

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 29, 2007 Session

STELLA ROY HURLEY v. MTD, INC.

**Direct Appeal from the Circuit Court for Greene County
No. 05CV495 Ben K. Wexler, Judge**

Filed August 24, 2007

No. E2006-02215-WC-R3-WC Mailed July 24, 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 § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The trial court found that the employee failed to prove that she had sustained permanent disability as a result of work-related injuries to her neck and arms. The employee has appealed that ruling, arguing that the evidence preponderates against the trial court's finding. The employee also specifically claims that the trial court erred by referring to one of the expert witnesses as a "non-treating" physician and by allowing certain medical records into evidence. We find no error and affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2006) Appeal as of Right; Judgment of the Circuit Court Affirmed

GARY R. WADE, J., delivered the opinion of the court, in which JERRY SCOTT, SR. J., and JON KERRY BLACKWOOD, SR. J., joined.

Howard R. Dunbar, Johnson City, Tennessee for the appellant, Stella Roy Hurley.

Thomas L. Kilday, Greeneville, Tennessee for the appellee, MTD, Inc.

MEMORANDUM OPINION

Factual and Procedural Background

At the time of the trial, Stella Roy Hurley ("Employee"), who had an eleventh grade education, was forty-seven years old. She had attended a vocational-technical school in Illinois but did not complete the program. In May of 2003, she was employed by MTD, Inc. ("Employer") as a "resistance welder" to assemble the exterior portions of bombs for use by the military. Her duties

required her to clamp two halves of the bomb together on one side, weld the clamped portion, and then repeat the process on the other side.

Originally, the Employee worked on a small bomb, known as “#33.” On July 27, 2004, some fourteen months after her employment, she was assigned to work on a larger bomb, referred to as “#83,” which was longer and heavier and required two persons to assemble. After only three hours of performing this new task, the Employee complained of pain in her back, neck, arms, and wrists and asked her supervisor to place her on light duty for the remainder of her shift. Her request was denied.

At trial, the Employee acknowledged that she had experienced similar symptoms in the preceding six months but claimed that “it flared up real bad and went to pulling and burning in me” before she notified her supervisor. She testified that when her symptoms persisted until the next morning, she again asked her supervisor to be referred to a doctor, but was again refused. The Employee then made a call to a higher official in the company and received a medical appointment for the following day. After the examination, Dr. Jamie Oakley directed her to discontinue her work. On the same day, she was notified that she was being laid off, along with several other employees, as part of a reduction in force. Thereafter, she was examined and/or treated by a number of doctors, including Dr. Richard Duncan, Dr. Mark McQuain, Dr. Marc Aiken, and Dr. Paul Gorman. She also had an independent medical examination by Dr. William Kennedy. Drs. Duncan, Gorman, and Kennedy testified by deposition. Dr. Norman Hankins, who also testified by deposition, performed a vocational evaluation.

A co-worker, Stephen Yost, confirmed that the Employee “was in a lot of pain” and “did a lot of crying.” He testified that she complained to the supervisors about her arms and shoulders.

Dr. Duncan, an orthopaedic surgeon specializing in spinal problems, examined the Employee in December 2004 and reviewed MRI studies of her neck. He found that she had bone spurs and bulging discs in her cervical spine which he considered related to the normal aging process. In his opinion, these conditions did not cause neck pain and did not place any restrictions upon her activities. Dr. Duncan found no permanent impairment.

Dr. Gorman, an orthopaedic surgeon specializing in hand problems, examined the Employee on two occasions, in February and April 2005. He concluded that she had several medical conditions, but determined that only one of these, bilateral carpal tunnel syndrome, was work-related. Dr. Gorman believed that this condition existed prior to the July 2004 event and that she became aware of it as a result of her work on that date. While assigning 2% permanent impairment to each arm, Dr. Gorman did not classify the Employee as a surgical candidate. He suggested that she avoid repetitive activities which required flexing of the fingers with a bent wrist.

Dr. Kennedy, an orthopaedic surgeon specializing in independent medical examinations, examined the Employee on June 21, 2005. Based, in part, upon the same MRI results relied upon by Dr. Duncan, it was his opinion that the Employee had a herniated disc at C5-6. He considered

the condition to be work-related and assigned 8% permanent impairment to the body as a whole as a result. Dr. Kennedy also found that the Employee had carpal tunnel syndrome but did not find this to be work-related because it pre-dated her employment. On cross-examination, Dr. Kennedy admitted that he was unaware of some relevant portions of the Employee's medical history, including prior treatment for neck, shoulder, and back injuries. Dr. Kennedy acknowledged that the Employee had reported symptoms that had no objective physical basis, had exaggerated her level of pain and had been less than candid in reporting her medical history.

Dr. Hankins, a vocational evaluator and partner of Dr. Kennedy, administered intelligence and achievement tests to the Employee. He testified that her IQ was ninety-one, in the average range, and that she was able to read and perform arithmetic at the high school level. It was Dr. Hankins' opinion that she had a vocational disability of 79% as a result of her injuries.

The Employee's supervisor, Daniel Williams, testified that she reported her symptoms on July 27th and 28th, but contended that her complaints were similar to those she had previously voiced whenever she worked on the #83 bombs. He stated that the Employee worked a regular shift on the day after the alleged injury on the smaller, #33, bombs. He denied that she asked for a referral to a doctor.

In addition to the evidence summarized above, the Employer offered numerous medical records into evidence. These records dealt with medical treatment rendered to the Employee for a wide variety of conditions over a period of twelve or more years prior to the date of the claimed work injury. Although the Employee objected to the introduction of these records on grounds of relevancy, the trial court allowed the evidence.¹

Just over a month after the conclusion of the trial, the trial court issued a written memorandum opinion, finding that the Employee had failed to demonstrate by a preponderance of the evidence that her various injuries were caused by her employment. Judgment was entered for the Employer and this appeal followed.

Questions for Review

On appeal, the Employee raises three issues:

1. Did the trial court err by finding that the Employee failed to prove that she had sustained permanent disability as a result of alleged work-related injuries to her neck and arms (carpal tunnel syndrome)?
2. Did the trial court err by referring to Dr. Gorman as a "non-treating" physician?
3. Did the trial court err by admitting prior medical records concerning the Employee?

Standard of Review

In a workers' compensation case, appellate review of the findings of fact made by the trial

¹The records were submitted in accordance with Rules 803(6) and 902(11) of the Tennessee Rules of Evidence. No objection was raised regarding authenticity.

court 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) (Supp. 2006). The application of this standard requires this Court to weigh the factual findings and conclusions of the trial court in workers' compensation cases in more depth to determine where the preponderance of the evidence lies. Vinson v. United Parcel Serv., 92 S.W.3d 380, 383-84 (Tenn. 2002). When the trial court has seen the witnesses and heard the testimony, considerable deference is given to the trial court's factual findings. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). When, however, medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000).

Analysis

I. Causation

The trial court specifically concluded that the Employee had failed to establish that her injuries were work-related:

[M]ost of the doctors in the case, including Dr. Kennedy[,] felt that [the Employee's] subjective symptoms were greater than her objective findings, that she had pain magnification, and over reaction to the situation [T]he plaintiff failed to prove by a preponderance of the evidence that her neck, shoulder, spine and disc injur[ies were] was caused by her work, nor that the carpal tunnel syndrome was caused by her work. . . .

Causation and permanency are, of course, issues of fact. The Employee argues that the testimony of Dr. Gorman, who was an authorized physician, establishes that her carpal tunnel syndrome was at least aggravated by her work. She also relies upon Dr. Kennedy's testimony that the MRI findings concerning her cervical spine represented an acute injury, rather than a chronic condition.

Dr. Duncan, however, testified that the MRI findings were more consistent with the normal aging process than with an acute injury. Moreover, Dr. Gorman's testimony about the Employee's carpal tunnel syndrome was equivocal. For example, he stated that the Employee's complaints were not proportional to the objective findings and that the problems caused by her carpal tunnel syndrome were minimal relative to her other medical problems. He did not believe the condition was actually caused by the work on the heavier bombs on July 27. Additionally, Dr. Kennedy was not able to relate the Employee's carpal tunnel syndrome to her employment and expressed reservations about the accuracy of the Employee's account of her medical history.

When the medical testimony differs, the trial court must choose which view to believe. In doing so, the court is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examinations, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672,

676 (Tenn. 1991). Moreover, it is within the discretion of the trial court to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Story v. Legion Ins. Co., 3 S.W.3d 450, 455 (Tenn. Workers' Comp. Panel 1999).

Typically, any "reasonable" doubt as to whether an injury arose out of employment is to be resolved in favor of the employee. White v. Werthan Indus., 824 S.W.2d 158, 159 (Tenn. 1992). This Court has held that an award may properly be based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997) (citations omitted). The trial court, however, saw and heard several of the witnesses first hand and concluded that the Employee had not met her burden of proof. Our own independent review of the medical depositions leads us to the conclusion that the evidence does not preponderate against that finding.

II. Reference to Dr. Gorman as a "non-treating" physician

In its memorandum opinion, the trial court referred to Dr. Gorman, as a "non-treating" physician. The statement was made in the context of comparing the deposition testimony of the various doctors, particularly that of Drs. Gorman and Kennedy. The Employee argues that because she was referred to Dr. Gorman through the workers' compensation carrier, he qualified as an "authorized" physician. Dr. Gorman, who examined the Employee on two occasions, did not render any medical treatment. Because the trial court accurately classified him as a "non-treating" physician, there was no error.

III. Admission of Medical Records

The Employee also argues that the trial court erroneously permitted irrelevant medical records dating back as far as 1990 and consisting of several hundred pages. The records are from a variety of sources and include information concerning the examination and treatment of the Employee for hepatitis, abdominal pain, sinusitis, and other conditions which do not bear any relationship to the issues. Some, however, document her previous complaints of neck, back or shoulder pain.

In our view, much of the information contained in the records is, in fact, unrelated to any conceivable issue in the case. Yet the erroneous admission or exclusion of evidence is subject to harmless error analysis under Rule 36(b) of the Tennessee Rules of Appellate Procedure. Blackburn v. Murphy, 737 S.W.2d 529, 533-34 (Tenn. 1987). Further, the burden of demonstrating prejudice from an evidentiary error is on the complaining party. Although the trial court, in this instance, made a brief reference to "medical records" in its opinion, there is no indication that the irrelevant medical evidence served as a basis for the denial of the claim. In consequence, the error must be classified as harmless.

CONCLUSION

We affirm the judgment of the trial court in all respects. Costs are taxed to the appellant, Stella Roy Hurley and her surety, for which execution may issue if necessary.

GARY R. WADE, JUSTICE

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STELLA ROY HURLEY V. MTD, INC.
Greene County Circuit Court
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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 appears 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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellant, Stella Roy Hurley, for which execution may issue if necessary.