IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 24, 2001 Session

LOUANA KLOPFENSTEIN v. WINDWOOD HEALTH REHAB CTR., ET AL.

Direct Appeal from the Circuit Court for Anderson County
No. 99LA0087 James B. Scott, Judge

No. E2000-02706-WC-R3-CV - Mailed - July 31, 2001
FILED: OCTOBER 18, 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.

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

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which WILLIAM M. BARKER J., and WILLIAM H. INMAN, SR. J., joined.

David M. Sanders, Knoxville, Tennessee, for the appellants, Windwood Health Rehab Ctr., et al.

Roger Ridenour, Knoxville, Tennessee, for the appellee, Louana Klopfenstein.

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). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

Discussion

The trial court found the plaintiff had suffered a seventy percent permanent partial disability to the right leg and held that Windwood Health Rehab Center was liable for compensation to the plaintiff. The defendant Windwood Health Rehab Center says the trial court erred in not finding the defendant Clinch River Home Health Inc. liable under the last injurious injury rule. We affirm the judgment of the trial court

Facts

On January 2, 1998, the plaintiff was working for the defendant Windwood when she fell in a shower while assisting a patient and suffered an injury to her right knee. Windwood did not contest the compensability of the injury. Windwood furnished medical care to the plaintiff. She was off from work for a "few weeks," returned to work for a "few weeks" without restriction and left the employment of Windwood after about "two weeks." The plaintiff went to work for the defendant Clinch River in March of 1998. The plaintiff testified that on February 12, 1999, she was giving a patient a bath in the patient's home which required that the patient be placed on a shower chair. According to the plaintiff she heard her knee pop and crack as she was performing this task.

The plaintiff testified she went from the patient's home back to Clinch River and reported this incident to Linda Darland, a secretary/receptionist. The plaintiff testified she told Linda Darland that she was at work and her knee began to hurt and swell up. She testified Ms. Darland made a doctor appointment for her. She was treated by Dr. Malagan, who had treated her previously, until he referred her to Dr. Cletus J. McMahon, Jr., an orthopedic surgeon. Ms. Darland testified the plaintiff never told her that she had injured herself while working for Clinch River. She denied making an appointment for the plaintiff with a doctor. Ms. Darland testified the plaintiff would tell her that her knee hurt and that she believed it was caused by an accident at her previous employment. Ms. Darland said the plaintiff never told her she was hurt while working for Clinch River.

Joyce Chattin, the director of nursing at Clinch River, testified the plaintiff came to her on February 12, 1999, and brought a note from a doctor that limited the plaintiff to lifting no more than thirty pounds. The plaintiff told Ms. Chattin not to worry that the cause of her problem happened at a place of previous employment.

Pamela Sue Obenshain, executive director at Clinch River, testified she talked to the plaintiff after February 12, 1999, and that the plaintiff could not point to any specific incident while working for Clinch River which caused an injury to her right knee. The plaintiff told Ms. Obenshain she thought the work for Clinch River aggravated the previous injury.

Medical Evidence

Dr. Cletus J. McMahon, Jr. an orthopedic surgeon first saw the plaintiff on February 24, 1999, when she was referred to him by Dr. Malagon. After testing of the plaintiff's right knee, Dr.

McMahon diagnosed her problem as a tear of the medial meniscus and chondromalacia to the right patella (softening of the articular cartilage). Dr. McMahon was of the opinion the cause of the plaintiff's knee problems was the fall of February 24, 1999. He opined she had sustained a seven percent permanent partial impairment to her right leg as a result of the injury. He fixed permanent restrictions of "being careful about squatting, doing bent knee activities such as going up and down stairs." Dr. McMahon was questioned closely by Windwood about whether the plaintiff reported to him an injury on February 12, 1999 while working for Clinch River. He testified she only talked about lifting patients but not about a specific injury. Dr. McMahon's testimony on whether there was a second injury and to the effect upon the plaintiff is so far speculative as to have no value in determining the issue raised in this case.[1]

Discussion

There is no question that the holding of the Court in *McCormick v. Snappy Car Wash*, 806 S.W.2d 527 (Tenn. 1991) that when an employee has had a previous injury for one employer and then sustained a subsequent injury while employed with a successive employer, the successive employer is liable for the entire disability caused by the subsequent injury. Whether there is a subsequent injury while in the employment of the successive employer is, however, a question of fact to be determined by the trial judge from the evidence presented in the case.

The testimony of the witnesses who testified before the trial judge, with the exception of the plaintiff, testified the plaintiff never told them she hurt herself while working for Clinch River. The plaintiff's testimony on whether there was an accidental injury on February 12, 1999 is less than certain at most; she told the doctor the work might have aggravated the injury she received while working at Windwood. The trial judge found testimony of the witnesses that there was no new injury while the plaintiff worked for Clinch River more credible.

Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

We find the evidence does not preponderate against the finding of the trial judge that no new injury occurred on February 12, 1999 and that the last injurious injury rule does not apply in this case.

Windwood argues that the award of seventy percent loss of use of the right leg found by the trial judge is excessive. This argument is based upon the fact the doctor only found a seven percent medical impairment and the restrictions placed upon the plaintiff were minimal. Further, Windwood argues the plaintiff has returned to work.

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[1] We have reviewed the deposition of Dr. Craig R. Colvin, a specialist in vocational rehabilitation and do not find it relevant to the issue raised in this case.

The determination of the amount of loss of use of a scheduled member when the loss is less than total is difficult to quantify. A worker does not have to show vocational disability or loss of earning capacity to be entitled to the benefits for loss of use of a scheduled member. *Duncan v. Boeing Tenn., Inc.*, 825 S.W.2d 416 (Tenn. 1992). The applicable rule is simple when there is a total loss of use of a scheduled member because the Workers' Compensation Act provides for the amount of compensation to be awarded in such cases. When the loss of use is less than total, the determination of the amount to which the worker is entitled to recover is less certain. For the most part, the issue is best resolved by the trial judge in the exercise of discretion after hearing all the evidence in the case. On review, we would not disturb such findings unless there is a clear showing of an abuse of that discretion.

We find the trial judge did not abuse his discretion in awarding the plaintiff seventy percent impairment to her right leg.

The cost of this appeal is taxed to Windwood.

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JOHN K. BYERS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

LOUANA KLOPFENSTEIN, Appellee v.
WINDWOOD HEALTH REHAB CENTER, ET AL., Appellants

Circuit Court for Anderson County
No. 99LA0087 James B. Scott, Jr., Judge

No. E2000-02706-WCM-R3-CV

JUDGMENT
Filed: October 18, 2001

This case is before the Court upon Applicant's motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well-taken and should be DENIED; 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 will be assessed to Winwood Health Rehab Center for which execution may issue if necessary.

PER CURIAM

Barker, J., not praticipating