IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 22, 2007 Session

TAMMY MATHIS v. DEER RIDGE MOUNTAIN RESORT AND SUE ANN HEAD, ADMINISTRATOR, SECOND INJURY FUND

Direct Appeal from the Circuit Court for Cocke County
No. 29078-I Ben W. Hooper, II, Judge
Filed March 26, 2008

E2006-02623-WC-R3-WC- Mailed February 20, 2008

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The issue presented by this appeal is whether the evidence preponderates against the trial court's finding under TCA 50-6-207 (4) (B) that the employee is totally incapacitated from working at an occupation that brings the employee an income and the resulting award of one hundred percent permanent and total disability when the collective evidence of all the vocational experts was a vocational impairment ranging from 55% to a maximum of 80%. We conclude that the evidence does not preponderate against the trial court's finding, and award and affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (2005 & Supp. 2007) Appeal as of Right; Judgment of the Circuit Court Affirmed

E. RILEY ANDERSON, SP. J., delivered the opinion of the court, in which GARY R. WADE, J. and TELFORD E. FORGETY, SP. J., joined.

Ricky L. Apperson, Knoxville, Tennessee, for the appellant, Deer Ridge Mountain Resort.

James M. Davis, Morristown, Tennessee, for the appellee, Tammy Mathis.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael Moore, Solicitor General; Lauren S. Lamberth, Assistant Attorney General, for the appellee, The Second Injury Fund.

MEMORANDUM OPINION

Factual and Procedural Background

Tammy Mathis ("Employee") worked as a maid and assistant housekeeper for Deer Ridge Mountain Resort ("Employer"). On December 24, 2003, she slipped on a patch of ice at work and fell down a flight of stairs injuring her coccyx (tailbone). Initially, she was taken to the emergency room at Fort Sanders Hospital in Knoxville. She was later treated by Dr. James Macguire, an orthopaedic surgeon, and then by Dr. David Wiles, a neurosurgeon. These doctors prescribed medication and physical therapy, which did not provide relief to Employee's symptoms of pain in the area of her coccyx. Neither Dr. Macguire nor Dr. Wiles testified.

Eventually, she was referred to Dr. Turney Williams, an anaesthesiologist who specialized in the treatment of chronic pain. Dr. Williams provided stronger medication, injected local anesthetic medication in the affected area, and performed a procedure called cryodestruction, which involved freezing of the nerves in the area of the coccyx. Some of these procedures provided temporary relief, but none provided permanent relief. At Dr. Williams' suggestion, Employee was treated by Dr. Paul Thur de Koos, who surgically removed her coccyx. Ultimately, this surgical procedure did not provide significant relief of Employee's symptoms.

The Employee filed a complaint for workers' compensation benefits against the defendant employer, Deer Ridge Mountain Resort in the circuit court for Cocke County, Tennessee on July 21, 2004. Employer answered conceding compensability and past payment of some temporary total disability benefits, but denied the employee was permanently and totally disabled. The trial was held on October 3, 2006 before Judge Ben Hooper II in Cocke County, Tennessee, the Employee's county of residence.

On the day of the trial, Employee was forty-one years old. She had completed the eighth grade, and had subsequently obtained a GED. She had also trained for and received a cosmetologist's license, but that had lapsed at some time after the injury at issue because of lack of finances. She had worked for Employer for about one and one-half years prior to her injury. Her job for Employer including cleaning and inspecting rooms and doing laundry. Prior to that time, she had been a hairdresser, waitress and housekeeper. She had been self-employed as a cosmetologist for about two years, but gave that up to obtain employment with family medical insurance. In that business, she had kept her own records, but had no other employees. She had neither worked nor looked for work after July 2004. Employer terminated her at that time because she could no longer perform the job. Her supervisor said she had done a fine job in the past. As a result she had been promoted and her pay had increased.

Employee testified that she had problems sitting, standing or walking for any period of time because of pain. She described her pain as a sharp, stabbing constant pain like a toothache running through her tailbone area to her hip, groin and leg. She had difficulty sleeping; two hours was her limit because of pain, and then she had to get up and move around. She had difficulty walking to her pond which was fifty feet away and difficulty climbing steps. Her legs were weak and wobbly. She had to constantly change positions from sitting to standing to lying down. She did not cook and did a small amount of housework. Her daily activities were very limited. She occasionally drove her father from her home in Del Rio to Knoxville for medical

treatment. She testified that she was not capable of performing any of her previous jobs. She did report to Jane Colvin-Roberson, a vocational evaluator, that she was able to carry a gallon jug of milk, and to hold her grandson, who weighed approximately fourteen pounds.

Dr. Turney Williams testified by deposition at the trial. His diagnosis, at the beginning and throughout, was that Employee has sustained sacroiliitis and coccydynia as a result of her fall. He described these conditions as sprains, and resulting inflammation, including nerve inflammation of the lowest joints of the spine. When asked about her prognosis just prior to the trial in August 2006, Dr. Williams responded "I think she's going to have trouble with her left sacroiliac joint and her coccyx on a long term basis, which could be years. It's difficult to resolve either problem completely and it could go on for a long time." Dr. Williams stated that he did not provide impairment ratings as part of his practice. However, he imposed several restrictions upon Employee's activities, including a twenty pound lifting limit, avoiding squatting and kneeling and changing positions at least once per hour. The Employee was still being treated by Dr. Williams for her symptoms at the time of the trial.

Dr. William Kennedy, an orthopaedic surgeon, performed an independent medical examination at the request of Employee's attorney. He likewise testified by deposition at the trial. His diagnosis was consistent with that of Dr. Williams. He assigned an 8% impairment to the body as a whole to Employee as a result of the injury. He testified that she should avoid repeated bending, stooping or squatting, vigorous pushing or pulling, excessive ladder climbing, and should be allowed to change positions as needed. He added a lifting restriction of twenty pounds maximum, ten pounds frequently.

Dr. Norman Hankins, a partner of Dr. Kennedy, performed a vocational evaluation of Employee. He administered testing which revealed an IQ of 84, which he described as being in the below average to average range. He found that she was able to read at an eighth grade level and to perform arithmetic at a sixth grade level. In his deposition, Dr. Hankins testified that he concluded that Employee had sustained a 79% vocational impairment based upon the restrictions suggested by Dr. Kennedy, and an 80% impairment based upon the restrictions suggested by Dr. Williams.

Jane Colvin-Roberson performed a vocational evaluation at the request of Employer. She administered some of the same tests used by Dr. Hankins. Her results showed an IQ of 94, reading at the high school level and arithmetic at the sixth grade level. Ms. Colvin-Roberson concluded that Employee had sustained a vocational impairment of 55%-60%. She did not consider the differences between Dr. Williams' proposed restrictions and those of Dr. Kennedy to be significant.

Employee had two previous work injuries to her low back, at a different level of the spine than this injury. She had received awards totaling 60% permanent partial disability to the body as a whole. As a result of those injuries, Employee began drawing social security disability benefits in 1995, but by 1997 she had rehabilitated herself , was off disability, had obtained a GED, followed her doctor's orders and was back at work. As the trial court remarked in his opinion "she was hoeing her own row and it was pure grit and determination."

The trial court found that Employee was a very credible witness and that "there is not a job in the world that she can do." The court said in his opinion "I don't know that I have tried a case in a long time where I've been any more convinced that I have sat here and seen credibility at one of the highest levels that I have ever detected." Based upon those findings, the trial court awarded benefits for permanent total disability and further found that the injury at issue had caused a 100% permanent disability, without regard to her previous injuries. Apparently applying Tennessee Code Annotated section 50-6-208(b), liability was apportioned 40% to Employer and 60% to the Second Injury Fund. Employer has appealed, contending that the trial court erred by finding the employee to be permanently and totally disabled.

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) (2005 & Supp. 2007). 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. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987). This Court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. Landers v. Fireman's Fund Ins. Co., 775 S.W.2d 355, 356 (Tenn. 1989). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

Employer and the Second Injury Fund contend that the trial court erred in finding Employee to be permanently and totally disabled. They argue that the testimony of both vocational evaluators demonstrates that she is not totally incapacitated "from working at an occupation which brings the employee an income," as required by Tennessee Code Annotated section 50-6-207(4)(B)(2005 & Supp. 2007). In addition, they refer to Dr. Kennedy's testimony that Employee is able to work, albeit at a light duty level, as precluding a finding of permanent total disability.

Dr. Hankins, who testified on behalf of Employee, opined that prior to her injury, Employee had roughly 39,000 jobs available to her in the Knoxville Metropolitan Area. He testified that, after the injury, approximately 8200 jobs remained available to her. Ms. Colvin-Roberson testified that there were 6000 to 6500 job in the Knoxville Metropolitan area that Employee was capable of performing post-injury.

Employer contends that the evidence most favorable to Employee on the issue — the testimony of Drs. Kennedy and Hankins — shows that there are numerous jobs which she can perform, and that she is therefore not "totally incapacitated" from income-producing work. Employer cites Jones v. Cracker Barrel Old Country Store, Inc., No. E2002-1681-WC-R3-CV, 2004 WL 1468357 (Tenn. Workers' Comp. Panel, June 30, 2004) in support of its position. In

Jones, both vocational experts found the employee was capable of performing jobs in the local market; one expert assessed a 65%-75% vocational disability and the other expert assessed a 90% to 95% vocational disability. The trial court awarded permanent total disability benefits. The Workers' Compensation Panel reversed, holding that the evidence did not demonstrate that the employee was "totally incapacitated" from working and that the trial judge incorrectly analyzed the issue under the permanent partial disability statute, Tennessee Code Annotated section 50-6-242.

Cracker Barrel does not establish a bright line rule and is distinguishable from the subject case. The panel and the parties agreed that the trial court had based its analysis on the wrong statute. 2004 WL 1468357 at *3. Further, the panel in that case analyzed only the vocational expert and physician evidence. In contrast, the record in this case contains substantial lay evidence which supports the trial court's finding. Moreover, the trial court in this case specifically and emphatically found that evidence to be credible.

Employee testified that she had difficulty sleeping, had weakness in her legs and was able to walk only fifty to one hundred feet at a time. She also testified that she had to change positions frequently from standing, to sitting, to lying down. She testified "I feel I have no life since December 24," the day of the injury. When asked at trial by Employer's counsel if she had any intention of going back to work she answered "I'd love to go back to work. I'd let you'uns have all of this if I could go back to work tomorrow. That's all I want to do is live a normal life again. That's all I ask for. I hate being like this. I hate this worser than anything, not being able to do nothing." The Employee's testimony about her limitations was corroborated by her sister and her next-door neighbor. The trial court found her to be a highly credible witness and also found her neighbor to be a very credible witness.

In making a determination on the issue of disability, a 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. Walker v. Saturn Corp. 986 S.W.2d 204, 208 (Tenn. 1998). The same rationale applies to the opinions of a vocational expert. Finally, it is of critical importance in our review of this case that an injured employee's assessment of her physical condition and resulting disabilities cannot be disregarded. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn.1975).

In this case, it is undisputed that Employee sustained a compensable injury which resulted in a substantial disability. She testified that she was extremely limited in her activities of daily living, and unable to perform any of the jobs which she had previously held in her lifetime. The trial court found her to be a highly credible witness, and found there was not a job in the world that she could do. We extend deference to that finding. Humphrey, supra. Certainly, the record would have permitted the trial court to find that Employee was not permanently and totally disabled. However, after observing her in person and hearing her live testimony, corroborated by others, the trial court found that she was, in fact, permanently and totally disabled. Based upon our independent review of the evidence, it does not preponderate against the trial court judgment.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed one-half to Deer Ridge Mountain Resort and its surety, and one-half to the Second Injury Fund.

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RILEY ANDERSON, SPECIAL JUSTICE

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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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed one-half to Deer Ridge Mountain Resort and its surety, and one-half to the Second Injury Fund.