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

MARGIE PILLERS v. JOSTEN'S PRINTING & PUBLISHING and TRAVELERS INSURANCE COMPANY

Direct Appeal from the Chancery Court of Montgomery County
No. 2002-01-0115, Hon. Carol Ann Catalano, Chancellor

No. M2003-02919-WC-R3-CV - Mailed: February 7, 2005
Filed - April 29, 2005

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 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 injured employee insists the award of twenty-five percent vocational disability to the body as a whole, based on a ten percent permanent medical impairment rating offered by the treating physician, is inadequate. The employee contends that the trial court erred in setting the impairment rating at ten percent and that the evidence preponderates for a finding of twenty-five percent medical impairment rating, subject to a multiplier of two and one-half. We hold that the evidence does not preponderate against the trial court's findings as to the extent of anatomical and vocational disability. Accordingly, the judgment of the trial court is affirmed.

Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right: Judgment of the Chancery Court Affirmed.

SCOTT, SR. J. delivered the opinion of the Court, in which DROWOTA, C.J., and STAFFORD, SP. J., joined.

Daniel C. Todd, Todd & Floyd, PLC, Nashville, TN, for the appellant, Margie Pillers.

Lee Anne Murray, Feeney & Murray, P.C., Nashville, TN, for the appellees, Josten's Printing & Publishing and Travelers Insurance Company.

MEMORANDUM OPINION

The employee-appellant, Margie Pillers, initiated this civil action to recover workers' compensation benefits for a work-related injury consisting of an exposure rash to her forearms. The only issue presented for trial was the extent of the injured employee's disability. The trial court, considering the treating physician's estimate of

medical impairment, awarded vocational disability benefits based on a ten percent skin disorder rating. The employee has appealed, contending that the award should be based on a twenty-five percent rating.

At the time of trial, Ms. Pillers, a high school graduate, was sixty-three years old and had worked at Josten's Printing & Publishing for over thirty years. It was uncontroverted at trial that while within the scope of her employment on October 18, 1999, Ms. Pillers came into contact with chemicals causing a rash to occur primarily on her forearms and also on her neck and belt line. Ms. Pillers described her condition as similar to that of poison oak, causing her forearms to itch, tingle, and bleed, and requiring daily applications of cortisone cream. Moreover, Ms. Pillers testified that the severity of the condition interfered with her sleep, leading to a decrease in her energy level; however, there was no medical testimony presented at trial linking her sleep problems to the rash.

While the proof at trial did not establish that the rash prevented Ms. Pillers from performing any specific physical activity, there was testimony that it adversely affected her energy level, thereby preventing her from volunteering for overtime as she did prior to the injury. Ms. Pillers further testified that the condition caused sensitivity to not only the temperature and the elements, but also to fumes, dust, and chemicals in the environment. Ms. Pillers also offered proof that the injury necessitated her requesting an additional four weeks' vacation each year. Ms. Pillers' supervisor of seventeen years, Albert Dauw, testified that Ms. Pillers had received excellent work evaluations both before and after the condition developed, and that he considered her to be one of Josten's best employees.

When her condition worsened, Ms. Pillers was referred to Dr. John Binhlam who treated her on four occasions. Based on his evaluation and the patient's history, Dr. Binhlam concluded that Ms. Pillers suffered from an allergic reaction to chemical contact dermatitis, arising within the course and scope of her employment. In his final impression, Dr. Binhlam opined that the patient had skin dysesthesia syndrome, a work-related injury that develops from an abnormal or hypersensitive state with respect to sensations on the skin. Dr. Binhlam assigned a Class Two impairment rating, pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides). See American Medical Association Guides to the Evaluation of Permanent Impairment, 178 (5th ed. 2001). Under the AMA Guides, a Class Two rating provides for a ten percent to twenty-four percent impairment range. [1]

Dr. Binhlam testified that within the Class Two range, Ms. Pillers' impairment was closer to ten percent, rather than twenty-four percent. Accordingly, the

[1] The AMA Guides provide five classes of impairment due to skin disorders. See AMA Guides at 178. Class Two provides for ten percent to twenty-four percent impairment and Class Three provides for twenty-five to fifty-four percent impairment. An injury is considered a Class Two impairment if it limits performance of *some* activities of daily life whereas an injury is considered a Class Three impairment if it limits performance of *many* activities of daily life. Id., at Section 8.7. (emphasis added). This is the only distinction between the two classes.

trial court found that Ms. Pillers had sustained a ten percent permanent partial impairment to the body as a whole and a twenty-five percent vocational disability, which was limited to two and one-half times the medical impairment rating in accordance with Tenn. Code Ann. § 50-6-241(a)(1) (amended 2004).

Appellate review is *de novo* upon the record of the trial court, with a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). To determine where the preponderance of the evidence lies, the reviewing court is required to conduct an independent examination of the record. Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1991). The standard governing appellate review of findings of fact by a trial court requires this Panel 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). 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 and may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 61 (Tenn. 2001). The reviewing court is able to make its own independent assessment of the medical evidence to determine where the preponderance of the proof lies when the medical testimony in a workers' compensation case is presented by deposition. Cooper v. Ins. Co. of North America, 884 S.W.2d 446, 451 (Tenn. 1994).

The issue on appeal is whether the evidence preponderates against the trial court's determination of the impairment rating assigned by Dr. Binhlam, the authorized treating physician. "[The] extent of vocational disability is a question of fact for the trial court to determine from all of the evidence." See Corcoran, 746 S.W.2d at 458. In determining vocational disability, the inquiry is whether the employee's earning capacity in the open labor market has been diminished due to the injury. Id. at 459. In making this determination, courts should consider "many pertinent factors, including job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to the anatomical disability testified to by medical experts." Clark v. National Union Fire Ins. Co., 774 S.W.2d 586, 588 (Tenn. 1989).

The fact that an injured employee is reemployed after the injury is relevant in determining vocational disability, but it is not controlling and is only one of many factors to be considered. Clark, 774 S.W.2d at 589. Moreover, vocational disability exists despite an employee's return to employment, "if the employee's ability to earn wages in any form of employment that would have been available to him in an uninjured condition is diminished by an injury." Id. When an injured employee is eligible to receive permanent partial disability benefits and she has returned to the pre-injury employment at a wage equal to or greater than the pre-injury wage, the maximum award that the employee may receive is two and one-half times the medical impairment rating determined pursuant to the AMA Guides. Tenn. Code Ann. § 50-6-241(a)(1) (amended 2004).

Ms. Pillers argues that she has at least a twenty-five percent impairment rating (Class Three); thus, she should receive an award of at least sixty-two and one half percent. She bases this assertion on Dr. Binhlam's statement that, assuming certain testimony, Ms. Pillers' rash limited her performance of *many* activities of daily life. We find that the totality of Dr. Binhlam's testimony does not support Ms. Pillers' argument. Dr. Binhlam assessed Ms. Pillers' condition as a Class Two impairment, assigning an impairment rating range of ten percent to twenty percent to the body as a whole. When asked for a more specific rating, Dr. Binhlam testified that Ms. Pillers' injury was closer to ten percent impairment. [2]

Dr. Binhlam further testified to the similarity of Ms. Pillers' injury to an example of a ten percent impairment rating provided in the AMA Guides. See AMA Guides at 180. Only when presented with a hypothetical scenario did Dr. Binhlam say that Ms. Pillers' injury could cause a limitation on performance of *many* activities of daily life and under those circumstances could be classified as a Class Three impairment. [3]

Dr. Binhlam made that statement with regard to the hypothetical scenario presented, which assumed the rash caused Ms. Pillers to feel weak during the day, feel nervous, and have trouble lifting things. To the contrary, Ms. Pillers never asserted those specific symptoms. As the hypothetical scenario does not include the same facts as the present case, we find that Dr. Binhlam's statements regarding the hypothetical scenario should not apply to a determination of impairment rating in this case. The only applicable medical evidence is Dr. Binhlam's determination that the injury should be assigned a Class Two rating, more closely resembling a ten percent impairment rather than the upper extremity of the given range. Consequently, we find that the evidence does not preponderate against the trial court's determination of the impairment rating.

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[2] Q. Now, when you put Ms. Pillers in the Class Two skin impairment, you could assign anywhere from a ten percent to a twenty-four percent impairment. If you have to pick a number that represents her permanent medical impairment rating, what is that number?
A. Do I have to pick?
Q. Yes.
Mr. Todd: Object to the form of the question.
Q. (By Ms. Murray) Yes. If somebody says you've got to pick is she closer to the ten percent range or is she closer to the twenty-four percent range?
A. Closer to the ten percent, based upon what information I did have.
(Deposition of Dr. Binhlam, p. 14, ll. 6-21).

[3] Q. Now, the only difference between Class Two and Class Three is whether the condition limits performance of some activities or performance of many activities; is that a fair reading of that?
A. Yes.
Q. And, Doctor, assuming that Ms. Pillers has testified that her arm condition disturbs her sleep, makes her feel weak during the day, feels tired, feels nervous, has trouble lifting things, and has just an overall energy level that's just not up to what is used to be, under the AMA Guidelines, would that constitute a limitation in the performance of many activities of daily living?
A. Assuming that testimony, that is reasonable.
Q. So she could be in Class Three? You were asked the question: Could she be in Class One? Could she be in Class III under that definition?
A. Under that definition, and assuming that testimony, she could.
(Deposition of Dr. Binhlam, p. 24, ll. 13-25; p. 25, ll. 1-7).

Therefore, we affirm the holding of the trial court. Costs of appeal are taxed to the appellant, Margie Pillers.

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JERRY SCOTT, SENIOR JUDGE

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ORDER

This case is before the Court upon the motion for review filed by Margie Pillers 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Margie Pillers, for which execution may issue if necessary.

PER CURIAM