IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(August 13, 1999 Session)

CLARA SCRUGGS,	)	
	)	
Plaintiff/Appellee,	)	**MADISON CHANCERY**
	)	
v.	)	**NO. W1999-01092-SC-WCM-CV**
	)	
WAL-MART STORES, INC.,	)	**HON. JOE C. MORRIS**
	)	
Defendant/Appellant.	)	
	)	**DECIDED APRIL 4, 2000**

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 M. Holder
Senior Judge F. Lloyd Tatum
Senior Judge L. T. Lafferty

AFFIRMED

L. T. LAFFERTY, SENIOR JUDGE

OPINION

This workers' compensation appeal has been referred to the Special Worker's Compensation Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e) for a hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The trial court, in its findings of fact and conclusions of law, determined that the plaintiff had a gradually occurring injury, and the statute of limitations was not tolled when she gave sufficient notice on September 29, 1997, the date of her lawsuit. Likewise, the trial court found the plaintiff suffered a thirteen (13) percent permanent partial disability to each upper extremity.[1] We will determine if the record supports the trial court's conclusions.

The defendant presents three appellate issues for review:

1. Whether the trial court erred in holding that the plaintiff's claim was not barred by expiration of the statute of limitations?

2. Whether the trial court erred in holding that the plaintiff incurred a permanent impairment?

3. Whether the trial court's disability award was excessive?

Review of the findings of fact made by the trial court is *de novo* upon the record, 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). However, considerable deference must be given to the trial court, who has seen and heard the witnesses, especially where issues of credibility and weight of oral testimony are involved. *Jones v. Hartford Accident & Indem. Co.,* 811 S.W.2d 516, 521d (Tenn. 1991).

After a review of the record in this cause, the briefs of the parties and appropriate law, we AFFIRM the trial court's judgment.

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[1]The correct method of assigning disability in a case like this is give one rating to both arms, rather than to each arm. However, in this case, the result is the same as that reached by the trial court.

FACTUAL BACKGROUND

At trial, Mrs. Clara Scruggs Brewster,[2] referred herein as "the plaintiff," testified that she was employed with Wal-Mart since 1991, primarily as a cashier. The plaintiff is age 44, attended the 12th grade, and has failed a GED test. Prior to her employment with Wal-Mart, the plaintiff was employed with K-Mart in the food service department. She described her cashier duties at Wal-Mart as involving a lot of lifting of heavy items, such as dog food bags, for scanning. The plaintiff testified that her right hand began to swell in 1992 while on the job, and she was seen by a "foreign doctor." He treated her with medication to eliminate the swelling. The plaintiff had no prior problems with her left hand. In July, 1995, while scanning a five pound bag of nectarines, the plaintiff lost control of her right hand and dropped the bag. The plaintiff made an accident report to Wal-Mart in which she stated that she had pain in her right wrist. The plaintiff saw Dr. Bingham, who performed a nerve test. The results were normal. The plaintiff testified that she did not miss any days at work, although she still had pain, and was moved to another job. The pain eventually went away, and her medical bills were paid by Wal-Mart.

The plaintiff testified that in July, 1997, she advised the company that she was again having problems with her right hand. She was given the names of three doctors and saw Dr. Jones in August, 1997. She advised Dr. Jones that she was having problems with both wrists, including swelling and numbness; however, her right wrist was worse than the left. Dr. Jones put a splint on her right wrist, and she started using her left hand to relieve the pressure on the right wrist. Dr. Jones took her off the cash register and permitted her to do light work. According to the plaintiff, it was at this point that she realized that she may have a serious problem with her wrists. When Dr. Jones released the plaintiff to resume her duties as cashier, her symptoms returned. She advised her manager of the problem and was given a position in men's wear, which required limited lifting; however, she testified that she still experienced pain in her wrists. In cross-examination, the plaintiff testified that her medical injuries were diagnosed as "tendinitis." The plaintiff was returned to work at her same pay rate.

Ms. Cynthia Watkins, supervisor in the billing department of the Jackson Clinic,

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[2]Since the event, the plaintiff has married.

testified that the billing records of the Jackson Clinic established that the plaintiff was treated in 1995, and the bills were paid by Wal-Mart's workers' compensation insurance company in 1996. Ms. Watkins also testified that a $20.00 bill was paid by Wal-Mart in March of 1997 for the plaintiff, but she could not say whether the payment was a posting error or who ultimately paid the bill. The bill revealed the charge of $20.00 was for a wrist support.

MEDICAL PROOF

Dr. Riley Jones, a board-certified orthopedic surgeon, testified that he first saw the plaintiff on August 19, 1997, with a complaint of pain in both wrists. Dr. Jones was aware that the plaintiff had seen Dr. Bingham in 1996. Objective tests ruled out early carpal tunnel syndrome. Dr. Jones put the plaintiff in splints, prescribed cortisone and Duract, and permitted her to return to light duty work. On September 9, 1997, Dr. Jones advised the plaintiff that her EMGs of the neck were normal, and she could continue to work four-hours of regular duty then four hours of light duty. The plaintiff was also to continue taking the anti-inflammatory medication. On October 14,1997, Dr. Jones found that the plaintiff had changed jobs and was doing much better. The plaintiff was discharged, and Dr. Jones found no permanent partial impairment nor evidence of tendinitis.

Dr. Robert J. Barnett, an orthopedic surgeon, saw the plaintiff on November 26, 1997, at the request of the plaintiff's attorney. The plaintiff advised Dr. Barnett that she was a cashier at Wal-Mart, which involved constantly lifting merchandise, and had developed pain in both wrists in 1995. As of November 26, 1997, the plaintiff continued to have pain in both wrists with weakness in her hands. Dr. Barnett opined that the plaintiff suffered from tendinitis of the forearm, or overuse syndrome. As a result, Dr. Barnett opined that the plaintiff had a five (5) percent permanent physical impairment to each arm as a result of her tendinitis. Applying the formula in Table 34 of the AMA Guides, Dr. Barnett admitted that the results would be a 10 percent impairment rating to the arm. He did not think the plaintiff's impairment was that high. Dr. Barnett stated that the plaintiff could not do a job of repetitive lifting, and she should not be doing any heavy lifting.

ANALYSIS

The defendant asserts that the trial court erred in finding that the plaintiff's claim was

not barred by the statute of limitations.

Tennessee Code Annotated § 50-6-203(a) provides:

> (a) The right to compensation under the Workers' Compensation Law shall be forever barred, unless the victim within one (1) year after the accident resulting in injury or death occurred the notice required by § 50-6-202 is given the employer and a claim for compensation under the provisions of this chapter is filed with the tribunal having jurisdiction to hear and determine the matter; provided that if within the one (1) year period voluntary payments of compensation are paid to the injured person or the injured person's dependents, an action to recover any unpaid portion of the compensation, payable under this chapter, may be instituted within one (1) year from the latter of the date of the last authorized treatment or the time the employer shall cease making such payments, except in those cases provided for by § 50-6-230.

The running of the statute of limitations is suspended until by reasonable care and diligence the employee discovers that he has sustained an injury that is compensable under the workers' compensation laws. *Livingston v. Shelby Williams Ind., Inc.,* 811 S.W.2d 511, 515 (Tenn. 1991), quoting *Pentecost v. Anchor Wire Corp*., 695 S.W.2d 183, 185 (Tenn. 1985). In addition, repetitive stress injuries do not constitute occupational diseases but are accidental injuries for the purposes of workers' compensation. *Lawson v. Lear Seating Corp.,* 944 S.W.2d 340, 341 (Tenn. 1997).

We agree with the trial court that Ms. Scruggs sustained a gradual injury related to her job at Wal-Mart and filed her lawsuit within the one year statute of limitations. The plaintiff received an injury to her right wrist in July, 1995, while working as a cashier. The plaintiff selected a Dr. Bingham from the list furnished by her employer, who diagnosed the plaintiff with tendinitis, and she was allowed to resume light duty. She testified that her symptoms subsided after treatment. In July, 1997, the plaintiff complained of pain in both wrists while on the job and was seen by Dr. Riley Jones. Dr. Jones ruled out carpal tunnel syndrome but did put the plaintiff in arm splints for relief of pain. Dr. Jones restricted the plaintiff from working as a cashier and put her on light duty. This restriction on using a cash register in July, 1997, gave rise to the plaintiff's belief that her present condition was connected to her injury at work in 1995. She filed her lawsuit on September 29, 1997, within the one year statute of limitations.

The defendant cites *Ogden v. Matrix Vision,* 838 S.W.2d 528 (Tenn. 1992), as a similar factual situation to support its contention that the plaintiff's action is untimely. We believe that the facts in *Ogden* are substantially different and distinguishable. Unlike Ms.

Scruggs, the employee in *Ogden* had continuous symptoms for three years before she filed her workers' compensation claim, and her diagnosis did not change over the same time period. We find no merit to this issue.

The defendant asserts that the trial court erred in holding that the plaintiff incurred a permanent impairment. From the trial court's findings of fact, the judge concluded that the plaintiff sustained a permanent partial disability apparently based on the depositional testimony of Dr. Robert Barnett. Both Drs. Barnett and Jones testified by deposition.

Where the issues involve expert medical testimony and all the medical proof is contained in the record by deposition, as it is in this case, then this Court may draw its own conclusions about the weight and credibility of that testimony, *Townsend v. State*, 826 S.W.2d 434, 437 (Tenn. 1992). With these principles in mind, we review the record to determine whether the evidence preponderates against the findings of the trial court.

Dr. Riley Jones opined that the plaintiff did not sustain any permanent partial impairment, nor any tendinitis. However, Dr. Robert Barnett concluded the plaintiff did sustain a five (5) percent permanent partial impairment to each arm as a result of tendinitis. Both doctors agreed that the plaintiff was restricted to light work, which did not require repetitive heavy lifting. As part of its argument, the defendant contends that Dr. Barnett's testimony should have been excluded as not complying with Tennessee Code Annotated § 50-6-204. In pertinent part, Tennessee Code Annotated § 50-6-204(d)(3) provides:

> To provide uniformity and fairness for all parties, any medical report prepared by a physician furnishing medical treatment to a claimant shall use the American Medical Association Guidelines to the Evaluation of Permanent Impairment (American Medical Association), or the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic Surgeons). A physician shall utilize the most recent edition of either the publication in determining the degree of anatomical impairment. A practitioner shall be required to give an impairment rating based on one (1) of the two (2) publications noted above.

Further, the defendant argues that Dr. Barnett's rating is not based upon either the AMA Guides or the Orthopedic Manual. As Dr. Barnett testified in his deposition, he did not follow the formula in the AMA Guides even though Dr. Barnett's C-32 indicated that he had used the AMA guides to derive his rating. In his testimony, Dr. Barnett related:

> Q. On that report [C-32] you indicated that the five percent impairment rating to both arms that you had given Ms. Scruggs was based upon Table 34, page 65 of the AMA Guides, Fourth Edition; is that correct?
>
> A. True.

Q. Now under that section, Doctor, there's formula that's used to derive percentage of loss of grip strength; is that correct?

A. You can use that, yes sir.

Q. Did you use that?

A. The formula or ---You might get larger ratings if I use that formula. I just thought some diminished grip.

Q. So you didn't use the formula there to rate her loss of grip strength; is that correct?

A. No. And as you say, there is some subjectivity to it. Sometimes if you use those formulas you get rather a high disability ratings, up to 30 percent of the arm sometimes. That's the reason I think you ought to use your judgment rather than just the chart.

Q. Well the table you reference, Doctor, does it not instruct you that you're to use that formula and the rating under that table? This is Table 34, page 65 of the guides.

A. If you want me to I'll use that table. It would be a lot more than five percent-- if you want me to use that table.

Q. How did you arrive at that five percent under Table 34 without using the formula provided under that table.

A. I just used my own judgment. There are other factors such as pain, swelling.

Q. Well where did you get the five percent from?

A. Out of my head. I can use that formula. The normal grip strength for a female is -- 23.4 times 2.2. It would be 20 percent loss -- it would be 10 percent loss of extremities if you went strictly by this table. That's the reason I thought it was just five percent.

The trial court accredited the medical testimony of Dr. Barnett. We have thoroughly reviewed the record in this case, as well as the testimony of Drs. Jones and Barnett, and find no reason to disagree with the trial court's determination.

Furthermore, the defendant challenges the amount of vocational disability assessed by the trial court. The extent of an injured worker's disability is an issue of fact. *Jaske v. Murray Ohio Mfg. Co.,* 750 S.W.2d 150, 151 (Tenn. 1988). In our *de novo* review, we are not bound by the trial court's factual findings but rather examine them in depth and conduct an independent examination to determine where the preponderance of evidence lies. *Walker v. Saturn Corp.,* 986 S.W.2d 204, 207 (Tenn. 1998). In assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and her

capacity to work at the kinds of employment available in her disabled condition. Tenn. Code Ann. § 50-6-241(b); *Worthington v. Modine Mfg. Co.,* 798 S.W.2d 232, 234 (Tenn. 1990).

The plaintiff is 44 years of age, dropped out of the 12th grade, and failed in her attempt to obtain a GED. She had worked primarily in the food service industry for the past 20 years. Most, if not all, of her work experience involved jobs that required her to do repetitive lifting with her hands. Since 1991, the plaintiff has experienced intermittent tendinitis, which with treatment and medication comes and goes. At the time of trial, the plaintiff still suffered from pain and some swelling which required her to change jobs from a cash register to men's wear. The plaintiff has sustained a five percent permanent impairment based upon a medical opinion.

We find that the trial court correctly determined that the plaintiff suffered a 13 percent vocational impairment to both arms. This is roughly two and one half (2½) times the anatomical rating given by Dr. Barnett and is reasonable considering the plaintiff's job skills, education, and ability to work. We find that the evidence does not preponderate against the trial court's judgment.

The judgment of the trial court is affirmed. The costs of this appeal are taxed to the defendant.

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L. T. LAFFERTY, SENIOR JUDGE

CONCUR:

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JANICE M. HOLDER, JUSTICE

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F. LLOYD TATUM, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

CLARA SCRUGGS, v. WAL-MART STORES, INC.

Chancery Court for MADISON County
No. 53808

No. W1999-01092-SC-WCM-CV

ORDER

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 on appeal are taxed to the appellant.

IT IS SO ORDERED this 4th day of April, 2000.

PER CURIAM