

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

January 22, 2001 Session

DOROTHY PIRTLE v. ROYAL INSURANCE COMPANY

**Direct Appeal from the Chancery Court for Obion County
No. 20,713 W. Michael Maloan, Chancellor**

No. W2000-00867-WC-R3-CV - Mailed May 21, 2001; Filed July 12, 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. In this appeal, the employer's insurer insists (1) the award of benefits based on 75 percent permanent partial disability to both arms is excessive and (2) the trial court erred in awarding as discretionary costs an independent medical examiner's fee for examining and evaluating the injured employee. As discussed below, the panel has concluded the award of disability benefits should be affirmed and the award of discretionary costs modified.

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

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

Stephen D. Jackson, Trotter & Jackson, Huntingdon, Tennessee, for the appellant, Royal Insurance Company.

Kyle E. Crowe, Martin, Tennessee, for the appellee, Dorothy Pirtle.

MEMORANDUM OPINION

The employee or claimant, Dorothy Pirtle, is 57 years old and has a high school education, but only functions at the fourth or fifth grade level. For the past twenty-eight years she has operated a sewing machine in a garment factory, where she gradually developed bilateral carpal tunnel syndrome.

The injury was diagnosed by Dr. Peter Lund, who performed corrective surgery and followed the claimant until she reached maximum medical recovery. He ultimately released her to return to

work without restrictions. He reported that she will not retain any permanent medical impairment, in his opinion. When she continued to suffer numbness, tingling, loss of grip strength and pain, and was unable to meet production expectations, her attorney referred her to Dr. Robert P. Christopher, a physical medicine and rehabilitation specialist.

Dr. Christopher estimated her permanent impairment at 10 percent to the right arm and 5 percent to her left arm. He restricted her from any work requiring repetitive use of the hands and wrists.

A vocational expert testified at trial that the claimant was incapable of returning to factory work, that she had no transferable job skills and no reasonable employment opportunities. As a result of her limitations, she is excluded from 90 percent of the jobs that were previously available to her, according to the expert. She is in fact receiving disability income from Social Security. The claimant testified that she cannot work.

Upon the above summarized evidence, the trial court awarded permanent partial disability benefits based on 75 percent to both arms and awarded \$915.00 in discretionary costs, including Dr. Christopher's fee of \$235.00 for examining the claimant for the purpose of evaluating her permanent impairment. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). Conclusions of law are reviewed de novo without any presumption of correctness. Perry v. Sentry Ins. Co., 938 S.W.2d 404 (Tenn. 1996). The extent of an injured workers vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450 (Tenn. 1999).

The appellant first contends the award is excessive because the testimony of the vocational expert, Nancy Hughes, is not worthy of consideration. Ms. Hughes was the only vocational expert who testified in the case. She is a certified rehabilitation counselor with a master's degree and many years of experience. Her opinion was well documented and she testified in person. Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173 (Tenn. 1999).

In making determinations, the trial courts are to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities for the disabled, and capacity to work at types of employment available in the claimant's disabled condition. Tenn. Code Ann. § 50-6-241(a)(1). An injured employee is competent to testify as to her own assessment of her physical condition and such testimony should not be disregarded. McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179 (Tenn. 1999). From our independent examination of the record and a consideration of these principles of law, we cannot say that the evidence preponderates against the trial court's finding as to the extent of the claimant's permanent disability.

The appellant next contends there is no statutory or other authority for awarding an independent medical examiner's examination fee as discretionary costs. The appellee concedes it. Dr. Christopher's fee was \$235.00.

For the above reasons, the judgment of the Chancery Court for Obion County is modified by reducing the award of discretionary costs by \$235.00, but otherwise affirmed. Costs on appeal are taxed to the appellant.

JOE C. LOSER, JR

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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, Royal Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM