

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

April 5, 2004 Session

SHARON PARKER V. EMERSON ELECTRIC COMPANY

**Direct Appeal from the Circuit Court for Henry County
No. 2144 Julian P. Guinn, Judge**

No. W2003-02328-WC-R3-CV- Mailed June 15, 2004; Filed July 19, 2004

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 of fact and conclusions of law. In this appeal, the employer contends that the trial court erred in considering the testimony of Dr. Joseph C. Boals, III, and that the award of thirty-five (35%) percent permanent partial disability to the body as a whole was excessive. We find these issues are without merit and affirm the judgment of the trial court.

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

WILLIAM B. ACREE, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and Robert L. Childers SP. J., joined.

Richard L. Dunlap, III, Paris, Tennessee, for the appellant, Emerson Electric Company.

Jeffrey P. Boyd, Jackson, Tennessee, for the appellee, Sharon Parker.

MEMORANDUM OPINION

Factual Background

The appellee, Sharon Parker, (hereinafter "Employee") is 52 years of age and has a high school education. The Employee's work experience has consisted of working at a number of factories. In 1996, she was hired by Emerson Electric Company (hereinafter "Employer") as an assembly line worker. On April 16, 2002, she fell and injured her knee, right elbow and lower back.

The Employer received medical treatment and was released to return to her regular job in November of 2002. On March 30, 2003, the plant closed, and she was laid off.

The Employee testified that when she returned to work, she endured pain in her arm, knee and back when bending, twisting and squatting. Since the plant closed, she has unsuccessfully sought employment and believes her opportunities are limited. Her prior work experience has been as a sewing machine operator, and she does not believe she is able to do that type of work because she cannot sit or stand all day. She testified that she will be unable to work at a job that requires lifting, turning, squatting and twisting.

The medical evidence before the court consisted of the medical records of Dr. Terry O. Harrison, the medical records of Dr. G. Blake Chandler, the records of Shania Campbell, a physical therapist, and the medical records and deposition of Dr. Joseph C. Boals, III.

The records of Dr. Harrison, a general practitioner, reflect that he initially saw Employee on April 16, 2002. According to the history, Employee fell at work and injured her right knee, right arm and back. He treated her for her back until August, 2002, and his diagnosis was a lumbar strain. He expected her to recover.

Dr. Chandler, an orthopedic surgeon, saw Employee in consultation with Dr. Harrison. He first saw her on May 15, 2002. His diagnosis was a right capitellum fracture minimally displaced and right prepatellar bursitis. Dr. Chandler sent her to physical therapy and treated her conservatively until September 6, 2002, at which time, he performed a right prepatellar bursectomy. Dr. Chandler last saw Employee on November 13, 2002, and found that she had done extremely well. He allowed her to return to full duty with no permanent restrictions and found no permanent partial impairment.

Dr. Boals, an orthopedic surgeon, performed an independent medical examination of Employee at her request. He saw her on January 14, 2003. Dr. Boals opined that Employee has permanent impairment because of the ongoing symptoms of pain in the back and knee, but he found no impairment for the injury to the right elbow. In Dr. Boals' opinion, the impairment for the back injury equaled five (5%) percent to the body as a whole. He relied upon Table 15-3, page 384, lumbar category, II of the AMA Guides Fifth Edition. He rated her at seven (7%) percent to the lower extremity or four (4%) percent to the body as a whole for the knee injury. He testified that the impairment for the knee injury was supported under chapter one, page eleven and by comparing that surgery to an undisplaced healed patella fracture in Table 17-33, page 546 of the Guidelines. The overall combined impairment was nine (9%) percent to the body as a whole. Dr. Boals further testified that Employee should avoid deep knee bending, prolonged walking, standing, stooping, squatting, climbing, use of foot pedals and excessive flexion, extension or rotation of the right knee and back. Dr. Boals was vigorously challenged in his deposition by the Employer. He was cross examined extensively about his ratings and the methodology in determining the ratings and about his practice which consists of conducting independent medical examinations for plaintiffs in litigation.

The trial court relied upon the anatomical rating of Dr. Boals. The trial court also found that although Employee is a high school graduate, she has difficulty articulating her claim and has obvious intellectual limitations. Her work history has been limited to manual labor, and she is not qualified to work in any field requiring other talents. The court further found Employee experiences the classic symptoms of a back injury; pain upon bending and squatting and limitations in twisting, lifting, prolonged standing or sitting. He awarded her benefits based upon a thirty-five (35%) percent permanent partial rating to the body as a whole.

Standard of Review

The standard 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, 149 (Tenn. 1989). 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 afforded those circumstances on review because it is the trial court which had the opportunity to observe the witness' demeanor and to hear the in-court testimony. *Long v. Tri-Con Industries, Ltd.*, 996 S.W.2d 173, 178 (Tenn. 1999). Where the issues involve expert medical testimony which is contained in the record by deposition, 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. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676-77 (Tenn. 1991).

Analysis

The first issue presented for review is whether the trial court erred in considering the testimony of Dr. Joseph C. Boals, III.

The Employer argues that Dr. Boals did not follow the AMA Guidelines in establishing the impairment rating. The Employer could have demonstrated that Dr. Boals was in error in one of two ways. First, the Employer could have done so through cross examination of Dr. Boals or secondly, the Employer could have done so by expert medical testimony. The Employer has done neither. We have carefully reviewed the record, and we cannot conclude that Dr. Boals erred in the manner in which he arrived at his impairment rating. We find this issue to be without merit.

The second issue presented for review is that the award of thirty-five (35%) percent permanent partial impairment to the body as a whole was excessive. Disagreements among treating and evaluating physicians as to the existence and degree of permanent impairment and restrictions are common in workers' compensation cases. The trial court has the discretion to accept or reject the opinion of one medical expert over the opinion of another medical expert(s). *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 335 (Tenn. 1990); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990); *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675 (Tenn. 1983). The extent of vocational disability 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 the vocational disability, the trial court is required to consider many pertinent factors such as age, education, skills, 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 Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990); *Roberson v. Loretta Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986). An injured employee is competent to testify as to her own assessment of her physical condition, and such testimony should be regarded in assessing vocational disability. *McIlvain v. Russell Stover Candies, Inc.*, 996 S.W.2d 179, 183 (Tenn. 1999).

Two doctors gave opinions upon permanent partial impairment. Dr. Boals testified by deposition that Employee has nine (9%) percent impairment to the body as a whole. Dr. Chandler said in a report that she had no permanent partial impairment. The other doctor, Dr. Harrison, did not give an opinion about impairment, but did say in a report that he expected her to recover. The trial court accepted the testimony of Dr. Boals. He also considered the testimony of Employee and the other evidence in the case. He found that she has intellectual limitations, her work history has been limited to manual labor, and she is not qualified for other type work. The trial court found that she experienced classic symptoms of a back injury and is restricted in her physical activities. Considering all of those factors, the trial court found that she sustained a permanent impairment of thirty-five (35%) permanent partial disability to the body as a whole. We find that the evidence does not preponderate against the trial court's finding as to the extent of vocational disability.

Conclusion

In conclusion, we hold that the trial court did not err in considering the medical testimony of Dr. Joseph C. Boals, III and that the evidence does not preponderate against his award of thirty-five (35%) percent permanent partial disability to the body as a whole. The costs are taxed to the Employer, Emerson Electric Company.

WILLIAM B. ACREE, JR., SPECIAL JUDGE

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JUDGMENT ORDER

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, Emerson Electric Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM