IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
September 19, 2003 Session

SHARON A. BATTLE v. METHODIST MEDICAL CENTER

Direct Appeal from the Circuit Court for Anderson County
No. AOLA0312 James B. Scott, Jr., Circuit Judge

Filed December 3, 2003

No. E2002-00566-WC-R3-CV

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. The trial court awarded the employee 5 percent permanent partial disability for a shoulder injury and 35 percent permanent partial disability for a neck injury. Plaintiff contends the awards are insufficient; the court was in error in capping the awards at two and one-half times impairment; and the court was in error in allowing discretionary costs. The judgment is affirmed.

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

ROGER E. THAYER, SP. J., delivered the opinion of the court, in which JOHN K. BYERS, SR. J., joined. E. RILEY ANDERSON, J., did not participate in the case.

April Carroll Meldrum, of Clinton, Tennessee, for Appellant, Sharon A. Battle.

Robert W. Knolton, of Oak Ridge, Tennessee, for Appellee, Methodist Medical Center.

MEMORANDUM OPINION

In this case, the trial court awarded the plaintiff, Sharon A. Battle, a total of 40 percent permanent partial disability to the body as a whole as a result of sustaining two separate work-related injuries. Plaintiff is dissatisfied with the awards and has appealed.

Basic Facts

______At the time of the trial, plaintiff was fifty-two years of age and was a high school graduate. After working a number of years as a waitress and grocery store produce manager, she obtained an

associates degree from Roane State Community College in radiological technology. In 1989 she began working for the defendant, Methodist Medical Center, in Oak Ridge as an x-ray technician.

On January 21, 1999, she injured her right shoulder at work and did not return to work until sometime in March of the same year. She was treated with cortisone injections and returned to work at the same rate of pay. On February 3, 2000, while working in the surgery room, she tripped over some wires and fell to the floor causing an injury to her neck. She underwent surgery during October 2000 for a ruptured disc. At the time of the trial below, she testified she was still having pain from both injuries. She returned to work from this second injury at the same rate of pay.

Upon her return to work from this second injury, the doctor imposed restrictions of not working more than eight hours a day or forty hours a week. After working for some period of time, she said that she had missed some work and that one of her supervisors had mentioned to her that she had been "calling in" a lot and thereafter, she decided to voluntarily reduce her work schedule to a four day work week. On cross-examination she admitted some of the absences from work were due to several other health problems and not as a result of the two work injuries.

Dr. Duncan L. McKellar, Jr., and orthopaedic surgeon, testified by deposition and stated he treated her for the shoulder injury and that she had chronic tendinitis. He treated her with medication and physical therapy and gave a 2 percent medical impairment. He also indicated she should restrict her work activities if she was working over her head.

Dr. Joel Ragland, a neurosurgeon, testified by deposition and stated he treated her for the neck injury and she had a ruptured disc at the C5-6 level on the left. He said she had complained of some numbness in her feet extending up her legs. Her symptoms did not improve much and a fusion was performed on October 26, 2000. He was of the opinion she had a 25 percent impairment and told her not to work more than eight hours a day or forty hours a week. There was also a restriction on overhead reaching.

Defendant hospital called only one witness who was Michael Galloway, a vocational disability consultant. He testified Ms. Battle did not have any vocational disability in her present occupation but said she would have a 15 percent vocational disability as to her prior work experience.

Findings of the Trial Court

The trial court awarded the plaintiff 5 percent permanent partial disability to the body as a whole as a result of the shoulder injury and 35 percent permanent partial disability as a result of the neck injury.

Standard of Review

The review of the appeal is *de novo* accompanied by a presumption that the findings of the

trial court are correct unless we find the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2).

Issues on Appeal

Plaintiff contends the awards are insufficient under the evidence as the trial court limited the awards so that the employee would not be discharged; that the court was in error in capping the awards at two and one-half the medical impairment; and the court was in error in not allowing an item of expense for discretionary costs. Defendant claims the appeal is frivolous.

Analysis of Issues

The trial court awarded the employee 5 percent permanent partial disability to the body as a whole for the shoulder injury and indicated the award was capped at two and one-half times the 2 percent medical impairment pursuant to the provisions of Tenn. Code Ann. § 50-6-241(a)(1). The record indicates that the employee returned to work after this first injury at the same rate of pay and same job and she continued to work regularly until she was involved in the second accident. Therefore, we find the court was correct in fixing the award of disability at 5 percent for the shoulder injury.

The court awarded the employee 35 percent permanent partial disability to the body as a whole for the neck injury which was much less than the statutory cap of two and one-half times the 25 percent medical impairment. Therefore, the questions on appeal are whether the award is insufficient and if so, whether the statutory cap comes into play in fixing an adequate award. The employee argues the award of disability was limited by the court in order to protect her from being discharged by her employer. It is further insisted the employee did not have a meaningful return to work as she had to reduce her work hours after the second injury. In fixing the 35 percent award, the trial court did indicate that an employee with a large disability award might not be retained in employment but also stated:

> And the way that I reached that percentage was really the inability of her to be able to pursue to the same degree, because she had certain work weeks that she was keeping over and above the forty hours. Now, I realize that she's making more than she did before, and this may be quite disappointing to you, but you know, when I read those doctors depositions, and know that she has had that fusing to her neck and she can't do overhead work . . . .

In determining vocational disability, a court is required to consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities and the capacity to work at types of employment available in claimant's disabled condition. ***Powell v. Blalock Plumbing and Elec.***, 78 S.W.3d 893 (Tenn. Workers Comp. Panel 2002); ***Nelson v. Wal-Mart Stores, Inc.***, 8 S.W.3d 625, 629 (Tenn. 1999). We find the court based

its decision upon considering the proper factors.

In our review of the entire record, we cannot say the award of 35 percent disability is inadequate and that the evidence preponderates against the award. Finding that the award of disability is adequate, we are not confronted with the question of which cap should apply under the statute.

The employee also contends the trial court was in error in declining to allow a certain item of expense as discretionary costs. The employer objected and the court did not allow the employee to recover an expert witness fee ($250.00) and the court reporter charges ($200.45) when plaintiff took the discovery deposition of witness Michael Galloway. This witness was a vocational disability consultant of the defendant who personally appeared and testified at the trial. The trial court allowed plaintiff to recover other discretionary costs in the total sum of $1383.15.

Rule 54.04(2), Tenn. R. Civ. P., authorizes a trial court in its discretion to allow costs for reasonable and necessary expert witness fees for depositions or trials and for reasonable and necessary court reporter charges at depositions or trials. A vocational disability expert is a "necessary expert" and his fees for appearing and testifying at trial may be allowed as a discretionary cost. ***Miles v. Marshall C. Voss Health Care Ctr.***, 896 S.W.2d 773 (Tenn. 1995).

We would first begin by pointing out that the allowance of expenses or costs under this rule is not mandatory but rests in the sound discretion of the court and on appeal, the ruling will not be disturbed unless it appears the court abused its discretion. The circumstances surrounding the trial of a claim may be such as to justify or deny the allowance of an item of expense under Rule 54.

In the present case, the plaintiff was informed the defendant would be calling Michael Galloway as a vocational disability witness and plaintiff decided to take his discovery deposition to learn of his findings and opinions. From the record it does not appear the plaintiff used the discovery deposition in any manner under Rule 32, Tenn. R. Civ. P. We do not find the evidence is sufficient for us to conclude the trial court abused its discretion.

The employer insists the appeal is frivolous. While we have not agreed with plaintiff's argument of the issues, we do not find the appeal to be of a frivolous nature.

Conclusion

The judgment of the trial court is affirmed. Costs of the appeal are taxed to the plaintiff employee.

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ROGER E. THAYER, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

SHARON A. BATTLE V. METHODIST MEDICAL CENTER
Anderson County Circuit Court
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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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellant, Sharon A. Battle, for which execution may issue if necessary.