IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
February 24, 2005 Session

ALICE ANN TRAVIS v. KAYSER-ROTH CORPORATION

Direct Appeal from the Chancery Court for Rhea County
No. 9220 Jeffrey F. Stewart, Chancellor

Filed August 19, 2005

No. E2004-00913-WC-R3-CV - Mailed May 11, 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 trial court dismissed the case finding plaintiff had not established sufficient evidence to prove notice and causation of injury. Plaintiff insists the court was in error in weighing the evidence. The judgment is affirmed.

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

ROGER E. THAYER, SP. J., delivered the opinion of the court, in which E. RILEY ANDERSON, J., and DON HARRIS, SR. J., joined.

J. Arnold Fitzgerald, Dayton, Tennessee, for appellant, Alice Ann Travis.

Jeffrey L. Cleary, Chattanooga, Tennessee, for appellee, Kayser-Roth Corporation.

MEMORANDUM OPINION

The employee has appealed from the trial court's action in dismissing her case as the court found she had failed to present sufficient evidence of a work-related injury and proper notice to the employer of the injury.

Facts

The accident in this case is alleged to have occurred on January 19, 1995. The present case was filed on July 2, 1999 which was after an earlier suit had been filed and was later nonsuited. The

case has proceeded through the court system at a snail's pace.

Plaintiff, Alice Ann Travis, age fifty-five years, began working for defendant, Kayser-Roth Corporation, during February 1968. She testified she injured her back while working as an inspector in the manual sewing department. She said that as she was reaching up over her head at a heavy metal tub of pantyhose, "the tub just pulled me down to the floor." She said the tub weighed about sixty pounds and that another employee saw her down and he went to get supervisor Ann Thurman. Another employee, Thelma Couch, came by and assisted her in going to the office of Rhoda Housley, plaintiff's supervisor. She testified she told her supervisor how she had injured herself and requested to go home. She never returned to work. A written report of an injury at work was not filed by the employee until August 24, 1995.

On about January 30, 1995 she saw Dr. Robert M. Canon and he gave her a back brace to wear. After some period of treatment, he released her to return to work with restrictions on lifting, bending and prolonged sitting and standing. She said she was told there was no work available with those physical restrictions.

During April 1995, she saw a Dr. Jost who referred her to a Dr. Gibson. Dr. Gibson later referred her to a Dr. Sendele.

Plaintiff was asked on cross-examination if she remembered filing a claim with her employer for short term disability benefits and receiving twenty (20) payments from Hartford Insurance Company. She replied she could not remember making the claim and receiving the benefits. However, when she was read portions of a deposition which she gave in 1996 while a previous case was pending, she admitted telling counsel that the signature on the claim form was hers. The claim for disability benefits was filed in evidence (Exhibit Number 8) and consists of three parts. The first part is to be filled out by the employee, the second part by the employer, and the third part by the treating physician. In filling out the form, plaintiff wrote her name, address, date of birth, etc. and left all questions blank with regard to the occurrence of an illness or injury and then signed it and dated it March 6, 1995.

When asked about prior injuries, she testified she had sustained a head and pelvis injury as a result of an auto accident when she was a teenager. Since leaving defendant's employment, she has only worked part time as a sitter.

Bobby Lee Gunter, a sewing machine technician, testified he saw plaintiff sitting down crying and overheard supervisor Ann Thurman ask plaintiff what was wrong and she told her she had hurt her back. Gunter said he no longer worked for defendant as he was later terminated for using abusive language toward his wife who also worked at the same plant.

Ann Thurman, a supervisor but not over plaintiff, testified on the day in question she went back to the area where plaintiff was located but did not engage in any conversation with her although

she did walk her out to her car. She specifically denied being told by the plaintiff that she had injured herself at work.

Rhoda Housley, plaintiff's supervisor, testified that during the lunch hour she was told the plaintiff was sick and needed to go home. She then left the lunchroom and found plaintiff sitting with Thelma Couch. She stated plaintiff only told her she was sick and needed to go home and there was no conversation about being hurt at work or about an injury to her back. The witness said the next day plaintiff called her and requested vacation days which were granted. There were other calls from plaintiff requesting additional vacation days.

Thelma Couch, a co-worker and friend of plaintiff, testified that while she was with plaintiff there was never any conversation about being hurt at work or anything about her back. A long time after the incident, plaintiff called her and told her a lawyer would be getting in touch with her about the incident. The witness asked why a lawyer would need to talk to her and the reply was it was about her back. Ms. Couch stated she told her that had never been mentioned and if she was asked, "I'll tell the truth regardless of who it hurts."

Donna Bennett, who was Donna Perry at the time in question, was another co-worker nearby plaintiff's work station. She stated she did not see her injure herself; that plaintiff did not tell her anything about an injury and she was not aware of why she was going home.

Dr. Robert M. Canon, an orthopaedic surgeon, testified by deposition and stated he first saw plaintiff on January 30, 1995 and his original records did not indicate a history of injuring her back by pulling down the tub of pantyhose. He said he changed his records because she had told him about the "tub incident at work" and the transcription of his notes failed to correctly recite the proper history. He also stated that she had been having pain in her neck and back for about one year prior to seeing him and x-rays indicated early degenerative disc changes. The MRI ordered by Dr. Gibson showed evidence of central herniation of the disc at L1-2 level, mild herniation of disc at L4-5 and arthritic changes at L5-S1 level. Dr. Canon also stated Dr. Gibson's records indicated he had been treating her for almost a year prior to the time in question. He gave her an 8 percent medical impairment.

An earlier deposition of Dr. Canon taken during the pendency of the earlier case indicated a history of having back pain for approximately one year and relating the problem at work where cold air was blowing continually on her neck and back.

Defendant introduced evidence that Dr. Canon had been indicted and convicted of ninety-five (95) counts of health care fraud in the United States District Court for the Eastern District of Tennessee.

Dr. George Seiter, an orthopaedic surgeon, saw plaintiff during April 1997 at her attorney's request for an independent medical examination. His history indicated she hurt her back at work while pulling the tub down and he found she had degenerative disc disease with chronic lumbar

strain, possible radiculopathy. He felt her condition had been aggravated by the incident at work. He also reviewed records of Dr. Jost which were based on an examination during early 1995 and he stated Dr. Jost's records did not indicate a history of an injury at work.

Findings of Trial Court

The trial court dismissed the case finding the plaintiff had not produced sufficient evidence to establish notice of injury and causation of injury. More specifically on the notice question, the court found that actual written notice of a work-related injury was not rendered until August 24, 1995 which was seven months after the alleged incident and that the plaintiff's application for disability benefits during March 1995 did not contain any description of an injury at work. Concerning actual notice to someone in a management capacity, the court held plaintiff had not carried her burden of proof.

Analysis of Issue

On appeal plaintiff insists the trial court was in error in not accepting the testimony of plaintiff and her co-employee, Bobby Lee Gunter.

Tennessee Code Annotated § 50-6-201 requires an employee to give written notice to the employer of a work-related injury unless the employee has actual notice of the injury. The notice must be given within thirty days after the accident or after becoming reasonably aware of the injury unless a reasonable excuse exists for not complying with the rule. Case law provides that the notice must be given to an agent or representative of the employer who is in a supervisory or management capacity. ***Kirk v. Magnavox Consumer Electronics Co.***, 665 S.W.2d 711 (Tenn. 1984).

The trial judge is primarily responsible to resolve conflicting evidence and on appeal the decision will not be disturbed unless we find the evidence preponderates against the conclusion of the court. Thus, the trial judge has discretion to conclude that the testimony of a particular witness or expert should be accepted over that of another witness or expert. ***Johnson v. Midwesco, Inc.***, 801 S.W.2d 904 (Tenn. 1990).

The evidence in the present action was sharply in conflict on both the issue of proper notice of an injury and causation of an injury. The Chancellor was in a better position to judge the credibility of the witnesses who appeared before him but we have the same ability as the trial court in reviewing and giving credit to deposition testimony and documentary evidence.

Conclusion

We are required to review the issues on appeal *de novo* accompanied by a presumption that the findings of the trial court are correct unless we find the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). From our independent review of the record, we find the evidence

preponderates in favor of the conclusion of the trial court. The judgment is affirmed.

The mediator has requested that mediation costs be charged as court costs in this case. The Panel has found that the requested fee [and expenses - if applicable] is/are reasonable. Costs of this appeal, including mediation costs, shall be taxed to the plaintiff-appellant, Alice Ann Travis, and her surety, for which execution shall issue if necessary.

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ROGER E. THAYER, SPECIAL JUDGE

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ORDER

This case is before the Court upon 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, which 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 on appeal are taxed to Alice Ann Travis.

IT IS SO ORDERED this 19th day of August, 2005.

PER CURIAM

Anderson, J. - not participating.