IN THE SUPREME OF TENNESSEE

AT NASHVILLE

MARY FRANCES ROBERTS	}	*MARSHALL CIRCUIT*
	}	
Plaintiff/Appellee	}	*No. Below 13160*
vs.	}	
	}	*Hon. Lee Russell*
MARCO PRINTING COMPANY, INC.	}	
and RELIANCE INSURANCE CO.	}	
	}	
Defendant/Appellant	}	
	}	*No. M1998-00197-WC-R3-CV*
vs.	}	
	}	*AFFIRMED*
MARCO PRINTING COMPANY, INC.	}	
and ITT HARTFORD	}	
	}	
Defendant/Appellee	}	

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 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 defendants/appellants, Marco and Reliance, for which execution may issue if necessary.

IT IS SO ORDERED on December 20, 1999.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(July 15, 1999 Session)

MARY FRANCES ROBERTS,	)	MARSHALL CIRCUIT
	)	
Plaintiff/Appellee	)	M1998-00197-WC-R3-CV
	)	
v.	)	
	)	Hon. Lee Russell, Judge
MARCO PRINTING COMPANY, INC., and RELIANCE INSURANCE CO.,	)	
	)	
Defendant/Appellant	)	
	)	
v.	)	
	)	
MARCO PRINTING COMPANY, INC., and ITT HARTFORD,	)	
	)	
Defendant/Appellee	)	
	)	

For Defendant/Appellant:	For Defendant/Appellee:	For Plaintiff/Appellee:
William G. McCaskill Fraley Taylor, Philbin, Pigue, Marchetti & Bennett Nashville, Tennessee	Blakeley D. Matthews Cornelius & Collins Nashville, Tennessee	Raymond W. Fayetteville, TN

MEMORANDUM OPINION
MAILED:

Members of Panel:

Frank F. Drowota, III, Associate Justice, Supreme Court
Samuel L. Lewis, Special Judge
Frank G. Clement, Jr., Special Judge

AFFIRMED

Clement, Judge

MEMORANDUM OPINION

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 of findings of fact and conclusions of law.

The employee seeks benefits resulting from carpal tunnel syndrome. The case presents three basic issues: (1) what is the date of the injury; (2) if it is the spring of 1995, does the employee have justification for not notifying the employer of the injury until 1997; and (3) does the evidence support the trial court's findings.

There are four parties to this action: the employee, Mary Frances Roberts ("Roberts"); her employer, Marco Printing Company, Inc. ("Marco"), which employed Roberts at all times material to this action; and two insurance companies, Reliance Insurance Company ("Reliance") and ITT Hartford ("ITT"), which provided workers compensation coverage during separate time periods pertinent to this matter.

Appellant Reliance contends that the employee's gradual injury did not become a compensable injury until March of 1997, at which time Reliance was no longer providing coverage for Marco. Alternatively, Reliance contends that if the injury did occur in the spring of 1995, the claim should be dismissed for failure to provide timely notice of injury to the employer pursuant to Tenn. Code Ann. §§ 50-6-201 and 50-6-202 and for failure to file the lawsuit within the one-year statute of limitations set forth in Tenn. Code Ann. § 50-6-203. Marco and Reliance further contend that the evidence does not support the trial court's 35% vocational disability award to each extremity. Marco and Reliance request that the trial court's judgment be reversed. As discussed below, the panel affirms the judgment of the trial court.

The employee is 58 years old and has an eighth grade education. She has worked several sewing jobs and also as a printer, which is her current occupation at Marco. She has been employed at Marco for fifteen years and was working there at the time of trial.

In the spring of 1995, Roberts developed pain in both hands and in her lower arms. She informed her boss, D.B. Minor, and he suggested that she see a doctor. On May 8, 1995, she saw Dr. Kenneth Moore, an orthopaedic specialist of her own choosing. Dr. Moore diagnosed pinched nerves, osteoarthritis, and carpal tunnel syndrome and ordered a course of conservative treatment. Roberts saw Dr. Moore a second time on May 16, 1995, at which time he gave her cortisone injections and ordered her to take two weeks off from work. Roberts testified that her hands felt better after the time off, therefore she returned to work. She went back to Dr. Moore on May 30, 1995, and again on July 11, 1995. Dr. Moore did not advise Roberts that her pain was work-related and, at the time, she did not realize she had a permanent injury. Roberts submitted Dr. Moore's fee for her treatment to her health insurance carrier, not to Marco's workers' compensation carrier.

Thereafter, Roberts returned to work and continued to operate a printing press. Her pain would come and go until March of 1997, when her pain worsened. She again reported her problems to her boss shortly after which she saw Dr. Jeffrey Adams on March 13, 1997. Dr. Adams confirmed that her pre-existing carpal tunnel syndrome was still present and for the first time he suggested that her problems might be caused by the repetitive nature of her work. Roberts informed her boss of the possible connection between her work and the pain in her hands. Soon afterwards, Roberts was examined by Dr. Michael Muha, who confirmed that her pain was caused by repetitive motion and suggested that she needed surgery. Dr. Muha did not expressly say that her pain was caused by her job, but after seeing Dr. Muha, Roberts officially submitted her workers' compensation claim on April 29, 1997.

Other than the two weeks Roberts was off from work in 1995 as authorized by Dr. Moore, she missed no other work as a result of her carpel tunnel problems until 1998, when she took up to fifteen vacation days because of the severity of the pain in her hands. She continued to work as a full-time press operator through 1997 and was still working at the time of trial in June of 1998. Roberts is now only able to produce half the amount of work orders that she could in 1995. Marco still employs Roberts, and she intends to remain at Marco until retirement.

Dr. Richard Fishbein examined Roberts on October 9, 1997. He determined

that she had sustained 10% impairment to the upper right extremity and 7% impairment to the upper left extremity, a condition he believed had arisen out of her employment. He confirmed the diagnosis of carpel tunnel syndrome, labeled her condition a permanent impairment, and recommended restrictions on lifting and carrying.

The trial court found that the plaintiff had sustained a compensable injury in March 1995, that the employee was justified in not providing notice of the injury until April 1997, that Reliance, not ITT Hartford, was the responsible insurer, and assessed a 35% vocational disability to each arm as a result of her work-related injury. Judgment was entered against Marco and Reliance in the amount of $23,688. All claims against ITT Hartford Insurance Co. were dismissed.

The standard of review for workers' compensation cases is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2)(1991 & Supp. 1998). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings. See Collins v. Howmet Corp., 970 S.W.2d 941, 943 (Tenn. 1998).

Date of Injury?

Reliance argues that the trial court erred in determining the date of injury was in the spring of 1995, insisting that the date of injury was March of 1997, when Roberts experienced so much pain that she went to see Drs. Adams and Muha. Reliance insists that her injury was not severe enough to be a "disabling injury" until March of 1997, for it was at that time that Roberts had to reduce her output and take vacation days because of the pain. In addition, Reliance argues that it was not until March of 1997 that a physician told her that her condition was permanent. Consequently, if the date of injury is March, 1997, Reliance asserts that ITT Hartford should be liable instead, given the fact that Reliance only provided coverage from January 17, 1994, to January 17, 1997 and ITT provided coverage thereafter.

In the spring of 1995, Dr. Moore diagnosed Roberts with carpal tunnel

syndrome and recommended she take two weeks off from work due to the pain in her arms. The two weeks she took off in the spring of 1995 was the first time she missed work because of her injury. This two week period was the first time Roberts was medically excused from work due to the pain in her hands. The time off from work also resulted in a reduction in her pain. The trial court determined that the date of injury occurred in March of 1995, when Dr. Moore recommended Roberts not work for two weeks because of the pain in her hands. A gradual injury like carpal tunnel syndrome is not compensable until the date on which the injury is so severe that it prevents the employee from working. Barker v. Home-Crest Corporation, 805 S.W.2d 373, 373-74 (Tenn. 1991). We agree with the trial court for the record supports the trial court's determination that the two-week period in 1995 was the date of injury. Since the injury occurred in 1995, and given the fact that ITT Hartford only covered workers' compensation claims from February, 1997 and thereafter, the trial court also ruled correctly when it dismissed the claim against ITT Hartford.

Were Notice and Filing of Suit Timely?

Marco and Reliance additionally assert that Roberts' claim is time barred, alleging that she failed to give timely notice of her 1995 injury. They argue that Roberts should reasonably have known that her injury was work-related in 1995 for she testified that she knew then that her pain depended on her level of activity at work. In essence, they claim Roberts had no reasonable excuse for the delay in giving notice.

A reasonable excuse for failing to give notice tolls the 30-day notice requirement in Tenn. Code Ann. §50-6-201. Pentecost v. Anchor Wire Corp., 695 S.W.2d 183, 185 (Tenn. 1985). In Pentecost, the employee found herself in a situation similar to Roberts for there was no single event or injury that signaled the work-related injury and, just as important, Pentecost's physicians did not advise her that her injury was work-related. Id. at 186. The Pentecost court reasoned that the employee could not be expected to inform the employer that her gradual injury was work-related when her physicians did not advise her, and she was thus excused from the requirement of notifying her employer within the 30-day period. Id. at 185. Pentecost also stated it was enough that the employee notified the employer of facts about the injury of which the employee was aware or of which he or she

reasonably should have been aware. Id. at 185.

Accordingly, Roberts could not reasonably have been expected to report her injury as work-related until March of 1997, which was the first time a doctor suggested to her that the injury was permanent and related to her work. Therefore, Roberts' failure to give notice within 30 days from the time she first saw Dr. Adams is based on a reasonable excuse, which is permitted under Tenn. Code Ann. § 50-6-201. The occasional conversations with her boss about the pain in her hands and her trips to the doctors were sufficient notification, for she was in essence sharing with her boss all she knew about her injuries.

Similarly, Marco and Reliance submit that Roberts did not file suit timely. They suggest that Roberts knew or should have known in the spring of 1995 that her injury was work-related. Therefore, they assert that the one-year statute of limitations for filing suit for a work-related injury had expired prior to her filing suit in July of 1997. Marco and Reliance concede that the statute of limitations for filing suit may be tolled until it is reasonably discoverable that the employee has sustained a compensable injury; however, they argue that Roberts should reasonably have known or discovered that her injury was compensable in 1995. Therefore, Marco and Reliance assert that the statute of limitations was no longer tolled, and Roberts' time for filing suit expired before she actually did so on July 7, 1997.

It is evident, however, that Roberts acted with reasonable care and diligence in determining that her injury was work-related and compensable. Pentecost equates the excuses for giving timely notice with those for failure to file suit within one year of the injury. Id. at 185. Consequently, it follows that the statute of limitations did not start running until Dr. Adams informed her in March of 1997 that her injury was work-related and permanent. Therefore, Roberts' workers' compensation claim filed on July 7, 1997, was timely filed within the statute of limitations.

Does the evidence support the award?

Finally, Marco and Reliance argue that, based on the medical testimony offered in the form of a report by Dr. Fishbein, a preponderance of the evidence

supports an award in the range of 20% to each extremity, rather than 35%. The appellants requested that this Court reduce the award.

In alleging that the only medical proof offered with respect to the anatomical disability was Dr. Fishbein's report, Marco and Reliance contend that this medical report should not be considered alone. Other evidence, such as Roberts' experience working as a sewing machine and printing press operator, her recent salary increases, her desire to remain in her current position at Marco, and her ability to work a normal work week are also important to the determination of vocational disability. Marco and Reliance argue that in light of all the evidence a reduced award from 35% to 20% disability would be more appropriate.

The extent of vocational disability is a question of fact to be determined from all the evidence, including lay and expert testimony. See Henson v. City of Lawrenceburg, 851 S.W.2d 809, 812 (Tenn. 1993). The test for vocational disability is whether there has been a decrease in the employee's capacity to earn wages in any line of work available to the employee. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 678 (Tenn. 1991). Factors to be considered in determining the extent of vocational disability include the employee's job skills and training, education, age, extent of anatomical impairment, duration of impairment, local job opportunities, and the employee's capacity to work at the kinds of employment available to her in her disabled condition. See Perkins v. Enterprise Truck Lines, Inc., 896 S.W.2d 123, 127 (Tenn. 1995). The employee's own assessment of her physical condition and resulting disability is competent testimony that should be considered as well. Id.

Reviewing the record with these principles in mind, the evidence does not preponderate against the trial court's finding of 35% disability to each extremity. Roberts' work output, her ability to do the jobs she once did, and her job prospects in general have been reduced by her carpal tunnel injuries. Her age and educational level also reduce the likelihood of her being hired elsewhere. In addition, Dr. Fishbein's report includes lifting and pushing and pulling restrictions, which keep her from doing certain jobs. The trial court based its decision on the testimony presented in court, the record of the treating and examining physicians, and the record as a whole, and it found that Roberts had sustained a 35%

permanent partial disability to each arm. Since all of the evidence puts her reasonably within the range of 35% vocational disability to each extremity as found by the trial court, that finding is affirmed.

In Conclusion

The judgement of the trial court is affirmed in all respects.

Costs on appeal are taxed to the defendants/appellants, Marco and Reliance.

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Frank G. Clement, Jr., Special Judge

CONCUR:

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Frank F. Drowota, III
Associate Justice, Supreme Court

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Samuel L. Lewis, Special Judge