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

FILED

June 5, 1998

Cecil W. Crowson
Appellate Court Clerk

LINDA LOU SHANK,	)	
	)	
Plaintiff/Appellee	)	RUTHERFORD CHANCERY
	)	
v.	)	NO. 01S01-9709-CH-00189
	)	
WAL-MART STORES, INC.,	)	HON. ROBERT E. CORLEW, III,
	)	CHANCELLOR
Defendant/Appellant	)	

For the Appellant:

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For the Appellee:

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M E M O R A N D U M O P I N I O N

Members of Panel:

Justice Frank F. Drowota, III
Senior Judge John K. Byers
Special Judge William S. Russell

AFFIRMED

BYERS, Senior Judge

OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court 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.

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 court in a workers' compensation case. *See Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452, 456 (Tenn. 1988).

In this case, the plaintiff brought suit against the defendant Wal-Mart, alleging she was entitled to workers' compensation benefits as a result of a back injury and sinus injury sustained in the course of her employment.

The trial court found the plaintiff's sinus injury was not compensable[1] but the plaintiff's back injury was compensable, awarding her 38 percent permanent partial disability to the body as a whole, temporary total disability benefits, and unpaid medical benefits for the services of Dr. Rex Arendall.

_____The defendant appeals and presents the following issues:

> "I. Pursuant to *Tennessee Code Annotated* § 50-6-102(a)(5) and the facts of this case, the proof at trial preponderates against the trial court's finding that the plaintiff's back injury was causally related to the accident she reported of April 26, 1994.
>
> II. The trial court erred in finding that the plaintiff's back injury was subject to the six (6) times multiplier in *Tennessee Code Annotated* § 50-6-241(b) rather than the two and one-half (2 ½) times multiplier in *Tennessee Code Annotated* § 50-6-241(a)(1).
>
> III. The medical care of Dr. Rex Arendall was unauthorized and should not have been awarded by the trial court.
>
> IV. The trial court erred in refusing to admit into evidence release from work slips provided to defendant by the plaintiff and which were included in and became a part of her personnel file."

We affirm the judgment of the trial court.

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[1] The plaintiff did not appeal the decision of the trial court with respect to her sinus injury. Therefore, the sinus injury will only be discussed for a clear understanding of her back injury.

FACTS

The plaintiff, age 39 at the time of trial, has a GED and no further vocational training. Before moving to Tennessee, the plaintiff lived in Michigan and performed a variety of jobs, all of which involved bending, stooping, twisting, and lifting 25 to 30 pounds and up to 80 pounds.

In May 1993, the plaintiff went to work for the defendant Wal-Mart as a stocker in the receiving department in Smyrna, Tennessee. As a stocker, she unloaded trucks, then delivered the merchandise to the pallets for the different departments, and then put the freight away. This work required her to lift up to 80 pounds.

The plaintiff testified she was stocking merchandise for the defendant on April 26, 1994 when a boxed chain saw fell from a pallet two or three feet above her and struck her on the left side of the face. She said her head, nose, and eye all hurt immediately. The plaintiff attempted to avoid the box by turning to the right, but she twisted her back as she was knocked to the concrete floor. She testified she experienced immediate back pain.

A co-worker, who took the plaintiff to the emergency room at Smyrna Medical Center, testified the plaintiff's only complaints of pain at the time of the accident were with regard to her head and face. The plaintiff testified her primary concern was her face because that injury was obvious and because her head and eye were giving her a throbbing headache.

After the accident, the plaintiff took off work for four or five days but returned to work for the defendant until the second week of June 1994. In June 1994, the plaintiff saw Dr. Gary Schwartz and Dr. Stephen Patten for complaints of mid to low back pain.

When the plaintiff resumed her work as a stocker, she continued to experience back pain which radiated into her legs. The plaintiff testified she was working for the defendant on June 13, 1994 when, as she carried four heavy paint cans up a ladder, she began to cough and feel a sharp pain in her back so severe that it took her breath away. She further testified this incident exacerbated her back pain. In August 1994, the plaintiff saw Dr. J. Wills Oglesby and told him about this coughing spell and the resulting low back pain.

Ms. Bronwen Wiezenhut, a workers' compensation rehabilitation consultant employed by the defendant's insurance carrier, testified her job is to make sure injured workers get proper medical treatment to assist them in returning to their previous duties. In managing the plaintiff's case, Ms. Wiezenhut was responsible for scheduling her appointments with doctors and overseeing her medical care.

However, the plaintiff and her husband testified Ms. Wiezenhut would cancel appointments and schedule them with another doctor; she would be late for appointments or go to the doctor without the plaintiff; she would forget important documents, as she did when she failed to take the MRI report to Dr. M. Robert Weiss; and she did not offer alternative health care to the plaintiff when she found out that Dr. Patten had referred her to Dr. Rex Arendall, informing the plaintiff instead that Dr. Arendall's care would not be covered by workers' compensation.

Furthermore, the plaintiff testified Ms. Wiezenhut did not offer her a panel of three physicians for her back injury. Instead, the plaintiff said Ms. Wiezenhut referred her to Dr. Oglesby for her back injury without mentioning she could select from a panel of two other physicians. On the other hand, Ms. Wiezenhut testified she faxed a list of three physicians to the insurance company, which then offered the plaintiff a panel of physicians for her back injury. Ms. Wiezenhut lacked any personal knowledge that the plaintiff was given a list of physicians and her testimony about this was based on inadmissible hearsay evidence, which the trial judge did not consider.

Beginning October 17, 1994, the plaintiff returned to work for the defendant where she sat on a stool and answered the telephone all day. The plaintiff testified she could not sit for prolonged periods because her back pain would radiate across her hip and down the back of her legs. She said she asked the defendant for a chair with back support but was told the stool was the only chair available. The last day the plaintiff worked for the defendant was October 19, 1994, staying only half of that day because the pain in her back was too severe.

The plaintiff's husband went to Wal-Mart on October 19, 1994 to voice his dissatisfaction with the physicians the defendant had provided to his wife because she was not getting any relief from her constant pain. Cynthia Avent, the defendant's personnel manager who is responsible for keeping the workers' compensation files,

confirmed through a note in the plaintiff's file that Mr. Shank had complained about the provided physicians. Ms. Avent further testified that subsequent to this note neither Wal-Mart nor Ms. Wiezenhut offered the plaintiff any additional health care.

Upon a referral from Dr. Patten, the plaintiff went to see Dr. Arendall on October 19, 1994 with complaints of low back pain. At Dr. Arendall's office, the plaintiff filled out a history of injury form on which she indicated that her injury was not job or accident related. She testified she did this because Ms. Wiezenhut had told her workers' compensation would not pay any more of her medical bills. The plaintiff and her husband testified they knew Dr. Arendall's care would not be covered by workers' compensation. They also testified Dr. Arendall knew her injury was work related from the very beginning.

In November 1994, Dr. Arendall performed back surgery on the plaintiff, and he took her off work for the next 11 months while she recuperated. Through December 1995, the plaintiff had follow-up visits with Dr. Patten and Dr. Devyani Sanders and continued to obtain work release slips.

The plaintiff testified that since these injuries she cannot clean her house, mow her lawn, enjoy the athletic and outdoor activities she did before the accident, or sit for prolonged periods of time. The plaintiff testified and the defendant confirmed she is still employed by Wal-Mart, but she has not worked since October 19, 1994.

In addition, the plaintiff testified she had never suffered from low back pain prior to the accident at work. The plaintiff testified she saw a chiropractor for neck adjustments and obtained work release slips from him while working in Michigan in 1990 and 1991, but she said she never saw him for back pain.

MEDICAL PROOF AND TESTIMONY

The medical records indicate that Dr. Gary Schwartz saw the plaintiff several times in June for complaints of mid-back pain. Dr. Schwartz could not find anything wrong with the plaintiff's back, so he referred her to Dr. Stephen Patten.

Dr. Patten became the plaintiff's treating physician, seeing her for the first time on June 10, 1994 for complaints of mid to low back pain which radiated into her legs. He ordered an MRI, performed on July 11, 1994, which indicated a mild diffuse disc bulge at L4-5 with apparent small herniation. Dr. Patten continued to treat the

plaintiff after her back surgery in November 1991 until he moved to Georgia. Then, Dr. Devyani Sanders took over Dr. Patten's treatment of the plaintiff.

_____Dr. J. Wills Oglesby, an orthopedist, saw the plaintiff on August 8, 1994 and recorded a history from her that she had a coughing spell on June 13, 1994 and thereafter developed severe left side low back pain. Dr. Oglesby placed her in a physical therapy and work hardening program, but he later noted this activity aggravated her back pain.

_____Dr. M. Robert Weiss, a neurosurgeon, performed an independent medical examination of the plaintiff on September 20, 1994. He also recorded a history of the coughing spell leading to her back pain. Dr. Weiss noted he needed to review the plaintiff's MRI, which he termed "reportedly negative." He opined she may return to work without restrictions.

Dr. Rex Arendall, a board certified neurosurgeon, testified by deposition. Dr. Arendall first saw the plaintiff on October 19, 1994 for complaints of low back pain with radiation into the left leg. At this time, Dr. Arendall said he was not given any history of the plaintiff's work accident on April 26, 1994. But, he also said the plaintiff told him that she wrote workers' compensation was not applicable on the history of injury form because she thought her coverage had been cut off.

Dr. Arendall diagnosed her with degenerative disc disease and performed a microscopic lumbar laminectomy on November 3, 1994. Dr. Arendall recognized an MRI, which indicated a herniated disc at L4-5, had been done as early as July 11, 1994. His notes and post-surgery tests indicated the plaintiff was continuing to have pain because of a lasting nerve impingement. He found she should be permanently restricted from repetitive bending, stooping, lifting over 25 pounds, or standing/sitting in one static position for prolonged periods. Dr. Arendall testified the plaintiff was off work for 11 months under his care and her condition would carry a medical impairment of ten percent to the body as a whole under the *AMA Guides.*

Based on her counsel's request, Dr. Arendall released copies of the plaintiff's file and the history of injury form dated October 19, 1994. Counsel then asked Dr. Arendall to give an opinion on causation. In a responsive letter dated February 16, 1995, Dr. Arendall stated based upon the history given by the plaintiff, as well as the

prior history given to the other treating physicians, he could not say the lumbar injury was related to the alleged incident with any degree of medical certainty.

On February 5, 1996, the plaintiff submitted a revised history of injury form to Dr. Arendall. In his medical deposition, Dr. Arendall opined on direct examination the plaintiff's injury was causally related to the April 26, 1994 incident if he based his opinion on the revised history of injury form rather than the initial history given by the patient. He further testified both the episode of the chain saw box falling on her and the coughing spell while holding heavy paint cans could cause a disc to rupture.

On cross-examination, Dr. Arendall stated based upon the initial history given by the plaintiff he could not say with any degree of medical certainty her disc herniation was caused by her work accident on April 26, 1994. When posed with the hypothetical of her work accident with the boxed chain saw, he testified on redirect examination this was the most likely cause of her disc injury.

Dr. Lloyd A. Walwyn, a board certified orthopedic surgeon, also testified by deposition. Dr. Walwyn saw the plaintiff for an independent medical evaluation on November 28, 1995 at the request of her counsel. He reviewed her medical records; took a medical history from her, which included a description of her work related accident and resulting symptoms; and examined her. To a reasonable degree of medical certainty, Dr. Walwyn diagnosed her with a surgically treated lumbar disc herniation with post surgical residual symptoms, which was consistent with her work injury on April 26, 1994.

Dr. Walwyn stated the plaintiff was at maximum medical improvement and her back condition would restrict her ability to lift, carry, push, or pull, to perform repetitious squatting, twisting, bending, or stooping, and to sit, stand, climb, or walk for prolonged periods. He opined the plaintiff would have a ten percent whole person permanent impairment based on her back injury, which was caused by her work accident.

Dr. Richard E. Fishbein submitted a C-32 form and later testified by deposition. He performed an independent medical evaluation of the plaintiff and agreed with Dr. Arendall and Dr. Walwyn in their impairment rating of ten percent for her back injury. Based on a reasonable degree of medical certainty, Dr. Fishbein

opined the most probable cause of the plaintiff's ruptured disc was when she twisted to avoid the boxed chain saw from striking her.

ANALYSIS

The Back Injury

The first issue raised by the defendant is whether the proof at trial preponderates against the trial court's finding that the plaintiff's back injury was causally related to the work accident she reported of April 26, 1994.

_____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(a)(5). The phrase 'arising out of' refers to causation. The causation requirement is satisfied if the injury has a rational, causal connection to the work. *Reeser v. Yellow Freight Sys., Inc.,* 938 S.W.2d 690, 692 (Tenn. 1997) (citations omitted).

Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have thus consistently held that an award may properly be based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when there is also lay testimony from which it may be reasonably inferred that the incident was in fact the cause of the injury. *Id.*

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). In this case, as in all workers' compensation cases, the claimant's own assessment of his physical condition and resulting disabilities is competent testimony and cannot be disregarded. *Tom Still Transfer Co. v. Way,* 482 S.W.2d 775, 777 (Tenn. 1972).

The defendant submits causation in this case is highly speculative and controverted based on the medical proof. The defendant says the plaintiff's first complaint of back pain after the April 26, 1994 accident was not until June 1994 to

Dr. Schwartz and other medical reports showed the plaintiff's back pain began after a coughing spell.

Further, the defendant points out that Dr. Arendall opined the plaintiff's injury was causally related to the April 26, 1994 incident only if he based his opinion on the revised history of injury form, which was written by the plaintiff's counsel. On cross-examination, Dr. Arendall stated based upon the initial history given by the plaintiff he could not say with any degree of medical certainty there was a causal connection between the work accident and her back injury.

In addition, the defendant says the opinions on causation of Dr. Walwyn and Dr. Fishbein, who only saw the plaintiff once for an independent medical evaluation, depended upon the reliability of the history they received from the plaintiff. The defendant urges this Court to give more weight to Dr. Arendall's opinion because he was one of the plaintiff's treating physicians.

After a careful review of the record, we note the medical testimony shows that Dr. Arendall, Dr. Walwyn, and Dr. Fishbein all testified there was a causal relationship between the work accident on April 26, 1994 and her back injury. Although Dr. Arendall's opinion on causation was based upon a revised history of injury form submitted by the plaintiff, we find two uncontroverted facts in his testimony to be significant: (1) he testified the plaintiff told him that she wrote workers' compensation was not applicable on the history of injury form because she thought her coverage had been cut off, and (2) he reviewed an MRI which indicated a herniated disc at L4-5 as early as July 11, 1994.

Finally, the plaintiff's own assessment of her physical condition and resulting disabilities is competent testimony which we cannot disregard. We find the evidence does not preponderate against the finding of the trial court that the plaintiff's back injury was causally related to her work accident on April 26, 1994.

The Multiplier Cap

The second issue raised by the defendant is whether the trial court erred in finding that the plaintiff's back injury was subject to the six (6) times multiplier in Tenn. Code Ann. § 50-6-241(b) rather than the two and one-half (2 ½) times multiplier in Tenn. Code Ann. § 50-6-241(a)(1).

Under the provisions of Tenn. Code Ann. § 50-6-241(a)(1), an injured employee who returns to her employment at a wage equal to or greater than the wage she was receiving at the time of injury cannot recover an award more than 2 ½ times the medical impairment rating found by the medical experts. The language of Tenn. Code Ann. § 50-6-241(b) provides that an injured employee who does not return to her employment at a wage equal to or greater than the wage she was receiving at the time of injury can recover an award up to 6 times the medical impairment rating.

To determine which statutory cap applies, we must decide whether the plaintiff made a "meaningful return to work." *Bailey v. Krueger Ringier, Inc.,* No. 02S01-9409-CH-00061, Weakley County (Tenn. May 17, 1995). What constitutes a meaningful return to work is a highly fact specific analysis:

> If the offer from the employer is not reasonable in light of the circumstances of the employee's physical ability to perform the offered employment, then the offer of employment is not meaningful and the injured employee may receive disability benefits up to six times the amount of the medical impairment. On the other hand, an employee will be limited to disability of two and one-half times the medical impairment if his refusal to return to offered work is unreasonable. The resolution of what is reasonable must rest upon the facts of each case and be determined thereby.

Newton v. Scott Health Care Ctr., 914 S.W.2d 884, 886 (Tenn. 1995).

After reviewing all the relevant facts in this case, we conclude the plaintiff did not make a meaningful return to work. The testimony of the plaintiff indicates she returned to work for the defendant four or five days after the work accident on April 26, 1994 and left work the second week of June 1994 after a coughing spell which exacerbated her back pain.

Thereafter, the plaintiff received reasonable and necessary medical treatment and tried to return to work for the defendant on October 17, 1994 where she sat on a stool and answered the telephone all day. The plaintiff testified she could not sit for prolonged periods because her back pain would radiate across her hip and down the back of her legs. She said she asked the defendant for a chair with back support but was told the stool was the only chair available. The plaintiff worked under these conditions until October 19, 1994, leaving in the middle of the day because the pain was too severe.

We find the trial court did not err by finding that the plaintiff did not make a meaningful return to work and therefore the application of the 6 times cap was proper.

The Medical Services of Dr. Arendall

The third issue raised by the defendant is whether the medical care of Dr. Arendall was unauthorized and should not have been awarded by the trial court.

Tenn. Code Ann. § 50-6-204(a)(4) provides:

> The injured employee shall accept the medical benefits afforded hereunder; provided, that the employer shall designate a group of three (3) or more reputable physicians or surgeons not associated together in practice, if available in that community, from which the injured employee shall have the privilege of selecting the operating surgeon or the attending physician; and, provided further, that the liability of the employer for such services rendered the employee shall be limited to such charges as prevail for similar treatment in the community where the injured employee resides. The above listing of physicians or surgeons may include doctors of chiropractic within the scope of their licenses.

In reviewing this statute, our Supreme Court has held:

> Where the employer fails to give the employee the opportunity to choose the ultimate treating physician from a panel of at least three physicians, he runs the risk of having to pay the reasonable cost for treatment of the employee's injuries by a physician of the employee's choice. . . . The decision turns on the issue of whether, under the circumstances, the employee was justified in obtaining further medical services, without first consulting the employer or its insurer.

United States Fidelity & Guar. Co. v. Morgan, 795 S.W.2d 653, 655 (Tenn. 1990) (citations omitted).

The defendant submits Dr. Arendall's medical treatment was unauthorized and the testimony of the plaintiff and her husband proves they were well aware of this fact. The defendant contends it provided medical care to the plaintiff and even stood ready to provide additional medical care, but the defendant says it did not receive notice of the plaintiff's dissatisfaction with the provided physicians until the very day she sought treatment from Dr. Arendall.

The record in this case reveals the plaintiff testified Ms. Wiezenhut did not offer her a panel of three physicians for her back injury. Instead, the plaintiff said Ms. Wiezenhut referred her to Dr. Oglesby for her back injury without mentioning she could select from a panel of two other physicians. Ms. Wiezenhut testified she faxed a list of three physicians to the insurance company, but she could not say the insurance company presented the list to the plaintiff.

In addition, the record shows the plaintiff's husband went to Wal-Mart on October 19, 1994 to voice his dissatisfaction with the physicians the defendant had provided to his wife because she was not getting any relief from her constant pain. Cynthia Avent, the defendant's personnel manager, testified that subsequent to this date neither Wal-Mart nor Ms. Wiezenhut offered the plaintiff any additional health care.

Under these circumstances, we find the plaintiff acted in good faith and was justified in seeking medical treatment on her own. *See United States Fidelity & Guar. Co. v. Morgan,* 795 S.W.2d 653, 655 (Tenn. 1990) (citations omitted). Even though the plaintiff went to see Dr. Arendall on October 19, 1994, the same day her husband complained to Wal-Mart, the record reveals the plaintiff was experiencing so much back pain that she reasonably thought she was not getting necessary medical care from the provided physicians who failed to acknowledge her herniated disc in the MRI report. Therefore, we believe the plaintiff was properly awarded the medical services of Dr. Arendall, whose treatment and surgery were reasonable and necessary.

The trial court found the defendant failed to provide the plaintiff with a panel of three physicians for her back injury. Ms. Wiezenhut lacked any personal knowledge that the plaintiff was given any list of physicians and her testimony was based on inadmissible hearsay evidence. Based on the trial judge's determination of credibility, we cannot say the evidence preponderates against the decision of the trial court to award the plaintiff the medical services of Dr. Arendall.

The Work Release Slips

The final issue raised by the defendant is whether the trial court erred in refusing to admit into evidence release from work slips provided to the defendant by the plaintiff and which were included in and became a part of her personnel file.

Regarding evidentiary issues, our Supreme Court has held:

> In Tennessee admissibility of evidence is within the sound discretion of the trial judge. When arriving at a determination to admit or exclude even that evidence which is considered relevant trial courts are generally accorded a wide degree of latitude and will only be overruled on appeal where there is a showing of abuse of discretion.

Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 442 (Tenn. 1992) (citations omitted).

The defendant sought to introduce work release slips which indicated the plaintiff saw a chiropractor and missed work for both lumbar spinal syndrome and headaches during the time she lived in Michigan. Counsel for the plaintiff objected to the admissibility of the work release slips on the basis of double hearsay. The trial judge stated the work release slips contained hearsay within hearsay but the first hurdle could be met as a business record exception. The trial judge allowed the work release slips to be marked for identification and to be used to cross-examine the plaintiff, who testified she could not remember what she had missed work for but she never saw the chiropractor for back pain.

We conclude the trial judge did not abuse his discretion by refusing to admit the work release slips into evidence and only allowing them to be used for their impeachment value.

CONCLUSION

We affirm the judgment of the trial court. The cost of this appeal is taxed to the defendant.

_____
John K. Byers, Senior Judge

CONCUR:

_____
Frank F. Drowota, III, Justice

_____
William S. Russell, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

LINDA LOU SHANK,	*}*	*RUTHERFORD CHANCERY*
	}	*No. 95WC-553 Below*
Plaintiff/Appellee	*}*	
	}	*Hon. Robert E. Corlew, III,*
vs.	*}*	*Chancellor*
	}	
WAL-MART STORES, INC.,	*}*	*No. 01S01-9709-CH-00189*
	}	
Defendant/Appellant	*}*	*AFFIRMED.*

FILED

June 5, 1998

Cecil W. Crowson
Appellate Court Clerk

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 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 Defendant/Appellant, for which execution may issue if necessary.

IT IS SO ORDERED on June 5, 1998.

PER CURIAM