

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

**NIKKI F. NELSON v. MAGNETIC SEPARATION SYSTEMS, INC., and
TRAVELERS INSURANCE COMPANIES**

Direct Appeal from the Chancery Court of Davidson County
No. 95-1961-I, Hon. Irvin Kilcrease, Jr., Judge
August, 2000 Session

No. M1999-02009-WC-R3-CV - Mailed: October 30, 2000
Filed - February 12, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with the Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting findings of fact and conclusions of law. The employee contends the Chancellor erroneously: [1] considered as substantive evidence the medical report of Dr. Miller; [2] failed to find her elbow, shoulder, neck and spine disabilities were caused by her work, and therefore [3] rendered an inadequate award. As discussed below, the panel concludes that the parties offered voluminous medical records, including those of Dr. Miller, which were, without objection or limitation, treated by the parties throughout the trial as substantive evidence. The chancellor properly treated those reports as substantive evidence. The panel further concludes the chancellor's decision limiting the award to work-related disability to the hands and wrists is supported by a preponderance of the evidence, and that the award of 20 percent disability to both arms should be affirmed in all respects.

Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right; Judgment of the Chancery Court Affirmed.

JOHN A. TURNBULL, Sp. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, and FRANK G. CLEMENT, JR., Sp.J., joined.

Peter D. Heil and Michael A. Friedland, Alan Wise, Stillman, Karr, & Wise, Nashville, TN, for the appellant, Nikki F. Nelson

Sean Antone Hunt, Spicer, Flynn & Rudstrom, PLLC, Nashville, TN, for the appellees, Magnetic Separation Systems, Inc. and Travelers Insurance Co.

MEMORANDUM OPINION

Nikki Nelson worked for Magnetic Separation Systems as an electronics technician, a job

which included assembling electronic devices. Her job included some highly repetitive work with screwdrivers and other hand tools. There is a significant dispute in the testimony and other evidence as to whether the tasks required hand and wrist activity which were both forceful and repetitive. Live demonstrations of the tasks required and a video tape of the assembly work were a part of the evidence at trial.

Ms. Nelson was not a happy employee. Her 18 month tenure with her employer was marked with numerous inter-office memos demonstrating a deteriorating relationship with her supervisors, and dissatisfaction by the employer with the quantity and quality of Ms. Nelson's work. During her last months of work for MMS, Ms. Nelson began having hand and wrist problems and reported: "My hands and wrists were hurting from doing coil bobbins all day. Normally I would work until my hands fell off, but being put on 30 days probation and all, my husband told me to go to the doctor."

The first among many doctors who treated Ms. Nelson was Dr. David McCoy, her family doctor, who first saw her on February 5, 1995. Clinical testing and the history related by Ms. Nelson caused Dr. McCoy to form the opinion that she had work-related carpal tunnel syndrome. Ms. Nelson then selected Dr. Jack Miller, an orthopaedic surgeon, from a list of doctors furnished by MMS. Dr. Miller treated her from February 14, 1995 until September, 1996. On his initial examination, Dr. Miller, based on Ms. Nelson's complaints of rather severe pain in both wrists together with positive Phalen sign and Tinel sign, diagnosed carpal tunnel syndrome and referred her to a neurologist for EMG testing. Dr. Miller was "shocked" that Ms. Nelson's initial EMG was normal and elected not to perform carpal tunnel release surgery at that time, but instead, Dr. Miller treated Ms. Nelson conservatively with physical therapy and cortisone injections. Dr. Miller directed that she not work. When Ms. Nelson's symptoms did not improve, Dr. Miller, in March, 1995, thought "carpal tunnel release is going to be justified, being recommended even though EMG's are normal." The employer then referred Ms. Nelson to Dr. Stephen Pratt for a second opinion. Dr. Pratt was "most certain that it is not carpal tunnel syndrome" and did not recommend carpal tunnel release surgery. Upon receiving Dr. Pratt's report, Dr. Miller elected not to proceed with surgery at that time. Dr. David Gaw did an independent medical exam in October, 1995, and agreed with Dr. Miller that Ms. Nelson had carpal tunnel syndrome, and recommended that she have surgery, even without a positive EMG. Dr. Miller again examined Ms. Nelson in October of 1995, and "strongly recommended carpal tunnel release" because of her persistent, long-standing complaints and clinical symptoms. Not satisfied to authorize surgery, the worker's compensation insurer, Travelers, sought a fourth opinion from Dr. Michael Milek who examined Ms. Nelson in January, 1996. Dr. Milek found "classic" carpal tunnel compression phenomena" and opined that "in all likelihood, she does have bilateral carpal tunnel compression." He recommended a repeat electrical study, and if "the electrical study is abnormal, then I would recommend carpal tunnel release."

Finally, in May, 1995, surgery was authorized by Travelers, and bilateral carpal tunnel release surgery was performed on May 8, 1996, by the company doctor, Dr. Jack Miller, who noted during surgery that "the median nerve did not appear to be significantly altered." In subsequent visits in May, June, July, September of 1996, Ms. Nelson reported serially to Dr. Miller "her pain is 95

percent gone,” “continues to have exceptional relief of pain,” “she is truly making an excellent

recovery,” and finally “how proud she was of her hands.” At her last visit on September 24, 1996, Dr. Miller reports: “She has minimal hypesthesia in the left hand second and third fingers, but otherwise, she is pain-free particularly at night.” Dr. Miller dismissed Ms. Nelson from his care and released her to return to work with a 5 percent impairment to both arms. She was not taken back into the work force at MMS.

Ms. Nelson moved to Florida and went into business doing TV and VCR repairs. After two weeks, she “was unable to move again,” “couldn’t turn my head, bend my elbows.” Ms. Nelson received no medical treatment in Florida. A friend took her to Massachusetts and cared for her. Soon after her move to Massachusetts, Ms. Nelson, on February 5, 1997, saw and was examined by Dr. David Levine at Beth Israel Hospital. Ms. Nelson reported markedly different symptoms to Dr. Levine than she ever related to her previous doctors according to their written records. In particular, she complained to Dr. Levine of totally disabling neck pain, shoulder pain, elbow pain, and persistent difficulty with fine motor movement (pinch and grasp of both hands). Although Dr. Levine indicated that he was somewhat hampered in evaluating her full history by not having the complete medical records from Tennessee, Dr. Levine took Ms. Nelson’s complaints at face value. He did a repeat EMG and prescribed physical therapy during his treatment which extended through November of 1997. In his C-32 form medical report introduced at trial, Dr. Levine related his diagnosis of double-crush syndrome (a medical condition caused by pressure on the median nerve as it passes through the neck); cubital tunnel syndrome (an irritation of the ulnar nerves at the elbow); as well as carpal tunnel syndrome. He assessed a total whole body impairment of 35 percent with significant restrictions.

Ms. Nelson was again seen by Dr. Gaw in December, 1998, for an independent medical examination. At that time, she presented with multiple complaints of constant pain which “completely dominated the physical exam.” Dr. Gaw recommended no further surgery, but felt that the “best approach would be psychological ... until the psychological aspect of her condition is addressed, I do not feel that any further ‘physical treatment’ would be of benefit.” In his C-32 form medical report introduced at trial, Dr. Gaw assessed a 10 percent impairment to both arms due to the carpal tunnel surgeries. He also assessed additional impairment for ulnar nerve sensory changes, cervical spine and chronic pain syndrome. With all impairments combined, Dr. Gaw rated 28 percent permanent impairment to the whole person. Dr. Gaw expressed the opinion that “the overuse syndrome is more likely than not related to her work activities. The chronic pain syndrome which is the major source of this patient’s problem, at this time, is not always apparent in its etiology.”

The only doctor who testified live at trial was Dr. Leon Ensalada who did not examine Ms. Nelson. Dr. Ensalada, after reviewing and analyzing all her medical reports, hospital records, Ms. Nelson’s discovery depositions, and a video tape of her work, rendered the opinion that none of Ms. Nelson’s problems were caused by work. Dr. Ensalada has never performed carpal tunnel surgery.

Dr. Miller's reports and impairment rating were not presented to the court by C-32 form medical report. Instead, at trial, the employee presented an exhibit consisting of all the medical reports, hospital summaries, and medical test reports. The contents of the 136 pages of medical

reports were treated throughout the trial as substantive evidence. The exhibit was presented to the court by agreement without statement by either party that its use by the court was to be limited in any way. The opinions of the doctors, including the medical impairment rating of Dr. Miller, were referred to in final argument by each attorney without objection.

The chancellor found that of all the injuries claimed, only the wrist and hand injuries were compensable. He found Dr. Miller's report and 5 percent impairment rating most persuasive and awarded 80 weeks of permanent partial disability payments based on a 20 percent vocational disability to both arms.

Issues

1. Did the trial court err in considering the medical reports and impairment rating of Dr. Miller as substantive evidence?
2. Did the trial court err in limiting the award to the hands and wrists?
3. Did the trial court render an adequate award?

Medical Report as Substantive Evidence

_____ Ms. Nelson contends that the chancellor improperly treated as substantive evidence the medical reports and impairment rating of the treating physician, Dr. Jack Miller, because they were not presented by C-32 form authorized by Tenn. Code Ann. Section 50-6-235(c)(i).¹

That code section allows parties to present medical evidence in worker's compensation cases without incurring the ever-growing costs of taking medical depositions. The medical reports and impairment rating of Dr. Miller did not comply with the provisions of Section 235(c)(1) because they did not bear an original signature, were not accompanied by the required affidavit, and did not include a statement of Dr. Miller's qualifications.

A review of the entire record in this case, however, reveals that the medical report of Dr. Miller was in fact introduced into evidence by counsel for Ms. Nelson during her testimony without

¹ T.C.A. Section 50-6-235 (c)(1) provides in part:

Any written medical report sought to be introduced as evidence shall be signed by the physician making the report bearing an original signature. A reproduced medical report which is not originally signed is not admissible as evidence unless accompanied by an originally signed affidavit from the physician or the submitting attorney verifying the contents of the report. Any written medical report sought to be introduced into evidence shall include within the body of the report or as an attachment a statement of the qualifications of the person making the report.

any statement limiting its use. Neither the reports nor their contents were objected to by either party. Each party referred to Dr. Miller's opinions throughout the trial and treated them as substantive evidence. By their conduct at trial, the parties impliedly stipulated the admissibility of Dr. Miller's reports. Ms. Nelson made no timely or specific objection to the admissibility of any of the medical reports as substantive evidence and accordingly has waived her right to challenge the evidence on appeal. T.R. Civ. P. 103(a)(1); T.R.A.P. 36(b); *Wright v. United Servs. Auto Ass'n.*, 789 S.W.2d 911, 914 (Tenn. Ct. App. 1990).

Causation

The chancellor found that only the hand and wrist injuries were compensable as arising out of the employment. Ms. Nelson argues that the chancellor erred in failing to find the elbow, shoulder, neck and spine injuries work-related. The evidence does not preponderate against the chancellor's findings.

The standard of review for findings of fact by the trial court is "de novo upon the record of the trial court accompanied by a presumption of correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. Section 50-6-225(e)(2)(1999). The trial court is in the best position to evaluate the credibility and testimony of the witnesses who testify live. *Story v. Legion Ins. Co.*, 3 S.W. 3rd 450, 451 (Tenn. 1999) However, when the medical testimony is in written form, this court is in the same position as the trial court to assess its credibility and determine its weight. *Id.* (See also *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997)). We must keep in mind that where that written medical evidence is based on history or symptoms related by a witness the trial court has heard testify in person, the impact of the trial court's credibility findings on the value of the written evidence must be given deference by the reviewing court.

The testimony of Ms. Nelson contained significant and material discrepancies. She disagrees with each and every doctor as to the history and extent of symptoms which she related to the physician. Specifically, she disagrees with Dr. Miller's written reports which indicated no complaint of elbow, shoulder or neck symptoms after her carpal tunnel surgery and until she was last seen and released by Dr. Miller in September, 1996, some 18 months after she last worked for MMS. She disagrees with other live witnesses relative to the physical requirements of the job she performed at MMS.

The chancellor had the opportunity to assess Ms. Nelson's credibility at trial. Both Dr. Levine and Dr. Gaw based their opinion on causation of the elbow, shoulder, neck and spine maladies on the history and symptoms given by Ms. Nelson. Dr. Levine candidly admits in a report that he did not have the benefit of Dr. Miller's full record. None of the work Ms. Nelson performed for MMS involved even moderate lifting or overhead work. Dr. Gaw could not relate the chronic pain syndrome to Ms. Nelson's employment. Taking into account the entire record, the decision of the chancellor on causation is supported by the evidence, even keeping in mind that reasonable doubt as to causation must be resolved in favor of the employee. *Hill v. Eagle Bend Mfg. Inc.*, 942 S.W.2d 483, 487 (Tenn. 1997).

Vocational Disability

Ms. Nelson next argues that her award of 20 percent disability to both arms was inadequate. When the trial court is faced with conflicting medical testimony “it is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation.” *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675, 676-77 (Tenn. 1983) (citing *Combustion Engineering Inc. v. Kennedy*, 562 S.W.2d 202 (Tenn. 1978)). Dr. Miller treated Ms. Nelson for 18 months. He first saw her some two weeks after

her first doctor’s visit. After a long course of conservative treatment, Dr. Miller performed carpal tunnel surgery. He saw Ms. Nelson four times after her surgery and noted her remarkable recovery which continued through his last examination in September, 1996. The chancellor accredited Dr. Miller’s medical impairment rating of 5 percent to each arm. Considering Ms. Nelson’s age (36 at present), her education (G.E.D.), her prior work history, and her lack of significant restrictions relating to her hands and wrists, the award of four times the impairment rating is reasonable. Since Ms. Nelson was paid temporary total disability benefits until she reached maximum medical improvement for her hand and wrist injuries, no additional temporary benefits are justified.

We conclude that the trial court’s judgment should be affirmed in all respects. The costs on appeal are assessed against the appellant.

JOHN A. TURNBULL, SPECIAL JUDGE

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**Chancery Court for Davidson County
No. 95-1961-I**

No. M1999-02009-SC-WCM-CV - Filed - February 12, 2001

JUDGMENT ORDER

This case is before the Court upon motion fore review filed by the appellant, Nikki F. Nelson to Tenn. Code. Ann. § 50-6-225(e)(5)(B) the entire record, including the order of referral to the Special Workers' Compensation Appeal 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 are taxed to the plaintiff-appellant, Nikki A. Nelson, and her surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Drowota, J., not participating