

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

October 10, 2000 Session

TERRI L. CARTER v. CMH MANUFACTURING, INC., ET AL.

**Direct Appeal from the Circuit Court for Grainger County
No. 6655 Rex Henry Ogle, Circuit Judge**

**No. E2000-00654-WC-R3-CV - Mailed
Filed: January 4, 2001**

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. This action seeking benefits for total and permanent disability attributable to a disputed diagnosis of carpal tunnel syndrome superimposed upon pre-existing injuries was dismissed. The plaintiff appeals and presents for review the issues of whether the plaintiff proved that she suffered a job-related injury, or that she suffered a vocational disability. We affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court is Affirmed.

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which E. RILEY ANDERSON, C.J. and JOHN K. BYERS, SR. J., joined.

Garry W. Ferraris, Knoxville, Tennessee, for the appellant, Terri L. Carter.

Linda J. Hamilton Mowles, Knoxville, Tennessee, for the appellee, CMH Manufacturing, Inc.

Paul G. Summers, Attorney General and Reporter; E. Blaine Sprouse, Assistant Attorney General, for the appellee, Dina Tobin, Worker's Compensation Division of the Tennessee Department of Labor/Second Injury Fund.

OPINION

Our review is *de novo* on the record. We presume the correctness of the judgment unless it is contrary to the preponderance of the evidence. RULE 13 (d) TENN. R. APP. P.

History

The plaintiff's industrial-accident history apparently began in 1992 when she suffered a knee injury which required arthroscopic surgery. She settled her worker's compensation claim and returned to work for the defendant.

In 1995 she claimed to have suffered a back injury when a cabinet fell and struck her. Her claim for worker's compensation benefits was litigated and no benefits were awarded.

Within a month, after unsuccessfully seeking benefits for her back injury, the plaintiff asserted the wrist problem on which the present litigation is focused, viz., carpal tunnel.

Plaintiff testified that her arm began swelling in December 1996 and that she worked some during the next month, but that she had to stop work because of her back, her knee and the lack of feeling in her right hand.

The plaintiff testified that she has no feeling in her right hand and arm and that it stays cold all the time; that she cannot lift an iron skillet; she drops milk gallons and that she has difficulty writing anything other than her name. She testified that she cannot not do any of the factory work that she had done in the past due to her knee, back and arm injuries.

In August 1996 the plaintiff applied for social security disability benefits, asserting that her disability went back to 1995, based on her knee injury. She mentioned nothing about a wrist or arm injury when she filed for Social Security Benefits. She told the Social Security Advisor, based upon her work history that she worked sporadically, and that she was not able to meet the rigors of a full time position because of her back and leg injuries. The Social Security Administration hearing was conducted in July 1997 and benefits, including some back pay benefits, were awarded by order dated September 25, 1998.

Ms. Carter admitted that in 1996, the last year she worked at Norris Homes prior to her arm problem, she worked very few hours per week, on average. In the year before her alleged wrist injury, plaintiff did not work forty hours in any week. She admitted that during the year before the claimed wrist injury, there were many weeks that she did not work at all and also that there were many weeks she only worked a few hours during the entire week.

The general manager of defendant's plant confirmed the sporadic work attendance of the plaintiff after her back and knee injuries and prior to her wrist/hand pain. Her attendance records for one year and four months before her wrist/arm injury claim reveal that she missed work for forty-one (41) weeks out of the sixty-four (64) week period. During that same time period she had seven (7) weeks where she only worked one (1) day or less.

Regarding the extent of her disability, prior to the alleged arm injury subject of the claim at bar, the court made the following inquiry:

Court: So do you think you could work even before you had this arm problem?
Witness: I tried to work all I could.
Court: I know, but do you think you could?
Witness: No . . .

The significance of this testimony is that the plaintiff was often absent during 1996 due to the problems and continuing pain from her prior knee and back injuries.

After the litigation over plaintiff's back injury was concluded, the plant manager discussed her attendance problem in January 1997. She told the manager that she could not get out of bed, that she could not do certain things, that she had to use a cane and that she also had problems with her wrist. She was advised that her medical restrictions would be accommodated but that she would have to comply with the defendant's attendance policy. Even if there was nothing to do other than for her to sit in the corner, that is what should be done; she needed to come back to work. Even after this talk, she did not comply with defendant's attendance policy. After sending a letter dated February 7, 1997 reminding her that she needed to report to work or have a doctor's excuse if she was absent, the plaintiff still did not report for work. She was terminated from her employment by letter dated February 20, 1997. This complaint was filed February 6, 1997.

Medical Testimony

Dr. David Hauge, a neurological surgeon and evaluating physician for plaintiff's claimed carpal tunnel syndrome, testified by deposition that he saw the plaintiff at the request of her attorney on one occasion, May 8, 1998, eighteen (18) months after the alleged onset of her symptoms. He had treated the plaintiff in 1996 for her low back pain, assigning partial permanent impairment of five percent (5%) to the body as whole at that time. The opinion rendered by Dr. Hauge was that in the absence of any contradictory symptoms, the history that plaintiff gave would be consistent with the causation of carpal tunnel syndrome. He testified that plaintiff's condition was a result of repetitive use of her hands at work, as distinguished from a particular traumatic incident, and further testified that he assumed the plaintiff had been working full time. Significantly, Dr. Hauge based his opinion as to the work related causation of plaintiff's wrist injury on an assumption which was not supported by the evidence.

Dr. Robert Haralson III, an orthopedic surgeon, testified by deposition. He stated that he saw the plaintiff on April 22, 1997, four (4) months after the alleged condition manifested itself. Plaintiff told him that she was employed at Clayton Homes and that she had several problems, including her right hand, her knee and her back. Complaints about her right hand were numbness that involved all of her fingers and the palm of her hand, radiating up the arm, hurting mostly when she worked. She was using a cane and wore an elastic knee brace on her leg.

Upon examination, Dr. Haralson determined that the plaintiff's hand numbness was unanatomic, meaning that there was no medical explanation for the numbness in the distribution

claimed by the plaintiff. If the problem was carpal tunnel syndrome as she claimed, the numbness would be in the distribution of the median nerve, the thumb, index, long finger and the thumb side of the ring finger on the palmar surface of the hand. Her hand would not be numb on the top of the hand and not in the little finger. Furthermore, she had almost no grip in her right hand despite the fact that there was no evidence of gross atrophy. Consequently, there was no anatomical explanation for her weak grip strength either. Dr. Haralson treated the plaintiff with an injection of an anesthetic and an anti-inflammatory. About one (1) month later, the plaintiff returned and stated that she had no improvement. Dr. Haralson's examination at that time suggested that the plaintiff was not giving her full effort.

Based on his treatment and examination of the plaintiff, Dr. Haralson testified that he believes that the plaintiff has some sort of problem with carpal tunnel but "he does not know where it came from," that is, he has not determined that it is a work related injury. He repeatedly testified that he was not sure that the plaintiff even has carpal tunnel syndrome stating:

And if you have numbness on the top of your hand it's not coming from carpal tunnel syndrome. So, I've got a lady with numbness of the whole hand, top and bottom, and a laboratory finding that may or may not be significant, and so I can't make the diagnosis of carpal tunnel syndrome.

The Findings

_____ Following the medical depositions and the stipulated reports from vocational experts, the trial judge noted that the testimony was clear. Prior to any alleged injury to her arm, plaintiff's work attendance was sporadic at best, indicating that she was having substantial difficulty going to work because of her preexisting back and knee injuries. Based upon the testimony of the doctors in deposition, the report of the vocational experts and upon the credibility of the witnesses in the case, the court made the following findings of fact and conclusions of law:

1. Plaintiff failed to carry burden by a preponderance of the evidence that any injury to Plaintiff's arm was work related. The Court was not sure if Plaintiff had carpal tunnel syndrome at all, since the Plaintiff's doctor (Dr. Hauge) assumed a continuous work schedule when he diagnosed her as having carpal tunnel syndrome which the Court stated was clearly wrong under the evidence in the case. However, if there was, in fact, an injury to her wrist, the Court found it not to be work related.
2. Further, the Court found no significant change in Plaintiff's ability to work as a result of the alleged wrist injury. Plaintiff was unable to work before her arm or wrist began to hurt, therefore there is not change in her physical condition due to the arm or wrist injury, and the case should be dismissed, a conclusion that he has made in only two (2) other worker's compensation

cases during his nine (9) years on the bench.

Analysis

It is a truism that the plaintiff had the burden of proving all of the essential elements of her claim by a preponderance of the evidence. The trial judge was of the opinion that she had failed to do so. The issue of credibility is of extended importance in this case; the plaintiff gave inconsistent and conflicting testimony regarding her ability to work before carpal tunnel syndrome, as we have noted. Where the issues of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial judge. *Humphrey v. David Witherspoon, Inc.* 734 S.W.2d 315 (Tenn. 1987).

Medical causation and permanency of the disability must be proved by expert testimony and the trial judge has discretion to accept the opinion of one expert over that of another. *See, Kellerman v. Food Lion, Inc.* 929 S.W.333 (Tenn. 1996). The only expert testimony addressed by the plaintiff on the issue of causation was that of Dr. Hauge, whose opinion was based on the assumption that the plaintiff was working full time in the position she described, which was not the case. Thus it was that Dr. Hauge's opinion lacked force since it was based on inaccurate information. The trial judge discounted Dr. Hauge's opinion for this reason.

The testimony of Dr. Haralson affords no support to the plaintiff's case. He declined to diagnose a carpal tunnel syndrome.

In light of the foregoing, there is no reason to discuss or consider vocational disability.

The judgment is affirmed at the costs of the appellant.

WILLIAM H. INMAN, SENIOR JUDGE

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JUDGMENT

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 facts 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, Terri L. Carter and Garry W. Ferraris, surety, for which execution may issue if necessary.

01/04/01