IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 27, 2009 Session

BERTHA MAI CLAIBORNE v. ABC GROUP FUEL SYSTEMS, INC.

Direct Appeal from the Chancery Court for Sumner County
No. 2007C-270 Tom E. Gray, Chancellor

No. M2008-02292-WC-R3-WC - Mailed - August 20, 2009
Filed - November 20, 2009

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 Employee alleged that she injured her back and neck as a result of an accident at work. Her authorized treating physician released her with no impairment. Employee's examining physician assigned 10% impairment. The parties invoked the Medical Impairment Registry ("MIR") process. The MIR physician assigned to Employee found 0% impairment. The trial court awarded benefits based upon the rating of Employee's physician. The trial court did not explain how the opinion of Employee's physician rebutted the MIR physician's opinion. Upon review, we conclude that the trial court erred by not accepting the impairment as determined by the MIR doctor. The judgment for permanent partial disability benefits is reversed, and the case is remanded to the trial court for additional proceedings.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery Court Reversed in part, Affirmed in part and Remanded

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which SHARON G. LEE, J., and E. RILEY ANDERSON, SP. J., joined.

Blakely D. Matthews and Pele I. Houk, Nashville, Tennessee, for the appellant, ABC Group Fuel Systems, Inc.

William L. Underhill and Michael L. Underhill, Madison, Tennessee, for the appellee, Bertha Mai Claiborne.

MEMORANDUM OPINION

Factual and Procedural Background

Bertha Mai Claiborne ("Employee") was an assembly line worker for ABC Group Fuel Systems ("Employer"), a manufacturer of automobile parts. She was injured on July 14, 2006, when a forklift truck ran into her, knocking her into the air and then onto a concrete floor. She testified that the incident injured her neck, shoulders, lower back, right hip, ribs and arms. It was stipulated that the event was compensable, and that Employer had appropriate notice of the resulting injuries alleged to result from it. Immediately after the incident, Employee was taken to a local emergency room for treatment. The emergency room physician ordered x-rays, examined her and prescribed medication. He advised her to see her primary care physician, Dr. Steven Mazurek. She did so a few days later.

Shortly thereafter, she was provided with a list of physicians by Employer. She selected Dr. Barry Bichon, a primary care physician. He provided conservative treatment, including medication and physical therapy. He also took her off work for a period of time. Employee's condition did not improve. Dr. Bichon recommended that she see a specialist and referred her to Dr. Jeffrey Hazlewood, a physiatrist. Employer offered a panel of orthopaedic surgeons, but acceded to Employee's request to approve treatment by Dr. Hazlewood.

Dr. Hazlewood testified by deposition. He first examined Employee on August 19, 2006. He treated her with medication and work restrictions. He also ordered physical therapy, which Employee began receiving in September. When Employee returned on August 31, she stated that she was worse, with pain in all parts of her body. After she received physical therapy, she reported a slight improvement in her symptoms. Dr. Hazlewood ordered a bone scan as a precautionary measure. The results of that study were unremarkable. Dr. Hazlewood testified that, throughout his course of treatment with Employee, he observed her to engage in "pain behaviors," i.e., behaviors which were out of proportion to the objective medical findings, or which were inconsistent during the course of the examination.

Dr. Hazlewood released Employee from his care on September 28, 2006. On that date, her reported symptoms were similar to those previously noted. Dr. Hazlewood found no objective basis for her complaints. He recommended that she return to work, without restrictions. He opined that she had 0% impairment. He considered it possible that Employee was malingering or engaging in disability-seeking behavior.

Employee returned to Employer on the next day. She presented Dr. Hazlewood's statement that she was able to work without restrictions. However, she did not believe that she was able to do so. She spoke to John Hendricks, Employer's Human Resources Manger, about her possible return. Employee testified that she told Hendricks that she was willing to try to return to her job, but did not believe that she could perform it. Hendricks testified at trial. His version of the conversation differed only slightly from Employee's. He stated that he asked her if she was able to do her job, and that she said she was not. He concluded that, under the circumstances, it was not in Employer's interest, or Employee's, to attempt to return her to work. The conversation occurred in the presence of another Human Resources employee, Tracey Locke, who confirmed Hendricks' version of the event.

Shortly after that date, Employee consulted Dr. Wright, a partner of Dr. Mazurek. She requested that he provide her with work restrictions. He declined to do so. In his note concerning that examination, Dr. Wright noted inconsistencies between Employee's ability to perform certain movements during his examination, and her ability to do so when conversing with him. Employee saw Dr. Mazurek on October 31 for symptoms of a cold. During this appointment, Employee again raised the issue of work restrictions. Dr. Mazurek's note states that she became belligerent during the discussion. He subsequently advised her to find another primary care physician. In her trial testimony, Employee denied that she had become either loud or belligerent during this appointment, but said that her daughter, who attended the appointment with her, did raise her voice. Employee did not advise either Employer, or her own attorney, of this contact with Dr. Mazurek.

In March 2007, Employee saw Dr. John Bacon, an orthopaedic surgeon. She selected Dr. Bacon on her own, and informed neither Employer nor her attorney that she was doing so. Dr. Bacon testified by deposition. Employee reported her symptoms to him, but did not advise him of any work injury. On a patient information questionnaire completed at the time, she indicated that her problem was not work-related. She eventually told him of the July 2006 incident at a later date. Similarly, she told him that the only treatment she had received for her symptom was a medication, Mobec. She did not tell Dr. Bacon who had prescribed that medication, nor did she identify any of the physicians who had previously treated her for her symptoms. Dr. Bacon did not see any of the records of those physicians, or the results of the various diagnostic tests which had been performed, until approximately one-half hour before his deposition was taken.

Dr. Bacon's diagnosis was that Employee had "a cervical strain, cervical spondylosis. A mechanical and muscular type back pain." He treated her conservatively with anti-inflammatory medication, muscle relaxers and work restrictions. She reported slight initial improvement. He found Employee to be at maximum medical improvement on July 17, 2007. He continued to see her approximately once a month thereafter until May 2008. There was no significant change in her condition during that time. Dr. Bacon opined that she had sustained permanent impairments of 5% to the body as a whole due to her cervical strain, and 5% to the body as a whole for her lumbar strain. He stated that the July 2006 incident was the cause of her injuries. He placed her on a permanent fifteen-pound lifting restriction, and limited her from bending and twisting.

Because of the difference between the impairment ratings, Employer initiated the Medical Impairment Registry process, as permitted by Tenn. Code Ann. § 50-6-204(d)(5). The physician selected was Dr. John Stanton, an orthopaedic surgeon. Dr. Stanton issued a written report in accordance with the procedure set out in the statute. In that report, he opined that Employee had no permanent impairment as a result of the July 2006 work injury. The report was placed into evidence by stipulation of the parties.

Employee was fifty-seven years old on the date of the trial. She had completed the ninth grade, and had no additional education. She began working for Employer in 1999. Prior to that, she had worked primarily as a sewing machine operator for various garment, boot, and bedding manufacturers. She had also worked in the deli section of a supermarket for three years. She had

not worked, for Employer or anywhere else, since July 2006. She had applied for, and was receiving social security disability benefits. She testified that she was unable to perform any of the jobs she had previously held. She said that she was unable to lift her grandchildren or work in her garden due to her neck and back problems. She was not able to perform housework as well as she had previously done.

On cross examination, Employee stated that she had been satisfied with Dr. Hazlewood's medical treatment initially, but became dissatisfied when he declined to order an MRI scan that she requested and released her to return to work. She stated that when she returned to Employer after being released by Dr. Hazlewood, she did not believe she was able to do her job. At one point, she testified that she informed Employer of that belief, but later denied that she had done so. She was wearing a cervical collar on the day of the trial. She had testified during her discovery deposition that she wore the collar all or most of the time. However, at trial she amended that testimony, stating that she wore it only when her neck hurt, and that her neck was hurting on the day of the trial.

Contrary to the findings of the MIR physician, the trial court found that Employee had sustained permanent injuries to her neck and back as a result of the July 2006 event. It also found that she had left her job because of self-imposed restrictions, and therefore had a meaningful return to work. It awarded 15% permanent partial disability to the body as a whole. It denied her claim for payment of medical expenses associated with Dr. Bacon's treatment, and also for additional temporary total disability. Employer has appealed, contending that the trial court erred by failing to accept the impairment rating of the MIR physician, by finding that Employee retained a permanent impairment as a result of her work injury, and by designating Dr. John Bacon as the authorized physician for future medical treatment. Employee has raised three additional issues on appeal, asserting that the trial court erred by applying the 1.5 times impairment cap to the award, by not awarding certain medical expenses, and by not awarding additional TTD benefits.

Standard of Review

Upon the record of the trial court, findings of fact are reviewed de novo with a presumption of correctness unless the evidence preponderates to the contrary. 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 witnesses' demeanor and to hear in-court testimony. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). A reviewing 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. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); *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

1. MIR Impairment Rating: Employer first contends that the trial court erred in rejecting

the impairment rating of Dr. Stanton, the MIR physician. Tenn. Code Ann. § 50-6-204(d)(5) provides, in pertinent part: "The written opinion as to the permanent impairment rating given by the independent medical examiner pursuant to this subdivision (d)(5) shall be presumed to be the accurate impairment rating; provided, however, that this presumption may be rebutted by clear and convincing evidence to the contrary."

In its bench decision, the trial court did not initially discuss Dr. Stanton's opinion. After counsel requested the court to address the issue, the court stated:

> What the Court in the matter of the Tennessee Department of Labor Medical Impairment Rating Registry and pursuant to the provision of T.C.A. 50-6-204(d)(5), Dr. John L. Stanton performed an independent medical examination and it was his opinion that Ms. Claiborne's condition was rheumatoid arthritis more than the accident at work. The Court finds that based on the medical records made here, the deposition of Dr. Bacon and the fact that Dr. Hazlewood was the pain specialist and not an orthopaedic surgeon, that the Court finds the evidence is clear and convincing that the Plaintiff did suffer a permanent partial disability anatomically to her neck and to her back based on the record that is before the Court.

Employer notes that the trial court did not directly discuss any of Dr. Stanton's specific findings, other than his overall conclusion that Employee's ongoing symptoms were not the result of her injury, but seemed to base its decision on the specialties of the two treating physicians - orthopaedics (Bacon) versus physical medicine (Hazlewood). Employer also points out that Dr. Stanton's report was issued before the depositions of Dr. Bacon and Dr. Hazlewood were taken, but counsel for Employee did not question either doctor concerning Stanton's opinions.

Employer also relies upon *Beeler v. Lennox Hearth Products, Inc.*, No. W2007-2441-SC-WCM-WC, 2009 WL 396121 (Tenn. Workers' Comp. Panel Feb. 18, 2009), which was released while this appeal was in the briefing stage. In that decision, a prior panel held that "clear and convincing evidence," as used in § 50-6-204(d)(5), has the same meaning as in other legal contexts. *Id.* at *4. Therefore, "if no evidence has been admitted which raises a 'serious and substantial doubt' about the evaluation's correctness, the MIR evaluation is the correct impairment rating." *Id.* On that basis, Employer argues that since there was no evidence in the record which directly criticized, or even addressed, Dr. Stanton's findings, Employee did not sustain her burden.

Employee contends that the trial court implicitly found that Dr. Bacon was more credible than the other doctors by clear and convincing evidence, and that finding should not be disturbed on appeal.

Our Supreme Court has described "clear and convincing evidence" as "evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Hodges v. S. C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992). This is a higher standard of proof than the preponderance of the evidence, which merely "requires that the truth of

the facts asserted be more probable than not." *Elchlepp v. Hatfield*, No. E2007-01154-COA-R3-CV, 2008 WL 2925712, at *4 (Tenn. Ct. App. July 30, 2008 (quoting *Teter v. Republic Parking Sys., Inc.*, 181 S.W.3d 330, 341 (Tenn. 2005)). The only factor mentioned by the trial court in its comparison of the medical evidence was the differing medical specialities of Dr. Bacon and Dr. Hazlewood. While this factor is certainly an appropriate one to consider in evaluating conflicting expert medical evidence, it is not sufficient alone to rebut the presumption created by section 50-6-204(d)(5). Moreover, Dr. Stanton, like Dr. Bacon, is an orthopaedic surgeon, so that comparison would have no effect in this case. We note that Employee initially gave Dr. Bacon a history which was incomplete at best, and untruthful at worst. He had limited knowledge of the medical treatment provided to Employee during the eight months between the date of her injury and her first appointment with him. In contrast, Dr. Stanton had complete history, including all of the medical records concerning the examinations and treatment of Employee in connection with her injury. Having conducted an independent review of all of the medical evidence, and giving special attention to the deposition of Dr. Bacon, we are unable to find anything which raises a serious or substantial doubt concerning Dr. Stanton's impairment rating of 0%. We therefore conclude that the trial court erred by rejecting that rating, and adopting Dr. Bacon's impairment rating as a basis for its award.

As a consequence of that conclusion, it is unnecessary for us to address Employer's argument concerning permanent disability, and Employee's argument concerning application of the one and one-half times impairment cap. We turn to the remaining issues raised by the parties.

2. Designation of Dr. Bacon: At the conclusion of its bench findings, the trial court ordered that Dr. Bacon be designated as the authorized treating physician. It did not provide an explanation for this ruling. Employer contends that this violates its right under section 50-6-204(a)(4) to designate a list of physicians from which Employee may select a treating physician.

Employee contends that she became dissatisfied with Dr. Hazlewood, and was therefore justified in seeking medical care on her own. She asserts that Employer refused to provide her with appropriate care, because Dr. Bichon initially recommended referral to an orthopaedic surgeon, and Dr. Hazlewood is a physiatrist. However, Employee testified on cross-examination that Employer did in fact, initially provide her with a panel of orthopaedic physicians. Because Dr. Bichon had recommended Dr. Hazlewood to her, she herself requested that his name be added to the list. Employer agreed to that request.

The evidence also reflects that Employee became dissatisfied with Dr. Hazlewood only when he recommended that she return to work. At that time she asked Dr. Hazlewood to refer her to another doctor for a second opinion. He declined to do so. He testified that he did not recommend a second opinion because he did not think it would serve a useful purpose. There is no evidence that she advised Employer of her alleged dissatisfaction with Dr. Hazlewood, or of her desire for a second opinion at that time. She was represented by counsel at the time. There are references in Employee's brief to a request to the Department of Labor for an additional panel of physicians at an unspecified time. The only mention of this in the record, however, is contained in counsel's closing argument. That request was reportedly denied. Employee testified that she did not tell either

Employer or her attorney that she was seeking additional medical treatment, first with Dr. Mazurek, or later with Dr. Bacon.

It is well-established that an employee may justifiably seek medical care for a compensable injury on her own when her employer refuses to do so. *Goodman v. Oliver Springs Mining Co., Inc.*, 595 S.W.2d 805, 807 (Tenn. 1980). However, an employee who becomes dissatisfied with the medical care which her employer is providing must consult with her employer before seeking treatment from other providers. *Buchanan v. Mission Ins. Co.*, 713 S.W.2d 654, 658 (Tenn. 1986). The evidence in this record establishes that Employer initially complied with its obligation to provide medical care for Employee's work injury, and that Employee did not advise Employer of her alleged dissatisfaction with that treatment. Further, the methods of treatment provided by Dr. Bacon did not differ significantly from those provided by Dr. Hazlewood or Dr. Bichon. In the absence of a failure by Employer to perform its statutory duty to provide medical treatment, there is no basis for depriving it of its statutory right to designate a list of physicians from whom Employee can seek that treatment. The portion of the judgment designating Dr. Bacon as the authorized treating physician is therefore vacated. The case will be remanded to the trial court for such proceedings as are necessary to permit Employer to provide medical treatment to Employee in accordance with the statute.

Based upon the same reasoning, we conclude that the evidence does not preponderate against the trial court's decision to deny Employee's request to require Employer to pay for treatment previously provided by Dr. Bacon.

3. Temporary Total Disability: The trial court also declined to award total temporary disability benefits for the period between the date Dr. Hazlewood released Employee in September 2006 and July 2007, the date she reached maximum medical improvement, according to the findings of Dr. Bacon. The court stated that this period of disability was the result of her decision to seek treatment on her own. Employee contends that Dr. Bacon's temporary restrictions would have prevented her from working, and that the only reason she was not working prior to that time was Mr. Hendricks' unilateral decision to send her home. We find that there is ample evidence in the record to support the trial court's finding on this matter, and therefore affirm as to this issue.

Conclusion

The award of permanent partial disability benefits to Employee is reversed. The portion of the judgment designating Dr. Bacon as the authorized treating physician is vacated. The judgment is affirmed in all other respects. The case is remanded for further proceedings consistent with this opinion. Costs are taxed to Bertha Claiborne, for which execution may issue if necessary.

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ALLEN W. WALLACE, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

BERTHA MAI CLAIBORNE v. ABC GROUP FUEL SYSTEMS, INC.

Chancery Court for Sumner County
No. 2007C-270

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ORDER

This case is before the Court upon the motion for review filed by Bertha Mai Claiborne pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 assessed to Bertha Claiborne, for which execution may issue if necessary.

PER CURIAM

SHARON G. LEE, J., not participating.