

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 16, 2002 Session

**DONNA HARDEY v. PML, INC., EBI COMPANIES AND JAMES
FARMER, DIRECTOR, TENNESSEE DEPARTMENT OF LABOR,
WORKERS' COMPENSATION DIVISION.**

**Direct Appeal from the Circuit Court for Benton County
No. OCCV-344 Julian P. Guinn, Judge**

No. W2001-02569-WC-R3-CV - Mailed November 6, 2002; Filed December 11, 2002

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. §50-6-285(e)(3) for hearing and reporting to the Supreme Court of findings and fact and conclusions of law. In this appeal the plaintiff, Donna Hardey (Hardey) contends the evidence preponderates in favor of an award in excess of the twenty-five percent (25%) permanent partial disability to the body as a whole awarded by the trial court. For the reasons stated in this opinion, we affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2001 Supp.) Appeal as of Right; Judgment of the Circuit
Court Affirmed**

W. MICHAEL MALOAN, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J. and JOE C. LOSER, JR., SP. J., joined.

Ricky L. Boren, Jackson, Tennessee, for the appellant, Donna Hardey.

Jeffrey G. Foster, Jackson, Tennessee, for the appellee, PML, Inc. and EBI Companies.

E. Blaine Sprouse, Nashville, Tennessee, for the appellee, Tennessee Department of Labor, Workers' Compensation Division

MEMORANDUM OPINION

The plaintiff, Hardey, was forty (40) years old at trial. She completed the eleventh (11th) grade and obtained a general equivalency diploma. Her work history is mostly manual labor in factories. She began working for PML in November 1994 as a welding machine operator until she was promoted to a group leader. As group leader she was responsible for assigning operators to presses and overseeing their operation.

In July 1997 Hardey hurt her neck at PML. Dr. Glenn Barnett diagnosed a herniated C6 disc on the left and on January 26, 1998 he performed an anterior cervical discectomy and fusion of the C6-7 discs. She filed a workers' compensation claim which was ultimately settled on January 8, 1999, for twenty percent (20%) permanent partial disability to the body as a whole. Hardey returned to work at PML as a group leader without restrictions.

Hardey began to have problems with her right shoulder and arm and returned to see Dr. Barnett on June 25, 1999. Dr. Barnett determined that she had a C5 herniated disc. On October 14, 1999, Dr. Barnett performed as a second operation a discectomy and fusion at the C5-C6 level. As a result of this second surgery, Dr. Barnett assigned an additional five percent (5%) permanent impairment and advised Hardey not to lift in excess of thirty (30) pounds on a regular basis.

In June 1999, Hardey complained to Dr. Barnett of right arm and finger numbness. A nerve conduction study showed mild to moderate carpal tunnel syndrome of the right arm. Dr. Barnett did not recommend surgery for this condition.

When Dr. Barnett saw Hardey on February 7, 2002, he noted she was doing "miserably, was quite uncomfortable, and taking up to fourteen Tylenol per day." Dr. Barnett testified it was not likely she would be able to return to work "unless she gets a dramatic improvement with her nonsurgical treatment of her pain." Due to her chronic pain, Dr. Barnett referred Hardey to Dr. Frank Jordan, a pain specialist. Dr. Jordan saw her on August 22, 2001, diagnosed radicular pain, prescribed medication and performed two (2) epidural blocks. Hardey testified she did not get any relief from Dr. Jordan's treatment.

Dr. Joseph Boals examined Hardey for an independent medical evaluation on October 30, 2000. On examination, Dr. Boals found extensive loss of motion in her neck, hypesthesia in the last three (3) fingers of her right hand, and a positive Phalen's test on the right arm. He assigned a ten percent (10%) permanent impairment for each cervical surgery and an additional ten percent (10%) for chronic pain syndrome. Dr. Boals assigned an additional ten percent (10%) permanent impairment for the carpal tunnel syndrome. As a result of both injuries and surgeries to her neck and her carpal tunnel syndrome, Dr. Boals recommended she not go back to manual labor employment. Her restrictions include no overhead work, no work away from her body, and a weight limit of less than twenty (20) pounds with no repetitive work using her hands or heavy gripping using her hands, and she is suited to only sedentary or light work status.

Hardey returned to work in December 1999 and resigned in March 2000. She testified she was in pain all the time and continued to require prescription pain medication, although she did not have any performance problems or complaints about her productivity at PML.

At the August 28, 2001 trial, the court found Hardey sustained a new neck injury at the C5 level in the course of her employment and awarded twenty-five percent (25%) permanent partial disability to the body as a whole and a ten percent (10%) permanent partial disability to the right arm for her carpal tunnel syndrome. Because this and her past award did not exceed one hundred percent (100%), the defendant, Department of Labor (Second Injury Fund) was dismissed. Tenn. Code Ann. § 50-6-208(b). Hardey has appealed the award of twenty-five percent (25%) to the body as a whole for the second neck injury as being inadequate. The award for the right arm carpal tunnel syndrome is not raised as an issue on appeal.

ANALYSIS

The scope of review of issues of fact is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). *Lollar v Wal-Mart Stores, Inc.*, 767 S.W.2d 143 (Tenn. 1989). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court's factual findings. *Humphrey v David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). However, where the issues involve expert medical testimony which is contained in the record by deposition, as it is in this case, then all impressions of weight and credibility must be drawn from the contents of the depositions, and the reviewing court may draw its own impression as to weight and credibility from the contents of the depositions. *Overman v Williams Sonoma, Inc.*, 803 S.W.2d 672, 676-77 (Tenn. 1991).

The only issue on appeal is the extent of vocational disability which is a question of fact to be determined from all the evidence, including both expert and lay testimony. *Collins v Howmet Corp.*, 970 S.W.2d 941, 943 (Tenn. 1998). In assessing vocational disability, the trial court is required to consider many pertinent factors such as the age, education, skills, and training, local job opportunities and capacity to work at types of employment available in the worker's disabled condition. Tenn. Code Ann. § 50-6-241 (a)(1); *Worthington v Modine*, 798 S.W.2d 232, 234 (Tenn. 1990); *Roberson v Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986).

In this case, the medical evidence consists of the depositions of treating physician, Dr. Glenn Barnett, and the evaluation of Dr. Joseph Boals. Their impairment ratings range from five percent (5%) to twenty percent (20%) to the body as a whole for the second neck injury and surgery. Dr. Barnett's restrictions are not to lift more than thirty (30) pounds on a repetitive basis as a result of the second injury and surgery. Dr. Boals' restrictions for both injuries and surgeries are no over head or away from the body work, twenty (20) pound lifting limit, and sedentary or light work. Both Dr. Barnett and Boals agreed Hardey's chronic pain syndrome might prevent her from returning to work.

Where there is a conflict between medical experts, a trial court has the discretion to accept the opinion of one medical expert over that of another unless evidence preponderates against that medical opinion. *Kellerman v Ford Lion, Inc.*, 920 S.W.2d 333, 335 (Tenn. 1996); *Johnson v. Midwesco*, 801 S.W.2d 804, 806 (Tenn. 1990). The trial court found Dr. Barnett to be “highly conservative and straight forward” and based on the trial court’s award he obviously gave greater weight to Dr. Barnett’s medical opinion.

Hardey testified she is unable to work due to her constant pain and reliance on pain killers. However, she worked at PML from December 1999 to March 2000 without any performance problems or complaints about her productivity and she has not sought any other employment since leaving PML. The trial court found Hardey to be a credible witness and, therefore, also gave her testimony significant weight. Hardey maintains the evidence preponderates in favor of an award in excess of the twenty-five percent (25%) permanent partial disability awarded by the trial court due to her constant pain, prescription medications, and inability to work at any gainful employment.

The defendants submit the trial court’s reliance on Dr. Barnett’s medical opinion was justified and within his discretion. The defendants each emphasize Hardey has permanent partial disability from the first injury of twenty percent (20%), twenty-five percent (25%) for the second neck injury and ten percent (10%) to the right arm (5% to the body as a whole) for the carpal tunnel syndrome which totals fifty percent (50%) to the body as a whole. Further, the employer, PML, points out the fact the trial court’s award of twenty-five percent (25%) permanent partial disability is five (5) times Dr. Barnett’s impairment rating of five percent (5%). The defendants conclude Hardey has been adequately compensated for her injuries.

After considering all the relevant factors in this case, we find the evidence does not preponderate against the trial court’s award of twenty-five percent (25%) permanent partial disability to the body as a whole.

CONCLUSION

The judgment of the trial court is affirmed. The costs of this appeal are taxed to the appellant, Donna Hardey.

W. Michael Maloan, 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 on appeal are taxed to the Appellant, Donna Hardey, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM