

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
February 2003 Session

**PHYLLIS PATRICE BRADEN v. NISSAN NORTH AMERICA, INC., ET
AL.**

**Direct Appeal from the Chancery Court for Rutherford County
No. 01-2181WC Robert E. Corlew, III, Chancellor**

**No. M2002-01173-WC-R3-CV - Mailed - May 29, 2003
Filed - July 1, 2003**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court 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 employee sustained an elbow injury caused by her repetitive work activities. The trial court found that the employee had suffered a 10% vocational disability to her right arm. In her appeal, the employee argues that the evidence preponderates against a finding of 10% and that the judgment in this matter should be increased to adequately compensate the plaintiff for her loss of employment opportunity. For the reasons stated in this opinion, we affirm the judgment of the trial court.

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

JAMES L. WEATHERFORD, SR.J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, C.J., and JOE C. LOSER, JR., SP.J., joined.

William L. Underhill and Aubrey T. Givens, Madison, Tennessee, for the appellant, Phyllis Patrice Braden.

Van French and Larry G. Trail, Murfreesboro, Tennessee, for the appellees, Nissan North America, Inc., and Royal Sunalliance Insurance Company.

MEMORANDUM OPINION

Ms. Phyllis Patrice Braden was 44 years old at the time of trial, and has a high school education. After high school, she worked in sewing factories for approximately 5 years. She then worked at a manufacturing plant as a machine operator. She worked at General Electric making air conditioners for 5 years, before starting work as a production technician at Nissan in 1991. Her job

duties at Nissan included using a screw gun repeatedly on the production line.

On October 16, 2000, Ms. Braden reported to the Nissan Medical Department that she had strained her right elbow. Dr. Terry Walker diagnosed tendinitis, prescribed pain medication and cortisone shots, and placed her on light duty. When her symptoms did not resolve, she was referred to Dr. Richard A. Rogers.

On November 30, 2000, Ms. Braden saw Dr. Rogers and reported that she had had problems with pain in her right upper extremity since September 16th, and that she related it to the repetitive use of her arm at work. She reported to him that “the pain was aggravated by gripping and lifting heavy objects.” Dr. Rogers found that she was very tender over the outside of her elbow where the muscles attach to the arm bone and that she had pain with lifting with her hand with the palm down, but had much less pain when lifting with the palm up. He also noted that “firm gripping with her elbow straight was very painful over the outside of her elbow.” Dr. Rogers diagnosed lateral epicondylitis of the right elbow and recommended surgery.

On January 15, 2001, Dr. Rogers performed surgery. Ms. Braden then underwent a course of physical therapy and was released to return to limited work on March 1, 2001.

On April 27, 2001, Dr. Rogers released Ms. Braden to return to her regular job and discontinued physical therapy. She returned to Dr. Rogers on May 23rd reporting that she had had to stop working after 6 days and return to physical therapy because of elbow pain.

On July 6, 2001, Ms. Braden returned to Dr. Rodgers complaining of continued elbow pain. Dr. Rogers found that she had reached maximum medical improvement, placed permanent work restrictions on Ms. Braden consisting of no repetitive firm gripping with the right upper extremity, and released her to return to him on an as needed basis.

On August 21, 2001, Dr. David Gaw performed an independent medical evaluation. He found that Ms. Braden had suffered a permanent injury caused by her frequent use of an air gun at Nissan. Dr. Gaw found normal range of motion and no weakness or atrophy. Dr. Gaw assigned a 3% permanent impairment to the right upper extremity as a result of her injury and felt that the restrictions given by Dr. Rogers were reasonable restrictions.

On September 25, 2001, Ms. Braden returned to Dr. Rogers accompanied by a job placement coordinator from Nissan to review a video tape of jobs to see if they fell within her restrictions. Dr. Rogers found that the jobs were within Ms. Braden’s restrictions.

Ms. Braden returned to work at Nissan in December of 2001. On January 3, 2002, Ms. Braden reported to Dr. Rogers that she was working a regular rotation within her permanent restrictions and was tolerating the job well. She advised that she was having no pain from her elbow and had worked at her new job for over three weeks. Ms. Braden never returned to Dr. Rogers with any further complaints.

Dr. Rogers found that Ms. Braden had not sustained any permanent impairment according to the *AMA Guides* and had normal grip strength.

Ms. Braden testified that she has difficulty with some of her continuing job duties at Nissan. She stated that the console job gave her problems when performing the job from the right side because she is right handed and because of the way she has to twist her arm in order to get into a position to shoot the screws into the console. She stated that this particular job caused swelling and pain when she performed it and she takes medication and uses ice packs on a daily basis to control the pain and swelling. She did state there were some jobs at Nissan which did not require the use of power tools that she was able to do without hurting her arm. She admitted that she had not made any complaints to her superiors at Nissan regarding problems with her job since she went back to work, but “suffered quietly.”

She also testified that she cannot do household duties such as cooking, cleaning, mopping and sweeping like she did before the injury. Her 19 year old daughter testified that her mother is still in a lot of pain and doesn't do much around the house.

The trial court found that Ms. Braden had sustained a 10 % vocational injury to her right arm and awarded a judgment of \$11,240.00. The defendants received credit for \$4,334.17 for long-term disability payments, a credit for \$4,736.90 as a set-off of a 60 day advance against the permanent partial disability benefits, and a further set-off of \$562.00 for an overpayment of temporary total disability benefits. The balance left due and owing to Ms. Braden was \$1,606.93. Ms. Braden's attorney was awarded a 20% attorney's fee in the amount of \$2,248.00 to be paid in a lump sum.

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). Conclusions of law are reviewed *de novo* without any presumption of correctness. *Ivey v. Trans Global Gas & Oil*, 3 S.W.3d 441, 446 (Tenn. 1999).

Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

When the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Insurance Co. of North America*, 884 S.W.2d 446,

451 (Tenn. 1994).

The plaintiff raises the sole issue of whether the preponderance of the evidence is contrary to the trial court's determination that the plaintiff has sustained a vocational disability of merely 10% as a result of her work related injuries.

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 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.

The trial court found that Ms. Braden had suffered a permanent injury because she had a permanent medical restriction. In assessing vocational disability, the trial court considered her age, education and past work history of manual labor type jobs. The trial court also noted that Ms. Braden was continuing to work doing the same job as before, earning the same money or more money than even before and had not complained to her supervisor.

The trial court stated that Ms. Braden would have some difficulty finding work because of her restrictions should she leave Nissan. In awarding 10% vocational disability, the trial court considered the appropriate factors and found that the injury had "a vocational impact, I think, upon Ms. Braden, but in fairness, it's not an extremely large one."

After reviewing the record in this case, we find that that the evidence does not preponderate against the finding of the trial court as to Ms. Braden's permanent impairment. The judgment of the trial court is affirmed. The costs are taxed to the appellant.

JAMES L. WEATHERFORD, 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 will be paid by the Appellant, Phyllis Patrice Braden, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM