

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

**FILED**

June 24, 1998

Cecil W. Crowson  
Appellate Court Clerk

HAROLD TREG COTTON,	)	
	)	
Plaintiff/Appellee	)	LAWRENCE CIRCUIT
	)	
v.	)	NO. 01S01-9706-CV-00188
	)	
EPSCO, INC.,	)	HON. JIM T. HAMILTON,
	)	JUDGE
Defendant/Appellant	)	

**For the Appellant:**

Steven A. Dix  
McClellan, Powers, Ehmling &  
Dix, P.C.  
201 West Main Street, Suite 201  
Murfreesboro, TN 37130

**For the Appellee:**

Paul A. Bates  
Christopher V. Sockwell  
Boston, Bates, Holt & Sockwell  
235 Waterloo Street  
P.O. Box 357  
Lawrenceburg, TN 38464

**MEMORANDUM OPINION**

**Members of Panel:**

Justice Frank F. Drowota, III  
Senior Judge John K. Byers  
Special Judge William S. Russell

AFFIRMED IN PART,  
MODIFIED IN PART, and  
REVERSED IN PART

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.

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 findings, 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).

In this case, the plaintiff brought suit against Epsco, Inc. ("Epsco") and later Hughes Parker Industries, Inc. ("Hughes Parker")<sup>1</sup>, alleging that he was entitled to workers' compensation benefits as a result of developing carpal tunnel syndrome in the course of his employment.

The trial court dismissed the suit against Hughes Parker and found that Epsco was not prejudiced by the plaintiff giving notice of his injury on April 3, 1996. The trial court awarded the plaintiff 40 percent permanent partial disability to both arms and seven weeks of temporary total disability.

\_\_\_\_\_ Epsco appeals and presents the following issues:

1. The plaintiff's cause of action is barred by the plaintiff's failure to give timely notice.
2. The plaintiff's cause of action is barred by the applicable statute of limitations.
3. The permanent partial impairment award is excessive.
4. There is no basis for an award of temporary total disability.

We affirm the judgment of the trial court that the plaintiff timely notified and filed suit against Epsco, we modify the judgment of the trial court to find that the plaintiff can recover 20 percent permanent partial disability to each upper extremity, and we reverse the judgment of the trial court that the plaintiff is entitled to temporary total disability benefits.

---

<sup>1</sup> There is no issue raised concerning the dismissal of Hughes Parker in this case.

## FACTS

The plaintiff, 34 years of age at the time of trial, graduated from high school in 1980 and earned a full music scholarship to Tennessee Tech. The plaintiff testified that he suffers from a panic disorder and depression for which he receives psychiatric treatment and drug therapy and that these problems prevented him from attending college and from working prior to 1994.

In 1994, the plaintiff began working for Epsco, an employer which provides temporary workers to local industries, including Hughes Parker. His employment history is as follows: (1) first employed by Epsco from October 23, 1994 to November 27, 1994; (2) directly employed by Hughes Parker from November 28, 1994 to February 20, 1995; (3) re-employed by Epsco from March 26, 1995 to April 30, 1995; and (4) again re-employed by Epsco from December 3, 1995 to March 24, 1996.

The plaintiff operated a metal stamping press for Hughes Parker. As a press operator, the plaintiff put 200 metal pieces into the press each hour and thereby used his hands for gripping, squeezing, and lifting eight hours a day. Within one month of working at Hughes Parker, the plaintiff said he began to experience pain, numbness, and tingling in his hands and arms. He testified that he never had problems with his hands prior to operating the press.

The plaintiff testified that he left Hughes Parker in February 1995 because his hands swelled and became numb. In March 1995, the plaintiff returned to work for Epsco because the symptoms had eased during the one month he did not work. However, the symptoms resumed and he quit working for Epsco in late April 1995. During the summer months of 1995, the plaintiff worked as a janitor and painter and said he did not experience any symptoms in performing these jobs. The plaintiff testified that he returned to work for Epsco in December 1995 because he had bills to pay. However, the symptoms resumed again and he quit work with Epsco in March 1996.

The earliest documentation of the plaintiff's condition appears in the notes of Dr. Ball and Dr. Panovec, his general practitioners. Dr. Panovec referred the plaintiff to Dr. Dirr, who performed an electromyogram which showed carpal tunnel syndrome on May 8, 1995. The plaintiff was given splints and considered taking a

new job due to the symptoms. In January 1996, the plaintiff returned to Dr. Panovec with carpal tunnel syndrome complaints and was referred to Dr. Moore, who performed bilateral carpal tunnel release surgery on April 1, 1996.

The plaintiff notified Epsco of his work injury by way of a letter from his attorney dated April 1, 1996, the day he underwent surgery. Epsco received the letter on April 3, 1996. The plaintiff testified that he did not realize the problems with his arms were permanent until he had surgery. The plaintiff testified that since surgery the numbness in his hands has improved but that he continues to have problems with gripping and holding onto items, with loss of strength in his hands and arms, and with lifting and gripping boxes in his current job where he makes \$1.50 more than he made working for Epsco.

### **MEDICAL TESTIMONY**

Dr. Kenneth Moore, a board certified orthopedic surgeon, testified by deposition. Dr. Moore first saw the plaintiff for complaints of numbness, stiffness, swelling, tenderness, and weakness in his hands. After examining him and reviewing a nerve conduction study and E.M.G., Dr. Moore diagnosed the plaintiff's condition as carpal tunnel syndrome on February 29, 1996. At that time, Dr. Moore discussed the details of surgery with him. Dr. Moore treated the plaintiff and performed bilateral carpal tunnel release surgery on April 1, 1996. Dr. Moore testified that he was not able to give the plaintiff an anatomical impairment rating nor was he able to place restrictions on him because he never returned for post-surgical care. Dr. Moore testified that it is possible that the plaintiff's condition and resulting surgery were a result of his employment with Epsco, but he also said that he never told the plaintiff that the condition was work related. Dr. Moore testified that it would take a patient six to eight weeks to return to work and 12 to 16 weeks to reach maximum medical improvement after carpal tunnel release surgery.

\_\_\_\_\_ Dr. David W. Gaw, a board certified orthopedic surgeon, also testified by deposition. On September 4, 1996, Dr. Gaw performed an independent medical examination of the plaintiff at the request of his attorney. At that time, the plaintiff was still complaining of pain in his hands but the numbness had improved. After reviewing his medical records, Dr. Moore gave the plaintiff a ten percent permanent partial impairment rating to each upper extremity and restricted him permanently

from continuous gripping, squeezing, or constant manipulation with his fingers. Regarding causation, Dr. Gaw testified that “barring any other significant history, the repetitive use of his hands for operation of a metal press would be the most likely cause of his condition.” Dr. Gaw stated that he never took the plaintiff off work and that none of his restrictions would prevent him from returning to work as a painter. Dr. Gaw testified that a patient having bilateral carpal tunnel release surgery could return to work after six to eight weeks and that during this interval the patient would be temporarily totally disabled.

### **ANALYSIS**

\_\_\_\_\_ In order to be eligible for workers’ compensation benefits, an employee must suffer “an injury by accident arising out of and in the course of employment which causes either disablement or death.” Tenn. Code Ann. § 50-6-102(a)(5). The phrase ‘arising out of’ refers to causation. The causation requirement is satisfied if the injury has a rational, causal connection to the work. *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997) (citations omitted).

Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have thus consistently held that an award may properly be based upon medical testimony to the effect that a given incident “could be” the cause of the employee’s injury, when there is also lay testimony from which it may be reasonably inferred that the incident was in fact the cause of the injury. *Id.*

Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, 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). 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).

## Notice

The first issue presented by Epsco is whether the plaintiff's cause of action is barred by his failure to give timely notice. Tenn. Code Ann. § 50-6-201 requires the employee to notify the employer of a work injury within 30 days of its occurrence unless there is a reasonable excuse. Epsco argues that the record clearly shows that the plaintiff's earliest knowledge that his job was causing his hands and arms to hurt was in November 1994, that the plaintiff also knew that he was diagnosed with carpal tunnel syndrome on May 8, 1995, and that the plaintiff discussed surgery with Dr. Moore on February 29, 1996. Based on any of these dates, Epsco says that the plaintiff's letter of April 1, 1996, which was received on April 3, 1996, was not timely notice.

\_\_\_\_\_ We find that the plaintiff did give timely notice of his injury to Epsco. Based on the law in gradual injury cases, the date of the accidental injury is the date on which the condition finally prevents the employee from performing his work. *Brown Shoe Co. v. Reed*, 350 S.W.2d 65 (Tenn. 1961). The record shows that the plaintiff finally quit his work at Epsco on March 24, 1996 because of the severe pain in his arms. This makes Epsco's receipt of the plaintiff's letter on April 3, 1996 within the 30 day statutory requirement.

Epsco also says that it did not waive notice and that the plaintiff failed to prove any reasonable excuse for not giving timely notice. Epsco argues that the plaintiff's failure to give timely notice prejudiced Epsco since it never had the opportunity to investigate the propriety of the plaintiff's medical treatment. However, as the plaintiff points out, Epsco proved no prejudice concerning the date of notice because a representative of Epsco testified that she never went to the plant to investigate the plaintiff's claim even after being put on notice of his work injury.

## Statute of Limitations

The second issue presented by Epsco is whether the plaintiff's cause of action is barred by the applicable statute of limitations. Tenn. Code Ann. § 50-6-203 requires the employee to file a claim for workers' compensation within one year of a work injury. Epsco argues that the plaintiff's complaint of April 25, 1996 was filed one year and six months after he first developed carpal tunnel syndrome symptoms

and knew or should have known that he sustained a work related injury in November 1994.

We find that the plaintiff filed suit within the applicable statute of limitations period. The Supreme Court adopted the rule that “in a carpal tunnel syndrome action, the date from which compensation flows is the last date worked by the claimant.” *Lawson v. Lear Seating Corp.*, 944 S.W.2d 340, 342 (Tenn. 1997) (citations omitted). Therefore, the filing of the plaintiff’s complaint on April 25, 1996 was within the one year statute of limitations period since he finally quit his work with Epsco on March 24, 1996 because of the severe pain in his arms.

### **Permanent Partial Impairment Award**

The third issue on appeal is whether the plaintiff’s award of 40 percent permanent partial disability is excessive. After a careful review of the record, we find that the award is excessive and modify the amount to 20 percent.

In making determinations, the court shall consider all pertinent factors, including lay and expert testimony and the employee’s age, education, skills, training, local job opportunities, and capacity to work at types of employment available in his disabled condition. Tenn. Code Ann. § 50-6-241(a)(1); *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986).

In reviewing these factors, we note that the plaintiff is a 34 year old high school graduate who earned a full music scholarship to Tennessee Tech and who has a panic disorder, yet the record reveals no proof that he suffers from any permanent diminished capacity. In addition, we note that the plaintiff never returned to Dr. Moore for an impairment rating or restrictions and that the plaintiff was never taken off work by Dr. Gaw, who said that none of the plaintiff’s restrictions would prevent him from working as a painter. Furthermore, the record reveals that the plaintiff has obtained employment since his injury making \$1.50 more per hour than he made working for Epsco.

Based upon these facts, we find that the trial court’s award of 40 percent permanent partial disability to both arms is not supported by a preponderance of the evidence. Therefore, the judgment of the trial court is modified to provide an award of 20 percent permanent partial disability to the body as a whole.

### **Temporary Total Disability Award**

The last issue on appeal is whether there is a basis for an award of temporary total disability benefits. We find that there is no basis for such an award and reverse that portion of the trial court's judgment.

In order to recover temporary total disability benefits, the plaintiff must prove that he was "(1) totally disabled to work by a compensable injury; (2) that there was a causal connection between the injury and his inability to work; and (3) the duration of that period of disability." *Simpson v. Satterfield*, 564 S.W.2d 953, 955 (Tenn. 1978). In this case, the plaintiff quit work without advising the defendant that he was unable to work and before the defendant had notice of any injury.

### **CONCLUSION**

We affirm the findings that the plaintiff timely notified and filed suit against Epsco, we modify the award of permanent partial disability to 20 percent to each upper extremity, and we reverse the award of temporary total disability. The cost of this appeal is taxed to Epsco.

---

John K. Byers, Senior Judge

CONCUR:

---

Frank F. Drowota, III, Justice

---

William S. Russell, Special Judge



IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

HAROLD TREG COTTON,	)	LAWRENCE CIRCUIT NO. CC-77-96
	)	
PLAINTIFF/APPELLEE,	)	HON. JIM T. HAMILTON, JUDGE
	)	
v.	)	
	)	S. CT. NO. 01S01-9706-CV-00188
EPSCO, INC.,	)	
	)	AFFIRMED IN PART, MODIFIED IN
DEFENDANT/APPELLANT.	)	PART AND REVERSED IN PART

**FILED**

June 24, 1998

**Cecil W. Crowson**  
**Appellate Court Clerk**

**JUDGMENT**

This case is before the Court upon motion for review pursuant to Tenn.

Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well taken and should be denied; 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 Defendant/Appellant, Epsco, Inc., for which execution may issue if necessary.

It is so ordered this 24th day of June, 1998.

PER CURIAM

DROWOTA, J. NOT PARTICIPATING