IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
OCTOBER 1998 SESSION

FILED

January 26, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

SHARON WYATT,	)	
	)	
Plaintiff/Appellee,	)	
	)	Shelby Circuit No. 78194 T.D.
v.	)	
	)	No. 02S01-9804-CV-00043
FRAYSER MANOR, INC., d/b/a WHITNEY MANOR APARTMENTS, and WHITNEY DAWNCREST, INC., d/b/a FRAYSER MANOR APARTMENTS	)	Honorable James F. Russell, Judge
	)	
	)	
	)	
Defendants/Appellants.	)	

For the Appellants:

John E. Dunlap
1433 Poplar Avenue
Memphis, TN 38104

For the Appellee:

Carl Wyatt
Lori Keen
Glassman, Jeter, Edwards & Wade
26 North Second Street
Memphis, TN 38103

M E M O R A N D U M O P I N I O N

Members of Panel:

Justice Janice M. Holder
Senior Judge John K. Byers
Senior Judge F. Lloyd Tatum

MODIFIED AND REMANDED

TATUM, Senior Judge

O P I N I O N

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.

In this workers' compensation case, the trial court rendered judgment in favor of the plaintiff/appellee, Sharon Wyatt, and against the defendants/appellants, Frayser Manor, Inc. and Whitney Dawncrest, Inc. The defendant, Frayser Manor, Inc. was made a party by amendment. Whitney Dawncrest, Inc. was doing business as Frayser Manor Apartments. The court dismissed the suit with respect to Rainey Brothers Construction Company, Inc.

The trial court's judgment included a finding that the plaintiff's average weekly wage was $192.91, the plaintiff was entitled to temporary total disability benefits for 26 weeks, and the plaintiff sustained 84 percent permanent partial disability to the right leg. The issues presented attack the trial court's judgment on these three findings.

At trial, all defendants vigorously contested whether they were subject to the workers' compensation law, claiming they did not have five employees. On this appeal, they present no issue concerning the trial court's finding in favor of plaintiff on this issue.

In our review, we must be mindful of several fundamentals. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's finding of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). This tribunal is required to conduct an independent examination of the evidence to determine where the preponderance of the evidence lies. Wingert v. Gov't of Sumner County, 908 S.W.2d 921 (Tenn. 1995). Where the trial judge has seen and heard the witnesses, especially when issues of credibility and weight to be given oral testimony are involved, on review considerable deference must still be accorded to those circumstances. Townsend v. State, 826 S.W.2d 434 (Tenn. 1992). However, this tribunal is as well situated to gauge the weight, worth, and significance of deposition testimony as the trial judge. Seiber v. Greenbrier Indus., Inc., 906 S.W.2d 444 (Tenn. 1995). All of the medical proof in this case was by deposition. The other evidence was by

oral testimony.

In September, 1995, the plaintiff was employed by the defendant/appellant, Frayser Manor, Inc., as an assistant manager. The plaintiff's duties were to answer the telephone and show apartments to potential tenants. For these services, she received an apartment which would have leased for $299 a month. She also received a utility allowance of $80 a month.[1] In addition, she performed various odd jobs such as hanging drapes, changing light bulbs, cleaning apartment units, and other unskilled domestic tasks for which she was compensated on the basis of $5.00 an hour.

On March 5, 1996, Mrs. Wyatt was injured when hanging a curtain while working for the appellants.[2] She fell from a ladder and fractured her right ankle. We will elaborate further on the evidence in our discussion of the issues.

We first address the issue as to whether the trial court accurately calculated the plaintiff's "average weekly wage." As previously stated, the trial court found the average weekly wage to be $192.91.

Tennessee Code Annotated § 50-6-102(a) provides:

> (1)(A) "Average weekly wages" means the earnings of the injured employee in the employment in which the injured employee was working at the time of the injury during the period of fifty-two (52) weeks immediately preceding the date of the injury divided by fifty-two (52); but if the injured employee lost more than seven (7) days during such period when the injured employee did not work, although not in the same week, then the earnings for the remainder of such fifty-two (52) weeks shall be divided by the number of weeks remaining after the time so lost has been deducted;
>
> (B) Where the employment prior to the injury extended over a period of less than fifty-two (52) weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, that results just and fair to both parties will thereby be obtained;
>
> (C) Where by reason of the shortness of the time during which the employee has been in the employment of the employee's employer, it is impracticable to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the first fifty-two (52) weeks prior to the injury or death was being earned by a person in the

[1]There is evidence that the utility allowance was only $70 per month. The trial court accredited the plaintiff's testimony that it was $80 per month and the evidence does not preponderate against this finding.

[2]The plaintiff actually worked for both appellants.

> same grade, employed at the same work by the same employer, and if there is no such person so employed, by a person in the same grade employed in the same class of employment in the same district;
>
> (D) Wherever allowances of any character made to any employee in lieu of wages are specified as part of the wage contract, they shall be deemed a part of such employee's earnings.

The record does not reveal the date of the plaintiff's first day of work for the appellants. Hence, it is not possible to calculate her length of employment with certainty. An exhibit indicates that the plaintiff was first paid by check for extra work on September 22, 1995 and was paid weekly thereafter, her last check being dated March 7, 1996, two days after her injury on March 5, 1996. She was paid a total of 25 weekly checks. Hence, with this record, the closest that we can calculate her length of employment is 25 weeks.

During the 25-week period, she earned a total of $2,552.18 for the various odd jobs she performed in addition to her apartment and utility allowance. Dividing this total by the number of weeks that she was employed, we calculate her average weekly wage for this odd job employment to be $102.04.

As previously stated, the plaintiff's compensation for being an assistant manager was the use of a $299 per month apartment plus an $80 per month utility allowance. The value of the apartment and utilities was $379 per month or $4,548 per year. There being 52 weeks in a year, we have divided the yearly value of the apartment and utility compensation by 52 and find that the weekly value of the apartment and utilities was $87.46. Adding this sum to the $102.04 average pay for doing odd jobs, we find that the total average weekly wage is $189.50. Her compensation rate was $126.33 per week. The trial judge did not detail his computations in arriving at the average weekly wage so we cannot explain the nominal variance between his conclusion and ours.

In the second issue, the appellants state that the trial court erred in awarding the plaintiff 26 weeks of temporary total disability benefits.

As previously stated, the plaintiff's accidental injury occurred on March 5, 1996 when she fell from a ladder and fractured both bones in her right ankle. Her orthopedic surgeon testified that she was able to resume regular duty on July 24, 1996. He performed three surgical procedures. One procedure was to repair the fracture of both bones. The

second procedure was to remove a screw that went from the larger bone to the smaller bone. The third procedure was to remove a "Rush rod" from the bone. The doctor testified that the third procedure, which was done on February 28, 1997, disabled the plaintiff for an additional "couple of weeks." We find that the preponderance of the evidence establishes that the plaintiff was temporarily and totally disabled from March 5, 1996 to July 24, 1996. This is a total of 22 weeks. She was also totally disabled for two weeks in March, 1997, for a total of 24 weeks.[3]

Under this issue, the appellants argue that the plaintiff is not entitled to any temporary total disability benefits because she lived in the apartment and received utilities from the time of the accident until August, 1996.

The evidence clearly preponderates against the finding of the trial judge that the appellants paid no rent or utilities from March to August, 1996. The plaintiff herself testified that she continued to live in the apartment until August, 1996 and that she paid no rent or utilities from March to the last of August. She moved in with her sister in August because she had taken a job with Calvary Learning Center.

The plaintiff argues that the rent and utilities allowance should be included in computing her average weekly wage, but that the payments of rent and utilities were voluntary payments and that the appellants should receive no credit for this with respect to temporary total disability.

In support of this argument, the plaintiff cites Brown v. Western Elec. Co., 646 S.W.2d 912 (Tenn. 1983). The Brown opinion does not adequately state the facts upon which it is based. It appears that the employer continued to pay the employee his regular salary, apparently after he had discontinued employment. It does not appear whether the discontinuance of employment was the result of the accident involved in the case or for some other reason. In any event, the Court held that these salary payments could not be applied as set-off to credit an award for permanent partial disability. The opinion does not state whether the weekly payments were made in accordance with a contract or why the weekly payments were made. The facts given in the opinion are so vague it is of no

[3]The plaintiff testified that she was off from work for the entire month of March, 1997. However, she did not state that she was disabled for the entire month. In any event, we find that the preponderance of the evidence establishes that she was disabled for two weeks in accordance with Dr. Jones's testimony.

assistance to us.

The other case cited by plaintiff is Williams v. Delvan Delta, Inc., 753 S.W.2d 344 (Tenn. 1988). That case is distinguishable in that voluntary payments were made by a defendant employer, but the defendant's proof revealed that the purpose of the payments was to make up the difference between "what her paycheck was and what her disability income was." Id. at 347. The defendant's own witness established that the benefit plan was to supplement workers' compensation benefits received by an injured employee. The Williams case is not applicable.

The appellants cite only Charles H. Smith v. Kinetic Concepts, Inc., an opinion of a special workers' compensation appeals panel filed at Nashville on September 12, 1997. In this unpublished opinion, it was held that when the employer paid the employee his regular pay for a period of time, this satisfied the employer's obligation to pay temporary total disability benefits for that time.

We agree with the logic of the Smith case. The value of the use of the apartment and utilities during the time of temporary total disability was a part of her wages by contract. Tenn. Code Ann. § 50-6-102(a)(1)(D); P & L Constr. Co. v. Lankford, 559 S.W.2d 793 (Tenn. 1978). We do not agree with plaintiff that the apartment and utilities are required to be included as wages to increase the average weekly wage but cannot be included as wages in computing what has been paid for temporary total disability. We have already held that the value of the apartment and the utilities allowance must be included to increase the plaintiff's average weekly wage. We now hold that these compensations must be included as benefits paid during the plaintiff's period of temporary total disability.

As previously stated, the value of the apartment and utilities furnished was $87.46 per week. Her compensation rate was $126.33 per week. Hence, the appellants yet owe plaintiff the sum of $48.87 for each week of temporary total disability, except for the two weeks in August, 1997, when the plaintiff was not living in the apartment. For these two weeks, she is entitled to be paid the sum of $126.33 per week.

We now address the appellants' issue attacking the award based on the finding that plaintiff sustained 84 percent permanent partial disability to the right leg. In deciding this

issue, we have observed these rules:

The plaintiff has the burden of proof and it is the plaintiff's responsibility to prove each and every element of his claim for workers' compensation benefits by a preponderance of the evidence. Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483 (Tenn. 1997); Tindall v. Waring Park Ass'n, 725 S.W.2d 935 (Tenn. 1987).

In Orman v. Williams Sonoma, Inc., 803 S.W.2d 672 (Tenn. 1991), the Supreme Court stated:

> These anatomical disability ratings are but one factor to consider in measuring vocational disability, the ultimate issue in all workers' compensation cases. Newman v. National Union Fire Ins. Co., 786 S.W.2d 932, 934 (Tenn. 1990). The test is whether there has been a decrease in the employee's capacity to earn wages in any line of work available to the employee. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 459 (Tenn. 1988). The assessment of this disability is based on all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work at the types of employment available in his disabled condition. Newman, 786 S.W.2d at 934; Corcoran, 746 S.W.2d at 458-59. The claimant's own assessment of his physical condition and resulting disabilities is competent testimony and cannot be disregarded. Corcoran, 746 S.W.2d at 458.

Id. at 677-78.

Plaintiff's attending physician, Dr. Riley E. Jones, testified that both the large and small bone in her lower ankle were broken. There was also a disruption of a ligament between the two bones. A rod was placed in the little bone and a screw was placed in the big bone. Another screw was placed through both bones to hold them together.

Dr. Jones testified that plaintiff cannot work at a job requiring her to stand constantly for eight hours a day, as in a production line. She can stand for one-half day. She has mild degenerative changes in her right ankle joint which causes pain.[4] She has a mild limp which "ought to subside." Dr. Jones testified that plaintiff had 14 percent anatomical impairment to the right leg according to the AMA Guidelines.

The plaintiff testified that she was 48 years of age at the time of trial. She has a twelfth grade education and a certificate in medical terminology from a vocational school, but she never utilized her skill in medical terminology. She has not worked most of her life,

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[4]Dr. Jones testified that these degenerative changes were brought about by the fractures.

but has remained in her home. Before beginning work for the appellants in September, 1995, she did work in restaurants.

She testified that when she was released by Dr. Jones she could have gone back to work (apparently for appellants), but she elected to work for Calvary Learning Center in August, 1996. Her present job is "pretty much of a sit-down job."

She testified that her foot was always swollen. She stated that she has learned to live with "a lot of pain." She has a "hard time with shoes" and cannot do a job requiring standing eight hours each day. She also could not do a job requiring a "lot of walking." She testified that she has a slight limp.

In his findings of fact, the trial judge stated:

> The Court believes that the employee was not returned to work at an equal or greater wage than the pre-injury amount. Indeed, she was not returned to work at all as that term has been defined by the Act.

There is no evidence to support these findings of the trial court.

There is no evidence in the record tending to establish that the plaintiff could not return to her former employment for the appellants at the same pay. There was no proof offered nor did plaintiff ever contend that she could not do the job she had previously done for the appellants.

The plaintiff mentioned no difficulty that she was having in the performance of her job at Calvary Learning Center. She does not establish or present any evidence that she made less at Calvary Learning Center than what she was earning for the appellants. Her prior employments were in restaurant work, but the evidence does not reflect what type of work she was doing in restaurants or that she could not perform the duties she previously did in restaurants. The plaintiff obtained her present job very soon after she was released to return to work by Dr. Jones. There is no evidence that she was refused any employment because of her ankle injury. As stated, the evidence does establish from both the plaintiff and Dr. Jones that she is unable to stand on her feet all day and, as Dr. Jones observed, she is unable to do production line work. However, there is no evidence in her past history that she has attempted to do production line work. Her anatomical impairment to the leg is only 14 percent.

In considering all of the evidence and the above-quoted authorities, we find that the

evidence preponderates against the trial court's finding of 84 percent permanent partial disability to the right leg. The evidence preponderates in favor of an award of 50 percent permanent partial disability to the right leg, and we must modify the trial court's judgment accordingly.

The plaintiff argues that the first two issues concerning her average weekly wage and the amount owing for temporary total disability were not raised in the trial court and cannot now be raised on appeal. The plaintiff cites State Dept. of Human Services v. Defriece, 937 S.W.2d 954 (Tenn. App. 1996) and Stewart Title Guaranty Co. v. FDIC, 936 S.W.2d 266 (Tenn. App. 1996).

The two cases cited hold that appellate courts can consider only such matters that were brought to the attention of the trial court and acted upon or pretermitted by the trial court. We have no quarrel with these holdings, but the plaintiff's reliance on these cases is misplaced. The issues concerning average weekly wages and temporary total disability were presented to the trial court who acted on the issues and entered judgment thereon. The issues are properly presented.

It results that the judgment of the trial court is modified with respect to the average weekly wage, the award for temporary total disability, and the extent of permanent partial disability as herein stated. The case is remanded for further proceedings that may be necessary.

The appellants will pay one-half of the costs and the appellee will pay the remaining one-half.

_____
F. LLOYD TATUM, SENIOR JUDGE

CONCUR:

_____
JANICE M. HOLDER, JUSTICE

_____
JOHN K. BYERS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

SHARON WYATT,	)	SHELBY CIRCUIT
	)	NO. 78194 T.D.
Plaintiff/Appellee,	)	
	)	Hon. James F. Russell,
vs.	)	Judge
	)	
FRAYSER MANOR, INC., d/b/a WHITNEY MANOR APARTMENT, and WHITNEY DAWNCREST, INC., d/b/a FRAYSER MANOR APARTMENTS,	)	NO. 02S01-9804-CV-00043
	)	
	)	
	)	
	)	
Defendants/Appellants.	)	MODIFIED AND REMANDED.

FILED
January 26, 1999
Cecil Crowson, Jr.
Appellate Court Clerk

JUDGMENT ORDER

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 will be paid one-half by appellants and one-half by appellee for which execution may issue if necessary.

IT IS SO ORDERED this 26th day of January, 1999.

PER CURIAM