IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
September 26, 2001 Session

MARTHA I. JOHNSON v. KNOX CO. BOARD OF EDUC., ET AL.

Direct Appeal from the Chancery Court for Knox County
No. 99-141825-2 Daryl R. Fansler, Chancellor

No. E2000-02513-WC-R3-CV - Mailed -November 9, 2001
Filed : December 17, 2001

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 hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court found the plaintiff is totally and permanently disabled and further found the Knox County Board of Education liable for 60 percent of the award and the Second Injury Fund liable for 40 percent. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court is Affirmed

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which E. RILEY ANDERSON, J., and ROGER E. THAYER, SP. J., joined.

Paul G. Summers, Nashville, Tennessee, for the appellant Second Injury Fund.

Stephen E. Yeager, Knoxville, Tennessee, for the appellees Knox County Board of Education and Tennessee School Boards Association.

Thomas S. Scott, Jr., Knoxville, Tennessee, for the appellee Martha I. Johnson.

MEMORANDUM OPINION

Review of the findings of fact made by the trial 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); *Stone v. City of McMinnville,* 896 S.W.2d 548, 550 (Tenn. 1995). Questions of law are reviewed *de novo* without a presumption of

correctness. *Peace v. Easy Trucking Co.*, 38 S.W.3d 526 (Tenn. 2001).

Facts

The plaintiff was 39 years of age at the time of trial. She did not complete high school and did not pass the GED exam. She completed nursing training and took courses in business technology through the Tennessee Technology Center. She is not married and has one child.

The plaintiff had various medical conditions prior to the injury–sustained in 1998–at issue in this case, including dyslexia, epilepsy (which she had from birth), a back sprain sustained in 1990 while working as a nurse's assistant, and a prior back injury suffered while working for the defendant School Board in 1993, and a stroke-like episode in 1996 caused by toxic levels of Dilantin in her system. In addition, the plaintiff suffers from choreoathetosis or truncal ataxia, a condition that causes her to have involuntary movements.

When the plaintiff first went to work for the defendant School Board in December of 1991, she listed the previous back injury that she sustained while working for a nursing home. She also described her epileptic condition. The plaintiff did, however, in her application state that she suffered no disability resulting from the injury at the nursing home or from the epilepsy and that she could perform her duties as a custodian.

As a result of the 1993 injury, the plaintiff received temporary total benefits and medical payments. She returned to work but did not claim any permanent disability benefits from this injury.

In 1995 or 1996, the plaintiff suffered a toxic episode from a build-up of Dilantin in her system. The effect on the plaintiff was similar to a stroke. As a result of this episode, the plaintiff lost control over her left side, experienced a lack of feeling in her feet, and her left arm became drawn up. The plaintiff was hospitalized for this and was treated for a considerable time. After some recovery from the episode, the plaintiff wished to return to work. Her doctor released her to return to work, but placed restrictions in her written release. When the plaintiff presented her written medical release to William Anderson, III, the person who reviewed medical reports, he told the plaintiff she could not return to work with the restrictions.

The plaintiff then persuaded her doctor to remove the restrictions and she returned to Mr. Anderson, who allowed her to return to work. Mr. Anderson testified "if the doctor sends a slip and says no restrictions, then I have to let them back to work." Mr. Anderson testified he knew the plaintiff was not able to do her work before the injury of 1998, which is the subject of this case. When asked if she was unable to do the job prior to the 1998 injury he responded, "no doubt about it." Mr. Anderson testified "the only reason I kind of buried my head to it [the disabilities of the plaintiff] was she had been a good employee." He went on to explain she needed to work and others helped her.

All parties agree the School Board had a written policy of not allowing anyone with medical

restrictions to be hired initially by the School Board or to be retained after being injured while already employed by the Board. Mr. Anderson was, in effect, the gatekeeper for implementing this policy. It was his duty to inform an employee they could not return to work after an injury. He could not, however, fire an employee who was not able to perform his or her work.

Discussion

All the parties agree the plaintiff was 60 percent disabled as a result of the compensable injury of June 9, 1998, and that she was 40 percent disabled because of her previous injuries and medical problems. The only issue is whether the School Board is able to call upon the Second Injury Fund for payment of the 40 percent disability as a result of the plaintiff's previous injuries.

The purpose of the Second Injury Fund is to encourage employers to hire handicapped persons or retain them after discovering the employee has a physical disability. *See Brown v. John Martin Constr. Co.*, 642 S.W.2d 145 (Tenn. 1982). The trial judge found, all parties agree and the facts show that this case falls under the provisions of Tennessee Code Annotated section 50-6-208(a)(1). An essential requirement for liability on the part of the Fund under this section is that the employer must have had actual knowledge of the pre-existing condition. The answer here turns on whether the knowledge Mr. Anderson had of the plaintiff's condition prior to the 1998 injury constitutes knowledge of the School Board. We think it does.

Further, we find the fact that Mr. Anderson knew of the disabilities is sufficient to allow the School Board to claim contribution from the Second Injury Fund.

There is no evidence that the plaintiff attempted to conceal her previous injuries. She initially returned a medical report to the supervisor which showed she had limitations. The supervisor advised her she could not return to work with written restrictions. The plaintiff then persuaded her physician to give her another report without fixing restrictions, and the supervisor then allowed the plaintiff to return to work.

Clearly the supervisor knew the plaintiff was unable to perform her job when she returned with the restriction-free medical report. The record shows he knew the plaintiff was unable to perform the job she was assigned. He testified he allowed the plaintiff to return to work because the plaintiff was a good employee and needed the work and that other employees helped her to perform her duties. The supervisor took the position at trial that if the restrictions were not in writing he had to allow the person to return to work. The supervisor, in his "gatekeeper" role on whether a person could be employed who had been previously injured or who could be retained after injury while in the employment of the defendant, had no authority to discharge a person who could not do the job. According to him, only the superintendent of schools could do this.

We hold that knowledge of a supervisor, who has been given authority by the Board to determine whether a previously injured or disabled person or employee can be employed by the Board or retained to work after an injury, is knowledge to the Board within the meaning of the

Second Injury Act, and that the Board may invoke the benefits of the Second Injury Fund in this case.

The plaintiff shall receive benefits until she reaches age 65 in accordance with the judgment entered by the trial court, with the Board to pay 60 percent and the Second Injury Fund to pay 40 percent of the award.

The cost of this appeal is taxed to the Second Injury Fund.

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JOHN K. BYERS, SENIOR JUDGE

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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.

Costs on appeal are taxed to the defendant appellant, Second Injury Fund for which execution may issue if necessary.

12/17/01