

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT NASHVILLE

(Assigned on Briefs July 25, 2006 Session)

KIMBERLY WALLS v. NATIONAL HEALTHCARE CORP.

**Direct Appeal from the Circuit Court for Marshall County
No. 15121 F. Lee Russell, Judge**

**No. M2005-02384-WC-R3-CV - Mailed - November 21, 2006
Filed - December 27, 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 asserts that the evidence preponderates against a finding that the employee's injury is work-related, that the award is excessive, and that the employee failed to give appropriate or reasonable notice of the claimed injury. We affirm.

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

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, CHIEF JUSTICE, and JEFFREY S. BIVINS, SP. J. joined.

Joseph Ward Henry, Jr., Henry, Henry & Underwood, Pulaski, Tennessee, for Appellant, National Healthcare Corp.

Barbara G. Medley, Medley & Spivy, Lewisburg, Tennessee for Appellee, Kimberly Walls.

MEMORANDUM OPINION

Facts

On August 13, 2002, Kimberly Walls filed a complaint for workers' compensation benefits for an injury to her back. She alleged she injured her back on or about January 27, 2002. She subsequently amended her complaint to allege a gradual and repetitive work injury. National Healthcare Corp. ("NHC") denied she suffered any compensable injury or disability. Ms Walls was age 31 at the time of the trial. She did not graduate from high school, but received a GED and had worked in several factories, at a motel and as a waitress. She received certification as an Licensed Practical Nurse in 1994 and worked at Wayne Medical Center as a surgical scrub nurse, a labor and delivery nurse and on the Med-Surg floor. She worked for Tennessee Valley Home Healthcare providing nursing home services from April 1995 to March 1997. From April 1997 to April 1998, she worked for Rehabilitation Home Health Care as an audit nurse. From June 1998 through November 2001, she worked for Bel Air Healthcare, a nursing home, Meadow Brook Nursing Home, and Village Manor, an assisted living facility. On December 3, 2001, she began working for NHC.

On Sunday, January 27, 2002, Ms. Walls experienced pain in her back while she was at home. She worked on Monday and Tuesday with increasing pain in her right hip and lower back and numbness in her right leg. She told Glenda Wright, the Director of Nursing at NHC that she had hurt her back somehow. On Wednesday, January 30, 2002, she worked part of the day and then went to see Dr. Denise Werner. She last worked for NHC on February 4, 2002, when she was told by the Director of Services, Sandra L. Owen, that she needed a doctor's note to allow her to continue working. Ms. Walls saw Dr. John Nwofia on May 1, 2002. She testified that after that visit she believed she had a work-related injury. On May 6, 2002, Ms. Walls reported to Sandra Owen at NHC that she wanted to make a claim for workers' compensation benefits.

Dr. Richard E. Fishbein, an orthopedic surgeon who saw Ms. Walls on April 21, 2005 for evaluation, was the only physician to testify in this case. Based on a personal examination and review of medical records of other physicians who had treated Ms. Walls, Dr. Fishbein testified that Ms. Walls was morbidly obese, and that it was more likely than not that her duties as a home healthcare nurse caused her condition, based on her history of no problems before beginning home health care nurse duties. He observed that her history of repetitive patient handling is a direct cause of work-related back aggravation. Dr. Fishbein also testified that he agreed with another physician, Dr. McNamara, that Ms. Walls has a 20 percent impairment to the body as a whole. While counsel for NHC questioned Dr. Fishbein's conclusions and the basis for his opinions, no physician testified to the contrary.

The trial court found that the "Plaintiff's low back injury was caused during the scope and course of her employment with the Defendant, and that she gave reasonable notice after she was advised by her doctor for the first time that the injuries were caused by her work." She was awarded workers' compensation benefits for 50 percent permanent, partial disability to the body as a whole.

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); *Houser v. BiLO, Inc.*, 36 S.W.3d 68, 70-71 (Tenn. 2001). 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 (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*, 36 S.W.3d at 71. However, this court 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).

Issues

Whether the evidence preponderates against a finding that the injury, complaints, and symptoms alleged by the plaintiff were caused by or arose from work-related activities?

Whether the award of 50 percent permanent partial disability is excessive?

Whether the plaintiff gave the appropriate and/or reasonable notice of a claimed work-related injury?

Discussion

I

NHC contends that the evidence proves that Ms. Walls sustained the injury to her back at home while lifting her baby and that the injury did not occur in the course and scope of her employment. The trial court observed Ms. Walls, Sandra Owen, Glenda Wright, and Karen Cameron while they testified, and obviously believed the testimony of Ms. Walls that she did nothing with her child on January 27, 2002 that would have caused her back to begin to hurt. Except in obvious cases, such as amputation of a member of the body, causation of an injury is established by expert medical testimony. *Conner Bros. Excavating Co., Inc. v. Long*, 98 S.W.3d 656, 660 (Tenn. 2003). Absolute certainty is not required and reasonable doubt must be extended in favor of the employee. *Long v. Tri-Con Ind.*, 996 S.W.2d 173, 177 (Tenn. 1999). In this case, the only physician to testify stated that the injury, more likely than not, arose from her employment. The evidence does not preponderate against the finding of the trial court that the injury is work-related.

II

NHC next contends that the award is excessive. The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999). As pointed out in *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000), in disputes over vocational disability, the focus of the Court is on the employee's ability to return to gainful employment. *Davis v. Reagan*, 951 S.W.2d 766, 767 (Tenn. 1997). "(T)he assessment of permanent total disability is based upon numerous factors, including the employee's skills and training, education, age, local job opportunities, and his capacity to work at the kinds of employment available in his disabled condition." *Cantrell v. Carrier Corp.*, 193 S.W.3e 467, 473-74 (Tenn. 2006). A rating of anatomical disability by a medical expert is one of the relevant factors, but "vocational disability is not restricted to the precise estimate of anatomical disability made by a medical witness." *Henson v. City of Lawrenceburg*, 851 S.W.2d 809, 812 (Tenn. 1993). The claimant's own assessment of her physical condition and resulting disabilities is competent testimony and cannot be disregarded." *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972).

Ms. Walls did not return to her duties as a home healthcare nurse after the injury. Three months after her surgery, she began working for the Maury County Board of Education as a "special needs nurse" assisting with severely handicapped children. She testified that she had to be cautious in doing any lifting and able to sit and walk when she needed. She performed that job for two school years. She is currently working as a private duty nurse, working three 12-hour shifts per week. She is paid \$16 or \$17 per hour depending on which days she works. She has no other employee benefits. She testified that she is able to perform her current job and her normal household duties so long as she does not "overdo." The evidence does not preponderated against the finding of the trial court.

III

NHC asserts that Ms. Walls did not give timely notice of any work-related injury to NHC. Dr. Fishbein's testimony supports a finding that Ms. Walls sustained a gradually occurring injury to her back. Ms. Walls testified, without contradiction, that she first learned that she had a work-related injury after she saw Dr. Nwofia on May 1, 2002. She made a claim for workers' compensation to NHC's Director of Services on May 6, 2002. Employees are excused from giving notice until they know or should know that the injury is work-related and has impaired their ability to work. *Banks v. United Parcel Serv., Inc.*, 170 S.W.3d 556, 561 (Tenn. 2005). In this case, we concur with the trial court that Ms. Walls provided timely notice of the work-related injury following her visit to Dr. Nwofia.

Disposition

The judgment of the trial court is affirmed. Costs of the appeal, including the mediator's fees, are taxed to the Appellant, National Healthcare Corp., and its surety.

Howell N. Peoples, Special Judge

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
JULY 25, 2006 SESSION

KIMBERLY WALLS v. NATIONAL HEALTHCARE CORP.

**Circuit Court for Marshall County
No. 15121**

No. M2005-02384-WC-R3-CV - Filed - December 27, 2006

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 appeals 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 fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs of the appeal, including the mediator's fees, are taxed to the Appellant, National Healthcare Corp., and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM