

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
April 29, 2014 Session

TERESA G. MOORE v. KNOX COUNTY GOVERNMENT ET AL.

**Appeal from the Circuit Court for Knox County
No. 261311 Harold Wimberly, Judge**

**No. E2013-01552-WC-R3-WC-MAILED-JUNE 19, 2014
FILED-NOVEMBER 12, 2014**

The employee sustained a compensable shoulder injury when she fell from a ladder while removing Christmas decorations. The trial court determined that the employee had sustained a 7% anatomical impairment, awarded her 21% permanent partial disability (“PPD”) benefits, and denied her claim for temporary disability benefits. The employer has appealed, asserting that the trial court erred by awarding benefits in excess of one and one-half times the anatomical impairment. The employee contends that the trial court erred by denying her temporary disability claim. 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 conclude that the trial court erred by awarding PPD benefits in excess of one and one-half times the impairment. We affirm the judgment in all other respects.

**Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2013) Appeal as of Right; Judgment
of the Trial Court Affirmed as Modified; Case Remanded**

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the Court, in which GARY R. WADE, C.J., and E. RILEY ANDERSON, SP. J., joined.

Edith S. Willcox, Knoxville, Tennessee, for the appellants, Knox County Government, Knox County Mayor Tim Burchett, and Knox County Commissioners.

H. Gene Bell and Katie Tolliver Jones, Knoxville, Tennessee, for the appellee, Teresa G. Moore.

OPINION

I. Factual and Procedural Background

Teresa Moore (“Employee”) began working as a Deputy Clerk for the Knox County Circuit Court (“Employer”) in 1992. On January 8, 2009, she was assigned to take down Christmas decorations in the office. While performing this task, she fell from a ladder onto her left side. She was taken to a walk-in clinic, where she received x-rays and pain medication, and then taken to the Emergency Department of St. Mary’s Hospital for additional treatment. Her left wrist was placed in a splint and she was advised that surgery would be necessary after swelling in the area decreased.

Over the next several months, Employee had surgery on her left wrist, her neck, and her left shoulder. Employer accepted the wrist and shoulder injuries as compensable but denied that the neck condition was work related. The parties attended a Benefit Review Conference on November 14, 2011, but were unable to resolve their differences. Employee then filed this civil action in the Circuit Court for Knox County on November 22, 2011. The matter proceeded to trial on April 10, 2013.

Employee testified that on January 28, 2009, Dr. Douglas Calhoun performed surgery on her left wrist, which included the insertion of “a plate, pins, and screws.” That hardware remained in her wrist at the time the trial occurred. Although Employee attempted to introduce evidence that Dr. Calhoun had assigned a 5% permanent impairment for the wrist injury, the trial court ruled that the evidence was not admissible. No additional evidence concerning the wrist injury was placed into the record, and Employee gave no testimony about the effects of her wrist injury on her work or other activities. She did state during cross-examination that she was right-handed.

Employee then came under the care of Dr. Paul Johnson, an orthopaedic surgeon, for the injury to her neck. Dr. Johnson performed a fusion of the C5-C6 vertebrae on August 11, 2009. Employer introduced a C-32 Standard Form Medical Report for Industrial Injuries from Dr. Johnson, in which he stated, “I do not believe that [Employee’s] cervical condition is or was work related.” Employee conceded that Dr. Johnson did not assign a permanent impairment for the neck injury, and no other evidence was introduced concerning that injury.

In March 2010, Employee came under the care of Dr. Paul Brady, also an orthopaedic surgeon, who testified by deposition. His diagnosis was a rotator cuff tear of the left shoulder. He opined that the injury was consistent with Employee’s January 8, 2009 fall. He performed a surgical repair of the shoulder injury on June 8, 2010. Employee was permitted to return to light-duty work on July 13, 2010, which was determined by the trial court to be Employee’s date of maximum medical improvement. Dr. Brady released

Employee from his care on April 26, 2012. At that time, she had regained full range of motion and her strength was “improving.” Dr. Brady assigned a 7% permanent anatomical impairment to the body as a whole but placed no permanent restrictions on Employee’s activities.

During her absence from work, Employee did not receive temporary disability benefits but was paid through annual leave and vacation pay. After missing a total of 120 days of work due to her three surgeries, Employee returned to work in 2010 in the same position she held prior to her fall. For three years after her return to work, Employee received her pre-injury hourly wage and continued to receive cost-of-living raises. One month prior to the trial, however, Employee was transferred to a different office and her work week was reduced to thirty hours, resulting in an overall reduction of her income. Employee testified that the reduction of hours was not by her choice.

The trial court took the case under advisement and announced its findings from the bench at a subsequent hearing. First, the court found that Employee’s neck injury was not compensable but that her wrist and shoulder injuries were compensable. Next, the court adopted Dr. Brady’s 7% impairment rating and awarded PPD benefits of 21% to the body as a whole, three times the anatomical impairment rating. Finally, the trial court denied Employee’s claim for temporary disability benefits, finding that Employee voluntarily “chose to utilize sick time and other benefits so that she would get 100 percent of the pay rather than the reduced amount of pay that she would get if [she] took worker’s compensation benefits.” Judgment was entered in accordance with those findings. Employer has appealed, asserting that the trial court erred by awarding PPD benefits in excess of one and one-half times Dr. Brady’s 7% impairment rating. Employee has raised an additional issue, contending that the trial court erred by failing to award temporary disability benefits.

II. Standard of Review

We are statutorily required to review the trial court’s factual findings “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.” Tenn. Code Ann. § 50-6-225(e)(2) (2008 & Supp. 2013). Following this standard, we are further required “to examine, in depth, a trial court’s factual findings and conclusions.” Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)). We grant considerable deference to the trial court’s findings of fact based upon its assessment of the testimony of witnesses it heard at trial, although not so with respect to depositions and other documentary evidence. Padilla v. Twin City Fire Ins. Co., 324 S.W.3d 507, 511 (Tenn. 2010); Glisson v. Mohon Int’l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). We review conclusions of law de novo with no presumption of

correctness. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). Although workers' compensation law must be liberally construed in favor of an injured employee, the employee must prove all elements of his or her case by a preponderance of the evidence. Crew, 259 S.W.3d at 664; Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992).

III. Analysis

A. Permanent Partial Disability Award

Employer contends that the award of 21% PPD benefits, three times the anatomical impairment assigned by Dr. Brady, conflicts with Tennessee Code Annotated section 50-6-241(d)(1)(A) (2008 & Supp. 2013), which limits awards to one and one-half times the anatomical impairment when an injured employee has returned to work for his or her employer at the pre-injury rate of pay. If an employee has not had a meaningful return to work for the pre-injury employer, the trial court may award up to six times the anatomical impairment rating. Id. § 50-6-241(d)(2)(A). In this instance, neither the trial court nor the parties directly addressed the limitations imposed by section 50-6-241(d)(1)(A). In its ruling, the trial court stated, "The proof . . . is that she is now back at work, although on reduced hours. Her total health condition would indicate that this probably has a significant effect on her overall status."

We conclude from this statement that the trial court determined that Employee did not have a meaningful return to work, which provided the basis for the decision to exceed the one and one-half times impairment cap and award PPD benefits at three times the impairment rating. As noted by the trial court, Employee is still working for her pre-injury employer, but in a different office and on reduced hours. She makes the same wage and receives cost-of-living increases, but her overall income has been reduced. Before we can assess this proof in light of the statutory caps, we must first determine whether the trial court erred by awarding PPD benefits based upon the 7% impairment rating assigned by Dr. Brady.

Employee argues that the evidence was sufficient to support the trial court's award of PPD benefits at three times her anatomical impairment rating, but argues that the court should have calculated the award by including a permanent impairment to her wrist. This argument is based upon the trial court's consideration of both lay and expert testimony concerning the wrist and shoulder injuries. It is undisputed that surgery was necessary to repair the wrist injury and that Employee retained a plate, pins, and screws in her wrist as a result of that injury. Although she introduced no admissible medical evidence of permanent impairment as to the wrist, Employee relies on Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452 (Tenn. 1988), for the proposition that such evidence was not necessary. In Corcoran, the trial court denied PPD benefits because the employee did not present medical evidence of a permanent impairment rating. Id. at 456. The treating physician had declined

to issue an impairment rating because he did not “have any idea how to do a disability rating.” Id. at 455. He had imposed, however, significant restrictions on the employee’s physical activities, id. at 456, and the employee also testified about the continuing effects of his injury, id. at 454. Under those circumstances, our supreme court ruled that the trial court had erred by denying PPD benefits, even in the absence of a numerical impairment rating. Id. at 459.

Employee also cites Lindbloom v. Metro 8 Sheet Metal, Inc., No. E1998-00495-WC-R3-CV, 2000 WL 233290 (Tenn. Workers’ Comp. Panel Feb. 28, 2000), in support of her position. In Lindbloom, the employee sustained a fractured ankle requiring surgery. Id. at *1. The treating physician testified that the employee had a permanent impairment, but his opinion was not based on the American Medical Association Guides to the Evaluation of Permanent Impairment or another appropriate method generally accepted in the medical community, as required by Tennessee Code Annotated section 50-6-204(d)(3)(A) (2008 & Supp. 2013). Id. at *2. Although the Special Workers’ Compensation Appeals Panel found “no competent proof as to anatomical rating,” it nevertheless awarded PPD benefits based upon the physician’s testimony that the employee was permanently impaired. Id. at *4.

In this instance, the proof about Employee’s wrist injury is not comparable to the evidence presented in Corcoran or Lindbloom. Here, there is no testimony from any medical witness that the wrist injury affects Employee’s ability to perform any task or limits her activities in any way. Furthermore, there is no testimony by Employee describing any continuing symptoms or problems with her wrist. She testified only that she is right-handed, while the injury occurred to her left wrist. The permanent impairment rating assigned by Dr. Calhoun was ruled inadmissible. Thus, the evidence in this record provides no basis for a conclusion that the wrist injury has caused any permanent disability. The only competent evidence of disability is Dr. Brady’s 7% rating regarding Employee’s shoulder. We must now determine whether the trial court erred by awarding PPD benefits at three times this impairment rating.

In Powell v. Blalock Plumbing & Electric & HVAC, Inc., 78 S.W.3d 893, 898 (Tenn. Workers’ Comp. Panel 2002), a Special Workers’ Compensation Appeals Panel upheld an award of benefits in excess of the one and one-half times cap when the injured employee returned to work at the same hourly rate of pay but was able to work only four days per week due to the effects of his work injury. More recently, in King v. Gerdau Ameristeel US, Inc., No. W2011-01414-WC-R3-WC, 2012 WL 3064640, at *3 (Tenn. Workers’ Comp. Panel July 30, 2012), another Panel reversed an award in excess of the cap when an injured employee was able to return to work at his pre-injury rate of pay for forty hours per week but was unable to work overtime as a result of his injury. And in Robinson v. Bridgestone

Americas Tire Operations, LLC., No. M2011-02238-WC-R3-WC, 2012 WL 5877497, at *4 (Tenn. Workers' Comp. Panel Nov. 21, 2012), a Panel held that an employee, whose rate of pay was reduced after his return to work as part of a plant-wide reduction caused by economic conditions, was not entitled to reconsideration of his prior workers' compensation settlement. In reaching that conclusion, the Panel stated:

In our view, the purpose of the two-tiered benefit system created in Tenn. Code Ann. § 50-6-241 is to protect the interests of several categories of employees, including (1) those who are unable to return to work for their employer because of the effects of their work injuries, (2) those who are able to return, but at a lesser wage because of the effects of their work injuries, and (3) those who, for reasons outside their control, are placed into the job market to compete against unimpaired applicants.

Id.; see also Young v. Bridgestone Ams. Tire Operations, LLC, No. M2011-02551-WC-R3-WC, 2013 WL 119193, at *4 (Tenn. Workers' Comp. Panel Jan. 10, 2013).

Employee offered no testimony or other evidence as to the reason for the reduction in her work hours—whether the change was temporary or permanent, whether other employees were similarly affected, or whether there was any relationship between Employee's work injury and the reduction in hours. In the absence of such evidence, and in light of Employee's three-year history of performing the same job for forty hours per week after her return to work, we conclude that her shortened work schedule just one month prior to trial does not provide an adequate basis for exceeding the one and one-half times cap. We hold, therefore, that the trial court erred by awarding benefits in excess of the one and one-half times cap. The award of PPD benefits is modified to 10.5% in compliance with Tennessee Code Annotated section 50-6-241(d)(1)(A).

B. Temporary Disability Benefits

Employee also contends that the trial court erred by failing to award temporary disability benefits. She asserts that she chose to use accrued leave time in order to continue to receive health insurance benefits while off work. There is no evidence to that effect in the record. We further note that Employee testified that she missed a total of 120 days of work as a result of her combined wrist, shoulder, and neck injuries. The trial court found, based on the evidence before it, that the neck injury was not compensable. Employee made no effort to apportion her absences among the specific injuries. On that factual background, we are unable to find that the evidence preponderates against the trial court's finding on this issue.

IV. Conclusion

The judgment of the trial court is modified to award 10.5% permanent partial disability benefits, but is otherwise affirmed. The case is remanded to the trial court for entry of an order consistent with this opinion. Costs are taxed to Teresa G. Moore, for which execution may issue if necessary.

JON KERRY BLACKWOOD, SENIOR JUDGE

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**Circuit Court for Knox County
No. 261311**

No. E2013-01552-SC-WCM-WC

Judgment Order

This case is before the Court upon the motion for review filed by Teresa G. Moore pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), 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 Teresa G. Moore and her surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

GARY R. WADE, J., not participating