

**IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON  
(October 9, 1995 Session)**

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DEBORAH JEAN BARNER, )  
                            )  
Plaintiff-Appellee,     )     HENRY CIRCUIT  
                            )  
V.                        )     Hon. Julian Guinn,  
                            )     Judge  
                            )  
EMERSON ELECTRIC COMPANY, )     No. 02S01-9505-CV-00043  
                            )  
Defendant-Appellant.    )

FILED

October 10, 1996

For Appellant:

Thomas F. Ventimiglia  
Hessing, Ventimiglia & Swayne  
Paris, TN

For Appellee:

Charles L. Hicks  
Appellate Court Clerk  
Camden, TN

**MEMORANDUM OPINION**

Members of Panel:

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Lyle Reid, Associate Justice, Supreme Court  
Joe C. Loser, Jr., Special Judge  
Janice M. Holder, Special Judge

AFFIRMED

Holder, Judge

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court pursuant to Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. Our scope of review of findings of fact by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2).

The employer contends the trial court erred in:

1. Awarding permanent partial disability benefits based on 80% to the left hand; and
2. Awarding the cost of obtaining Dr. Robert J. Barnett's deposition as a recoverable discretionary cost.

We affirm the trial court as to both issues.

Deborah Jean Barner ("Barner") is 41 years of age and a high school graduate. Other than attending college for one quarter, she has no additional educational experience, specialized training or vocational training. Her work history consists entirely of factory work. Prior to employment at Emerson, Barner performed assembly work in a plastics factory and worked in factories where clothing was constructed and shoes were manufactured.

On October 18, 1993, Barner injured her non-dominant left hand arising out of the course and scope of her employment. From a list of three doctors given to her by the employer, she chose Dr. Harrison, whose billing reflects that he treated her on four occasions over a four month period. Dr. Harrison referred her to Dr. Stonecipher, an orthopedic surgeon. Barner became dissatisfied with Dr. Stonecipher's treatment and continued to have difficulty performing her job duties without swelling and constant pain.

Barner was then referred by her attorney to Dr. David Gaw, who referred her to Dr. Charles Emerson, another orthopedic surgeon. Dr. Emerson's records,

stipulated for admission into evidence, diagnosed an ulnar dislocation of the extensor tendons of the second and third finger secondary to a tear or stretching of the shroud fibers of the MCP joint. Barner underwent surgery on March 4, 1994, and was returned to work by Dr. Emerson on April 5, 1994, with the recommendation not to return to her previous job of lifting motors. On May 9, 1994, Dr. Emerson recommended that Barner not lift more than 10 pounds until the tendons of her left hand had totally healed.

Barner has returned to her regular job. She is, however, doing assembly line work, making parts for a saw rather than lifting and carrying motors. Barner complains of swelling in her hand after working on the assembly line. She continues to have difficulty making a fist and in using her second and third fingers in lifting or handling objects, compensating by placing her palm upward and using the outside part of her hand to lift objects.

Based on his examination of Barner on September 9, 1994, Dr. Emerson found that she had a forty-eight percent (48%) impairment of the index finger on the basis of her limitation of motion of the PIP and MCP joints. He equated the impairment to a ten percent (10%) impairment of hand function based on the AMA Guidelines to Impairment of Function. On October 26, 1994, Dr. Emerson clarified his impairment function rating by increasing the impairment to her hand to eleven percent (11%), giving consideration to decreased grip strength.

Dr. Robert J. Barnett saw Barner on one occasion for the purpose of expressing an opinion at trial. He provided no treatment. Dr. Barnett testified by deposition that upon examination on August 5, 1994, Barner could bend the metacarpal phalangeal joint of her left hand only about 15 degrees, rather than the usual 80 or 90 degrees making a fist. She can flex the middle finger only about 15 degrees. Her fingers will not touch her palm, the distance between her fingers and palm being several inches.

When measured, Barner's grip strength in the injured left hand was only 25

pounds compared to a grip of 70 pounds with the right hand. Basing his opinion on the latest edition of the AMA Guidelines, Dr. Barnett found that Barner suffered a sixty percent (60%) grip strength loss in the hand and assessed her impairment as twenty-seven percent (27%) to the hand. In making his assessment, Dr. Barnett considered Barner's inability to finely coordinate her fingers, her lack of grip in picking up objects, the weakness in her hand, and her inability to hold small things because she cannot make a fist.

#### PERMANENT PARTIAL DISABILITY RATING

The employer contends that the trial court erred in awarding permanent partial disability benefits based on eighty percent (80%) to the left hand.

The trial court found that, based on the testimony and record of the physicians and the testimony of Barner, that she has an almost total loss of her hand due to her inability to close her fingers; that her injured fingers cannot be brought to the palm and are almost useless unless she is attempting to grip an object in excess of at least three inches in diameter. Barner has difficulties with lifting movements and suffers pain after the use of her hand for prolonged periods.

The trial judge may consider many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomical impairment, for the purposes of evaluating the extent of a claimant's permanent disability. Miles v. Liberty Mut. Ins. Co., 795 S.W.2d 665 (Tenn. 1990); Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990).

Barner's work experience was entirely as a factory worker. The injury to her fingers significantly affected her ability to perform job related duties; she continues to be unable to fully function without pain and swelling. We find that the evidence does not preponderate against the findings of the trial court.

## AWARD OF EXPENSE OF DR. BARNETT'S DEPOSITION

The employer contends that the opinion of Dr. Barnett was not necessary to the court's decision and that the trial court erred in awarding, as a recoverable discretionary cost, Dr. Barnett's deposition fee of \$540.00, plus \$101.40 for the taking and transcribing of the deposition.

The employer argues that the claimant obtained Dr. Barnett's testimony after one consultation for the sole purpose of making a recommendation concerning the extent and degree of Barner's injury. Dr. Barnett based part of his opinion on his review of Dr. Emerson's medical file; the court ruled that the expense of Dr. Emerson's treatment was not recoverable from the employer because the treatment was not authorized. The employer also points out that Dr. Barnett's rating was made before Dr. Emerson's final evaluation of impairment and his discharge of Barner. The Plaintiff readily admits that Dr. Barnett's treatment was not authorized by the employer.

Rule 54.04(2) of the Tennessee Rules of Civil Procedure provides:

Costs not included in the bill of costs prepared by the clerk are allowable only in the court's discretion. Discretionary costs allowable are: reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions or trials. . . . Subject to Rule 41.04, a party requesting discretionary costs shall file and serve a motion within thirty (30) days after entry of judgment. The trial court retains jurisdiction over a motion for discretionary costs even though a party has filed a notice of appeal.

The awarding of discretionary costs is discretionary, and the judgment of the trial court will not be disturbed on appeal absent a showing that the trial court abused its discretion. Perdue v. Green Branch Min. Co., 837 S.W.2d 56, 60 (Tenn. 1992). The trial court based much of its ruling on the testimony of Dr. Barnett and the medical records of Dr. Emerson. Dr. Emerson, who was not authorized to treat Barner but who did perform apparently necessary surgery, did not testify. Dr. Barnett, who was similarly unauthorized to treat Barner, did

testify.

That these doctors were unauthorized to treat Barner under the workers' compensation statute under T.R.C.P. 54.02(2) does not make their testimony unnecessary. The trial court could, and did, draw useful and necessary conclusions from the records and testimony. *Cf. Miles v. Voos Health Care Center*, 896 S.W.2d 773 (Tenn. 1995) (discretionary costs are available for expense of trial testimony of vocational expert). We find that the trial court did not abuse its discretion in awarding the costs associated with Dr. Barnett's deposition against the employer.

The judgment is affirmed and the cause remanded to the trial court for collection of costs and enforcement of judgment. Costs on appeal are taxed to the defendant-appellant.

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Janice M. Holder, Judge

CONCUR:

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Lyle Reid, Associate Justice

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Joe C. Loser, Jr., Special Judge