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

DIANA J. NEESE v. SHONEY'S INC.

Direct Appeal from the Circuit Court for Putnam County
No. 01N-0039 John A. Turnbull, Judge

No. M2002-01277-WC-R3-CV - Mailed - July 2, 2003
Filed - September 30, 2003

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. In this case, the trial court found that the employee had sustained a 75% vocational disability to each extremity for bilateral carpal tunnel syndrome caused by her work activity. The employer argues that this award is excessive and preponderates against the evidence. For the reasons set out in this opinion, we affirm the judgment of the trial court.

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 FRANK F. DROWOTA, III, C.J., and JOE C. LOSER, JR., SP.J., joined.

Mark A. Baugh, Nashville, Tennessee, for the appellant, Shoney's Inc.

Kelly R. Williams, Livingston, Tennessee, for the appellee, Diana J. Neese.

MEMORANDUM OPINION

Ms. Diana Neese was 51 years old at the time of trial. She has a ninth grade education, but later earned her GED in 1984. She lives in rural Tennessee near the border of Clay County and Overton County, although she has a Hilham, Tennessee street address.

She has worked primarily as a cook for retirement centers and a public school system since she started working in 1960. She has worked as a backline cook for several fast food restaurants. She has also worked as a cashier, an assembly line worker, and child care worker.

In August of 1999, Ms. Neese began working at Shoney's in Cookeville as a salad bar attendant. In this job, she was responsible for maintaining the salad bar by carrying out trays of food, big pots of soup, bowls, and plates.

In February of 2000, Ms. Neese started experiencing problems with her hands: "My hands and arms were hurting, going numb and tingling, and I kept dropping things." She stated she had never had any problems with her hands or wrists prior to February of 2000.

On March 22, 2000, she saw her primary care physician, Dr. Mauricio, complaining of numbness in her arms, which started at her elbow. Dr. Mauricio, then referred her to Dr. Robert Nelson. On April 17, 2000, Dr. Nelson diagnosed Ms. Neese with bilateral carpal tunnel syndrome.

On April 28, 2000, Ms. Neese informed Mr. Jimmy Price, manager at Shoney's, that she had carpal tunnel syndrome. Dr. Nelson performed surgery on her right wrist on May 31, 2000 and operated on her left wrist on June 30, 2000.

On November 7, 2000, Ms. Janet K. Patterson, physical therapist administered Ms. Neese's functional capacity evaluation. Ms. Patterson indicated that Ms. Neese would not use her fingers for fine motor tasks, would take frequent rests and would not use her arms for reaching more than 30 seconds at a time during the test. According to Ms. Patterson, test results indicated 1) inconsistent or sub-maximal effort on grip strength and push tests; and 2) that her heart rate did not correlate with reported levels of pain.

On November 16, 2000, Dr. Nelson released Ms. Neese to return to work light-duty and assigned restrictions of no lifting over 10 to 12 pounds and no repetitive lifting of 5 to 7 pounds on a regular basis, and no repetitive motions with her hands. Ms. Neese returned to Dr. Nelson on January 2, 2000, still complaining of some pain in her hands with weakness and numbness. Dr. Nelson found she had reached maximum medical improvement and assigned the same restrictions on a permanent basis. Dr. Nelson found that Ms. Neese has sustained a 30% permanent partial impairment to each hand.

Dr. Nelson indicated there are different factors that relate to the level of pain you can expect from patients after a bilateral carpal tunnel release. He listed one factor as what the surgeon finds at the time of surgery----"[F]or instance, in her case where I described that the median nerve as it was coming underneath that ligament, it was really adherent or adhered to the ligament, ... I had to do what is called a neurolysis, which means that you have to take a nerve once you kind of separate it off the ligament and actually try to release pressure on the individual fibers of the nerve. In her case that was necessary. Sometimes that is not necessary. So, all of that has to do with the prognosis of what you expect the future to be for that particular patient."

As to Ms. Neese's prognosis, Dr. Nelson stated ".... essentially on both sides [of] the median nerve I found that she had quite a bit of compression on the nerve. So, from that standpoint, I felt that she may not recover as much as some do that have that type of surgery. So, I was a little bit

concerned about her prognosis at that time." According to Dr. Nelson, he expected her to have pain in her wrists with activities like "meal preparation and house cleaning.....just for activities of daily living essentially that you have to do....that is when I expect her to have the most problems."

In January of 2001, Ms. Neese returned to work at Shoney's as a hostess. According to Ms. Neese, she quit after she worked for only 13 hours over a 3 week period—"they really didn't have me on the schedule in January. I just – I would go in, and if they needed me, I could work. If not, they sent me home." She was not getting enough hours to make it financially feasible to continue working at Shoney's given the length of her commute to Cookeville.

On May 31, 2001, Dr. Paul Abbey, orthopedic surgeon, examined Ms. Neese for an independent medical evaluation. Dr. Abbey found that she had sustained 10% impairment to both the right and left upper extremity as a result of bilateral carpal tunnel syndrome. Dr. Abbey found that "she was limited to grasping on a repetitive basis no more than 10 pounds, but frequently can lift from 15 to 20 pounds." He concluded that she had "positive clinical findings of median nerve dysfunction, electrical conduction delays, impairment due to residual carpal tunnel" and based his rating on sensory and motor deficits. Dr. Abbey confirmed that Ms. Neese was able to return to work at Shoney's in some capacity.

Mr. John Whitaker, vocational case manager for GENEX Services, performed a transferrable skills analysis based on Ms. Neese's work history and medical restrictions. Mr. Whitaker did not meet or interview Ms. Neese. Mr. Whitaker concluded there were jobs available to Ms. Neese within a 30 mile radius of her residence to based on statistics from the Tennessee Employment Security Department for Overton, Putnam, and Jackson counties. Mr. Whitaker found that she "would be eliminated from no more than 55% of the jobs she was previously capable of performing."

Dr. Julian Nadolsky, vocational rehabilitation expert for the plaintiff, found that Ms. Neese was 100% vocationally disabled. He found Ms. Neese's reading ability to be low average and her arithmetic skills to be borderline. In manual dexterity tests, Ms. Neese had considerable difficulty grasping small pieces and frequently dropped them. Her measurement of dexterity fell "well below the first percentile."

Dr. Nadolsky testified as follows:

Q. Now Doctor, on page 5 of your report, it's your opinion that on the basis of her performance during the dexterity testing, Ms. Neese does not have sufficient use of her arms to perform the day-to-day duties of any occupation in the competitive labor market, and she would therefore be 100% disabled for work.

A. Yes.

Q. On Page 4, you said that there were several jobs that she could do?[1]

A. I said it was based upon - on page 4, it was based upon the limitations that were placed upon her by Dr. Nelson and Dr. Abbey, in assuming that she has no greater than below average to inferior manual and finger dexterity. ...

But based upon the actual test results, she is well below the first percentile on everything and definitely has inferior - not between below average and inferior, but definitely inferior manual and finger dexterity. She would be a 100% disabled.

Ms. Neese has not applied for other employment since leaving Shoney's. Ms. Neese stated that she still has pain in her wrists and has trouble sleeping. She cannot do embroidery anymore because she is unable to hold a needle. She has trouble with earrings and buttons and tying her shoes. She has trouble with household chores and with holding things. She has trouble even holding a cigarette and has burn marks on her clothes. Ms. Neese stated that she is unable to do any of the job activities of her former employment due to her injury and restrictions. These tasks included serving food, cooking food, washing dishes, mopping the floor, and other basic kitchen work.

Ms. Neese's son, Mr. Shane Neese, testified that his mother was always a hard worker and steadily employed prior to her injury of February, 2000. She has trouble with household chores and has to ask for help and often drops things.

The trial court awarded Ms. Neese a 75% vocational disability to each extremity.

ANALYSIS

Our 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 correctness, unless the preponderance of the evidence is otherwise. *Tenn. Code Ann.* § 50-6-225(e)(2). 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). Conclusions of law are reviewed *de novo* without any presumption of correctness. *Ivey v. Trans Global Gas & Oil*, 3 S.W.3d 441, 446 (Tenn. 1999).

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).

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[1] Jobs available to Ms. Neese based on her medical restrictions included usher, ticket taker, surveillance system monitor, a gate tender, school crossing guard, hostess, flagger, information clerk, and an order caller. In his analysis, Dr. Nadolsky defined local area labor market as a 13 county-wide area or Upper Cumberland Plateau.

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 defendant raises the sole issue of whether the trial court's finding of 75% vocational disability to each extremity is excessive and preponderates against the evidence.

In assessing the extent of an employee's vocational disability, the trial court may consider the employee's age, education, skills and training, local job opportunities, anatomical impairment ratings, and the capacity to work at the types of employment available in her disabled condition. *Walker v. Saturn Corp.*, 986 S.W.2d 204, 208 (Tenn. 1998). The test is whether there has been a decrease in the employee's ability to earn wages in any line of work available to the employee. *Corcoran* at 459.

The trial court considered the appropriate factors in assessing vocational disability. The trial court noted that both physicians had found that her post-op EMG test was still positive and that she still had some nerve involvement. The trial court found Mrs. Neese's testimony regarding her condition to be credible. The trial court was in the best position to evaluate the credibility of the witnesses.

The defendant's expert, Mr. Whitaker, testified at trial. He concluded that she was eliminated from 55% of the jobs that had been available to her prior to her injury. [2] Dr. Nadolsky found that Ms. Neese was 100% vocationally disabled.

The trial court did not find Ms. Neese to be 100% disabled. The trial court found that her job opportunities were very limited because of her medical restrictions. In spite of her limitations, he found that she could do such jobs as telemarketer. The trial court noted that while she could perform such jobs as an usher, ticket taker, school crossing guard, etc. that these jobs were limited in her area.

After considering the appropriate factors, the trial court chose to set the vocational disability rating at 75%. After reviewing the record in this case and giving deference to the trial court's finding as to Ms. Neese's credibility, we find that the evidence does not preponderate against the finding of the trial court as to vocational disability.

CONCLUSION

[2] The appellant argues that the trial court erroneously focused on where Ms. Neese lived in determining local labor market and criticized Mr. Whitaker for not being familiar with where she lived. The trial court did question the accuracy of the report as to 1) whether Cookeville was within a 30 mile radius of Ms. Neese's residence which is near the border of Clay County and Overton County and 2) why Clay County was not included in the report. We find no error on the part of the trial court.

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

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JAMES L. WEATHERFORD, SR. J.

IN THE SUPREME COURT OF TENNESSEE
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No. M2002-01277-SC-WCM-CV - September 30, 2003

JUDGMENT

This case is before the Court upon a motion for review filed by Shoney's, Inc., 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 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 Shoney's, Inc., for which execution may issue if necessary.

PER CURIAM

Drowota, C.J., not participating.