

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT MEMPHIS
March 25, 2015 Session

**PAUL V. PERMENTER v.
BRIGGS AND STRATTON CORPORATION ET AL.**

**Appeal from the Chancery Court for Dyer County
No. 09CV413 Tony A. Childress, Chancellor**

No. W2014-00582-SC-R3-WC – Mailed August 3, 2015; Filed September 8, 2015

An employee alleged that he developed cubital tunnel syndrome and carpal tunnel syndrome as a result of his work activities. His employer provided medical treatment for the former condition but denied liability for both conditions at trial. The trial court found that the cubital tunnel syndrome was compensable but the carpal tunnel syndrome was not. It further found that Employee had a meaningful return to work, thus limiting his recovery to one and one-half times the anatomical impairment. The employee has appealed, asserting that the evidence preponderates against the trial court's findings regarding his carpal tunnel syndrome and return to work. The employer contends that the evidence preponderates against the finding that the cubital tunnel syndrome was compensable. Pursuant to Tennessee Supreme Court Rule 51, the appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. We affirm the judgment.

**Tenn. Code Ann. § 50-6-225(a) (2014) Appeal as of Right; Judgment of the
Chancery Court Affirmed**

CHANCELLOR MARTHA B. BRASFIELD delivered the opinion of the Court, in which JUSTICE HOLLY KIRBY and JUDGE BEN H. CANTRELL joined.

Mark D. Johnston, Dyersburg, Tennessee, for the appellant, Paul V. Permenter.

Charles R. Patrick and Lawrence W. White, Memphis, Tennessee, for the appellees, Briggs and Stratton Corporation and Liberty Insurance Corporation.

OPINION
Factual and Procedural Background

The parties attempted to resolve their differences at a Benefit Review Conference held on September 22, 2009, but were unable to do so. The employee filed this action in the Chancery Court for Dyer County on October 12, 2009. The case was tried on June 30, 2014.

Paul Permenter (“Employee”) was forty-four years old on the date of trial. He attended school through the eleventh grade and later obtained a GED. He attended Dyersburg State Community College for one semester but did not complete his courses. He also briefly attended a technical school. His early work history included farm work as a teenager and operating a lift that loaded barges. He worked for more than fifteen years at a rubber manufacturing facility, where he did “pretty much everything,” including operating a mixer, working on a production line, shipping and receiving clerk and warehouseman. He was a plumber for several years and later became a welder. He owned and operated a retail packing and shipping store at one time. He also was a correctional officer at Northwest Correctional Facility in Lake County.

Employee began working for Briggs and Stratton Corporation (“Employer”) through a temporary agency in November 2007. He was hired by Employer on January 28, 2008. He worked in the fabrication department. His job consisted of taking sheets of steel and placing them in various presses and stamping machines to manufacture lawn mower decks. The fabrication area consisted of four processes. An employee would place a sheet of metal on the first machine, where it would be “prepped.” Another employee would take the resulting piece of metal to a second machine for further processing and so on. Employees in the department rotated between the stations hourly. Employee estimated the size of the sheets of metal as five feet by five feet by one-eighth of an inch. Mike Wilson, Employer’s former Health and Safety Engineer, described the sheets as somewhat smaller.

Employee testified that he began have pain in both arms in December 2007. His symptoms worsened over time. On February 29, 2008, he reported the matter to Employer. He was initially referred to a Dr. Green for treatment. He testified that during this time, he had severe pain in both arms from his “shoulder all the way down to the fingertips.” He also had numbness and tingling in both arms. His symptoms did not improve, and so he was referred to Dr. David Yakin, an orthopaedic surgeon, for further evaluation and treatment.

Dr. Yakin testified by deposition. He first saw Employee on March 18, 2008. At that time, Employee complained of bilateral elbow pain and numbness in the small and ring fingers of each hand. After examining Employee, Dr. Yakin’s initial diagnoses were bilateral cubital tunnel syndrome and bilateral epicondylitis. He continued work restrictions previously set by Dr. Green and ordered a nerve conduction study. The results of the nerve

conduction study were normal. However, Employee's clinical examination continued to be consistent with cubital tunnel syndrome. Dr. Yakin injected Employee's elbows with cortisone, but this did not improve his symptoms. When Employee returned on April 4, 2010, he described his arm pain as ten on a scale of ten. Dr. Yakin found this to be out of proportion for epicondylitis and cubital tunnel syndrome. He ordered an MRI of both elbows. That study showed bilateral thickening of the ulnar nerve. Dr. Yakin considered this to be a congenital condition unrelated to Employee's work.

A trial with splints did not improve Employee's symptoms, and so on June 5, 2008, Dr. Yakin recommended surgical decompression of the ulnar nerve at the elbow. The procedure was carried out on Employee's right arm on June 20, 2008. Initially, Employee did not report improvement after the surgery. By August, he began to improve, and the improvement continued through September and October. However, Employee continued to have pain in his right elbow, leading Dr. Yakin to order a second nerve conduction study in November. The result of that study was normal. Dr. Yakin declared Employee to be at maximum medical improvement on November 20, 2008. He assigned 2% impairment to the right arm. He placed no permanent activity restrictions on Employee.

Dr. Yakin testified that he "did not really address" Employee's left arm when he released him. He added that Employee didn't mention his left arm to him at that time. He later received a letter from Employer's insurer about the left arm. He responded by answering "No" to the question, "Do you believe a PPD rating is needed for the left elbow?" Dr. Yakin further testified that Employee did not have any median nerve complaints suggestive of carpal tunnel syndrome during his course of treatment. He further observed that the nerve conduction studies he ordered were negative for carpal tunnel syndrome.

By the time Dr. Yakin released him, Employee had been terminated by Employer for absenteeism. The testimony of Mike Wilson established that Employer had a written policy for absenteeism and that the policy was set out in the Employee handbook. Employee acknowledged that he had received the handbook and was generally aware of the policy. In general, an employee was subject to termination after six "occurrences." An occurrence was an unexcused absence. An employee would be charged with one-half of an occurrence for arriving at work late or leaving before the end of his shift. The basis for Employee's termination was set out in an April 30, 2008 note of John Wilham, Employer's Human Resources Manager:

To Whom It May Concern:

Paul Permenter was employed as a Production Operator for the Briggs & Stratton Company in Newbern, Tennessee on January 28, 2008.

From January 28 through February 29, Mr. Permenter had 9.5

occurrences of absence. On February 29, he filed a workers' compensation claim stating he was injured in the workplace.

Beginning March 3, 2008 until March 24, 2008, Mr. Permenter's attending physician held him off work due to medical reasons. On March 24th, the physician returned Mr. Permenter to work with restrictions. At that time, Briggs & Stratton provided work for Mr. Permenter that was within those medical restrictions.

From March 24 until his termination on April 16, Mr. Permenter accrued 19 more occurrences of absence even though work was available to him and he was expected to work. Due to his overall record of absence since his employment, excluding the period from March 3 to March 24, his employment was terminated. During that period he missed approximately 50% of the available work hours.

Employee did not dispute that he missed work, reported late or left early on the number of occasions set out in the memo. However, he stated that he always called in to inform Employer when he was unable to come to work, or informed his supervisor when he left before the end of his shift. He further testified that all of his occurrences were due to severe pain in his arms. In addition, he stated that he never received any written or verbal warnings concerning his attendance prior to his termination.¹ He agreed that Employer provided work with the temporary restrictions set out by Dr. Yakin.

Employee testified that he had neither worked nor sought employment since being terminated. He did not believe he was capable of performing any work due to pain in his arms. His daily activities consisted of limited household chores and playing a video game. He had not seen Dr. Yakin since being released in November 2008. He was unsure whether Dr. Yakin or his evaluating physician, Dr. Janovich, had placed any permanent restrictions on his activities.

Dr. John Janovich, an orthopaedic surgeon, examined Employee on two occasions, April 30, 2009 and November 29, 2011. His opinions were originally submitted to the trial court by means of a C-32 Standard Form Medical Report for Industrial Injuries. Employer thereafter exercised its right to conduct a cross-examination deposition in accordance with Tennessee Code Annotated section 50-6-235.

¹Employer's witness, Mr. Wilson, stated that he gave verbal warnings to Employee concerning his attendance. (Trans. Vol. 2, pp. 195-97, 203) There was no evidence that any written warnings were given prior to termination.

As a result of the April 30, 2009 evaluation, Dr. Janovich opined that Employee retained a 7% permanent impairment to each arm due to ulnar nerve compression at the elbow, i.e., cubital tunnel syndrome. He testified that his clinical examination, as well as the records of Dr. Yakin, supported that diagnosis, although the results of two nerve conduction studies were normal. He found that Employee had positive Tinel's and Phalen's signs at the wrists and elbows. Although the wrist findings suggested "subclinical" carpal tunnel syndrome, his opinion in April 2009 was that Employee had permanent impairment solely for the cubital tunnel syndrome.

Dr. Janovich did not know why Employee returned to him in November 2011. At that time, Employee had an "intention" tremor in addition to his previous symptoms. Dr. Janovich opined that the tremor was not related to Employee's work injury. Dr. Janovich's clinical findings in 2011 were the same as his 2009 findings. However, he concluded that it was appropriate to assign impairment for carpal tunnel syndrome. He assessed an additional 5% permanent impairment to each arm for that condition. Dr. Janovich stated that Employee "had increased enough" to warrant the additional impairment. However, he repeated that the clinical examination had not changed from the 2009 examination. He agreed that there was no objective diagnostic testing that confirmed the diagnosis of carpal tunnel syndrome. He deferred to Employee's treating physicians on the subject of permanent restrictions.

The trial court took the case under advisement. It subsequently issued its findings of fact and conclusions of law. It found that Employee had sustained bilateral cubital tunnel syndrome as a result of his work for Employer. It further found that he had sustained a 7% anatomical impairment of each arm as a result of that condition. It rejected Employee's claim for benefits associated with carpal tunnel syndrome. It found that Employee had been terminated for violating Employer's attendance policy and thus had a meaningful return to work. It awarded permanent partial disability benefits of 10.5% to each arm. The trial court made alternative findings in the event that this Panel determined either that Employee had compensable carpal tunnel syndrome or that he did not have a meaningful return to work.² Employee has appealed, contending that the trial court erred by rejecting his carpal tunnel syndrome claim and by finding that he had a meaningful return to work. Employer asserts that the trial court erred by awarding benefits for cubital tunnel syndrome and by basing its award on Dr. Janovich's impairment rating.

Analysis

The standard of review of issues of fact in a workers' compensation case is *de novo*

²Because we affirm the trial court's principal findings, it is not necessary to address the alternative findings.

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(a)(2) (2014).³ 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. Madden v. Holland Group of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Carpal Tunnel Syndrome

Employee's first contention is that the trial court erred by failing to award benefits for carpal tunnel syndrome. The gist of Employee's argument is that the testimony of Dr. Janovich on this subject is more persuasive than that of Dr. Yakin. Because both physicians testified by deposition, we are able to independently evaluate that evidence. Foreman, 272 S.W.3d at 571. Our review leads us to the conclusion that the trial court's analysis of this issue is sound. Dr. Yakin testified unequivocally that Employee did not complain of carpal tunnel syndrome symptoms during his entire course of treatment, from March through November 2008. Further, Dr. Yakin's regular clinical examinations did not elicit any findings consistent with carpal tunnel syndrome. That testimony is substantiated by Dr. Yakin's records. Dr. Yakin also pointed out that Employee had two nerve conduction studies that were negative for carpal tunnel syndrome. He added that, while such studies frequently produced "false negatives" for cubital tunnel syndrome, they rarely did so for carpal tunnel syndrome.

Regarding Dr. Janovich's testimony, it is noteworthy that his first examination took place in April 2009, five months after Employee had been released by Dr. Yakin and one year after he was terminated by Employer. Dr. Janovich found clinical signs of carpal tunnel syndrome during that examination but did not consider it appropriate to assign permanent impairment. His second examination occurred more than two years after the first. He testified repeatedly that the results were the same as the April 2009 examination. There had been no additional diagnostic testing, and Dr. Janovich did not order any. Nevertheless, Dr. Janovich found that Employee's condition had "increased" in some unspecified way and that it had become appropriate to assign impairment.

³Formerly codified at Tennessee Code Annotated section 50-6-225(e)(2) (2008 & Supp. 2013).

Although workers, compensation law must be construed liberally in favor of an injured employee, it is the employee's burden to prove causation by a preponderance of the evidence. See Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991). The proof of a causal connection between the employment and the injury may not be speculative, conjectural, or uncertain. Clark v. Nashville Mach. Elevator Co., Inc., 129 S.W. 3d 42, 47 (Tenn. 2004). Our independent review of the medical evidence leads us to the same conclusion reached by the trial court. Employee failed to sustain his burden of proof that a causal relationship existed between his work for Employer during the period of January through April of 2008 and the carpal tunnel syndrome diagnosed by Dr. Janovich in April 2009 and rated by him in November 2011.

Meaningful Return to Work

After setting out Employee's attendance record in detail and describing Employer's attendance policy, the trial court found:

From the date of his being hired on January 28, 2008 until the date he was terminated on April 16, 2008, the employee had accrued approximately 18 occurrences. Several of those occurrences, 9.5, occurred before the date of the injury, and several more, 8.5, occurred after the date of injury. The occurrences the employee accrued after the date of injury were accrued when the employee had been released for restricted work duties and the employer had work available for the employee that fit within those restrictions. The employer's absentee policy does state an employee who accrues occurrences are to be given warnings some of them which can be verbal and some written. The employer never gave the employee any type of written warnings for the occurrences he had accrued. One of the reasons for this was that the employee was absent from work so much that the employer did not have an opportunity to give him those written warnings. The employer terminated the employee because the employee had violated its absentee policy by missing too many days of work. (Tech. p. 143)

Employee's position on this issue is not clearly expressed. However, we understand his arguments to be that the reason given for his termination was pretextual (See, Durham v. Cracker Barrel Old Country Store, Inc., No. E2008-00708-WC-R3-WC, 2009 WL 29896, at *4-5 (Tenn. Workers Comp. Panel Jan. 5, 2009)) and that his absences and tardinesses were all caused by the effects of his injury, making his actions reasonable for purposes of analyzing meaningful return to work. (See, Yang v. Nissan N. Am., Inc., 440 S.W.3d 593, 600 (Tenn. 2014) .

In our view, the evidence is clear that Employee's attendance was poor both before and after his work injury. As Mr. Wilham's file note sets out, Employee missed more than

50% of the work hours available to him after he was hired by Employer, even when the time missed due to medical orders of Dr. Green and Dr. Yakin is excluded from consideration. An employee's reliable presence in the workplace is a fundamental component of the employment relationship. Under the circumstances, Employer had a legitimate basis for terminating Employee.

The Supreme Court has held that an Employee may have a meaningful return to work even when he resigns, if that resignation is based upon a realistic belief that he is no longer able to perform his job because of the effects of his work injury. Yang, 440 S.W.3d at 600; see also, Howell v. Nissan N. Am., Inc., 346 S.W.3d 467, 473 (Tenn.2011). Employee contends that he was absent and tardy because the pain from his injury prevented him from being able to perform his job. The Yang Court noted that the analysis of the relationship between an employee's work injury and his professed inability to return to work, "is typically best left to the trial judge who has had the opportunity to observe the witnesses, determine their credibility, and assess 'the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to either return to or remain at work.'" 440 S.W.3d at 600 (internal citation omitted).

In the case before us, Employee testified that his bilateral arm pain was so severe that his ability to use his arms from 2008 until June 30, 2014, the date of the trial, was minimal. Dr. Yakin testified that Employee's symptoms were out of proportion to the physical findings, and even Dr. Janovich found that some of Employee's complaints were non-anatomic. The trial court had the opportunity to observe Employee's demeanor and physical presentation in person. It did not make an explicit finding concerning Employee's credibility, but we infer from its findings that it did not place great weight on his description of his physical condition. See In re Sidney J., 313 S.W.3d 772, 777 (Tenn.2010); Interstate Mech. Contractors, Inc. v. McIntosh, 229 S.W.3d 674, 678 (Tenn.2007). We defer to that assessment.

Cubital Tunnel Syndrome

For its part, Employer contends that the trial court erred by finding that Employee's cubital tunnel syndrome was caused by his work. It points out that Employee worked in its fabrication department for only a few months. It also asserts that the evidence does not establish that his job required repetitive use of the arms. However, two doctors testified regarding causation. Both doctors opined that Employee's cubital tunnel syndrome was related to his work. Employer presented no countervailing evidence. We conclude that there is no basis in this record to support a conclusion that the evidence preponderates against the trial court's finding on this issue.

Impairment Rating

Employer also asserts that the trial court erred by adopting Dr. Janovich's impairment rating for the cubital tunnel injury. Dr. Yakin opined that Employee had impairments of 2% to the right arm and 0% to the left arm. Dr. Janovich opined that Employee retained 7% impairment to each arm. Each doctor stated that his rating was based upon the Sixth Edition of the AMA Guides. Employer points out that Dr. Yakin was a treating physician, while Dr. Janovich's role arose from the litigation of the claim. It also notes that Dr. Janovich ordered no diagnostic testing and did not use any type of medical instrument in conducting his examination of Employee.

We note that Dr. Yakin's testimony concerning his reason for not assigning impairment to the left arm is not entirely consistent. At one time, he suggested that, once surgery took place, he focused his attention exclusively on the right arm. At another point, he stated that he was not asked to evaluate the left arm when he released Employee. After being shown the letter of inquiry on this very subject, with his response, he testified that Employee had no complaints concerning his left arm by November 2008. We find these inconsistencies to detract from the weight of his testimony.

It is more important that the records and testimony of Dr. Yakin and Dr. Janovich provide support for the proposition that Employee reported problems with both arms and that there was an objective basis for at least some of those problems. Employee testified at length concerning his symptoms and limitations. Such testimony is competent evidence. McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn. 1999) While it is clear that the trial court did not accept Employee's account at face value, it is equally clear that it did not discount that evidence entirely. In that regard, Dr. Janovich's opinion regarding impairment consistent with the trial court's assessment of Employee's loss of function. A trial court generally has the discretion to choose which expert to accredit when there is a conflict of expert opinions. Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel 1996); Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990). We conclude that, based on the record as a whole, the trial court did not abuse its discretion by adopting Dr. Janovich's cubital tunnel impairment rating over that of Dr. Yakin.

Conclusion

The judgment of the trial court is affirmed. Costs are assessed one-half to Paul V. Permenter and his surety and one-half to Briggs and Stratton Corporation and Liberty Insurance Corporation, for which execution may issue if necessary.

MARTHA B. BRASFIELD,
CHANCELLOR

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

PAUL V. PERMENTER v. BRIGGS AND STRATTON CORPORATION

**Chancery Court for Dyer County
No. 09CV413**

No. W2014-00582-SC-R3-WC – Filed September 8, 2015

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 on appeal are taxed one-half to Appellant, Paul V. Permenter and his surety, and one-half to Appellees, Briggs and Stratton Corporation and Liberty Insurance Corporation, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM