

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

FILED

March 3, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

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|--------------------------|---|-------------------------|
| BEVERLY RIDDLE, |) | |
| |) | MADISON CHANCERY |
| Plaintiff/Appellee |) | |
| |) | NO. 02S01-9706-CH-00058 |
| v. |) | |
| |) | HON. JOE C. MORRIS, |
| MURRAY OUTDOOR PRODUCTS, |) | CHANCELLOR |
| |) | |
| Defendant/Appellant |) | |

For the Appellant:

J. Arthur Crews, II
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For the Appellee:

T. J. Emison, Jr.
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MEMORANDUM OPINION

Members of Panel:

Justice Janice Holder
Senior Judge John K. Byers
Senior Judge William H. Inman

AFFIRMED

BYERS, Senior Judge

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

The trial judge awarded the plaintiff 58 percent permanent partial disability to each arm as a result of carpal tunnel syndrome.

The defendant raises the following issues on appeal:

- I. Whether the trial court erred in finding that the plaintiff had properly satisfied notice and statute of limitations requirements for her alleged left upper extremity injury.
- II. Whether the trial court erred in awarding the plaintiff 58 percent impairment to each arm.

We affirm the judgment.

FACTS

The plaintiff, age 48 at the time of trial, graduated from high school, attended one year of nursing school at Union University, and attended Jackson State Community College. Her work experience is varied: waitress at Dairy Queen; receptionist and later dental assistant at an orthodontist's office; quality control worker at Proctor & Gamble; cook at Woolworth's; stocker and later pharmacist's assistant at K-Mart; receptionist and later ad salesperson and later mail room worker at The Jackson Sun; worker at Photo Mart; order filler at Bendix; and, stocker at Wal-Mart.

Beginning January 18, 1993, the plaintiff worked for the defendant doing assembly line work which required her to use air powered hand tools and which demanded repetitive use of her hands and arms. The plaintiff testified that she first felt soreness in her hands, especially her right hand, in December 1994. The plaintiff saw a Dr. Schwartz for this complaint, and she testified that he said her problem was job related. After this doctor visit, the plaintiff informed the defendant's personnel director about her problem. Later, the plaintiff saw Dr. Joseph C. Boals, III upon a referral by her attorney, and then she saw Dr. Mark Harriman at the request of the defendant's attorney.

As a result of the problems with her hands, the plaintiff testified that she has lost at least half the function of her hands and arms; she experiences pain,

numbness, and tingling in her hands and arms at work every day and thus wears braces on her wrists; she awakes at night with no feeling in her hands; she takes longer to do housework; and, she cannot sew, grip or open objects, write, type, drive, or hold the telephone, all because her fingers and hands lose feeling. The plaintiff testified that she did not miss any work due to the problems with her hands and arms. At the time of trial, the plaintiff was still working for the defendant, but at her request she was taken off the assembly line and instead was given work that did not require the use of air powered tools.

Prior to working for the defendant, the plaintiff testified that she did not have problems with her hands or arms. The plaintiff testified that today she could still perform her previous work as a quality control worker at Proctor & Gamble, an ad salesperson at The Jackson Sun, or a stocker at Wal-Mart.

EXPERT TESTIMONY

_____Dr. Joseph C. Boals, III, a board certified orthopedic surgeon, testified by deposition. Dr. Boals examined the plaintiff and diagnosed her with suspect bilateral carpal tunnel syndrome, advising her to obtain a nerve conduction study to confirm the diagnosis. NCS and EMG tests were performed on the plaintiff by Dr. Bingham, who found that her motor conduction for both wrists was in the "high normal" range. The results of these tests were reviewed by Dr. Boals, and he assessed a 20 percent permanent physical impairment to each of the plaintiff's upper extremities based upon the AMA Guides. Dr. Boals recommended that the plaintiff have surgery. He also testified that the plaintiff should not work in jobs that require repetitive use of both hands and arms in assembly tasks or repetitive use of hand tools, pliers, cutters, scissors, hammers, screwdrivers, wrenches, sewing machines, or keyboards.

_____Dr. Mark Harriman, a board certified orthopedic surgeon, also testified by deposition. Dr. Harriman examined the plaintiff and determined that she had good grip strength which was mildly weak, an excellent pulse, no muscle atrophy, and normal muscle testing. Dr. Harriman agreed with Dr. Boals' finding of work related bilateral carpal tunnel syndrome, his recommendation of surgery, and his work restrictions. Dr. Harriman estimated permanent physical impairment of ten percent to each of the plaintiff's arms.

_____Dr. William M. Jenkins, a director of rehabilitation counseling, testified by deposition. Dr. Jenkins administered several tests to the plaintiff in order to measure her reading and writing skills. Dr. Jenkins testified that the plaintiff's vocational disability was 75 percent, reaching this conclusion based upon the plaintiff's medical diagnosis and percentage of impairment.

_____Brenda C. Dailey, a vocational rehabilitation counselor, also testified by deposition. Ms. Dailey took a social and work history from the plaintiff, performed an analysis of the plaintiff's prior work, and also performed vocational testing on the plaintiff. Ms. Dailey testified that the plaintiff's vocational disability was 35 percent or 45 percent, stating that while the plaintiff had limitations in the factory setting due to her medical restrictions there were still a number of jobs which were medically appropriate for the plaintiff.

ANALYSIS

_____Review of the findings of fact made by the trial court is *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. Tenn. Code Ann. § 50-6-225(e)(2). *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial court in a workers' compensation case. See *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard testify, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. See *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). The trial court has the discretion to accept the opinion of one medical expert over another medical expert. *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990).

_____In this case, as in all workers' compensation cases, the claimant's own assessment of his physical condition and resulting disabilities is competent testimony and cannot be disregarded. *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972). The extent of vocational disability is a question of fact to be

determined from all of the evidence, including lay and expert testimony. *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990).

Notice and Statute of Limitations

This case involves carpal tunnel syndrome, a gradual injury. The defendant argues that the plaintiff's claim with regard to her left upper extremity should be dismissed because notice was not timely given. The plaintiff notified the defendant that she was having problems with her left arm on February 10, 1996. The defendant points out that the plaintiff gave conflicting testimony about when she first noticed problems with her left arm, for she made three different statements about when she first noted a problem, the latest date being June 1995.

The defendant acknowledges that in a gradual injury case the court looks to the date the plaintiff was unable to work for purposes of determining notice and statute of limitations requirements. *See Barker v. Home-Crest Corp.*, 805 S.W.2d 373 (Tenn. 1991); *Brown Shoe Co. v. Reed*, 350 S.W.2d 65 (Tenn. 1961). The defendant urges this Court not to apply this rule because the plaintiff's case is unique in that she did not reach a date whereupon she was unable to continue working. The defendant submits that the plaintiff knew or reasonably should have known that she sustained a work related injury to the left arm on December 13, 1994; June 1995; or December 19, 1995. The defendant argues that no matter which of these three dates this Court selects as a starting point the plaintiff failed to give timely notice and failed to timely file suit. The defendant also argues that this is not a case where notice could be excused because the plaintiff, regardless of her sophistication, had actual knowledge that her injury was work related based upon discussions with Dr. Boals and her attorney.

Although the application of the last day worked rule in this case would perhaps be unique, as the defendant says, because the plaintiff never left work, we are not inclined to attempt to carve out an exception to the rule and relate the time for which notice must be given and the statute of limitations begins to run in gradual injury cases on the basis that the employee never stopped work. To do so would inject unnecessary confusion into determining the triggering date for the notice and limitations period to begin. We cannot find that this rule would create any undue

prejudice to employers in these types of cases, which would require an alteration to the general rule on notice and limitations guidelines in gradual injury cases.

We find therefore that timely notice of the injury was given and suit was timely filed.

Vocational Disability

The defendant emphasizes the following facts in support of its argument that the extent of the plaintiff's vocational disability does not approach 58 percent permanent partial disability to each upper extremity: (1) the plaintiff has had no medical treatment for bilateral carpal tunnel syndrome; (2) the plaintiff has not undergone any surgical procedure for her condition; (3) the plaintiff has not been taken off work for even one day by any physician because of her condition; (4) at the time of trial, the plaintiff continued to work for the defendant; and (5) the plaintiff has a diverse employment background which extends far beyond mundane manual labor.

The extent of vocational disability is a factual question which the trial court decides based upon numerous factors. The plaintiff argues that the trial court's award of 58 percent permanent partial disability to each of the plaintiff's upper extremities is supported by the preponderance of the evidence and by the lay, medical, and vocational testimony. The plaintiff also points out that the trial court had the benefit of observing the plaintiff testify in person and that its decision about her credibility should not be disturbed unless the record contains clear, concrete, and convincing evidence which contradicts the finding.

Based upon the above, we find the evidence does not preponderate against the findings of the trial court and we affirm the judgment.

The cost of this appeal is taxed to the defendant.

John K. Byers, Senior Judge

CONCUR:

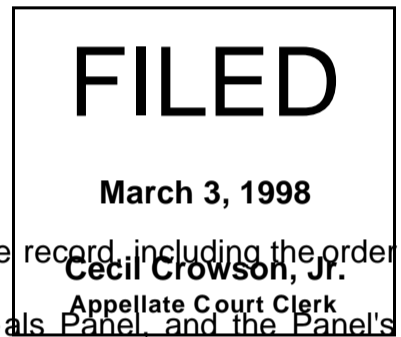
Janice Holder, Justice

William H. Inman, Senior Judge

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

BEVERLY RIDDLE,)
) MADISON CHANCERY
) NO. 51254
)
) Plaintiff/Appellee,)
) Hon. Joe C. Morris,
 vs.) Chancellor
)
) MURRAY OUTDOOR PRODUCTS,)
) NO. 02S01-9706-CH-00058
)
) Defendant/Appellant.) AFFIRMED.

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 Appellant, and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 3rd day of March, 1998.

PER CURIAM

(Holder, J., not participating)

