IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 15, 2010 Session

CHERYLE DARLENE GOODWIN v. UNITED PARCEL SERVICE, INC., ET AL.

Appeal from the Chancery Court for White County
No. 9952 Ronald Thurman, Chancellor

No. M2010-01134-WC-R3-WC - Mailed - January 26, 2011
Filed - April 14, 2011

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 sustained a compensable injury. She returned to work for her employer in the same job, at the same hourly wage. However, her earnings were reduced because she declined offers of additional work, which she had usually accepted before her injury. She declined these offers because she could no longer safely perform them. The trial court held that she did not have a meaningful return to work, and awarded benefits in excess of one and one-half times the impairment. Her employer has appealed, asserting that the trial court erred by finding that she did not have a meaningful return to work. We affirm the judgment.

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

JON KERRY BLACKWOOD, SR.J., delivered the opinion of the Court, in which CORNELIA A. CLARK, C.J., and WALTER C. KURTZ, SR.J., joined.

David T. Hooper, Brentwood, Tennessee, for the appellants, United Parcel Service, Inc. and Liberty Mutual Insurance Company.

Walter S. Fitzpatrick, III, Cookeville, Tennessee, for the appellee, Cheryle Darlene Goodwin.

MEMORANDUM OPINION

Factual and Procedural Background

Cheryle Goodwin ("Employee") was a "pre-load clerk" for United Parcel Service, Inc. ("Employer") at its Cookeville, Tennessee facility. Her primary job function was to receive packages with problems such as incorrect addresses, damage or leakage, and take necessary corrective action, such as determining the correct address, or repacking the contents. She usually worked about twenty-five hours per week at this job. In addition, she was qualified to work as a "cover driver," delivering packages when there were not enough regular drivers due to vacations, illnesses, etc. She sometimes made "Next Day Air" deliveries of packages for which the customer had paid a premium to have delivered by a particular time of day, and for "Saturday Air" deliveries, for which the customer had paid an additional premium for delivery on that day of the week.

Work as a cover driver, or making Next Day Air or Saturday Air deliveries was voluntary and was compensated at a higher hourly rate than Employee received as a pre-load clerk. Employees who desired such work received additional training, and were then placed on a list of qualified workers. When such work became available, it was offered to qualified employees on the basis of seniority. Each employee had the option to accept or decline an offered assignment.

Employee was injured while performing her normal pre-load clerk duties on February 12, 2007, when a box fell on her right arm, resulting in a crush injury to her right wrist. It is undisputed that the injury was compensable. Employee was initially referred to a primary care physician for treatment. She was then referred to Dr. Douglas Haynes, an orthopaedic surgeon. Dr. Haynes provided conservative treatment for a period of time, without significant improvement. On May 25, 2007, he performed a surgical procedure known as a "first dorsal compartment release." Employee's condition did not improve, and Dr. Haynes then referred her to Dr. Michael Milek, an orthopaedic surgeon who specializes in treatment of the hands and arms.

Dr. Milek ultimately recommended a second, more extensive surgical procedure. This took place on April 25, 2008. Employee had some improvement, but continued to have pain and weakness in her hand. After a period of recovery and physical therapy, she was released to return to work in October 2008. Dr. Milek assigned an anatomical impairment of 8% to the right arm, based upon loss of range of motion of the wrist. He placed no permanent restrictions on her activities. He prescribed a brace, which she wore while working and at other times.

Employee returned to her job as a pre-load clerk. She continued to be offered opportunities to work as a cover driver, but declined all such offers. She also declined all

offers to make Saturday Air deliveries. She accepted offers to make Next Day Air deliveries on four occasions during the year after her return to work. Employee testified that she declined the offers of delivery work because she had concerns about her ability to drive delivery vehicles which had manual transmissions, and to handle packages of up to seventy pounds, a requirement for delivery drivers. Employee's supervisor, Ann Shelton, testified that Employee told her, on at least some of the occasions that she turned down such work, that she was babysitting for her grandchildren. Ms. Shelton also testified that Employee had passed an annual check of her ability to drive a delivery truck (known as a "space and visibility review") shortly before trial, and had also passed a Department of Transportation physical.

Dr. Robert Landsberg performed an IME at the request of Employee's attorney on December 22, 2008. In his initial report, he opined that Employee had an impairment of 18% of the right arm, based upon a combination of loss of range of motion and loss of grip strength. He placed no permanent restrictions upon her activities.

Employer initiated the Medical Impairment Registry ("MIR") process. Dr. Michael LaDouceur, an orthopaedic surgeon, was selected to perform the examination, which occurred on March 26, 2009. Dr. LaDouceur's report was approved by the Commissioner of the Department of Labor and Workforce Development and filed with the trial court. Dr. LaDouceur opined that Employee had an anatomical impairment of 13% of the right arm. He used the same methodology followed by Dr. Landsberg. However, his measurements showed greater range of motion and diminished grip strength compared to Dr. Landsberg's.

Dr. Landsberg testified that Dr. LaDouceur had performed the examination correctly, but had incorrectly calculated the impairment resulting from Employee's loss of grip strength. He suggested that the error was one of either arithmetic, or misreading the table from the fifth edition of the AMA Guides used to determine grip strength impairment. Dr. Landsberg testified that, using Dr. LaDouceur's measurements, the correct grip strength impairment was 20% of the right arm. Dr. Landsberg testified that Dr. LaDouceur's calculation of the range of motion component of the impairment was correct, based upon the measurements in the MIR report. He opined that the correct impairment, based upon all of Dr. LaDouceur's measurements, was 22% of the right arm.

Employee testified that she was forty-nine years old. She had begun working for Employer in 1995, and continued to be employed there when the trial occurred. She was a high school graduate. She had previously worked in a factory, as a secretary and receptionist, as a manager at a fast food restaurant, and as a day care worker. She testified that she had pain in her hand and difficulty lifting and gripping. She agreed that she had frequently been offered work as a cover driver, but had declined for the reasons set out above. She said she

was unable to plant and tend a garden, which she had done before her injury. She also reported difficulty carrying a full laundry basket.

The trial court found that Employee had not had a meaningful return to work. It further found that she had rebutted the impairment rating in the MIR report by clear and convincing evidence, and that the correct impairment was 22% of the right arm. It awarded 65% permanent partial disability ("PPD") to the right arm. Employer has appealed, contending that the trial court erred by not utilizing the rating of the MIR physician, and by finding that Employee did not have a meaningful return to work.

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 to the trial court when the trial judge had the opportunity to observe the witness' 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

1. *MIR Impairment Rating*

Employer first contends that the trial court erred by finding that Dr. LaDouceur's impairment rating had been rebutted by clear and convincing evidence. It does not contest the arithmetic proposed by Dr. Landsberg. Rather, it argues that Dr. LaDouceur deliberately chose to assign a lower impairment for diminished grip strength because of discrepancies in the results of Employee's testing. Specifically, Employer argues that the results of the "rapid exchange" test varied significantly from the results of the "five-position" test, casting doubt on the consistency of Employee's effort. Employer suggests that Dr. LaDouceur chose the lower impairment because of that discrepancy. That is a plausible explanation for Dr. LaDouceur's conclusions. However, his written report does not contain any statement to that effect, and his deposition was not taken. In the absence of some substantive evidence that a deliberate choice was made because of discrepancies in the test results, Dr. Landsberg's

testimony that there was a simple calculation error stands unrebutted. For that reason, we are unable to conclude that the evidence preponderates against the trial court's finding that Dr. LaDouceur's rating was rebutted by clear and convincing evidence.

2. *Meaningful Return to Work*

Employer contends that the trial court erred in finding that Employee did not have a meaningful return to work. It notes that she has returned to her previous job as a pre-load clerk, and that her hourly rate of pay is actually higher than it was at the time of the injury. *Cf. Powell v. Blalock Plumbing & Electric*, 78 S.W.3d 893, 897 (Tenn. 2002) (defining "wage" as "the hourly rate of pay for any employee who is compensated on an hourly basis."), *superseded by statute on other grounds*, Act of June 11, 2010, ch. 1034, §§ 1-2, 2010-3 Tenn. Code Ann. Adv. Legis. Serv. 22, 22 (LexisNexis), *as recognized in Blake v. Nissan N. Am. Inc.*, No. M2009-02173-WC-R3-WC, 2010 WL 4513390 (Tenn. Workers' Comp. Panel Nov. 10, 2010). Employee contends that the trial court's finding is supported by several items of evidence. First, it is not disputed that she has worked fewer hours in her pre-load job, as a result of the economic slowdown. The amount of reduction is not clear from the record. Further, her overall earnings have diminished because she no longer accepts assignments as a cover driver, and has accepted only a few Saturday/Next Day Air assignments since her return to work. She contends that she is unable to perform those assignments due to her injury. In response, Employer points out that Employee passed an evaluation to remain on the list of employees eligible to accept cover driver and Saturday/Next Day Air assignments; that those opportunities continue to be offered; that no doctor has placed any restrictions upon Employee's activities; and that she continues to remain on the cover driver list, which prevents other, less senior employees from being placed there.

As the Supreme Court observed in *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 328 (Tenn. 2008):

> 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. The determination of the reasonableness of the actions of the employer and the employee depends on the facts of each case.

(Citations omitted). Recent panel decisions confirm that there is no bright line test to be applied in determining whether or not an employee has had a meaningful return to work. In *Patton v. Hartco Flooring Co.*, No. E2008-01829-WC-R3-WC, 2009 WL 3170391, at *7 (Tenn. Workers' Comp. Panel Oct. 1, 2009) an employee who returned to the same job but eventually transferred to a less strenuous, lower-paying job was held not to have a

meaningful return to work. In contrast, the employee in *Douglas v. Dura-craft Millwork, Inc.*, No. W2008-02010-SC-WCM-WC, 2009 WL 3108740, at *5 (Tenn. Workers' Comp. Panel Sept. 29, 2009), who declined an offer of a transfer to a different job based upon his subjective belief that he would not be able to perform it, was held to have a meaningful return to work. In *Blair v. Wyndham Vacation Ownership, Inc.*, No. E2009-01343-WC-R3-WC, 2010 WL 2943144, at *5-6 (Tenn. Workers' Comp. Panel July 27, 2010), an employee who declined to attempt to return to her job within medical restrictions based upon her subjective belief that she could not perform it was also held to have a meaningful return to work.

In the case before us, there is no question Employee returned to work for her Employer as a pre-load clerk, and was paid at a slightly greater hourly wage than she had received at the time of the injury. Prior to her injury, she had worked twenty-five, and sometimes more, hours per week in that position. After her return, she was asked to limit her hours to twenty-five per week. This change was not related to her injury, but to economic conditions. Moreover, the effect of the limitation on her actual income is not clear from the record. Prior to her injury, she had also regularly accepted extra work as a cover driver and Saturday/Next Day Air driver. After her return, she accepted no extra work as a cover driver, and only a few offers to work as a Saturday/Next Day Air driver. Those jobs, especially the cover driver job, required her to lift and carry packages as heavy as seventy pounds, without assistance. While she also had to handle heavy packages as a pre-load clerk, other employees were nearby to assist her, if necessary. Such assistance would not be readily available to her, as a cover driver.

Applying the *Tryon* standard, we conclude that the evidence supports the conclusion that Employer acted reasonably in its attempts to provide Employee with cover driver and Saturday/Next Day Air assignments after she returned to work. We also conclude that the evidence supports the conclusion that Employee acted reasonably in declining those assignments, based upon her evaluation of the residual effects of her injury on her ability to perform those assignments. The trial court determined that the employee was a credible witness. The trial court was presented with a close question on the meaningful return to work issue. We are unable to conclude that the evidence preponderates against its decision.

Conclusion

The judgment is affirmed. Costs are taxed to United Parcel Service, Inc., and Liberty Mutual Insurance Company and their sureties, for which execution may issue if necessary.

_____

JON KERRY BLACKWOOD, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

CHERYLE DARLENE GOODWIN v. UNITED PARCEL SERVICE, INC. ET AL.

Chancery Court for White County
No. 9952

No. M2010-01134-SC-WCM-WC - Filed - April 14, 2011

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by United Parcel Service, Inc. and Liberty Mutual Insurance Company pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), 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 United Parcel Services, Inc. and Liberty Mutual Insurance Company and their sureties, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Cornelia A. Clark, J., not participating