credible witness. Her testimony was consistent with a history that she gave to the doctors and to the vocational

[2] Dr. Schoettle did not testify concerning specific restrictions. Mr. Kennon interpreted his testimony to mean that she was physically capable of sedentary work only.

> rehab experts . . . . The testimony is undisputed that her lifestyle has been changed dramatically from being a very lively, active person to someone who stays inside her home because of her desire not to get out and her inability to get out of the house. . . . There's been no proof here from [Employer] as to whether or not they have a position that would meet the limitations that [Employee] has. Again, the only medical proof here comes from Dr. Schoettle, and he says she cannot go back there . . . . There's only one conclusion, and that is that [Employee] is permanently disabled.

Judgment was entered in accordance with that ruling. Employer has appealed, contending that the evidence preponderates against the finding of permanent total disability. Employer also contends that trial the court erred in failing to find that Employee had 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, 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 in reviewing the trial court's findings of credibility and assessment of the weight to be given to that 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 must 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). 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).

Analysis

Employer contends that the trial court erred in finding that Employee was totally disabled. Employer also argues that the trial court erred in finding Employee had no meaningful return to work. Employer contends that Employee should be subject to the one and one-half impairment cap.

1. Disability

Tennessee Code Annotated section 50-6-207(4)(B) (2008) provides that an injured employee is totally disabled when the employee's injury "totally incapacitates the employee

from working at an occupation that brings the employee an income." Employer contends that although Employee may not be able to continue working as a registered nurse, she has the capability to return to gainful employment elsewhere. In support of this contention, Employer points out that Employee's work as a registered nurse was technically skilled, that she had supervisory and administrative experience, and that Dr. Schoettle did not specifically prohibit her from working in positions outside the RN field. Employer asserts that the facts of this case are analogous to two other cases in which injured employees were found not to be totally disabled, *Hubble v. Dyer Nursing Home*, 188 S.W.3d 525 (Tenn. 2006), and *Deller v. Federal Express Corp.*, No. W2007-00668-SC-WCM-WC, 2008 WL 902669 (Tenn. Workers' Comp. Panel Apr. 1, 2008).

In *Hubble*, the employee argued on appeal that the evidence preponderated against the trial court's finding that Employee had sustained a 95% permanent partial disability rather than permanent total disability. Employee testified that:

> [H]er ability to drive [was] limited; she [had] difficulty lifting minimal amounts of weight; she [had] difficulty sitting or standing in one position for any length of time; and she [could not] do many of the basic household chores. However, she testified that she [babysat] her brother's two children, who were four years old and nine months old at the time of trial.

188 S.W.3d at 531. The treating physician testified that employee "could work in the future, although she was limited to performing sedentary work which would allow her flexibility to move around throughout the day." *Id.* at 530. Employee's evaluating physician agreed with this assessment. *Id.* A vocational evaluator testified that employee had a permanent disability of 77% to 95%. *Id.* at 531. The Supreme Court held that the evidence did not preponderate against the trial court's finding on the issue of disability. *Id.* at 528.

In *Deller*, the employee was an airplane pilot who suffered a low back sprain as a result of a fall. 2008 WL 902669, at *1. Employee's treating physician restricted employee from sitting more than four hours at a time. *Id.* As a result of that restriction, employee was unable to return to her former job. *Id.* at *2. The trial court awarded permanent total disability benefits. *Id.* The Special Workers' Compensation Appeals Panel reversed, noting that even though employee was precluded from performing her previous job duties, the employee had "extensive education and has performed successfully in a job which requires the highest level of skill and judgment," that she had obtained three real estate licenses after her injury, and that the restrictions placed upon her by her treating physician were "not severe or unusual." *Id.* at *3-*4.

We do not find either *Hubble* or *Deller* to be persuasive in this case. Although the employee in *Hubble* was limited to sedentary work, her treating and evaluating physicians and the vocational evaluator all believed her to be capable of working. We have carefully examined the testimony of Dr. Schoettle in this case and cannot find any statement therein that provides a reasonable basis for a belief that Employee is capable of working. Indeed, Dr. Schoettle's testimony on the subject must be characterized as pessimistic. The testimony of the two vocational evaluators also differed from the evidence in *Hubble*. In the case now before this Court, Dr. Kennon found that there were two jobs that Employee *might* be capable of performing, but neither was available in or near her community. Ms. Weiss found Dr. Schoettle's testimony concerning Employee's limitations to be unclear. Ms. Weiss hypothesized, however, that if Employee was capable of supervisory work outside of the field of nursing, the resulting disability would be 85%. Ms. Weiss conceded that Employee was totally disabled, or nearly so, if not capable of such work. We find the latter conclusion to be more consistent with Dr. Schoettle's testimony.

Further, although Employee was a highly-skilled worker, much as the pilot in *Deller*, her physical limitations were more significant that Ms. Deller's. In addition, the uncontradicted lay and medical testimony was that Employee has a substantial limitation upon her cognitive and analytical abilities due to the effects of the many medications required to manage her ongoing pain, neurological symptoms, and depression. She also suffers from incontinence.

For these reasons, we find that *Hubble* and *Deller* are not analogous to this case. We conclude that the evidence does not preponderate against the trial court's finding that Employee is permanently and totally disabled.

2. Return to Work

As a second issue, Employer argues that Employee did have a meaningful return to work, and thus she should be subject to the one and one-half impairment cap set forth in Tenn. Code Ann. § 50-6-241(d)(1)(A)(2008). Employer contends that an employee should be subject to the lower impairment cap when the employee does not attempt to return to work after being released to work by the treating physician. *Blair v. Wyndham Vacation Ownership, Inc.*, No. E2009-01343-WC-R3-WC, 2010 WL 2943144, at *6 (Tenn. Workers Comp. Panel July 27, 2010). In *Blair*, the Panel opined that because the employee did not attempt to return to work, there was no way to know if her injuries interfered with her ability to do her job or whether employer would have been unable to accommodate her limitations. *Id.* The *Blair* Panel held that because the employee did not attempt to return to work, "[a]ny conclusion about what might have happened is mere speculation." *Id.*

Employer also relies on *Webb v. Shoe City, Inc.*, No. W1998-00741-WC-R3-WC, 2000 WL 33126578 (Tenn. Workers Comp Panel Sept. 20, 2000), in which the Panel found that an employee acted unreasonably in failing to communicate with her employer regarding her work restrictions or her release by her doctor. *Id.*, at *8. The *Webb* Panel held that "[a]t some point, the employee has to take the initiative to go back to work, and that point is logically when he or she is released to go back to work by the doctor." *Id.*

Employer argues that because of Employee's inaction and unilateral decision that she could not return to work, Employee precluded Employer from accommodating her restrictions and any conclusion about what Employee could or could not have done about her employment is now mere speculation. Employer emphasizes that Employee admitted that she did not communicate with Employer about returning to work after Dr. Schoettle released her from his care, Employee did not inform Employer about the restrictions placed on her by Dr. Schoettle, and Employee did not seek employment for either another registered nurse position or an administrative position. Thus, Employer claims, Employee acted unreasonably and should be considered as having had a meaningful return to work, subject to the one and one-half impairment cap.

Employee contends that, unlike the employees in *Blair* and *Webb*, when Dr. Schoettle released Employee from his care, he specifically stated that Employee could not return to any type of gainful employment in the nursing profession, even in a sedentary job as a registered nurse. Employee argues that it was because of Dr. Schoettle's prognosis that she never contacted Employer about returning to work. Employee also points out that Employer never made any attempt to contact her about returning to work. Finally, Employee argues that not only was there no evidence that the Employer had any kind of work available to the Employee within her restrictions, but Employer failed to introduce evidence that it had any jobs available at Employee's salary as required by Tenn. Code Ann. § 50-6-241)(d)(1)(A). Thus, Employee contends that she did not have a meaningful return to work, and the one and one-half impairment cap should not apply.

The trial court found the *Blair* case distinguishable. Unlike the employee in *Blair*, the trial court opined, "There's been no proof here from [Employer] as to whether or not they have a position that would meet the limitations that [Employee] has. Again the only medical proof here comes from Dr. Schoettle, and he says she cannot go back [to her former employment] . . . ." In *Blair*, there was no evidence that Employee's failure to attempt to return to work was based upon any medical advice or opinion. 2010 WL 2943144, at *6. Here, however, there is such evidence. Considering the seriousness of Employee's injury and her resulting problems, the Employer's position on this issue borders on frivolous. None of the cases cited require an attempt to return to work when the evidence clearly shows that such an effort would be futile.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Davita, Inc. and its surety, for which execution may issue if necessary.

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WALTER C. KURTZ, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

VONETTA MOUSSEAU v. DAVITA, INC.

Chancery Court for Hardeman County
No. 16963

No. W2010-02612-SC-WCM-WC - Filed February 21, 2012

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Davita, Inc. 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 Davita, Inc. and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Janice M. Holder, J., not participating