

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

MARY E. MOFFITT v. U.S. XPRESS ENTERPRISES, ET AL.

**Direct Appeal from the Chancery Court for Hamilton County
No. 02-0143 Howell N. Peoples, Chancellor**

Filed July 28, 2006

No. E2004-02500-WC-R3-CV - Mailed June 28, 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 Employee asserts that the trial court erred in finding that she did not sustain injuries arising out of and in the course and scope of her employment with Employer as a result of an incident occurring on December 14, 2000, and also asserts that the trial court erred in assessing court costs against her. We agree with the findings of the trial court and affirm the judgment.

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

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the court, in which WILLIAM M. BARKER, C. J., and SHARON G. LEE, J., joined.

Jay K. Kohlburch, Knoxville, Tennessee, attorney for appellant, Mary E. Moffitt.

David C. Nagel, Chattanooga, Tennessee, attorney for appellees, U.S. Xpress Enterprises and Liberty Mutual Insurance Company.

Robert J. Uhorchuk and Robert C. Denny, Chattanooga, Tennessee, attorneys for appellees, U.S. Xpress Enterprises and Travelers Insurance Company.

MEMORANDUM OPINION

Factual Background

On February 8, 2002, Mary Moffitt [hereinafter "the Employee"] filed a complaint against U.S. Xpress alleging that as a result of an October 19, 2000 event she suffered a work related injury

and was therefore entitled to workers' compensation benefits. At that time, Travelers Insurance Company provided workers' compensation coverage for U.S. Xpress. In her complaint, the Employee also alleged that she suffered a work related injury on December 14, 2000. Liberty Mutual Insurance Company was the workers' compensation insurance carrier for U.S. Xpress at the time of this injury. The Employee also sued the Second Injury Fund because she had suffered a work related injury in 1993 while employed in Florida by K-Mart and as a result of these alleged injuries, she claimed that she was 100 percent totally and permanently disabled.

The Employee was the only witness to testify at the trial of this matter on September 16, 2004. Doctors William Kennedy and Norman Hankins testified by deposition. In addition, numerous exhibits were introduced including various medical records of other doctors who had treated the Employee.

At the time of the trial, the Employee was fifty-one years old. She finished the ninth grade and later obtained her GED. Her previous work experience had been as a cashier in small businesses.

In 1993, the Employee was employed by K-Mart in Florida. While mopping a spill from the floor, she experienced pain in her neck. A myelogram was performed on May 27, 1993, which revealed defects at L4-5 and L5-S1 due to disc herniation. A CT scan of the same date revealed disc herniation at L4-L5 with impingement of the right L5 nerve. Surgery was performed on the Employee on June 25, 1993, but only at the L5-S1 level. Her workers' compensation claim was settled in an administrative proceeding in Florida based upon a 10 percent permanent medical impairment rating to her whole body.

After the surgery in 1993, the Employee went to Arizona where she attended vocational rehabilitation classes. She decided to become a long haul truck driver, took the necessary training and began working for U.S. Xpress in February 2000. The Employee testified that before training and going on the road she informed U.S. Xpress of her back surgery in Florida. She also testified that at the time she began working with U.S. Xpress, the problems with her back had resolved themselves.

On October 19, 2000, the Employee was bending over to roll up the landing gear on her trailer. She testified that as she stood up, she felt pain in her low back. She notified her supervisor, Lee Coleman, of the injury. The Employee testified that she informed Mr. Coleman that she could continue her delivery because she didn't think she had "done anything because the burning and pain only lasted a few minutes." The next day when she arrived at Tallahassee, Florida, she discovered that she could barely walk and she notified Mr. Coleman of her condition. Mr. Coleman dispatched emergency medical technicians to meet her. She was taken to Tallahassee Memorial Hospital and treated in the emergency room with an injection. She rested for a few days until October 24, 2000, when she informed U.S. Xpress that she was ready to return to work and on October 26, 2000, she passed a physical examination administered by the Department of Transportation. The Employee testified that when she returned to work at U.S. Xpress, she had no restrictions and was feeling the

same way she felt prior to the accident.

On December 14, 2000, the Employee was making a delivery in Columbus, Ohio. She testified that she slipped on ice and her right leg went underneath her and she landed on her left knee and hit her right hip and elbow. She immediately notified U.S. Xpress but did not request any medical treatment because her back was not hurting. The Employee testified that within a few days, her back began to hurt. She testified that she informed Mr. Coleman that she would prefer to see her personal physician in Arizona. During this period she continued to work as Mr. Coleman attempted to schedule a delivery to the West for her. However, it was not until February 15, 2001, the last day that she worked, that she saw Dr. Gordon Young in Arizona. The Employee testified that by the time she saw Dr. Young, she was hurting in her back, right hip and leg. Dr. Young's reports indicated that he also saw the Employee on February 21, March 7 and April 14, 2001. His notes indicate that on April 14, 2001, she was referred to Dr. Cavanaugh for epidural blocks.

On March 7, 2001, the Employee applied to the Arizona Industrial Commission for workers' compensation benefits. Shortly thereafter, she was informed by representatives of Liberty Mutual that her claims relating to the December 14, 2000 injury were not covered under its policy. The Employee testified that she was still experiencing pain and, as a result, she applied for welfare in Arizona.

The Employee testified that she saw Dr. Barbara Garcia. Dr. Garcia's notes indicate that she referred the Employee to Dr. David Sanders for an MRI of her low back. Dr. Sanders' notes indicate that the MRI revealed a disc problem at L4-5. Further medical records reveal that on July 25, 2001, the Employee was seen by Dr. Thomas J. Graves at Maryville Hospital Center and that he administered a cortisone injection in her lower back. The Employee testified that she then began to see Dr. Jonathan Landsman, an orthopedic surgeon in Phoenix, Arizona, and that on November 21, 2001, Dr. Landsman performed back surgery.

On November 13, 2002, at the request of her attorney, the Employee was seen by Dr. William Kennedy, an orthopedic surgeon in Jonesborough, Tennessee. Dr. Kennedy testified by deposition that he reviewed the medical records of Dr. Landsman, and that Dr. Landsman performed a right L4 laminectomy on the Employee. Dr. Kennedy's history indicated that the Employee told him that she had not sustained any injuries since the December 14, 2000 event. Dr. Kennedy opined that the slip on the ice of December 14, 2000, was the cause of her present pain and that the fall aggravated her previous disc bulge at L5. He also testified that the October 19, 2000 incident did not cause her subsequent surgery at L4 by Dr. Landsman. Dr. Kennedy described the October injury as a back sprain which did not produce any medical impairment or any work restriction.

Finally, portions of the Employee's discovery deposition were read into the record relative to the itinerary for her visit to Dr. Kennedy on November 13, 2002.

Ruling of the Trial Court

On September 24, 2004, the trial court filed a comprehensive Memorandum Opinion and Order. The court found that the Employee had not met her burden of proof that the December 14, 2000 fall was the cause of her back condition. The trial court further ordered that the claim against Liberty Mutual and the Second Injury Fund be dismissed. The trial court ordered Travelers Insurance Company to pay all medical expenses for the Employee's visit to the emergency room on October 19-20, 2002, and dismissed all other claims against Travelers Insurance Co. Costs were adjudged against the Employee.

Issues on Appeal

The Employee appeals and presents for review the following issues: (1) whether the Plaintiff sustained injuries from the alleged December 14, 2000 accident which would result in permanent total or permanent partial disability and (2) whether the trial court erred in assessing court costs against the Plaintiff.

Standard of Review

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. *Lollar v. Wal-Mart Stores, Inc.*, 767 S.W.2d 143, 149 (Tenn. 1989); Tenn. Code Ann. § 50-6-225(e)(2). Where the trial judge has seen and heard the witnesses especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be afforded those circumstances on review since the trial court had the opportunity to observe the witness's demeanor and to hear the in-court testimony. *Long v. Tri-Con Indus., Ltd.*, 996 S.W.2d 173, 178 (Tenn. 1999). When issues regarding credibility of witnesses and the weight to be given their testimony are before a reviewing court, considerable deference must be accorded the trial court's factual findings. *See Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions and the reviewing court may draw its own conclusions with regard to those issues. *Orman v. Williams Sonoma, Inc.* 803 S.W.2d 672, 676-77 (Tenn. 1991).

Analysis

In denying the Employee's claim against Liberty Mutual for the event of December 14, 2000, the trial court found numerous inconsistencies in her testimony and statements to doctors which led the trial court to conclude that her testimony was not credible. We make note of several of the inconsistencies referred to in the trial court's Memorandum and Order.

- 1) On March 7, 2001, the Employee executed a workers' compensation benefit form for the Arizona Industrial Commission. On the form, she indicated that she hurt her back on October 19, 2000 while rolling the landing gear on her truck. She did not mention

the December 14, 2000 event.

2) On a note dated November 21, 2001, Dr. Jonathan Landsman indicated that the Employee stated that she slipped and fell in February 2001 and injured herself.

3) Dr. Young's assistant noted on February 15, 2001:

S. c/o low back pain, (R) leg pain. Long hx of back problems - surgery 1993. Last O.V. 12/99 was feeling better until Oct. 2000 when she strained her back and was seen in the E.R. Doesn't feel she can drive a truck any longer and would like to go on disability.

4) Dr. Young's notes of February 21, 2001, under the 'problem' portion read in part:

Back pain. Patient has had a longstanding history of back pain. In the early 1990s at the point of going on disability when she was offered vocational rehab to drive a truck. She has done that since that time with reasonable success until this last few months where she again developed severe low back pain . . . She has no definitive injury.

The note further indicated: "Pain since October."

5) Dr. Kennedy testified in his deposition that the Employee told him in November 2002 that she had not sustained any additional injuries since December 14, 2000. However, she testified that she tripped over a friend's dog and suffered back and leg pain. And in the medical records, there is a rehabilitation note dated October 4, 2001 which indicates the Employee fell on May 2001 and had difficulties with household chores.

Dr. Kennedy's opinions were based upon the Employee's history of the injuries she received as a result of the December injury. This history is contradicted by statements made by the Employee at trial, statements made to other treating doctors and written statements to the Arizona Industrial Commission as found in reports attached as exhibits to Dr. Kennedy's deposition.

To put the Employee's claims in the present case "into focus," the trial court reviewed the medical records of the Employee concerning her 1993 injury at K-Mart and concluded from the records (1) that the Employee had a bulging disc at L4-5 after the K-Mart incident, yet the surgery was not performed at L4-5; (2) that her Florida award included the injury to L4-5 and L5-S1; (3) that the Employee has historically had pain complaints that were not substantiated by medical and scientific testing; and (4) that the Employee had a verifiable degenerative disc disease at L4-5 and L5-S1 before the 2000 incident. The trial court found "[t]he past reinforces the court's view of the present claim. The court has difficulty believing her trial testimony." In support of these

conclusions, the trial court noted in part the following prior medical history in its Memorandum Opinion:

- 1) A May 27, 1993 myelogram indicating anterior L4-5 and L5-S1 extradural defects most likely due to disc herniation and CT scan of same date indicating evidence of posterior right central lateral disc herniation at L4-L5.
- 2) Surgery performed on June 25, 1993 on the L5-S1 level only after which the Employee continued to complain of pain.
- 3) An October 15, 1993 MRI performed by Dr. Joseph Kandel indicating a mild disc protrusion at the L4-5 level.
- 4) A neurological examination by Dr. Charangit S. Dhillon who reported in a June 15, 1994 letter that the Employee “claims she has been given the impression that she will end up in a wheelchair,” and “claims she has been told she is unfit for any kind of gainful employment and is permanently disabled.” An MRI ordered by Dr. Dhillon indicating a small herniated disk at L4-5.
- 5) Medical records revealing that on December 22, 1994, Dr. Kevin S. Ladin performed an independent medical exam which indicated that the Employee had sustained a 10 percent whole person impairment on the basis of a surgically treated disc herniation at L5-S1 and a non surgically treated disc herniation at L4-5.
- 6) The results of a 1994 functional capacity evaluation indicating the Employee scored nine out of sixteen positive scores for exaggerated behavior consistent with an elevated perception of disability.
- 7) A July 3, 1995 letter from Dr. Barranco stating that there was no medical scientific test to substantiate the Employee complaints of pain.

It is well-settled law in Tennessee that an employee has the burden of proof to prove all elements necessary for her recovery. *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 543 (Tenn. 1992). Considerable deference must be given to the trial court’s finding of fact, especially where issues of credibility are involved. *Long v. Tri-Con, Ltd.*, 996 S.W.2d 173, 178 (Tenn. 1999). In the case at bar, the trial court specifically found that the testimony of the Employee was not credible. The trial judge had the opportunity to observe the witness’s demeanor and is therefore entitled to considerable deference in its findings regarding weight and credibility of oral testimony. From the panel’s independent examination of the record, giving due deference to the findings of the trial court, we are unable to say that the preponderance of the evidence is otherwise.

Finally, the Employee asserts that the trial court erred in assessing court costs against her and in failing to award discretionary costs against Travelers since they have been ordered to pay the

medical expenses for her emergency room treatment of October 19, 2000.

Tennessee Code Annotated section 20-12-101 states that “the successful party in all civil actions is entitled to full costs unless otherwise directed by law, or by a court of record for which judgment is rendered.” Trial courts are free to apportion costs between litigants as the equities of each case demands. Furthermore, the assessment of such costs falls within the reasonable discretion of the trial court which may allocate the costs between the parties as it feels the equities require. *Perdue v. Green Branch Mining Co. Inc.*, 837 S.W.2d 56, 60 (Tenn. 1992). Appellate courts will generally not interfere with the trial court’s assessment of costs absent a clear abuse of discretion. *Id.* In light of the comprehensive findings made by the trial court we uphold the trial court’s assessment of costs.

Conclusion

The judgment of the trial court is affirmed and remanded for such purposes consistent with this opinion. Costs on appeal are assessed against Appellant and her surety.

JON KERRY BLACKWOOD, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

MARY E. MOFFITT V. U.S. EXPRESS ENTERPRISES, ET AL.
Hamilton County Chancery Court
No. 02-0143

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No. E2004-2500-WC-R3-CV

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, Mary Moffitt, for which execution may issue if necessary.