IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 16, 2015 Session

**MARY HOVATTER v. JDAK, LLC, ET AL.**

**Appeal from the Chancery Court for Robertson County**
**No. CH14CV168 Laurence M. McMillan, Jr., Chancellor**

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**No. M2015-01015-SC-R3-WC – Mailed December 18, 2015**
**Filed December 30, 2015**

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An employee developed carpal tunnel syndrome. Her employer provided medical treatment until the authorized treating physician opined the condition did not arise primarily from her work. The employer then denied the claim. At trial, the employee presented the testimony of an evaluating physician who opined her work was the primary cause of the condition. The trial court found the employee had successfully rebutted the opinion of the authorized treating physician, as required by Tennessee Code Annotated section 50-6-102(12)(C)(ii). It further found the condition arose primarily from her employment, as required by section 50-6-102(12)(A)(ii) and awarded benefits. The employer appeals. The appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. We affirm.

**Tenn. Code Ann. § 50-6-225(a)(2) (2014) Appeal as of Right;**
**Judgment of the Chancery Court Affirmed**

DON R. ASH, SR.J., delivered the opinion of the Court, in which CORNELIA A. CLARK, J. and BEN H. CANTRELL, SR.J., joined.

Alex B. Morrison, Knoxville, Tennessee, for the appellants, JDAK, LLC, and United Wisconsin Insurance Company.

Lee Borthick, Springfield, Tennessee, for the appellee, Mary Hovatter.

## OPINION

### Factual and Procedural History

Mary Hovatter ("Employee") works for JDAK, LLC ("Employer"), a manufacturer of windows. On the date of trial, April 14, 2015, forty-six year-old Employee worked for Employer as a quality inspector. Previously, from approximately 1993 to 2001, she built windows for Employer using vibrating equipment. Then, from approximately 2001 to 2013, she worked for Employer as a "felter," a position in which she used scissors to cut felt and rubber and then placed rubber liners in window frames. Employee is left hand dominant and operated the scissors with her left hand. She described the work as repetitive and over time, she began to experience numbness and cramping in her left hand. Eventually, these symptoms became so intense she reported them to the plant manager, John Howard. Mr. Howard completed an injury report and referred her to Northcrest Medical Clinic. Employee was subsequently referred to Dr. Paul Novak, an orthopaedic surgeon specializing in treatment of the hands and arms.

As explained in his deposition testimony, Dr. Novak met with Employee one time, on November 25, 2013. She complained of numbness, pain and cramping in her left hand. She told Dr. Novak she repetitively used scissors to cut felt and rubber, but her work did not require using significant vibrating machinery or regularly lifting more than ten to twenty pounds. Dr. Novak inquired regarding heavy lifting and exposure to vibration because, he stated, either can potentially cause or aggravate carpal tunnel syndrome. Employee reported that her symptoms developed gradually; no traumatic or acute event occurred to cause her symptoms. She further reported a diagnosis of tendinitis in the hand approximately four years prior.

At the November 2013 appointment, Dr. Novak x-rayed Employee's wrist; the x–ray revealed mild arthritis in the wrist at the STT (scaphotrapeziotrapezoidal) joint. He also reviewed a prior nerve conduction study which, according to the performing doctor, indicated moderate to severe carpal tunnel syndrome of the left hand. Dr. Novak physically examined Employee, finding good, pain-free range of motion in her wrists and hands, but also finding "very mild tenderness" in her left thumb. Employee scored negatively on a Finkelstein's test—testing for tendinitis—but positively on a Durkan's compression test—testing for carpal tunnel syndrome. Ultimately, the doctor diagnosed Employee with moderate to severe left carpal tunnel syndrome, noting Employee's history of diabetes, hypertension and tobacco use. He explained, "[m]oderate to severe carpal tunnel syndrome not only affects the sensation and can cause numbness and tingling, but also can affect the strength of the hand and can result in weakness which could progress, and over a long period of time potentially result in more permanent weakness, numbness[.]" Dr. Novak recommended non-surgical

treatment options such as rest, ice, modification of activities, elevation, over-the-counter non-narcotic pain medicine as needed and wrist splints as needed. However, he also discussed with Employee possible physical therapy, steroid injections and carpal tunnel release surgery.

Dr. Novak explained carpal tunnel syndrome as follows:

> [C]arpal tunnel syndrome is essentially a pinched nerve at the wrist. The median nerve in specific is the nerve that can have increased pressure on the nerve which can cause symptoms related to that.
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> . . . .
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> There are nine tendons and one nerve that pass through the carpal tunnel. The carpal tunnel is formed on one side by the carpal or wrist bones and on the other side, on the palm side, by a thick, fibrous ligament called the transverse carpal ligament.

Dr. Novak was then questioned regarding causation. He was unable to confirm Employee's carpal tunnel syndrome was caused by her work, although he did "believe that her work had at least aggravated her symptoms." He seemingly dismissed Employee's mild arthritis and tobacco use as the causes of her injury. He agreed active tendinitis could "possibl[y]" contribute to carpal tunnel syndrome symptoms, but as stated above, a Finkelstein's test indicated no active tendinitis. He explained Employee is "in a high risk group for developing carpal tunnel regardless of her occupation, given that she is a 44-year old woman with diabetes." While he found causation "multi-factorial," he found Employee's risk factors—age, gender and diabetes—"most responsible" for her carpal tunnel syndrome.

Dr. Novak acknowledged medical literature is "vast and varied" regarding whether light repetitive tasks cause carpal tunnel syndrome. However, he opined "heavy, forceful repetitive grasping, vibration activities are the primary potential causes of occupational carpal tunnel syndrome." He stated, "Her work was described as . . . repetitive, though she denied . . . forceful activities or vibration exposure. She denied any change in her work or position over the last 10 to 12 years. And based upon that, my opinion [i]s that her carpal tunnel syndrome was, more likely than not, not a result of her work, but was aggravated at least by the activities at work."

Upon receiving this information from Dr. Novak, Employer's workers' compensation insurer denied her claim for benefits. Employee pursued her claim through the Department of Labor and Workforce Development and later filed this action in the Chancery Court for Robertson County.

Employer accommodated Employee's medical restrictions and she continued to work for Employer. Specifically, in October 2014, she was promoted to quality inspector, a role in which she "manages the distribution of glass and inspects receiving inbound products in process, the rounds inspection, and some final assembly inspection." [sic] At the time of trial, she was also working two part-time jobs—as a CNA at a nursing home and as a cashier at Wal-Mart. She testified currently without repetitive use, her left hand "stays numb" and "cramps sometimes[,]" with repetitive use, however, her symptoms are worse.

At the request of her attorney, Dr. David Gaw, an orthopaedic surgeon independently examined Employee on April 28, 2014. Dr. Gaw also reviewed the previous nerve study and the records from Northcrest Medical Clinic and Dr. Novak. In his deposition, Dr. Gaw testified the "classic" causes of carpal tunnel syndrome are cumulative trauma and overuse syndromes. He opined Employee's condition was related to her work activity. He stated, "Based on the history given by the patient, I think it's more likely than not that this lady's carpal tunnel syndrome on the left is related to the type of work activity that she performed at [Employer] which involved repetitive use of scissors, gripping, and squeezing." Dr. Gaw then opined Employee retained a 2% permanent impairment to the left arm pursuant to the Sixth Edition of the AMA Guides.

Dr. Gaw agreed carpal tunnel syndrome is caused by a compression of the medial nerve which passes through the carpal tunnel. Tendons, likewise, pass through the carpal tunnel and Dr. Novak agreed, in certain cases, tendon swelling—which can result from tendinitis—can cause carpal tunnel syndrome or the symptoms of carpal tunnel syndrome. He also acknowledged diabetes can cause increased nerve sensitivity to pressure, age-related thickening of tendons can cause carpal tunnel syndrome, and women are more likely than men to be affected by carpal tunnel syndrome.

Dr. Gaw acknowledged carpal tunnel syndrome is multi-factorial in etiology and the relationship between repetitive activity and carpal tunnel syndrome is disputed in medical literature. However, he maintained Employee's work is the primary cause of her carpal tunnel syndrome.

The trial court issued its findings from the bench as follows, in part:

> [Employee] was diagnosed with left carpal tunnel syndrome on November 7th, 2013. The question in this case is, is whether it was work-related. Taking into account the employee's history in working there at [Employer], as well as the expert testimony of Dr. Gaw, the Court finds that [Employee] did, in fact, sustain a work-related injury, a gradual injury, to her left upper extremity, and that that injury arose out of and was within the course and scope of her

employment with [Employer].

The court further found the injury was permanent and adopted Dr. Gaw's 2% impairment rating to the left arm. The award of permanent partial disability benefits was undisputedly capped at one and one-half times the medical impairment. Accordingly, the court awarded 3% permanent partial disability. Employer appeals, contending the trial court misapplied two recent amendments to the workers' compensation law, Tennessee Code Annotated section 50-6-102(12)(A)(ii) (Supp. 2013), which assigns a presumption of correctness to the opinions of an authorized treating physician, and section 50-6-102(12)(C)(ii) (Supp. 2013), which defines a gradual injury as one that "arose primarily out of and in the course and scope of employment."[1]

## Standard of Review

Appellate review of workers' compensation decisions is governed by Tennessee Code Annotated section 50-6-225(a)(2) (2014), which provides appellate courts must "[r]eview . . . [the trial court's] findings of fact . . . de novo upon the record of [the trial court,] accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." As the Supreme Court has observed many times, reviewing courts must conduct an in-depth examination of the trial court's factual findings and conclusions. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). However, when the issues involve expert medical testimony contained in the record by deposition, "determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues." Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

## Analysis

On appeal, Employer contends the trial court erred in finding Employee successfully rebutted Dr. Novak's presumptively correct causation opinion—that Employee's injury did not arise primarily out of and in the scope of her employment with Employer.

"Any employee seeking to recover workers' compensation benefits must prove that the injury both arose out of and occurred in the course of employment." Trosper v. Armstrong, 273 S.W.3d 598, 604 (Tenn. 2008) (citing Tenn. Code Ann. § 50-6-102(12)

[1] This section took effect on June 6, 2011. See 2011 Public Acts, Ch. 416. However, the legislature has since amended the statute, most recently effective May 4, 2015.

(2008)). "The phrase 'arising out of' refers to the cause or origin of the injury and the phrase 'in the course of' refers to the time, place, and circumstances of the injury." Id. (quoting Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008) (internal quotation marks omitted)). "An injury arises out of employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury." Id. (citing Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 678 (Tenn. 2005)). "Except in the most obvious cases, causation must be established by expert medical evidence." Id. (citing Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 354 (Tenn. 2006)).

Tennessee's Workers' Compensation Law, Tennessee Code Annotated section 50-6-102(12)(C)(ii) (Supp. 2013),[2] excludes from the definitions of "injury" and "personal injury," among other things, "[c]umulative trauma conditions, . . . carpal tunnel syndrome, or any other repetitive motion conditions unless such conditions arose primarily out of and in the course and scope of employment."

Additionally, Tennessee Code Annotated section 50-6-102(12)(A)(ii) (Supp. 2013), provides: "(ii) The opinion of the physician, selected by the employee from the employer's designated panel of physicians pursuant to §§ 50-6-204(a)(4)(A) or (a)(4)(B), shall be presumed correct on the issue of causation but said presumption shall be rebutted by a preponderance of the evidence."

Employer paints this case as a battle of experts and it contends Employee, through Dr. Gaw's testimony, failed to rebut the presumptively correct causation opinion of Dr. Novak. Specifically, Employer argues Dr. Gaw's testimony should be given less weight than that of Dr. Novak because Dr. Gaw was retained solely for litigation and lacks credentials possessed by Dr. Novak.

It appears the expert physicians are equivalently competent to opine regarding Employee's injury. Dr. Novak is an orthopaedic surgeon. He completed an orthopaedic residency and a fellowship in hand, elbow and shoulder surgery. Additionally, he is board certified in general orthopaedics with a certificate of added qualifications of the hand. Similarly, Dr. Gaw is a physician specializing in orthopaedics. Both Dr. Novak and Dr. Gaw met with Employee on one occasion, both examined the same test results, and both ultimately diagnosed Employee with carpal tunnel syndrome. The doctors, however, diverged regarding their theories of causation. As explained above, Dr. Novak pinned causation on Employee's underlying risk factors although he determined her work aggravated her injury. Because he was undisputedly selected from a panel of physicians provided in accordance with section

[2] Subsequent statutory amendments are inapplicable in this case.

50-6-204(a)(4), a rebuttable presumption of correctness attached to his opinion regarding causation. See Tenn. Code Ann. § 50-6-102(A)(ii) (Supp. 2013). Dr. Gaw conceded carpal tunnel syndrome is multi-factorial in etiology, but he linked Employee's injury primarily to the repetitive nature of her work.

At first blush, the doctors' opinions appear contradictory. However, further examination dispels such appearance. Dr. Novak, as set out above, primarily linked Employee's injury to her underlying risk factors. He found no causal connection between Employee's work and her carpal tunnel syndrome, opining forceful repetitive grasping or use of vibrating tools—*to his knowledge* not present in this case—was required to make such a causal connection. However, he acknowledged Employee's work activities likely aggravated her symptoms. Dr. Gaw conceded Employee's risk factors of age, gender and diabetes increased her risk to develop carpal tunnel syndrome. However, he testified any repetitive use of the hands, whether forceful or not, was sufficient to cause or advance carpal tunnel syndrome. Ultimately, he opined Employee's work is the primary cause of her carpal tunnel syndrome.

At trial, Employee testified Dr. Novak only questioned her regarding her last 12 to 13 years of employment working as a felter. However, for seven to eight years prior, she built windows for Employer using vibrating equipment. Employer's plant manager confirmed assembling and building windows likely requires use of a vibrating air drill. Dr. Novak admittedly based his causation opinion, at least in part, on Employee's lack of exposure to vibration and he described a significant link between vibration exposure and carpal tunnel syndrome.

Having carefully reviewed the evidence before us, we conclude Employee carried her burden of rebutting Dr. Novak's causation opinion by a preponderance of the evidence. Dr. Gaw opined Employee's injury primarily stemmed from the repetitive use of her hands. Dr. Novak was unwilling to opine Employee's injury arose primarily from her employment given her history ostensibly lacking "heavy, forceful lifting; gripping; and/or exposure to vibration[.]" However, even if we accept Dr. Novak's position that such activity is required to produce carpal tunnel syndrome, the evidence demonstrates Employee was indeed exposed to vibration for many years. Accordingly, we conclude Employee successfully rebutted the presumption set forth in Tennessee Code Annotated section 50-6-102(12)(A)(ii) and demonstrated, by a preponderance of the evidence,[3] her condition arose primarily out of and

[3] In her appellate brief, Employee contends she must prove only her employment "could or might have been the cause" of her injury, citing Crew, 259, S.W.3d 656. This is not the applicable standard. "For an injury to be compensable under the Tennessee Workers' Compensation Law, an employee must prove *by a preponderance of the evidence* that the injury is one arising out of and in the course of employment." Dixon v. Travelers Indem. Co., 336 S.W.3d 532, 537 (citations omitted) (emphasis added).

in the course and scope of employment.

## Conclusion

The judgment of the chancery court is affirmed. Costs are taxed to JDAK, LLC, United Wisconsin Insurance Company and their surety for which execution may issue if necessary.

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DON R. ASH, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

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**No. M2015-01015-SC-R3-WC - Filed December 30, 2015**

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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 JDAK, LLC, United Wisconsin Insurance Company and their surety, for which execution may issue if necessary.

PER CURIAM