IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 26, 2007 Session

SHARON ELDRIDGE v. PUTNAM COUNTY BOARD OF EDUCATION

Direct Appeal from the Chancery Court for Putnam County
No. 05-312 Vernon Neal, Chancellor

No. M2006-02046-WC-R3-WC - Mailed - July 17, 2007
Filed - August 17, 2007

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The trial court found that the employee had not had a meaningful return to work, and awarded twenty percent (20%) permanent partial disability to the body as a whole. The employer has appealed that ruling, contending that the award should have been "capped" in accordance with Tenn. Code Annotated section 50-6-241(d)(1)(A) (Supp. 2004) and that the Court erred by accrediting the testimony of Dr. Fishbein over that of Dr. Talmage. We affirm the judgment of the trial court as modified herein.

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

JERRY SCOTT, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J. and DONALD P. HARRIS, SR. J., joined.

Frederick R. Baker, Cookeville, Tennessee, for the appellant, Putnam County Board of Education.

Chad Marcus Jackson, Nashville, Tennessee, for the appellee, Sharon Eldridge.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

The employee, Sharon Eldridge, began working for her employer, the Putnam County Board of Education, in 1990 as a school cafeteria cook. Five years later, she had advanced to the position of cafeteria manager. At the time of her injury, she was forty-seven years old. She is a high school graduate. Her previous employments included work as a sewing machine operator in various factories**,** a clerk-typist in the office of the Overton County Clerk and an assembly line worker. In 1997, she had lower back surgery for a condition which was not related to her employment.

Her on-the-job injury occurred on October 26, 2004, when she experienced an onset of low back and leg pain after lifting two buckets of dirty mop water to empty them into a sink. She reported her injury to the school principal and the supervisor of the school cafeterias. She was referred to James B. Talmage, M.D., an occupational medicine specialist, who testified by deposition. She saw Dr. Talmage two days after the injury, and he diagnosed a low back strain. He prescribed medication and placed Ms. Eldridge on light duty, and she returned to work. She improved, and Dr. Talmage released her to full duty on December 7, 2004, with no restrictions. At that time, she advised the doctor that she had "recovered to her chronic (pre-injury) level of back symptoms and difficulty and had no consequence." He testified that she retained no permanent impairment from the injury.

Ms. Eldridge returned to her pre-injury position of cafeteria manager, where she continued working until May 13, 2005, when she resigned. She testified that, during that period, she continued to suffer pain and had difficulty performing her job. In January, 2005, she called Dr. Talmage's office and sought an appointment to get additional pain medication. He refused to see her. She then went to Dr. Tolbert who gave her pain pills, muscle relaxers and Prednisone. That summer, Dr. Tolbert sent her back to Dr. Joe Jestus who had performed her back surgery in 1997. Her supervisor, Karen Dalton, the Supervisor of School Nutrition Programs, testified that Ms. Eldridge did not advise her of any problems, and that she had observed her performing her job duties in a satisfactory manner without apparent difficulty. The trial court found both witnesses to be credible.

The circumstances surrounding Ms. Eldridge's resignation were as follows: Anna Ruth Burroughs, a subordinate employee working for Ms. Eldridge met with Ms. Dalton to tell her that she was retiring. At that time, she gave Ms. Dalton an eighteen page list of grievances about Ms. Eldridge. Ms. Burroughs requested that her retirement remain confidential. By chance, Ms. Eldridge met with Ms. Dalton immediately after Ms. Burroughs left Ms. Dalton's office. Ms. Dalton mistakenly told Ms. Eldridge about Ms. Burroughs' retirement plans and requested that Ms. Eldridge keep that information confidential. They then discussed Ms. Burroughs' complaints. Later in the day, Ms. Burroughs called Ms. Dalton. She was upset because Ms. Eldridge had disclosed her retirement plans to other cafeteria employees. Ms. Dalton then spoke to Ms. Eldridge by telephone. The conversation included a statement to the effect that Ms. Burroughs had told Ms. Dalton that she wanted to slap Ms. Eldridge's face, or as Ms. Eldridge testified, she was "going to get whupped on

Monday" by Ms. Burroughs. The next day, Ms. Eldridge faxed her one sentence resignation to Ms. Dalton. Two days later, she sent an e-mail to Ms. Dalton, two other individuals and all School Board members explaining that she quit because of Ms. Burroughs' antipathy toward her, her refusal to work where she had experienced "verbal threats of being assaulted" and her belief that Ms. Burroughs should have been fired for her remark to Ms. Dalton. She did not mention any inability to defend herself.

After her resignation, Ms. Eldridge worked briefly as a cook at a school cafeteria in Overton County for five days and as a sales clerk at a beauty supply store for a week. She testified that she was unable to perform those jobs due to back pain. At some point during 2005, she began to receive regular prescriptions for pain medication from two physicians. In September 2005, she was examined by Dr. Jestus, who had performed her back surgery on September 16, 1997. Prior to that surgery she had been receiving chiropractic treatments from Max Atkins**,** D.C., since April, 1991. She was later seen in April, 2006, by Dr. Cates, who prescribed Prednisone.

Richard Fishbein, M.D., an orthopedic surgeon, performed an independent medical evaluation of Ms. Eldridge on January 24, 2006 and he testified by deposition. Dr. Fishbein diagnosed an "aggravation and sprain" of the low back. He assigned a 5% impairment of the body as a whole, and recommended that Ms. Eldridge avoid "excessive stooping, bending [and] squatting." He further stated that he would have recommended the same restrictions after the 1997 surgery.

At the conclusion of the evidence, the trial court found that Ms. Eldridge did not have a meaningful return to work, because at the time of her resignation, she was not able to perform the duties of her job. The court awarded her a judgment based on 20% permanent partial disability to the body as a whole.

II. ISSUES

The Board of Education raised the following issues on appeal:

(1) Did the trial court err in finding that Employee did not have a meaningful return to work?

(2) Did the trial court err by accepting the testimony of Dr. Fishbein, who conducted the independent medical examination, over the testimony of Dr. Talmage, the authorized treating physician on the issue of permanent impairment?

III. 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. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2006). When issues of credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony.

Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the testimony necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

IV. ANALYSIS

The School Board first contends that the award should be "capped" at 1.5 times the impairment rating, in accordance with Tennessee Code Annotated section 50-6-241(d)(1)(A) [1] because Ms. Eldridge had a meaningful return to work, and her resignation was unrelated to her injury. In support of the latter contention, her employer relies upon her email, in which she stated that her resignation arose from the events concerning her fears about the subordinate employee, but did not make any reference to any physical or medical problems. At trial, Ms. Eldridge relies on her own testimony concerning the pain and difficulty which she had with her job after she returned to work after being released to do so by Dr. Talmage. In addition, she asserts that her resignation was reasonable, in that it was based upon her fear of being assaulted by a subordinate. She also contends that her use of pain medication for her injury made it unsafe for her to continue working with kitchen equipment.[2]

In *Hardin v. Royal & Sunalliance Ins.*,104 S.W.3d 501, 506 (Tenn. 2003), the Supreme Court held that in the context of a petition for reconsideration, an employee who resigned after returning to her pre-injury employment can escape the lower cap set out in Tennessee Code Annotated section 50-6-241(a), which applied to that injury, "only if the resignation was reasonably related to the injury."

In *Lay v. Scott County Sheriff's Dept.*, 109 S.W.3d 293 (Tenn. 2003), the Supreme Court considered the application of the lower cap to a situation in which an employee resigns for reasons unrelated to the injury. In that case, the employee returned to work at his pre-injury job for five months, then resigned to take a better job. The Supreme Court held that "[s]o long as a return to work is offered, as it was here, an employee who resigns for reasons unrelated to his injury may not escape the statutory caps." *Id.* at 299.

In this case, the trial court found that Ms. Eldridge, although she gave a different reason in her letter of resignation, was not able to continue performing the duties of her job at that time. In the alternative, the court found that she was unable to perform those duties at the time of trial. The court's findings specifically refer to his observation of Ms. Eldridge at trial. As noted above,

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[1]Because this injury occurred after July 1, 2004, it is governed by the lower cap of Tennessee Code Annotated section 50-6-241(d)(1)(A) as enacted by 2004 Tenn. Pub. Acts, Chap. 962, § 11.

[2]Ms. Eldridge had taken two pain pills the last day that she worked. Her supervisor testified that she would not have allowed her to work around the kitchen equipment had she known she was taking pain medication while working.

findings of a trial court regarding the weight and credibility of live testimony are entitled to considerable deference. However, our independent review of the record leads to the conclusion that, even in light of that deference, the evidence preponderates against the findings of the trial court on this issue. Our conclusion is premised upon Ms. Eldridge's May 15, 2005 two page e-mail explaining why she resigned two days earlier. In that letter, she described the ongoing personality conflict with her subordinate employee. She stated her opinion that Ms. Burroughs should have been immediately terminated, and expressed her disappointment that that had not been done. She specifically referred to her disappointment as the reason for her resignation, as follows:

> I will not work here, where I have had verbal threats of being assaulted, if these comments were made to Karen Dalton, Ann should have been terminated immediately by Karen Dalton. This is my main grounds [sic] for my resigning. This is why I resigned on Friday May 13, I will not work in an environment where threats of violence have been made against me and nothing is done about it.

The letter does not contain any references to her medical problems, or any difficulties in performing the duties of her job or concerns about the use of pain medication on the job. In her testimony, she described a time before her resignation when she went home, "dropped into" a chair, "grabbed the pain pills" and was crying. Her husband told her "if you're hurting that bad, just quit, we can make it." The next day she went to see Dr. Graves, the school principal, who agreed that she may have to quit.

We find that the e-mail and the testimony of Ms. Dalton, her supervisor, that Ms. Eldridge had neither mentioned nor demonstrated any inability to do her job, outweigh the deference we must give the trial court's observation of the witness. We conclude that Ms. Eldridge's resignation was not reasonably related to her injury and that she had a meaningful return to work. The award of permanent partial disability benefits is therefore subject to the limitation codified at Tenn. Code Ann. section 50-6-241(d)(1)(A).

The second issue raised by her employer is that, under the standards for the comparison of expert testimony, the trial court erred by accepting the testimony of Dr. Fishbein regarding impairment, rather than that of the treating physician, Dr. Talmage. As noted above, a reviewing court is able to make its own evaluation of expert proof which is submitted by deposition. *Guess v. Sharp Mfg. Co. of Am.,* 114 S.W.3d 480, 484(Tenn. 2003). From our review of the medical evidence, we note that there are factors which support acceptance of either doctor's opinion. Dr. Talmage saw Ms. Eldridge on several occasions near the time of the injury. He also had extensive specialized training in the application of the *AMA Guides to the Evaluation of Permanent Impairment, 5th Edition.* On the other hand, Dr. Fishbein saw her much nearer the trial date, and had the benefit of medical records which were not available to Dr. Talmage. He too was very familiar with the Guidelines. Our review of the medical depositions, and the entire record, leads us to conclude that the evidence does not preponderate against the trial court's decision to accept Dr. Fishbein's opinion that Ms. Eldridge sustained a permanent impairment. Applying the limitation of Tennessee Code Annotated section 50-6-241(d)(1)(A) to the 5% anatomical impairment found by Dr. Fishbein, we conclude that the judgment herein should be modified to 7.5% permanent partial

disability to the body as a whole.

VI. **CONCLUSION**

The judgment of the trial court is affirmed as modified to award Ms. Eldridge 7.5% permanent partial disability to the body as a whole. This cause is remanded to the trial court for entry of a judgment in accordance with this opinion. Costs are taxed one-half to the appellant and its sureties, and one-half to the appellee and her sureties, for which execution may issue if necessary.

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JERRY SCOTT, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
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MARCH 26, 2007 SESSION

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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 are taxed one-half to the appellant and its sureties, and one-half to the appellee and her sureties, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM