

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

September 21, 2009 Session

JUDITH ANN LESKO v. TENNESSEE SCHOOL BOARD, ET AL.

**Direct Appeal from the Circuit Court for Moore County
Nos. 917 & 918 W. Lee Russell, Judge**

**No. M2009-00060-WC-R3-WC - Mailed - December 22, 2009
Filed - January 22, 2010**

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 a hearing and a report of findings of fact and conclusions of law. The employee alleged that she had sustained a permanent disability as a result of a work-related injury to her lower back. The trial court ruled that she had no permanent disability. She has appealed, contending that the trial court erred in accepting the testimony of the treating physician over that of the evaluating physician. We find no error, and affirm the judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court
Affirmed**

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., J., and DONALD P. HARRIS, SR. J., joined.

Barry H. Medley, McMinnville, Tennessee, for the appellant, Judith Ann Lesko.

John W. Barringer, Jr. and Heather Hardt Douglas, Nashville, Tennessee for the appellees, Tennessee School Board and Bedford County EMS.

MEMORANDUM OPINION

Factual and Procedural Background

Judith Lesko ("Employee") was an emergency medical technician ("EMT")/paramedic for

Bedford County Emergency Medical Service (“Employer”). She injured her lower back¹ on September 21, 2007, while assisting in moving a patient on a stretcher from a wooded area. She advised her immediate supervisor of the injury at that time, but did not request medical treatment. Her pain increased over the following days. On September 25, she sought treatment at Harton Regional Medical Center Emergency Room. She was given an injection and oral medication for pain. Thereafter, she went to her regular primary care physician, Dr. J. Howard Rupard. Although she did not consult Employer before visiting Dr. Rupard, his treatment was subsequently authorized because he was on Employer’s list of approved physicians.

Dr. Rupard provided conservative care, including steroids, muscle relaxers, pain medication and physical therapy. He ordered an MRI of her lumbar spine. That test revealed only minor degenerative changes. Employee’s condition improved only slightly as a result of these measures. Dr. Rupard referred her to Dr. Jeffrey Hazlewood, a physiatrist, for further treatment. Dr. Rupard did not testify. Some of his records were placed into evidence as exhibits, and others were summarized in reports of doctors who did testify.

Dr. Hazlewood testified by deposition. He first examined Employee on October 31, 2007. He also spoke directly to the physical therapist who had been treating her. His diagnosis was of a soft tissue injury to the lower back. He considered her reported symptoms to be disproportionate to the objective findings of the MRI scan, and of his physical examination. He described her gait as “very slow and bizarre, with almost shuffling type steps.” He noted that she had “positive Waddell signs” and stated in his report that “symptom magnification appears to be present.” He recommended continued conservative treatment, including additional physical therapy. He also discussed Employee’s weight with her, because he believed that this could both slow her recovery from her injury, and cause additional back trouble in the future.² He assigned work restrictions, but these were not compatible with her job duties. As a result, she remained off of work.

Dr. Hazlewood examined Employee for the second, and last, time on November 26, 2007. She reported slight improvement. Her physical examination was similar to the previous one. Dr. Hazlewood noted that she was moving “a bit better today than last time, but still walks very slowly and somewhat stiffly.” He discharged her from his care, recommending a home exercise program. Prior to the examination, Dr. Hazlewood viewed part of a video recording taken by a private investigator, which showed Employee leaving a physical therapy facility. Dr. Hazlewood testified that he observed her walking from the facility “very slowly, stiffly, like I had seen her in my office.” The video showed Employee driving to a gas station/grocery store. Dr. Hazlewood testified that her movements at the gas station/grocery store were completely different. Dr. Hazlewood also viewed the Employee “. . . pushing her cart to her truck unloading . . . two large objects. [And] . . . did not

¹ At trial, Employee also alleged that she sustained injuries to her neck and both shoulders. The trial court denied those claims, and she has not contested that ruling on appeal.

² On the date of the examination, Employee weighed two hundred thirty-eight pounds. She was five feet, three inches tall.

appear in pain.” He considered her movements as displayed in the video to be inconsistent with her movements in his office.

Dr. Richard Fishbein, an orthopaedic surgeon, conducted an IME at the request of Employee’s attorney on July 17, 2008. His diagnosis was a “contractable low back strain.” He assigned 6% impairment to the body as a whole for the injury. He opined that she was medically unable to return to her job as an EMT/paramedic, but imposed no additional specific restrictions upon her activities. He had viewed the surveillance recording, but did not consider it to reveal any significant information.

Employee was forty-four years old. She was a high school graduate. She had attended two semesters of college. She had completed an eighteen-month course of study in Indiana, where she was first licensed as an EMT. Prior to that time, she had worked as a sales representative, retail clerk and secretary. She worked as an EMT in Indiana for an unspecified amount of time before moving to Tennessee in 2006. She was hired by Employer in February 2006. She was terminated by Employer in November 2007. She received unemployment benefits for a period of time, then found employment as a customer service representative for a pen company. She was working in that job at the time of the trial.

Employee testified that her lower back pain was “awful.” She said that she was unable to use a “push mower” to work in her yard, and had switched to a riding mower as a result. She was able to operate a vacuum cleaner for only fifteen or twenty minutes before having “spasms in my back and pain [shooting] down my leg.” She reported difficulty with sitting for longer than one hour at a time. She testified that she was unable to drive from her home in Moore County to Dr. Hazlewood’s office in Lebanon without stopping to rest. On cross examination, she agreed that she had not missed any time from her current job due to her back injury. She had testified in her discovery deposition that she left her home only to go to work and to go shopping. However, she conceded on cross examination that she had posted photographs on an internet site which showed her attending a concert in Huntsville, Alabama in September 2008. The photos were introduced into evidence. In them, Employee does not display any obvious signs of discomfort. She had also stated in her deposition that she had difficulty sitting in hardbacked, plastic chairs. Another photo from the same web site showed her sitting in such a chair without apparent difficulty.

Bryce Tribe, a private investigator, testified on behalf of Employer. He had conducted surveillance of Employee over a period of several days in late October and early November 2007. He narrated two video recordings taken during the surveillance. The longest sequence showed Employee leaving a physical therapy appointment in Shelbyville, walking slowly to her truck, and driving to a convenience store, where she made a purchase. From that location, she drove approximately two and one-half hours to a Kroger supermarket in Clarksville. She entered the supermarket and returned with a cart of groceries, which she placed in her truck. She appeared to be walking normally. She then drove to a residence near Clarksville.

The trial court rendered its decision in the form of a written memorandum. It noted

discrepancies between Employee's deposition testimony, trial testimony, the testimony of Dr. Hazlewood and the video recording and photographs of her activities. It concluded that she did not sustain any permanent impairment or disability as a result of her work injury. Employer was ordered to provide medical care in accordance with the workers' compensation law. Employee has appealed, contending that the trial court erred by finding that she did not sustain permanent impairment or disability as a result of her work-related back injury.

Standard of Review

Our standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); see also Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004); Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 825 (Tenn. 2003). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the court on appeal must extend considerable deference to the trial court's factual findings. Houser v. Bi-Lo, Inc., 36 S.W.3d 68, 71 (Tenn. 2001). In reviewing documentary evidence such as depositions, however, we extend no deference to the trial court's findings. Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006). Conclusions of law are subject to de novo review without any presumption of correctness. Rhodes, 154 S.W.3d at 46; Perrin, 120 S.W.3d at 826.

Analysis

Employee contends that the evidence preponderates against the trial court's finding that she did not sustain permanent disability from her back injury. She characterizes the case as "a classic 'battle of the doctors,'" and argues, without much elaboration, that the objective medical findings support Dr. Fishbein's conclusions over those of Dr. Hazelwood. Employer contends that Dr. Hazlewood's conclusions are more consistent with the evidence, especially the evidence concerning Employee's credibility. In that regard, Dr. Fishbein explicitly stated that his conclusions were premised upon the accuracy of the information provided to him by Employee.

The trial court did not make an explicit finding concerning Employee's credibility in its memorandum decision. However, it discussed the many conflicts between her trial testimony and other evidence in the case immediately before finding that she did not sustain permanent disability. We view the trial court's statements as a de facto finding that Employee's credibility was diminished. The evidence supports such a finding. Employee testified at trial and in her discovery deposition that she was in constant pain and discomfort which severely limited her activities. The video and photographic evidence conflicted with that testimony.

Dr. Fishbein based his opinion that Employee had a permanent impairment largely upon her subjective complaints. He testified that he assumed her statements to him about her condition were true. In that regard, his report states that she reported "constant moderate to severe aching, burning,

locking, numbness, tingling, popping, swelling, stiffness, tenderness, throbbing and weakness of her back and lower extremities.” She also told him she had “difficulties with daily activities involving bending, sitting, climbing, standing, gripping, twisting, lifting, squatting and moving back about.” The video and photographic evidence produced by Employer casts doubt upon Employee’s credibility in general, and the accuracy of those statements in particular. Because those statements were the factual basis for Dr. Fishbein’s opinion, the accuracy of that opinion is also questionable. Under the circumstances, we are unable to conclude that the evidence preponderates against the trial court’s decision to give greater weight to the testimony of Dr. Hazlewood, or its finding that Employee did not sustain a permanent disability.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Judith Ann Lesko and her surety, for which execution may issue if necessary.

JON KERRY BLACKWOOD, SENIOR JUDGE

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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 Judith Ann Lesko and her surety, for which execution may issue if necessary.

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