

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

LINDA MAY KEPLEY,)
)
Plaintiff/Appellee)
)
v.)
)
YAMAKAWA MANUFACTURING)
COMPANY OF AMERICA and)
YASUDA FIRE & MARINE)
INSURANCE COMPANY)
)
Defendants/Appellants)

SUMNER CIRCUIT

Hon. Tom E. Gray
Judge

NO. 01S01-9505-CV-00075
(No. 12456-C Below)

FILED

April 26, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

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For the Appellee:

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MEMORANDUM OPINION

Members of Panel:

Justice Frank F. Drowota, III
Senior Judge John K. Byers
Special Judge Robert L. Childers

**AFFIRMED
AND
REMANDED**

BYERS, Senior Judge

_____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 to the Supreme Court of findings of fact and conclusions of law.

The defendants appeal the trial court's award of 40% permanent partial disability to the right upper extremity. They contend that the plaintiff did not prove that she had suffered a permanent injury, that they are not liable for such injury, if it exists, due to the application of the last injurious injury rule and that, even if her injury is compensable and they are liable, the trial court's award is excessive.

We affirm the judgment of the trial court.

The plaintiff, 45 at the time of trial, has a G.E.D. She has worked almost exclusively in manufacturing facilities, performing mostly assembly and packing jobs. She began working for the defendant-employer in May 1991. In July 1992, she began experiencing problems with her wrists. She was eventually referred to Dr. Anderson, a neurologist, who took her off work for about three weeks. She returned to work after this respite but quit after a few months to move to Illinois to marry.

She testified at trial that her arms improved while she was off work. She testified that, when she returned to work, she worked with pain and at a slower rate than she had before. She did not work for the first few months she lived in Illinois, and she testified that her arms improved over this time but that her pain never resolved, and she tried to use her left hand more often.

Dr. Anderson testified that an E.M.G. performed on the plaintiff prior to her being taken off work indicated she had carpal tunnel syndrome in her left arm. This diagnosis was consistent with the plaintiff's subjective complaints and his objective findings, he testified. When she returned from Illinois to see him in November, he performed another E.M.G. on her, which indicated borderline carpal tunnel syndrome in her right arm. At the plaintiff's request, he released her to return to work.

Plaintiff began working for R.G. Ray in Illinois at the end of January 1994. After about five weeks, she began experiencing pain in her wrists again, worse pain

than she had previously experienced. She returned to see Dr. Anderson on March 10, 1994.

Dr. Anderson performed a third E.M.G., which revealed findings in the normal range. He testified that he found some objective findings of continuing neuropathy on his physical exam. He restricted the plaintiff from moving her hands more than four times a minute and using her hands for more than six hours. He testified that she reached maximum medical improvement on that date.

Plaintiff returned to R.G. Ray but was placed on medical leave since the company did not have any jobs within her restrictions. She returned to Tennessee, where she unsuccessfully attempted several manufacturing/packing jobs. At the time of trial, she worked as a sales clerk for a fireworks store.

Dr. Anderson assigned the plaintiff a five percent impairment to her right arm under the A.M.A. Guides. He opined that she will continue to have an underlying condition. He also opined that the improvement in the E.M.G. findings indicates that she received no additional underlying anatomical injury while employed with R.G. Ray.

Our review is *de novo* on the record accompanied by the presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise. TENN. CODE ANN. § 50-6-225(e)(2).

The defendants' contention that the plaintiff did not suffer a permanent injury focuses mainly on the results of the third E.M.G. However, Dr. Anderson's testimony, taken in context, clearly reveals his opinion that she has suffered a permanent injury.

We do not agree with the defendants' contention that the last injurious injury rule applies. For that rule to apply, there must be another injury or aggravation of the condition. The evidence indicates that there was no new injury during her employment with R.G. Ray and that any aggravation that occurred was merely an increase in pain. Under workers' compensation law, no injury has occurred if a pre-existing condition has been aggravated merely by an increase in pain. *Cunningham v. Goodyear Tire & Rubber Co.*, 811 S.W.2d 888, 890 (Tenn. 1991).

Finally, we cannot find that the evidence preponderates against the trial court's finding of 40% permanent partial disability to the plaintiff's right arm.

Although her anatomical disability is low, the court must consider factors other than the anatomical impairment when assigning vocational disability. The test is whether there has been a decrease in the employee's capacity to earn wages in any line of work available to the employee, including lay and expert testimony, employee's age, education, skills, training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition. *Orman v. Williams-Sonoma, Inc.* 803 S.W.2d 672, 678 (Tenn. 1991).

The judgment is affirmed, and costs are assessed to the defendants/appellants. We remand the case to the trial court for entry of any orders necessary to carry out this judgment.

John K. Byers, Senior Judge

CONCUR:

Frank F. Drowota, III, Justice

Robert L. Childers, Special Judge