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

FILED

March 3, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

TERESA WOODY,	)	OBION CHANCERY
	)	
Plaintiff/Appellee	)	NO. 02S01-9976-CH-00052
	)	
	)	
GOODYEAR TIRE & RUBBER CO.,	)	WILLIAM MICHAEL MALOAN CHANCELLOR
	)	
Defendant/Appellant	)	

For the Appellant:

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For the Appellee:

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M E M O R A N D U M O P I N I O N

Members of Panel:

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

AFFIRMED **INMAN, Senior Judge**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance

with T.C.A. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The trial court awarded the plaintiff benefits based on a finding of 25 percent permanent partial disability to her whole body. The defendant appeals, asserting the excessiveness of this award and the bar of the statute of limitations.

An in-depth discussion of her employment history with the defendant is necessary for an adequate assessment of her claim.

She was 34 years old at the time of trial and lives in Obion County, Tennessee. She completed high school and attended Vanderbilt University for a short period of time. At the time of trial, she was a senior at the University of Tennessee at Martin majoring in English, lacking approximately three hours before graduation. Following graduation, she plans to attend graduate school, seek a Masters Degree in English, and ultimately teach.

Her work history includes a work study program at Vanderbilt University, primarily clerical in nature. She has worked for Baptist Hospital in Union City as an admission clerk, a clerical position, and in 1988, she began working for Goodyear Tire & Rubber Company, in the gift shop. Shortly thereafter, she moved into the factory, working on a bias unit, which involved repetitive overhead lifting, twisting and turning. In June of 1989, she began having pain and problems with her shoulders, and informed her supervisor, David Stephenson, of these problems and filled out an incident report in July, 1989. She was initially seen by Dr. David St. Clair who diagnosed impingement syndrome. Her claim for workers' compensation benefits was eventually denied.

She continued to work on the bias machine and her shoulder problems progressively worsened. In 1990, she resigned her position with the defendant to attend school, and worked part-time for Baptist Hospital in Union City, again

in a clerical position. Her shoulder pain and problems substantially improved while she was attending school. In 1992, she returned to work for the defendant as a tire inspector in the final finish department, which required her to pick up, transfer, and throw tires many times per day. Her shoulder problems again worsened. On October 18, 1993, she began seeing Dr. M. A. Blanton, an orthopedic surgeon in Union City, Tennessee, who diagnosed her condition as subacromial impingement syndrome which is an "overuse syndrome associated with the type of work she was performing . . . which involves 'grinding of the rotator cuff through the bursa on the bottom of the shoulder blade'." She left the employment of the defendant a second time, returning to school and the clerical job at the hospital. The pain in her shoulders greatly improved. She continued to see Dr. Blanton, who opined in March, 1994 that "she has almost a 100 percent likelihood of responding to conservative treatment alone."

In late 1994, plaintiff once again returned to work for the defendant as a forklift driver. Almost immediately, the pain in her shoulders increased. She returned to Dr. Blanton who recommended surgery to alleviate the impingement syndrome, noting that all conservative measures had failed. Plaintiff testified that this was the first time she realized that her injuries were possibly going to be permanent in nature. On January 19, 1995, surgery was performed on the left shoulder, and on March 28, 1995, surgery was performed on the right shoulder. Her recovery from the surgeries was uneventful and she was released to return to work in late April 1995, and she, in fact, returned to work for the defendant as a stock trucker on May 1, 1995. She was later transferred to the bias machine and worked for approximately three weeks before resigning her employment. She was last seen by Dr. Blanton on May 19, 1995, when, on that visit, Dr. Blanton advised plaintiff that she was physically unable to perform this job and encouraged her to seek other employment.

On November 2, 1994, she filed this workers' compensation complaint, which was heard on December 5, 1996. The issues before the court were whether the plaintiff's claim for workers' compensation benefits was barred by the statute of limitations and, if not, the extent of the plaintiff's permanent partial disability, if any. Dr. Blanton testified at length regarding the development and nature of plaintiff's impingement syndrome, as illustrated by the following testimony:

> Q: . . . I think the meaning is clear, but to make sure, it is the fact that this is heavy repetitive type work that over a period of time has developed this condition in this young lady, is that a true statement?
>
> A: Yes.
>
> Q: Would you also agree that . . . there was a constant insult on her shoulders that made this a progressively worsening condition, would you agree with that?
>
> A: Yes . . .
>
> Q: [C]ouldn't we say that the last injurious exposure that this lady suffered was that hard work she was doing prior to the surgeries that you performed?
>
> A: Yes.

Additionally, Dr. Joseph Boals also testified on behalf of the plaintiff, noting that the cause of her injuries was the result of "the repetitive work she did at Goodyear over a number of years."

On the issue of permanent impairment, Dr. Blanton opined that the plaintiff sustained a one to four to five percent disability to each upper extremity based on lost range of motion and instability. He opined that "the type of work that she has been trying to do at Goodyear is not compatible with her physical capabilities . . . I would strongly suggest that she pursue that change of career description . . . all she needs is to get away from that type of work to probably regain physical continuity." Dr. Boals testified regarding impairment, finding that, based upon his examination of the plaintiff, she

retained ten percent permanent partial impairment to each upper extremity as a result of the injury she sustained while working for the defendant. He also encouraged her to "eliminate repetitive or heavy lifting from the waist level up."

Plaintiff testified that she still experiences "[s]tiffness, pain, difficulty rotating my shoulders, difficulty lifting things, difficulty doing my own work in class, I have to ask my professor to let me write my papers . . . [instead] of typing them out."

> Q: Can you raise your arm up and put it behind you? Do you have that type of motion?
>
> A: It's very painful for me to do that.
>
> Q: You can do it but it hurts?
>
> A: It hurts . . .
>
> Q: Give us some examples, if you can, of any type of physical activity, leisure, sports.
>
> A: I used to like to play tennis, I can't do that, I can't ride my bike . . . I can no longer swim.

Following the introduction of the medical evidence and the testimony of the plaintiff, the trial judge held that the plaintiff's lawsuit was timely filed and that the plaintiff was entitled to 25 percent permanent partial disability to the body as a whole as a result of injuries sustained while working for the defendant.

The Statute of Limitations

A claim for workers' compensation benefits is barred unless the injured employee brings an action therefor before the expiration of one year "after the occurrence of the injury." T.C.A. § 50-6-224. The issue is one of law, *Whitehead v. Aluminum Company of America*, 361 F.2d 620 (6th Cir. 1966),

and the delimiting period commences to run from the occurrence of the injury, and not from the occurrence of the accident. *Griffitts v. Humphrey,* 288 S.W.2d 1 (Tenn. 1955). Repetitive stress injuries are accidental, and are not occupational diseases. *Brown Shoe Co. v. Reed,* 350 S.W.2d 65 (Tenn. 1961). It is well known that with repetitive stress injuries the symptoms appear and worsen over an extended period of time, *see, Lawson v. Lear Seating Corp.*, 944 S.W.2d 340 (Tenn. 1997), making it difficult to determine when the accident occurs.

In *Barker v. Home-Crest Corp.,* 805 S.W.2d 373 (Tenn. 1991), the plaintiff suffered a carpal tunnel syndrome. The Supreme Court held that the plaintiff suffered a new injury each day at work, and therefore the 'accidental injury' occurred on the date the plaintiff "could not longer perform her work." *Lawson, supra,* followed the rationale expressed in *Barker.* We think these cases control the disposition of the case at Bar. The plaintiff sustained a gradually occurring injury which eventuated in surgery in January 1995. We find that the complaint was timely filed.

The Extent of Disability

This issue involves the award of 25 percent permanent partial disability to the body as a whole as a result of the work-related injuries plaintiff suffered while employed by the defendant. To determine the propriety of the amount of a workers' compensation award, the existence of permanent impairment must be established by competent medical evidence. *Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452, 456 (Tenn. 1988). In the case at Bar, the permanency of the injury was established by all experts who testified in the case. The treating physician, Dr. M. A. Blanton, opined that the plaintiff sustained a one to four to five percent disability to each upper extremity based on lost range of motion and disability resulting from the work injury. He testified that "the type of work that she has been trying to do at Goodyear is not compatible with her

physical capabilities . . . I would strongly suggest that she pursue that change of career description . . . all she needs is to get away from that type of work to probably regain physical continuity." Dr. Joseph Boals, who evaluated the plaintiff at the request of counsel, also testified regarding impairment, finding that she retained ten percent permanent partial impairment to each arm as a result of the injury she sustained while working for the defendant. He also encouraged her to "eliminate repetitive or heavy lifting from the waist level up."

Once permanency has been established, the amount of vocational disability suffered by the plaintiff must be determined. In making this determination, the trial court must decide how much the injury impairs the employee's earning capacity, not the degree of anatomical impairment. *Corcoran, supra,* at 458. In making determinations, the court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition. T.C.A. § 50-6-241(a)(1); *Roberson v. Loretto Casket Co.,* 722 S.W.2d 380, 384 (Tenn. 1986). In addition, in determining the extent of the disability, 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).

Admittedly, the issue of excessiveness of the amount of permanent disability awarded is a close one, since the plaintiff has embarked upon a new career - teaching - which ordinarily does not require heavy lifting or repetitive actions. But her testimony that she can no longer engage in sports or leisure time activities was unrebutted, and, taken as a whole, we cannot find that the evidence preponderates against the finding of 25 percent permanent, partial disability.

The judgment is therefore affirmed at the costs of the appellants and the case is remanded for all appropriate purposes.

_____
William H. Inman, Senior Judge

CONCUR:

_____
Janice Holder, Justice

_____
John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

TERESA WOODY,	)	OBION CHANCERY
	)	NO. 18,367
Plaintiff/Appellee,	)	
	)	Hon. William Michael Maloan,
vs.	)	Chancellor
	)	
GOODYEAR TIRE & RUBBER CO.,	)	NO. 02S01-9976-CH-00052
	)	
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)