IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(November 15, 1999 Session)

SANDRA WARREN v. AMERICAN ALLIANCE INSURANCE COMPANY, ET AL.

Direct Appeal from the Chancery Court for Chester County
No. 9333 Joe C. Morris, Chancellor

No. W1999-02695-WC-R3-CV - Mailed April 27, 2000; Filed June 16, 2000

This is an appeal by the employer, Premier Manufacturing Corporation, and its insurer, American Alliance Insurance Company, from an award in favor of the plaintiff, Sandra Warren, based upon a finding that the plaintiff had a work-related permanent partial disability of 39 percent to the body as a whole. The trial court found that the plaintiff had pre-existing spondylolisthesis, which was asymptomatic until the work injury of April 23, 1998, and which was exacerbated and advanced to the point of making it symptomatic. The chancellor held that the two and one-half (2.5) times cap established in Tennessee Code Annotated § 50-6-241(a)(1) applied in this case. In two issues, the defendant argues that: (1) the evidence preponderates against the trial court's finding that the plaintiff's injuries were compensable; and (2) the evidence preponderates against the trial court's holding that the plaintiff had a permanent partial vocational disability of 39 percent to the body as a whole. We find that the judgment of the trial court is affirmed as modified.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court is Affirmed as Modified.

TATUM, SR. J., delivered the opinion of the court, in which HOLDER, J., and ELLIS, SP. J., joined.

Jeffrey P. Boyd, Jackson, Tennessee, for the appellants, American Alliance Insurance Company, et al.

Gayden Drew, IV, Jackson, Tennessee, for the appellee, Sandra Warren.

MEMORANDUM OPINION

The plaintiff testified that she was thirty-four (34) years old at the time of trial and had either a ninth or tenth grade education. She had previously worked as a sewing machine operator and in a factory, where she assembled parts for washing machines.

She testified that she began working for the defendant the first time on May 20, 1997, and

at that time, she had no back trouble. Her job was that of a grill operator, which required her to lift wire bundles weighing from twenty (20) to twenty-five (25) pounds repeatedly. She testified that she was too short for the machine that she used, and the awkward position in which she was forced to place herself caused her to develop pain in her ribs, low back, and knee. She went to a nurse practitioner but did not go to a doctor or report any work-related injury to her employer. She terminated her employment after she had worked for the defendant for four or five weeks. After leaving the defendant's employ, all of the plaintiff's pain disappeared in about one month.

At the defendant's urging, the plaintiff returned to work for the defendant on December 8, 1997. She began working as a bender, which she described as an easy job that gave her no difficulty. She then began working one-half day as a bender and one-half day as a grill operator. She testified that she had no back problems whatsoever until she injured her back at work on March 20, 1998.

After the plaintiff was injured on March 20, she was treated by a nurse practitioner, and her supervisor allowed her to work as a bender for two weeks. Her back pain improved but did not completely disappear. She was then instructed to return as a grill operator full-time. The plaintiff testified that she reinjured her back while working on the heaviest grill on April 23, 1998. Following the plaintiff's injury on April 23, she went to the hospital emergency room and was seen by Dr. Neblett. After treating her for a considerable period, Dr. Neblett referred her to Dr. Chung.

The plaintiff testified that, since the accident, she has had severe back pain and can not bend or twist consistently. She also experiences bowel trouble. She testified that she did not think she could work at any job which she had done in the past.

Dr. John W. Neblett, a neurosurgeon, testified by deposition. He stated that he first saw the plaintiff on April 23, 1998, in the emergency room of Jackson Madison County General Hospital. The plaintiff described her job as a griller, requiring repetitive bending and holding things at shoulder height. She stated that the work caused her pain beginning on April 22, 1998, and that she was able to work one-half day before the pain developed intensely in the left hip. She had shaking in her sides and difficulty walking due to tingling in her left foot.

Dr. Neblett's final diagnosis was pain as a result of mechanical factors or a ligamentous injury. He diagnosed the plaintiff with Grade I spondylolisthesis and recommended physical therapy. Dr. Neblett was of the opinion that the spondylolisthesis pre-existed the date of the plaintiff's symptoms. He could not determine if the spondylolisthesis became more severe by the plaintiff's employment without X-rays taken previous to her employment.

Dr. Neblett continued to see the plaintiff until the end of July, 1998, during which time her low back pain had improved but had not disappeared. In June, 1998, an epidural steroid block was administered, but this did not result in improvement.

Dr. Neblett testified that, from a neurosurgical prospective, he could find no evidence of impairment to the plaintiff, but he thought that the plaintiff's work caused the painful lumbar back condition. Dr. Neblett could not be certain that the work injury did not cause an anatomic condition

in the plaintiff's back, but it was his opinion that she had musculoskeletal pain that did not make the anatomy worse. On cross-examination by plaintiff's counsel, Dr. Neblett testified that the AMA Guidelines rated Grade I spondylolisthesis at 7 percent to the body as a whole. A copy of this guideline was made an exhibit. It reveals that the 7 percent rating is applicable when the spondylolisthesis is accompanied by pain and is in the lumbar region.

The plaintiff's counsel also presented Dr. Neblett with the orthopedic manual. The plaintiff insists that this manual revealed, through Dr. Neblett's testimony, that a person with Grade I spondylolisthesis would qualify for a rating of 20 percent permanent physical impairment to the body as a whole. Dr. Neblett, who was a neurosurgeon, testified that he did not use the orthopedic manual and was not at all familiar with it. The portion of the orthopedic manual upon which the plaintiff relies was made an exhibit and will be discussed further hereinafter.

Dr. Ron Bingham also testified by deposition on behalf of the defendant. He is a specialist in physical medicine and rehabilitation. Dr. Bingham saw the plaintiff on May 7, 1998, and testified that he examined her and obtained history from her but did not review any records. He testified that he found no objective abnormality with respect to the plaintiff and that she was not qualified for a disability rating. He testified that no work restrictions should be placed upon her.

The deposition of Dr. Joseph C. Boals, III, an orthopedic surgeon, was in evidence on behalf of the plaintiff. He saw the plaintiff on October 27, 1998, at the request of the plaintiff's attorney. After setting forth her history, he performed testing and concluded that the neurological test was normal. He found Grade I spondylolisthesis at L-5 and S-1. It was Dr. Boals's opinion that the spondylolisthesis was congenital. Dr. Boals's diagnosis was acute lumbar strain with aggravation of spondylolisthesis and chronic, ongoing symptoms of pain. He thought that this was a result of the plaintiff's injury at work.

Dr. Boals testified that the plaintiff had 7 percent permanent partial impairment to the body as a whole according to the AMA Guidelines. He thought that she had a prognosis of "fair to good." Dr. Boals testified that the plaintiff should not have a job requiring heavy lifting and that she should be able to change positions frequently. She should not work in a factory that would require her to stand all day and would place her back in positions of stress. According to Dr. Boals, the plaintiff "should become asymptomatic" if she confines her activity to these restrictions.

STANDARD OF REVIEW

The standard of review of factual issues in workers' compensation cases is de novo upon the record of the trial court with a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(b)(2); Henson v. City of Lawrenceburg, 851 S.W.2d 809, 812 (Tenn. 1993). Under this standard, we are required to conduct an in-depth examination of the trial court's findings of fact and conclusions of law to determine where the preponderance of the evidence lies. See Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 282 (Tenn. 1991); King v. Jones Truck Lines, 814 S.W.2d 23, 25 (Tenn. 1991). In making such a determination, this Court must give considerable deference to the trial judge's findings regarding the weight and credibility

of any oral testimony received. Townsend v. State, 826 S.W.2d 434, 437 (Tenn. 1992). However, the determination of factual issues in the present case involves medical testimony derived solely from depositions, so all impressions regarding weight and credibility must be drawn from the contents of the documents, rather than an evaluation of live witnesses. Thomas, 812 S.W.2d at 283. Therefore, this Court may draw its own conclusions about weight, credibility, and significance of such testimony. Seiber v. Greenbrier Indus., Inc., 906 S.W.2d 444, 446 (Tenn. 1995).

It is well established that the plaintiff in a workers' compensation case must prove causation and permanency of his injury by a preponderance of the evidence using expert testimony. See Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487 (Tenn. 1997); Thomas, 812 S.W.2d at 283; Roark v. Liberty Mutual Ins. Co., 793 S.W.2d 932, 934 (Tenn. 1990). However, expert testimony must be considered in conjunction with the employee's testimony as to how his injury occurred and his subsequent physical condition. Thomas, 812 S.W.2d at 283.

ISSUE ONE

In considering all of the evidence, including the medical evidence as well as the plaintiff's testimony, we cannot say that the evidence preponderates against the finding of the trial court that the plaintiff suffered a compensable injury. The first issue is, therefore, overruled.

ISSUE TWO

We next address the second issue as to whether the award of 39 percent permanent partial disability to the body as a whole, based on a finding that the orthopedic guidelines fixing the anatomical rating at 20 percent impairment to the body as a whole, is supported by a preponderance of the evidence. Both Dr. Neblett and Dr. Boals testified that the AMA Guidelines fix the plaintiff's anatomical impairment rating at 7 percent. Dr. Boals, although an orthopedic surgeon, was not questioned with regard to the orthopedic guidelines.

Dr. Neblett's testimony with regard to the Orthopedic Surgeon's Manual for Evaluating Permanent Impairment is as follows:

> Q. (By Mr. Drew) And then, Doctor, you're not familiar with this guideline, the Manual for Orthopedic Surgeons in Evaluating Permanent Impairment, are you?
>
> A. I don't refer to that, no, sir.
>
> Q. But are you familiar that it does exist?
>
> A. I know it exists from previous depositions.
>
> Q. But being a neurosurgeon, you don't use it. This is

mainly used by orthopedic surgeons. Is that correct?

A. Yes, sir.

Q. Now, let me point you to page twenty-nine of this book, and realizing that you don't normally use it –

MR. BOYD: I'm going to object to the introduction of that on the basis that he does not normally use it and, therefore, may not be qualified as an expert in the use of it.

Q. (By Mr. Drew) Okay. At page twenty-nine of this book, which is another rating manual that is acceptable to use by law, but grade-one spondylolisthesis in this booklet calls for an impairment rating of twenty percent to the body as a whole, does it not?

A. In this book it does indicate twenty percent, yes, sir.

Only page 29 of the Orthopedic Guides was introduced into evidence or shown to Dr. Neblett. With regard to the low lumbar spine, page 29 contains only paragraph C, D, E, and F. Paragraph D, on which Dr. Neblett's testimony was based, is as follows:

D. Same as (B) with spondylolysis or spondylolisthesis Grade I or II, demonstrable by x-ray, without surgery, combined trauma and pre-existing anomaly.

What is referred to as "(B)" is not included in the exhibit and was not shown to Dr. Neblett. Obviously, (B) is a part of this paragraph and must be considered in using paragraph D. If it is not, Grade I or Grade II spondylolisthesis with no pain or other symptoms is graded at 20 percent and spondylolisthesis, Grade I or II, with disabling pain would both be rated the same at 20 percent. It is not reasonable that spondylolisthesis with no disabling symptoms would be as disabling as spondylolisthesis with severe disabling pain. With only a portion of the factors used in this paragraph, we cannot accredit this testimony. On our de novo review, we find that the evidence preponderates against the chancellor's finding that the plaintiff's medical or anatomical impairment rating was 20 percent to the body as a whole. The preponderance of the evidence establishes that the AMA Guidelines, which fix the plaintiff's anatomical impairment at 7 percent, is applicable.

No issue is made with regard to the trial judge's findings that the two and one-half (2.5) times cap is applicable. Therefore, we have not summarized the evidence on this point. However, we find that the preponderance of the evidence supports this finding. In light of the plaintiff's lack of education and experience only in manual labor at plants or factories, we find that she is entitled to an award based upon two and one-half (2.5) times 7 percent, or 17.5 percent permanent partial

disability to the body as a whole. The judgment of the trial court is modified accordingly.

It results that the judgment of the trial court is affirmed as modified. The plaintiff and the defendants will each pay one-half of the costs.

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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 appears 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 on appeal are taxed one-half to the Appellants and one-half to the Appellee, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM