

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

March 17, 2014 Session

**RHONDA KYLE v. VOLUNTEER HOME CARE
OF WEST TENNESSEE, INC.**

**Appeal from the
Chancery Court for McNairy County
No. 8797 Martha B. Brasfield, Chancellor**

No. W2013-01892-WC-R3-WC - Mailed July 3, 2014; Filed August 7, 2014

An employee sustained a work-related injury to her back while working as a nursing assistant for her employer. The employee received medical care, returned to work, but experienced pain in performing her job. Two years later, the employee resigned, citing back pain related to her work. After an unsuccessful Benefit Review Conference, the employee filed an action for workers' compensation benefits. The trial court determined that the employee did not make a meaningful return to work following her injury and awarded permanent partial disability benefits in excess of one and one-half times the employee's anatomical impairment rating. The employer appealed, arguing that the trial court erred by concluding that the employee did not make a meaningful return to work. After a thorough review of the record, we 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**

J. S. "STEVE" DANIEL, SP.J., delivered the opinion of the Court, in which JANICE M. HOLDER, J., and DON P. HARRIS, SP.J., joined.

P. Allen Phillips, Jackson, Tennessee, for the appellant, Volunteer Home Care of West Tennessee, Inc.

Art D. Wells, Jackson, Tennessee, for the appellee, Rhonda Kyle.

OPINION

Factual and Procedural Background

From May 2006 until March 2012, Rhonda Kyle worked as a private duty certified nursing assistant for Volunteer Home Care of West Tennessee (“Volunteer”). In her position with Volunteer, Ms. Kyle provided Volunteer’s home-bound patients with daily care, which included meal preparation, bed-changing, bathing, laundry, and routine housekeeping. On October 28, 2009, Ms. Kyle felt a stabbing pain in her back after she tried to turn a patient during a bath. She reported the injury to her supervisor and was referred to an orthopedic surgeon for treatment. Ms. Kyle’s physician ordered her to remain off work for several months. In January 2010, Ms. Kyle’s physician released her to return to work on a light-duty basis, and in March 2010, she was permitted to return to full-duty work. Ms. Kyle continued working for Volunteer for the next two years. In March 2012, Ms. Kyle resigned from her position with Volunteer due to her persistent back pain. Ms. Kyle subsequently filed a claim for workers’ compensation benefits with the Department of Labor. After the parties failed to resolve the claim during a Benefit Review Conference, Ms. Kyle filed the present action on June 2, 2011, in the Chancery Court for McNairy County, Tennessee. The case proceeded to trial on July 19, 2013.

At trial, Ms. Kyle testified that she was fifty-one years old and had graduated from high school. Ms. Kyle also testified that she became a certified nursing assistant in 2005 and had received additional training to administer medications. Ms. Kyle detailed her employment history, which consisted primarily of factory work. Ms. Kyle explained the circumstances surrounding her October 28, 2009 injury and recounted her return to work for Volunteer in March 2010. Ms. Kyle testified that she returned to work in the same position she held prior to her injury. She worked with several patients after her return but continued to have back pain.

In early 2012, Ms. Kyle began looking for substitute employment and received an offer of employment from another home health care agency, Nicholas Matters. Ms. Kyle accepted the position with Nicholas Matters and submitted her written resignation to Volunteer on March 27, 2012. Ms. Kyle’s resignation letter was introduced at trial and states, “I am writing to inform you that I cannot continue my employment at Volunteer Home Care. The physical requirements of my job with Volunteer cause[] me significant pain in my back.” Ms. Kyle testified that at the time she resigned in March 2012, she saw three patients on a regular basis. One was a hydrocephalic child. Ms. Kyle initially had no trouble lifting that patient, but lifting the child became more difficult as the child gained weight. The second patient was an adult male who required assistance with bathing and dressing. According to Ms. Kyle, the most difficult aspects of working with him were bending over to make his bed, vacuuming, and mopping. Ms. Kyle’s third patient had severe Alzheimer’s

disease, was bedridden, and required lifting on and off of her potty chair. Ms. Kyle testified that her back pain made lifting the third patient difficult.

Ms. Kyle further testified that she has been a private-duty, certified nursing assistant for Nicholas Matters since she left Volunteer in March 2012. At the time of trial, Ms. Kyle's only patient was an autistic woman. Ms. Kyle explained that unlike her patients at Volunteer, her patient at Nicholas Matters does not need to be lifted and can walk on her own. Ms. Kyle further testified that she continues to experience back pain, but her pain is less frequent since resigning from Volunteer.

Ms. Kyle introduced the transcript of Dr. Masterson at trial. In his deposition, Dr. Masterson testified that he first saw Ms. Kyle on November 9, 2009, and that he initially diagnosed her as having a lumbar sprain or strain. He ordered Ms. Kyle off work and initiated a course of conservative treatment, including medication and physical therapy. Over the following weeks, Ms. Kyle's condition did not improve, and on December 12, 2009, he ordered an MRI of Ms. Kyle's spine, which revealed "facet arthropathy" at the L3-4, L4-5 and L5-S1 levels. Dr. Masterson described "facet arthropathy" as a mild arthritic condition that involves the knuckle-like bones at the back of the spine. Dr. Masterson prescribed a work-hardening program. On December 22, 2009, Ms. Kyle underwent a functional capacity evaluation (FCE). Dr. Masterson reviewed the results of the FCE and in January 2010, permitted Ms. Kyle to return to work with restrictions of no lifting over 20 pounds from the floor to her waist or from her waist to her chest. He also recommended that she not stoop, bend, or twist. Ms. Kyle subsequently returned to work for Volunteer, where she was given a desk in Volunteer's office and was required to read medical materials. On March 8, 2010, Ms. Kyle returned to Dr. Masterson for a follow-up appointment. Although she was still experiencing pain in her lower lumbar region, Ms. Kyle indicated that she would like to "try to give it a go" at her work. Dr. Masterson assented to Ms. Kyle's request, deemed her to be at maximum medical improvement, released her to return to work with no restrictions and assigned no permanent impairment at that time.

Dr. Samuel Chung, a physiatrist, examined Ms. Kyle on November 8, 2010, at the request of her attorney. The transcript of Dr. Chung's deposition was also introduced at trial. In his deposition, Dr. Chung agreed with Dr. Masterson's diagnosis of facet arthropathy. Dr. Chung opined, however, that Ms. Kyle retained a 3% impairment to the body as a whole from her work injury. Dr. Chung testified that Ms. Kyle was capable of performing most of the activities required of a CNA. He opined, however, that Ms. Kyle should not lift or turn patients who weighed 200 pounds or more, which was a requirement of the Volunteer job description.

After hearing the evidence, the trial court issued its findings from the bench. The trial court found that Ms. Kyle was a credible witness and concluded that both physicians also

found Ms. Kyle to be credible. The trial court determined that Ms. Kyle did not have a meaningful return to work because she continued to have back pain, she complained about that pain to her supervisor, and Volunteer took no action to address those complaints. The trial court therefore determined that Ms. Kyle's permanent partial disability award was not subject to one and one-half cap prescribed by Tennessee Code Annotated section 50-6-241(d)(1)(A) (2008). The trial court adopted Dr. Chung's impairment rating of 3% and awarded 12% permanent partial disability to the body as a whole. Volunteer timely appealed, asserting that Ms. Kyle voluntarily resigned from her employment after a meaningful return to employment and that the trial court therefore erred by awarding benefits in excess of the cap.

Standard of Review

Courts reviewing an award of workers' compensation benefits must conduct an in-depth examination of the trial court's factual findings and conclusions. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). When conducting this examination, Tennessee Code Annotated section 50-6-225(e)(2) (2008) requires the reviewing court to "[r]eview . . . the trial court's findings of fact . . . 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." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). However, the reviewing courts need not give similar deference to a trial court's findings based upon documentary evidence such as depositions, Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006); Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004), or to a trial court's conclusions of law, Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

The sole issue in this appeal is whether the trial court erred by awarding benefits in excess of one and one-half times the medical impairment in accordance with Tennessee Code Annotated section 50-6-241(d)(1)(A) because Ms. Kyle voluntarily resigned from her employment.

Statutory Cap

Tennessee Code Annotated section 50-6-241(d)(1)(A) provides in part:

For injuries occurring on or after July 1, 2004, in cases in which an injured employee is eligible to receive any permanent partial disability benefits either for body as a whole or for scheduled member injuries, . . . and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability benefits that the employee may receive is one and one half (1 1/2) times the medical impairment rating determined pursuant to the provisions of § 50-6-204(d)(3). In making the determinations, the court shall consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities and capacity to work at types of employment available in claimant's disabled condition.

Thus, when an employee “has the opportunity to return to his place of employment at the same or greater wage,” the employee's award of permanent partial disability benefits is limited to one-and-one-half times her medical impairment rating. Williamson v. Baptist Hosp. of Cocke Cnty., 361 S.W.3d 483, 488 (Tenn. 2012). In contrast, when an injured employee is not returned to work by the employer at a wage equal to or greater than her pre-injury wage, the employee may receive an award of permanent partial disability benefits up to six times her medical impairment rating. Tenn. Code Ann. § 50-6-241(d)(2)(A); Williamson, 361 S.W.3d at 488. “When the employee has made a ‘meaningful return to work,’ the lower cap of one-and-one-half times the impairment rating applies.” Id. (quoting Nichols v. Jack Cooper Transp. Co., 318 S.W.3d 354, 361 (Tenn.2010)).

The concept of a “meaningful return to work” guides the determination of whether the lower statutory cap applies in a given case. Id. As the Supreme Court has explained:

The circumstances to which the concept of meaningful return to work must be applied are remarkably varied and complex. 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.

As a result of extensive litigation over the concept of meaningful return to work in the context of claims for permanent partial disability benefits, we have the benefit of many decisions in which this Court and the Appeals Panel have addressed whether a particular employee has had a meaningful return to work. These decisions provide that an employee has not had a meaningful return to

work if he or she returns to work but later resigns or retires for reasons that are reasonably related to his or her workplace injury.

Tyron, 254 S.W.3d at 328-29 (citations omitted). When determining whether an employee has had a meaningful return to work, “[t]hree factors guide the analysis: (1) whether the injury rendered the employee unable to perform the job; (2) whether the employer refused to accommodate work restrictions arising from the injury; and (3) whether the injury caused too much pain to permit the continuation of the work.” Williamson, 361 S.W.3d at 488 (citations and internal quotation marks omitted).

In this case, the trial court determined that Ms. Kyle continues to have back pain due to her injury and that she informed Volunteer of the pain on a number of occasions. As the trial court stated at the conclusion of the trial, “[A]lthough [Volunteer] knew [Ms. Kyle] had hurt her back on the job[,] . . . [it] didn’t ask any questions . . . about this back injury. I think if someone had known or had gone through the process, [Ms. Kyle] would have been sent to Dr. Masterson, but it didn’t happen.” Ms. Kyle was familiar with the requirements of her job and attempted for almost two years to meet those requirements. During that time, her work caused her persistent back pain on a daily basis. Ms. Kyle advised her supervisor and her physician of those problems, but nothing in the record suggests that Volunteer offered or was capable of offering a modified-duty position. Based on our review of the record, we are unable to conclude that the evidence preponderates against the trial court’s finding that Ms. Kyle did not have a meaningful return to employment. We therefore affirm the judgment of the trial court.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Volunteer Home Care of West Tennessee, Inc., and its surety, for which execution may issue if necessary.

J. S. “STEVE” DANIEL, SPECIAL JUDGE

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JUDGMENT 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 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 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, Volunteer Home Care of West Tennessee, Inc., and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM