

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

January 28, 2008 Session

GLENDA OVERTON v. REGIS CORPORATION

**Direct Appeal from the Chancery Court for Trousdale County
No. 6783 Charles K. Smith, Chancellor**

**No. M2007-00069-WC-R3-WC - Mailed - October 3, 2008
Filed - November 4, 2008**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The trial court awarded the employee, Glenda Overton, 80% permanent partial disability to the body as a whole and temporary partial disability benefits in a stipulated amount. It also awarded a 25% lack of good faith penalty on the temporary disability for non-payment. The employer, Regis Corporation, has appealed, alleging that the trial court erred in finding that Ms. Overton sustained a permanent injury or, in the alternative, that the amount of the award is excessive. Regis also contends that the trial court erred in assessing the penalty for non-payment of the temporary disability benefits. We affirm the award of permanent disability and reverse the assessment of the penalty for non-payment.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Reversed in Part

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and JERRY SCOTT, SR. J., joined.

Terry L. Hill and Laurenn S. Disspayne, Nashville, Tennessee, for the appellant, Regis Corporation.

William Joseph Butler and E. Guy Holliman, Lafayette, Tennessee, for the appellee, Glenda Overton.

MEMORANDUM OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Glenda Overton worked as a cosmetologist for Regis Corporation at a salon located in a Wal-Mart store. She also owned her own beauty salon. Ms. Overton was injured on July 20, 2004 when she tripped over an electrical cord and fell to the floor. She alleged that she sustained injuries to her neck, low back and left shoulder as a result of the incident. The incident was accepted as compensable by Regis. Rather than providing a panel of physicians, a representative of Regis asked Ms. Overton if she “had a preference” for a particular doctor. Ms. Overton had previously been treated by Dr. Barrett Rosen and suggested he be authorized to treat her injury. Regis agreed to authorize Dr. Rosen to treat her injury.

Dr. Barrett Rosen, a board certified orthopaedic surgeon, testified that he examined Ms. Overton on August 9, 2004. At that time, she complained of pain in her neck, left shoulder and low back radiating into the left leg and foot. His examination revealed significant limitation of motion of the neck in all directions and diffuse tenderness in the lumbar area with moderate limitation of motion. His diagnosis was cervical and lumbar strains. He ordered conservative treatment, consisting of anti-inflammatory medication, physical therapy and work restrictions, including a limit of ten to twelve hours of work per week. She appeared to improve somewhat, but continued to have symptoms with pain in multiple areas. In November 2004, Dr. Rosen ordered an MRI, which revealed no abnormalities of any significance. Dr. Rosen saw her on an intermittent basis thereafter but her condition did not change significantly. Dr. Rosen testified that she reached maximum medical improvement in April 2005.

Dr. Rosen last saw Ms. Overton in December 2005. He testified that, in addition to her limitation of working ten to twelve hours per week, her permanent restrictions were: occasional outstretched use of the arms; occasional heavy gripping; no use of vibrating tools; lifting limited to ten pounds frequently and twenty-five pounds occasionally; alternate sitting and standing every thirty minutes; and occasional stooping, bending and twisting. Dr. Rosen testified that the cause of those restrictions was the injury she sustained on July 20, 2004. On cross-examination, Dr. Rosen testified that his examination and testing of Ms. Overton after her work injury had not revealed any objective findings. He also stated that the restrictions which he had imposed were essentially based upon her statements to him relative to when her pain symptoms occurred. He testified that there was no objective basis upon which a permanent impairment could be assigned.

Prior to the injury at issue in this case, Ms. Overton had been treated by Dr. Eugene Regen, a partner of Dr. Rosen, for injuries she received in a 1994 automobile accident. Her complaint at that time was neck pain, radiating into her arms. She returned to Dr. Regen from time to time thereafter, with similar symptoms. Dr. Regen’s records contain a June 1995 letter from Dr. Everette Howell, a neurosurgeon, assigning Ms. Overton a 5% permanent impairment to the body as a result of that injury.

Ms. Overton’s care was transferred to Dr. Rosen in September 1999. At that time, her symptoms were similar to those she had reported to Dr. Regen. Dr. Rosen’s associate, Dr. Tompkins, saw her in December 2002, when she complained of pain in her left arm, shoulder, and hip following a fall while dealing with her dogs. She was diagnosed with a left elbow fracture. Ms. Overton also had problems with her right shoulder which eventually required surgery.

Subsequent to her work injury, Ms. Overton was examined by Dr. Walter Wheelhouse, a board certified orthopaedic surgeon, at the request of her attorney. Upon examination, Dr. Wheelhouse noted tenderness in the back of her neck, a limited range of motion in all six planes measured with the dual inclinometers. She had a positive Spurling's maneuver in her neck indicating persistent pain and problems with her neck which Dr. Wheelhouse described as an objective finding. Ms. Overton had a limited range of motion in the left shoulder, tenderness and guarding in her low back as well as a limited active range of motion in the low back. Her Waddell's signs were negative indicating no evidence of symptom magnification on her part. His diagnoses were cervical strain, sprain and radiculopathy; left shoulder strain; left hip contusion; and mechanical low back pain and strain. Dr. Wheelhouse assigned impairments of 8% to the body as a whole for the cervical strain; 8% to the body as a whole for the low back strain; and 4% to the body as a whole for loss of range of motion of the left shoulder. Under the method used in the AMA Guides, these impairments combined for a 19% permanent impairment to the body as a whole. He generally agreed with the permanent restrictions imposed by Dr. Rosen. During cross-examination, Dr. Wheelhouse testified that he was unaware of Ms. Overton's pre-injury history of neck and shoulder problems at the time of his evaluation. He had, however, reviewed records of her pre-injury medical treatment by Drs. Regen and Rosen prior to his deposition.

Ms. Overton was also examined by Dr. Robert Dimmick, a board certified orthopaedic surgeon, at the request of Regis's attorney. Dr. Dimmick noted Ms. Overton did not appear to be in acute distress during her office visit and seemed to be able to change between a variety of positions without observable sign of discomfort. Dr. Dimmick described her range of motion in the left shoulder as being inconsistent. He also described her as having an inconsistent pain response to palpation of the anterior aspect of the shoulder. Dr. Dimmick also reviewed x-ray and MRI studies that had been done. He opined that Ms. Overton had suffered contusion and bruising of her left shoulder and hip as a result of the fall. He noted that records of Ms. Overton's course of physical therapy contained no reference to symptoms of, or treatment for, low back symptoms after the first three sessions. He also concluded that she had degenerative changes in her cervical and lumbar spine, which, in his opinion, were the source for her continuing symptoms. Based upon the inconsistencies he testified he had observed, Dr. Dimmick found no impairment and did not recommend any permanent restrictions on Ms. Overton's activities.

On the date of trial, Ms. Overton was fifty-five years old. She was a high school graduate. Thereafter, she attended cosmetology school and was licensed as a cosmetologist and as an aesthetician. She had worked as a hairdresser and aesthetician for approximately thirty-five years. Prior to her injury on July 20, 2004, she was a full cosmetologist performing shampoos, permanents, cutting and highlighting. She also did facial waxing and performed hairdressing, makeup and manicuring services on corpses at funeral homes. In addition to her employment at a Smart Style Salon with Regis, she owned and worked part-time at a hair salon in Hartsville. Ms. Overton testified that between the two salons, she worked from sixty to seventy hours per week.

In August 2004, following her injury, she was terminated by Regis. Ms. Overton related the firing to the injury. She had been given work restrictions by her treating physician, Dr. Barrett Rosen. She was not allowed to work more than ten to twelve hours per week nor to stand more than thirty minutes at a time. She could only occasionally bend, stoop and twist. With those restrictions, she could not perform the work she had been doing for Regis. Ms. Overton was not paid temporary disability benefits by Regis and, since she was unable to work, could not apply for unemployment benefits. She worked in her hair salon on a limited basis in accordance with the work restrictions that had been imposed. She scheduled appointments so that she was able to rest between them. She also testified she was limited in performing certain types of procedures which required bending, standing for long periods of time, or working with her arms outstretched. According to Ms. Overton, she, essentially, has been limited to cutting hair and to seeing two to six customers per day during the three days each week that she works. She is no longer able to perform her services at funeral homes because that work requires standing and leaning over the corpse which causes her significant pain. Ms. Overton testified she continues to follow the restrictions imposed by Dr. Rosen.

The trial court found that Ms. Overton had sustained a permanent injury and awarded 80% permanent partial disability to the body as a whole. In arriving at this conclusion, the trial judge found Dr. Wheelhouse was the most knowledgeable of the three doctors with regard to evaluating permanent impairment in accordance with the AMA Guides. He also found Dr. Wheelhouse's examination was more thorough and that he followed the AMA Guides more closely than the other two doctors. The trial court also found Ms. Overton to be a "very honest" witness.

The permanent partial disability benefits awarded by the trial court was commuted to a lump sum. The trial court also awarded temporary partial disability benefits in the amount that had been stipulated by the parties, and awarded a 25% penalty for non-payment of those benefits. Regis has appealed, alleging the trial court erred by finding that Ms. Overton sustained a permanent injury; that the award was excessive; that the trial court erred in awarding a "lack of good faith" penalty for unpaid temporary partial disability benefits; and that the trial court erred in commuting the award to a lump sum.

STANDARD OF REVIEW

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2007). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). A trial court's conclusions of law are reviewed de novo upon the record

with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

ANALYSIS

1. Permanency

Regis contends that the evidence preponderates against the trial court's finding that Ms. Overton sustained permanent disability as a result of her work injury. In support of this position, it points to the testimony of Dr. Dimmick that Ms. Overton retained no permanent impairment; the testimony of Dr. Rosen that there was no basis upon which to assess permanent impairment; and the absence of objective medical findings. Regis also contends that the testimony of Dr. Wheelhouse is flawed because, at the time of his evaluation, he was not aware of Ms. Overton's medical history prior to the work injury.

In response, Ms. Overton contends the trial court's finding is supported by the testimony of Dr. Wheelhouse that she had a permanent impairment; the imposition of permanent restrictions by Dr. Rosen; and the testimony of Ms. Overton, her husband, and a neighbor concerning her ongoing problems after the injury. Ms. Overton also points out that, although Dr. Wheelhouse was unaware of her medical history at the time he examined her, he had reviewed those records prior to his deposition and did not change his opinions.

The element of causation is satisfied where the "injury has a rational, causal connection to the work," Braden v. Sears, Roebuck & Co., 833 S.W.2d 496, 498 (Tenn. 1992). However, the proof of the causal connection may not be speculative, conjectural, or uncertain. Clark v. Nashville Mach. Elevator Co., 129 S.W. 3d 42, 47 (Tenn. 2004). All reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. Phillips v. A&H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004); Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997). Our courts have "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 reasonably may be inferred that the incident was in fact the cause of the injury." Reeser, 938 S.W.2d at 692.

Ms. Overton had received medical treatment for symptoms similar to those which arose after her fall at work for many years prior to that fall. Neither Dr. Rosen or Dr. Regan had found it necessary to impose formal restrictions upon her activities prior to the July 2004 injury. Dr. Rosen did place significant permanent restrictions upon her activities after the injury and testified the necessity for these restrictions was caused by Ms. Overton's work injury. Dr. Wheelhouse, upon whose opinion the trial court relied, found Ms. Overton had a permanent impairment as a result of her work injury, testified there were objective findings to support that conclusion, and further testified that there was no evidence of symptom magnification. Ms. Overton's testimony concerning her limitations after her injury was supported by the testimony of lay witnesses all of whom the trial court found to be credible. Based upon these considerations, the deference we must afford the trial court with regard to the credibility of witnesses who testified before it, and the entire record in the case, we find that the evidence does

not preponderate against the trial court's finding that Ms. Overton suffered permanent disability as a result of her July 2004 work injury.

2. Extent of Disability

Regis argues that the award of 80% permanent partial disability to the body as a whole is excessive. In support of this position, Regis notes that Ms. Overton continued to work at her own salon from the date of injury until the trial. It also cites the absence of objective medical findings and points to her history of similar shoulder, neck and back problems. Regis also argues that Dr. Wheelhouse had no knowledge of these pre-existing symptoms and treatment at the time of his evaluation and therefore his assessment of her impairment was flawed.

In response, Ms. Overton cites several factors which tend to support the trial court's finding. These include the permanent restrictions placed upon her activities by Dr. Rosen and Dr. Wheelhouse; the substantial impairment rating assigned by Dr. Wheelhouse, upon which the trial court expressly relied; Ms. Overton's own testimony concerning her present abilities; and her limited experience outside the field of cosmetology.

In assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and her capacity to work at the kinds of employment available in her disabled condition. Tenn.Code Ann. § 50-6-241(b) (Supp.2003); Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn.1990); Roberson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn.1986). Further, the claimant's own assessment of her physical condition and resulting disabilities cannot be disregarded. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn.1975); Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn.1972). The trial court is not bound to accept physicians' opinions regarding the extent of the plaintiff's disability, but should consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 677 (Tenn.1983).

Our review of the evidence leads to the conclusion that Ms. Overton sustained a significant disability as a result of her work injury. The testimony of Dr. Rosen, who was her doctor both before and after the injury provides a strong basis for that conclusion. Both Dr. Rosen and Dr. Wheelhouse limited Ms. Overton to working ten to twelve hours per week. Such a limitation amounts to a reduction of 80 to 83% from her average work week prior to her injury. Moreover, she is further limited in the variety of cosmetology and aesthetician services she is able to offer during the time she does work. Taking these factors into consideration, we conclude that the evidence does not preponderate against the trial court's finding that Ms. Overton sustained a permanent partial disability of 80% to the body as a whole. We therefore affirm the trial court's finding as to the extent of permanent partial disability.

3. Assessment of Penalty for Unpaid Temporary Partial Disability Benefits

The trial court found that Ms. Overton was to receive temporary partial disability benefits from the date of her first appointment with Dr. Rosen to the date he found her to be at maximum medical improvement. The parties had stipulated prior to trial what the amount due would be if the trial court awarded those benefits. That ruling has not been appealed. However, the trial court also imposed a 25% penalty upon Regis for the non-payment of those benefits because it

found “the employer lacked good faith in paying [sic] this temporary partial disability payment. . .” Regis contends that the ruling was erroneous.

Tennessee Code Annotated section 50-6-205(b)(3) provides that if an employer or an employer's insurer fails to pay temporary disability benefits within twenty (20) days after the employer has knowledge of any disability that would qualify for benefits under the workers' compensation law, the trial court may assess a penalty of 25% of the amount not paid. Tenn. Code Ann. §50-6-205(b)(3)(A-D) (Supp. 2007). This penalty is to be assessed only if such failure to pay results from bad faith on the part of such employer or insurer, Mayes v. Genesco, Inc., 510 S.W.2d 882, 885 (Tenn. 1974), in which case the penalty is mandatory. Woodall v. Hamlett, 872 S.W.2d 677, 679 (Tenn. 1994). In the present case, Ms. Overton's income from Regis was based upon a guarantee of the minimum wage for the time she worked against commissions. If her commissions exceeded the guaranteed rate, then she received her commissions. She worked for Regis in six hour shifts and the trial court found her average weekly wage to be \$181.50, but the average number of hours she worked for Regis each week cannot be determined. Following her injury, Regis was made aware she was limited to working twelve hours per week. Regis was also aware that Ms. Overton was working in the shop that she owned. Because she was able to work under the restrictions imposed by her treating physician, she was not entitled to temporary total benefits. She never conveyed to Regis the amount she was able to earn working in her shop, nor did she otherwise make a claim for temporary partial benefits. The trial court did not specifically find Regis acted in bad faith in failing to pay temporary partial benefits. In our view, the facts stated do not warrant a finding of bad faith. The trial court's assessment of the 25% penalty on the temporary partial disability benefits is, therefore, reversed.

4. Lump Sum Award

The trial court commuted the entire permanent partial disability award. Based upon testimony by Ms. Overton and her husband, the court made a finding that Ms. Overton was able to manage the award wisely, and that commutation was in her best interest. That finding was supported by evidence that Ms. Overton had run her own business for many years and that she and her husband had wisely managed their finances. The evidence does not preponderate against the trial court's finding on this issue.

CONCLUSION

The trial court's award of permanent partial disability benefits amounting to 80% to the body as a whole, in lump sum, is affirmed. The award of a penalty for non-payment of temporary disability benefits is reversed. Costs of this appeal are taxed to Regis Corporation and its surety, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
JANURY 28, 2008 SESSION

GLEND A OVERTON v. REGIS CORPORATION

**Chancery Court for Trousdale County
No.6783**

No. M2007-00069-WC-R3-WC - Filed - November 4, 2008

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 appeals 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 Regis Corporation and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM