

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

February 25, 2013 Session

BETTY NORTON v. WHIRLPOOL CORP.

**Appeal from the Chancery Court for Coffee County
No. 10-292 L. Craig Johnson, Judge**

**No. M2012-00966-WC-R3-WC - Mailed June 25, 2013
FILED JULY 26, 2013**

In this workers' compensation action, the employee alleged that she sustained permanent disability from a work-related injury to her right shoulder. Her employer denied that the injury caused a permanent disability. The trial court found that the employee was permanently and totally disabled as a result of her work injury and entered a judgment to that effect. The employer has appealed, contending that the trial court erred by finding permanent and total disability. The appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery Court Affirmed

DONALD P. HARRIS, SP. J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., J. and BEN H. CANTRELL, SR. J., joined.

David T. Hooper, Brentwood, Tennessee, for the appellant, Whirlpool Corporation.

Russell D. Hedges, Tullhoma, Tennessee, for the appellee, Betty Norton.

OPINION

Factual and Procedural Background

When the trial of this matter took place on April 3, 2012, Betty Norton was seventy-three years old. She was a high school graduate and had worked for Whirlpool Corporation

(“Whirlpool”) for about twenty-three years. For the last seven or eight of those years, she was an inspector. In that job, she routinely picked up parts weighing from 20 to 40 pounds, examined them, and replaced them on a line. On occasion, she also inspected compressors which weighed 50 to 70 pounds.

Ms. Norton initially injured her right shoulder in October 2004 attempting to free a part that had become caught on the line. She promptly reported the injury and was referred to Dr. William Mayfield, who restricted her from lifting more than ten pounds, from working with her arm in an outstretched position, and advised her to limit the use of the arm for pushing and pulling. Ms. Norton provided a document containing these restrictions to Whirlpool’s plant nurse. She was returned to her regular job, which included activities outside Dr. Mayfield’s restrictions. The pain in her shoulder continued to worsen, but Ms. Norton was able to work by applying a heating pad during her breaks. She continued to receive medical treatment from various physicians and from Whirlpool’s onsite clinic until the fall of 2007, when she was referred to Dr. Roderick Vaughn, an orthopaedic surgeon. Dr. Vaughn modified Ms. Norton’s prior restrictions, advising her to not lift over five pounds or to work in outstretched and overhead positions. Again, Ms. Norton provided Dr. Vaughn’s note to Whirlpool, and again she was returned to her regular job, which did not accommodate those restrictions. To the contrary, she was required to lift heavier parts and the pain in her shoulder worsened between the time she saw Dr. Vaughn and mid-December 2007.

In December 2007, Whirlpool began a series of voluntary layoffs because they were “closing down the air products side” where Ms. Norton worked. Ms. Norton testified that she did not accept the initial round of layoffs, but because her shoulder was getting worse and she was having to lift heavier parts, she accepted a voluntary layoff the second time it was offered by Whirlpool. Ms. Norton had sufficient seniority that she could have kept her job by transferring to the built-in refrigeration department, which was scheduled to remain open for several more months. Ms. Norton testified that she decided against transferring because her shoulder was getting worse and the parts used in the refrigeration department were even heavier than those she had been working with. After accepting the layoff, she applied for and received unemployment compensation benefits for approximately one year. In May 2008, she submitted an application for retirement benefits. This occurred shortly after her seventieth birthday. Ms. Norton testified that she had not intended to retire in 2008, but had planned to work “as long as I could.” The entire Whirlpool facility closed in August 2008.

Ms. Norton testified that she was unable to move her right arm behind her back. She was able to lift it overhead only with the assistance of her left arm. She could not lift a gallon of milk with her right arm. Vacuuming and sweeping caused pain. Ms. Norton

treated her pain by using over-the-counter medications such as Advil and “pain patches” prescribed by Dr. Vaughn.

Dr. David Gaw, an orthopaedic surgeon, examined Ms. Norton at the request of her attorney on June 18, 2010. In addition to a physical examination of Ms. Norton, Dr. Gaw reviewed records of Dr. Vaughn and Dr. Mayfield. His diagnosis was tendinopathy, which he described as “a disorder of the tendons of the rotator cuff of the right shoulder, with degenerative changes in the joint, both the acromioclavicular and glenohumeral joint.” He stated that he found she had weakness and diminished range of motion in several planes. Based on the history given to him, he formed the opinion that “the incident at work would have been the most likely cause. But even if that time period was not right, I think the type of work that she described doing over a period of years would also be a likely cause.” Dr. Gaw testified that Ms. Norton retained a 14% permanent impairment to the right upper extremity which equates to an 8% permanent impairment to the body as a whole as a result of her condition. While he did not assign any specific activity restrictions, he stated that he considered the restrictions imposed by Dr. Vaughn to be “common sense.”

During cross-examination, Dr. Gaw agreed that tendinopathy may be described as a fraying of the tendons of the rotator cuff and indicates a more degenerative than traumatic condition. He testified that Ms. Norton’s injury did not require surgery. He agreed that her condition as shown on the MRI was not unusual for a seventy-year-old person but stated his belief that the MRI did not show what was actually going on in Ms. Norton’s shoulder. During redirect examination, Dr. Gaw stated that in his opinion Ms. Norton’s shoulder was not normal for her age because she did not have the function, including movement and ability to perform activities without discomfort, that people her age would normally have. He noted that once Ms. Norton’s condition became active, her continuing to work in the same job would worsen it over time. He testified that a review of Dr. Mayfield’s findings when he last examined her in September 2006 and a review of the findings of Dr. Vaughan when he examined her in November 2007 revealed that Ms. Norton had lost movement and strength in her shoulder during that time. He noted that she had no abnormal findings in her left shoulder. Finally, he confirmed that Ms. Norton’s history correlated with his examination findings and his opinion that her shoulder condition was work-related.

Dr. Rodney Caldwell, a vocational evaluator, testified on behalf of Ms. Norton. He administered the Wide Range Achievement Test, which showed that she was able to read at a tenth-grade level and perform arithmetic at a fifth grade level. Based on her work history, he concluded that she had no transferable work skills. Based on Dr. Vaughn’s restrictions, he opined that she was unable to perform any of her previous jobs and that she had no local job opportunities. During cross-examination, he agreed that Ms. Norton had been able to successfully perform work outside those restrictions for over three years after her initial injury.

The trial court announced its findings from the bench. It accredited Ms. Norton's and Dr. Gaw's testimony. It found that her acceptance of a voluntary layoff in December 2007 did not constitute a voluntary resignation. Based on her education, skills, and employment background, the trial court concluded that she was permanently and totally disabled. Judgment was entered in accordance with those findings. Whirlpool has appealed, contending that the evidence preponderates against the trial court's finding that Ms. Norton is permanently and totally disabled and that the trial court erred by awarding benefits in excess of six times the anatomical impairment, per Tennessee Code Annotated section 50-6-241(d).

Standard of Review

Courts reviewing an award of workers' compensation benefits must conduct an in-depth examination of the trial court's factual findings and conclusions. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). When conducting this examination, Tennessee Code Annotated section 50-6-225(e)(2) requires the reviewing court to "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). However, the reviewing courts need not give similar deference to a trial court's findings based upon documentary evidence such as depositions, Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006); Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004), or to a trial court's conclusions of law, Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Permanent Total Disability

Whirlpool argues that the trial court erred by finding Ms. Norton to be permanently and totally disabled. In support of this argument, it advances several contentions: that Ms. Norton did not suffer an acute injury, that she did not miss any work prior to her voluntary layoff, that her condition was degenerative and age-related, that she continued working at her regular job even after medical restrictions were imposed, that her employment ended as a result of a voluntary layoff, and that she accepted unemployment compensation benefits after that layoff occurred.

Ms. Norton testified that she sustained an acute injury in October 2004. She described the mechanism of injury in detail. Her testimony is supported by numerous undisputed facts. She reported the injury immediately and was referred by Whirlpool to Dr. Mayfield and other physicians for treatment. Dr. Mayfield placed restrictions on the use of her right arm in October 2004 and she continued to seek and receive medical treatment for her injury until her eventual layoff in December 2007. Dr. Gaw testified that her right shoulder symptoms were consistent with either the October 2004 event or the day-to-day tasks of her job. Whirlpool presented no contrary medical evidence. In consideration of these facts, we conclude that the evidence does not preponderate against the trial court's finding that Ms. Norton sustained a compensable injury to her right shoulder.

Whirlpool also argues that Ms. Norton's continuing ability to work at her regular job until 2007, in spite of her medical restrictions, shows that she did not suffer a disabling injury. Ms. Norton testified that the condition of her shoulder worsened from the date of her injury until she chose to accept the voluntary layoff offered by Whirlpool. The trial court accredited that testimony. Because Whirlpool chose, for reasons of its own, not to comply with the medical restrictions imposed by Dr. Mayfield and Dr. Vaughn, Ms. Norton's choices were limited to continuing to work or losing her job. Under the circumstances, her decision to continue to work does not negate the possibility that her disability gradually increased as she did so. Whirlpool does not dispute that Dr. Vaughn placed a five-pound lifting restriction on Ms. Norton, as well as positional limitations. We have no difficulty in concluding that those restrictions, placed upon a seventy-year-old employee whose work history consists entirely of unskilled and semi-skilled labor, "totally incapacitate[d] [her] from working at an occupation that brings the employee an income." Tenn. Code Ann. §50-6-207(4)(B) (2008 & 2012 Supp.) Ms. Norton's post-layoff acceptance of unemployment compensation benefits is consistent with this conclusion. When she applied for those benefits, she certified that she was available for work. She testified that she was willing to work at any job within the restrictions placed on her by Dr. Vaughn. She stated that she had to "check for jobs," presumably through the Department of Labor and Workforce Development, during this period, but was unable to find work. The absence of available jobs within her medical restrictions supports the trial court's conclusion that she was permanently and totally disabled.

Application of Tennessee Code Annotated section 50-6-241(d)

Whirlpool also asserts that Ms. Norton's award of permanent disability benefits should be limited to six times her medical impairment by operation of Tennessee Code Annotated section 50-6-241(d). Section 50-6-241 creates a statutory scheme for establishing maximum permanent partial disability awards for employees depending on whether they are returned to employment by their pre-injury employer at a rate of pay equal to or greater than they were receiving at the time of injury. If they are so returned to work, the employee is

now limited to a disability recovery of one and one-half times the impairment rating. Section 50-6-241(d) sets a maximum recovery of six times the impairment rating if the employee is not returned to employment at a rate of pay equal to or greater than they were receiving at the time of injury. Our Supreme Court held in Davis v. Reagan, 951 S.W.2d 766 (Tenn. 1997), that section 50-6-241 is not applicable to cases involving permanent total disability. Id. at 768-69. Since we have affirmed the trial court's finding that Ms. Norton is permanently and totally disabled, this code section is not applicable and Whirlpool's argument is without merit.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Whirlpool Corporation and its surety, for which execution may issue if necessary.

DONALD P. HARRIS, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

BETTY NORTON v. WHIRLPOOL CORP.

**Chancery Court for Coffee County
No. 10-292**

No. M2012-00966-WC-R3-WC - FILED JULY 26, 2013

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 will be paid by Whirlpool Corporation, and its surety, for which execution may issue if necessary.

PER CURIAM