

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(November 15, 1999 Session)

ANTONIA REGINA ROSE v. EMERSON MOTOR COMPANY

**Direct Appeal from the Chancery Court for Gibson County
No. H 4108 George R. Ellis, Chancellor**

No. W1999-02705-SC-WCM-CV - Mailed May 17, 2000; Filed September 20, 2000

This is an appeal by the defendant/employer. The only issue presented is whether the evidence preponderates against the trial court's award of 35% permanent partial disability to each of the plaintiff's arms. We find it does not and affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court is Affirmed.

STAFFORD, SP. J., delivered the opinion of the court, in which HOLDER, J., joined and Tatum, Sr. J., filed a dissenting opinion.

P. Allen Phillips, Jackson, Tennessee, for the appellant, Emerson Motor Company.

T.J. Emison, Jr., Alamo, Tennessee, for the appellee, Antonia Regina Rose.

MEMORANDUM OPINION

This worker's 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) 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, 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 worker's compensation case. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988). However, considerable deference must be given to the trial judge, who has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved. *Jones v. Hartford Accident & Indem. Co.*, 811 S.W.2d 516, 521 (Tenn. 1991).

I. Facts

The plaintiff is a thirty-two-year-old female. She is a high school graduate who attended beauty school and Jackson State Community College for one and one-half years each. She is a certified nursing assistant and has additionally worked in a factory and as a fast food employee.

The plaintiff began her employment with the defendant in April 1994 as a "brush" person. This job required her to place parts in a machine and brush them with sandpaper. In June 1997, the plaintiff began a new job which she described as being more hand intensive. Her hands subsequently began to go numb and tingle. After reporting this to the plant nurse, she was seen by Dr. Woodall approximately seven times and then by Dr. Hugh Glenn Barnett.

Two nerve conduction studies were performed on the plaintiff which revealed that she was suffering from carpal tunnel syndrome. She received injections in her wrists, was prescribed medication and also wore braces. None of this treatment was successful. She was subsequently placed on lighter duty but continued to experience pain.

On January 9, 1998, Dr. Barnett performed surgery on the plaintiff's left hand. On June 18, 1998, he performed surgery on the plaintiff's right hand. On July 10, 1998, Dr. Barnett released the plaintiff to return to work. He did not place any restrictions on her other than to state that "if it hurt to try not to do it."

The plaintiff returned to the same job that she held before her surgery. At the time of trial, she testified that she was working eight hours a day, six days a week. She has not bid for another job because she currently works days and does not want to lose her shift.

At trial, the plaintiff testified that she continues to have problems with both hands with her right hand being worse than her left hand. Her right thumb aches and her fingers tingle and go numb. Her left thumb is also sore and the fingers on her left hand tingle and go numb as well. She testified that her strength and gripping ability in both hands is not as good now as it was before the injury.

The plaintiff testified that the injury has affected the way in which she performs her job. She is required to lift motors that weigh between five and ten pounds each. When lifting heavier motors, it hurts her arms and shoulders. She is also unable to work as fast now as she could before the injury.

The plaintiff has difficulty sweeping, washing dishes and vacuuming. She also has difficulty opening jars, buttoning a shirt and fixing her daughter's hair. She testified that she has problems holding on to anything tight for a long period of time. She has pain in her fingers, arms and hands that she did not have before the injury. Because of the pain, she takes approximately six Aleve per day.

Dr. Barnett and Dr. Joseph C. Boals testified by way of deposition. Dr. Barnett performed the surgery on both of the plaintiff's arms. He last saw the plaintiff on September 23, 1998. At that time, he testified that the plaintiff was relatively satisfied with the surgeries but had experienced a recurrence of some symptoms in her right hand after returning to work. He found no obvious atrophy and believed the plaintiff had excellent grip strength. He placed no restrictions on the plaintiff other than "if it hurt to try not do it." Dr. Barnett opined that the plaintiff had suffered a 5% impairment to each arm as a result of the carpal tunnel syndrome and surgeries.

Dr. Boals evaluated the plaintiff on October 14, 1998. He testified that his examination revealed a negative Phalen's test bilaterally and an average grip strength of 48 pounds bilaterally. He also stated that the normal grip strength for a person in the plaintiff's age group would be 70 pounds. He diagnosed the plaintiff as suffering from residuals from bilateral carpal tunnel release. He utilized a Jaymar dynamometer to test the plaintiff's grip strength and opined that the plaintiff had suffered a 20% impairment to each arm. He stated that the plaintiff should avoid work requiring heavy gripping and repetitive use of her hands and wrists. He also testified that this impairment was based solely on her diminished strength.

II. ANALYSIS

Both Dr. Barnett and Dr. Boals testified that the plaintiff had suffered an impairment as a result of her injury. Dr. Barnett opined that the plaintiff had suffered a 5% impairment bilaterally while Dr. Boals believed that the plaintiff had suffered a 20% impairment bilaterally.

When medical testimony differs, it is within the discretion of the trial judge to determine which expert testimony to accept. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. 1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804 (Tenn. 1990).

"[W]here the issues involve expert medical testimony and all the medical proof is contained in the record by deposition, as it is in this case, then this Court may draw its own conclusions about the weight and credibility of that testimony, since we are in the same position as the trial judge With these principles in mind, we review the record to determine whether the evidence preponderates against the findings of the trial court."

Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); see also *Elmore v. Travelers Ins.*, 824 S.W.2d 541, 544 (Tenn. 1992) (when testimony is presented by deposition, this Court is in just as good a position as the trial court to judge the credibility of those witnesses.)

The defendant challenges the amount of vocational disability assessed by the trial court. The extent of an injured worker's disability is an issue of fact. *Jaske v. Murray Ohio Mfg. Co.*, 750 S.W.2d 150, 151 (1988). The Supreme Court discussed a similar injury in *Walker v. Saturn Corp.*, 986 S.W.2d 204 (Tenn. 1998). In *Walker*, the plaintiff claimed to have suffered a work-related injury to both her right and left arms. She received a disability rating on her left arm from medical providers but did not receive one on her right arm. Even though no doctor had given the plaintiff a disability rating to her right arm, the trial court found that she had suffered an 85% vocational

disability to both arms. The Special Workers' Compensation Appeals Panel of the Supreme Court reversed the award. The Panel found that the medical testimony did not support an award of permanent partial disability to the right arm and modified the award to the left arm.

The Supreme Court reversed the Panel decision and reinstated the trial court's award of 85% permanent partial disability to both arms. The Court stated that:

"The Panel correctly held that a vocational impairment is measured not by whether the employee can return to her former job, but whether she has suffered a decrease in her ability to earn a living. See *Corcoran*, 746 S.W.2d at 458. This Court stated in *Corcoran* that a vocational disability results when "the employee's ability to earn wages in any form of employment that would have been available to him in an uninjured condition is diminished by an injury. *Id.* at 459.

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. Further, the claimant's own assessment of her physical condition and resulting disabilities cannot be disregarded. 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." (Citations omitted.)

Walker, 986 S.W.2d at 207-08.

Both doctors agree that the plaintiff has suffered an impairment to each arm as a result of the injury. The plaintiff testified regarding the impact the injury has had on her life. Although she previously worked as a certified nurse's assistant, she testified she could not do that job now due to the lack of strength in her arms. She also testified that she continues to suffer pain, numbness and tingling in both of her hands and shoulders. Because of the injury, she now has difficulty performing many tasks required of her at home.

We find that the trial court properly applied the relevant factors in determining the amount of vocational disability suffered by the plaintiff. We are to presume the correctness of the trial court's findings unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Humphrey v. Witherspoon*, 734 S.W.2d 315 (1987). We find that the evidence does not preponderate against the judgment of the trial court.

The judgment of the trial court is affirmed. The costs of this appeal are taxed to the defendant.

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SENIOR JUDGE TATUM, dissenting.

This is an appeal by the defendant/employer in which the only issue presented is whether the trial court erred in awarding 35 percent permanent partial disability to each of the plaintiff's arms. It is undisputed that the plaintiff suffered bilateral carpal tunnel syndrome from a work injury. I agree that the plaintiff has a permanent injury but I would modify the award to 20 percent disability to both arms.

I agree with the summary in the majority opinion governing the standards of our review. I am mindful that the evidence of both doctors is by deposition and that we are as capable of evaluating this evidence as the trial judge. From the entire record, I am convinced that the evidence preponderates against the finding that the plaintiff has 35 percent permanent disability to both arms. I will now summarize the evidence.

The plaintiff began working for the defendant in April, 1994, as a "brush person." She places parts in a machine and then brushes them. It is necessary for her to lift the parts, which weigh from five (5) to ten (10) pounds each, in order to place them in the machine.

She testified that her right hand gives her more problems than the left. Her right thumb aches and fingers tingle and go to sleep. This difficulty "comes and goes." Lifting heavy weights and driving automobiles causes tingling and numbness in her fingers. She testified that she has aching in her right wrist and forearm, mostly when she is at home. She does not know the cause of this. She obtains relief by rubbing her arm and taking Aleve.

She testified that she has soreness in her left thumb, and the fingers on her left hand tingle and go to sleep. She has loss of grip strength in both the right and left hand, and the throbbing, tingling, and going to sleep of her hands or fingers interferes with her sleep about three nights each week. This is relieved by massaging. This also causes her difficulty in doing her housework. Dr. Barnett released her from further treatment on July 10, 1998.

The plaintiff testified that she works six (6) days each week and has a forty-eight (48) hour work week. She has worked for the defendant for five (5) years and has the highest paying job she has ever had. The plaintiff testified that she has lost no time from her work, except for one day when surgery was done. She was doing the same work at the time of trial on February 2, 1999, that she was doing before she had carpal tunnel syndrome. The plaintiff further testified that the carpal tunnel syndrome has affected her work only "a little bit" and she received an increase in pay since surgery. She testified that she enjoys her work and expects to continue with the same work. Although she has approximately five (5) years seniority, she has not bid for an easier job because she does not want to lose her daytime shift.

Danny Stewart testified that he is the plaintiff's supervisor and that the quality of her work has remained the same before and after her surgery. Mr. Stewart testified that the plaintiff has never complained to him about any difficulties that she has had with her hands and arms in her work.

Dr. Joseph C. Boals, an orthopedic surgeon, testified by deposition on behalf of the plaintiff. Dr. Boals testified that he saw the plaintiff on October 14, 1998, at the request of plaintiff's attorney, for evaluation purposes only. Dr. Boals testified that by use of a Jaymar dynamometer, he tested the plaintiff's grip strength which showed forty-eight (48) pounds bilaterally. The normal grip strength for a person of her age is around seventy (70) pounds. Dr. Boals testified that the plaintiff had 20 percent permanent impairment to both arms according to the AMA Guidelines. He testified that this impairment rating was based "solely upon her diminished strength." He did not attribute any impairment for tingling fingers or pain. Dr. Boals testified that the AMA Guides cautioned against relying on grip strength in assessing disability. He testified that the reason for this is "the manner of measuring it (grip strength) is somewhat difficult and that is the problem we have in performing any type of strength test."

Dr. Boals testified that the plaintiff had no nerve root entrapment and no atrophy in muscles. He stated that the plaintiff was not able to return to activities required by her job with the defendant or perform any work that required repetitive use of her hands and wrists. He specified several occupations that the plaintiff could not follow that required repetitive use of hands and wrists.

Dr. Glenn Barnett, a neurological surgeon, testified by deposition on behalf of the defendant. Dr. Barnett stated that he first saw the plaintiff on December 30, 1997, when she was complaining of both hands hurting. The plaintiff's history was that her hands began to tingle and go to sleep. She saw a Dr. Woodall about seven times from September, 1997, to December, 1997. Conservative treatment was without success. Nerve conduction studies showed bilateral carpal tunnel syndrome.

Dr. Barnett performed left carpal tunnel release on January 9, 1998, which relieved most of the plaintiff's symptoms, but her right hand and arm continued to be symptomatic. On June 18, 1998, Dr. Barnett performed surgery on the plaintiff's right carpal tunnel, and she was released on July 10, 1998.

Dr. Barnett testified that the plaintiff returned on September 23, 1998, and told him she was relatively satisfied with her surgeries, particularly on the left, but that something had recurred to some extent on the right. No atrophy was found, and Dr. Barnett described her strength as "excellent." Dr. Barnett offered the plaintiff supportive symptomatic treatment and told her that if she could not tolerate the activities of her job, she should seek work less physically demanding. Dr. Barnett placed no specific restrictions on the plaintiff but told her that her activities should be controlled by the amount of pain that she experienced.

Dr. Barnett testified that the plaintiff had 5 percent permanent impairment to both arms according to the AMA Guidelines. He stated that the surgery was successful. He did not test the plaintiff's grip strength with a Jaymar dynamometer, stating that it was his opinion that this was a subjective test and was not reliable.

After considering all of the evidence, I conclude that the preponderance of the evidence does not support an award based on 35 percent permanent partial disability to each arm. In my opinion, the preponderance of the evidence supports an award based on 20 percent permanent partial disability to each arm.

The plaintiff's testimony reveals that she has lost no time from her work due to her condition and has continued to work for six (6) days each week and forty-eight (48) hours per week. The record reveals that this work is strenuous, but the carpal tunnel syndrome has affected the plaintiff's work only slightly, according to her own testimony. She actually enjoys her work, according to her testimony, and has made no attempt to procure an easier job. She expects to continue with this job indefinitely. It is true that Dr. Boals testified that she was unable to continue with this type of work, while Dr. Barnett testified that she should be guided by the amount of pain that she had. The plaintiff has elected to reject Dr. Boals' opinion that she cannot continue with the same work; since she is not experiencing enough pain to cause her to desire other employment. She is taking Dr. Barnett's advice and continuing with the same work. I am convinced that she would not and could not continue this work with 35 percent disability to both arms.

Dr. Boals' rating of 20 percent impairment is based solely upon his testing of strength. Dr. Boals testified that there were difficulties and problems in connection with strength testing, as did Dr. Barnett. The AMA Guides also recognized the unreliability of the testing of grip strength. Dr. Barnett saw the plaintiff several times for a period of about six months and performed surgery on both wrists. Dr. Boals saw the plaintiff only one time and that was for the purpose of litigation and not treatment.

The plaintiff is comparatively well educated, was only thirty (30) years of age at the time of trial, and, if not already qualified, she could easily become qualified to obtain other work with little physical requirements. From her testimony, it is clear that she does not find it necessary to seek other employment and does not desire other employment.

I would modify the judgment so as to award the plaintiff compensation based upon 20 percent permanent partial disability to each arm.

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JUDGMENT

This case is before the Court upon Emerson Motor Company's motion for review 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.

Costs will be assessed to Emerson Motor Company for which execution may issue if necessary.

PER CURIAM

Holder, J., not participating