

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

November 24, 2008 Session

TAMMY SEALS v. VANGUARD OF MANCHESTER, LLC

**Direct Appeal from the Chancery Court for Coffee County
No. 06-435 L. Craig Johnson, Judge**

**No. M2008-00744-WC-R3-WC - Mailed - February 5, 2009
Filed - March 9, 2009**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The employee was an LPN for a nursing home. She was diagnosed with carpal tunnel syndrome in 2003. She was terminated, for reasons unrelated to her work injury, in 2005. She began working in a similar job for a second nursing home. In September 2006, she had surgery to treat her condition. She sued the earlier employer, but not the latter employer, seeking workers' compensation benefits. The trial court applied the "last day worked" rule, and found that the injury occurred while she worked for the second employer. The lawsuit was dismissed. The employee has appealed, arguing that the trial court erred in its determination of the date of her injury. We affirm the judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery Court
Affirmed**

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and ALLEN W. WALLACE, SR. J., joined.

Russell D. Hedges, Tullahoma, Tennessee, for the appellant, Tammy Seals.

Owen R. Lipscomb, Nashville, Tennessee, for the appellee, Vanguard of Manchester, LLC.

MEMORANDUM OPINION

Factual and Procedural Background

Tammy Seals worked as an LPN for Vanguard of Manchester, a nursing home, from 1998 until September 2005. In 2003, she developed a mass in her neck, which was unrelated to her employment. She was referred to Dr. Uskavitch, a neurologist, for evaluation of that condition. In the course of that evaluation, Dr. Uskavitch performed an EMG which revealed left carpal tunnel syndrome. He treated her conservatively, which relieved her symptoms to some degree.

In 2004, Vanguard introduced a computer-based system of maintaining patient charts. As a result, Ms. Seals was required to use a computer keyboard for a large part of her work day. Her carpal tunnel syndrome symptoms increased.

In August 2005, Ms. Seals received a negative performance evaluation. Her supervisor notified Ms. Seals that it would be necessary to improve her performance in specific job functions within 30 days. This did not occur, and Ms. Seals was terminated in September 2005. After a brief period of unemployment, she found work at Life Care Center, another nursing home, in a job similar to the one she had with Vanguard. She continued to have symptoms in her left arm. In April 2006, she gave birth. Her symptoms continued. In August 2006, she consulted Dr. James Extine, an orthopaedic surgeon in Winchester. Dr. Extine ordered an EMG study, which showed “severe” carpal tunnel syndrome. She was then referred to Dr. Gary Stevens, an orthopaedic surgeon in Tullahoma. Dr. Stevens recommended carpal tunnel release surgery.

The surgery was carried out on September 12, 2006. Ms. Seals’s symptoms improved significantly thereafter. However, she retained residual numbness in her fingertips, which interfered with her ability to insert IV needles. She returned to work for Life Care Center, and continued to work there as of the date of the trial. She filed this suit against Vanguard, alleging that her work at Vanguard was the cause of her carpal tunnel syndrome. Vanguard denied liability, contending that Life Care Center was responsible for the injury under the workers’ compensation law. Life Care Center was not a party in the lawsuit.

At trial, Vanguard presented the deposition of Dr. Stevens. He initially opined that Ms. Seals’s carpal tunnel syndrome was “more likely than not related to the time period of her employment at [Vanguard].” He based this opinion on the fact that there had been a negative EMG study on the left side at the time of her right carpal tunnel surgery in 1998, followed by the positive study from Dr. Uskavitch in 2003. He testified that carpal tunnel syndrome was associated with repetitive use of the hands for tasks such as typing, filing and assembly line work. He then stated: “If you have carpal tunnel symptoms and you continue to do repetitive [motions of the hands], it will probably increase the symptoms.” He agreed that extensive use of the hands on a computer could cause carpal tunnel syndrome to arise, or to get worse. Dr. Stevens assigned a permanent anatomical impairment of 1% to the left arm. He placed no restrictions upon Ms. Seals’s activities.

On cross examination, Dr. Stevens stated that “the severity of what led to me recommending surgery does start around 2004.” He also testified that the history given to him by Ms. Seals was that she had been having symptoms since 2004 which had gotten worse in the year prior to his initial examination of her. On redirect, he was asked if “damage was being done all the way up to the day

of surgery.” He responded: “The possibility of damage could be done right up to the time of surgery when you release it.”

Dr. David Gaw, an orthopaedic surgeon, performed an IME at the request of Ms. Seals. He assigned 5% permanent impairment to the left arm due to the carpal tunnel syndrome and surgery. He opined that her work as an LPN was the most likely cause of her condition. He was unaware that she had changed employers eleven months before the surgery performed by Dr. Stevens. He testified that “any type of repetitive activities can continue to irritate [carpal tunnel syndrome].”

Ms. Seals was thirty-four years old. She was a high school graduate, had completed a one-year program to obtain her nursing license, and had attended Middle Tennessee State University for two years. Her employment history prior to becoming a nurse consisted of working in fast food restaurants. The job which she obtained after being terminated by Vanguard was with a nursing home, and was substantially similar to her previous job. She testified that her job at Life Care required more work on computers than her job at Vanguard. She also testified that her symptoms did not change in intensity after recurring in 2004. She stated that, after surgery, she continued to have problems with grip strength and with numbness in her fingertips. As a result of the latter problem, she usually requested assistance from other employees when she was called upon to place an IV needle in a patient’s arm.

The trial court applied the “last day worked” rule to determine the date of Ms. Seals’s injury. That was the day immediately before the surgery on her arm. On that basis, the court concluded that the injury arose during the subsequent employment, and Vanguard was therefore not liable. The trial court found that Ms. Seals had given appropriate notice of her injury. It also made an alternative ruling that she had sustained a 15% permanent partial disability to the left arm as a result of her carpal tunnel syndrome and surgery. Ms. Seals has appealed, asserting that the trial court erred by applying the last day worked rule, thus determining that the date of her gradual injury occurred after her work for Vanguard had ended.

Standard of Review

The standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness’ demeanor and to hear in-court testimony. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315 (Tenn. 1987). A reviewing court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); *Landers v. Fireman’s Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989). A trial court’s conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. *Ridings v. Ralph M. Parsons Co.*, 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

Citing *Building Materials Corp. v. Britt*, 211 S.W.3d 706 (Tenn. 2007), the trial court determined that Ms. Seals was able to work until she had surgery on her hand. The trial court found that the injury occurred in September 2006, while Ms. Seals was employed by Life Care, which was not a party to the lawsuit. Ms. Seals contends that the trial court's reliance on *Britt* was misplaced. She notes that no finding was made that her syndrome progressed after she left Vanguard and argues that the evidence does not support such a conclusion. From that premise, she contends that the trial court should have applied the "last injurious injury" rule, and assigned liability to Vanguard. She relies on *Mahoney v. NationsBank of Tenn. N.A.*, 158 S.W.3d 340 (Tenn. 2005), *overruled on other grounds*, *Britt*, 211 S.W.3d at 713, and *Buckingham v. Fidelity and Guar. Ins. Co.*, No. M2006-01587-WC-R3-WC, 2007 WL 3120710 (Tenn. Workers' Comp. Panel Oct. 25, 2007). In each of these cases, the trial court and reviewing court analyzed the evidence to determine if a progression of the underlying condition occurred after a change in employers or insurers. In *Mahoney*, it was determined that the condition continued to worsen; in *Buckingham*, it was determined that it had not.

A recent decision of the Supreme Court, *Crew v. First Source Furniture Group*, 259 S.W.3d 656 (Tenn. 2008) also addresses "the last, injurious injury" rule: [I]n order for the rule to apply, there must be some showing that the employee's condition worsened due to the working conditions at the second employer. . . . [citing *Mahoney*, 158 S.W.3d at 346].

Ms. Seals testified that her symptoms did not change after she left Vanguard. However, it is undisputed that her subsequent job involved activities very similar to her duties for Vanguard. Further, she testified that her subsequent job involved more computer work than she had done for Vanguard. Throughout the case, she has taken the position that computer work was the cause of her carpal tunnel syndrome. Dr. Stevens did not state clearly that the second job caused a progression of the condition. However, he stated her history was that the condition had worsened in the year before he first saw her, i.e., after she was no longer working for Vanguard. He also stated extensive computer work could cause carpal tunnel syndrome, and that damage could continue as long as one continued repetitive hand activities. This testimony is consistent with the Supreme Court's observation in *Lawson v. Lear Seating Corp.* that each day an employee with carpal tunnel syndrome continued to work constituted "a 'new' injury in that it further aggravated Claimant's condition." 944 S.W.2d 340, 342 (Tenn. 1997) (quoting *Brooks Drug, Inc. v. Workmen's Comp. Appeal Bd.*, 636 A.2d 246, 249 (Pa. Commw. Ct. 1993)). Dr. Gaw's testimony on the subject is of limited value, in light of his lack of knowledge of the job change.

Our independent review of the record leads us to the conclusion that the evidence does not preponderate against the trial court's finding that Ms. Seals' injury occurred in September 2006. In light of that holding, it is unnecessary for us to address the remaining issues raised by the parties.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Tammy Seals and her surety, for which execution may issue if necessary.

JON KERRY BLACKWOOD, SENIOR JUDGE

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NOVEMBER 24, 2008 SESSION

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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 appeals 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 Tammy Seals and her surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM