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

JANET A. RHOADY v. BRIDGESTONE/FIRESTONE, INC.

Direct Appeal from the Circuit Court for Warren County
No. 1711 Larry Stanley, Judge

No. M2005-02326-WC-R3-CV - Mailed: January 30, 2007
Filed - March 5, 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 appellant employer asserts that the evidence preponderates against the trial court's award to the employee of a 39% permanent partial disability to the body as a whole, asserting that the impairment resulted from a pre-existing condition. The appellant also contests the lump-sum award to the employee of $85,000.00, asserting that the appellant employer has a companion disability program. We conclude that the findings of the trial judge should be affirmed.

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.

B. Timothy Pirtle, McMinnville, Tennessee, for the appellant, Bridgestone/Firestone, Inc.

Henry D. Fincher, Cookeville, Tennessee, for the appellee, Janet A. Rhoady.

MEMORANDUM OPINION

This worker's 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. In this appeal, the employer, Bridgestone/Firestone, Inc., has presented the following issues:

1. Whether the employee, Janet Rhoady, suffered a compensable injury arising in the course and scope of her employment at Bridgestone/Firestone or whether it was a natural progression of a pre-existing spinal stenosis;

2. Whether the trial court properly found a 17% impairment rating and a 39% permanent vocational disability for Rhoady; and

3. Whether, in light of the employer Bridgestone/Firestone's disability program, the trial court properly commuted the award to a lump sum of $85,000 plus attorney's fees.[1]

After carefully reviewing the trial court's legal and factual findings, we affirm the trial court's ruling in favor of Rhoady on all issues.

I. FACTUAL BACKGROUND

At the time of the trial, May 12, 2005, Ms. Rhoady was 46 years old. She is five feet, three inches tall and slender in build. She had been married 28 years and has two grown children. She has a high school education. Prior to her employment at Bridgestone/Firestone, she had worked at a manufacturing plant as a secretary. She worked for Bridgestone/Firestone for nine-and-one-half years, working in the tire building area of their plant until after her surgery in April 2003. After her surgery and physiometry testing on August 13, 2003, she was sent to work in the plant's laboratory. In her laboratory position, she tests tires. She has the least seniority of any employee working in the laboratory. Her ten-year employment anniversary at Bridgestone/Firestone was in October 2005.

Rhoady claims she suffered an injury on January 4, 2003, when she felt shooting pain across her lower back, which then radiated down her legs. She testified that she felt fine until lunch; after lunch, pain set in. By the end of the day, she had trouble walking because pain radiated down her legs and into her feet. She was afraid to report her condition to her employer because she had been warned not to violate any safety rules. She did, however, report the injury to Jim Medler, her team leader, on January 17, 2003. She told him that she had hurt her back moving carts and that her condition was getting worse. She was no longer able to "make ticket," or the production quota. She somewhat dragged her right leg and could not lift as much weight. She was sent to Christy Swanson, the plant nurse, who directed her to return to her chiropractor, Dr. Leland Northcutt. Several weeks later, Bridgestone/Firestone sent her to Dr. Ray Troop, a panel physician, who referred her to Dr. Michael Moran, an orthopedic surgeon. Dr. Moran's partner, Dr. Warren McPherson, treated Rhoady. Dr. McPherson performed a decompressive laminectomy in April 2003. Since that time, she has had flare-ups. She has since seen Dr. Moran. After suit was filed, she was seen by Dr. David Gaw and Dr. Thomas O'Brien for independent medical examinations.

[1]The parties do not dispute Rhoady's average weekly wage.

II. MEDICAL AND EXPERT TESTIMONY

Beginning in 1997, Dr. Northcutt saw Ms. Rhoady for mid-back and neck pain. In September 1997, he treated her for lower back pain, pain that she had experienced for the two months before her visit. X-rays showed mild scoliosis. Dr. Northcutt manipulated her lower vertebra in the L-4 and L-5 area. In July 1998, she returned for further treatment for lower back pain. She had some decreased range of motion in the joints of her lower back area with muscle spasms and tenderness. She received a series of treatments, ending in December 1997. In February 1999, she returned to Dr. Northcutt, complaining only of upper back pain. On January 13, 2000, she returned again, now complaining of lower back soreness and pain for the two weeks prior to her visit, for which she received several treatments. She returned again on August 23, 2001, telling Dr. Northcutt that moving carts in her workplace had resulted in lower back pain. Dr. Northcutt diagnosed her with a lumbar strain in the same area that he had previously treated. After more treatment, her range of motion increased.

Rhoady again returned to Dr. Northcutt on December 10, 2002. During that visit, she complained of neck, upper back, and lower back pain for about two months prior to her visit. She stated that the cause was probably standing at work. Dr. Northcutt found a decreased range of motion in her joints, muscle spasms and tenderness in her lower back. She received a chiropractic adjustment, ultrasound, EMS and ice on that day and on December 13, 2002. She returned on January 15, 2003, with multiple problems. She had neck soreness, tingling in her big toes, lower back pain, left leg pain, numbness and a left patellar reflex, all of which had been a problem for the two weeks prior to her visit. Dr. Northcutt testified that her condition had worsened since her December 2002 visit. Ms. Rhoady gave him no specific history of trauma or injury that day. She had a decreased range of motion in her joints and a negative straight-leg raising test. He stated that she showed no evidence of radicular pain. He testified that her condition had worsened since December 2002. He administered similar treatment, and she returned on February 3, 2003. Dr. Northcutt also prescribed some traction, but the traction made the pain worse. He referred her for a MRI. After reading the MRI, Dr. Northcutt concluded that Rhoady had some facet joint degenerative changes and a mild ligamental problem. Dr. Northcutt concluded that, if her report of the January 2003 work incident were accurate, the alleged injury caused the advancement and worsening of her condition.

Rhoady was ultimately referred to Dr. Warren McPherson, a board-certified neurosurgeon. He saw Ms. Rhoady on February 24, 2003, and prescribed epidural steroids. He found that she had minimal pain from a straight-leg raising test. Three weeks later, she returned to Dr. McPherson. After reviewing her MRI, he found "some congenital stenosis at L-4 L-5." He recommended surgery, a decompressive laminectomy. Following surgery, he allowed her to return to work gradually, beginning on May 19, 2003. In July 2003, he prescribed a work-hardening program, physical therapy and a gradual return to regular duty. However, Rhoady reported she could not withstand the strain of working for more than six hours. Dr. McPherson next sent her for a functional evaluation. The evaluation results prescribed "medium heavy work." In August 2003, Dr. Moran took over her care again, and, in September 2003, she saw him, complaining of a

muscular lumbar strain. By December 2003, he found that she was developing some right leg radiculopathy. He sent her to a pain clinic because he could offer her no more effective treatment himself.

Dr. McPherson testified by deposition that her condition was related to a workplace injury which occurred on January 4, 2003. He found that the workplace injury made her underlying condition, spinal stenosis, more severe. He found a 9% impairment. He further found that, if she had returned to Dr. Moran for pain, then he would add 2%, for a total of 11%. He did not do a range-of-motion test on her. He found that she would need pain medication and physical therapy in the future.

Dr. David Gaw, a board-certified orthopedic physician and board-certified independent medical evaluator, saw Rhoady on March 23, 2004, for an independent medical examination. Dr. Gaw testified by deposition that she had aggravated her spinal stenosis, a pre-existing condition, through the January 4, 2003, incident. Her symptoms of the aggravation were pain and numbness in the lower extremities. He found she had a total impairment of 17%, 12% due to the three-level decompressive laminectomy ("taking off the bone to give the spinal cord and nerves more room") that Dr. McPherson had performed and 6% for loss of movement on a range-of-motion test, which he determined with an inclinometer. He found that she had load restrictions, including lifting over 40-50 pounds only occasionally, 20-25 pounds frequently, and avoiding frequent twisting, bending, or awkward positions. He stated that she would continue to have occasional numbness and pain on and off, for which he advised injections and medication. On cross-examination, he stated that she had a functional range of movement. She could bend over to 90 degrees and "perform almost all activities of daily living." Her prognosis was "dealing with the pain that is attendant to this condition." He did not find a specific radiculopathy, as shown on an EMG, but did find a sensory loss in both her feet and large toes. He opined that Dr. Warren McPherson did not follow the protocol in the American Medical Association Guides, Fifth Edition, but was a good treating physician.

Dr. John Thompson, a board-certified orthopedic surgeon, saw Rhoady on December 21, 2004, for a single-visit evaluation. His purpose was to evaluate her following an August 2004 incident at Bridgestone/Firestone. Rhoady reportedly picked up a 45-pound bucket, twisted to the left, and then felt a strain to her lower back and radiation down the sides of her leg and calf to the top of her foot.[2] He found that she suffered a 3% impairment caused by a workplace accident. He assigned her a 19% whole-body impairment, a figure which included the prior 17% impairment.

Dr. Thomas O'Brien, a board-certified orthopedic surgeon, also saw Rhoady on January 12, 2005, for a single-visit independent medical examination. Dr. O'Brien found her degenerative spinal stenois was "not either aggravated or accelerated beyond normal progression by her work activities in January 2003." He testified by deposition that Dr. McPherson's rating of 9% impairment to the body as a whole was appropriate. He stated that it was likely that she would continue to experience

[2]The trial was postponed to determine if this incident caused further injury to Ms. Rhoady.

flare-ups of her condition as she aged, flare-ups that would become "more frequent and longer-lasting." He did not perform a physical examination or a range-of-motion test with an inclinometer. He stated that he was unsure how Dr. McPherson arrived at his impairment rating and that he was not aware of any numbness or tingling in Ms. Rhoady's leg prior to January 4, 2003. He denied that the aggravation or acceleration of her condition was caused by moving carts at work but rather by a natural progression of her underlying condition. He did state, however, that, if she had reported pain after the surgery, then the impairment would have risen to 11%.

III. FINDINGS OF THE TRIAL COURT

The trial court found that Rhoady suffered an injury to her back while working at Bridgestone/Firestone in January 2003. The trial court credited Dr. McPherson's and Dr. Gaw's opinions that the injury caused an aggravation of Ms. Rhoady's pre-existing spinal stenosis. The trial court found an anatomical impairment rating of 17% to Rhoady's body as a whole and awarded her a 39% vocational disability rating. In addition, because the trial court found that Ms. Rhoady had demonstrated a reasonable ability to manage her finances, the trial court awarded her $85,000 in a lump sum, with any remainder to be paid to her periodically, plus lifetime medical benefits. The trial court also commuted the attorneys fees to a lump sum. On a Motion to Alter or Amend, the trial court found that, even though Dr. Northcutt had noted some decreased range of motion in Rhoady's joints before January 4, 2003, it was too speculative to determine the degree of limitation from Dr. Northcutt's observations.

IV. STANDARD OF REVIEW

The standard of review in workers' compensation cases is *de novo* on the record, with a presumption of the correctness of the trial court's ruling, unless the preponderance of evidence is to the contrary. Tenn. Code Ann. § 50-6-225(e)(2) (2005); Mahoney v. Nationsbank of Tenn., N.A., 158 S.W.3d 340, 343 (Tenn. 2005). When the trial court has seen the witnesses and heard their testimony, especially where issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's factual findings. Mahoney, 158 S.W.3d at 343; Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315, 315 (Tenn. 1987). As to documentary evidence, such as records and depositions of expert witnesses, appellate courts may make an independent assessment of the credibility of the documentary proof it reviews without affording deference to the trial court's findings. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991); see also Perrin v. Gaylord Entm't Co., 120 S.W. 3d 823, 827 (Tenn. 2003).

V. ANALYSIS

A. Compensability

The thrust of the Workers' Compensation Act is that an employee must suffer an accidental injury arising out of and in the course and scope of employment in order to be compensated. Tenn. Code Ann. § 50-6-103(a) (2005).

In this case, Bridgestone/Firestone asserts that Ms. Rhoady had pre-existing conditions, spinal stenosis and degenerative disc disease, that were the cause Rhoady's complaint of pain on January 4, 2003 (not reported until January 17, 2003) and thus not compensable. An employee cannot recover for an "accidental injury" if the accident did not otherwise injure or advance the severity of that condition or result in any other disablement. Talley v. Va. Ins. Reciprocal, 775 S.W.2d 587, 592 (Tenn. 1989). If the accident simply caused more pain, then the employee cannot recover. See Smith v. Smith's Transfer Corp. 735 S.W.2d 221, 225 (Tenn. 1987). Though pain is considered a disabling injury, it is only compensable when it stems from a work-related injury. See Sweat v. Superior Indus., Inc., 966 S.W.2d 31, 32 (Tenn. 1998); Boling v. Raytheon Co., 448 S.W.2d 405, 407 (Tenn. 1969). To be compensable, a workplace accident must advance the pre-existing condition, there must be anatomical change in the pre-existing condition, or the employment must cause an actual progression of the underlying disease. Sweat, 966 S.W.2d at 32-33.

As she asserts that her pre-existing condition advanced and became more severe as a result of the January 4, 2003, accident, Rhoady relies on Hill v. Eagle Bend Mfg. Inc., 942 S.W.2d 483 (Tenn. 1997). In that case, the claimant had a pre-existing back injury for which he received an 88.5% permanent partial disability benefit to the body as a whole; later, he suffered a subsequent back injury, which qualified him for additional benefits from the Second Injury Fund. Id. at 486. The Court stated that an employer takes an employee as he or she is and assumes the responsibility of him or her having a pre-existing condition which might result in a work-related injury, even though that injury might not have occurred in a person without a pre-existing condition being present. Id. at 488. On this basis, the Court upheld an award to the employee for the full extent of his back injuries and related mental health injuries because it found that the worker had sustained a work-related progression of his pre-existing back condition. Id. at 488-89.

With these principles in mind, we now review the instant case's factual record. Rhoady testified she had several prior workers' compensation injuries: a slip on a floor which hurt her neck in March 1997; a right ankle contusion or sprain June 1997, at which time a cart rolled over her foot; a left finger injury in May 2000; and pain in the middle of her back which occurred while she pulled carts in August 2001. These accidents are documented in Dr. Northcutt's medical reports. On December 10 and 13, 2002, Dr. Northcutt made a simple notation: "neck/upper back/lower back pain [for] two months/possibly from standing [at] work." For these symptoms, he adjusted her neck.

Rhoady testified that, before her January 4, 2003, incident, the lower back pain was

> just a minor ache. [But after lunch] it just degenerated. . . . [B]y the end of the shift, I was in such pain every time I picked up my foot I was having trouble walking. It seemed like I would drag my right leg. It just didn't seem like it operated quite right, but the pain that [sic] radiating down my legs into my feet was just incredible. . . . I noticed both big toes of mine were very much numb. . . . And I thought, something is going on here; but I didn't know what it was.

That day, she worked as she usually did in the tire operation. As part of that work, she pushed carts. For her to get the carts to roll that day, she had to put her back into it and shove the cart as hard as she could to get the wheels to start rolling. The carts did not roll very well.

Dr. Northcutt testified that Rhoady came to see him on January 15, 2003, with several problems, including lower back pain, numbness in her big toes, pain and numbness in her left leg, and a left patellar reflex which had bothered her for two weeks. Dr. Northcutt found that these were different complaints than she had previously made. He told her that, if she did not improve, he would refer her for a MRI. He did so on February 3. He also tried traction to help improve her condition, but that treatment made her worse. Dr. Northcutt testified that, if her January accident did occur, then it worsened or accelerated the pre-existing stenosis. Before the February 2004 MRI, no one had diagnosed her as having spinal stenosis or degenerative changes, even though Dr. Northcutt had taken a number of x-rays, finding only a slight scoliosis evident on them.

Dr. McPherson, the workers' compensation panel physician, testified that her condition was related to the January 4, 2003, workplace injury. He found that the workplace injury worsened her spinal stenosis and assigned her an anatomical impairment rating of 9%. He also testified that he would increase the rating by 2% if she had subsequently returned for treatment of pain, for a total impairment rating of 11%. At the time of his testimony, Dr. McPherson was aware that Rhoady had previously received treatment from a chiropractor.

Dr. Gaw testified that her workplace injury advanced and made her condition more severe because, based on her medical history, there had been no recorded leg pain or numbness prior to January 4, 2003. He assigned her an impairment rating of 12% for her back and 6% for limited range of motion, for a total impairment rating of 17%.

Dr. Thompson testified about the August 2004 workplace incident. He assigned an additional 3% impairment because of the incident, basing his finding on the results of a leg-raising test. His total impairment rating was 19%.

Dr. Thomas O'Brien, Bridgestone/Firestone's independent medical examiner, found her condition "was neither aggravated or accelerated beyond normal progression by her work activities in January 2003." He was, however, not aware of any numbness or tingling in Ms. Rhoady's leg prior to January 4, 2003. He found that her new complaints were "a progression of her underlying degenerative condition."

Taking all the facts and expert opinions into account, we cannot say that the evidence preponderates against the trial court's finding that the workplace injury caused an aggravation of her pre-existing condition and made it more severe. When confronted with conflicting expert opinions, the trial court must weigh those opinions and conclude which opinion or opinions to accept. See Parker v. Ryder Truck Lines, Inc., 591 S.W.2d 755, 760 (Tenn. 1979). Here, the trial court apparently credited Dr. Gaw's 17% total anatomical impairment rating, discounting other possible

expert opinions that were both higher (19%) and lower (9%). The record reveals a sound basis for the trial court's decision.

The real point of contention between the parties was whether Rhoady should be awarded 6% for a loss of range of motion in addition to the original impairment. Dr. Gaw testified at length as to how Rhoady's impairment should be measured by the use of the AMA Guides. The proper analysis, he asserted, resulted in an 12% rating because of Rhoady's multilevel spinal fusion, with or without decompression, with residual signs and symptoms. He then justified his decision to add a 6% impairment for her lost range of motion, which he measured with an inclinometer. By contrast to Dr. Gaw's analysis, Dr. McPherson reached his 9% rating without deploying the range-of-motion method or using an inclinometer. Bridgestone/Firestone's expert, Dr. O'Brien, reached his 9% rating after having made no measurements at all: he simply agreed that Dr. McPherson was correct. We also find any reliance on Dr. Northcutt's general observation of some decreased range of motion in 2001 and 2002 to be speculative: no measurement of any loss occurred at that earlier time. We find that the evidence does not preponderate against the trial court's assignment of a 17% anatomical impairment rating. We affirm the trial court on this issue.

The trial court also found that Rhoady should receive a 39% permanent partial vocational disability rating. See Tenn. Code Ann. § 50-6-207(3) (2005). This amount is within the 2.5 multiplier cap for permanent partial vocational disability awards set forth in Tennessee Code Annotated section 50-6-241(a) (2005) for situations, like that in this case, in which "the pre-injury employer returns the employee to employment at a wage equal to or greater than" what she earned before the injury.

When a trial court awards an employee permanent partial disability benefits, it "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(c). The trial court's order in this case demonstrates that the trial court, either explicitly or implicitly, took all "pertinent factors" into account when making its 39% permanent partial disability award. See, e.g., GAF Bldg. Materials v. George, 47 S.W.3d 430, 433 (Tenn. Workers' Comp. Panel 2001). We affirm the trial court on this issue.

C. LUMP-SUM AWARD TO PLAINTIFF

Bridgestone/Firestone argues that Rhoady should not receive a commuted lump sum because such a payment would preempt Bridgestone/Firestone's own disability benefits plan from providing periodic benefits. We conclude that this issue is moot because all of the permanent partial disability benefits to which Rhoady is entitled have already accrued.

After an employee receives any temporary total disability benefits to which she is entitled, she may be awarded permanent partial disability benefits. Tenn. Code Ann. § 50-6-207(i)-(ii) (2005). In this case, Rhoady received $5566.13 in temporary total disability benefits, which translates into approximately ten weeks of benefits under the statute. See Tenn Code Ann. § 50-6-

207(1)(A). Based on her injury date of January 4, 2003, she would have therefore been entitled to begin to collect any permanent partial disability benefits due to her on or about March 18, 2003. The trial court awarded her a 39% permanent partial disability rating, qualifying her for a maximum of 156 weeks of benefits. See Tenn. Code Ann. 50-6-207(3)(F) (2005). Because more than 156 weeks have elapsed between on or about March 18, 2003, and the date of this opinion, Rhoady is already entitled to receive all the benefits that have accrued during that time. Therefore, this issue is moot.

CONCLUSION

We affirm the judgment of the trial court in all respects. Costs are taxed to the appellant, Bridgestone/Firestone, Inc.

_____
MARIETTA M. SHIPLEY, SPECIAL JUDGE

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

JANET A. RHOADY v. BRIDGESTONE/FIRESTONE, INC.

Circuit Court for Warren County
No.1711

No. M2006-02326-WC-R3-CV - Filed - March 05, 2007

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 the Appellant, Bridgestone/Firestone, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM