IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
(March 7, 2006 Session)

ROSEANN HUFFAKER v. ST. MARY'S HEALTH SYSTEM, INC.

Direct Appeal from the Chancery Court for Knox County
No. M-02-156761 John Weaver, Chancellor

Filed September 1, 2006

No. E2005-02428-WC-R3-CV - Mailed June 14, 2006

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 of findings of fact and conclusions of law. The employer contends the trial court erred in (a) finding employee's claim for latex allergy to be compensable, (b) failing to impose liability on a subsequent employer, and (c) awarding 50 percent vocational disability. We affirm.

Tenn. Code Ann. § 5-6-225(e) (1999) Appeal as of Right; Judgment of the Knox County Chancery Court is affirmed.

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, CHIEF JUSTICE, and JON KERRY BLACKWOOD, SR. J. joined.

John B. Dupree, McGehee, Newton, Stewart, Cole, Dupree & Boswell, P.A., Knoxville, Tennessee, for the Appellant, St. Mary's Health System, Inc.

James S. McDonald, Dunn, MacDonald, Coleman & Reynolds, P.C., Knoxville, Tennessee, for the Appellee, Roseann Huffaker.

MEMORANDUM OPINION

Facts

The trial court rendered a bench opinion in this case that accurately summarizes the facts and medical proof and we quote the following pertinent findings:

> The claimant in this Worker's Compensation case is a 50-year old female nurse. She graduated from a three-year nursing school and later obtained a BSN in nursing; that may be redundant.
>
> She has been working on a regular basis as a registered nurse since 1976. She's worked at several hospitals including St. Mary's Hospital. She's had more than one period of employment at St. Mary's Hospital. Her most recent period of employment at St. Mary's Hospital was from March of 1999 to December of 2003.
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> In June or July of 2002, the claimant was working in the heart catherization laboratory at St. Mary's. She began to experience a persistent runny nose and other allergy-type symptoms. The claimant previously had allergy problems and believed that perhaps her allergies were getting worse.
>
> Claimant's symptoms seemed to correlate with the presence of latex gloves. However, the claimant was afraid to report her problems to her employer because she was afraid that her employer would dismiss her consistent with her impression of the discharge of another nurse, Glenda Inman.
>
> But with symptoms including nasal congestion, drainage, sniffling, sneezing, as well as episodes of shortness of breath and wheezing on occasion on exposure to latex at St. Mary's Hospital, the claimant went to see Dr. Marek Pienkowski, a physician specializing in allergy and immunology.
>
> Dr. Pienkowski, M.D., also has a Ph.D. in immunology. Dr. Pienkowski testified in this case by deposition. . . . Dr. Pienkowski testified that his skin testing of the claimant indisputably confirmed that the patient has latex allergy, and consequently, she should avoid all work environments containing latex. . . . (He) testified that his treatment for the claimant is for her to avoid latex. Dr. Pienkowski also recommended the claimant carry an epi-pen, an auto injector of Epinephrine so that she could inject herself in the event of a severe allergic reaction. . . . (He) testified that the claimant's problem is probably the latex gloves in the hospital environment and that most likely she could work in environments outside a hospital environment.

Claimant filed her complaint for Worker's Compensation benefits on December 16, 2002. Her apprehension about informing her employer about her problems with latex was borne out. Upon being served with her complaint, St. Mary's Hospital sent the claimant home and has never offered for her to return to work.

The claimant saw Dr. Tydance L. Prince, M.D., on September 3, 2003. Dr. Prince is a Board certified allergist and immunologist. He also testified by deposition. Dr. Prince likewise diagnosed the claimant with latex allergy. . . (He) opined that the claimant developed her latex allergy at St. Mary's Hospital, considering that her symptoms began there and that is the first time that she had to leave the workplace. . . . (T)he claimant has a 26 to 50 percent Class 3 impairment. He further testified that the claimant will need prescription medications if she gets around latex and will need inhalers and should carry Epinephrine with her.

The claimant was also seen by another Board certified allergist and immunologist, Dr. Michael Miller, M.D., who also testified by deposition. The claimant chose Dr. Miller from the panel that St. Mary's offered to her and had previously seen Dr. Miller about allergy problems. . . . Dr. Miller testified that when he saw the claimant on February 3, 2003, it was at the request of her employer or its insurance company for a Worker's Compensation evaluation and that he saw the claimant as a consultant on behalf of her employer. Dr. Miller opined that the claimant does not have latex allergy and that she could return to work.

However, apparently the claimant cannot return to work at St. Mary's Hospital. Almost three years after St. Mary's sent the claimant home, it has never requested or offered for her to return to work. Also it has paid no TTD and has not provided the claimant with any medical benefits.

Dr. Prince testified . . . that the negative methacholine challenge test relied upon by Dr. Miller does not rule out latex allergy. . . . Dr. Prince testified that it was simply too dangerous to do the inhalation test referred to in the AMA guidelines.

This Court finds the opinions of Dr. Pienkowski and Dr. Prince to be persuasive that the claimant has latex allergy.

From the medical evidence, particularly the testimony of Dr. Prince, this Court finds and concludes the claimant developed latex allergy while employed by St. Mary's Hospital. Dr. Prince, like Dr.

> Pienkowski, believes that the claimant should avoid latex and testified . . . that he would prefer that the claimant leave the cath lab environment and that it would be his best recommendation that the claimant get out of the field.

After being sent home by St. Mary's Health System Inc. ("St. Mary's") on December 19, 2002, Ms. Huffaker was out of work for approximately four months and then began employment with MedSource as a traveling nurse. She was sent to work in the "latex safe" cath lab at Harris Methodist Hospital in Fort Worth, Texas. The lab still had latex products including gloves, catheters and computers. During the three months she worked there, Ms. Huffaker experienced "a few" latex allergy reactions and missed four or five days of work due to fatigue as a result of her latex allergy. Ms. Huffaker then worked for eleven months at Blount Memorial Hospital in Blount County, Tennessee as a nurse in the cath lab. Blount Memorial did not have a latex free or latex safe lab. Ms. Huffaker experienced allergy symptoms including a constant runny nose, headaches, fatigue, hives, congestion, coughing facial flushing and joint pain. Her supervisor discussed with her that she had excessive absences from work. She next worked at the cath lab at the University of North Carolina at Chapel Hill. She experienced similar problems with latex allergy there. She next worked in the cath lab at St. Thomas Hospital in Nashville, Tennessee. Again, she experienced the same symptoms and missed work due to the latex allergy. At the time of trial, Ms. Huffaker was working at the cath lab at Fort Sanders Parkwest Hospital in Knoxville. She testified that her condition was better because they did not have powdered latex gloves in the cath lab.

The trial court also found that Ms. Huffaker's latex allergy condition is permanent and that the last injurious exposure rule did not shift liability for the condition from St. Mary's Hospital to a subsequent employer.

Issues

St. Mary's Health System, Inc. submits the following questions:

> Whether the trial court erred in awarding benefits to the Plaintiff-Appellee when the only reliable medical evidence shows that she does not have a latex allergy?
>
> Whether the trial court erred in finding that Defendant-Appellant should be liable when the *Last Injurious Exposure Rule* should have placed liability upon a subsequent employer?
>
> Whether the trial court erred in awarding 50 percent vocational disability when the Plaintiff-Appellee has been working at the same pre-injury employment for 2 ½ years, when there is no expert testimony relating to

permanent restrictions and the only anatomical impairment rating is substantially flawed?

Ms. Huffaker submits as a separate issue whether "the trial court erred in awarding only 50 percent vocational disability, which award merely equaled the upper limit of the AMA medical impairment she sustained."

Standard of Review

The standard of review in a workers' compensation case is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Layman v. Vanguard Contractors, Inc.*, 183 S.W.3d 310, 314 (Tenn. 2006). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases to determine where the preponderance of the evidence lies. *Vinson v. United Parcel Service,* 92 S.W.3d 380, 383-4 (Tenn. 2002). When the trial court has seen the witnesses and heard the testimony, especially when issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's findings of fact. *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 71 (Tenn. 2001). This court, however, is in the same position as the trial judge in evaluating medical proof that is submitted by deposition, and may assess independently the weight and credibility to be afforded to such expert testimony. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002).

Questions of law are reviewed *de novo* without a presumption of correctness. *Perrin v. Gaylord Entertainment Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

Discussion

I

The trial court was faced with diametrically opposed medical opinions regarding whether Ms. Huffaker developed a latex allergy. Two treating physicians opined that she developed a latex allergy at St. Mary's. One consulting physician opined that she did not have a latex allergy. The trial judge has the discretion to conclude that the opinion of one expert should be accepted over that of another expert. *Thomas v. Aetna Life and Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1991). This is especially true in a case such as this one where the lay testimony strengthens the medical evidence supporting a diagnosis of latex allergy. *Williams v. Tecumseh Products Co.*, 978 S.W.2d 932, 935 (Tenn. 1998). The trial judge discussed, with specific reference to the medical depositions, the conflicting testimony and the weight he accorded the respective expert opinions. The record fully supports his conclusions. We find the trial court did not err in awarding Ms. Huffaker benefits for her latex allergy.

II

Occupational disease cases are treated the same as gradually developing injuries for the purpose of determining when the statute of limitations commences. *Smith v. Asarco Inc.*, 627 S.W.2d 946, 948 (1982). The rights of the parties are determined as of the date the employee becomes disabled, either partially or totally, as a result of the injury. Tenn. Code Ann. § 50-6-303(a)(1) provides: "When the employee and employer are subject to the provisions of the Worker's Compensation Law, the partial or total incapacity for work or the death of an employee resulting from an occupational disease as herein defined shall be treated as the happening of an injury by accident."

St. Mary's is correct that in gradually occurring injuries, the date of injury has been the last day the employee is able to work because of the injury. *Lawson v. Lear Seating Corp.*, 944 S.W.2d 340, 342-43 (Tenn. 1997); *Barker v. Home-Crest Corp.*, 805 S.W.2d 373, 375-6 (Tenn. 1991). The Supreme Court has determined that the last day worked rule does not apply when an employee gives actual notice of an injury to the employer prior to missing work on account of the injury. *Bone v. Saturn Corporation*, 148 S.W.3d 69, 73-74 (Tenn. 2004). In this case, Ms. Huffaker filed her complaint for Workers' Compensation benefits on December 16, 2002. The rights of the parties are determined as of that date, unless St. Mary's can show that Ms. Huffaker's impairment increased or her occupational disease was advanced while she was working for a subsequent employer. The burden is on St. Mary's to show that Ms. Huffaker's latex allergy was aggravated or advanced due to working conditions at her subsequent employer. There must be a progression of her occupational disease. *Mahoney v. NationsBank of Tennessee*, 158 S.W.3d 340, 346 (Tenn. 2005); *Barker*, 805 S.W.2d at 375.

Ms. Huffaker testified that she felt her physical condition and resulting disabilities were the same as when she worked at St. Mary's. Dr. Prince indicated that her disease was about the same as when she worked at St. Mary's. He testified: "With these types of allergens, it's more likely to get worse than to get better if you get continued exposure, that's correct. I just don't have any evidence that she said that she's getting worse." Dr. Pienkowski declined to state an opinion on whether Ms. Huffaker had a permanent impairment for latex allergy. He had not seen her for two years, but indicated that typically, continuous exposure will lead to progression of the disease and more severe reactions. Ms. Huffaker's testimony would indicate that her case in not typical.

The trial court expressly considered the medical testimony in relation to the lay testimony and concluded that Ms. Huffaker did not sustain any increased impairment or advancement of her latex allergy while working for subsequent employers. The record does not preponderate against the finding that the last injurious exposure rule does not relieve St. Mary's.

III

Both St. Mary's and Ms. Huffaker question whether the trial court made an appropriate award of permanent partial disability. St. Mary's contends the award is excessive and Ms. Huffaker contends the award should be increased. No vocational expert testified in this case. The trial court noted that Ms. Huffaker should avoid latex and should not be working as a nurse in a hospital; that she was, in fact, working with the symptoms latex allergy and the threat of going into anaphylactic shock out of economic necessity; and that she has an impairment of 26 to 50 percent. Ms. Huffaker is qualified to do other nursing jobs outside a hospital environment. The evidence does not preponderate against the award of 50 percent permanent disability to the body as a whole.

Disposition

The judgment of the trial court is accordingly affirmed and the case is remanded for any necessary proceedings. Costs of the appeal are taxed to the Appellants.

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Howell N. Peoples, Special Judge

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ROSEANN HUFFAKER v. ST. MARY'S HEALTH SYSTEM, INC.

Chancery Court for Knox County
No. 15676-1 John F. Weaver, Judge

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JUDGMENT

This case is before the Court upon the motion for review filed by St. Mary's Health System, Inc., 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 overruled. 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.

Also before the Court is a request by the appellee, Roseann Huffaker, that the Court find the instant appeal frivolous under Tennessee Code Annotated section 27-1-122. The Court does not find the appeal to be frivolous.

Costs are assessed to St. Mary's Health System, Inc.

It is so ORDERED.

PER CURIAM

Barker, C.J., not participating