

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

January 29, 2007 Session

**WANDA BARRON v. TENNESSEE
DEPARTMENT OF HUMAN SERVICES**

**Direct Appeal from the Tennessee Claims Commission
No. 20200425 Nancy C. Miller-Herron, Commissioner**

No. W2006-00963-SC-WCM-WC - Mailed June 12, 2007; Filed August 14, 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 to the Supreme Court of findings of facts and conclusions of law. The Claims Commission awarded 94% permanent partial disability to the employee and commuted the award to a lump sum. The employee's position is that she is permanently and totally disabled. We agree with the position of the employee. Accordingly, we award the employee permanent total disability benefits and reverse the commutation of the award to a lump sum.

Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Tennessee Claims Commission affirmed as modified in part, reversed in part, and remanded.

JAMES F. BUTLER, SP.J., delivered the opinion of the court, in which JANICE M. HOLDER, J., joined. ROBERT E. CORLEW, SP.J., filed a dissenting opinion.

Erich M. Shultz, for the appellant, Wanda Barron.

Michael E. Moore, Acting Attorney General, and Sarah Frances Henry, Assistant Attorney General, for the appellee, Tennessee Department of Human Services.

MEMORANDUM OPINION

FACTUAL BACKGROUND

The employee, Wanda Barron ("Plaintiff"), initiated this civil action against the Tennessee Department of Human Services ("Defendant") to recover workers' compensation benefits arising out of a fall she suffered while she was inspecting a daycare facility in the course and scope of her employment. At the time of her trial, Plaintiff was 32 years of age with two minor children.

Plaintiff completed high school and earned a Bachelor's Degree in social work from the University of Memphis and has completed some work toward her Master's Degree in education.

Plaintiff worked for the Tennessee Department of Children's Services for approximately one year. She then transferred to the Tennessee Department of Human Services where her duties included inspecting daycare centers. Inspecting daycare centers involves driving to each center, checking its files, bathrooms, kitchen area, playground areas, and checking vehicles for proper equipment. Plaintiff was responsible for between twenty and thirty daycare centers and she was to visit each one approximately seven times per year. In addition, Plaintiff also had other administrative and clerical duties.

On January 24, 2002, Plaintiff was inspecting a daycare center when she fell on a wooden ramp, landing on her buttocks. Plaintiff experienced immediate pain in her buttocks and low back. The incident was reported to Plaintiff's supervisor, Dorothy Jones. The incident was witnessed by Mrs. Stevenson.

Plaintiff was treated by Dr. Stephen Waggoner, an orthopaedic surgeon, from March 6, 2002 until June 26, 2002. Plaintiff's complaints were persistent severe pain in the lower lumbar spine, which also radiated into the left anterior thigh and calf. She also had complaints of tenderness in the left foot and weakness in the leg. On physical examination, Plaintiff indicated mild tenderness over the sacrum and coccyx region, but Dr. Waggoner did not observe swelling or spasms in her back. Throughout subsequent examinations, Plaintiff continued to complain of increased lower back pain and left leg pain. Her neurologic exam was normal. X-rays taken of her spine and coccyx did not reveal any evidence of fracture. There were symptoms of radiculopathy but no objective findings to corroborate these symptoms. Dr. Waggoner recommended an MRI of the lumbar spine. The MRI indicated a possible contusion over the coccyx region but no evidence of fracture, disk herniation, or spinal stenosis. At that time, Dr. Waggoner felt Plaintiff had a lumbar strain, as well as a possible contusion to the coccyx. Dr. Waggoner recommended an aggressive physical therapy program. At times, Dr. Waggoner felt Plaintiff exhibited signs of symptom magnification on her examinations, but he stated that this was basically a non-physiologic type of finding. The physical therapy did not improve Plaintiff's condition and was later terminated by Dr. Waggoner because he felt it would not be helpful.

On March 27, 2002, Plaintiff was still complaining of persistent lower back pain and swelling around her coccyx area. A physical examination on that date showed minimal swelling and minimal tenderness in the lumbar region. Dr. Waggoner continued to see Plaintiff, but found little in the way of objective findings to explain her complaints of severe pain. By June 2002, Plaintiff returned to Dr. Waggoner with reports of increasing lower back pain and left hip pain. A repeat MRI showed no abnormalities. His impression at that time was that Plaintiff suffered from chronic back pain with left hip pain. Dr. Waggoner ordered a bone scan to rule out other abnormalities and prescribed Celebrex for her inflammation. On June 26, 2002, Plaintiff returned to Dr. Waggoner still complaining of severe back pain and hip pain. He again noted positive Waddells signs on physical examination, and the neurologic examination and bone scan were both normal. Having nothing else

to offer Plaintiff in the way of treatment, Dr. Waggoner released her at maximum medical improvement and informed her that she could return to her regular job. He instructed her to continue her exercises on her own at home and to take Advil or Aleve for the pain. Dr. Waggoner was unsure why Plaintiff was having such severe pain.

Dr. Waggoner did not attempt to assign an impairment rating to Plaintiff based on her persistent complaints of pain. He stated, "I make my impairments based on more objective findings. Pain is something so subjective that it is very difficult to rate somebody based on just pain Different patients have different amounts of pain with the same type of injury."

Dr. Waggoner indicated that he did not disbelieve Plaintiff's complaints of pain but did not know why she was having the extent of pain she complained of. He stated that he did not find that Plaintiff had no disability but that she had no anatomic impairment. Dr. Waggoner was not aware of any event involving Plaintiff which would cause her pain other than the fall she described to him.

After Plaintiff's release by Dr. Waggoner she sought treatment from Dr. Sheila Thomas, her primary care physician. Dr. Thomas first saw her on July 9, 2002. Dr. Thomas did not examine Plaintiff's back but did notice that Plaintiff was limping and was "sitting on the edge of the chair as if she were uncomfortable." Dr. Thomas gave her an intramuscular injection of Toradol and over a period of time, treated her with injections, muscle relaxers, steroids, and pain medications. Dr. Thomas noted that nothing seemed to rid Plaintiff of her pain. She referred Plaintiff to a pain specialist. Concerning permanent medical impairment as described in the AMA Guides, 5th Edition, Dr. Thomas stated that "the only thing that I can say about that is that she is unable to do her activities of daily living." Dr. Thomas went on to say that she was "unable to give the percentages." When asked whether Plaintiff's condition was permanent, Dr. Thomas responded that none of the treatments she had prescribed had worked. At trial, Plaintiff was still seeing Dr. Thomas for treatment of her injuries.

Plaintiff filed a claim with the Tennessee Claims Commission seeking workers' compensation benefits for permanent total disability and for medical expenses incurred as a result of her injury. Following a trial, the Commissioner found the evidence insufficient to establish that Plaintiff suffered a permanent injury as a result of the accident. The issue of medical expenses was found moot, and the Commission dismissed Plaintiff's claims. Plaintiff appealed, and the appeal was referred to the Special Workers' Compensation Appeals Panel pursuant to Tennessee Code Annotated section 50-6-225(e)(3). Following oral argument before the Panel, the case was transferred to the Tennessee Supreme Court for review. The Tennessee Supreme Court held that the Commission erred in finding that the evidence was insufficient to establish that Plaintiff's injury was permanent and in dismissing her case. Barron v. State of Tennessee Dep't of Human Services, 184 S.W.3d 219, 222 (Tenn. 2006). The Tennessee Supreme Court reversed the judgment of the Commission and remanded the case to determine the extent of vocational impairment and the reasonableness and necessity of medical expenses paid by Plaintiff relative to this injury. Id. at 222-23.

On remand, the Commission ruled that Plaintiff had suffered a permanent partial disability of 95% to her whole body, which was ordered to be paid in a lump sum of \$118,101.60. The

Commission also ordered that Plaintiff be awarded her unpaid medical expenses of \$681.29 and all future reasonable and necessary medical expense connected with her job-related injury. The Commission also awarded \$350.00 to Plaintiff for discretionary costs. Plaintiff has appealed the Commissioner's order, urging this Court to order permanent total disability benefits and requesting that the Court find that the Commissioner erred in awarding the benefits in a lump sum.

STANDARD OF REVIEW

Our review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2005). Conclusions of law established by the trial court come to us without any presumption of correctness. Watt v. Lumbermens Mut. Cas. Ins. Co., 62 S.W.3d 123, 127 (Tenn. 2001). When all of the medical proof is presented by deposition, we must determine the weight to be given to the expert testimony and draw our own conclusions with regard to the issues of credibility. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). The Workers' Compensation laws "should be rationally but liberally construed to promote and adhere to the Act's purposes of securing benefits to those workers who fall within its coverage." Martin v. Lear Corp., 90 S.W.3d 626, 629 (Tenn. 2002) (quoting Watt, 62 S.W.3d at 128). Nonetheless, the burden of proving each element of his cause of action rests upon the employee in every Workers' Compensation case. Cutler-Hammer v. Crabtree, 54 S.W.3d 748,752 n.2 (Tenn. 2001). In making determinations, the trial courts are to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities for the disabled employee and capacity to work at types of employment available in the claimant's disabled condition. Tenn. Code Ann. §50-6-241(a)(1) (1999).

DISCUSSION AND ANALYSIS

During a telephone conference on April 7, 2006, the Commissioner found that the medical expenses incurred by Plaintiff up to the date of the trial were reasonable and necessary. This finding was not objected to on appeal in this case and is therefore affirmed.

On the issue of whether or not Plaintiff should be awarded permanent partial disability or permanent total disability, the Commissioner reviewed the evidence and testimony before her at the original trial. The Commissioner reviewed the testimony of Dr. Waggoner and Dr. Thomas, as did this Court. While Dr. Waggoner could not explain Plaintiff's complaints of severe pain with objective findings, he did confirm that her complaints were persistent and that she had chronic back pain and left hip pain.

The Commissioner found "that a permanent partial disability to the body as a whole was established by competent medical and lay testimony, and that it was clear that Plaintiff's work related injury impaired her earning capacity and that it seemed unlikely that Plaintiff could again work as a daycare counselor, or any job which requires a lot of bending, stooping, or walking." The Commissioner found Plaintiff's permanent partial disability to be 94% to her whole body.

Although the Commissioner did not make any specific findings with reference to credibility of witnesses, she did state that in forming her judgment, she carefully weighed the credibility of the witnesses. The Commissioner also had the advantage of observing Plaintiff. The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004). Where the trial court has seen and heard witnesses, especially where the issues of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court's factual findings. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987).

The claimant testified, un rebutted, that her injury affects her ability to do everyday activities like ironing, driving, or moving clothes from the washer to the dryer. She further testified that it was difficult for her to bend over or to walk for long periods of time. She has difficulty lifting things and could not pick up a cast-iron skillet. She further testified that there is no employment that she could perform. She stated that when she tried to return to work, the driving, lifting, and sitting increased her pain, and she was unable to continue working. She has not tried to get any other jobs because of the pain. Plaintiff's testimony was verified by the testimony of her husband. He testified that he now does the cooking, cleaning, laundry, grocery shopping, and drives Plaintiff around when he is not at work. He testified that Plaintiff was active prior to her injury and did activities with their children. He testified that now he gets the children dressed and ready for school. He further related that on a recent vacation to Six Flags Plaintiff had to be wheeled around in a wheelchair, and she was unable to ride the rides with the children.

Mrs. Dorothy Jones, Plaintiff's supervisor, testified that Plaintiff's job required a lot of walking around, bending, and stooping and that Plaintiff tried to return to work but was unable to do her job. She testified that Plaintiff's job was very physically active and also mentally demanding. She testified that when Plaintiff tried to return to work, she was not able to function and that her situation got worse. Mrs. Jones testified that she did not believe Plaintiff to be able to work because of the extent of her pain, which she personally observed. She also did not know of any other kind of work that Plaintiff would be able to perform.

The extent of an injury to workers' disability is an issue of fact. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). Plaintiff contends that she is permanently and totally disabled. There is no question that her injury is permanent. When an injury not otherwise specifically provided for in the Act totally incapacitates a covered employee from working at an occupation which produces an income, such employee is considered totally disabled. Tenn. Code Ann. § 50-6-207(4)(B) (Supp. 2001); Prost v. City of Clarksville Police Dep't, 688 S.W.2d 425, 427 (Tenn. 1985). "The statutory definition of total disability focuses on an employee's ability to return to gainful employment." Davis v. Reagan, 951 S.W.2d 766, 767 (Tenn. 1997).

In assessing Plaintiff's vocational disability, we are urged by Defendant to find that the Commissioner's award of 94% permanent partial disability to the body as a whole was excessive. We are urged by Plaintiff to find that the Commissioner's award of 94% to the body as a whole was not in accord with the evidence and that Plaintiff was permanently and totally disabled. Plaintiff's testimony, along with that of her husband and Mrs. Jones, was uncontroverted. There was no

evidence presented by Defendant to rebut this testimony. With due deference to the findings of the Commissioner, considering this testimony and the lack of any testimony to the contrary, we cannot conceive of any employment opportunities for Plaintiff. We conclude that Plaintiff is totally disabled as defined in Tennessee Code Annotated section 50-6-207(4)(B).

The Commissioner commuted Plaintiff's award to a lump sum. There was no motion or request made to commute the award to a lump sum. There were no findings made other than the statement of the Commissioner that the lump sum award was in the best interest of Plaintiff. In view of our finding that Plaintiff is permanently and totally disabled, no more than one hundred weeks of benefits may be commuted to a lump sum pursuant to Tennessee Code Annotated § 50-6-207(4)(A)(ii)(b). Further, both Plaintiff and Defendant agree that the Commissioner's order was inappropriate. We therefore reverse the Commissioner's order that any award be paid in a lump sum.

CONCLUSION

The judgment of the Tennessee Claims Commission is modified to award permanent total disability benefits to Plaintiff. The award of lump sum benefits is reversed. The award of medical expenses incurred by Plaintiff up to the date of trial is affirmed. The case is remanded to the Commission for any necessary proceedings. Costs of the appeal are assessed to the Appellee, the State of Tennessee.

JAMES F. BUTLER, SPECIAL JUDGE

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ROBERT E. CORLEW, SP.J., dissenting.

I must respectfully dissent. The commissioner, who, at the trial of the case, had the opportunity to see the three witnesses who testified in person before the court determined that the Employee was not permanently and totally disabled as the majority herein finds. The Employee testified about the things she is able to do and those that she cannot. She explained that she can take children to school and go to the grocery store or to visit relatives, but her pain affects her ability to watch television. Her husband testified as to things he observed. The Employee's former supervisor's testimony was very limited. The medical proof presented by the treating orthopedic surgeon, who specializes in spinal disorders found no permanent injury and did not establish any work restrictions. He conducted numbers of tests: multiple MRI scans, a bone scan, a neurologic exam, x-rays, and physical examinations. All of these tests were normal. The treating physician testified repeatedly as to his findings of symptom magnification, positive Waddell's signs, and instances where the Employee gave poor effort in subjective tests. The Employee testified that she had seen a large number of physicians. Of this group of doctors, other than the treating orthopedic surgeon, only the Employee's primary care physician testified. The primary care doctor never testified that the Employee was permanently disabled, although she did testify that the Employee was "unable to do her activities of daily living."¹ To the extent that this is a relevant finding in determining permanent and total vocational disability, the Employee's own testimony addressed her abilities in this area. I find the Employee's testimony to be at variance with that opinion of the primary care physician. The primary care physician provided no anatomical rating, which of course is not required for a finding of disability, but she provided no evidence of any work restrictions either. No vocational expert testified, and although I agree that such proof is not always necessary or even helpful, some proof from an expert might have assisted in establishing the Employee's position.

¹The deposition of Stella Thomas, M.D., the primary care physician, was not a part of the record on appeal, however, without exception, both counsel quoted liberally from that deposition during the presentation of the proof.

In summary, I find it very difficult to conclude that the Employee is permanently disabled. She is a 32-year-old college graduate, has taken courses toward a master's degree but has not sought any further employment. She has no work restrictions, no anatomical impairment, and no objective findings of permanent injury. She does have numerous findings of symptom magnification. This is particularly significant where the specialist who provided the majority of her care found no permanent disability and where there was no testimony from any of the large number of other doctors from whom the Employee sought treatment. In the face of all of these matters, the Employee offers only her own lay testimony, that of her husband, the limited testimony of her former supervisor, and excerpts from the deposition of the primary care physician. The trial court who evaluated the lay testimony in person found the Employee not to be permanently and totally disabled. We are required to defer to the trial court's evaluation of the credibility of those witnesses and the finding that the employee is not permanently and totally disabled is entitled to a presumption of correctness. While I would not diminish the 94% vocational disability finding as the State requests, particularly in light of the prior decision of the Supreme Court in this case, I would affirm the decision of the claims commissioner.

ROBERT E. CORLEW, SPECIAL JUDGE

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SERVICES**

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by the Tennessee Department of Human Services pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to the Tennessee Department of Human Services and its sureties, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holder, J., Not Participating