

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

**LINDA HARRIS v. AMERICAN BREAD COMPANY**

**Chancery Court for Davidson County  
No. 95-2768-I**

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**No. M1998-00611-SC-WCM-CV  
Filed - June 13, 2000**

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**JUDGMENT ORDER**

This case is before the Court upon motion for review by American Bread Company 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, which 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.

The motion for damages filed by Linda Harris is also denied.

Costs are taxed to the American Bread Company and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Drowota, J., Not Participating

**IN THE SUPREME COURT OF TENNESSEE**  
**SPECIAL WORKERS' COMPENSATION APPEALS PANEL**  
**AT NASHVILLE**  
**(July 15, 1999 Session)**

LINDA HARRIS,	)	M1998-00611-SC-WCM-CV
	)	
Plaintiff/Appellee	)	
	)	DAVIDSON CHANCERY
v.	)	
	)	NO. 95-2768-I
AMERICAN BREAD COMPANY,	)	
	)	IRVIN H. KILCREASE, JR.
Defendant/Appellant/ Cross-Appellee	)	CHANCELLOR

For Appellant:

William L. Abernathy, Jr.  
Leitner, Williams, Dooley, & Napolitan, PLLC  
Nashville, Tennessee

For Appellee:

John Grissim, Jr.  
Mitch Grissim & Associates  
Nashville, Tennessee

MEMORANDUM OPINION

Mailed - March 7, 2000  
Filed - June 13, 2000

Members of Panel:

Frank F. Drowota, III, Associate Justice  
Frank G. Clement, Jr., Special Judge  
Samuel L. Lewis, Special Judge

AFFIRMED IN PART/  
REVERSED IN PART AND REMANDED  
Judge

Clement,

## MEMORANDUM 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 of findings of fact and conclusions of law.

In this appeal, both the employer, American Bread Company ("American"), and the employee, Linda Harris ("Harris") seek relief on appeal. American contends (1) that Harris did not give proper notice pursuant to Tenn. Code Ann. § 50-6-201, and (2) that the evidence presented at trial does not support an award of fifty-five percent (55%) vocational disability. Harris contends that the trial court erred in applying the "last injurious injury rule" to bar her claim for injury to her right upper extremity.

As discussed below, this Panel finds that the evidence does not preponderate against the trial court's finding that Harris gave proper notice and that Harris' injuries were properly assessed as it concerns the left upper extremity; however, we find the preponderance of the evidence is contrary to the trial court's finding as it concerns Harris' claim for injury to her right upper extremity and we find that the trial court erred in its application of the "last injurious injury rule" which was the basis for barring Harris' claim for injury to her right upper extremity.

Appellate review on factual issues is de novo with a presumption that the trial court's findings are correct, unless the preponderance of the evidence is otherwise. Tenn Code Ann. § 50-6-225(e)(2) (1991 & Supp. 1998); e.g., Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487 (Tenn. 1997). When a trial court has seen and heard witnesses and issues of credibility and weight of testimony are involved, considerable deference is afforded the trial court's findings of fact. Id.

Harris is a forty-six year old woman who received a GED after leaving school in the eleventh grade. She began working for American in 1972, at the age of 19.

She worked for American for 22 years, staying with American until it closed in December 1994. Thereafter, Harris held a job at General Hospital for only two or three months as a file clerk. She left that job to accept a seasonal position at the post office sorting mail. She worked for the Postal Service for a mere three months, from September 18, 1995, until December 29, 1995.

Harris began experiencing pain in 1989 or 1990, while employed by American. She assumed her pain was caused by arthritis. She did not see a physician. Instead, she treated the pain by wearing wrist bands and applying Ben-Gay ointment. The pain persisted intermittently for years. In 1994, Harris first sought medical care for her "arthritis" from Dr. Paul Talley, her family physician. Dr. Talley's diagnosis was arthritis, just as Harris had assumed. He instructed her to take Motrin and to continue wearing the wristbands. This treatment failed to alleviate Harris' symptoms, therefore Dr. Talley referred Harris to Andani S. Prakash, M.D., who performed EMG and nerve conduction studies on her "left" upper extremity on December 29, 1994. These studies were consistent with left carpal tunnel syndrome.<sup>1</sup>

Harris notified American within a week of being diagnosed with carpal tunnel syndrome by Dr. Prakash and Dr. Talley. American prepared a first report of the injury on January 9, 1995. Harris was then examined by four more doctors, each specializing in orthopedics. Larry Laughlin, M.D., saw Harris on two occasions. On January 26, 1995, Dr. Laughlin found signs of tendinitis and early bilateral carpal tunnel syndrome. On February 24, 1995, Dr. Laughlin evaluated Harris once again, this time finding no signs of his earlier diagnosis and placed no restrictions on Harris.

On July 17, 1995, Harris was evaluated by William Bacon, M.D., who assigned a twenty percent (20%) medical rating to Harris' left upper extremity for moderate carpal tunnel syndrome. Although Dr. Bacon examined the right wrist, he did not

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<sup>1</sup>Significantly, Dr. Prakash performed no tests on Harris' right upper extremity.

give it a rating following the first examination.

On May 29, 1996, Frank Jones, M.D., an orthopedic surgeon, found no abnormalities; however, because Dr. Jones was suspicious of carpal tunnel syndrome, and because he felt Dr. Prakash's interpretation of the EMG was inconclusive, he ordered a nerve conduction study to be done by Richard Lisella, M.D., the results of which were normal.

Dr. Bacon examined Harris a second time on August 14, 1996, following which Dr. Bacon maintained his twenty percent (20%) rating for left carpal tunnel syndrome but added a ten percent (10%) rating for right carpal tunnel syndrome. Dr. Bacon reported that the repetitive lifting at the bakery had caused the carpal tunnel syndrome and that Harris' work sorting mail accelerated the right carpal tunnel syndrome.

### **Notice**

American asserts that Harris failed to give timely notice for she knew of her condition for several years prior to giving notice. Consequently, American insists Harris' claim should be denied.

An employee must give written notice of an injury within thirty (30) days after the injurious occurrence, unless the injured worker has a reasonable excuse for the failure to give the required notice. Tenn. Code Ann. § 50-6-201. The trial court found that Harris did not realize her condition was work related until Dr. Prakash's diagnosis in October or November of 1994. Prior to that time, Harris reasonably believed she was suffering from arthritis. Based upon these facts, the trial court determined that Harris' delay in giving notice was reasonable and, therefore, excusable. See Livingston v. Shelby Williams Industries, 811 S.W.2d 511, 514 (Tenn. 1991) (finding that a delay in asserting a compensable claim is reasonable and justified if the employee has limited understanding of his or her condition and rights and duties under the Act.); Talley v. Virginia Ins. Reciprocal, 775 S.W.2d 587, 591 (Tenn. 1989); Brown Shoe Co. v. Reed, 350 S.W.2d 65, 70 (Tenn. 1961)

(finding that until an employee is assured of the seriousness of her injury, her failure to give notice is reasonable). Based upon these facts, we find that the preponderance of the evidence is not contrary to the trial court's findings with respect to notice.

### **Disability Rating**

American next contends that the trial court erred in awarding a fifty-five percent (55%) permanent disability to Harris' left upper extremity for carpal tunnel syndrome. American argues that the evidence is "mixed" because of the different diagnoses of the medical experts.

In determining whether there has been a decrease in the employee's capacity to earn wages in any line of work available to the employee and in assigning permanent partial disability, a trial court should consider both expert and lay testimony, as well as the employee's age, education, skills, training, local job opportunities, and capacity to work at types of employment available in the claimant's disabled condition. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 678 (Tenn. 1991). Further, when the opinions of medical experts differ in a workers' compensation case, the trial court has absolute discretion to accept the opinion of one medical expert over another. Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990).

Although the medical experts disagree on Harris' degree of disability, the trial court elected to rely on Dr. Bacon's twenty percent (20%) medical rating to Harris' left upper extremity for moderate carpal tunnel syndrome. The trial court clearly considered these factors in determining Harris' vocational disability, as is evidenced in the Order of the trial court which reads:

The proof at trial established that William L. Bacon, M.D. diagnosed the Plaintiff with left carpal tunnel syndrome and assigned the Plaintiff an impairment rating of 20% to her left upper extremity. Based upon the Plaintiff's age, education, skills and job training, local job opportunities, and capacity to work at types of employment available to her following this injury, the Court is of the Opinion that the

Plaintiff retains a permanent partial impairment of fifty-five percent (55%) to her left upper extremity as a result of her work-related injury of October 31, 1994 at American Bread Company.

Harris' formal education is limited to her GED. While she has some additional training, her employment experience is limited to jobs which require use of her upper extremities and the record clearly indicates that Harris continues to experience significant pain in her wrists, which pain is exacerbated by repetitive motion.

Based on the evidence in the record and the reasoning set forth in the Order of the trial court, this Panel finds that the preponderance of the evidence is not contrary to the trial court's findings or the award of fifty-five percent (55%) permanent partial disability to Harris' left upper extremity for carpal tunnel syndrome.

### **Last Injurious Injury**

Harris contends that the trial court erred in denying her right upper extremity claim. The trial court found that her last injurious injury occurred while employed at the Postal Service, which was subsequent to her employment with American. Based upon that finding, the trial court ruled that the "last injurious injury rule" barred her claim for disability to the right upper extremity.

The "last injurious injury rule" provides that an employer takes an employee as he finds him. Therefore, the new employer is liable for disability resulting from injuries sustained by an employee arising out of and in the course of her employment even though it aggravates a previous condition with resulting disability far greater than otherwise would have been the case. McCormick v. Snappy Car Rentals, Inc., 806 S.W.2d 527, 529 (Tenn. 1991). This rule requires that a causal connection must exist between the employment and the resulting injury. The most recent injury causally related to the employment renders the employer at that time liable for full compensation for all of the resulting disability even though increased by aggravation of a previous condition of disease or injury of such employee. Id. However, if the second incident is only increased pain, then the second incident is not a "second injury". See Cunningham v. Goodyear Tire & Rubber Co., 811 S.W.2d

888, 891 (Tenn. 1991). If the later employment simply makes the pain worse and nothing more, then the employee has not sustained an “injury by accident” as defined in the workers’ compensation laws. See Smith v. Smith’s Transfer Corp., 735 S.W.2d 221, 225 (Tenn. 1987); Boling v. Raytheon Co., 448 S.W.2d 405, 407 (Tenn. 1969). If the latter is the case, then there has been no subsequent injury and the subsequent employer would not be liable; while the prior employer, if liable but for a subsequent “last injurious injury,” would remain liable.

We find no evidence of a second injury in this record. No expert has testified that the injury to Harris’ right upper extremity was caused by her work as a clerk for the Postal Service. Dr. Bacon, Harris’ treating physician, stated in his deposition:

Based on the history that I have and the history recently provided, I think that Linda Harris had clear-cut left carpal tunnel syndrome and subjectively had carpal tunnel syndrome on the right. I think one has to consider that the job at the bakery definitely caused the left, caused the right. The right was accelerated by working as a letter sorter.

Furthermore, when Harris was asked at the trial court if she believed that the carpal tunnel in her right arm resulted from her work at American or her work elsewhere, Harris stated, “most definitely at the bakery, because that’s where it started hurting at, at the bakery.”

Based on the lay and expert testimony, this Panel finds that a sufficient causal link exists between Harris’ present injury to her right upper extremity and her prior injury while in the employ of American. Therefore, we find that the preponderance of the evidence is contrary to the trial court’s findings concerning the injury to the right upper extremity and its application of the “last injurious injury rule”.

#### **In conclusion**



After carefully reviewing the evidence in this case, this Panel affirms the trial court's ruling with respect to notice and with respect to the award of fifty-five percent (55%) partial disability; however, this Panel reverses the trial court's decision to bar recovery for Harris' right upper extremity and, therefore, remands this one issue to the trial court for further proceedings.

The judgment of the trial court is accordingly affirmed in part and reversed in part and remanded. Costs are taxed to American Bread Company.

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Frank G. Clement, Jr., Special Judge\_

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CONCUR:

Frank F. Drowota, III, Associate Justice  
Samuel L. Lewis, Special Judge