IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
July 2003 Session

JUNE BETTY WILLIAMS v. SATURN CORPORATION

Direct Appeal from the Chancery Court for Maury County
No. 99-116 Stella L. Hargrove, Chancellor

No. M2002-02916-WC-R3-CV - Mailed - December 5, 2003
Filed - March 2, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel 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 employer appeals the judgment of the trial court awarding the employee 20% permanent partial disability to the body as a whole for work-related injuries to both shoulders, and denying a set-off for disability payments paid under an employer-funded plan. The employer contends that the trial court erred: 1) in basing the employee's award on an anatomical impairment rating not based entirely on the AMA Guides; and 2) in not granting a set-off for disability payments paid by the employer pursuant to *Tenn. Code Ann.* § 50-6-114(b). We hold that the evidence does not preponderate against the trial court's findings as to anatomical and vocational disability. Accordingly, the judgment of the trial court is affirmed as to this issue. We find that this case should be remanded for further proceedings on the issue of whether a set-off is warranted in this case.

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

JAMES L. WEATHERFORD, SR.J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JOE C. LOSER, JR.,SP.J., joined.

Thomas H. Peebles, IV, Columbia, Tennessee, for the appellant Saturn Corporation.

Michael D. Dillon, Nashville, Tennessee, for the appellee June Betty Williams.

MEMORANDUM OPINION

Ms. June Williams was 44 years old at the time of trial. She has a 12th grade education and completed a medical assistant course. She began working for General Motors in 1977 and worked

as a punch press operator or assembly line worker for 10 to 11 years there. During layoffs from GM, she worked in fast food restaurants and worked one year as a medical office assistant.

In 1991, Ms. Williams moved to Tennessee to work for Saturn Corporation. She worked on the assembly line using torque guns and doing other repetitive work with her arms above shoulder level. She gradually developed aching and soreness in her shoulders and shoulder blade area. After being treated for several years at the clinic at Saturn, she was eventually referred to Dr. Jeffery Adams, orthopedic surgeon, for treatment.

When conservative treatment did not resolve her symptoms, she had surgery on her right shoulder for tendinitis of the biceps tendon on February 23, 1999. She had 2 surgeries on her left shoulder – one for a labrum tear on June 22, 1999, and an arthroscopic synovectomy on January 19, 2000. Her last day of work prior to surgery was February 8, 1999.

On September 19, 2000,[1] Dr. David Gaw, M.D., evaluated Ms. Williams and found that her injuries were caused by her work activities. He assigned permanent restrictions which included avoiding frequent or continuous overhead or outstretched use of the hands for pushing, pulling or lifting. Dr. Gaw assigned a 4% anatomical impairment to the body as a whole for each shoulder, for a combined 8% anatomical impairment rating. He based this rating on minimal loss of motion and change in anatomy due to the 3 surgical procedures.[2] Dr. Gaw acknowledged that the AMA Guides do not specifically cover the surgical procedures undergone by Ms. Williams:

> Well, this is one of those conditions which is not specifically covered by the Guides. There's nothing in there that says debridement of the labrum or cutting the biceps tendon and moving it around, but it's – I think it has to do with just experience or understanding the physiology or explaining this lady's loss of function. I think that's, in my opinion, a minimal impairment, but certainly there has been some change in this person's anatomy of the shoulder.

On January 8, 2001, Ms. Williams returned to work at Saturn test-driving cars, a job that is within her medical restrictions, but she has concerns about low job seniority in this position. The surgical procedures significantly reduced her pain, but she "still has some trouble" when she uses her arms in an overhead position. She can not lift either arm for very long and still has pain when doing certain activities. She now has difficulty in holding the phone with her right arm, putting on clothes, and getting in or out of a bathtub. Ms. Williams is now limited in such activities as painting her house, gardening and bowling.

Two vocational experts testified at trial. Ms. Patsy Bramlett assigned a 10% vocational

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[1] He testified at his deposition that she reached maximum medical improvement on this date.

[2] Dr. Gaw assigned 2% to the right upper extremity and 1% to the left upper extremity for loss of motion based on pp. 43-45 of the AMA Guides. He assigned 5% impairment to each upper extremity for the surgical procedures.

disability rating and Dr. Kenneth Anchor assigned a 53-58% vocational disability rating.

Ms. Kimberly Curry, Saturn disability administrator, testified that Saturn has an employer-funded disability benefits plan approved by a collective bargaining agreement. This plan allows the employer to offset disability payments made under the plan against workers' compensation benefits. Saturn paid $7,743.45 ($6,728.25 after taxes) in disability benefits to Ms. Williams for her shoulder injuries from September 19, 2000, (the date of MMI) to January 8, 2001, (the date she returned to work after surgery). These disability benefits represented 60% of her salary. No proof was presented showing the amount of disability payments she received prior to this time period. Ms. Curry stated she would have received 100% of her salary the first month, 80% the second month and 60% for the remaining months.

Saturn denied compensability of this claim until the day of trial when it stipulated Ms. Williams had suffered a work-related injury. It had refused to pay temporary total disability benefits which would have been 66 2/3 of her average weekly wage tax-free. The plaintiff did not seek temporary total benefits at trial. The trial court found that the date of injury was February 8, 1999, and the average weekly wage to be $515.00.

The trial court found that Ms. Williams had sustained an 8% permanent partial impairment to the body as a whole. The trial court found that she had sustained a 53-58% vocational disability which was limited to 20% or 2.5 times the medical impairment rating in accordance with *Tenn. Code Ann.* § 50-6-241(a)(1) and awarded $41,200.00 in benefits paid as a lump sum.

The trial court did not allow the workers' compensation award to be offset by paid disability benefits pursuant to *Tenn. Code Ann.* § 50-6-114(b), by finding that such a set-off would result in Ms. Williams receiving less that she would have otherwise received under the workers' compensation law.

ANALYSIS

Review of findings of fact 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). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial court in workers' compensation cases. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings on review. *Jones v. Sterling Last Corp.,* 962 S.W.2d 469, 471 (Tenn. 1998).

When the medical testimony is presented by deposition, as it was in this case, the court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Insurance Co. of North America*, 884 S.W.2d 446, 451 (Tenn. 1994).

The defendant has presented two issues in this appeal.

I. Whether the trial court erred by basing the employee's award on an impairment rating by Dr. Gaw that was not based on the AMA Guides.

Tenn. Code Ann. § 50-6-241(a)(1) provides:

> (a) (1) For injuries arising on or after August 1, 1992, in cases where an injured employee is eligible to receive any permanent partial disability benefits, pursuant to § 50-6-207(3)(A)(I) and (F), and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is two and one-half (2 ½) times the medical impairment rating determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment (American Medical Association), the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community. In making determinations, the court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition.

Tenn. Code Ann. § 50-6-241(a)(1).

Dr. Gaw based his 8% anatomical impairment rating on loss of motion and the 3 surgical procedures performed on Ms. Williams. After noting that Ms. Williams' injuries were not covered in the A.M.A. Guides or the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment, the trial court found that Dr. Gaw used an appropriate method used and accepted by the medical community.

Dr. Gaw based a portion of his impairment rating on loss of function and change in anatomy due to the 3 surgical procedures. Ratings for these surgical procedures are not covered in the A.M.A. Guides or Manual for Orthopedic Surgeons. The statute provides an alternative method in such a case. *See Brown v. Campbell County Board of Education*, 915 S.W.2d 407, 416 (Tenn. 1995) (held *Tenn. Code Ann.* § 50-6-241 did not violate equal protection in part because it provided for methods for impairment ratings for injuries not covered by Guides. "[A]

medical expert can still provide an impairment rating based upon the expert's training and experience consistent with methods used and accepted by the medical profession.") Dr. Gaw based his opinion on his experience and physiology of Ms. Williams condition. Dr. Gaw has given lectures and directed seminars on disability evaluations using the A.M.A. Guides. The defendant did not put on any medical proof to refute Dr. Gaw's impairment rating.

The trial court found Ms. Williams to be a very credible witness who wants to remain in the work force. She has held only production jobs since 1977 except for one year as a medical assistant. The trial court accepted the opinion of Dr. Anchor that Ms. Williams had a 53-58% vocational disability rating.

After careful review of the record, we find no error on the part of the trial court in determining that Ms. Williams had an 8% anatomical impairment to the body as a whole. We also find that the trial court properly weighed all of the relevant factors in determining Ms. Williams' vocational disability. The evidence does not preponderate against the finding of the court that Ms. Williams sustained an 8% anatomical impairment resulting in a 20% vocational disability which is 2 ½ times the anatomical impairment rating.

II. Whether the trial court erred by not reducing the employee's award by the amount of money paid by Saturn to the employee in disability benefits pursuant to Tenn. Code Ann. § 50-6-114(b).

Saturn argues that the trial court erred in not granting a set off for disability benefits. Saturn denied Ms. Williams' claim and did not pay temporary total benefits under workers' compensation equaling 66 2/3% of her average weekly wage. The plaintiff did not seek temporary total disability benefits at trial. Saturn presented testimony that it paid Ms. Williams disability benefits based upon 60% of her wages, totaling $7,743.45 before taxes and $6,728.35 after taxes from the date of maximum medical improvement to the date she returned to work (9/19/00- 1/08/01). The record does not contain any proof as to disability payments for earlier time periods or the amount of temporary total benefits that Ms. Williams' would have been entitled to receive under workers' compensation law.

In addition to permanent partial disability benefits, an employer must pay an employee who has sustained a permanent injury "[s]ixty-six and two-thirds percent (66 2/3%) of such injured employee's average weekly wages for the period of time during which such injured employee suffers temporary total disability on account of the injury. . ." *Tenn. Code Ann*. § 50-6-207(3)(A)(I).

Tenn. Code Ann. § 50-6-114(b) provides:

> However, any employer may set off from temporary total, temporary partial, and permanent partial and permanent total disability benefits any payment made to an employee under an employer funded disability plan for the same injury; provided,

> that the disability plan permits such an offset. Such an offset from a disability plan may not result in an employee receiving less than the employee would otherwise receive under the Workers' Compensation Law. In the event that a collective bargaining agreement is in effect, this provision shall be subject to the agreement of both parties.

Tenn. Code Ann. § 50-6-114(b).

We find that this case should be remanded for the taking of further proof on: 1) amount of temporary total benefits Ms. Williams would have been entitled to under workers' compensation law until September 19, 2003 the date of maximum medical improvement established at trial; and 2) the total amount of disability plan payments received by Ms. Williams; to determine whether a set off is warranted pursuant to *Tenn. Code Ann.* § 50-6-114(b).

CONCLUSION

The judgment of the trial court is affirmed as to Ms. Williams' anatomical and vocational disability rating. This case is remanded on the issue of set off for further proceedings consistent with this opinion. Costs are taxed to the appellant, Saturn Corporation.

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JAMES L. WEATHERFORD, SR.J.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

JUNE BETTY WILLIAMS v. SATURN CORPORATION

No. M2002-02916-SC-WCM-CV - March 2, 2004

JUDGMENT

This case is before the Court upon Saturn Corporation's motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B). 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 are incorporated herein by reference.

Whereupon, it appears to the Court that the motion for review is not well-taken and should be DENIED; 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 will be assessed to Saturn Corporation for which execution may issue if necessary.

PER CURIAM

Holder, J., not participating.