IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 30, 2005 Session

MONICA D. PERRY v. GAP, INC.

Direct Appeal from the Chancery Court for Macon County
No. 3868 C. K. Smith, Chancellor

No. M2004-02525-WC-R3-CV - Mailed - April 27, 2006
Filed - May 31, 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 treating specialist found the Employee not to be impaired due to a pinched nerve in her neck, which was resolving. An independent medical examiner [IME] testified that she retained an 8 percent permanent partial disability impairment. The trial judge accepted the opinion of the IME and awarded the Plaintiff 20 percent permanent partial disability. We do not find that the evidence preponderates against the holding of the trial court. Accordingly, the judgment of the trial court is affirmed.

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

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., joined and ROBERT E. CORLEW III, SP. J., filed a dissenting opinion.

Richard C. Mangelsdorf, Jr. and Stephen B. Morton, Nashville, Tennessee, attorneys for Appellant, Gap Inc.

William Joseph Butler and E. Guy Holliman, Lafayette, Tennessee, attorneys for Appellee, Monica Perry.

MEMORANDUM OPINION

The Employee alleged that in February 2003 she suffered an injury to her neck and left shoulder, and in July and August 2003 she suffered a gradual injury to her left and right hands, wrists

and to both arms. She specifically alleged temporary total disability,[1] and permanent partial disability, for which she sought workers' compensation benefits.

The complaint was answered in course. The Employer disclaimed knowledge of gradually occurring injuries and "demanded strict proof of the Plaintiff's claimed entitlement to benefits" while admitting the occurrence of the February 26, 2003 accident.

Trial was held August 31, 2004. The earlier filed depositions of doctors Thomas Tompkins and Walter Wheelhouse were considered by the trial judge, who, following a brief recess, filed a 24-page memorandum opinion emphasizing the testimony of the Employee and awarding her benefits for 20 percent vocational disability.

The Employer appeals, asserting that: (1) the trial court erred in denying the Employer's motion to compel an independent medical exam of the Employee pursuant to Tennessee Code Annotated section 50-6-204(d)(1) and Rule 35.01 of the Tennessee Rules of Civil Procedure; (2) the evidence preponderates against the degree of vocational disability found by the trial court; and (3) the Employee is not entitled to a disability award pursuant to Tennessee Code Annotated section 50-6-205(a) and the policies behind the Workers' Compensation Act.

Appellate review is de novo on the record, accompanied by a presumption that the judgment is correct unless the evidence otherwise preponderates. Tenn. R. App. P. 13(c); Tenn. Code Ann. § 50-6-225(e); *Lollar v. Wal-Mart Stores Inc.*, 767 S.W.2d 143, 149 (Tenn. 1989).

Discussion

The Employee is twenty-seven years old, and a single mother of three children. She completed the eighth grade, and has no vocational or occupational skills. She was employed by the Employer when she was eighteen years old.

In February 2003, she testified that she injured her neck and shoulder during the course of her job in "wand and loading," which she described as loading the trailers with boxes of clothing, ranging in weight from 2 pounds to 50 pounds. She felt a sharp pain in her neck which ran through her shoulder. She was seen and treated by Dr. Tompkins on numerous occasions, but contends that no visit or treatment ever exceeded three minutes. She last saw Dr. Tompkins in August 2003, but her pain and numbness continued, interfering with her ability to perform simple household tasks. She never complained at work about her condition. She never mentioned to a supervisor that she was hurting, explaining that if she "said anything she would be put out of work." She earns $13.89 per hour, with health insurance benefits.

The Employee takes ibuprofen daily, but admitted she never asked her treating physician for

[1] The Employee did not sign the complaint, and it was developed at trial that she lost no time from work, thus negating and refuting this portion of her claim. *See* Tenn. R. Civ. Pro. 11(3).

pain medication. Dr. Tompkins ordered an MRI, which she remembered, but according to the Employee, he never discussed the findings with her. She could not remember the x-ray examinations by Dr. Tompkins. She testified on discovery that she disliked her job, but her response on cross-examination, like many of her responses, was "I don't remember."

Drs. Tompkins and Wheelhouse, each orthopedic specialists, testified by deposition. Dr. Tompkins' assessment was a pinched nerve in her neck, which revealed a small focal posterior disc protrusion at C6-C7, with no evidence of spinal stenosis or impingement on the cervical spinal cord. He continued to see the Employee, and gave a final diagnosis of improving cervical radiculitis. He recommended that she continue wearing a neck brace and continue light duty, with no heavy lifting and no overhead work. She continued to see Dr. Tompkins, complaining that her neck hurt, with some numbness in her hand. Dr. Tompkins suspected carpal tunnel syndrome, but an EMG by another specialist revealed no evidence of carpal tunnel syndrome, ulnar neuropathy, or cervical radiculopathy. She was last seen on August 14, 2003, when her symptoms were better. Dr. Tompkins testified that she has no physical impairment.

The Employee was referred to Dr. Wheelhouse by her attorneys for an independent medical examination on May 10, 2004. He specializes in evaluating physical disability and testified that the Employee had a limited range of motion in her cervical spine caused by cervical sprain with the C6-7 and C7-T1 disc protrusions, which were caused by repetitive lifting of heavy boxes. He stated this condition was permanent, and that she retained 8 percent disability to her whole person.

The Employer argues that its motion to compel an examination of the Employee should have been granted. The trial judge stated "the Defendant has already had the Plaintiff seen by another of their doctors and [the court] will not require her to go to yet another doctor." It is within the authority of the trial judge to require another examination of the Employee, *see* Tennessee Code Annotated section 50-6-204(d)(1), and the exercise of such authority is subject to review to determine if the trial court abused its discretion in denying the motion. *See e.g., Long v. Tri-Con Indus.*, 996 S.W.2d 173, 178-79 (Tenn. 1999).

In *Long*, the Tennessee Supreme Court held that a physical examination of the employee, performed by a physician provided to the Employee on the panel required by statute, was sufficient where the physician was qualified to evaluate the patient. *Id.* at 179. The Court found that the panel physician in that case was qualified, even though he was an internist and not a specialist. *Id.* In the present case, the panel physician referred the Employee to an orthopedic surgeon, who testified that she retained no anatomical impairment. This Panel and the trial court had the opportunity to review the opinion testimony of both this specialist and Dr. Wheelhouse in determining the outcome of this case. While physical examinations requested pursuant to Tennessee Code Annotated section 50-6-204(d)(1) generally should be granted, we review the trial court's action on these requests under an abuse of discretion standard. *Id.* We find that the medical testimony provided in this case is sufficient to fulfill the statutory requirements in Tennessee Code Annotated section 50-6-204(d)(1). Accordingly, we hold that there is no abuse of discretion in the denial of the Employer's motion in this case.

The Employer also argues that the Employee is not entitled to an award of vocational disability pursuant to the provisions of Tennessee Code Annotated section 50-6-205(a), and pursuant to the policies behind the Workers' Compensation Law. Tennessee Code Annotated section 20-5-205(a) states:

> (a) No compensation shall be allowed for the first seven (7) days of disability resulting from the injury, excluding the day of injury, except the benefits provided for in § 50-6-204, but if disability extends beyond that period, compensation shall commence with the eighth day after the injury. In the event, however, that the disability from the injury exists for a period as much as fourteen (14) days, then compensation shall be allowed beginning with the first day after the injury.

The Employer contends that since the Employee did not miss any work due to her injury, the injury did not last more than seven days and that the Employee is therefore not entitled to any type of disability benefits. We decline to accept this reasoning, since the Workers' Compensation Act clearly contemplates the opposite result.

First, the plain language of the quoted section does not require that an employee miss time from work in order to receive compensation under the Act. We will not read into the language of section 50-2-205(a) to find this meaning, since "[l]egislative intent is to be ascertained whenever possible from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language." *Schering-Plough v. State Board of Equalization*, 999 S.W.2d 773, 775 (Tenn. 1999). Second, the Workers' Compensation Act itself allows for disability benefits based only on a percentage of vocational disability, when an employee's condition is permanent, under the permanent partial disability classification. *See Joe C. Loser, An Outline of the Workers' Compensation Law of Tennessee*, 23-24 (12th ed. 2005). As noted by the Supreme Court in *McKenzie v. Campbell and Dann Manufacturing Company*, 354 S.W.2d 440, 445 (Tenn. 1962), there is a difference between the legal, and the medical, concepts of disability under workmen's compensation statutes; the one means inability to work or earn wages; and the other, inability in a physical or clinical sense." (citations omitted). The determination of permanent partial disability is based on the employee's capacity to work in the open labor market. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 459 (Tenn. 1988). The assessment of vocational disability is a question of fact to be determined from all of the evidence, including: lay and expert testimony, the employee's age, education, skills, training, local job opportunities, and capacity to work at available jobs in the disabled condition. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 678 (Tenn. 1991). Further, the provisions of section 50-6-205(a) are not applicable in this case, since the Employee's condition is permanent, and therefore exceeds the temporal requirements for compensation.

The Employer also asks that we consider the intent of the legislature in enacting the Workers' Compensation Law, to find that the policies behind the Act do not comport with a disability award in this case. One of the purposes of the Workers' Compensation Law is to compensate employees

for a decrease in earning capacity. *Liberty Mut. Ins. Co., v. Starnes*, 563 S.W.2d 178, 179 (Tenn. 1978). We do not find that compensation of the Employee in this case violates that policy.

The Employee has been found 20 percent permanently partially disabled, based on the opinion of Dr. Walter Wheelhouse. The Employer complains that the Employee never missed one day of work, and that Dr. Wheelhouse performs one to two independent medical examinations per week for the Plaintiff=s attorney in this case. The Employer further contends that Dr. Wheelhouse has never reported a zero percent impairment rating, and that his testimony should be rejected.

We have carefully reviewed the testimony of these two experts. Their respective opinions were divergent - as is frequently the case - which decades ago gave rise to the principle that the trial judge, absent extraordinary circumstances, was free to accept one expert's opinion over another. *See Williams v. Tecumseh Prods. Co.*, 978 S.W.2d 932, 935 (Tenn. 1998). The trial judge accepted the opinion of Dr. Wheelhouse, and we do not find that the evidence preponderates against the judgment.

The judgment of the trial court is affirmed. The costs of this appeal are assessed to the Appellant.

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WILLIAM H. INMAN, SENIOR JUDGE

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ROBERT E. CORLEW, dissenting opinion.

I respectfully dissent because I feel the majority misconstrues the provisions of Tennessee Code Annotated § 50-6-204(d)(1) and the case law which has interpreted that statute previously. The statute in question provides as follows:

> The injured employee must submit to examination by the employer's physician at all reasonable times if requested to do so by the employer, but the employee shall have the right to have the employee's own physician present at such examination, in which case the employee shall be liable to such physician for such physician's services.

Id. In this case, the Employee chose one of three physicians listed on the panel provided by Employer. Employee was then referred by that physician to an orthopedic surgeon for further treatment. The Employer made a motion to conduct an Independent Medical Examination (hereinafter "IME"). The motion was denied by the trial court. The trial court determined that both the doctor the Employee chose from the panel and the orthopedic surgeon that the panel doctor referred were "the Defendant's doctors."

Although the treating orthopedic surgeon, to whom the Employee was referred, testified and presented his opinion that the Employee had no anatomical impairment, the initial treating physician, from the panel, formed no opinion and did not testify. Nonetheless, the trial judge denied the Employer's motion for an IME. No recognition was given to the fact that the treating physician was not selected by the Employer, but rather by the physician the Employee selected from the panel of physicians provided by the Employer as the law requires. No other reasons were stated by the trial judge in the exercise of his discretion. No concerns were voiced by the trial judge with respect to delays regarding the trial. No recognition was given to the fact that the

Employee's IME physician rendered an opinion that the Employee sustained an eight percent anatomical impairment. The Employee's IME physician found that she had "significant clinical findings with loss of motion and tenderness and guarding in her neck and weakness and decreased sensation" in her arm. None of these findings were noted by the treating physician. These determinations by the Employee's IME physician were based primarily upon subjective findings, despite the fact that the Employee's x-rays, nerve conduction studies, and cervical myelogram were all normal. The Employee missed no time from work and experienced no surgical procedure. The treating physician testified that when he released the Employee, she expressed no symptoms, and she continues to be considered one of the better employees for the Employer.

I am aware of a small body of caselaw which previously has addressed the issue of the employer's right to an IME. First, and probably most significant, is *Stubblefield v. Hot Mix Paving Co.*, 383 S.W.2d 44 (Tenn. 1964). In that case, the trial court ordered that the employee be examined by a specialist in Nashville when the employee was a resident of Coffee County. Then Chief Justice Hamilton Burnett, writing for the unanimous Court, recognized that the "employer has a right to have the employee examined by a doctor or a physician of his chosing so long as he ... pays the expense of the employee ..." *Id.* at 47.

I am also aware of an unpublished decision affirming the decision of a trial judge denying an employer's request for an IME where the court appointed a physician in a somewhat similar situation. In denying the employer's motion for an IME, a Workers' Compensation Panel determined that

> the employer presented their [sic.] motion to the trial judge asking for an examination of the plaintiff by their [sic.] own physician. *The trial judge came perilously close to reversible error in denying this motion. However, based upon the colloquy between counsel for the employer and the court, we find, in this case, no reversible error* [emphasis added].

Darnell v. American Home Assurance Co., 1994 WL 902459 (Work. Comp. Panel, March 3, 1994). The opinion written by the late Senior Judge John Byers, in which former Chief Justice Frank Drowota and Special Judge Joe C. Loser (now Dean of the Nashville School of Law) concurred, then went on at some length to quote a discussion between the court and counsel for the employer. In that cause, the trial judge allowed an additional examination, but the court appointed the IME physician rather than allowing the employer to select the physician. The panel found that the employer had "acquiesced in [the decision of the court in appointing an orthopedic doctor for purpose of] examination of the employee and precludes them from now complaining." *Id.*

Similarly, in *Long v. Tri-Con Industries, Ltd.*, 996 S.W.2d 173 (Tenn. 1999) the Tennessee Supreme Court reversed the findings of the Workers' Compensation Panel and found that the trial court did not commit reversible error when it refused to allow an employer to obtain

an IME. In that case, however, the trial judge did allow a further examination of the employee, who had experienced a back problem. The trial judge ordered that the employee should return for re-evaluation by a physician who had been selected previously by the employee from the list provided, but who had provided only evaluation and no treatment. The employee had been treated by her family physician and a neurosurgeon to whom her family physician referred her. Then Chief Justice Riley Anderson, writing for the Court, found that the employer failed to show that the trial judge abused his discretion when he allowed a further examination by a doctor who testified that he was "much more qualified to see a patient with a back problem than is an orthopedic surgeon," and who saw patients with back problems "every day of the year" and was "amply qualified to evaluate a patient or a person with a back problem." *Id.* at 179.

Thus, I would find that, as the law has established, the better rule is that the trial court should allow the employer an IME of its choosing, unless there is a strong reason for limiting the choice of the employer. Where there are reasons for limiting the choices of the employer, the trial court should choose a qualified physician, as in *Darrell* and *Long*. Where the trial court has summarily denied the right of the employer to obtain an IME without any cause other than the fact that the employee was treated by a physician to whom she was referred by a physician the employee chose from the panel, I would hold that there was an abuse of discretion. The employer has not chosen either of those doctors.

Certainly the trial court has discretion in the determination of whether an Employer is entitled to conduct an IME. By affirming the decision of the trial court in this case, however, the majority gives its approval to the trial court's exercise of its discretion to deny the Employer the right to an IME for the sole reason that the Employee has received, and the Employer has provided, treatment as the worker's compensation law requires.

In today's workers' compensation cases, knowledge of the American Medical Association Guides to the Evaluation of Permanent Impairment (hereinafter "AMA Guides") has become a science within itself. Dr. Wheelhouse, for example, has testified as to his specialty in the evaluation of impairment. Where the court summarily denies the employer the right to obtain the services of a physician who also has specialized knowledge of the AMA Guides for no reason other than that the employee has been treated by an approved physician, is fundamentally unfair. Both parties should have the right to benefit from experts who have specialized knowledge of the AMA Guides. Where the employee obtains the services of one who has specialized knowledge of the AMA Guides, then both sides should have access to such experts. The trial court denied the Employer the right to such an expert opinion. By affirming the decision of the trial court, the majority herein determines, in effect, that it is within the discretion of the trial judge to deny the employer the right to the services of an expert in the AMA Guides anytime the employer has provided care for an employee and the initial treating physician has made a referral to another doctor.

While I hold the greatest respect for the majority and for the trial judge herein, I would reverse the decision of the lower court and remand the cause with directions that the case should

be further considered after the Employer has the opportunity to present evidence from a physician which the Employer selects. Denial of the Employer's opportunity to obtain an IME in this case is, I believe, an abuse of discretion and is reversible error.

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AT NASHVILLE
NOVEMBER 30, 2005 Session

MONICA D. PERRY v. GAP, INC.

CHANCERY Court for Macon County
No. 3868

No. M2004-02525-WC-R3-CV - Filed - May 31, 2006

JUDGMENT

This case is before the Court upon the motion for review filed by 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 for 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 the Appellant, GAP, Inc., and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM