IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT KNOXVILLE
(March 16, 1999 Session)

CORA McGINN, CHANCERY	)	CAMPBELL
	)	
Plaintiff-Appellee,	)	Hon. Billy Joe White,
	)	Chancellor.
v.	)	
	)	No. 03S01-9807-CH-00083
DENAMERICA CORPORATION d/b/a DENNY'S RESTAURANT and CNA INSURANCE COMPANY	)	

)
Defendants-Appellants.)

For Appellants:

Linda J. Hamilton Mowles
Lewis, King, Krieg, Waldrop & Catron
Knoxville, Tennessee

For Appellee:

Vic Pryor
Jacksboro, Tennessee

Kathy Parrott
LaFollette, Tennessee

M E M O R A N D U M O P I N I O N

Members of Panel:

William M. Barker, Associate Justice
Howell N. Peoples, Special Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED Loser, Judge

MEORANDUM OPINION

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) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employer and its insurer insist (1) the employee did not suffer an injury compensable under the workers' compensation law of Tennessee, (2) the award of permanent partial disability benefits is excessive and (3) the trial judge erred in rejecting the testimony of Dr. Robert E. Ivy. As discussed below, the panel has concluded the judgment should be affirmed.

After a trial of the issues raised by the parties, the chancellor awarded

permanent partial disability benefits based on eighty percent to the body as a whole. Because the first two issues involve factual questions, we have reviewed those issues *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise, as required by Tenn. Code Ann. § 50-6-225(e)(2).

The employee or claimant, Cora McGinn, is forty-nine years old with a high school education and training and experience in the food service industry and experience as a convenience store manager, nurse's assistant, assistant lounge manager and cosmetics seller. She began working at Denny's restaurant in 1996.

In April of the same year, she began to develop pain and numbness in both hands and wrists, which she reported to her employer, Denny's. She left Denny's restaurant in September of the same year, because the pain had become so severe that she could no longer do her work. She testified at trial that she never had problems with her hands before working for this employer. When her physical problems did not abate, she requested medical care and was referred to Dr. Ivy, an orthopedic surgeon.

Dr. Ivy first saw the claimant on November 8, 1996 and diagnosed bilateral carpal tunnel syndrome and bilateral scapholunate dissociation. He testified the carpal tunnel syndrome was probably caused by the claimant's work at Denny's, but that the scapholunate dissociation was not caused but could have been aggravated by her work. The doctor performed carpal tunnel release surgery on her right arm. Surgery on her other arm was later performed by another surgeon. Dr. Ivy released the claimant to return to work on July 1, 1997 with no impairment.

Dr. William E. Kennedy, another orthopedic surgeon, examined Ms. McGinn on February 13, 1998 and diagnosed severe scapholunate dissociation and carpal tunnel syndrome. He opined that both injuries were probably caused or aggravated by the work she did at Denny's and assigned twenty-seven percent permanent impairment to the right arm and twenty-nine percent permanent

impairment to the left arm, from history, medical records and grip strength testing.

A third orthopedic surgeon, who performed the second surgery, testified that scapholunate dissociation was a condition that was consistent with work related repetitive trauma and that the claimant's period of disability is indefinite. Vocational disability experts estimated her permanent vocational disability at from sixty-five percent to one hundred percent.

Unless admitted by the employer, the employee or claimant has the burden of proving, by competent evidence, every essential element of his claim. Oster v. Yates, 845 S.W.2d 215 (Tenn. 1992). In the present case, the employer denied that the employee suffered an injury by accident or occupational disease arising out of the employment and questioned the extent of disability, but admitted the other essential elements of a workers' compensation claim.

An accidental injury is one which cannot be reasonably anticipated, is unexpected and is precipitated by unusual combinations of fortuitous circumstances. Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993). It is the resulting injury which must be unexpected in order for the injury to qualify as one by accident. Id. "Injury" has been defined as including "whatever lesion or change to any part of the system (that) produces harm or pain or lessened facility of the natural use of any bodily activity or capability." Id. Where a condition develops gradually over a period of time resulting in a definite, work-connected, unexpected, fortuitous injury, it is compensable as an injury by accident. Brown Shoe Co. v. Reed, 209 Tenn. 106, 350 S.W.2d 65 (1961). For an injury to be compensable, it need not have been foreseen or expected, but, after the event, it must only appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence and reasonably have been, if thought of at the time of employment, considered a risk. Lawson v. Lear Seating Corp., 944 S.W.2d 340 (Tenn. 1997). An employer takes an employee as he is and assumes the risk of having a weakened condition aggravated by an injury which might not affect a normal

person. Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483 (Tenn. 1997). Accordingly, we cannot say that the evidence preponderates against the trial court's finding that the claimant suffered an injury by accident.

"Arising out of" refers to the origin of the injury in terms of causation; Reeser v. Yellow Freight System, Inc., 938 S.W.2d 690 (Tenn. 1997); and "in the course of" relates to time, place and circumstance; McCaleb v. Saturn Corp., 910 S.W.2d 412 (Tenn. 1995). Not every injury by accident which occurs in the course of employment is compensable; it is only compensable if it also arises out of employment, but any reasonable doubt as to whether such an injury arises out of the employment should be resolved in favor of the employee. Reeser v. Yellow Freight Systems, Inc., 938 S.W.2d 690 (Tenn. 1997). The proof that the injury occurred at work is established by the claimant's own uncontradicted testimony, and the proof of the required causal connection by the uncontradicted testimony of three different physicians. Compensability is simply not a viable issue in this case.

Once the causation and permanency of an injury have been established by expert testimony, 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 purpose of evaluating the extent of a claimant's permanent disability. Tenn. Code Ann. § 50-6-241(a)(2). The opinion of a qualified expert with respect to a claimant's clinical or physical impairment is a factor which the court will consider along with all other relevant facts and circumstances, but it is for the courts to determine the percentage of the claimant's industrial disability. Pittman v. Lasco Industries, Inc., 908 S.W.2d 932 (Tenn. 1995).

From a consideration of the employee's age, education, training, duration of disability and the expert opinions accepted by the trial court, we do not find the evidence to preponderate against the trial court's award of permanent partial disability benefits.

When the medical testimony differs, the trial judge must choose which

view to believe. In doing so, he is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672 (Tenn. 1991). Moreover, it is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Hinson v. Wal-Mart Stores, 654 S.W.2d 675, 675-7 (Tenn. 1983). The chancellor did not abuse his discretion by rejecting Dr. Ivy's opinion in favor of the opinions of two other well qualified orthopedic surgeons.

The judgment is affirmed. Costs on appeal are taxed to the defendants-appellants and the cause is remanded to the trial court.

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Joe C. Loser, Jr., Special Judge

CONCUR:

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William M. Barker, Associate Justice

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Howell N. Peoples, Special Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

FILED

June 10, 1999

Cecil Crowson, Jr.
Appellate Court
Clerk

CORA McGINN	)	CAMPBELL CHANCERY
	)	No. 14,467
Plaintiff-Appellee,	)	
	)	No.03S01-9807-CH-00083
v.	)	
	)	
DENAMERICA CORPORATION d/b/a DENNY'S RESTAURANT and CNA INSURANCE COMPANY	)	Hon. Billy Joe White Chancellor
	)	
Defendants/Appellants,	)	

JUDGMENT ORDER

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 facts 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 Appellants, Denamerica Corporation, dba Denny's Restaurant, CNA Insurance and Linda J. Mowles, surety, for which execution may issue if necessary.

06/10/99