

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
April 29, 2014 Session

KAREN R. WOODS v. ACE-AMERICAN INSURANCE ET AL.

**Appeal from the Law Court for Sullivan County
No. C39791 E. G. Moody, Chancellor**

No. E2013-01916-SC-R3-WC-MAILED-JULY 16, 2014/FILED-AUGUST 15, 2014

The employee fell at work and suffered a lower back injury. She received medical treatment, including two back surgeries, over a period of years. The trial court awarded permanent disability benefits based on the employee's back injury and a bladder and bowel dysfunction that developed during her subsequent treatment. Her employer's insurer has appealed, asserting that the trial court erred by adopting one medical expert's disability rating over another, by finding that the bladder and bowel dysfunction was caused by the work-related injury, and by awarding benefits in excess of the one and one-half times impairment cap because the employee voluntarily resigned. 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 in accordance with Tennessee Supreme Court Rule 51. We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2013) Appeal as of Right; Judgment
of the Trial Court Affirmed**

E. RILEY ANDERSON, SP. J., delivered the opinion of the Court, in which GARY R. WADE, C.J., and JON KERRY BLACKWOOD, SR. J., joined.

William Troy Hart and Kristen C. Stevenson (on appeal), and Daniel W. Starnes (at trial), Knoxville, Tennessee, for the appellants, ACE-American Insurance and Sedgwick Claims Management Services, Inc.

J. David Miller, Kingsport, Tennessee, for the appellee, Karen R. Woods.

OPINION

I. Factual and Procedural Background

Karen Woods (the "Employee") was employed as a manager by Dollar Tree, a retail

store in Kingsport, Tennessee. On November 25, 2005, she tripped and fell over a large crack in the floor while walking to the bathroom at work. She experienced pain in her back and leg, reported the incident to her supervisor, and completed an accident report. She declined to seek medical treatment at that time, thinking that her symptoms would improve. Her job duties, however, which included unloading boxes of merchandise from trucks, restocking merchandise, and climbing ladders, caused her back and leg pain to increase over time.

The Employee asked to see a doctor, but the accident report had been lost or misplaced, which caused a delay in starting the Employee's treatment. She was eventually referred to Dr. Joseph Grant, an orthopaedic surgeon, in August 2006. Dr. Grant examined her and found she was having right hip pain which was radiating into her thigh and leg. She also had lumbar pain, tenderness, and loss of motion. Dr. Grant began a course of conservative treatment, including cortisone injections and physical therapy, but the Employee had ongoing and escalating pain and did not improve.

After Dr. Grant moved his practice to Kentucky, the Employee was referred to Dr. Rebekah Austin, a neurosurgeon, for further treatment in November 2009. Dr. Austin examined the Employee and found she had nerve root compression on the right side and continued to have back and leg pain. A lumbar MRI, which had been performed earlier in 2009, revealed a right-sided paracentral disc protrusion, severe stenosis of the right lateral recess, with impingement of the right traversing nerve root. According to Dr. Austin, the disc at L4-5 had deteriorated more rapidly than expected and was accelerated by the back injury. Dr. Austin concurred with Dr. Grant that fusion surgery was an option because of the Employee's symptoms and radiographs, but she initially ordered physical therapy and a lumbar epidural steroid injection. The Employee's pain, however, did not improve, and, after the injection, she noticed numbness in the groin and experienced urinary frequency and bowel dysfunction.¹ Dr. Austin last saw the Employee on February 26, 2010.

Dr. Austin suffered a stroke in May 2010 and the Employee was referred to Dr. Gregory Corradino, a neurosurgeon, who first saw her on August 21, 2010. Dr. Corradino performed a lumbar laminectomy at the L4-5 level on October 10, 2010. The Employee had initial relief but her symptoms returned shortly after the procedure. Dr. Corradino ordered an MRI which demonstrated a recurrent disc herniation at L4-5. He then performed a revision surgery at the same level in February 2011. He last treated the Employee in July 2011, but she had only minimal improvement and was referred to another doctor for pain

¹ The Employee had previously had episodes of urinary incontinence following a partial hysterectomy in 2005. She had corrective surgery for those problems in May 2005 and had no additional problems until the epidural injection in January 2010.

management.

The Employee made a claim for permanent disability benefits arising from her work injury of November 25, 2005. The claim was not resolved at the Benefit Review Conference held on July 31, 2011. The Employee then filed this civil action in the Law Court for Sullivan County. The matter proceeded to trial on June 4, 2013.

Dr. Corradino, who testified by deposition, stated that the Employee returned to see him on February 2, 2012, for the purpose of conducting a functional capacity evaluation. At that time, Dr. Corradino declared the Employee to be at maximum medical improvement and assigned a 7% permanent impairment to the body as a whole due to the back injury and surgeries. According to Dr. Corradino, at best the Employee was capable only of sedentary work with a fifteen-pound lifting restriction. He further opined that the Employee would continue to have significant back and leg pain and would need further treatment. Dr. Corradino testified that loss of bladder and/or bowel control is a known risk of epidural injections, and that he would identify a causal relationship between the epidural injection and the incontinence if the Employee had no history of such problems prior to the 2010 epidural. It was undisputed that, until the 2010 epidural was injected, the Employee had no problems with incontinence after she had corrective surgery in May 2005.

Dr. Austin also testified by deposition. She had not examined or otherwise seen the Employee since 2010. Dr. Austin based her testimony on her prior physical examination of the Employee, her prior treatment of the Employee, her own recollections, the medical records of other treating physicians, and the records of Dr. Corradino. Dr. Austin stated that the Employee had an impairment of 10% to the body as a whole due to her back injury and surgeries. Dr. Austin agreed with Dr. Corradino that the Employee should be restricted to sedentary work with a fifteen-pound lifting restriction. In addition, she assigned an 11% permanent impairment for the Employee's ongoing urinary incontinence, and a 5% permanent impairment for the rectal dysfunction. According to the combined values chart of the Fifth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, these combined for an impairment of 24% to the body as a whole. Dr. Austin confirmed that the Employee first complained of groin numbness and decreased ability to control her bowels in January 2010, shortly after the epidural injection, and further testified that an epidural injection could cause these symptoms.

The Employee, who was fifty-nine years old at the time of the trial, testified that she had left school in the tenth grade but had obtained a GED in 1995. She had later taken some computer-related classes at an evening adult education facility. She testified that she began working at Dollar Tree in 2001 and loved her job. Her prior work experience included receiving and stocking at a clothing store, managing a clothing store, and assisting customers

in a shoe store. At Dollar Tree, her responsibilities included unloading merchandise from delivery trucks, climbing ladders, displaying and re-stocking merchandise, cleaning, and operating a cash register. She testified that she reluctantly resigned from Dollar Tree in August 2008 because, at that time, she felt she was unable to perform several aspects of her job, including those which required lifting, crawling, climbing, and standing. She explained that while she had discussed with her supervisor her inability to perform those job duties, it was her belief that Dollar Tree did not have any “sit down” type of job she could perform. She had not applied for other employment since her resignation from Dollar Tree.

The Employee further testified that she continued to have bladder incontinence and rectal dysfunction. She wore adult diapers because of these problems. Before her injury she had a very active life, which consisted of cleaning and washing, yard work, gardening, and tending to her grandchildren. Since her injury, she has been limited in her ability to drive, to go to events such as fairs, or to shop because she needs to be near a restroom at all times. The Employee testified that she needs assistance to get in and out of the shower and is unable to put on socks or any type of shoe other than “slip-ons” because she cannot bend over.

The trial court took the case under advisement and later issued a written Opinion and Judgment. First, the court found that the Employee was extremely credible and that the bowel and bladder dysfunction was directly related to her work injury. Second, the court found that the Employee had severe limitations on her daily living activities due to pain, numbness, and bowel and bladder dysfunction. Finally, the trial court adopted Dr. Austin’s impairment rating, rather than the rating assigned by Dr. Corradino, and awarded 65% permanent partial disability benefits to the body as a whole. Dollar Tree’s insurer filed a timely notice of appeal, contending that the trial court erred by adopting Dr. Austin’s impairment rating, by finding that the bladder and bowel problems were caused by the work injury, and by awarding benefits in excess of the one and one-half times impairment cap.

II. Standard of Review

In Tennessee workers’ compensation cases, this Panel reviews the trial court’s findings of fact de novo, accompanied by a presumption of correctness of the finding, unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008 & Supp. 2013); Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). “This standard of review requires us to examine, in depth, a trial court’s factual findings and conclusions.” Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991) (citing Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 675 (Tenn. 1991)). When the trial court has heard in-court testimony, we give considerable deference 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). The same deference need not be extended to findings based on documentary evidence such as depositions. Glisson v. Mohon Int’l,

Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). Indeed, where medical expert testimony is presented by deposition, we may independently assess the content of that proof in order to determine where the preponderance of the evidence lies. Williamson v. Baptist Hosp. of Cocke Cnty., Inc., 361 S.W.3d 483, 487 (Tenn. 2012) (quoting Trosper v. Armstrong Wood Prods., Inc., 273 S.W.3d 598, 604 (Tenn. 2008)). On questions of law, our standard of review is de novo with no presumption of correctness. Wilhelm, 235 S.W.3d at 126. The extent of vocational disability is a question of fact to be decided by the trial judge. Johnson v. Lojac Materials, Inc., 100 S.W.3d 201, 202 (Tenn. Workers' Comp. Panel 2001). "Although workers' compensation law must be construed liberally in favor of an injured employee, it is the employee's burden to prove causation by a preponderance of the evidence." Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008).

III. Analysis

A. Impairment Rating

The insurer first contends that the trial court erred by adopting Dr. Austin's impairment rating, rather than that of Dr. Corradino, as the basis for its disability award. Dr. Austin assigned a 10% impairment for the back injury and surgery, while Dr. Corradino assigned 7%. Dr. Austin also assigned additional impairments for the Employee's bladder and bowel dysfunction, for a total combined impairment of 24% to the body as a whole. The insurer argues that Dr. Corradino was more qualified to assess the Employee's permanent impairment because he provided care over a longer period of time, was the authorized treating physician when the Employee reached maximum medical improvement, and had based his opinion on the care and treatment he provided to the Employee.

Whenever there is a conflict of expert opinions, the trial court generally has the discretion to choose which expert to accredit. 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). Moreover, "[w]hen the medical testimony differs, the trial judge must obviously choose which view to believe. In doing so, he is allowed . . . to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts." Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991).

In this case, both Dr. Austin and Dr. Corradino were treating physicians, albeit at different points in time. Each relied, to some extent, on the records of the other in addition to his or her own observations to arrive at his or her opinion. The trial court was faced with the choice of which expert's impairment rating it should adopt for the Employee's back injury. Dr. Corradino treated the Employee for eleven months and performed two major surgeries on her lower back. He found her to be at maximum medical improvement in February 2012 and had the opportunity to observe her condition at the conclusion of her

course of treatment. Dr. Austin, on the other hand, had not seen the Employee since May 2010 and based her opinions on her physical examination, her own treatment, the medical records of other treating physicians, and Dr. Corradino's records. She, however, also found externally verifiable radiculopathy—ongoing right leg, right lateral thigh, and right calf pain—after the surgeries by Dr. Corradino.

The trial court had additional evidence which it considered extremely credible. Specifically, it had the Employee's own testimony concerning the effects of her injury on her ability to work and perform other activities of daily living, which was corroborated by the testimony of her husband and daughter. An injured employee's own assessment of her physical condition and resulting disabilities cannot be disregarded. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975); Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn. 1972). A trial court is not bound to accept physicians' opinions regarding the extent of disability but should consider all the evidence, both expert and lay testimony, to decide that issue. Walker v. Saturn Corp., 986 S.W.2d 204, 208 (Tenn. 1998) (citing Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 677 (Tenn. 1983)). It is very clear from the testimony of the Employee, her husband, and her daughter that her injury caused a very significant diminution in her ability to function. The joint opinion of both Dr. Austin and Dr. Corradino that she is now limited to sedentary work is consistent with such a conclusion. In light of these considerations, the evidence does not preponderate against the trial court's decision to adopt Dr. Austin's impairment rating.

B. Compensability of Bladder and Bowel Dysfunction

The insurer also challenges the decision of the trial court to award benefits based upon the disability ratings assigned by Dr. Austin as to the Employee's urinary frequency and rectal dysfunction. Again, the trial court is entrusted with choosing which expert to accredit. Significantly, Dr. Austin was the treating physician at the time the Employee received the epidural injection that precipitated the onset of her bladder and bowel symptoms. As the trial court observed, Dr. Austin was "more knowledgeable about the [Employee's] symptoms before and after the injection and in a much better position to opine about the presence or absence of an impairment rating related to the epidural steroid injection." Dr. Corradino was not even asked to assign a disability for the bladder and bowel dysfunction. In addition, although Dr. Corradino's opinion was based on his understanding that those symptoms were present before the Employee's work injury and before the epidural injection, he conceded that a causal connection between the injection and the Employee's incontinence would exist if the Employee's earlier symptoms following her hysterectomy had been resolved in 2005. As noted, it is undisputed that the Employee underwent corrective surgery in 2005 and did not suffer any further incontinence symptoms until after the 2010 epidural injection. The trial court, therefore, did not err by finding that the Employee's incontinence was caused by her work injury.

C. Meaningful Return to Work

The insurer also takes issue with the trial court's failure to cap the permanent disability award at one and one-half times the impairment rating, arguing that the Employee's voluntary resignation limits her award of permanent disability benefits. Tennessee Code Annotated section 50-6-241 (2008 & Supp. 2013) provides:

For injuries occurring on or after July 1, 2004, in cases in which an injured employee is eligible to receive any permanent partial disability benefits either for body as a whole or for schedule member injuries, . . . and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability benefits that the employee may receive is one and one half (1½) times the medical impairment rating

. . . .

For injuries arising on or after July 1, 2004, in cases in which the pre-injury employer did not return the injured employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability benefits that the employee may receive for body as a whole and schedule member injuries subject to subdivision (d)(1)(A) may not exceed six (6) times the medical impairment rating

Tenn. Code Ann. § 50-6-241(d)(1)(A), (2)(A) (emphasis added).

Our supreme court has recognized the concept of a “meaningful return to work” in order to guide the application of the appropriate statutory cap when “an employee who becomes permanently, partially disabled as the result of a workplace injury returns to work for the pre-injury employer but does not remain employed.” Tryon v. Saturn Corp., 254 S.W.3d 321, 328 (Tenn. 2008). The inquiry of whether an employee has had a “meaningful return to work” depends upon “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. If an employee returns to work but later resigns or retires for reasons that are reasonably related to his or her work injury, the higher cap in section 50-6-241(d)(2)(A) is applicable. Id. at 328-29. If, however, the employee later retires or resigns for personal or other reasons that are not reasonably related to his or her work injury, the employee has had a meaningful return to work which triggers the lower cap in section 50-6-241(d)(1)(A). Id. at 329. Ultimately, the touchstone of the meaningful-return-to-work analysis is “reasonableness,” which is a highly fact-intensive inquiry that will depend upon

the circumstances in each case. Id. at 328. Three factors, however, guide the 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. Id. at 329.

The resolution of this issue hinges on the testimony of the witnesses and the trial court’s assessment of their credibility. It is well established that when the trial judge had the opportunity to observe the witnesses’ demeanor and to hear live testimony, considerable deference must be afforded any credibility or factual determinations. Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 642 (Tenn. 2008). In Howell v. Nissan North America, Inc., 346 S.W.3d 467, 472-73 (Tenn. 2011), the supreme court affirmed a trial court’s finding that the injured employee was entitled to reconsideration of a prior settlement after she resigned because she believed she was not physically capable of working on an assembly line. The evidence in that case demonstrated that the employee had worked on that line before and was certain that her injuries would prevent her from working at that job. Id. at 473.

We consider this case to be similar to Howell. At the time of her resignation, the Employee had worked for Dollar Tree for approximately seven years as a clerk, assistant manager, and manager. She had a clear idea of the physical requirements of all of the jobs at her store. Those jobs all required lifting, climbing, carrying, and bending. She had been under medical treatment for her work-related back injury for almost three years with minimal improvement of her symptoms. Because of those symptoms, she was unable to tolerate the physical activities required of her. The trial court found her to be extremely credible. Under these circumstances, we agree with the trial court’s finding that the Employee acted reasonably by resigning, and that she did not have a meaningful return to work. We conclude, therefore, that the trial court did not err by awarding permanent partial disability benefits that exceeded the one and one-half times impairment cap.

IV. Conclusion

The judgment of the trial court is affirmed. Costs are taxed to ACE-American Insurance, Sedgwick Claims Management Services, Inc., and their surety, for which execution may issue if necessary.

E. RILEY ANDERSON, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
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**Law court for Sullivan County
No. C39791**

No. E2013-01916-SC-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 to ACE-American Insurance, Sedgwick Claims Management Services, Inc., and their surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM