IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
February 23, 2005 Session

AMY BROWN YOUNG v. INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, ET AL.

Direct Appeal from the Chancery Court for Grundy County
No. 5173 Jeffrey F. Stewart, Chancellor

No. M2004-00433-WC-R3-CV - Mailed - April 25, 2005
Filed - May 27, 2005

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 plaintiff complained of wrist pain which was subjectively diagnosed as cumulative trauma. The treating physician found no impairment, as did neither of the first two physicians to whom the plaintiff was referred. The third physician, Dr. Fishbein, relying on subjective complaints, made four years after the plaintiff left her job, found a 5 percent impairment in each arm. We find the evidence preponderates against the judgment.

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

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which FRANK F. DROWOTA III, P. J., and DONALD PAUL HARRIS, SR. J., joined.

B. Timothy Pirtle, McMinnville, Tennessee, for appellants, Insurance Company of the State of Pennsylvania and Bridgestone/Firestone, Inc.

Robert S. Peter, Winchester, Tennessee, for appellee, Amy Brown Young.

MEMORANDUM OPINION

This complaint was filed October 11, 2001. The plaintiff alleges that she was employed by the defendant in 1994, and in the course of her employment developed bilateral carpal tunnel syndrome in both hands and arms, resulting in disablement. The defendant filed its answer denying that the plaintiff suffered a compensable injury. The case was heard September 22, 2003. The Chancellor found that the plaintiff "sustained an injury to her 'right and left' arms in 1997 . . . and

retains a vocational disability of 10 percent to both arms." Judgment was entered for 40 weeks at the compensation rate of $453.14. The defendant appeals, and presents one issue for consideration: "Whether the evidence preponderates against a finding of permanent injury to support an award of vocational disability of 10 percent to both arms." Our review is *de novo* on the record, and we presume the correctness of the judgment unless, after an in-depth consideration, the evidence preponderates against it. Tenn. Code Ann. § 50-6-225(e); ***Alley v. Consolidated Coal Co.***, 699 S.W.2d 147 (Tenn. 1985); ***Humphrey v. Witherspoon, Inc.***, 734 S.W.2d 315 (Tenn. 1987). The extent, if any, of the vocational disability of the plaintiff is a question of fact to be determined from all of the evidence, including lay and expert testimony. ***Cleek v. Wal-Mart Stores***, 19 S.W.3d 770 (Tenn. 2000); ***Nelson v. Wal-Mart Stores***, 8 S.W.3d 625 (Tenn. 1999).

The plaintiff complained to the plant nurse that she was having pain in both hands because of the constancy of the use of her hands on the job. Her physician ordered EMG-nerve conduction studies, which were normal and prescribed wrist splints. She continued to complain and was referred to an orthopedic surgeon, Dr. James L. Rungee, whose impression was "wrist-pain with neuritic sounding component." He ruled out carpal tunnel syndrome, and diagnosed "cumulative trauma" based on the plaintiff's subjective complaints. He found no anatomical impairment. She saw a third Independent Medical Examiner [IME] on October 25, 2001, on a referral by her attorney to Dr. Richard Fishbein, orthopedic surgeon. He reviewed the medical records of Dr. Rungee, and other physicians who had seen the plaintiff, and apparently talked to the plaintiff briefly before concluding, without further adieu, that "Amy Brown has . . . . a syndrome of multiple upper extremity problems none of which are surgically correctable and *actually none of which have (sic) any actually definitive diagnostic testing."* He nevertheless opined that she had a minimum impairment of 5 percent to each arm.

The plaintiff left her job in 1997 and never returned to work. Instead, she apparently set her sights on criminal activity, involving multiple convictions for passing worthless checks and drug and firearms charges. At the time of trial, she was incarcerated for numerous worthless check convictions; before that, she had pleaded guilty to eight (8) separate worthless check charges in another county. On October 3, 2001, she pleaded guilty, in Warren County Criminal Court, to charges of possession of Hydrocodone, possession with intent to sell methamphetamine, a Schedule II drug, and possession of a weapon with the intent to go armed. In February 2001, she pleaded guilty to a charge of manufacturing methamphetamine and was sentenced to five years. Thereafter, she was indicted for possession of drug paraphernalia and the manufacture of methamphetamine in November 2002, for which a trial is pending.

Work Record

As stated, the plaintiff was hired on October 3, 1994, and almost immediately had performance and attendance problems which persisted throughout her employment. Somewhat strangely, she denied having problems with her work performance or with absenteeism, in light of the employer's extensive documentation to the contrary, and for which she was reprimanded. The record is replete with proof detailing the efforts made to train and motivate the plaintiff. During the

entire process she never reported or complained of pain or stress in working at the hex bead winder: at no time did the plaintiff or other employee report or complain that the job was repetitious or was causing any "cumulative trauma" problems, until June 30, 1996 when the plaintiff complained to the plaint nurse, as aforesaid. She left her job in 1997, as related, and never returned.

She twice testified that she never applied for another job after she left Bridgestone. But, the personnel record files revealed that in March1998 she worked for Dragon Freight Brokerage as a dispatcher, which she admitted when recalled to explain her earlier denials. Her explanation was the she "didn't apply for the job."

Medical Proof

Her treating physician was Dr. James Rungee who first saw her August 6, 1997. He diagnosed wrist pain with neuritic sounding components. Studies ruled out carpal tunnel syndrome. Based on a subjective examination, he arrived at a diagnosis of "cumulative trauma," which was not ratable according to the Guidelines, and which resulted in no impairment, vocational or otherwise, according to Dr. Rungee.

She was referred by her attorney to various physicians for evaluation, one of whom, Dr. Richard Fishbein, testified by deposition. He examined the plaintiff on October 25, 2001, more than four (4) years after her last visit to Dr. Rungee.

Dr. Fishbein was wholly unaware of plaintiff's activities during her four years at Bridgestone. In fact, she had served two hundred and forty-five (245) consecutive days in the Warren County Jail on various criminal charges, immediately before Dr. Fishbein saw her.

He testified that his attempts at measuring plaintiff's grip strength were too inconsistent or "non-reproducible" to be reported as valid, and admitted that the findings on clinical examination by Doctors Rungee and Bagby were, as they reported, inconsistent or "non-reproducible." He agreed that the EMG-nerve conduction studies by Dr. Graham were normal regarding the median and ulnar nerves. Dr. Fishbein ordered no testing and recommended no further care, but nevertheless assigned five (5) percent permanent anatomical impairment under the A.M.A. GUIDES, 5TH EDITION for "early carpal tunnel" or "sub clinical carpal tunnel," which he had essentially ruled out.

The appellant complains in a commendable professional way that the judgment is not only not supported by a preponderance of the evidence, as required by law, but is essentially unjust because, to quote the appellant, "the appellee is a convicted felon and a liar." This language, while draconian, is nevertheless supported by the record. The appellee had multiple felony convictions at the time of trial, with additional charges and indictments pending, many involving drug paraphernalia used in the manufacture of the current scourge of methamphetamine. Superimposed upon her extensive criminal conduct is her clearly perjurious testimony that she was not again employed after quitting her job with the appellant. We acknowledge that a rejection of the appellee's claim for workers' compensation benefits ought not to be, and cannot be, predicated upon her

subsequent malfeasances which affect her credibility, not her entitlement.

It is well-known to the Bar that we are as well situated as the trial court to judge the worth and weight of testimony by deposition,[1] and with respect to the testimony of Dr. Fishbein, we have done so. He knew very little about the appellee; he made no tests, and apparently conducted only the most cursory examination of her arms. He was unaware, for instance, that she had been incarcerated for months before his IME employment. He was the third IME to have been employed, and his opinion that the appellee retained a "minimal" 5 percent impairment owing to repetitive use of her arms cannot be credited when arrayed against the testimony of Dr. Rungee, the treating physician, and the opinion of the other physicians that crept into the record. Moreover, the testimony of the unions representative that the appellee's job did not involve repetitive actions was not controverted except by the appellee. Lastly, we note that the appellee did not controvert the arguments of the appellant but simply relied upon the findings of the trial judge.

We find the evidence preponderates against the findings of the trial court, and in favor of the appellant. The judgment is reversed and the complaint is dismissed at the costs of the appellee and the sureties or her prosecution bond.

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WILLIAM H. INMAN, SENIOR JUDGE

[1] *See*, ***Henson v. City of Lawrenceburg***, 851 S.W.2d 809 (Tenn. 1993).

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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 appeals 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 will be paid by the Appellee, Amy Brown Young and the surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM