IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
July 2003 Session

DARCUS WILLIAMS v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

Direct Appeal from the Circuit Court for Davidson County
No. 01C-3538 Walter C. Kurtz, Judge

No. M2002-03038-WC-R3-CV - Mailed - January 28, 2004
Filed - March 1, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with *Tenn. Code Ann.* § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The employer appeals the trial court's judgment that the employee suffered an injury arising out of and in the course and scope of her employment when the employee left her work station to go to a break area on the employer's premises to hand some money to her friend to repair her car and slipped in a puddle of water and injured her back as she was about to re-enter the building. The employee contends that the trial court erred in finding the employee suffered only a 20% anatomical impairment and a 40% vocational disability for this injury. The panel has concluded that the judgment of the trial court should be affirmed.

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

JAMES L. WEATHERFORD, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JOE C. LOSER, SP.J., joined.

Aundreas Wattley-Smith, Nashville, Tennessee, for the appellant Metropolitan Government of Nashville and Davidson County, Tennessee Acting By and Through The Electric Power Board Through Said Government a/k/a Nashville Electric Service.

Jerry D. Mayo, Nashville, Tennessee, for the appellee Darcus Williams.

MEMORANDUM OPINION

Ms. Darcus Williams was 42 years old at the time of trial. She is a single mother with two children ages 25 and 11. She graduated from high school and has taken college courses. She had

worked as a file clerk for a bank and a university before she began working for Nashville Electric Service ("NES") in July 1987 as a clerk typist. She had also worked for 5 years at the Hyatt Regency as a reservations agent and catering coordinator. Ms. Williams also worked a second part-time job during holidays and other times during her employment with NES.

The main NES building has a back entrance with a concrete porch and a chain link fence beside it. There is a picnic table in this area and employees take breaks there and use this area to smoke. It is also a poplar area for employees to be dropped off and picked up from work. Employees use this entrance to go to other buildings on the NES property. According to Ms. Williams, it is common practice for employees to stand on the porch and receive items such as lunch, papers, money or clothes from friends or family members who are on the outside of the fence. NES security guards or supervisors had never told her that this activity was prohibited. Mr. Robert Mansolino, NES employee safety and health manager, testified: "I think it's pretty common for employees to go out that back door to carry on business or go to their personal vehicle or whatever." He was not aware of any NES rule prohibiting employee use of this area.

On December 28, 2000, Ms. Williams had problems with her car and had a friend drop her off at work. During work hours she needed to give some money to her friend to get her car repaired. She arranged to meet him at the chain link fence near the back door of the main NES building so she could hand him the money. At about 10:30 a.m. she left her workstation and went down to deliver the money. After giving the cash to her friend at the fence, she turned and reached for the door to the building when she slipped in a puddle of a slimy, watery substance and fell. Her friend called the security guard and she reported to the nurses' station complaining of low back pain that radiated to her left leg.

A January 4, 2001, MRI indicated a lumbar disc protrusion. After conservative treatment failed, Dr. Thomas O'Brien, an orthopedic surgeon, performed a 2-level laminectomy and fusion. Her pain and radicular symptoms did not resolve and a second MRI showed scar and granulated tissue surrounding the nerve root.

Dr. O'Brien found that she had sustained a 13% anatomical impairment rating.[1] He stated that he expected her to "have some ongoing permanent discomfort in her leg as a result of scarring and intrinsic nerve damage present pre-operatively." He imposed permanent restrictions of "no lifting greater that 25 pounds and limited bending and stooping." He felt she could return to her job as a clerk typist.

Dr. David Gaw, an orthopedic specialist, performed an independent medical evaluation and assigned a 22% anatomical impairment rating to the body as a whole based on the AMA Guides 5th Edition. He disagreed with Dr. O'Brien's 13% rating because Dr. O'Brien did not utilize the range

[1] Dr. O'Brien acknowledged that he did not follow the AMA Guides' range of motion protocols because he felt it would not give a valid impairment rating due to Ms. Williams' inconsistent results on her functional capacity evaluation.

of motion method as required by the Guides for this type of injury. He advised Ms. Williams to avoid long static positions, avoid frequent twisting, bending, or being in awkward positions, and not lift more than 50 pounds occasionally or 25 frequently. Dr. Gaw thought she could return to her job as a clerk typist.

NES referred Ms. Williams to Dr. Keith Nichols, a pain management specialist, for an evaluation of post-surgical pain. He found Ms. Williams had "failed back syndrome." He did not assign an impairment rating but stated that a person with a 2 level fusion such as Ms. Williams would have at least a 20% anatomical impairment. While he thought Dr. O'Brien's impairment rating was incorrect, he also testified that Dr. Gaw failed to test the validity of Ms. Williams' range of motion tests according to the Guides. He felt she could return to her employment.

On May 11, 2001, Ms. Williams returned to work half days and resumed full time work on July 9, 2001. In August of 2001, NES brought disciplinary charges and sought termination for "unsatisfactory attendance and reporting of those absences." She was suspended for 3 days without pay and put on probation. In May of 2002, NES again filed charges and sought termination for absences and not providing doctor's excuses. Ms. Williams was suspended from work on June 7, 2002 and her civil service hearing is scheduled in December 2002. Her primary care physician, Dr. Stephen May, testified that he had treated Ms. Williams from January 22, 2001 until June 3, 2002 for various conditions including abdominal pain, sore throat, urinary and bowel problems, and sinus congestion.

According to Ms. Williams, stress from pain and harassment at work caused her pre-existing fibromyalgia condition to become worse, and she also had to see a therapist. She also developed gastrointestinal problems from taking pain medication for her back injury . She feels that she could not work on a regular full time basis when she had flare-ups of back pain. She currently works out of her home as a phone solicitor for the Association of Retarded Citizens of Davidson County.

The trial court found that Ms. Williams had suffered an injury arising out of and in the course and scope of her employment when she fell at NES. The trial court found that she sustained a 20% anatomical impairment and a 40% vocational disability to the body as a whole. Because her vocational disability did not exceed 2 ½ times her anatomical impairment rating, the trial court found that the issue of meaningful return to work was moot.

ANALYSIS

Review of findings of fact by the trial court shall be *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, 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. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances. *Humphrey v. David Witherspoon, Inc*., 734 S.W.2d 315 (Tenn. 1987).

When the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Insurance Co. of North America*, 884 S.W.2d 446, 451 (Tenn. 1994).

The employer contends that the trial court erred in finding that Ms. Williams sustained a compensable injury arising in and out of the course and scope of her employment with NES.

In a workers' compensation case, the plaintiff has the burden of proving every element by a preponderance of the evidence. *Tindall v. Waring Park Ass'n*, 725 S.W.2d 935, 937 (Tenn. 1987). In order to be eligible for workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." *Tenn. Code Ann*. § 50-6-102(12). "In the course of" refers to the time, place and circumstances of the injury, while "arising out of" refers to causation. The causation requirement is satisfied if the injury has a rational, causal connection to the work. *Loy v. North Bros. Co.,* 787 S.W.2d 916, 918 (Tenn. 1990); *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997)

In *Carter v. Volunteer Apparel, Inc.*, 833 S.W.2d 492, 495 (Tenn. 1992)(holding that an employee who fell in a break area before her shift began suffered a compensable injury[2]) the Tennessee Supreme Court stated:

> [E]mployees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred or unless the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.
>
> 833 S.W.2d at 495 (quoting 1A Larson, Workmen's Compensation Law, § 21 (1990)).

The trial court found: "that the action of Ms. Williams of going outside to handle person[al] business on company property is not unreasonable or unusual, nor is it a departure that would infer that Ms. Williams intended to abandon her job." The court also noted that in doing so she was not violating any explicit rule of the employer. We agree with the trial court that the employee's actions in this case do not significantly differ from going outside to smoke or eat lunch in a company provided break area.

---

[2]In *Carter*, the Court noted that the employer had acquiesced in the custom of pre-work breaks. *Id.* at 494. In this case the employer was aware that employees commonly used this area to "carry on business" and did not prohibit such activities in this area.

The trial court also found that Ms. Williams was injured by a condition under her employer's control and while on the employer's premises. At the time of the accident she was walking in an area provided by the employer and encountering the same hazard and ordinary risk of employment (the puddle of water) that she normally would entering the building to go to work, taking break time or carrying out duties of her job.

The evidence does not preponderate against the trial court's finding that Ms. Williams sustained an injury arising out of and in the course and scope of her employment with NES.

The employee asserts that the trial court should have found that she sustained a 22% permanent partial impairment to the body as a whole and awarded more than 40% vocational disability.

In its 18 page memorandum order, the trial court reviewed the impairment ratings and medical testimony and found: 1) that Dr. O'Brien did not adhere to the AMA Guides; 2) that Dr. Gaw did not test the validity of Ms. Williams' range of motion results; and 3) that while Ms. Williams had impairment and residual symptoms she also overstated her impairment. The trial court took these factors into consideration in finding that Ms. Williams had a 20% anatomical impairment to the body as a whole.

When medical testimony differs, it is within the discretion of the trial judge to determine which expert testimony to accept. *Kellerman v. Food Lion, Inc.,* 929 S.W.2d 333, 335 (Tenn. 1996). Upon reviewing the medical testimony in this case, we find that the evidence supports the trial court's finding as to anatomical impairment.

The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony *Tenn. Code Ann.* § 50-6-241; *Worthington v. Modine Manufacturing Co.*, 798 S.W.2d 232, 234 (Tenn. 1990). The assessment of this disability is based on all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work at the types of employment available in his disabled condition. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 678 (Tenn. 1991). The test is whether there has been a decrease in the employee's capacity to earn wages in any line of work available to the employee. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d at 459.

All of the physicians agreed that Ms. Williams could return to her job. The trial court found that she was "still capable of significant employment." In finding that Ms. Williams had sustained a 40% vocational disability, the trial court stated:

> The Court believes that Ms. Williams has overstated her incapacity to work and her pain. Her self-reported limitations are inconsistent with the testimony of the physicians in this case. In addition, plaintiff is computer literate

and has had a significant amount of varied employment experiences in the secretarial/clerical field.

The trial court was in the best position to judge the credibility of the witnesses. We find that the trial court weighed the proper factors in assessing vocational disability. The evidence does not preponderate against the trial court's finding that Ms. Williams sustained a 40% vocational disability due to her work-related back injury. The issue of meaningful return to work is pretermitted as we have upheld the trial court's ruling of 40% vocational disability which is less than 2 ½ times the 20% anatomical impairment rating.

CONCLUSION

The judgment of the trial court is affirmed. Costs are taxed to the appellant.

_____

JAMES L. WEATHERFORD, SR. J.

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

DARCUS WILLIAMS v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

Circuit Court for Davidson County
No. 01C-3538

No. M2002-03038-WC-R3-CV - Filed - March 1, 2004

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 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 paid by the appellant, Metropolitan Government of Nashville and Davidson County, Tennessee Acting By and Through The Electric Power Board Through Said Government a/k/a Nashville Electric Service, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM