IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 25, 2003 Session

LISA DAVID v. SOARING HIGH SALES

Direct Appeal from the Chancery Court for Madison County
No. 59375 Joe C. Morris, Chancellor

No. W2002-02781-WC-R3-CV - Mailed July 2, 2003; Filed August 11, 2003

This workers' compensation appeal has been referred to the Special Workers' Compensation Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the employer contends that the evidence preponderates against the trial court's finding that (1) plaintiff was performing an errand that benefitted the employer at the time of the accident, and (2) that plaintiff suffered permanent partial disability to the body as a whole in the amount of 65%. As discussed below, the panel has concluded the judgment should be affirmed.

Tenn. Code Ann. § 50-6-225(e) (2002) Appeal as of Right; Judgment of the Chancery Court is Affirmed

ROBERT L. CHILDERS, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J. and ALLEN W. WALLACE, SR. J., joined.

D. Scott Turner and Sean Hunt, Memphis, Tennessee, for the appellant, Soaring High Sales.

George L. Morrison III, Jackson, Tennessee, and Mary Dee Allen, Cookeville, Tennessee, for the appellee, Lisa David.

MEMORANDUM OPINION

Plaintiff, Lisa David, filed a Complaint for workers' compensation benefits on January 16, 2002. The trial was heard on September 4, 2002. At the conclusion of the proof, the trial court awarded plaintiff benefits equal to 65% permanent partial disability to the body as a whole. Defendant, Soaring High Sales (SHS), appeals the decision of the trial court. For the reasons set forth below, we affirm.

FACTS

Plaintiff, a 41-year old woman, a high school graduate, briefly attended community college and completed a ten- month vocational course to become a registered dental assistant. Her past work history included jobs as a cashier, cosmetics sales person, office manager and a dental assistant. She was hired by SHS in May 2001 as office manager where she performed mostly basic clerical work and some packing and unpacking of boxes containing Tupperware products. She also checked the mailbox at the work premises daily and checked the post office box for mail occasionally.

On the morning of June 19, 2001, plaintiff's boss, Cathy Spotts, was preparing for a business trip for SHS. Plaintiff was to drive Spotts to the Old Country Store in Jackson to meet the party that Spotts was going to ride with. On that same morning plaintiff's son stopped by her office to borrow money from her. When her son returned to his vehicle he could not get it started. Plaintiff called her brother-in-law to come to SHS to help start the truck, but he was unsuccessful. Her brother-in-law offered to take plaintiff's son to work, but plaintiff declined the offer.

Plaintiff and her son then drove to the Sonic restaurant to pick up lunch for themselves and for Spotts. Plaintiff and her son returned with the food, but Spotts was still not ready to leave. Spotts told plaintiff to go to the post office, take her son to work, and then return to take Spotts to meet her party. Plaintiff and her son left the office in a company-owned vehicle and, after driving a short distance, their vehicle was struck broad-side by another vehicle that ran a stop sign.

Plaintiff was injured in the accident and was taken by ambulance to the emergency room. After being evaluated in the emergency room plaintiff began treatment with her family physician, Dr. Todd Teague, for pain in her neck, left shoulder and left arm. After treating her briefly Dr. Teague referred plaintiff to Dr. Glenn Barnett, a neurosurgeon, who performed an MRI test that revealed a herniated disk in her neck. She was treated conservatively with medications and received physical therapy, but her symptoms continued. Dr. Barnett performed an anterior cervical diskectomy with allograph fusion on October 1, 2001. Dr. Barnett noted that plaintiff did not obtain the expected result from the surgery. He also noted that persons with the diagnosis and treatment that plaintiff received, who are not able to resume normal activities within three months of surgery, are often never able to resume previous activity levels. Plaintiff attempted to return to work for SHS in December 2001, for about six weeks, but she was unable to continue working because of continuing pain and problems with her neck, left shoulder and left arm.

Dr. Barnett opined that plaintiff suffered a ten percent (10%) permanent partial impairment to the body as a result of her ruptured disk and treatment. He advised plaintiff to stay away from activities that really bother her symptoms, but he placed no specific restrictions on her. Plaintiff was also evaluated by Dr. Joseph C. Boals III, an orthopedic surgeon. Dr. Boals opined that plaintiff suffered a twenty-five percent (25%) permanent partial impairment to her body. Dr. Boals also gave a separate rating for her left shoulder injury. Based on the ongoing symptomatology and evidence of arthritis on x-ray, he assessed an additional three percent (3%) permanent partial impairment to the body.

ANALYSIS

The trial court, after hearing testimony and weighing the evidence, found that plaintiff was performing an errand to benefit her employer at the time of the accident, and that she was taking her son on a personal errand. The trial court also found that plaintiff had suffered a sixty-five percent (65%) permanent partial disability to the body.

Appellate review is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. Sec. 50-6-225(e)(2). This tribunal is not bound by the trial court's findings, but instead conducts an independent examination of the record to determine where the preponderance lies. *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991). Considerable deference must be given to the trial court's finding of fact, especially where issues of credibility are involved. *Collins v. Howmet,* 970 S.W.2d 941, 943 (Tenn. 1998). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676-77 (Tenn. 1991).

An employee's right to recover under the Workers' Compensation Act requires a finding that the injury arose "out of and in the course of employment." Tenn. Code Ann. Sec. 50-6-102(5). The phrases "arising out of" and "in the course of" employment comprise two separate requirements. *Woods v. Harry B. Woods Plumbing Co.*, 967 S.W.2d 768, 771 (Tenn. 1998). The phrase "in the course of" refers to the time, place and circumstances under which the injury occurred. *Knox v. Batson,* 399 S.W.2d 765 (Tenn. 1966). The phrase "arising out of" refers to an injury's origin. *Id.* The word "employment" is given a liberal meaning, and is not limited to actual work, but instead extends to all activities that the employment expressly or impliedly entitles the worker to do. *Tallent v. M.C. Lyle & Son,* 107 Tenn. 482, 216 S.W.2d 7 (1948). Any reasonable doubt as to whether an injury arose out of the course and scope of one's employment is to be resolved in favor of the employee. *Hall v. Auburntown Industries, Inc.*, 684 S.W.2d 614, 617 (Tenn. 1985). An injury arises out of the course and scope of employment if it has a rational causal connection to the employment and occurs while the employee is engaged in the duties of employment. *Id.*

With respect to injuries that occur during travel with a dual purpose, meaning both employment related and personal, we have adopted the position that: "[t]he mission for the employer must be the major factor or, at least, a concurrent cause of the journey . . . This does not, however, require or authorize the weighing of the motives and objects of the employer and employee for the purpose of ascertaining the most important or compelling cause of the journey, *but simply requires that the service of the employer be at least a concurrent cause of the trip.*" *Armstrong v. Liles Construction Company,* 389 S.W.2d 261, 263 (Tenn. 1965).

Plaintiff testified that her boss directed her to go to the post office, drop her son off at work and then return to the office. She further testified that she was following that directive when the accident occurred. While defendant's witness, Cathy Spotts, testified she "felt sure" that she did not

direct plaintiff to check the mail, the trial court obviously chose to credit the positive assertion of plaintiff over the less positive statement of Spotts. Where the issue depends upon the credibility of witnesses, the trial court, who sees the witnesses and hears the proof, is the best judge of credibility and its findings are entitled to great weight. *Hill v. Eagle Bend Mfg.,* 942 S.W.2d 483 (Tenn. 1997). We find that the preponderance of the evidence on this issue supports the trial court's decision.

The second issue raised by defendant is the trial court's award to plaintiff of sixty-five percent (65%) permanent partial disability to the body. Defendant asserts that the award is more than 2.5 times her medical impairment rating. The existence of permanent impairment must be established by competent medical proof. *Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452, 456 (Tenn. 1988). Both Dr. Barnett and Dr. Boals established the existence of plaintiff's permanent impairment. Once permanency has been established, the court must determine the amount of vocational disability plaintiff has suffered as a result of the work injury. In making this determination the trial court must decide how much the injury impairs the employee's earning capacity. *Id.*

The trial court must consider a variety of factors, both medical and non-medical, expert and non-expert, in reaching this determination. Relevant medical factors include the degree of anatomical impairment assessed and any restrictions imposed on the plaintiff's ability to work. *Jaske v. Murray Ohio Manufacturing Company, Inc.,* 750 S.W.2d 150, 151 (Tenn. 1988). Non-medical factors include the employees's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition. *Orman, supra,* at 678. The key consideration is whether the employee's earning capacity in the operative labor market has been diminished by the residual impairment caused by a work related injury. *Corcoran, supra,* at 459.

Dr. Barnett opined that plaintiff sustained a ten percent (10%) permanent impairment to the body. Dr. Boals opined that plaintiff sustained a twenty-five percent (25%) permanent impairment to the body from her herniated disk and neck injury and an additional three percent (3%) permanent impairment to the body as a result of her shoulder injury. If there is conflicting medical testimony, the trial judge is free to conclude that the opinion of a particular expert should be accepted over that of another expert. *Thomas v. Aetna Life & Casualty Co.,* 812 S.W.2d 278 (Tenn. 1991). The sixty-five percent (65%) permanent disability awarded by the trial court is within 2.5 times of the total of twenty-eight percent (28%) permanent impairment testified to by Dr. Boals. We find that the preponderance of the evidence on this issue supports the trial court's decision.

CONCLUSION

After reviewing the trial court's findings and the briefs and oral argument submitted by the parties, we find that the evidence preponderates in favor of the trial court's judgment and we affirm it. Costs are taxed against the appellant.

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ROBERT L. CHILDERS, SPECIAL JUDGE

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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 Appellant, Soaring High Sales, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM