

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
July 2002 Session

**CYNTHIA L. URSERY v. LIBERTY MUTUAL INSURANCE GROUP, ET
AL.**

**Direct Appeal from the Circuit Court for Davidson County
No. 00C-2899 Thomas W. Brothers, Judge**

**No. M2001-02749-WC-R3-CV - Mailed - October 17, 2002
Filed - November 20, 2002**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with *Tennessee Code Annotated* § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this case, the employer appeals the trial court's award of 80% permanent partial disability to the employee where 1) the medical proof established a 5% anatomical impairment to both elbows; and 2) a vocational expert gave the employee a 90% vocational disability rating based on loss of access to 90.4% of the jobs available to her prior to her injury due to her permanent medical restrictions. We find that the evidence does not preponderate against the trial court's findings, and therefore the award is not excessive. We affirm the judgment of the trial court in all respects.

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

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

David T. Hooper, Brentwood, Tennessee, for the appellants, Liberty Mutual Insurance Group and United Parcel Service, Inc.

H. Tom Kittrell, Jr., Nashville, Tennessee, for the appellee, Cynthia Ursery.

MEMORANDUM OPINION

Mrs. Cynthia Ursery, the employee-appellee, was 46 years old at the time of trial. She graduated from high school in 1972 and has had no further educational training.

From 1979 until April of 2001, Mrs. Ursery worked for United Parcel Service (UPS), the employer-appellant, on a part-time basis. For a number of years she “bagged” small packages by pulling, pushing, or lifting the packages into bags and in turn putting the bags onto a conveyor belt. These packages were supposed to be limited to 10 pounds but at times exceeded 20 pounds in weight. Mrs. Ursery estimated she sorted 2,000 to 4,000 packages a night.

For at least 10 years of her employment with UPS, she sorted individual small packages. In this job she was required to pick up the package and move her palms into an upright position continuously to read the label on the packages to place them in the correct bin. Other job duties she performed at UPS included loading and fueling trucks, and driving local routes.

From 1988 to 1992, Mrs. Ursery also worked at Castner Knotts as a sales clerk where her job duties included unpacking clothes and hanging the items on display racks.

In June of 1998, Mrs. Ursery saw Dr. Robert Russell because she had been experiencing pain in her left elbow. Dr. Russell prescribed medicine and gave her an “arm bandit.” She returned to Dr. Russell in the fall of 1998 complaining of right elbow pain for which he also prescribed an “arm bandit.” In January of 1999, she received two cortisone shots which only seemed to increase the pain in her elbows.

Mrs. Ursery sought additional medical care and chose Dr. Jane Siegel from a panel presented to her by UPS. Dr. Siegel took Mrs. Ursery off work for about 5 or 6 weeks. Though her elbows improved with rest, as soon as she returned to work, her pain resurfaced. Dr. Siegel diagnosed chronic medial epicondylitis and performed surgery on Mrs. Ursery’s right elbow in May of 1999.

Mrs. Ursery returned to work with restrictions. UPS assigned her to a light duty job fueling trucks and driving them short distances across the yard. Mrs. Ursery began to have trouble pulling herself into the trucks and eventually re-injured her right elbow in May of 2000. She was put on medical leave until September of 2000, when she returned to work sorting light-weight letters.

Mrs. Ursery’s elbow pain continued. Consequently, Dr. Siegel placed her on permanent restrictions of lifting no more than 5 pounds and of making no highly repetitive motion of her wrist for more than 1 hour at a time. Dr. Siegel found that Mrs. Ursery had reached maximum medical improvement on April 20, 2001, and assigned a 5% anatomical impairment rating to both elbows.

In April of 2001, UPS terminated Mrs. Ursery’s employment because it had no work available that she could perform within her medical restrictions. She was earning \$20.00 per hour at the time of her termination.

Ms. Rebecca Williams, a Certified Vocational Evaluation Specialist, testified at trial on behalf of Mrs. Ursery. As part of a vocational evaluation performed in August of 2001, Ms. Williams interviewed Mrs. Ursery for over 3 hours, administered the Wide Range Achievement Test

and reviewed her medical records. Ms. Williams found that Mrs. Ursery had lost access to 90.4% of the jobs available to her prior to her injury, due to her permanent medical restrictions. Based on this loss of access, Ms. Williams determined that Mrs. Ursery had a 90% vocational disability rating.¹

Ms. Williams also cited the fact that Mrs. Ursery is approaching older worker status (age 50); the remoteness of her high school education; and her lack of transferrable job skills as factors working against her in obtaining a new occupation.

Mrs. Ursery testified that she could no longer do housework or participate in recreational activities that she enjoyed prior to her injury. She also stated she could not perform the job functions required for work in a department store or at UPS.

The trial court found that Mrs. Ursery had sustained an 80% permanent partial disability to both arms pursuant to *Tennessee Code Annotated* § 50-6-207(3)(A)(ii)(w) for scheduled injuries.

ANALYSIS

Our 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 correctness, unless the preponderance of the evidence is otherwise. *Tenn. Code Ann.* § 50-6-225(e)(2). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. See *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

The sole issue raised by the appellant in this case is whether the award of 80% permanent partial disability to each arm is excessive under all the circumstances.

The appellants claim that the trial court's award of 80% permanent partial disability is "aberrant" because the award is 16 times Mrs. Ursery's anatomical impairment rating. However, the statutory multiplier limits on permanent partial disability awards contained in *Tennessee Code Annotated* § 50-6-241 do not apply to cases involving injuries to scheduled members.²

¹According to Ms. Williams, there are no jobs available to her that have an hourly wage of \$20.00 per hour that she was earning at the time of her termination at UPS. Her starting wages in the light class jobs remaining available to her would range between \$ 6.00 to \$9.00 an hour. Also, Mrs. Ursery has lost access to her former job as a sales clerk due to her lifting restrictions.

²See *Atchley v. Life Care Ctr.*, 906 S.W.2d 428, 431 (Tenn. 1995) (holding that *Tenn. Code Ann.* § 50-6-241(a)(1), which limits awards for permanent partial disability to 2 1/2 times the anatomical impairment rating, applies only to cases involving injuries to the body as a whole); *Adkins v. Modine Mfg. Co.*, No. E2001-01237-WC-R3-CV, 2002 Tenn. Lexis 181 (Tenn. Apr. 8, 2002) (citing *Atchley* and holding that the 6 times multiplier cap contained in *Tennessee Code Annotated* § 50-6-241(b) does not apply to scheduled member awards).

Anatomical disability ratings are but one factor to consider in determining vocational disability, the ultimate issue in all workers' compensation cases. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 677-78 (Tenn. 1991). The test is whether there has been a decrease in the employee's ability to earn wages in any line of work available to the employee. *Corcoran* at 459.

In assessing the extent of an employee's vocational disability, the trial court may consider the employee's age, education, skills and training, local job opportunities, anatomical impairment ratings, and the capacity to work at the types of employment available in her disabled condition. *Walker v. Saturn Corp.*, 986 S.W.2d 204, 208 (Tenn. 1998). The claimant's own assessment of her physical condition and resulting disabilities is competent testimony and cannot be disregarded. *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972).

The trial court is not bound to accept physicians' opinions regarding the extent of the plaintiff's disability, but should consider all the evidence, both lay and expert testimony, in determining the extent of an employee's disability. *Walker* at 208; *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675, 677 (Tenn. 1983). See *Vannata v. Tomlinson*, 774 S.W.2d 921, 924 (Tenn. 1989) (noting that anatomical disability ratings given by physicians, though important, are not controlling).

The trial court found that Mrs. Ursery's "ability to earn money has been drastically reduced" due to her work injury. While noting the disparity between the 5% anatomical impairment rating and the 90% vocational disability rating, the trial court concluded that her "substantial vocational disability" and "considerable medical restrictions" supported a finding of 80% permanent partial disability. The trial court cited *Walker v. Saturn Corp.*, 986 S.W.2d 204 (Tenn. 1998) in support of its ruling.

In *Walker*, the Supreme Court upheld an award of 85% disability to both arms even though the medical proof did not establish a great percentage of anatomical impairment,³ where the plaintiff had established proof of diminished earning capacity in the open labor market which included a 97% occupational disability rating due to considerable medical restrictions, limited training and lack of transferrable job skills. *Id.*

Mrs. Ursery was 46 years old at the time of the trial, has a high school education, and has no special skills. She has a 5% anatomical impairment rating for both elbows and permanent restrictions of lifting no more than 5 pounds and of making no highly repetitive motion of her wrist for more than 1 hour at a time. Ms. Williams found that these physical limitations prevented her from accessing 90.4% of the employment positions she would have been able to apply for prior to her injury. Moreover, Ms. Williams testified that Mrs. Ursery had no transferrable job skills.

³ The employee in *Walker* had a 3 to 15% anatomical impairment to the left arm, no impairment rating to the right arm and permanent restrictions.

Lastly, we consider Mrs. Ursery's own assessment of her condition. Mrs. Ursery testified that she could no longer do housework or participate in recreational activities that she enjoyed prior to her injury. Further, she testified, and the evidence showed, that she could not return to work at UPS in any capacity.

In light of Mrs. Ursery's severely diminished ability to access employment in the local job market, considerable medical restrictions, education and lack of transferrable job skills as well as her own unchallenged testimony as to her condition, we agree with the trial court's assessment that Mrs. Ursery's ability to earn wages has been drastically reduced by her work injury. Accordingly, we find that the evidence supports the finding of the trial court that Mrs. Ursery sustained a 80% permanent partial disability to both elbows.

CONCLUSION

The judgment of the trial court is affirmed. Costs are assessed to the appellants, Liberty Mutual Insurance Group and United Parcel Service, Inc.

JAMES L. WEATHERFORD, SR. J.

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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 appellants, Liberty Mutual Insurance Group and United Parcel Service, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM