

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 28, 2000 Session

KITTY LOU KIMBRO v. FERRO CORPORATION

**Appeal from the Criminal Court for Wilson County
No. 98-1665 J. O. Bond, Judge**

**No. M2000-00400-WC-R3-CV - Mailed - January 30, 2001
Filed - March 30, 2001**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e)(3) (1999) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. Ferro Corporation raises three issues on appeal, arguing that the trial court erred in (1) finding that the plaintiff had suffered a permanent injury to the left upper extremity, (2) finding a 10 percent anatomical impairment to the left upper extremity, and (3) assessing awards of 45 percent permanent partial disability to the right upper extremity and 30 percent permanent partial disability to the left upper extremity. On review, the Panel concludes that the evidence does not preponderate against the trial court's finding of a permanent injury to the left upper extremity. Furthermore, though we conclude that the trial court's finding of 10 percent anatomical impairment to the left upper extremity was excessive, we nonetheless hold that the evidence does not preponderate against the trial court's awards of 45 percent permanent partial disability to the right upper extremity and 30 percent permanent partial disability to the left upper extremity.

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

CAROL CATALANO, Sp. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., and JAMES L. WEATHERFORD, Sr. J., joined.

Jill A. Hanson, Nashville, Tennessee, for the appellant, Ferro Corporation.

Susan K. Bradley, Murfreesboro, Tennessee, for the appellee, Kitty Lou Kimbro.

MEMORANDUM OPINION

I. Facts and Procedural History

Kitty Lou Kimbro,¹ the plaintiff, began working for Ferro Corporation (Ferro), the defendant, in July 1987. Except for a two-year layoff which ended in 1993,² she was employed by Ferro continuously. During her employment with Ferro, Kimbro occupied a variety of positions, working as a smelter operator, running machines in Ferro's milling department, and mixing, weighing, and packaging raw materials. Many of these tasks involved strenuous lifting of boxes and bags of materials. At some point while working in the milling department, Kimbro noticed that she was experiencing pain in her hands. In February 1998, Kimbro reported this pain to Ferro.

Initially, Kimbro was treated conservatively for her injuries, but eventually she was referred to Joseph Weick, M.D., who performed a surgical "carpal tunnel release" on her right arm. Kimbro returned to work for Ferro on light duty the day after her surgery. Subsequently, Kimbro transferred to Ferro's "lab" department, where she worked full time and without restrictions, though she still experienced pain to her hands while writing and while operating air hoses used in the lab. During this time, Kimbro complained to Weick on numerous occasions that she was having difficulty with her grip strength and with controlling her thumb. Kimbro continued to work for Ferro for approximately nine months before she was terminated.³

At trial, Kimbro testified that she continued to have pain in the edges of her hands, through her thumbs and down the sides of her palms, and she also had symptoms of numbness and problems gripping. Kimbro also presented the deposition testimony of orthopedic surgeon Richard Fishbein, M.D., who assigned Kimbro an anatomical impairment rating of 5 percent to the left upper extremity and 12 percent to the right upper extremity. Ferro, on the other hand, presented the deposition testimony of Wieck, who assigned Kimbro an anatomical impairment rating of 5 percent to the right upper extremity, but no impairment rating to the left upper extremity. Wieck, however, conceded that he did not evaluate her left extremity in determining impairment.

The trial court concluded that Kimbro had suffered a permanent vocational disability resulting from bilateral carpal tunnel syndrome, and it awarded Kimbro benefits based on findings of 45 percent permanent partial disability to the right upper extremity and 30 percent permanent partial disability to the left upper extremity. Ferro appealed, asserting that the trial court erred in (1) finding permanent injury to the left upper extremity; (2) finding a 10 percent anatomical impairment to the left upper extremity; and (3) assessing permanent partial disability awards of 45 percent to the

¹At trial, Kimbro testified that she was forty years old and has obtained her GED.

²During the period in which she was laid off from Ferro, Kimbro worked in various jobs as a dock worker, waitress, and cashier.

³In her brief, Kimbro intimates that she was wrongfully terminated because she was "fired . . . after giving her deposition in this workers' compensation action." Ferro maintains that she was terminated for "attendance reasons." The allegation that Kimbro was fired wrongfully, however, is not part of the action before the Panel and will not be addressed.

left upper extremity and 30 percent to the right upper extremity. On review, the Panel concludes that trial court did not err in finding a permanent injury to the left upper extremity. Moreover, while the court concludes that the trial court's finding of 10 percent anatomical impairment to the left upper extremity was excessive, we nonetheless conclude that the evidence does not preponderate against the trial court's respective awards of 45 and 30 percent disability to the right and left upper extremities. Therefore, the judgment of the court below is affirmed.

II. Standard of Review

In workers' compensation cases, the standard of review is *de novo* upon the record, accompanied by a presumption of the correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); Spencer v. Towson Moving and Storage, Inc., 922 S.W.2d 508, 509 (Tenn. 1996). The application of this standard requires the Court to weigh in more depth the factual findings and conclusions of the trial court in a workers' compensation case. Cleek v. Wal-Mart Stores, 19 S.W.3d 770, 773 (Tenn. 2000).

III. Analysis

A. Permanency of the Injury to the Left Upper Extremity

We begin by addressing whether the trial court erred in finding that Kimbro suffered a permanent injury to her left upper extremity. The burden of establishing the permanency of an injury is on the plaintiff, and permanency must be established by expert medical proof. Worthington v. Modine Manufacturing Co., 798 S.W.2d 232, 233 (Tenn. 1990); Owens-Illinois Inc. v. Lane, 576 S.W.2d 348 (Tenn. 1978). Where the expert testimony conflicts, "it is within the discretion of the trial judge to determine which expert testimony to accept." Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675 (Tenn. 1983). When evaluating the credibility of conflicting experts, "the trial court is allowed to consider the qualifications of the experts and the information available to them." Ormon v. Williams Sonoma, Inc., 803 S.W.2d 672 (Tenn. 1991).

As noted by Ferro, Wieck and Fishbein offered conflicting testimony concerning whether Kimbro had sustained a permanent injury to her left upper extremity; Fishbein assigned a permanent anatomical impairment rating to the injury but Wieck did not. Ferro contends that Fishbein's testimony should be given little weight because Fishbein saw Kimbro at the request of her attorney and did not act as a treating physician. Notably, however, Wieck's deposition reveals that Kimbro was still experiencing symptoms in her left arm during her last visit with him on September 10, 1998, and his conclusion that Kimbro did not have further problems with her left arm was based largely on the fact that she did not return to his office after that visit. As noted by the trial court, Wieck's evaluation was limited regarding the permanency of the injury to the left upper extremity when compared to the evaluation conducted by Fishbein. The trial court was within its discretion in affording more weight to Fishbein's testimony, and the preponderance of the evidence supports the trial court's conclusion that Kimbro's injury to her left upper extremity was permanent.

B. Anatomical Impairment Rating to the Left Upper Extremity

On the other hand, it appears that the evidence preponderates against the trial court's finding of a 10 percent anatomical impairment to the left upper extremity. The highest anatomical impairment rating assessed by expert testimony was Fishbein's assessment of 5 percent impairment; Wieck assessed no impairment rating to the left upper extremity. Furthermore, the trial court's conclusion that the impairment rating should be 5 percent was apparently based not upon a disagreement with Fishbein's assessment of the injury but upon the court's reading of the AMA Guides by which impairment ratings are evaluated. As stated by the court, "It [the AMA Guides] says, the only minimum it has with this problem is 10 percent, that's the minimum and I'm not going to go past that . . ." However, the Panel finds that the evidence, as supplied by the testimony of Fishbein and Wieck, does not support an assessment of anatomical impairment above 5 percent. Therefore, the Panel concludes that the permanent impairment rating to the left upper extremity should be assessed at 5 percent in accordance with Fishbein's testimony.

C. Permanent Partial Disability Assessments

Despite our conclusion that Kimbro should have been given an anatomical impairment rating of 5 (rather than 10) percent to the left upper extremity, however, we nevertheless conclude that the evidence does not preponderate against the trial court's findings of 45 percent permanent partial disability to the right upper extremity and 30 percent permanent partial disability to the left upper extremity. The extent of vocational disability assessed by the trial court is not exclusively dependent upon the anatomical impairment rating assigned to an injury. As stated in Corcoran v. Foster Auto GMC, Inc.,

While an anatomical disability rating based on one of the two statutory references is preferable and ordinarily, if not uniformly, part of the proof offered by either or both parties, the ultimate issue is not the extent of anatomical disability but that of vocational disability, the percentage of which does not definitively depend on the medical proof regarding a percentage of anatomical disability. Once causation and permanency are shown by medical evidence, "[w]e do not find, either in the statute or in the cases, a mandatory requirement that the trial judge fix permanent partial loss of use ... solely with reference to expert testimony."

746 S.W.2d 452, 457-58 (Tenn. 1988) (quoting Holder v. Wilson Sporting Goods, 723 S.W.2d 104, 108 (Tenn.1987)); cf. also Worthington v. Modine Manufacturing Co., 798 S.W.2d 232, 234 (Tenn. 1990) (observing that where the evidence establishes that an injury is permanent, an expert's failure to assign an anatomical impairment rating will not preclude an award of benefits). When assessing the extent of an employee's disability, the trial court may consider "many pertinent factors, including job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to the anatomical disability testified to by medical experts." Employers Insurance Co. of

Alabama v. Heath, 536 S.W.2d 341, 343 (Tenn. 1976). Significantly, the “employee’s own assessment of her physical condition and resulting disability is competent testimony and cannot be disregarded.” Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 678 (Tenn. 1991). In determining vocational disability, the question is not whether the employee is able to return to the work being performed when injured but whether the employee’s earning capacity in the open labor market has been diminished by the residual impairment caused by a work-related injury. See Ware v. United States Steel Corp., 541 S.W.2d 107, 111 (Tenn. 1976); see also Holder v. Wilson Sporting Goods, 723 S.W.2d 104, 108 (Tenn. 1987); Prost v. City of Clarksville Police Department, 688 S.W.2d 425, 427 (Tenn. 1985).

In the pending case, Kimbro testified that she still experienced pain, numbness, and cramping in her hands, she still frequently had to wear braces on her wrists, and she often had difficulty gripping items and writing. In addition, she stated that “everything that is in my area that I am qualified to do requires heavy lifting or working on an assembly type line and I just don’t feel I can do those things.” The trial court found Kimbro to be very credible and relied extensively on her testimony, and the Panel accords considerable deference to the trial court’s assessment of the credibility of testimony it hears. See Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987). Given Fishbein’s testimony that Kimbro’s injuries are permanent, combined with Kimbro’s testimony, given great weight by the trial court, that her injuries have dramatically affected her employability in the local job market, the Panel concludes that the evidence does not preponderate against an award of 45 percent permanent partial disability to the right upper extremity and 30 percent permanent partial disability to the left upper extremity.

IV. Conclusion

For the foregoing reasons, the Panel concludes that the preponderance of the evidence supports the trial court’s awards of permanent partial disability in this case. Therefore, we affirm the judgment of the trial court. Costs on this appeal are taxed to Ferro Corporation, for which execution may issue if necessary.

CAROL CATALANO, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

KITTY LOU KIMBRO v. FERRO CORPORATION

No. M2000-00400-SC-WCM-CV - Filed March 30, 2001

ORDER

This case is before the Court upon 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 on appeal are taxed to the appellant.

IT IS SO ORDERED this 30th day of March, 2001.

PER CURIAM

Birch, J. - Not participating.