IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 28, 2000 Session

PEGGY BIRMINGHAM v. PORTER-CABLE CORPORATION

Appeal from the Chancery Court for Madison County
No. 55001 Joe C. Morris, Chancellor

No. W1999-00695-WC-R3-CV - Mailed December 11, 2000; Filed February 28, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. §50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The defendant, Porter-Cable Corporation, appeals the judgment of the Chancery Court of Madison County which awarded the plaintiff, Peggy Birmingham, permanent partial disability of sixty percent (60%) to the body as a whole. For the reasons stated in this opinion, we affirm the judgment of the trial court.

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

W. MICHAEL MALOAN, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and HENRY D. BELL, SP. J., joined.

M. V. Tichenor, Memphis, Tennessee, for the Appellant, Porter-Cable Corporation.

Gayden Drew, IV, Jackson, Tennessee, for the Appellee, Peggy Birmingham.

MEMORANDUM OPINION

The plaintiff, Peggy Birmingham, was forty-seven (47) years old at the time of trial. She completed the seventh (7^{th}) grade and obtained her GED. Her prior work experience included working as a waitress, managing a grocery and a restaurant, and being an assistant manager of a book store.

Plaintiff worked for the defendant, Porter-Cable from 1971 to 1981 and from 1986 till 1998. While at Porter-Cable, she was a machine operator and a technician–a job that required her to pick up fiberglass tubs of motors weighing 60 to 80 pounds on a repetitive basis. On January 17, 1997, she injured her back while lifting a tub of motors. She notified her team leader and the plant nurse

of her injury. The plant nurse referred her to Dr. Gilbert Woodall who treated her with medicine and shots to her hip for about six months. Dr. Woodall returned her to work with a twenty-five (25) pound lifting restriction with no bending or stooping.

Plaintiff continued to have problems with her back, so the plant nurse referred her to Dr. John Everrett. Dr. Everrett saw plaintiff on November 5, 1997, and kept her on the twenty-five (25) pound weight restriction. Dr. Everett referred plaintiff to Dr. Dirk Franzen, a neurosurgeon with Semmes-Murphy Clinic who saw her on March 3, 1998. The defendant requested Dr. Franzen's opinion as to plaintiff's permanent physical impairment. Dr. Franzen referred the plaintiff to Dr. Sharron Thompson, a physical and rehabilitative specialist, for an evaluation. Dr. Franzen stated Dr. Thompson had "specialized training interest in that area,"and he felt "she would render a more objective and accurate opinion than he could."

Dr. Thompson evaluated plaintiff on September 22, 1998, and felt she had a chronic sprain and mild myofascial pain syndrome which was more probably than not caused by her work-related injury. Dr. Thompson assessed a ten percent (10%) permanent impairment to the body as a whole according to the AMA guidelines.

At the defendant's request, Dr. John Brophy evaluated plaintiff on March 31, 1999. Dr. Brophy confirmed her preexisting arthritis in her lumbar spine. Her physical exam was normal. Dr. Brophy found no evidence of a ruptured disc, nerve root compression, or radiculopathy and felt plaintiff could return to work. He diagnosed left sacroilitis and chronic mechanical back pain which was caused by her work injury. Dr. Brophy did not feel she had any physical impairment.

At the plaintiff's request, Dr. Robert Barnett evaluated plaintiff on May 12, 1999. Dr. Barnett testified the work injury aggravated the preexisting arthritis in her back. Dr. Barnett assigned a fifteen percent (15%) permanent impairment to the body as a whole based on the AMA guidelines. He testified she had a one time lifting restriction of fifteen (15) pounds and she should not do any repetitive lifting, bending, stooping, long standing and long sitting.

Plaintiff continued to work, but was moved to a different line which required her to lift thirty-five (35) pounds. In November, 1997, she complained to Dan Spencer, the company human resource manager, that her job exceeded her restrictions and she was moved to a light duty position. Plaintiff testified that in January, 1998, Spencer told her there was no more light duty and that she was laid off. Defendant denies plaintiff was laid off, but that she voluntarily took a leave of absence to draw workers' compensation benefits. The defendant presented testimony that the company policy is to offer light duty to injured employees with restrictions and that light duty was available to plaintiff in January of 1998 when she voluntarily took a leave of absence.

In May 1998, plaintiff attempted to manage a restaurant, but it closed six months later and she has not worked since. Plaintiff testified she has constant back pain, throbbing in her hip and has trouble bending over.

The trial court found the plaintiff did not make a meaningful return to her work and awarded permanent partial disability benefits of sixty percent (60%) to the body as a whole.

The defendant, Porter-Cable, has presented three issues on appeal.

1) Whether the trial court erred in finding that plaintiff did not make a meaningful return to work?

2) Whether the trial court erred in relying on the deposition testimony of Dr. Robert Barnett and/or Dr. Sharron Thompson rather than the testimony of Dr. John Brophy?

3) Whether the trial court erred in awarding plaintiff a permanent partial disability rating for vocational disability purposes of 60%?

ANALYSIS

The scope 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). *Lollar v Wal-Mart Stores, Inc.*, 767 S.W.2d 143 (Tenn. 1989). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court's factual findings. *Humphrey v David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). However, where the issues involve expert medical testimony which is contained in the record by deposition, as it is in this case, then all impressions of weight and credibility must be drawn from the contents of the depositions, and the reviewing court may draw its own impression as to weight and credibility from the contents of the depositions. *Overman v Williams Sonoma, Inc.*, 803 S.W.2d 672, 676-77 (Tenn. 1991).

1) **Meaningful return to work.**

Tenn. Code Ann. § 50-6-241(a)(1) provides as follows:

> (a)(1) For injuries arising on or after August 1, 1992, in cases where an injured employee is eligible to receive any permanent partial disability benefits, pursuant to § 50-6-207(3)(A)(I) and (F), 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 injury, the maximum permanent partial disability award that the employee may receive is two and one-half (2 ½) times the medical impairment rating determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment (American Medical Association), the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community. In making determinations, the court shall consider 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.

This statute provides that if the injured employee returns to work at the same or greater wage any award cannot exceed two and one-half (2 ½) times her impairment rating. If the injured employee does not return to employment at the same or greater wage the two and one-half (2 ½) times limitation does not apply. The trial court must determine whether the employee's return to work was meaningful. This determination is a question of fact. Relevant factors for the trial court to consider as to whether the injured employee had a meaningful return to work include: (1) the reasonableness of an employer's offer to return to work; (2) the nature of the work to be performed, and restrictions, if any, placed on an employee; (3) whether an employee's refusal to return to work is reasonable in light of the nature of the work and restrictions; and (4) the reasonableness of an employee's decision to discontinue working if he returned to work for a period of time. *Newton v Scott Health Care Center*, 914 S.W.2d 884, 886 (Tenn. 1995).

The defendant submits the plaintiff made a meaningful return to her work at the same or greater wage than she earned at the time of her injury and, therefore, the trial court erred in its award of vocational disability which exceeded two and one-half (2-1/2) times any impairment rating of the plaintiff. In support of its argument, the defendant points out the plaintiff worked for more than one year and the company attempted to accommodate her with jobs that were within her weight restriction of twenty-five (25) pounds. The plaintiff left her employment voluntarily and testified she did not quit because she could no longer perform in her job.

The plaintiff responds the defendant did not act reasonably in assigning her to jobs that exceeded her lifting restriction of twenty-five (25) pounds and required bending and stooping. The plaintiff was not able to return to any of her former jobs due to her restrictions.

The testimony as to the circumstances of plaintiff's leaving her employment are conflicting. Plaintiff says she was laid off because the defendant decided not to allow her light duty. Defendant says plaintiff voluntarily took a leave of absence and ultimately quit to manage a restaurant.

The trial court resolved this factual issues in favor of the plaintiff. In his findings the trial court stated as follows:

> While the Plaintiff was able to continue working for the Defendant for a period of time after her injury, she was placed on restrictions and eventually lost her job because of her restrictions and because she was physically unable to continue working. The Defendant made the decision that the Plaintiff could not continue to work for them. The Plaintiff's job requirements exceeded the medical restrictions placed upon her by the Defendant's own company physicians. Therefore, the Court finds that the Plaintiff did not reach maximum medical improvement and her award is not capped at 2.5 times the medical rating.

Considering all of the relevant factors in *Newton*, we find the evidence does not preponderate against the trial court's finding that the plaintiff did not make a meaningful return to work and the limitations of Tenn. Code Ann. §50-6-241(a)(1) do not apply.

2) Medical evidence.

The defendant contends the trial court erred when it relied on either the expert medical testimony of Dr. Thompson and/or Dr. Barnett rather than Dr. Brophy. In support of its argument, the defendant points out all the expert medical evidence is by deposition and, therefore, this panel must make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000). We agree.

The defendant submits Dr. Brophy is a board certified neurosurgeon and Dr. Thompson is not certified in neurosurgery–her speciality is physical medicine and rehabilitation. Both doctors found the same objective findings, but Dr. Brophy gave no impairment while Dr. Thompson assessed a ten percent (10%) permanent impairment. Because Dr. Barnett's independent medical evaluation consisted of a thirty (30) minute examination and his rating of fifteen percent (15%) permanent impairment was based on subjective tests, defendant contends Dr. Barnett's opinion should be disregarded.

In response, the plaintiff states the trial court has the discretion to accept the opinion of one medical expert over the opinion of another. *Johnson v. Midwesco*, 801 S.W.2d 804 (Tenn. 1990). We also agree unless, of course, the evidence preponderates against the trial court's finding. Plaintiff points out that Dr. Brophy also only saw plaintiff on one occasion for an independent medical evaluation; Dr. Barnett has more experience than Dr. Brophy; and Dr. Thompson's speciality preponderates in favor of the trial court's reliance on their opinions rather than Dr. Brophy.

After a careful review of all the expert medical evidence, we find that the evidence does not preponderate against the trial court's reliance on expert medical evidence other than Dr. Brophy.

3) Award of Vocational Disability.

Finally, defendant submits the trial court erred in its award of sixty percent (60%) permanent partial disability to the body as a whole. The extent of vocational disability is a question of fact to be determined from all the evidence, including lay and expert testimony. *Worthington v. Modine*, 798 S.W.2d 232, 234 (Tenn. 1990). The trial court is required to consider all relevant factors including the age, education, skills and training, local job opportunities and capacity to work at types of employment available in claimant's disabled condition. Tenn. Code Ann. §50-6-241(a)(1); *Roberson v. Loretto Casket Co.*, 722 S.W.2d 300, 384 (Tenn. 1986).

The plaintiff has a limited education, few transferable job skills, and permanent physical

restrictions which will impair her future employability. After a careful review of all the evidence in this case, we find the evidence does not preponderate against the trial court's award of sixty percent (60%) permanent partial disability to the body as a whole.

CONCLUSION

The judgment of the trial court is affirmed. The costs of this appeal are taxed to the defendant, Porter-Cable Corporation.

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W. MICHAEL MALOAN, SPECIAL JUDGE

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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 to the Defendant/Appellant, Porter-Cable Corporation, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM