IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
December 15, 2005 Session

C. ANNETTE GARLAND v. ST. MARY'S HEALTH SYSTEM, INC.

Direct Appeal from the Chancery Court for Knox County
No. 056665-1 John R. Weaver, Chancellor

Filed March 21, 2006

No. E2005-01512-WC-R3-CV - Mailed February 17, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the supreme court of findings of fact and conclusions of law. The trial court awarded Plaintiff 54 percent permanent partial disability as a result of sustaining a latex allergy injury. Defendant contends the evidence established that Plaintiff did not have a latex allergy condition and if she did, her last employer would be responsible for compensation under the last injurious exposure rule. We affirm the judgment.

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 THOMAS R. FRIERSON, II, SP. J., joined.

John B. Dupree, Knoxville, Tennessee, for Appellant, St. Mary's Health System, Inc.

James S. MacDonald, Knoxville, Tennessee, for Appellee, C. Annette Garland.

MEMORANDUM OPINION

This appeal has been perfected by the Defendant, St. Mary's Health System, from a ruling of the Chancery Court, awarding C. Annette Garland [hereinafter "Plaintiff"] 54 percent permanent partial disability as a result of a latex allergy condition.

Facts

Plaintiff is forty years of age and has a G.E.D. certificate. She continued her education to some extent and during June 2000 was employed as a surgical technician in the cath lab at St. Mary's

Hospital in Knoxville. For a number of years prior to working at the hospital, she had suffered from allergy problems which she described as being seasonal. After working for some period of time, she testified that her allergy condition became worse and she developed a chronic cough along with a runny nose, watery eyes just like a cold that went on indefinitely and would never go away. One day during the summer of 2002 while at work, her cough became so severe she broke a blood vessel in her left eye and had to leave the room. Later, increased symptoms included shortness of breath, wheezing, chest tightness, nausea and headaches. She also described an incident when she was the only person who could take her father-in-law to the emergency room for treatment and suffered an attack while there.

During November 2002 she was diagnosed as having a latex allergy condition and she said the hospital took some temporary steps to help her situation by removing latex gloves out of the lab but she said there were still other products there that contained latex and that outside parties would sometimes enter the lab with latex products. She said the latex gloves later returned to the area as doctors requested their use.

Plaintiff testified that she noticed her symptoms would subside if she was away from her work such as on vacation or if she was off for several days but would return shortly after continuing to work. When away from work, she said she learned to be careful because she had problems if she came in contact with balloons in a grocery store or in a store where tires were being displayed and sold and that these occurrences would aggravate her symptoms.

She filed this action for workers' compensation benefits on December 5, 2002, and testified that several days later, hospital personnel advised her she would have to go home on medical leave and she was never recalled to work.

After not finding another type job for some time, she became employed by East Tennessee Children's Hospital as a surgical technician in the operating room. She worked for about six weeks during August to October 2003 and had to stop because her symptoms resumed. She had disclosed that she had a latex allergy condition and the hospital thought they were latex safe but it did not work out that way. Witness Paul Bates, vice-president for human resources, testified he finally told Plaintiff that the hospital did not feel like it was a safe place for her to be working.

Several publications issued by St. Mary's Hospital were filed in evidence and these documents addressed latex allergy risks and problems. One of the exhibits noted that in addition to latex gloves, a person with such an allergy should be aware that latex could be found in urinary and IV catheters, adhesive tape, IV tubing ports, syringe plungers, vial needle parts and numerous other items often found in hospitals.

Plaintiff's husband, Gary Garland, testified that prior to going to work at St. Mary's his wife did experience some allergy problems but that was mostly in the spring and fall seasons. He stated that after working at the hospital for some period of time, her condition became much worse especially with her cough and breathing problems.

The trial court heard evidence from three medical witnesses. One doctor appeared and testified at the hearing and the other two doctors testified by deposition.

Dr. Marck M. Pienkowski, an immunology specialist, testified by deposition and stated he first saw plaintiff on July 26, 2002, when she was complaining of shortness of breath, coughing and wheezing. He followed her for several visits and performed certain tests. He was of the opinion she had a latex allergy and that it was caused by her working at the hospital as she had all the clinical symptoms and testing was consistent with this diagnosis. He did not give an impairment rating as he said that was beyond the scope of his practice.

Dr. Tidence L. Prince, a board-certified doctor in allergy and immunology, testified by deposition. His record indicated she had been seen during 1994 for some allergy problems and again during June 2002 when she saw a nurse practitioner for shortness of breath and coughing spells. He saw her on September 11, 2003 and reviewed testing results performed by Dr. Pienkowski. Dr. Prince was of the opinion she had a type 1 allergy to latex, allergy rhinitis and mild persistent asthma and food allergies. He said her condition was most likely caused by her work at St. Mary's and that a hospital environment has a tendency to expose an individual to a lot of latex in various products. The doctor stated that she had tested positive on the skin test performed by Dr. Pienkowski and that there were other ways to test an individual for a latex allergy but some of the procedures could result in extreme reactions and because of the possibility of this result, these tests are not usually performed. He stated that Plaintiff had a 51 to 100 percent respiratory impairment.

Dr. Michael M. Miller, a board-certified allergist, personally appeared at the trial and testified that he saw Plaintiff only one time on January 6, 2003. He disagreed with Dr. Pienkowski on his diagnosis and said although Plaintiff had sensitive skin, there was no evidence she suffered from a latex allergy problem. He also said that she did not have asthma as her history was not compatible with this diagnosis. Dr. Miller also felt that a prick test through a latex glove which was performed by Dr. Pienkowski was not reliable. He filed a number of articles in regard to studies concerning latex allergy problems and gave the results of statistical studies which he said indicated Plaintiff had a very low risk of having a latex allergy as a result of her work.

Two witnesses who had qualifications in vocational assessment testified before the trial court. Witness Michael Galloway interviewed Plaintiff, did some testing and read the testimony of the three doctors. He was of the opinion there would be no vocational disability under Dr. Miller's conclusions but considering the evidence of the other two doctors, Plaintiff's vocational disability would be 100 percent. Witness Bart A. Brinkman reviewed the medical evidence of the three doctors and concluded there would be no vocational disability under Dr. Miller's conclusions; that vocational disability would be 20-25 percent under Dr. Prince's evidence; and 100 percent under Dr. Pienkowski's findings.

Standard of Review

The standard of review of factual issues in a workers' compensation case is de novo upon

the record of the trial court, accompanied by a presumption of correctness of the trial court's findings unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). When the trial court has seen the witnesses and heard the testimony, the appellate court must extend considerable deference to its findings especially where issues of credibility and the weight of testimony are involved. However, when medical proof is presented by deposition the reviewing court may draw its own conclusions about the weight and credibility of the expert testimony since it is in the same position as the trial judge for evaluating such evidence. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729 (Tenn. 2002); *Seals v England/Corsair Upholstery Mfg. Co., Inc*., 984 S.W.2d 912, 915 (Tenn. 1999).

Analysis of Issues

The Chancellor fixed Plaintiff's vocational disability to be 54 percent to the body as a whole and was of the opinion that the last injurious injury rule did not apply to the facts of the case.

On appeal Defendant hospital contends the greater weight of the evidence supports Dr. Miller's opinion that Plaintiff does not have a latex allergy condition. It is also argued that if the claim is compensable, the last injurious injury rule would place liability upon Plaintiff's last hospital employer, East Tennessee Children's Hospital.

The evidence with regard to the diagnosis and cause of Plaintiff's condition was in sharp conflict between Dr. Miller and the two treating doctors. The trial court found Dr. Prince and Dr. Pienkowski's testimony to be more persuasive. The trial judge has the discretion to conclude that the opinion of a particular expert should be accepted over that of another expert. *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278 (Tenn. 1991); *Johnson v. Midwesco, Inc*., 801 S.W.2d 804 (Tenn. 1991). The evidence does not preponderate against this finding.

On the issue of liability, Tennessee law does not provide for apportionment of liability between successive employers or their insurance companies. *McCormick v. Snappy Car Rentals, Inc*., 806 S.W.2d 527 (Tenn. 1991); *Bennett v. Howard Johnson Motor Lodge*, 714 S.W.2d 273 (Tenn. 1986); *Baxter v. Smith*, 384 S.W.2d 936 (Tenn. 1962).

The last injurious injury rule places liability on the last employer if the court is convinced that the disability was caused by successive work-related injuries but is unconvinced that any one employment is the more likely cause of the disability. However, when a compensable injury at one employment contributes to a disability occurring during a later employment involving work conditions capable of causing the disability but which did not contribute to the disability, the "last injurious exposure" rule does not apply and the first employer is liable. Helton v. State, 800 S.W.2d 823 (Tenn. 1990).

In the present case the trial court found that the medical evidence was not sufficient to establish any permanent disability as a result of the last employment but that Plaintiff had only said her symptoms had resumed during the short period of her last employment.

We agree that the last injurious exposure rule does not apply in this case. Plaintiff had not worked since her termination from St. Mary's Hospital in December 2002 and only worked for about six weeks during the August to October 2003 period. She said there had been no real change in her original condition but that her symptoms resumed during the last employment. We find the latex allergy condition originated during the employment at St. Mary's Hospital and that there was no evidence indicating there had been an advancement or progression of her condition during the last employment at the other hospital. The evidence does not preponderate against the court's conclusion of this issue.

Plaintiff contends that the award of 54 percent disability is insufficient and that the award should be increased to 100 percent disability. While the evidence indicates Plaintiff would be precluded from working in a hospital environment, she had worked as a cashier, a food service worker, a nurse's aide and a sewing machine operator. We agree with the trial court that she still has opportunities and qualifications for jobs other than hospital work and cannot say that the evidence preponderates against the award of 54 percent disability.

Conclusion

The evidence does not preponderate against the findings of the trial court and the judgment is affirmed. Costs of the appeal are taxed to the defendant and its surety.

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ROGER E. THAYER, SPECIAL JUDGE

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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, St. Mary's Health System, Inc., for which execution may issue if necessary.