IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
SEPTEMBER 29, 2006 Session

TRACY BROWN-HARPER v. NISSAN NORTH AMERICA, INC.

Appeal from the Chancery Court for Rutherford County
Case No. 51563 Robert E. Corlew, III, Chancellor

No. M2006-00044-WC-R3-CV - Mailed: February 8, 2007
Filed - March 16, 2007

This worker's compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employer Nissan North America, Inc., asserts that the trial court erred by awarding benefits based on a 4% anatomical and 48% vocational disability rating to the lower right extremity to the employee, Tracy Brown-Harper. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right;
Judgment of the Trial Court Affirmed

MARIETTA M. SHIPLEY, SP. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J. and DONALD P. HARRIS, SR. J., joined.

Van French, Murfreesboro, Tennessee, for the appellant, Nissan North America, Inc.

Neal Agee, Jr., Lebanon, Tennessee, for the appellee, Tracy Brown-Harper.

MEMORANDUM OPINION

FACTS AND PROCEDURAL HISTORY

An assembly line technician at Nissan North America, Inc. ("Employer") for nineteen years before her January 2005 retirement, Tracy Brown-Harper ("Employee") reported to Employer a gradually-occurring injury to her right knee in March 2003.[1] Following initial treatment in

[1]On appeal, Employer does not contest that Employee's injury arose out of and occurred in the course of her employment.

Employer's in-house clinic and with a general practitioner, Employer provided her a panel of three physicians from which to seek further treatment; she chose Nashville orthopedist Dr. Blake Garside.

Dr. Garside undertook surgery to repair Employee's right-knee meniscus tear in June 2003. After recuperating from the surgery, Employee returned to full duty in September 2003. However, in February 2004, she returned to Dr. Garside, complaining of increasing pain and weakness in her right knee. Dr. Garside first tried a series of injections to bolster her knee's strength; when this course failed, Dr. Garside performed a second surgery in August 2004, during which he repaired a second meniscus tear and found advancing chondromalacia, or wear of the joint. Employee undertook physical therapy and work hardening during her second recuperation period, finally returning to work with no restrictions from Dr. Garside on November 1, 2004. But Dr. Garside advised Employee on her last visit to him that, if she experienced continued pain or weakness in her right knee, he would place her on permanent work restrictions, including limits on her standing or walking.

At trial, Employee testified that she did continue to experience pain and weakness in her knee while working and indicated that, primarily because of this pain and weakness, she resigned her position with Employer. She left her job on January 8, 2005. Soon thereafter, on March 17, 2005, Employee filed a complaint for permanent partial disability benefits under the workers' compensation statute. Discovery ensued.

By deposition, two physicians offered expert opinions regarding an appropriate anatomical disability rating for Employee. Following the AMA Guides, Fifth Edition, Dr. Garside assigned Employee a 2% rating for each meniscus tear, for a total rating of 4% to the lower right extremity. By contrast, Dr. Richard Fishbein, who conducted an independent medical evaluation of Employee, assigned a 20% rating to the lower right extremity, also using the AMA Guides, Fifth Edition. He disagreed with Dr. Garside's rating principally because he opined that Dr. Garside had analyzed the extent of Employee's disability too narrowly. While Dr. Fishbein certainly agreed that a proper rating would take into account the two meniscus tears, he asserted that Employee's advancing joint wear would necessitate a total knee replacement in the foreseeable future. When he factored in the certainty of a knee replacement, Dr. Fishbein opined that the 20% rating was appropriate.

The case was tried on December 7, 2005. Employee testified. In addition to relating the general progression of her injury and treatment, recited above, she stated that she was then forty-two years old, a married mother of two who had a high school degree and some college training but no marketable skills other than those of a laborer, and a husband who made about $120,000 per year. She indicated that there had been four reasons for her resignation from Employer: (1) it would have been impossible to have found a position at Employer that could have accommodated the permanent restrictions Dr. Garside would have placed on her, (2) her job was being relocated to a distant locale, (3) Employee's husband made enough money to support her entire household, and (4) she wanted to stay at home and raise her two sons. However, she emphasized that "those kinds of permanent restrictions . . . was [sic] a very large factor in quitting." On cross-examination, she stated that she had planned for some time to retire to tend to her family, although not as quickly or abruptly as she

did. In addition, she conceded that she had never inquired of Employer or any other expert whether the restrictions Dr. Garside would have placed on her could have been accommodated within her workplace.

Employee also testified that she had lost the ability to undertake many activities in her daily life. She could no longer squat or kneel for long periods of time while she gardened. She could not take exercise walks. She could not run and play outdoors with her children. She also did not feel comfortable attempting again to snow ski, an activity her husband and she had previously enjoyed. Employee's husband, Kevin Harper, also testified at trial, corroborating many of these limitations.

In a December 13, 2005, letter opinion, the trial court found that "the triggering event causing [Employee's] early retirement was the failure of [Employee] to fully recover from [her knee] injury." The court adopted Dr. Garside's 4% anatomical disability rating to Employee's lower right extremity and then analyzed the factors for permanent partial disability benefits. Specifically, the trial court noted Employee's middle age, her limited pursuit of a college education, and the probable limitations on her employability due to her injury, given the skills she possessed. The trial court indicated that "[p]articularly significant in our determination has been the lay testimony presented by [Employee] with regard to her subjective complaints of pain, her self-limitations, and the fact that she voluntarily ceased her employment primarily due to the pain caused by the job [with Employer]." Based on all the evidence, the trial court granted Employee benefits based on a 48% vocational disability rating, which it apportioned to her right leg.

Employer appealed, raising only the issue of whether the trial court erred in assigning Employee benefits based on a 48% permanent partial disability rating to the lower right extremity when the court adopted only a 4% anatomical disability rating to the member at issue.

DISCUSSION

Standard of Review

In a workers' compensation case, "[r]eview of the trial court's findings of fact shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (2005); see also Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004); Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 825 (Tenn. 2003). An appellate court must extend considerable deference to the trial court's factual findings where the trial court has seen and heard witnesses and issues of the credibility or the weight of oral testimony are involved, Gray v. Cullom Mach. Tool & Die, Inc., 152 S.W.3d 439, 442 (Tenn. 2004), but it does not grant such deference when reviewing documentary proof or expert testimony presented by deposition, Lane v. Nissan N. Am., Inc., 170 S.W.3d 564, 569 (Tenn. 2005).

The Trial Court's Vocational Disability Rating Was Not Erroneous

The trial court credited Dr. Garside's 4% anatomical disability rating to Employee's lower right extremity and then awarded Employee benefits based on a 48% permanent partial disability rating to that member. See Tenn. Code Ann. § 50-6-207(3) (2005). Because an injury to a leg has a specific benefit scheme scheduled in the statute, see id. § 50-6-207(3)(A)(ii)(o), no permanent partial disability benefit cap limits the award. Id. § 50-6-241(a)-(b) (2005). In addition, the anatomical rating is but one factor considered when fixing a permanent partial disability rating, the ultimate issue on which a trial court must rule. See Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998); Newman v. Nat'l Union Fire Ins. Co., 786 S.W.2d 932, 934 (Tenn. 1990).

When determining a permanent partial disability award for a lower extremity, a trial court "shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skill and training, local job opportunities, and capacity to work at types of employment available." Id. § 50-6-241(d)(1)(A). Further, the claimant's own assessment of his or her physical condition and resulting disabilities is competent evidence and should be considered. See McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn. 1999); Orman, 803 S.W.2d at 678. As recited above, the trial court's letter opinion amply demonstrates that, either explicitly or implicitly, the trial court took all "pertinent factors" into account. See, e.g., GAF Bldg. Materials v. George, 47 S.W.3d 430, 433 (Tenn. Workers' Comp. Panel 2001). The trial court evidently found Employee a credible witness because it relied very heavily on her testimony to make its findings. Under the applicable standard of review, we may not second-guess conclusions based on this testimony or substitute our own judgment for that of the trial court merely because we might have chosen another alternative.

CONCLUSION

Finding that the evidence does not preponderate against the trial court's decision, we affirm the trial court's judgment in this case. The costs of this appeals are taxed to Nissan North America, Inc.

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MARIETTA M. SHIPLEY, 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 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 will be paid by Nissan North America, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM