2012 WL 11934787 (N.M.) (Appellate Petition, Motion and Filing)
Supreme Court of New Mexico

Lona Englett, Worker-Petitioner,

vs.

Bee Hive Assisted Living, and Church Mutual Insurance Company, Employer/Insurer-Respondent.

Nos. 12/33840, 32007, 09-58762.
September 27, 2012.

Appeal from the Workers' Compensation Administration David Skinner Workers' Compensation Judge

Petition for Writ of Certiorari to the Court of Appeals

James Rawley, 919 Gold Ave. SW, Albuquerque, NM 87102, Tel (505) 243-2255, Fax (505) 243-2253. Attorney for Worker-Respondent.

2. QUESTIONS PRESENTED

1. Was Worker's refusal to continue work reasonable under the totality of the circumstances. Was Employer's oral offer of continued employment sufficient evidence of an offer to return to work within restrictions? The answer determines if Worker gets TTD.

2. Did Worker”s evidence in the record as a whole compel a finding of causation of her secondary mental depression? What is the meaning of “”“equivocal” testimony in these circumstances.

3. Is a requirement of the job of caregiver for **elderly** patients in an assisted living home heavy because assisting patients who fall and in the event of a fire, helping them out windows (none occurred) is a heavy job as defined by statute, 52-1-26.4(C)(2)?

4. Is Worker entitled to the training point when the record as a whole supports she cannot perform any work, 52-1-26.3(C)?

3. STATEMENT OF FACTS

A. THE ISSUE OF THE TTD CLAIM WAS WHETHER WORKER'S REFUSAL TO WORK WAS REASONABLE.

***3** The facts pertinent to the TTD claim are that Worker and her supervisor, Lori Butler, had a conversation about her return to work on August 22, 2009, which resulted in Worker quitting.

As to her light duty or day shift, her supervisor, Ms. Butler testified by deposition,

we were waiting for her to be released to go back to work…having her there during the days, because I have two caregivers on shift at the time, and so having her there as that third person was extremely expensive, because there wasn't very much that we wanted to allow her to do, because we didn't want to mess up her back any worse than it was, and so we put her on the day shift and kind of came up with some way funky things for her to do. (Pg. 30)

When asked what led up to her termination, Ms. Butler testified

we had several conversation once she came back to work…we were waiting to get that final okay for her to be able to go back to full work…and I said to her…once she got approval that she could go back to…doing anything… without any restrictions, that I would put her back on graveyard…and the next day, two or three days later, she was scheduled to come in and work, and she didn't come in, she didn't call. (Pg. 31)

As to Worker performance of her job of graveyard prior to the no show, no call, Ms. Butler testified "she was very dependable", pg. 32-33. There was no written offer made after her no show because "If they chose to do a no call no show, that was interpreted as they were voluntarily quitting…" pg. 34. Ms. Butler's letter to unemployment included "As soon as she would have been released by the doctor from light duty, she would have gone back to nights". Also ***4** Ms. Butler wrote, "Bee Hive was willing to keep her on light duty, and there was no time frame to this ending", pg. 38. On cross examination by Bee Hive's attorney, Ms. Butler testified in response to the question

If Ms. Englett had not quit her job, would Bee Hive have continued to employ her in that light duty capacity? A. Yes…until - I mean we were really hoping she could go back to - to, you know, being able to be off restricted duty, so that we could get her back on her normal schedule and not have that extra person there during the daytime, because there just really wasn't enough for three people to do. (Pg. 45)

Ms. Butler then volunteered "I wanted her back on night time, because she had done a really good job on nights," pg. 46.

Worker's decision to quit was reasonable, that she could not safely do night shift duty alone, due to her back injury. As such her refusal was involuntary. B. SECONDARY MENTAL

With respect to secondary mental benefits, the issue was whether Worker's depression following the accident was caused by her work injury, the chronic pain and disability from her low back pain with radiculopathy, and loss of physical capacity. On that matter the Court found Dr. Granados' testimony equivocal pg. 2 of Compensation Order, and denied benefits. Worker submitted Findings Nos. 25-33, which summarized recites Dr. Granados did testify with reasonable medical ***5** certainty Worker's depression, adjustment disorder, and anxiety and pain disorder resulted from her work injury.

The testimony of Dr. Granados was not equivocal. If fact all testimony pg. 5-32 of direct examination recited the history of her August 22, 2009 injury, pg. 8, her depression noted by Dr. Brady October 2009, pg. 8, stated her complaints were related to her pain, pg. 10, that Dr. Brady started Effexor November 9, 2009, pg. 11, that the Effexor was helpful to her pain related depression, pg. 11-14, that she has an adjustment disorder with depression and anxiety, and a pain disorder, pg. 18-19, that she is not at MMI, pg. 23, that causation of her psychological problem is due to her injury, pg. 23, that he recommends psychiatric care, pg. 26, and again affirms causation, pg. 30. On cross examination the sole testimony contrary was the following: "Looking at your letter of January 3, Exhibit E, you were careful to state that you're unable to determine this causation to a reasonable degree of medical probability, is that correct? A. Correct."

Although indirect, the explanation for this opinion of January 3, 2011, versus his deposition testimony of March 17, 2011, is found pg. 24-25 when asked again by counsel on causation, Dr. Granados testified:

Part of my concern was that there was some elevation on the scale that pertained to the potential for some disordered thinking. So that's, in part, why I was being a little cautious. I was wanting to make sure that we looked at that more carefully, because of - I guess what I was worried about was that there might have been something underlying ***6** that may not have come to the - may not have come clear in the course of this brief evaluation. (Pg. 24-25)

Elaborating further, Dr. Granados testified on pg. 26, "I recommended that a psychiatric consultation might be considered". On direct examination concerning Exhibit E, Dr. Granados testified:

I guess I was trying to buy a little bit of time in trying to make some determination about causation because those things were out there. (cognitive or delusion, p. 27 line A). And I guess I was hoping that perhaps that there were some additional treatment and we could evaluate the response to those treatments, that that might provide us some better medical… (Pg. 28)

When pressed on direct examination about the below 5% causation statement, pg. 29, Dr. Granados testified he would not give sole causation lines 2-5, but the injury was not a negligible cause, line 5-14, and was a mixed cause, lines 15-22, restated and affirmed, pg. 30.

In the case, Employer denied mental health care resulting in a lack of documentation of this consequence of her injury despite the IME recommendation for further evaluation by a psychiatrist. That too was denied first by Employer, then by the WCJ, which stated the testimony of Dr. Granados was equivocal.

C. PHYSICAL CAPACITY

The dispute of the physical capacity issues was if her job was heavy or medium. Regarding the physical capacity of the job of caregiver to **elderly** persons in an assisted living home of fifteen persons. Worker testified she was injured ***7** repositioning a patient in bed, lifting the patient to do so, a task involving a patient weighing over 150*l*bs. In addition the job included assisting patients to transfer to a wheel chair, or shower chair, or walk. The dispute included how much weight was lifted during assistance, breaking a fall or preventing one. Employer offered the deposition testimony of Ms. Butler, pg. 18, who stated if a patient fell to the floor, she would not be lifted up alone, perhaps helped up, or the fire department called; a judgment call. This testimony alone establishes the residents were too heavy to help up to their feet unless partly able, providing a wide range of push, pull and carry for the helper.

Additionally although no fire emergency occurred, the home's fire plan called for assistance of the **elderly** out of the first floor windows. Worker Requested Findings Nos. 17-19, 21. Worker testified in the event of a fire, she would have to take them out the window, “grab ahold”, and take them out. She would stand outside the window and assist them. Regarding fire safety, Ms. Butler testified, we would have a dire drill every month, p. 46. The manual of Bee Hive relevant to fire safety included Evacuation Procedure in Case of Fire ““Remove all residents who are in immediate danger of fire”. The evacuation plan shows residents being evacuated by exit doors leading to the outside of the building. Assisting these **elderly** people each out of bed, out their bedroom door and down the hallways in a rapid manner with a fire in the building is the plan depicted. ***8** Such a test is simply not medium as it involves tasks ordinarily done by firemen, corrections officers, hospital orderlies, police, and other first responders. The task would be only more arduous if taking a resident out the first floor window was required.

Regarding the physical capacity required for the job at Bee Hive, the testimony of Lori Butler, Worker's supervisor, was:

As long as that person in the home could assist us in helping them with all their ADL's, then they could be in our home. If we had somebody who was just dead weight, you know, they couldn't stand up long enough so that we could pull their pants down or couldn't hold themselves up at their rails so we could pull their pants back up, you know, couldn't help us to transfer them from the bed to the chair, they couldn't stay in our home. (Pg. 13-14)

See also pg. 15-16 “help them get to another position”, pg. 17 “we did a lot of bedside and chair side supervision and assisting”, and pg. 26 “we had several residents that we would get up once or twice a night to toilet”.

Based upon these facts, the record as a whole supports that, in addition to her medium duties found by the court, there was a rare occurrence, at least, where a caregiver would have to lift over 50*l*bs. As such the duty of caregiver is equivalent to a correction offer who rarely must lift an injured or unconscious person. The fire emergency requirements are indistinguishable from the essential duties evidence in *Moya v. City of Albuquerque*, 2008 NMSC 004, (2007), where the Court held that an emergency duty exhibit for a corrections officer was ***9** dispositive. This Court of Appeals in its Notice of Proposed Summary Disposition page 5 states that other than Findings submitted “there does not appear to have been any other evidence presented on the subject

(referring to lifting tenant and assisting in an emergency)". The writer was mistaken as there was substantial evidence in the record of testimony and deposition. Perhaps this portion of the opinion reflects a basic misunderstanding when it calls these **elderly** folk living in a home with 15 individual bedrooms and a caretaker to them with personal care responsibility ""tenants". These residents are utterly dependent on personal care and are in need of an assisted living facility, quite different from tenants in an apartment building, for example. Based on the record as a whole, this job is heavy, and there is no substantial evidence to support it being medium. This finding should be reversed; her job was heavy.

D. TRAINING POINT

Regarding the training point, the Court found Worker could do a companion job and she was performing such work for a relative, pg. 2 Compensation Order. Her testimony at trial was of some days watching television with her boyfriend's mother as one does for a social visit, not an employment, not full time or scheduled, not cooking or cleaning for her, simply no basis for a finding this activity was comparable to her prior companion job.

***10** Worker described her ordinary day, following a pain interrupted sleep, getting out of bed and sometimes her right leg gives way. Worker can do her bathroom and meal fixing. Worker typically sits with her boyfriend's mother and watches television part of the time. Worker lies down for an hour in the afternoon. Simply driving a short distance to the grocery store caused back pain such that she has to take five minutes to get out of her car. She can't lift 10*l*bs. Lifting over 10lbs causes back pain. Worker testified she could not do any of her past work as she could not do the lifting or assisting of resident. She testified she can only stand or walk 20 minutes without hurting so bad her right leg is dragging, Tape Log, [R.P. 181-182].

Worker testified she had only a few jobs in her life, beginning as a caregiver at Paramount assisting **elderly**. She described lifting patients in to wheelchairs. She worked there four (4) years. Worker had helped a lady who fell on the floor at Paramount resulting in injury to her back and therapy for a week, followed by a full return to work. Worker then moved to Albuquerque in 2007. Prior to Bee Hive, Worker had an independent caregiver job helping a gentleman with his own strong caregiver to lift him, no shower or bath help from her. She worked there almost a year. Worker then began at Bee Hive in 2008, hired to do graveyard, every two hours toilet the resident, and housekeeping duties of mopping and garbage disposal.

***11** The Court found her capacity was sedentary, implying she could work a full day. Worker was found totally disabled by the Social Security Administration, meaning no job she could perform.

****2 1. ACTION TAKEN BY THE COURT OF APPEALS***

The Court of Appeals entered its decision on August 29, 2012 affirming the Workers' Compensation Administration's determination that Worker was not entitled to certain indemnity benefits. The Opinion is attached as Exhibit "A".

4. BASIS FOR GRANTING RELIEF AND ARGUMENT

The Court of Appeals' Opinion conflicts with *Ortiz v. BTU Block and Concrete Co*, 122 N.M. 381 (Ct. App. 1996); *Chavez v. SED Laboratories*, 129 N.M. 794 (S.Ct. 2000); and Section 52-1-26.4(C)(2) of the Workers' Compensation Act. The Court of Appeals erred as to the reasonableness of her refusal when Ms. Englett would not continue on light duty as required due to Bee Hive's need to have her off days and on night. The Court of Appeals erred in interpreting the cautionary preliminary diagnosis of work related depression as "Equivocal". Equivocal was confused with concepts of unreliability which do not apply here, pg. 3.

The Court of Appeals opinion conflicts with *Moya v. City of Albuquerque*, 2008 NMSC 004, (2007). The Court of Appeals erred as to physical capacity in rejecting the fire plan evidence when it mistook her supervisor Lori Butler's testimony of procedure when a patient falls during nonemergency times and an emergency due to a fire, pg. 4.

Lastly the Court of Appeals accepted that Worker was acting as caregiver to her boyfriend's mother when all she testified to was visiting occasionally, and no ***12** other evidence of work was in the record. All the evidence was she couldn't work. This opinion conflicts with *Rodriguez v. La Mesilla Construction Co.* 123 N.M. 489 (1997).

These matters were presented to the Court of Appeals directly in Worker's Memorandum in Opposition to Proposed Disposition filed July 12, 2012.

5. *PRAYER FOR RELIEF*

There are amply ground for reversal of the Court of Appeals in this case and reinstate of the WCJ's decision. Wherefore, Worker prays that the Court of Appeals' Opinion be reversed and that the case be remanded to the WCJ and for such other and further relief as the court deems just and proper.

James Rawley

Attorney for Worker

919 Gold Ave. SW

Albuquerque, NM 87102

(505) 243-2255

***13** The undersigned Attorney at Law hereby certifies that a true copy of the forgoing was mailed to all counsel and parties of record in this matter on the 27th day of September, 2012.

Judge David Skinner

Workers' Compensation Administration

P.O. Box 27198

Albuquerque, NM 87126

Paul Koller

Rodey, Dickason, Sloan, Akin & Robb, P.A.

P.O. Box 1888

Albuquerque, NM 87103

James Rawley

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