IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
October 13, 2000 Session

MARY MARTIN v. CATHOLIC MUTUAL GROUP ET AL.

Direct Appeal from the Circuit Court for Montgomery County
No. C-13-125 James Weatherford, SR. J. by designation

No. M2000-00228-WC-R3-CV - Mailed - January 4, 2001
Filed - February 5, 2001

This Workers' Compensation appeal has been referred to the Special Worker's 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.
The trial court awarded to the employee a forty (40%) percent vocational disability to each arm for the work related injury of bilateral carpel tunnel syndrome. No award of vocational disability was made to the claimant for bilateral epicondylitis and the trial court found evidence was insufficient to award future medical for epicondylitis. We affirm the findings of the trial court.

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

TOM E. GRAY, SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, J and JOHN K. BYERS, SR. J., joined.

Elaine M. Youngblood, Nashville, Tennessee, for the Appellant, Catholic Mutual Group.

Julia F. Smith, Clarksville, Tennessee for the Appellee, Mary Martin

MEMORANDUM OPINION

Claimant, Mary Martin, was forty-five (45) years of age on the date of the trial. She graduated from high school in Memphis, Tennessee and then earned a Bachelor of Science Degree with a major in elementary education from Austin Peay State University, Clarksville, Tennessee in 1976. She was granted a certificate from the State of Tennessee to teach in elementary grades.

Upon graduation, Ms. Martin as an employee of the Montgomery County, Tennessee Board of Education taught first grade. She decided that she was not well suited for teaching. Teaching in

the elementary school was stressful, made her anxious and tried her patience. She was not a good disciplinarian. Ms. Martin concluded that it was not fair to the children for her to try to continue teaching and after a year and a half, she resigned.

For several months Ms. Martin did not work outside the home and then she accepted a job at a daycare center. When she and her husband learned they could not have children, she quit the job at the daycare center and later claimant accepted a job as Director of Patchwork Primer Preschool, a small private school. This job was for half a day five days per week and required teaching four-year old preschool, making out payroll, paying bills, advertising and interviewing and hiring teachers. When the owners closed the preschool, Ms. Martin went to work part-time for Immaculate Conception Church's Pre-School teaching four-year olds three days a week from 8:00 a.m. to noon. While teaching in the preschool, she was offered a part-time receptionist job at Immaculate Conception Church. She taught school in the morning and worked as a receptionist in the afternoon. In the summer of 1983 she began full-time work as a receptionist.

While working for the church, Ms. Martin began to take computer classes to help in her job. She took several word perfect classes and an Internet class, and she went to Phoenix, Arizona on two occasions to take classes to learn Parish Data Systems Software.

The job as receptionist expanded and by 1993-1994 she was a full-time secretary. Her job included posting contributions every week for 350 to 400 contributions, keeping up with the census membership for the entire parish and typing the bulletin.

As the years went by more and more was added to the job of Ms. Martin. She was given the responsibility of facility scheduling as well as ceremony scheduling, such as baptisms, confirmations, and marriages. She also coordinated volunteers that worked in the office. By her estimate she was using her computer keyboard at least eighty (80%) percent of the day.

In October, 1989 Dr. R. W. Hudson, M. D. referred Mary Martin to Dr. Steve Salyers, M. D. a board certified orthopaedic surgeon. Medical notes of Dr. Salyers of October 18, 1989 reveal that the patient told him that over the last several months she had experienced pain and episodes of numbness and tingling in both upper extremities, occasionally in her fingers, occasionally in the forearm, sometimes in the wrists and sometimes in the posterior upper arm. Conservative treatment was commenced by the doctor. The records reflect that Ms. Martin continued to see Dr. Salyers, and in addition to upper extremity problems she saw him for back pain and for heel pain.

On the 29th day of November, 1994 Dr. Salyers diagnosed bilateral carpel tunnel syndrome and surgery was planned. On the 29th day of December, 1994 right carpel tunnel release was performed by Dr. Salyers; on the 26th day of October, 1995 left carpel tunnel release was performed by Dr. Salyers.

After the carpel tunnel release surgeries Ms. Martin returned to her secretarial job. She continued under the treatment of Dr. Salyers, and his medical notes for claimant reveal slow

improvement with some numbness in the hands as active use of the hands increase.

The medical notes of April 16, 1996 show that Dr. Salyers was of the opinion that the patient had reached maximum medical improvement as of that date and that she had a five (5%) percent permanent partial impairment to the right upper extremity and a five (5%) percent permanent partial impairment to the left upper extremity with no occupational restrictions.

Ms. Martin was back in the office of Dr. Salyers on June 4, 1996 with resumption of symptoms. Fourteen days later she returned for treatment with her chief complaint being bilateral arm pain, especially in the evenings. She had bilateral hand pain into the thumb more prominent on the right. July 3, 1996 Dr. Salyers' notes read that Ms. Martin reports her hands are some better, and she has been less active at work.

Claimant continued under the care of Dr. Salyers seeing him for neck and back problems. She reported numbness and tingling in the upper extremities on June 16, 1997, and Dr. Salyers' impression was ulnar neuritis. He treated her for hand and arm problems as well as her back problem. As of July 31, 1997 the patient was still having ulnar nerve symptoms, and the doctor decided to repeat electrodiagnostics noting that it was not uncommon for this study in the particular condition of Ms. Martin to be normal.

Catholic Mutual Group, Appellant, decided that Ms. Martin should see a physician other than Dr. Salyers and sent her to Dr. Jeffery Lawrence in Nashville who found forearm pain, numbness and tingling and referred her to Dr. Daniel J. McHugh, M.D. for an EMG/NCS. After a verbal report from Dr. McHugh that the ulnar nerves looked normal with abnormal EMG and evidence of mild residual changes of the median nerves across the carpel tunnel area, Dr. Lawrence was of the opinion that the claimant was suffering from tendinitis in her wrists and forearm. He prescribed therapy twice a week for three (3) weeks and anti-inflammatory medication.

Claimant saw Dr. Lawrence only (2) times and then requested to see a physician in Clarksville to avoid the drive to Nashville. Catholic Mutual Group referred her to Dr. Keith Starkweather then. His physical examination demonstrated pain on the medial and lateral epicondyle of both the right and left elbow. She followed up treatment with persistent pain in the elbows. Dr. Starkweather was of the opinion that medication for pain and avoidance of position of her wrists which involve persistent wrist extension such as typing or repetitive grasping activities was the best long term treatment solution.

In January, 1998 Ms. Martin saw Dr. Starkweather reporting that time off from work had been helpful to her symptoms. The doctor observed that "the more she uses her wrist for typing in an extended position, the worse her symptoms get and vice versa," and he returned her to work to modify her activity as tolerated.

In February, 1998, Ms. Martin left her job as secretary at the church. When she resigned her position, she was earning $11.00 per hour, and she was contributing each week to a retirement

account which was matched by her employer.

After leaving the job at the church, Ms. Martin did some substitute teaching which reinforced her reasons why she could not be a public school teacher. She sent out between 60 and 80 resumes and applied for jobs where a lot of typing was not required. In August, 1998 claimant accepted a job at $7.50 per hour working for Dr. Tom Grabenstein putting information in the computer, pulling charts and filing. Putting charges into the computer became a problem for the claimant as she did not perform the task as fast as her supervisor demanded. The pace required at Dr. Grabenstein's office was stressful for Ms. Martin, and she resigned.

Within two weeks of leaving the employment of Dr. Grabenstein Ms. Martin began working 20 hours per week for $8.00 per hour at St. Martha's Catholic Church in Ashland City, Tennessee. This is a small church with approximately 100 members. Claimant posts 40 to 50 weekly contributions as compared to 300 to 400 at Immaculate Conception Church. At the time of the trial, Ms. Martin was still working at St. Martha's.

On December 17, 1998 Ms. Martin saw Dr. David W. Gaw, a board certified orthopedic surgeon, for an independent medical evaluation. In making preparation for seeing Ms. Martin Dr. Gaw reviewed her medical records from Dr. Salyers, Dr. Lawrence, Dr. McHugh, Dr. Starkweather and Dr. Ferraraccio. He made physical examination and diagnosed post-operative carpel tunnel surgery bilaterally and medial epicondylitis bilaterally.

Dr. Gaw noted that Ms. Martin had surgery on the right hand and did get relief, but as she resumed her activities on the keyboard at her work pain and tingling in the hand returned. The severe numbness in the hand did not return. After surgery on the left hand the numbness, tingling and cramping significantly decreased, but upon a return to work she had problems but not as severe as before surgery.

It was the opinion of Dr. Gaw that the carpel tunnel syndrome and the medial epicondylitis were caused by the work of Ms. Martin at Immaculate Conception Church. He did not assign any permanent partial impairment for the epicondylitis. For the bilateral carpel tunnel syndrome he testified that according to the AMA Guidelines, Fourth Edition Table 16, page 56-57 that the employee retains a ten (10%) percent permanent partial impairment to the right upper extremity and a ten (10%) percent permanent partial impairment to the left upper extremity which converts to a twelve (12%) percent permanent partial impairment to the body as a whole.

On direct examination Dr. Gaw testified that he guessed he would have to say the epicondylitis was most likely permanent. On cross examination he said that if Ms. Martin avoids those activities which stress or overuse the arms that the epidondylitis would go away and stay away.

Appellate review of factual issues in worker's compensation cases is de novo with a presumption that the trial court's findings are correct, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2)(1999); Hill v. Eagle Ben Mfg. Inc. 942 S. W. 2d 483,

487 (Tenn. 1997).

At the trial court employee and employer agreed that the only issue in dispute was the extent of vocational disability. When appealed, the appellant, employer, raised only the issue that the award of a forty (40%) percent vocational disability to each arm was not supported by the evidence. Appellee, employee, added the issue that the trial court erred in failing to grant an award of vocational disability and future medical benefits for bilateral epicondylitis.

The issue and extent of a permanent vocational disability are questions of fact for the trial court to determine and are subject to the de novo standard of review. Corcoran v. Foster Auto GMC Inc. 746 S. W. 2d 452, 458 (Tenn. 1988) Jaske v. Murray Ohio Mfg. Co., Inc. 750 S. W. 2d 150, 151 (Tenn. 1998). The appellate court is not bound by the trial court's factual findings, but is to examine them in depth and conduct an independent examination to determine where the preponderance lies. Galloway v. Memphis Drum Service 822 S. W. 2d 584, 586 (Tenn. 1991).

Claimant suffered a partial permanent impairment to both arms as a result of the bilateral carpel tunnel syndrome, and this fact is not in dispute. Appellant contends that the five (5%) percent impairment to each arm assessed by Dr. Salyers was the appropriate anatomical impairment as opposed to the ten (10%) percent anatomical impairment to each arm given by Dr. Gaw. The record does not reflect which impairment rating was utilized by the trial judge. Both physicians gave her partial permanent anatomical impairments to each arm, and both were of the opinion that the bilateral carpel tunnel syndrome was caused by her work at Immaculate Conception Church.

Appellant argues that the testimony of Dr. Salyers should be given the greatest weight in this case because he treated Ms. Martin for her carpel tunnel complaints from 1989 through late 1997 and because Dr. Salyers performed the surgical releases.

When the medical testimony is presented by deposition, as it was in this case, this court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. Cooper v. INA 884 S.W. 2d 446, 451 (Tenn. 1994). Landers v. Fireman's Fund Ins. Co. 775 S.W. 2d 355, 356 (Tenn. 1989).

When Dr. Salyers gave his deposition on April 27, 1989, Dr. Gaw had performed the independent medical evaluation on Ms. Martin and had given his report and his deposition. Dr. Salyers was asked to comment or give his opinion as to the ten (10%) percent impairment given by Dr. Gaw to each arm of the employee. Dr. Salyers stated:

> Dr. Gaw is referring to Table 16 on page 57, where a mild degree of entrapment of the median nerve at the wrist is given a ten (10%) percent rating. Ms. Martin has had two follow-up electrodiagnostic studies and apparently several follow-up physical examinations which have found no significant physical findings consistent with carpel tunnel syndrome, and the electrodiagnostic testing has shown great

> improvement to the point of normal electrodiagnostics post-operatively. My feeling is that the carpel tunnel syndrome, specifically the pressure on the median nerve, has been fixed by her operative procedure. On the other hand, dividing the transverse carpel ligament does cause some ongoing problems with the hand consistently and because of that, I feel that a five (5%) percent impairment to the upper extremity is appropriate for these patients who are having ongoing symplomatology.

It was on the 16th day of April, 1996 that Dr. Salyers gave the five (5%) percent permanent partial impairment to each upper extremity for carpel tunnel syndrome, and it was on that date that he said Ms. Martin was at maximum medical improvement.

On June 4, 1996 and June 18, 1996 Ms. Martin saw Dr. Salyers with resumption of some symptoms. On the 18th day of June, 1996 he wrote that Ms. Martin has bilateral carpel tunnel syndrome and has bilateral hand pain into the thumb. Ms. Martin continued to see Dr. Salyers until the latter part of 1997 with problems to both upper extremities.

Tennessee Code Annotated § 50-6-241 provides for medical impairment ratings to be based on the American Medical Association Guides to the Evaluation of Permanent Impairment, or the Manual for Orthopedic Surgeons in Evaluation Permanent Physical Impairment or in cases not covered by either of these, by any appropriate method used and accepted by the medical community. Dr. Salyers and Dr. Gaw use the AMA Guides.

Dr. Gaw testified that he utilized page 56 and Table 16 of the AMA Guides, Fourth Edition in arriving at his opinion of the permanent partial impairment of Ms. Martin. Pages 56 and 57 with Table 16 were made an exhibit to his testimony. For entrapment neuropathy the AMA Guides provide two (2) methods for determining the impairment rating. One method is by measuring sensory and motor deficits as described in the AMA Guides. The other method is to use Table 16 on page 57. The evaluator is cautioned not to use both methods.

Dr. Salyers did not testify as to the AMA Guides section on entrapment neuropathy that he followed to arrive at an impairment rating. He testified that Ms. Martin had two (2) follow-up electrodiagnostic studies and follow-up examination with no significant findings consistent with carpel tunnel syndrome. His medical records show that after he gave the impairment rating Ms. Martin suffered symptoms of carpel tunnel syndrome which included bilateral hand pain into the thumb.

At page 56 in the AMA Guides the following example is given:

> Example: A 35-year-old forklift mechanic had a 2-year history of median nerve compression in the right hand with abnormal results of median nerve conduction studies and an abnormal electromyogram.

> Seven months after surgical decompression of the median nerve in the right carpal tunnel, followed by a change of occupation to salesman, the man's only symptoms were infrequent, transient episodes of numbness in the thumb and index finger after 40 minutes of driving.
>
> Examination showed a full range of movement of all joints and normal two-point discrimination sensory testing. Compared to the left hand, the right hand had a 60% strength loss index (Table 34.p.65).
>
> The upper extremity impairment due to a mild residual carpal tunnel syndrome is 10% (Table 16, p.57) or 6% of the whole person (Table 3, p.20). No additional impairment is allotted for loss of grip strength.

The preponderance of the evidence weighs in favor of the ten (10%) percent impairment to each upper extremity given by Dr. Gaw.

Although finding that the preponderance of the evidence supports Dr. Gaw's ten (10%) percent impairment to each upper extremity, it is pointed out that in Duncan v. Boeing Tennessee, Inc. 825 S. W. 2d 416 (Tenn. 1992) this Court reaffirmed its holding in Oliver v. State 762 S. W. 2d 562 (Tenn. 1988) that a worker does not have to show vocational disability or loss of earning capacity to be entitled to the benefit for the loss of use of a scheduled member.

In considering proof of medical anatomical disability ratings, the trial court is not required to accept without reservation an expert's opinion, but is charged with making an independent determination on consideration of such factors as age, education, training, job skills, work experience and job opportunities available to the worker with anatomical disability of claimant. Duncan supra; Miles v. Liberty Mutual Ins. Co. 795 S. W. 2d 665 (Tenn. 1990). Ms. Martin is college educated with a degree in elementary education, but she determined after teaching for a year and one half and again trying substitute teaching that she was not well-suited for such employment. She and her husband testified as to what she could and could not do physically as a result of the injury to her upper extremities. The evidence does not preponderate against the trail court's finding that Ms. Martin suffered a forty (40%) percent disability to each upper extremity.

The burden of proof rests upon the party claiming the benefits of the Workers' Compensation Act to establish the claim of permanent or permanent partial disability by a preponderance of all of the evidence. Parker v. Ryder Truck Lines, Inc. 591 S. W. 2d 755 (Tenn. 1979). The claimant has not carried that burden as to bilateral epicondylitis. As stated earlier Dr. Gaw stated that if Ms. Martin avoided those activities that stress or overuse the arms that the epicondylitis would go away and stay away.

The judgment of the trial court is affirmed in all respects.

Costs are assessed to the Appellant.

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TOM E. GRAY, SPECIAL 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 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 the appellant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM