

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

December 14, 2009 Session

DONNA ISBELL v. JIMMY DEAN FOODS

Appeal from the Chancery Court for Dyer County
No. 07C254 Tony Childress, Chancellor

No. W2009-00378-WC-R3-WC - Mailed July 12, 2010; Filed August 16, 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. The employee alleged that she sustained a repetitive motion injury to her chest and back. Her employer denied liability. Three doctors testified concerning the issues of causation and permanency. The trial court found that the employee had sustained a compensable injury, and awarded 16% permanent partial disability ("PPD") benefits to the body as a whole. On appeal, the employer contends that the trial court erred by awarding any benefits. The employee contends that the award is inadequate. We agree with the employee and increase the award to 30% PPD to the body as a whole and otherwise affirm the judgment of the trial court.

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

JAMES F. BUTLER, SP. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, J., and DONALD P. HARRIS, SR. J., joined.

Kenneth R. Rudstrom and Mildred L. Sabbatini, Memphis, Tennessee, for the appellant, Jimmy Dean Foods.

Jay E. DeGroot, Jackson, Tennessee, for the appellee, Donna Isbell.

MEMORANDUM OPINION

Factual and Procedural Background

Donna Isbell (“Employee”) worked in Jimmy Dean Foods’ (“Employer”) food processing plant for approximately eighteen years. For the last five years of her employment, she operated a machine which produced sausage links. She testified that this job required her to push meat into the machine with one hand, while using her other hand to arrange sausage links as they left the machine. Every two hours, she would move to the opposite side of the machine, thus switching the tasks performed by her right and left hand. The job required repetitive twisting. Working on one side of the machine required her to be in a particularly uncomfortable position.

While working on January 4, 2007, Employee began to experience a sharp pain in her right side and chest. She advised her supervisor. The pain continued, and she went to the on-site nurse’s station. She told the nurse she thought her pain might be related to her gall bladder, but the nurse did not agree. Employee was able to finish her work shift. The next day, she visited her primary care physician, Dr. Allen Gooch. At that time she still believed her symptoms were being caused by her gall bladder.

Dr. Gooch testified by deposition. He ordered multiple diagnostic tests, including a CT scan, blood testing, a bone scan, and plain x-rays. The results of these tests were all normal. He ultimately concluded that Employee “had a repetitive motion pain, or a repetitive motion that was causing chest wall pain, musculoskeletal pain.” He opined this condition was caused by her work activities. Dr. Gooch placed several permanent restrictions upon her activities, including limiting her lifting to no more than twenty pounds on an occasional basis, no pushing or pulling, no repetitive motion, and no reaching. Dr. Gooch opined that Employee did not have “permanent disability” as a result of her condition. He explained that Employee had no limitation of motion, but “just had pain when she would start doing the repetitive motion.” Dr. Gooch opined Employee had not sustained permanent impairment, but admitted he did not consult any type rating manual in expressing that opinion.

Employer was unable to accommodate the restrictions placed upon Employee by Dr. Gooch. She was placed on leave status. After one year, she had not returned to work, and her employment was terminated. She testified that she had not worked since being placed on leave in January 2007. She had inquired at Wal-Mart, and she had also “looked on the internet to do computer there at the house. And I’ve done a partial thing with Goodyear. I’ve made it so many – through three or four steps.” She did not testify concerning any other attempts to find employment.

Dr. Samuel Chung testified by deposition. Dr. Chung, a physiatrist, conducted an independent medical examination of Employee on March 28, 2007 at the request of her attorney. He also examined the records of Dr. Gooch. He found that she had decreased range of motion in the thoracic area, tenderness at the T3 and T4 vertebrae on the right side, and numbness along the T4 dermatome on the right side. He opined that she had “residual from upper thoracic injury with ongoing symptomatology.” He also testified that “repetitive motion, especially using the upper thoracic area as frequently as [Employee] has, actually would be the causation of some of her symptoms.” Using the diagnosis-related estimate (“DRE”) section of the Fifth Edition of the AMA Guides, Dr. Chung assigned an 8% permanent anatomical impairment to the body as a whole for this condition. He recommended that Employee avoid “extensive stooping, squatting, bending, climbing, twisting and rotation of the upper back.”

Dr. Blake Chandler testified by deposition. Dr. Chandler, an orthopaedic surgeon, conducted an independent medical examination of Employee on July 19, 2007 at the request of Employer’s attorney. He reviewed the records of Dr. Gooch, and also ordered an MRI scan of Employee’s thoracic spine. Dr. Chandler testified that the study showed minimal degenerative changes, which he attributed to the aging process. He opined that she had chronic right chest wall pain. He “could not specifically relate it to a definitive work-related injury.” He further opined that she had no anatomical impairment as a result of the condition.

Employee was forty-three years old when the trial took place. She is a high school graduate. Prior to being hired by Employer, she had worked as a waitress and cook, and also in the shipping department of a clothing manufacturer. She had not worked since January 2007. She testified that several activities of daily living, including sweeping, vacuuming, washing windows, and pushing a lawn mower caused her to have increased pain in her right side. She said that she was also unable to throw a ball or go fishing.

The trial court issued a written decision. It found that Employee had sustained a compensable injury. It found her anatomical impairment to be 8% to the body as a whole, and awarded 16% PPD to the body as a whole. On appeal, Employer contends that the trial court erred by finding that Employee sustained a compensable injury, or in the alternative, by finding that Employee sustained permanent impairment and disability as a result of the injury. Employee contends that the award of PPD benefits is inadequate.

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' demeanor and to hear in-court testimony. Madden v. Holland Group of Tenn., Inc., 277 S.W.3d 896, 900 (Tenn. 2009). "When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues." Foreman v. Automatic Systems, Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

1. Causation

Employer contends that the evidence preponderates against the trial court's finding that Employee sustained a compensable injury. In support of that contention, it asserts that the results of the various diagnostic tests ordered by Dr. Gooch were normal. Employer concedes that an MRI scan showed degenerative changes in the thoracic spine, but points to the testimony of Dr. Chandler, who ordered the study, that those changes were minimal and likely related to the aging process. Employer further argues that Dr. Gooch's conclusion that Employee's pain was related to work activity was based upon unreliable evidence, specifically, her report to him that her symptoms greatly decreased when she not working. Employer argues that Employee's trial testimony concerning her continuing symptoms undermines the information upon which Dr. Gooch based his opinion.

In response, Employee notes that both Dr. Gooch and Dr. Chung considered her problems to be work-related. She further points to testimony of Dr. Chandler on cross-examination that repeated twisting activity could have caused or contributed to her condition, although, if that was the case, he would expect her symptoms to resolve when she stopped performing that activity.

In summary, the evidence before the trial court was that Employee had an acute onset of pain while at work. All of the physicians who testified stated that the types of symptoms which she reported were consistent with the type of activities required by her job. Dr. Gooch, the treating physician, placed significant permanent restrictions upon her activities as a result of his diagnosis. Dr. Chung's diagnosis differed in some respects from Dr. Gooch's, but he also attributed her condition to repetitive work activities. Dr. Chandler "could not specifically relate" Employee's symptoms, or the condition that caused them, to a particular work injury. However, he also testified that her symptoms were consistent with repetitive twisting, an activity which was indisputably part of Employee's job. Weighing this

evidence independently, as we are required to do, we are unable to conclude that it preponderates against the trial court's conclusion that Employee sustained a compensable injury.

2. Permanency/Extent of Disability

Both sides question the trial court's award of PPD benefits. Employer contends that the evidence preponderates against the finding that Employee had any permanent impairment as a result of her injury. Employee contends that the award does not adequately compensate her for the disability caused by her injury. In assessing the extent of an employee's vocational disability, a trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and her capacity to work at the kinds of employment available in her disabled condition. Tenn.Code Ann. § 50-6-241(2008); Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn.1990); Roberson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn.1986). Further, the claimant's own assessment of her physical condition and resulting disabilities cannot be disregarded. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn.1975); Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn.1972). The trial court is not bound to accept physicians' opinions regarding the extent of the employee's disability, but should consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 677 (Tenn.1983).

Employer relies primarily upon the testimony of Dr. Gooch (Employee's primary care physician) and Dr. Chandler that she did not have any assignable impairment under the AMA Guides. Employer dismisses Dr. Chung's testimony because it was based upon a section of the Guides concerning spinal injuries. It submits that Employee's own testimony, and the testimony of the two other physicians, demonstrate that she did not have any spinal condition related to her work, but a muscular problem of the chest wall. On that basis, it argues that use of a spine-based impairment was incorrect.

Employee points out that all physicians agreed that her symptoms were real. She notes that the symptoms commenced in January 2007, while she was at work, and that those symptoms limited her activities thereafter. While Dr. Gooch did not assign permanent impairment, he did place significant permanent restrictions upon her activities. In addition, Dr. Chung's examination revealed findings consistent with a thoracic spine problem. Employee notes that her work experience is limited to relatively unskilled jobs, that the restrictions placed upon her by Dr. Gooch conflict with many of the types of jobs available to her, and that her ongoing symptoms have limited her ability to perform many routine tasks of daily living. Our review of the record leads us to the conclusion that the trial court's assessment that Employee sustained a permanent disability is consistent with the law, and

supported by evidence.

Having concluded the Employee has sustained a compensable injury both in the course of and in the scope of her employment, and that her impairment is permanent, we now consider Employee's claim that the trial court's award was inadequate. Plaintiff is (now) a forty-four year old female who has a high school diploma. Her work history was that of a cook and waitress at a café, working in the shipping department of All Wear in Newbern, Tennessee, and eighteen years of employment with her Employer. Her prior job duties all involved manual labor. According to the trial court, she has limited transferrable job skills. After Dr. Gooch imposed permanent restrictions on her, Employer could not accommodate those restrictions, and one year later she was terminated. Employee has not been employed since the permanent restrictions were imposed. Dr. Chung also opined Employee should avoid extensive stooping, squatting, bending, climbing, twisting, and rotation of her upper back, because those activities can aggravate her condition as well as possibly cause a rupture in her back. Dr. Chandler felt her injury could be progressive in nature.

In accordance with our duty to independently weigh the evidence, we are persuaded that Employee's ability to earn wages has been more significantly impaired than is suggested by the trial court's award. We respectfully increase the award to 30% permanent partial disability to the body as a whole.

Conclusion

The judgment of the trial court is affirmed as modified herein. The costs are taxed to the Appellant, Jimmy Dean Foods and its surety, for which execution may issue if necessary.

JAMES F. BUTLER, SPECIAL JUDGE

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ORDER

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 fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed to the Appellant, Jimmy Dean Foods, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM