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

LINDA MEADOWS v. WAUSAU INSURANCE COMPANY

Direct Appeal from the Chancery Court for Rhea County
No. 9318 Jeffrey F. Stewart, Chancellor

Filed December 8, 2003

No. E2002-02828-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. In this appeal, the defendant, Wausau Insurance Company, insists that the trial court erred in determining Wausau was liable for the plaintiff's compensation, and that the trial court erred in allowing the plaintiff to voluntarily dismiss co-defendant, Legion Insurance Company.

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

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which E. RILEY ANDERSON, J., and ROGER E. THAYER, SP. J., joined.

David C. Nagle, Chattanooga, Tennessee, for the appellant, Wausau Insurance Company

Michael A. Wagner, Chattanooga, Tennessee, for the appellee, Linda Meadows

MEMORANDUM OPINION

Review of the findings of fact made by the trial court is *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). *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

The trial court in this case found the plaintiff to be permanently and totally disabled and that Wausau was liable for the plaintiff's compensation. The trial court also allowed the plaintiff to voluntarily dismiss the co-defendant, Legion Insurance Company. The plaintiff argues that the trial court was correct in its ruling, and we agree.

Facts

The plaintiff, Ms. Meadows, was employed by Hobbs Staffing, a temporary employment agency, when she was working for, and injured on the job at, Suburban Manufacturing Company in March of 1999. She received medical attention and returned to work for Hobbs, but at a different place called Save-A-Pet. In August 1999, she was involved in another accident again injuring her back. She again received medical attention and returned to work. Ms. Meadows injured her back two more times, in January of 2000 and May of 2000, for which both occurrences she received medical attention and returned to work. In August of 2000, Ms. Meadows felt that she was no longer able to work because of the pain due to her back.

Ms. Meadows also began suffering psychological problems not long after her first injury in March of 1999. These psychological problems seemed to worsen between March of 1999 and the summer of 2000. She was admitted to two different psychiatric hospitals at least five times. In addition, Ms. Meadows has sought medical attention for her back several times between June 1, 2000 and September 22, 2001.

Wausau was the workers' compensation insurance carrier for Hobbs between August 1, 1998 and August 1, 1999. Legion was the workers' compensation carrier for Hobbs between August 1, 1999 and August 1, 2000. Fireman Fund was the insurance carrier for Hobbs between August 1, 2000 and August 1, 2002. Wausau filed a motion for summary judgment on March 18, 2002, and while that motion was pending, the plaintiff sought to voluntarily dismiss co-defendant Legion which the trial court allowed the plaintiff to do.

Medical Evidence

Ms. Meadows was seen by a number of doctors for both her back injuries and her psychological injuries. Dr. Michael Gallagher, a neurosurgeon, treated Ms. Meadows after her injury in March of 1999, and also several times later after Ms. Meadows had said she had re-injured her back. Dr. Gallagher felt that Ms. Meadows had a compression fracture, but allowed her to return to work with some limitations and restrictions. Dr. Gallagher testified that he found no new associated symptoms after each incident of re-injury to the back, and also that each of these new incidents were related to the March of 1999 incident.

Ms. Meadows also saw Dr. Scott Hodges, an orthopaedic surgeon. Dr. Hodges diagnosed Ms. Meadows as having a preexisting condition of hyperthoracic hyperkyphosis, which he concluded would cause her chronic back pain. Dr. Hodges also felt that all of her subsequent symptoms and problems with Ms. Meadows' back were related to the injury in March of 1999.

Ms. Meadows also saw two psychiatrists, Dr. Sydney Alexander and Dr. Terry Holmes. Dr. Alexander testified that there must be a nidus, or precipitating event for Ms. Meadows' condition, and agrees that this would be the March 1999 injury. However, Dr. Alexander also testified that her chronic pain increased with each subsequent injury or incident related to her back, and did not attribute it all back to her March 1999 incident.

Dr. Holmes testified that Ms. Meadows suffers from a bipolar disorder, and that there is a connection between this and her back injury. Dr. Holmes also testified that Ms. Meadows has had chronic pain since the March of 1999 injury, and that all of the subsequent incidents were just incidents of the chronic pain manifesting itself in different ways. Dr. Holmes believes that the nature of this mental disorder is irreversible and that Ms. Meadows will need medication and treatment for the rest of her life.

Dr. Robert Bradley, a rehabilitation counselor, testified as to Ms. Meadows' vocational abilities. Dr. Bradley felt that Ms. Meadows would not be able to keep any job in light of her physical limitations and psychological problems. Dr. Bradley felt that Ms. Meadows had no job opportunities in the job market.

Discussion

The defendant/appellant argues that the trial court erred in allowing the plaintiff to voluntarily dismiss Legion Insurance Company while the defendant's motion for summary judgment was pending. Under Rule 41.01(1) of the *Tennessee Rules of Civil Procedure*, the plaintiff has the right to take a voluntary non-suit to dismiss an action, except when a motion for summary judgment made by an adverse party is pending. The right of the plaintiff to non-suit is subject to the restriction that the granting of the non-suit will not deprive the defendant of a right that has become vested during the pendency of the case. *Anderson v. Smith*, 521 S.W.2d 787 (Tenn. 1975). In the present case, Wausau had taken no action whatsoever against Legion Insurance Company, therefore Legion was not an adverse party to Wausau. The dismissal of Legion also did not deprive Wausau of any right, Wausau could still offer evidence that Ms. Meadows' injury occurred while Legion was the insurance carrier. Therefore we agree with the trial court allowing the plaintiff to voluntarily dismiss Legion Insurance Company while Wausau's motion for summary judgment was pending.

The trial judge in this case found the testimony of Drs. Gallagher and Hodges significant in that they both testified that they believed Ms. Meadows' subsequent incidents and problems with her back were related to her March 1999 injury. Specifically, Dr. Gallagher found no new associated symptoms after each of the subsequent injuries that he saw her for. Dr. Hodges testified that she did not experience any advancement of her anatomical condition.

The trial judge also found the testimony of the two psychiatrists, Drs. Alexander and Holmes, important in deciding the issue of whether or not, and how, Ms. Meadows' psychological problems relate back to her injury in March 1999. Although the two psychiatrists,

Drs. Alexander and Holmes, agreed with the opinions given by Drs. Gallagher and Hodges that Ms. Meadows' chronic pain from her back is one of the factors that causes her to have the psychological difficulties that she has, Dr. Alexander is of the opinion that her chronic pain increased with each subsequent injury or incident that occurred. Dr. Holmes is of the opinion that all of the subsequent incidents relate back to the injury from March 1999. The trial court has the discretion to accept the opinion of one medical expert over another medical expert, *Kellerman v. Food Lion, Inc.,* 929 S.W.2d 333 (Tenn. 1996); *Johnson v. Midwesco, Inc.,* 801 S.W.2d 804, 806 (Tenn. 1990), and the trial judge in this case decided to accept the testimony of Dr. Holmes over Dr. Alexander as it relates to Ms. Meadows' psychiatric condition.

Although this Court is able to make its own independent assessment of the medical proof presented by deposition to determine where the preponderance of the evidence lies, *Cooper v. INA,* 884 S.W.2d 446, 451 (Tenn. 1994); *Landers v. Firemen's Fund Ins. Co.,* 775 S.W.2d 355, 356 (Tenn. 1989), where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. *See Humphrey v. David Witherspoon, Inc.,* 734 S.W.2d 315 (Tenn. 1987). The evidence does not preponderate against the findings of the trial court, and we affirm the same.

Costs are taxed to the appellant.

JOHN K. BYERS SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

LINDA MEADOWS V. WAUSAU INSURANCE COMPANY
Rhea County Chancery Court
No. 9318

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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, Wausau Insurance Company, for which execution may issue if necessary.