IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
February 22, 2010 SESSION

WENDY BLAIR v. WYNDHAM VACATION OWNERSHIP, INC.

Circuit Court for Sevier County
No. 2008-01101-1

No. E2009-01343-WC-R3-WC - Filed July 27, 2010

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, Wyndham Vacation Ownership, and its surety, and one-half to Wendy Blair, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
February 22, 2010 Session

WENDY BLAIR v. WYNDHAM VACATION OWNERSHIP, INC.

Appeal from the Circuit Court for Sevier County
No. 2008-0110-I Ben W. Hooper, II, Judge

No. E2009-01343-WC-R3-WC - Filed July 27, 2010

Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. Wendy Blair ("Employee") sustained injuries as a result of a fall which occurred in the course of her work as a sales agent for Wyndham Vacation Ownership ("Employer"). The trial court found that she suffered permanent injuries to her neck and lower back due to the fall and that she had not made a meaningful return to work. The trial court awarded Employee 78% permanent partial disability ("PPD") benefits to the body as a whole. Employer has appealed from that judgment. We conclude that the trial court erred in its finding that Employee did not have a meaningful return to work. Consequently, we modify the judgment to award 19.5% PPD to the body as a whole.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court Modified

SHARON BELL, SP. J., delivered the opinion of the Court, in which SHARON G. LEE, J., and DONALD P. HARRIS, SR. J., joined.

Christopher Brown and Adam Russell, Knoxville, Tennessee, for the appellant, Wyndham Vacation Ownership.

George R. Garrison, Sevierville, Tennessee, for the appellee, Wendy Blair.

MEMORANDUM OPINION

Factual and Procedural Background

Employee was a sales representative for Employer, which operated a timeshare resort in Sevier County. She was injured on December 31, 2006, when she slipped and fell while exiting a bus that transported potential customers between Employer's sales office and the resort site. She filled out an incident report on the day the event occurred. The report states that she fell and "hit my lower back (full force) and my left forearm." At trial, she testified that she also struck her head as she fell. She did not request medical treatment at that time. She testified that she "thought I would go home and relax for a couple of days since we were off New Year's Day, and I would be better and ready to go to work."

When Employee returned to work on January 2, 2007, she requested medical attention. Employer referred her to Dr. Sandra Byrd.[1] Dr. Byrd took Employee off of work, and prescribed anti-inflammatory medications. Employee's condition did not improve. A magnetic resource imaging ("MRI") scan of her lumbar spine was performed on January 17, 2007. Employee testified that she began to have neck pain prior to that date. She testified that she called Dr. Byrd's office on January 12, 2007 to request that an MRI of her neck be scheduled also. Dr. Byrd did not testify and her records were not placed into evidence.

Employee was referred to Dr. Kent Sauter, a neurosurgeon, for further treatment. She first saw Dr. Sauter on February 6, 2007. At that time, she completed an "intake sheet" which requested basic personal information and information concerning her current injury and past medical history. On that document, Employee stated that her chief complaint was "lower back pain." Under "History," she wrote "12/31/06 - slipped & fell; the pain is in my low back; back muscles & rt. leg mainly; rest & medication helps some." Employee testified that she did not mention her neck on the intake sheet because her primary symptoms at the time were in her lower back. However, she also testified that she verbally told Dr. Sauter of her neck symptoms during the February 6, 2007 appointment.

Dr. Sauter testified by deposition. He stated that the January 16, 2007 MRI showed a disc herniation at the L2-3 level, on the left side. At that time, Employee's symptoms were primarily in her lower back and right leg. Dr. Sauter recommended physical therapy and epidural steroid injections. When she returned to him on February 27, 2007, neither treatment had occurred. Dr. Sauter testified that Employee first reported having symptoms in her neck and left arm at that appointment, and that she said those symptoms had started

[1] Sandra Byrd is referred to as a doctor at some places in the record, and as a nurse-practitioner in others. For the sake of clarity, we refer to her as Dr. Byrd throughout this opinion.

at the end of January. Her lower back and right leg symptoms continued. Dr. Sauter next saw Employee on April 24, 2007. At that time, she had undergone physical therapy and cervical traction, which had not improved her condition.

Dr. Sauter ordered an MRI of the cervical spine. This took place on May 10, 2007. The MRI, done on May 10, 2007, showed a herniated disc at the C4-5 level on the right side, and degenerative changes.[2] Her cervical spine symptoms were on the left side. Because the MRI findings in both the cervical and lumbar spine were on the opposite side of her symptoms, Dr. Sauter did not consider Employee to be a surgical candidate. He opined that her neck and arm problems were not related to the December 31, 2006 fall because of the length of time between the event and the onset of symptoms. He saw Employee on one more occasion, in June of 2007. Her condition had changed little.

Employee disagreed with Dr. Sauter's opinion concerning her neck. She requested and received from Employer a second panel of physicians from which she selected Dr. Hauge, whom she saw on one occasion. Dr. Hauge did not testify, and his records were not placed into evidence. Employee was then referred to Dr. Peter Vonderau, a physiatrist. Dr. Vonderau, by deposition, testified that he saw Employee on two occasions. The first appointment occurred on October 1, 2007. His diagnosis was generalized low back and lower extremity pain. He recommended additional physical therapy and placed "light-duty lifting restrictions" upon her. The second appointment was on November 5, 2007. At that time, he placed her at maximum medical improvement ("MMI"), and released her to full-duty work. He assigned 0% impairment for the lower back injury. He did not treat her neck problems and offered no opinions on that subject.

Dr. Vonderau was provided a copy of Employee's job description at or near the time of the October 1, 2007 appointment. Based upon that, he opined that the job complied with the restrictions he had placed upon Employee. On October 3, 2007, Jan Palmer, Employer's Human Resources Director, called Employee, and also sent a fax message to her to schedule her return to work. Employee did not think she was able to perform her job due to pain and declined to attempt to do so. On October 24, 2007, Ms. Palmer sent a letter to Employee describing their conversation of October 3, 2007 and advising Employee that she would be "administratively terminated for failure to return to work." The letter also advised Employee that she was eligible to apply for re-employment. Ms. Palmer also testified that, based upon her observation of sales representatives at work, Employee's job complied with Dr. Vonderau's restrictions.

[2] Employee had a spinal fusion at the C5-6 level in 1996, which was also reflected in this study.

Dr. William Kennedy, an orthopaedic surgeon, conducted an independent medical evaluation at the request of Employee's attorney. He concluded that she had sustained an aggravation of pre-existing degenerative changes in her cervical and lumbar spine as a result of the December 31, 2006 fall. He assigned 8% permanent impairment to the body as a whole for the cervical injury and 5% for the lumbar injury, for a total anatomical impairment of 13% to the body as a whole. He recommended that she avoid repetitive use of her arms, should not hold her head in a fixed position for long periods of time, should not work overhead, should avoid repeated bending, stooping or squatting, walking on rough terrain, and excessive stair climbing. He also imposed a twenty-pound lifting restriction. On cross-examination, Dr. Kennedy testified that Employee told him her neck pain began one week after the December 31, 2006 incident. He agreed that there was no objective medical evidence to explain her complaints of numbness and tingling in her left arm.

Ms. Palmer testified that Employee's job could be performed within the restrictions suggested by Dr. Kennedy.

At the time of trial, Employee was forty-six years old. She had an associates degree in nursing, and held a current nursing license in Georgia. She had worked as a "cardiovascular operating room nurse," from 1996 to 2002. She did not have a nursing license in Tennessee. She had a real estate agent's license in Tennessee, although she had only sold timeshares. She and her husband had owned and operated a motorcycle shop from 2000 until 2006. She had also worked for five years as a bank teller at an earlier time. She began working for Employer in April 2006. She had not worked since her injury. She was not asked if she had sought employment after her termination in October 2007.

Employee testified that she has constant stiffness and pain in her neck, with tingling and numbness in her left arm. She has difficulty handling small objects and described a tremor in her left hand. She described her lower back pain as constant, and stated that it is aggravated by sitting too long, hiking, and swimming. She does not consider herself capable of performing any of her previous jobs. Specifically, she does not think she can return to her job as a sales representative because her pain will interfere with her ability to interact with the prospective purchasers, and because showing the timeshare units often requires walking and climbing stairs.

The trial court found that Employee injured her neck and has lower back problems as a result of the December 31, 2006 fall at work, and awarded 78% PPD to the body as a whole. Employer has appealed, asserting that the trial court erred by determining that Employee's alleged neck injury arose from her employment and by finding that she did not make a meaningful return to work. In the alternative, Employer contends that the award is excessive.

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) (2008). When 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's demeanor and to hear in-court testimony. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315 (Tenn. 1987). A reviewing court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. *Ridings v. Ralph M. Parsons Co.*, 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

Compensability of Neck Injury

Employer argues that the evidence preponderates against the trial court's finding that Employee sustained a compensable neck injury. Employer points out that she did not mention hitting her head or injuring her neck in the incident report which she filled out on the day of the event. Similarly, Employer points to the intake sheet which Employee completed for Dr. Sauter on February 6, 2007, which refers to lower back and leg pain twice, but does not mention her neck. Employer also relies upon Dr. Sauter's testimony that Employee did not advise him of any neck problems until her second appointment with him, on February 27, 2007. Employer also argues that Employee has provided several different dates for the commencement of her neck pain: approximately one week after the accident (Dr. Kennedy's testimony); the end of January (Dr. Sauter's testimony); and around January 12 (her trial testimony).

Employee relies on her trial testimony that her neck and arm began to hurt shortly after December 31, 2006, that she did not mention those symptoms on the initial incident report because she didn't consider them to be important at the time, and that she didn't include them on Dr. Sauter's intake form because her lower back was her main problem at that time.[3] She relies upon the testimony of Dr. Kennedy that symptoms of the type of injury she sustained sometimes do not appear for two weeks or more after the precipitating event.

[3] The latter assertion is somewhat inconsistent with her trial testimony that she requested Dr. Byrd's office to schedule a cervical MRI on January 12, 2007.

Both sides presented credible expert medical evidence to support their opposing theories on this issue. The trial court based its finding that Employee injured her neck during the December 31, 2006 incident largely upon its assessment of the credibility of her testimony that she hit her head during the fall and that her neck and arm symptoms began shortly thereafter. Giving that finding the deference to which it is entitled on appeal, we find that the evidence does not preponderate against the trial court's decision on this issue.

Meaningful Return to Work

Employer contends that any award of PPD benefits to Employee should be limited to one and one-half times the anatomical impairment, pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A). That contention is based upon Employee's decision not to attempt to return to work after light duty restrictions were placed on her by Dr. Vonderau in October 2007. It is not disputed that Employer requested that Employee return to work at that time. Two witnesses, Dr. Vonderau and Jan Palmer, testified that the physical requirements of her job were within the restrictions imposed on her. Employee testified at trial that she did not believe that she was able to perform the job, either at that time or any time thereafter. She agreed that the job required essentially no lifting, stating that the only object she had to lift and hold was a clipboard. In defense of her decision, Employee testified that she believed she was unable to work the long hours required by the job. In that regard, she testified that she worked six or seven days per week, ten to twelve hours per day. That testimony was partially confirmed by Ms. Palmer, the Human Resources Director for Employer. Ms. Palmer described the workload as seasonal, agreeing that sales representatives often worked sixty or more hours per week during the spring and summer. However, she also testified that sales representatives often worked fewer than five days per week during the slow seasons. Employee took the position that the job required bending, specifically to speak to the children of prospective buyers. She testified that the job required climbing stairs, but agreed that elevators were available most of the time.

The gist of Employer's argument is that Employee acted unreasonably by failing to even attempt to return to work. In *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 328 (Tenn. 2008), the Supreme Court observed: "When determining whether a particular employee had a meaningful return to work, the courts must assess the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to either return to or remain at work." Applying that standard, the Court affirmed that trial court's finding that the employee did not have a meaningful return to work when his decision to retire was based in part on medical advice.

Employer contends that it acted reasonably, by offering a position to Employee which Dr. Vonderau found to be within her restrictions. It cites two recent panel cases which

follow *Tryon*, *Iacono v. Saturn Corp.*, No. M2008-00139-WC-R3-WC, 2009 WL 648962 (Tenn. Workers' Comp. Panel Mar. 12, 2009) and *Douglas v. Dura-Craft Millwork, Inc.*, No. W2008-02010-SC-WCM-WC, 2009 WL 3108740 (Tenn. Workers' Comp. Panel Sept. 29, 2009). In *Iacono*, the employee chose to accept a voluntary retirement offer while still receiving temporary disability benefits. The employer contended that it had work available within the permanent restrictions later placed upon him by his treating physician. The employee expressed a subjective belief that he would be unable to perform the job. The Panel affirmed the trial court's ruling that the employee's recovery was limited by the lower cap. In *Douglas*, the employee made a meaningful return to work, but was subsequently laid off due to a reduction in force. The employer offered him a different job, at the same rate of pay, but the employee declined. That Panel reversed the trial court's ruling that the lower cap did not apply, holding that the employee's refusal to attempt to return to work was not reasonable.

In this case, there is no evidence that Employee's decision not to attempt to return to work was based upon any medical advice or opinion. To the contrary, there is medical testimony, from Dr. Vonderau, that the position offered was within Employee's physical capabilities. Her decision was not based upon Dr. Kennedy's recommendations because his examination of her did not occur until two months later. Even taking Dr. Kennedy's testimony into account, there is nothing in his testimony which can be reasonably understood to express the opinion that Employee was unable to perform the job of a sales representative for Employer. In addition, there is lay testimony from Ms. Palmer that the job could be carried out within those restrictions.

It is possible that, if Employee had attempted to return to work, her injuries would have interfered with her ability to do her job, and Employer would have been unable to accommodate her limitations, or Dr. Vonderau or another physician may have concluded that she was not capable of that type of work. However, Employee did not attempt to return to work. Any conclusion about what might have happened is mere speculation. The medical evidence in the record, in our view, clearly supports the conclusion that Employer acted reasonably in offering to return her to work, and Employee acted unreasonably by declining that offer. Applying the *Tryon* standard, set out above, we therefore conclude that Employee had a meaningful return to work for the purposes of section 50-6-241(d)(1)(A) and her award of benefits is therefore subject to the one and one-half times impairment cap contained in that section. The award of PPD benefits will therefore be modified to 19.5% to the body as a whole. In light of this conclusion, it is unnecessary for us to address Employer's argument that the award was excessive.

Conclusion

The judgment of the trial court is modified to award 19.5% permanent partial disability benefits to the body as a whole to Employee. It is affirmed in all other respects. Costs are taxed one-half to the appellant, Wyndham Vacation Ownership, and its surety, and one-half to Wendy Blair, for which execution may issue if necessary.

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SHARON BELL, SPECIAL JUDGE