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

October 13, 2000 Session

# RALPH DEAN PIERCE, JR, ET AL. v. CINCINNATI CASUALTY INSURANCE COMPANY, ET AL.

**Direct Appeal from the General Sessions Court for Warren County**
**No. 6804-GSWC Larry G. Ross, Judge**

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**No. M2000-00273-WC-R3-CV - Mailed - January 4, 2001**
**Filed - January 5, 2001**

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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 to the Supreme Court of findings of fact and conclusions of law. In this case, the employer, appellant, contends that (1) the trial court erred in awarding permanent disability benefits for the right arm, and (2) the trial court's award of 62% permanent partial disability for employee's left arm was excessive. The employee contends that the award to the right arm was insufficient. For reasons stated below, the trial court is affirmed.

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

TOM E. GRAY, SP.J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, J. and THOMAS K. BYERS, SR., J, joined.

Michael Parsons, Nashville, TN for Appellant, Insurance Company of the State of Pennsylvania, CIGNA Insurance Company, Carrier Corporation, United Technologies.

Frank D. Farrar and William Joseph Butler, McMinnville, TN for Appellee, Ralph Dean Pierce, Jr.

## MEMORANDUM OPINION

At the time of the trial, Ralph Dean Pierce, Jr., claimant, was 50 years of age and had worked for Carrier for twenty years. Mr. Pierce testified that he had taken a course in electricity after high school graduation, but that he never used the training and had never obtained an electrician's license.

He had no other vocational training and possessed no special skills. Since high school graduation in 1968, claimant had labor intensive employment at several different jobs with never being fired or disciplined on the job resulting in time off.

Starting at Carrier more than twenty years ago the first job assigned to claimant was that of degreaser helper. This job involved loading and unloading coils weighing from one pound to thirty pounds into a basket. He then became a material handler which included helping to unload coils off the end of the line and putting them in containers. As a material handler he also drove a stand-up fork truck to move the coils within the coil shop. He was an assembly line worker which required a lot of heavy lifting to put in the bolts. Another job he performed was in the press shop where the worker must set up a machine and run parts; changing the dies required lifting and some dies were of such weight and length to require two people to lift and put into place. This job also required taking parts out of the bin, putting them up to the machine and bending them. The employee had to turn the part and then remove the part and place in a different container.

Claimant testified that at the present time he is a stockman A, and that his job requires lifting, pushing and pulling. He said that on this job because of the thin gauge of the metal parts that he can determine how much to pick up at one time. He did not believe any of the parts weighed more than ten pounds.

Wayne Burch, claimant's immediate supervisor, testified on direct that he had observed Mr. Pierce doing each phase of his job and that Mr. Pierce was able to perform the tasks without appearance of physical difficulty. To his supervisor, Mr. Pierce has not made complaints of difficulty with the job or of pain or discomfort. Mr. Pierce had not advised his supervisor of any restrictions, limitations or disabilities on his ability to work.

Sitting in the courtroom during the testimony of Ralph Dean Pierce, Jr., Wayne Burch had the opportunity to hear questions and answers. On cross examination Mr. Burch was asked if he believed Mr. Pierce, and he answered, yes.

Mr. Burch testified that Mr. Pierce is in effect a material handler, and that he must lift parts and that he must push and pull a cart. He estimated that an empty cart weighs seventy-five (75) pounds and when full the cart would have a weight of two hundred (200) pounds. Claimant pushes and pulls these carts every working day and sometimes must work ten hours a day. From the testimony of Mr. Burch there is no question that Mr. Pierce is a person who has a strong work ethic and one who does not complain.

Claimant began suffering left elbow pain and began to undergo the treatment of Dr. Douglas Haynes. Treatment consisted of restricted activity, physical therapy and multiple injections. With no improvement Mr. Pierce began treatment on the 29th day of October, 1998 under the care of Dr. Roderick Vaughn, a board certified orthopaedic surgeon. After examination Dr. Vaughn diagnosed claimant with chronic left elbow pain, medial and lateral epicondylitis and mild cubital tunnel syndrome. The patient suffered from epicondylitis on both sides of his left elbow. The diagnosis

of cubital tunnel syndrome reflected that Mr. Pierce experienced symptoms such as numbness in the ring and small finger that pointed to an ulnar nerve problem at the left elbow.

Not improving with treatment Dr. Vaughn recommended and performed surgery on the left elbow of Mr. Pierce on the 25th day of February, 1999. Known as a medical epicondyle release and debridement, the surgery involved the removal of degenerative and inflamed tissue. The surgery confirmed that Mr. Pierce did have some inflamation of the ulnar nerve at the left elbow.

Dr. Vaughn continued as claimant's treating physician and testified that on March 23, 1999 Mr. Pierce reported pain in his right elbow. Upon examination, right lateral epicondylitis was diagnosed. The right elbow was injected with medication, and Mr. Pierce did experience some relief, but the pain and symptoms returned. By August, 1999 the primary complaint of claimant was the right elbow pain. It was Dr. Vaughn's opinion that as to the problem with the left elbow the patient reached maximum medical improvement in May, 1999.

Dr. Vaughn testified that he found Mr. Pierce to be honest and truthful and compliant and that with the history which Mr. Pierce gave to him that his problem with his arms that it is more probable that this is work associated. He testified that repetitive activity of pushing and pulling objects causes the tendon to become inflamed.

No permanent partial impairment for the left arm injury was given by Dr. Vaughn, and he testified that the American Medical Association Guidelines To the Evaluation of Permanent Impairment do not provide any impairment for this injury or this type of injury.

For an independent medical evaluation Mr. Pierce saw Dr. C. Robinson Dyer, a board certified orthopaedic surgeon, on the 21st day of October, 1999. Dr. Dyer took a history of the claimant, reviewed his medical records, and examined him. Dr. Dyer noted that Mr. Pierce was still having pain in both elbows with the right elbow being more acute. The doctor found instability of the left elbow joint and significant atrophy to the left forearm as compared to the right, after taking into account the fact that the plaintiff is right-arm dominant.

It was the testimony of Dr. Dyer that the injury to both the right and left arm were related to the work of Mr. Pierce. Dr. Dyer testified that the claimant's injuries were permanent.

A permanent partial impairment was given to claimant by Dr. Dyer. He expressed his impairment ratings to each arm in two different ways, as a percentage of the upper extremity and as a percentage of the arm based upon the elbow impairment. He used the American Medical Association Guidelines To The Evaluation of Permanent Impairment, Fourth Edition in arriving at his opinion.

For the left elbow injury, Dr. Dyer assigned 20% impairment for instability and an additional 8% for weakness for a combined total of 28% permanent partial impairment to the left arm. The elbow impairment of 20% for the elbow instability according to testimony of Dr. Dyer was based

on the latest edition of the AMA Guides with the 8% impairment for weakness being based upon his experience, training and education. He testified that the AMA Guides permit an examiner to assign an impairment rating based upon clinical findings where the examiner believes that the Guides' estimate of impairment does not sufficiently reflect the severity of the patient's condition.

Dr. Dyer converted the 20% instability rating to a 14% impairment to the left upper extremity and the 8% weakness impairment to an additional 5% impairment to the upper extremity. He explained that the upper extremity has four parts, the hand, the wrist, the elbow and the shoulder but that this injury did not effect the shoulder and was limited to the arm.

With regard to the right elbow, Dr. Dyer testified that the AMA Guides do not provide an impairment rating for pain or use and there isn't a specific rating addressed through the guidelines for epicondylitis. He assigned a permanent partial impairment of 8% to the right upper extremity.

A vocational expert, Pat Hyde, testified live at the trial. This witness had interviewed the claimant, reviewed all the medical information, tested for malingering and administered the Wide Range Achievement Test to the employee. According the witness there was no malingering, and the employee read above the 12th grade level, spelled at the 5th grade level and performed math at the beginning of the 8th grade level.

It was the opinion of the vocational expert that the employee could only perform 10% of the jobs left for him in that he had suffered a 90% vocational disability to the body as a whole due to the injuries to his arms.

At the conclusion of the trial the judge announced his opinion from the bench. He found that there was no dispute that the employee suffered a compensable injury arising out of and in the course and scope of his employment. Considering factors including age, education and transferable skills the judge was of the opinion that the employee suffered a 62% vocational disability to the left arm and a 14% disability to his right arm. Lump sum was awarded and future medicals were ordered to remain open.

The trial judge did not state the vocational disability in a percentage as to the body as a whole, but by simple mathematics applied to the statutory laws the award of the judge converts to a 38% vocational disability to the body as a while.

It appears that appellant and appellee do not question the credibility of Mr. Pierce or Mr. Burch. The preponderance of the evidence is that they were truthful under oath.

Appellate review of factual issues in workers' compensation cases 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)(1999); Hill v. Eagle Ben Mfg. Inc. 942 S.W. 2d 483, 487 (Tenn. 1997).

The issue and extent of a permanent vocational disability are questions of fact for the trial court to determine and are subject to the de novo standard of review. Corcoran v. Foster Auto GMC, Inc. 746 S. W. 2d 452, 458 (Tenn. 1988) Jaske v. Murray Ohio Mfg Co., Inc. 750 S. W. 2d 150, 151 (Tenn. 1988). The Appellate Court is not bound by the trial court's factual finding, but is to examine them in depth and conduct an independent examination to determine where the preponderance lies. Galloway v. Memphis Drum Service 822 S. W. 2d 584, 586 (Tenn. 1991)

The employer does not contest that the employee suffered an "accident" arising out of and in the course and scope of his employment. No issue is raised as to notice. Employer contends that the trial court erred in awarding permanent disability benefits for the right arm and that the trial court's award of 62% permanent partial disability to the employee's left arm was excessive. By argument the employer asserts that the preponderance of the evidence is clearly on its side.

Dr. Vaughn saw the employee for a period of months for the purpose of providing medical treatment. Dr. Dyer saw the employee on one occasion for the purpose of an independent medical evaluation. These two physicians agree that the employee has injury to both arms. They agree the injury was more probable than not caused by his employment. Where they disagree is that Dr. Vaughn did not assign any permanent partial impairment to the left or right arm. Dr. Dyer gave a rating to both arms.

Upon careful review the preponderance of the evidence does not weigh against Dr. Dyer. But considering the case without an impairment rating there is evidence to support the trial judge.

In Walker v. Saturn Corp. 986 S. W. 2d 204 (Tenn. 1998) Justice Barker writing for the Supreme Court at page 207 stated:

> An anatomical impairment rating is not always indispensable to a trial court's finding of permanent impairment. See Newman v. National Union Tire Ins. Co., 786 S. W. 2d 932, 934 (Tenn. 1990); Corcoran, 746 S. W. 2d at 457. In fact, anatomical impairment is distinct from the ultimate issue of vocational disability that the trial court must assess. Wilks v. Resource Auth. Of Sumner County, 932 S. W. 2d 458, 463 (Tenn. 1996); Perkins v. Enterprise Truck Lines, Inc., 896 S. W. 2d 123, 125 (Tenn. 1995). An employee should not be denied compensation solely because she is unable to present a witness who will testify to the exact percentage of her medical impairment. Corcoran, 746 S. W. 2d at 457.

The evidence established that Mr. Pierce suffered pain in the left arm for two years before seeing Dr. Vaughn. Surgery by Dr. Vaughn provided objective evidence that the employee was injured. After surgery the employee got some relief, but pain continued. A problem developed in the right arm. Injection into the right elbow gave temporary relief. Mr. Pierce's job requires that he perform repetitive work with his arms and Dr. Vaughn testified that "sometimes if an individual is

performing an activity in a repetitive manner, that repetitive stress can lead to inflammation and eventually degenerative tendon." He also said that pulling and pushing objects most likely caused the tendon to become inflamed.

Claimant must work and has a strong work ethic. That he goes to work each day and pushes and pulls the carts in performance of his job without complaint should not be held against him.

According to T.C.A. 50-6-229(a) the employee presented evidence that he could manage money and that it was in his best interest for any award to be paid in lump sum. The trial court granted his request for lump sum. The evidence supports the lump sum payment.

The trial court's finding of a sixty-two (62%) percent vocational disability to the left arm and a fourteen (14%) percent vocational disability to the right arm a thirty-eight (38%) percent vocational disability to the body as a whole is supported by the evidence.

The judgement of the trial court is affirmed.

Cost are assessed to appellant.

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Tom E. Gray, Special Judge

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**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 appears 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 the appellant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM