IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
January 22, 2001 Session

VIKI PARKER v. WAUSAU INSURANCE COMPANIES.

Direct Appeal from the Chancery Court for Crockett County
No. 7722 George R. Ellis, Judge

No. W2000-01517-WC-R3-CV - Mailed March 8, 2001; Filed May 3, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for a hearing and reporting to the Supreme Court of findings of fact and conclusions of law. After a detailed analysis of the evidence in the trial record, the trial court found the plaintiff sustained a 45 percent permanent partial disability to the right and left arms. However, the trial court denied the request for a lump sum. The defendant, Wausau Insurance Companies, appeals and presents one issue for appellate review: Whether the trial court's award of 45 percent permanent partial disability to each of the plaintiff's arms is excessive and not supported by a preponderance of the evidence? From our review of the entire record, the judgment of the trial court is affirmed for the reasons set forth below.

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

L. TERRY LAFFERTY, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JOE C. LOSER, JR., SP. J., joined.

R. Dale Thomas and Michael L. Mansfield, Jackson, Tennessee, for the appellant, Wausau Insurance Companies.

T. J. Emison, Jr., Alamo, Tennessee, for the appellee, Viki Parker.

MEMORANDUM OPINION

The plaintiff, age 42, married with one son, completed the 11th grade, but was able to obtain a GED from Newbern High School. Through the years, the plaintiff has furthered her education by attending various community colleges, Newbern Area Vocational Technical School, Dyersburg State Community College and Jackson State Community College. From 1978, the plaintiff has worked at various jobs ranging from sales, factory production work, secretary for a church, TV and radio

stations.

On November 16, 1996, the plaintiff went to work for the Caterpillar Company as a machinist running metal parts. In her testimony, the plaintiff explained her job function. She would unload parts and place them on a computerized machine which would drill or cut holes in various areas of the parts. When the centering machine cuts a hole, it left a raw edge, leaving sharp edges called burrs. To smooth these raw edges, the plaintiff was required to use an air-powered tool, 12,000 to 24,000 rpms with both hands and smooth the raw edges. Once this was done, the plaintiff would use a wire brush to clean the part and then prepare the part for buffing.

The plaintiff stated that Caterpillar used a team management approach with no real supervisor, but everyone worked together. The plaintiff testified that in October 1997, the team decided that it would be in the team's best interest that she work the burr bench. The plaintiff stated that she began having problems with her hands in November 1997, and continued working her regular job until her surgery in May of 1999. In August 1999, the plaintiff returned to her job at Caterpillar until February 2000, when she quit work. During her return she still experienced difficulty with her wrists when picking up parts for the burr bench.

Since leaving work in February 2000, the plaintiff testified that she remains in daily pain. She stated that she is unable to perform many household duties, including vacuuming and opening jars, so her husband must do these jobs. Further, the plaintiff has trouble holding a newspaper while reading, driving a car for any distance and demonstrated for the court her difficulty in touching her thumb and little finger together. To relieve her constant pain, the plaintiff has used sleep aids, heat packs, alcohol rubs, and a TENS unit (electronic shocking device) at the home. In her opinion, the plaintiff testified that she could not do many of her past jobs because of the lifting, bending, climbing, etc.

Brant Channing Cope, an insurance surveillance agent for Integrated Resource Group, testified that he conducted two surveillances on the plaintiff. The first was on April 2, 2000, between the hours of 7:30 a.m. and 3:02 p.m. By the use of a video camera, Mr. Channing observed the plaintiff vacuuming her sunroom at 8:09 a.m. On April 26, 2000, Mr. Channing observed the plaintiff between the hours of 7:52 a.m. and 3:30 p.m. During this surveillance, Mr. Channing observed the plaintiff dig a hole with a shovel for a banana tree, lift and carry two bags of ice with her hands, fan herself and put some articles in a pickup for a fishing trip. At the fish site, the plaintiff was observed lifting a 48 quart cooler. During 14 hours of video surveillance, the plaintiff was observed performing physical activity for approximately 20 minutes.

Rhonda Jean Lee, Human Resource Manager for Caterpillar, described the team management concept utilized by Caterpillar. The team handles internal discipline and arranges vacations, work assignments and daily interactions with customers. Ms. Lee stated that the plaintiff returned to the burr bench upon release from the doctor and was assigned to Team 23. Ms. Lee stated that she heard from one of her assistants that the plaintiff was leaving Caterpillar. Ms. Lee called the plaintiff and she was informed that the plaintiff was on medical leave and quitting her job due to stress. The

medical leave was unrelated to her work at Caterpillar.

DEPOSITION TESTIMONY
MEDICAL EVIDENCE

Dr. Carl W. Huff, a board certified orthopedic surgeon and expert in occupational medicine, saw the plaintiff on February 6, 1998. After a history and examination, Dr. Huff determined that the plaintiff has paresthesia and weakness in both hands, and trigger finger on the right ring finger. An EMG indicated no neuropathy or carpal tunnel syndrome at that time. Dr. Huff administered an injection of Decadron in the right wrist and an injection of the flexor tendon sheath of the right ring finger. On a follow-up visit March 4, 1998, the plaintiff's tingling and paresthesia seemed to be doing better, but Dr. Huff recommended that she should avoid working the burr bench because it requires a lot of pinch grip which could irritate the median nerve. On April 5, 1998, the plaintiff continued to have numbness and weakness of her hands which had become worse. An EMG revealed an abnormal function of the median nerve at or about the wrist bilaterally. On May 13, 1999, Dr. Huff performed surgery to release the carpal tunnel and to release the trigger finger of the right ring finger. Dr. Huff returned the plaintiff to light duty on May 24, 1999. Between May 1999, and August 27, 1999, Dr. Huff saw the plaintiff six times in which she complained of pain at the incision site, but she had improved as far as the use of her hands. Utilizing a Jamar dynamometer, Dr. Huff determined that the plaintiff had a grip strength of 50 pounds on the left wrist and 38 pounds on the right wrist. Dr. Huff opined that the plaintiff reached maximum medical improvement on August 27, 1999, and assigned the plaintiff a 3 percent permanent partial impairment to each upper extremity. Dr. Huff opined that the plaintiff had no work restrictions.

Dr. Joseph C. Boals, an orthopedic surgeon, testified that he saw the plaintiff on November 15, 1999, for an independent medical evaluation at the request of counsel. Dr. Boals obtained the plaintiff's work history and reviewed the medical records of Dr. Huff, which reflected that Dr. Huff operated on both hands along with an additional surgery for a trigger finger of the ring finger on the right hand. The plaintiff's numbness had eased, but she had noticed some decreased grip strength. By using a Jamar dynamometer instrument, Dr. Boals determined that the plaintiff had a grip strength on the left of 56 pounds and on the right of 50 pounds. Dr. Boals stated that in carpal tunnel surgery the transverse ligament is divided in order to accomplish this surgery, the intent being to get pressure off of the nerve which is beneath that ligament. The thick muscles of the small finger and thumb attach to that ligament and when doing things like reaching out to grab a softball or open a wide mouth peanut butter jar top or pickle jar top, it's very important that that ligament and muscular unit be intact. When it is cut, you replace the tension that would normally be there to hold these muscles down with scar tissue. It is Dr. Boals' theory that that is what causes unanimous complaints from all patients of inability to hold things without dropping them and to open Coke top bottles and other various bottles. Dr. Boals opined that the plaintiff sustained a 10 percent permanent partial impairment of each upper extremity. As to the plaintiff's ability to work at her past vocations, Dr. Boals opined that she would not be able to due to the repetitiveness and heavy gripping that is repeated, but could do many things if it's only an isolated incident of performing gripping movement.

Dr. Robert W. Kennon, a clinical psychologist and expert in the evaluation of vocational disability, testified by deposition in this lawsuit at the request of plaintiff's counsel. On March 29, 2000, Dr. Kennon administered a series of standardized tests to evaluate the plaintiff's vocational disability. These tests were the Shipley Institute of Living Scale, the Wide Range Achievement Test - Revision III, the Millon Clinical Multiaxial Inventory III, and the Grooved Pegboard Test. Also, Dr. Kennon reviewed the medical depositions of Drs. Huff and Boals. Dr. Kennon determined that the plaintiff was functioning at the 88th percentile intellectual, which is in the average range. Other tests indicated that the plaintiff's reading skills were adequate, her spelling abilities were deficient and that her math skills were more developed than her written expressions.

Psychological tests indicated that the plaintiff views herself in a negative manner. She is cynical, doubts others and feels she is somewhat jinxed. Dr. Kennon found the plaintiff very emotional, very open, very candid, honest and frank about some of the difficulties she experienced. During the interview, the plaintiff became tearful and frustrated about the fact that she had difficulty dressing herself and doing simple tasks like reading a newspaper. Dr. Kennon administered a Grooved Pegboard test to the plaintiff that measures manual and finger dexterity. It was Dr. Kennon's opinion that 99.9 percent of the population would score at a higher level than the plaintiff and that the plaintiff has significant problems with speed, manual dexterity and finger dexterity. Dr. Kennon testified in reviewing Dr. Huff's permanent physical impairment of 3 percent to each extremity, he noted that Dr. Huff did not have any specific work restrictions or specific work limitations. Dr. Kennon opined that the plaintiff had a vocational range of 45 percent, which would be accurate with Dr. Huff's assessment for the plaintiff. Taking into account Dr. Boals' findings, Dr. Kennon opined that the vocational range of disability is still 45 percent. To obtain employment, Dr. Kennon believes the plaintiff would require some vocational rehabilitation and some assistance in developing skills. However, she would not be able to perform repetitive tasks.

ANALYSIS

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, 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)(2000); *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).

The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. *Worthington v. Modine Mfg. Co.,* 798 S.W.2d 232, 233 (Tenn. 1990).

Our review of the expert medical testimony reflects that Drs. Huff and Boals both determined that the plaintiff sustained permanent partial impairment as a result of her employment with Caterpillar. They, however, differed as to the extent of anatomical impairment. Dr. Huff believes a 3 percent impairment to each upper extremity is more applicable than Dr. Boals' opinion that 10 percent was the more reasonable impairment to each upper extremity. Likewise, both doctors

disagreed on the plaintiff's ability to work with or without restrictions. We note that the trial court has the discretion to accept the opinion of one medical expert over another medical expert. *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990).

Regarding the lay testimony, the plaintiff explained in detail how she has significant problems with both hands. She stated that it was difficult to open various jars, read and hold a newspaper, doing some routine house chores and having difficulty in driving and clothing herself. The plaintiff advised the trial court of the attempts to use sleep aids, other medication and remedies to relieve her pain. In this case, as in all workers' compensation cases, the plaintiff's own assessment of her physical condition and resulting disabilities is competent testimony and cannot be disregarded. *Tom Still Transfer Co., Inc. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972).

In making determinations of vocational disability, the court shall consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in the plaintiff's disabled condition. Tenn. Code Ann. § 50-6-241(a)(1); *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986). Our review of these relevant factors shows the plaintiff is 42 years old, has a satisfactory education, she had received training in sales and some office work, she has worked in many factory jobs which required extensive repetitive hand movement, and the local job opportunities are limited in that most jobs require repetitive hand movement. We do note that Dr. Kennon believes the plaintiff could benefit from more rehabilitation or vocational education, but her job opportunities would be mostly in general sales.

Finally, the trial court commented on the plaintiff's emotional status due to the limited use of her hands in performing routine chores. Where the trial court has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial court's determination. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315 (Tenn. 1987).

From our review of the entire record, we find that the evidence does not preponderate against the finding of the trial court that the plaintiff suffered a 45 percent permanent partial disability to each arm. We note, however, that the assessment should have been made under Tennessee Code Annotated § 50-6-207(3)(A)(ii)(w) for the loss of two arms rather than making separate awards for each arm. We therefore modify the award to 45 percent permanent partial disability to both arms which will neither increase nor decrease the award but will conform the trial court's judgment to the statute.[1]

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[1]The trial court awarded 45 percent permanent partial disability to each arm based on a two hundred week maximum loss of an arm for a total award of one hundred eighty weeks of benefits. *See* Tenn. Code Ann. § 50-6-207(3)(A)(ii)(m). Loss of two arms is a scheduled injury with a maximum of four hundred weeks of benefits. Tenn. Code Ann. § 50-6-207(3)(A)(ii)(w). Forty-five percent permanent partial disability to both arms is also one hundred eighty weeks of benefits.

The judgment of the trial court is affirmed as modified and the cost of this appeal is taxed to the defendant.

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L. TERRY LAFFERTY, 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 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, Wausau Insurance Companies, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM