

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE

February 22, 2010 Session

LORI TURNER v. MASTERBRAND CABINETS, INC., ET AL.

Appeal from the Circuit Court for Cumberland County

No. CV004514 Amy V. Hollars, Judge

No. E2009-00922-WC-R3-WC - Filed August 26, 2010

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Supreme Court Rule 51 for a hearing and a report of findings of fact and conclusions of law. Lori Turner ("Employee") sought reconsideration of her prior workers' compensation settlement pursuant to Tennessee Code Annotated section 50-6-241(a)(2). Her claim had been settled for 14% permanent partial disability ("PPD") to the body as a whole, based upon a 7% anatomical impairment. Upon reconsideration, the trial court awarded an additional 21% PPD, for a total of 35% PPD to the body as a whole. Masterbrand Cabinets, Inc. ("Employer") has appealed, contending that the evidence preponderates against the amount of the award. Finding no error, we affirm the judgment.

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

SHARON G. LEE, J., delivered the opinion of the Court, in which DONALD P. HARRIS, SR. J., and SHARON BELL, SP. J., joined.

Mary Dee Allen, Cookeville, Tennessee, and Mark D. Roamaniuk and Jeffrey S. Beck, Indianapolis, Indiana, for the appellants, Masterbrand Cabinets, Inc. and Indemnity Insurance Company of North America.

James P. Smith, Crossville, Tennessee, for the appellee, Lori Turner.

MEMORANDUM OPINION
Factual and Procedural Background

Employer is a manufacturer of kitchen and bathroom products. Employee worked at its Crossville plant, where raw lumber was processed into components, shipped, and assembled elsewhere. On March 9, 2004, Employee injured her right shoulder. The injury was accepted as compensable. Her treating physician, Dr. Edwin Spencer, an orthopaedic surgeon, diagnosed a torn rotator cuff. Surgery was performed on June 23, 2004 to repair the rotator cuff, and also to remove bone spurs and inflamed tissue. Employee continued to have pain in her shoulder. Dr. Spencer performed a second arthroscopic procedure on November 10, 2004. He determined that the rotator cuff was intact, and that Employee's symptoms were due to inflammation in the area. He removed additional inflamed tissue.

Employee's condition improved after the second procedure. Dr. Spencer released her from his care on April 8, 2005 and assigned to her an anatomical impairment of 7% to the body as a whole. He placed no permanent restrictions upon her activities. She returned to work for Employer at a wage equal to or greater than her pre-injury wage. She entered into a settlement with Employer based upon 14% PPD to the body as a whole. The settlement was approved by the trial court on December 30, 2005.

On March 21, 2008, Employer closed its Crossville plant, and Employee was terminated. She then filed the instant petition for reconsideration of her previous settlement pursuant to Tennessee Code Annotated section 50-6-241(a)(2). At trial, she testified that she had worked primarily in the "rough mill" area of the plant after she returned to work from her injury. Her job consisted primarily of feeding pieces of wood of varying lengths into a machine, then inspecting and stacking the resulting product. She worked in this part of the plant for more than two years. A few months before the plant closed, she was transferred to the "machine room," where she operated a saw. The evidence indicates that her job in this area was less strenuous than her job in the rough mill.

Employee testified that her shoulder caused her to have difficulty performing her job in the rough mill. She testified that other workers assisted her in performing her duties. Specifically, she said that Mike Dolinich, her live-in boyfriend, would take her turn on "the long line," which required handling longer, heavier pieces of wood. Mr. Dolinich testified at trial and confirmed that he worked on the long line in place of Employee and other female co-workers. Employee testified that her shoulder often ached. However, she did not return to Dr. Spencer, or ask to do so, after April 2005, but treated these symptoms with over-the-counter medications such as Alleve or Tylenol. She testified that she did not consult Dr. Spencer because she understood that there was nothing else he could offer to improve her shoulder.

Employee testified that she complained to her supervisor, Stewart Roberson, concerning the difficulty she had performing her job in the rough mill. Mr. Roberson testified that he had no recollection of receiving such complaints, stating “[s]he could have, but I don’t remember it if she did.” Brenda Roysden, a supervisor at the Crossville facility, testified that she was Employee’s immediate supervisor on occasion, but not continuously, after her return to full-duty work in 2005. Ms. Roysden testified that Employee did not inform her of any problems or symptoms with her shoulder from the time of her return until the closure of the plant.

Dr. Spencer testified by deposition. He confirmed that Employee had not sought treatment with him since 2005. He testified that, at the time he released her, her rotator cuff was intact, and that he “[didn’t] have any reason to believe that she couldn’t go back to doing job X, Y or Z, whether it’s throwing boards or whether it’s driving or whether it’s typing.” He also explained that the impairment rating which he had assigned in 2005 was based upon two factors: reduced range of motion and loss of strength. He testified that he later concluded that his rating was incorrect, because it was not appropriate to combine these two factors under the AMA Guides.

Employee was a forty-six year old high school graduate. She had no additional education, but had received some computer-related training through a previous employer. She had worked at Wal-Mart as a sales clerk, cash register operator and department manager for ten years after she graduated from high school. She had then worked at Avery Dennison, a factory which manufactured markers. In that job she operated a tow motor, ran a machine of some sort, packed markers and was a backup supervisor. When Avery Dennison closed in 2001, Employee went to work for Employer and worked for approximately six and a half years.

Before Employer’s plant closed on March 21, 2008, Employee began looking for other employment. On February 29, 2008, she began working on weekends as a correctional officer for the Cumberland County Sheriff’s Department while also working for Employer. Her job involved intake of female prisoners and monitoring prisoners generally at the Cumberland County jail.

The trial court awarded an additional 21% PPD to the previous 14% settlement, for a total of 35% PPD. Employer has appealed, contending that the trial court erred by awarding “significant additional PPD benefits” to Employee.

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 correctness of the findings, 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' demeanor and to hear in-court testimony. Madden v. Holland Group of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). When 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. Foreman v. Automatic Systems, 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 by awarding significant additional PPD on reconsideration. In support of its position, Employer notes that Dr. Spencer placed no permanent restrictions upon Employee, that she was able to perform a physically demanding job for three years after being released, and that she was able to find new employment shortly after the plant closure was announced, and before the plant closed.

In support of the trial court's decision, Employee points out that the court specifically found her to be a credible witness, a finding which is entitled to deference on appellate review. Madden, 277 S.W.3d at 900. In that context, she relies upon her own testimony, as supported by Mr. Dolonich and Dora Evans (a former co-worker in the rough mill), that she was slower and less capable at work after her injury than she had been before, that she was able to continue working only with difficulty, and that she was limited in various activities outside the workplace because of her shoulder. She concedes that she was able to find another job quickly, but points out that it is much less strenuous than her work for Employer. In addition, Employee notes that her work experience is entirely in relatively unskilled work, that she is forty-six years old, and has no education beyond high school.

In reconsidering the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and her capacity to work at the kinds of employment available

in her disabled condition. Tenn. Code Ann. § 50-6-241(a)(2).¹ Further, the claimant's own assessment of her physical condition and resulting disabilities cannot be disregarded. Black v. Liberty Mut. Ins. Co., 4 S.W.3d 182, 185 (Tenn. Workers' Comp. Panel 1999). The trial court is not bound to accept physicians' opinions regarding the extent of the plaintiff's disability, but should consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 677 (Tenn.1983).

Reviewing this record in light of these considerations, we conclude that reasonable minds could disagree concerning the appropriate amount of additional disability to be awarded Employee. The trial court's decision to award an additional 21% is certainly at the upper end of the reasonable range. However, it is consistent with Employee's age and her relatively unskilled work history. More significantly, in our view, it is consistent with her own testimony concerning the effects of the injury upon her ability to perform various work-related activities. The trial court had the opportunity to observe that testimony and determine the appropriate weight of that evidence. There is undoubtedly evidence in the record that would justify a lower award. However, on balance, we are unable to conclude that the evidence preponderates against the trial court's decision concerning Employee's disability.

¹ Tennessee Code Annotated section 50-6-241(a)(2) provides as follows:

(2) In accordance with this section, the courts may reconsider, upon the filing of a new cause of action, the issue of industrial disability. Such reconsideration shall examine all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition. The reconsideration may be made in appropriate cases where the employee is no longer employed by the pre-injury employer and makes application to the appropriate court within one (1) year of the employee's loss of employment, if the loss of employment is within four hundred (400) weeks of the day the employee returned to work. In enlarging a previous award, the court must give the employer credit for prior benefits paid to the employee in permanent partial disability benefits, and any new award remains subject to the maximum established in subsection (b).

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to the appellants, Masterbrand Cabinets, Inc. and Indemnity Insurance Company of North America, and their surety, for which execution may issue if necessary.

SHARON G. LEE, JUSTICE

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JUDGMENT

This case is before the Court upon the motion for review filed by Masterbrand Cabinets, Inc. pursuant to Tenn. Code Ann. § 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 taxed to Masterbrand Cabinets, Inc. and its surety, Indemnity Insurance Company of North America, for which execution may issue if necessary.

LEE, J., NOT PARTICIPATING