

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 13, 2004 Session

VELMA KELLER v. SNAP-ON, INCORPORATED

**Direct Appeal from the Chancery Court for Washington County
No. 34366 G. Richard Johnson, Chancellor**

December 28, 2004

No. E2003-02379-WC-R3-CV - Mailed November 22, 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. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court awarded the employee 50 percent permanent partial disability to her left arm and 60 percent permanent partial disability to her right arm as a result of carpal tunnel syndrome injuries. Employer contends the awards are excessive. The judgment is affirmed.

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

ROGER E. THAYER, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J., and HOWELL N. PEOPLES, SP. J., joined.

Jennifer P. Keller, Johnson City, Tennessee, for Appellant, Snap-On, Incorporated.

Howell H. Sherrod, Johnson City, Tennessee, for Appellee, Velma Keller.

MEMORANDUM OPINION

The employer, Snap-On, Incorporated, has appealed from the action of the trial court awarding the employee, Velma Keller, 50 percent permanent partial disability to her left arm and 60 percent permanent partial disability to her right arm. The employee appeals from the trial court's finding a foot injury was not caused by her employment.

Facts

Velma Keller, a 63 year old employee with a G.E.D. certificate, sustained bilateral carpal tunnel injuries as a result of her work activity where she was employed as a salaried production

scheduler. This work required extensive writing and posting daily work transactions to a computer. Her injuries began in January 1995 and continued to get worse until her surgical procedures in the early part of 2001. After some period of recovery, she returned to work at the same job until June 2002 when she elected to retire.

Plaintiff testified she still experienced a great deal of difficulty with her hands; that she was not able to do most household chores because it hurt when she tried to lift or push something; she had difficulty in cooking because it hurt to lift pots and pans; and that she had to stop all gardening activities.

She came under the care of Dr. Paul W. Gorman who testified by deposition. Dr. Gorman, a board certified orthopaedic surgeon specializing in hand problems, saw her in 1995 and treated her conservatively for several years until her condition eventually required surgery. He stated her injury on the right hand was worse than the left hand and that she was right-handed. He was of the opinion she had recovered well from the surgical procedures in January and March 2001 and he released her to return to work. He stated she had a 2 percent impairment to each arm and when he released her, he did not impose any restrictions. At other points in his testimony he said she should be “judicious about her activities with her hands . . .” and also that she would be in a light duty work classification under U.S. Department of Labor guidelines because of limits on lifting, pulling and squeezing.

Dr. William E. Kennedy, a retired orthopaedic surgeon who restricts his practice to performing independent medical examinations, examined plaintiff during November 2002 and reviewed her medical records. He was of the opinion she had a 27 percent impairment to the right arm and a 16 percent impairment to the left arm. He indicated she should observe restrictions in lifting, pushing and pulling.

With respect to the injury to her feet, plaintiff contends she did not suffer any permanent disability but she had to seek medical treatment for a temporary injury and that her employer should be liable for the payment of \$1446.65 for this treatment. To support her claim, she filed the deposition of Dr. Aaron Perkins, a podiatrist, who testified he saw her during April 2001 and she was complaining about pain in both feet. His diagnosis was neuroma of the second and third interspace of each foot. He said “neuroma” was an enlargement of the nerves in the foot and that she got better after several visits where he administered injections and after she had taken anti-inflammatory medication. On the questions of permanent disability and causation of injury, he stated she did not have any permanent disability and he could not say whether the condition was work-related although her work seemed to aggravate the problem. No restrictions were imposed on her work activity.

At the conclusion of the trial, the court issued a detailed statement of findings and fixed plaintiff’s disability at 50 percent to her left arm and 60 percent to the right arm. The claim for the foot injury was dismissed as the court found her condition was not work-related.

Standard of Review

The review of the case on appeal is *de novo* accompanied by a presumption of the correctness of the findings of the trial court unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(2). Where the trial court has seen and heard witnesses and issues of credibility and the weight of oral testimony is involved, the trial court is usually in a better position to judge credibility and weigh evidence but where evidence is introduced by deposition, the appellate court is in as good a position as the trial court in reviewing and weighing testimony. *Lander v. Fireman's Fund Ins. Co.*, 775 S.W. 2d 355, 356 (Tenn. 1989).

Analysis

_____ The employer argues the awards of 50 percent disability to the left arm and 60 percent disability to the right arm are excessive. It has often been stated in appeals of this nature, the extent of vocational disability is primarily a question of fact for the trial court and it must be determined from all the evidence including lay and expert testimony. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W. 3d 625, 629 (Tenn. 1999). Anatomical impairment is a separate and distinct finding from vocational disability and is only one factor to be considered in determining the extent of vocational disability. *George v. Building Materials Corp.*, 44 S.W.3d 481 (Tenn. 2001). When fixing disability to a scheduled member, the main question is to ascertain the loss of use of that member. *Duncan v. Boeing Tennessee, Inc.*, 825 S.W.2d 416 (Tenn. 1992).

In support of the contention the awards are excessive, defendant argues the trial court failed to consider the opinion of the treating physician who found the impairment to be 2 percent to each arm. We do not find the record supports this conclusion. In examining the court's findings and conclusions it is apparent the court considered this evidence but obviously declined to accept it as it conflicted with other expert evidence. The trial court is clothed with the authority and discretion to decide which evidence is acceptable when it is in conflict. *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278 (Tenn. 1991); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804 (Tenn. 1990).

In addition to medical impairment, the trial court should also consider the employee's age, education, training and skills as well as the opportunity for employment in the open labor market. *Orman v. Williams-Sonoma, Inc.*, 803 S.W.2d 672, 678 (Tenn. 1991).

The evidence does not preponderate against the awards of disability.

Plaintiff contends the trial court was in error in dismissing the foot claim and that the appeal by the employer is frivolous. The trial court found the employee's foot condition was not work-related and the evidence does not preponderate against this conclusion. While we have agreed with the employee in upholding the awards of disability, we do not find the appeal was of a frivolous nature.

Conclusion

The judgment of the trial court is affirmed. Costs of the appeal are taxed to the defendant-employer.

ROGER E. THAYER, 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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the defendant-employer, Snap-On Incorporated, for which execution may issue if necessary.