IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 5, 2004 Session

DONNA PAYTON v. McKENZIE VALVE AND MACHINING COMPANY, ET AL.

Direct Appeal from the Circuit Court for Carroll County
No. 4473 C. Creed McGinley, Judge

No. W2003-02094-WC-R3-CV - Mailed August 24, 2004; Filed October 6, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, Employer argues: (i) that the trial court erred in allowing the testimony of one of Employee's witnesses; (ii) that the evidence preponderates against the trial court's finding that Employee's injury was caused by her employment; and (iii) that the evidence preponderates against the trial court's award of 37.5% permanent partial disability to each arm. We conclude that the evidence fails to preponderate against the trial court's decision to allow the testimony of Employee's witness, the trial court's finding that Employee's injury was caused by her employment, and the trial court's award of 37.5% permanent partial disability to each arm. We, therefore, affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Trial Court Affirmed

ROBERT L. CHILDERS, SP.J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and WILLIAM B. ACREE, SP.J., joined.

S. Newton Anderson and Mildred L. Sabbatini, Memphis, Tennessee, for the appellants, McKenzie Valve and Machining Company and Travelers Insurance Company.

Robert T. Keeton, Jr., Huntingdon, Tennessee, for the appellee, Donna Payton.

MEMORANDUM OPINION

Factual Background

Appellee, Donna Payton, ("Employee") was 41 years old at the time of the alleged injury.

She has a GED, attended vocational school for blueprint reading and tax preparation, and took several college night courses. Throughout the majority of her working life, she has worked as a machinist. In July 1997, Employee began working as a machinist for Employer, McKenzie Valve and Machining Company, ("Employer").

In the summer of 2001, Employee began to complain of numbness in her arms and hands. She reported these complaints to Employer. She was diagnosed by Dr. Gulish with bilateral carpal tunnel syndrome. After watching a videotape of Employee's required job activities, Dr. Gulish opined that if the videotape accurately depicted Employee's job duties, her injuries should not have been caused by her work. Employee disputes that the videotape fairly depicts her job duties.

Cliff Swierck was allowed to testify over Employer's objection on grounds that Employee failed to list Mr. Swierck in her responses to interrogatories as a person with knowledge. Mr. Swierck corroborated Employee's testimony that the video did not show many of her required activities.

Dr. Chandler performed carpal tunnel release surgery of Employee's right hand in October 2001, and of her left hand in February 2002. He released Employee with a 0% impairment rating to the right arm and a 3% impairment rating to the left arm. Dr. Chandler opined that Employee's continuing problems with numbness and pain in her arms were likely due to porphyria, a blood disease from which she suffers. Dr. Kaufman, a specialist who has treated Employee for porphyria, noted that her condition is worsening. Employee was terminated from her job after her release by Dr. Chandler. After a trial on the merits, the trial court awarded Employee a permanent partial disability of 37.5% to each arm.

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); *Lollar v. Wal-Mart Stores, Inc.*, 767 S.W.2d 143, 149 (Tenn. 1989). Where the trial judge has seen and heard the witnesses especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be afforded those circumstances on review because it is the trial court which had the opportunity to observe the witness' demeanor and to hear the in-court testimony. *Long v. Tri-Con Industries, Ltd.*, 995 S.W.2d 173, 178 (Tenn. 1999). Where the issues involve expert medical testimony which is contained in the record by deposition, then all impressions of weight and credibility must be drawn from the contents of the depositions and the reviewing court may draw its own impression as to weight and credibility from the contents of the depositions. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 676-77 (Tenn. 1991).

Analysis

Employer argues that the trial court erred in allowing the testimony of Cliff Swierk as evidence herein, contending that Employer was prevented from adequately preparing for trial due to Employee's intentional failure to disclose the identity of the witness. The trial court found that Employee did identify Mr. Swierk as a person having knowledge relative to operation of machinery at the plant. Further, Employer did not request a continuance so that it might adequately prepare for trial. We conclude, therefore, that the trial court did not err in allowing Mr. Swierk's testimony in this case.

Dr. Eugene Gulish, Employee's treating orthopedic surgeon, opined that Employee's carpal tunnel was not caused in the course and scope of her employment with McKenzie Valve. Dr. Gulish acknowledged in his report that as part of Employee's duties she was required to flex and extend her wrists some 2-3 times per day, and that Employee also used a hand grinder to debur, even if only for a short time daily. However, Dr. Gulish admitted in his report that he based his opinion also on a discussion with Richard Sumpter, who assured the doctor that Employee was not required to repeatedly flex and extend her wrists when working with her machine, leading Dr. Gulish to conclude that, "I think if that is true we have to conclude that such short periods of using wrists in this fashion should not have caused carpal tunnel."

Employee testified that the videotape presented by Employer displaying duties required of the Employee did not demonstrate all of Employee's duties. Mr. Sumter testified that Employer had problems with the Employee's machine malfunctioning a lot, which was not shown on the video. The video also did not show the machine using a larger drill, or holes being gouged, or the setup of and putting tools in the machine, or the machine occasionally dropping tools and Employee being required to get behind the machine to get the tools, which are all part of Employee's regular work responsibilities. It is obvious that the trial court found Employee and her witnesses to be more credible than the Employer's witnesses.

We agree with the trial court and conclude, based on the testimony of Employee and the deposition testimony of Dr. Barnett, that Employee's carpal tunnel syndrome is directly related to her employment with Employer and that Employee should be awarded appropriate workers' compensation benefits.

Employer argues that the evidence preponderates against the trial court's award of 37.5% permanent partial disability to each of Employee's arms. Employer argues that Employee's inability to return to work is caused by her battle with porphyria and is not a consequence of residual impairment caused by her carpel tunnel syndrome. Employer contends that because Dr. Barnett was not Employee's treating physician and because he improperly relied on loss of grip strength for the impairment rating he assigned to Employee, his opinion should not be given any weight.

Where medical testimony differs, it is within the discretion of the trial court to conclude that the opinion of certain experts should be accepted over that of other experts. *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675, 676-77 (Tenn. 1983). Trial courts are not bound to accept

physicians' opinions regarding the extent of an employee's disability, but should consider all the evidence, both expert and lay testimony, in determining the extent of an employee's disability. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). In this case, the trial court reviewed expert medical proof from both Dr. Chandler and Dr. Barnett, who held varying opinions as to the impairment rating for Employee. The trial court, after considering all of the facts of the case, awarded a 37.5% permanent partial disability rating to each arm. We find the award by the trial court is supported by the record and that the evidence preponderates in favor of the trial court's judgment.

Conclusion

We conclude that the evidence fails to preponderate against the trial court's decision to allow the testimony of Employee's witness, the trial court's finding that Employee's injury was caused by her employment, and the trial court's award of 37.5% permanent partial disability to each arm. The judgment of the trial court is therefore affirmed. Costs are taxed to the appellants, McKenzie Valve and Machining Company and Travelers Insurance Company, for which execution may issue if necessary.

_____

ROBERT L. CHILDERS, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 5, 2004

DONNA PAYTON v. MCKENZIE VALVE AND MACHINING COMPANY, INC., et al.

Circuit Court for Carroll County
No. 4473

No. W2003-02094-WC-R3-CV - Filed October 6, 2004

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 on appeal are taxed to the Appellants, McKenzie Valve and Machining Company and Travelers Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM