

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

February 23, 2005, Session

ELTON LEE HUDSON v. THE AEROSTRUCTURES CORP., ET AL.

**Direct Appeal from the Criminal Court for Wilson County
No. 02-0663 J. O. Bond, Criminal Court Judge**

**No. M2003-03091-WC-R3-CV - Mailed - April 29, 2005
Filed - June 14, 2005**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the employer asserts that the trial court erred in awarding to the employee eighty-five (85%) percent permanent partial disability to the right and left hands as a result of an injury sustained during the course of his employment with Aerostructures Corp. We conclude that the evidence presented does not preponderate against the findings of the trial judge and, in accordance with Tennessee Code Annotated §50-6-225(e)(2), affirm the judgment of the trial court.

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

DONALD P. HARRIS, SENIOR JUDGE, delivered the opinion of the court, in which FRANK F. DROWOTA, CHIEF JUSTICE, and WILLIAM H. INMAN, SENIOR JUDGE, joined.

Stephen W. Elliott, Nashville, Tennessee, for appellant, Aerostructures Corp.

William Joseph Butler and Frank D. Farrar, Lafayette, Tennessee, for appellee, Elton Hudson.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND.

Elton Lee Hudson was, at the time of trial, sixty-four years of age and had completed the twelfth grade of high school. He had worked in a chicken hatchery, for the City of Lebanon Water Department performing maintenance, and for Wilson County Motors in the body shop, cleaning and painting automobiles. Mr. Hudson next worked for Continental Insurance Company for twenty-two

years (1972 to 1994) as an automobile appraiser. Following that, he returned to Wilson County Motors as body shop manager. In that job he made estimates, wrote job tickets, and supervised the overall operation of the shop. The job included some physical labor such as carrying automobile tires, delivering parts, cleaning cars and driving a vehicle.

In 1998, after leaving Wilson County Motors, Mr. Hudson went to work for Aerostructures Corp. as a spray painter. He worked long hours, sometimes as much as twelve hours per day, six days per week. He painted with a spray gun and was able to alternate between using his right and left hands squeezing the paint gun with the index finger of the hand he was using. After about three years at this job, he began noticing tingling and numbness in the thumb, index and middle fingers of both hands. Then he began experiencing pain and burning at work and the condition became progressively worse. He eventually saw Dr. David Schmidt who diagnosed his condition as carpal tunnel syndrome. He underwent a right carpal tunnel release on September 22, 2001, and a left carpal tunnel release on February 20, 2002.

In January 2002, Mr. Hudson was laid off by Aerostructures due to a slow down in the airline industry. After his operations, he did well and was able to return to work in February 2003 when the lay off was over. Upon returning to work, however, his problems recurred. His job was easier in that he no longer had to hold the paint when spraying. Rather the paint was kept in a can equipped with a hose and Mr. Hudson could squeeze or grip the trigger. Nonetheless, he began experiencing increased sensation in the index and middle fingers of both hands. He also experienced stiffness and difficulty gripping with these fingers together with pain that extended into his forearms.

Plaintiff described his hands as not much better than they were prior to surgery. He does not have as much numbness in his fingers as he did, but they hurt worse now than they did before surgery. He has difficulty driving in that his fingers go to sleep and he has to hold the bottom of the steering wheel. After short distances, ten to fifteen miles, he has to swap hands and hold one hand in his lap while the other hand is holding the steering wheel. Reading a newspaper causes his fingers to "go to sleep." Prior to his injury he could lift a hundred pounds. Now he doubts he could lift twenty pounds without developing symptoms in his hands, arms or fingers. After weed eating about three to four minutes, sweeping two or three minutes, or washing an automobile three or four minutes he experiences numbness in his fingers. He has difficulty holding objects in his hands and frequently drops keys, glasses fo tea and similar items on almost a daily basis.

He is doing the same job that he did prior to his surgery but does not paint as long in an eight-hour shift as he did and believed he could not actually paint more than three or four hours per day. His job title has not changed and he does not have any permanent or physical restrictions placed upon him by his treating physician that Aerostructures Corp. has to accommodate. He does not believe he could do any of the jobs he held prior to working at Aerostructures but admits he has not attempted any of those jobs.

II. MEDICAL EVIDENCE.

The treating physician was Dr. David Mark Schmidt who also testified by way of deposition. Dr. Schmidt is a board certified orthopaedic surgeon, specializing in hand and upper extremity surgery. He initially saw Mr. Hudson on May 9, 2001, when he was sent by his employer's workers' compensation carrier for evaluation regarding numbness and tingling in his hands. He also had symptoms at night and with daily living activities. Dr. Schmidt performed an examination and found the symptoms predominately caused by the median nerve distribution of both hands, the right being worse than the left. His findings indicated carpal tunnel syndrome. Dr. Schmidt ordered x-rays which showed some early mild arthritic changes on the knuckles of his right hand and electrical studies that confirmed the presence of carpal tunnel syndrome, moderate on the right and mild on the left. Mr. Hudson underwent a right carpal tunnel release on September 11, 2001, and had a left carpal tunnel release on February 19, 2002.

According to Dr. Schmidt, Mr. Hudson was generally pleased with the result of the surgeries. He had diminished sensation and some persistent vague tingling in the fingers, but was overall improved. Dr. Schmidt determined that Mr. Hudson reached maximum medical improvement on August 5, 2002. Applying the *Fifth Edition of AMA Guides to the Evaluation of Permanent Impairment*, Dr. Schmidt opined that he retained a 5% residual impairment for his right upper extremity and a 3% impairment to the left. Dr. Schmidt did not recommend any permanent physical restrictions for Mr. Hudson.

Dr. Robert Landsberg, a board certified orthopaedic surgeon, performed an independent medical evaluation of Mr. Hudson on August 22, 2003. In addition to taking a medical history and performing a physical examination, Dr. Landsberg reviewed medical records from Dr. Schmidt and electrical studies taken May 9, 2001, indicating moderate right and mild left carpal tunnel syndrome, electrical studies from January 23, 2002, showing left upper extremity borderline to mild left carpal tunnel syndrome and bilateral postoperative electrical studies dated August 19, 2002, showing moderate right carpal tunnel syndrome and borderline left carpal tunnel syndrome without acute denervation.

During physical examination, Tinel's test on the right, which is tapping on the known position of the median nerve, produced tenderness in the palm in the distribution of the median nerve. Tinel's test on the left was mildly positive with tingling to the palm and fingers. Phalen's test on the right, which is a wrist flexion test that increases pressure in the carpal tunnel, produced numbness and tingling within fifteen to twenty seconds and pain up into the forearm. Phalen's test on the left produced the same symptoms as on the right. Tinel's and Phalen's tests are to determine whether there is irritation in the median nerve. According to Dr. Landsberg, the positive tests indicated the presence of irritation which correlated with the postoperative electrical studies showing

positive for carpal tunnel syndrome.¹

Dr. Landsberg's diagnosis was status post work-related bilateral carpal tunnel release with residual mild carpal tunnel syndrome and mild bilateral wrist and mild bilateral index finger stiffness. According to the *Fifth Edition of the AMA Guides*, Dr. Landsberg assigned an 11% upper extremity impairment on the right hand and a 12% left upper extremity rating for the left. Dr. Landsberg recommended restrictions because after he returned to work Mr. Hudson's condition deteriorated. The restrictions recommended were no repetitive squeezing or gripping with either hand, minimal use of vibratory or pneumatic tools and no pounding with the palms of his hands. He also recommended that he not repetitively or frequently flex or extend or rotate his hands because that motion causes irritation of the median nerve in the carpal tunnels.

III. VOCATIONAL EVIDENCE.

Dr. Rodney Caldwell, a vocational expert who held a Ph. D. in Vocational Psychology, performed a vocational evaluation of Elton Lee Hudson. As part of the evaluation he took his work history, administered a wide range achievement test and the Minnesota Manual Dexterity Test. On the achievement test, Dr. Caldwell found that Mr. Hudson was reading above the twelfth grade level and had twelfth grade math skills. On the dexterity test, Mr. Hudson had a score of 128 seconds which was very slow and would place him below the first percentile of all persons. According to Dr. Caldwell, his manual dexterity score was well below that required for most production jobs.

Dr. Caldwell testified that the extent of Mr. Hudson's vocational disability turned upon the restrictions that had been imposed. If Dr. Schmidt's recommendation of no restrictions were accepted, there would be vocational disability. Based upon Dr. Landsberg's restrictions of no repetitive gripping or squeezing with either hand, minimal use of vibratory or pneumatic tools, and no pounding of the palms of either hand, however, Mr. Hudson would have a vocational disability of 80 to 85%. According to Dr. Caldwell, if Mr. Hudson did not have skills as a claims adjuster, his disability would have been about 10% higher.

David Wesley Cox, a vocational rehabilitation counselor and disability consultant, was asked to evaluate Elton Hudson relative to his ability to work and specifically the extent to which his carpal tunnel syndrome would interfere with his ability to perform in any other occupations. Mr. Cox has a Bachelor's degree from the University of Florida and two Masters of Science degrees from the University of Tennessee both in Human Service related professions, one being rehabilitation counseling. He interviewed Mr. Hudson, reviewed the medical evidence and performed a transferable work skill analysis, that is, determining what work skills he had that he could still perform after his injury. In performing his analysis, he accepted Dr. Caldwell's testing as accurate.

¹Dr. Landsburg also had a report from Dr. Andani S. Prakash who examined the plaintiff on September 12, 2003, and found positive Tinels and Phalens, bilaterally, with decreased grip strength in both hands. Dr. Prakash's diagnosis was residual bilateral carpal tunnel syndrome.

According to Mr. Cox, the primary issue was what work restrictions were imposed upon the plaintiff. Since his treating physician, Dr. Schmidt imposed no work restrictions, Mr. Hudson could do what he did before the injury and there would be no vocational disability. In considering Dr. Landsberg's restrictions, Mr. Cox used the *Dictionary of Occupational Titles* which defines frequencies as never, occasionally, frequently, and either constantly, repetitively, or continuously. According to that authority, never means not at all; occasionally means 1% to 33% of a work shift; frequently from 34% up to 66%; and repetitively, constantly or continuously 67% or above. Accordingly, he interpreted Dr. Landsberg's restriction calling for no repetitive squeezing to mean Mr. Hudson still had the ability to squeeze or grip frequently or up to 66% of a work shift. In the opinion of Mr. Cox, the physical limitations imposed by Dr. Landsberg, using these definitions, eliminated only 12.5% of the jobs available to Mr. Hudson.

IV. THE RULING OF THE TRIAL COURT.

The trial court found the plaintiff had sustained an 85% permanent partial disability to each hand entitling him to 340 weeks of benefits at his compensation rate of \$562.00 per week based upon an injury date of May 9, 2001.

V. THE STANDARD OF REVIEW.

On this appeal, the standard of review is provided for by the legislature in Tenn.Code Ann. §50-6-225(e)(2) as follows:

Review of findings of fact by the trial court shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.

Where credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. *Long v. Tri-Con Industries, Ltd.*, 996 S.W.2d 173, 178 (Tenn. 1999). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions and the reviewing court may draw its own conclusions with regard to those issues. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672 at 676 (Tenn. 1991).

VI. ANALYSIS

The sole issue raised on this appeal is whether the trial court's award of 85% permanent partial disability to each hand was excessive. The existence and extent of a permanent vocational disability are questions of fact for determination by the trial court and, as stated above, are reviewed de novo, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *Walker v. Saturn Corp.*, 986 S.W.2d 204 (Tenn. 1998); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164 (Tenn. 2002). In assessing the extent of an employee's vocational

disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and his capacity to work at the kinds of employment available in his disabled condition. Tenn. Code Ann. § 50-6-241(b); *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232 (Tenn. 1990); *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380 (Tenn. 1986). Further, the claimant's own assessment of his physical condition and resulting disabilities cannot be disregarded. *Uptain Constr. Co. v. McClain*, 526 S.W.2d 458 (Tenn. 1975); *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775 (Tenn. 1972).

In this case, the trial court found the plaintiff to be a credible witness worthy of belief. According to the plaintiff's testimony, the condition of his hands has resulted in severe limitations on his activities. There is nothing in this record to indicate the plaintiff is not credible. While the appellant would fault the plaintiff for testifying he did not believe he could perform any of his prior employments without actually trying to perform them, there is nothing in that testimony that leads us to believe he was untruthful. Moreover, because of the deference that must be given the trial court who observed the witness and his demeanor while testifying, this court has to agree with the trial court's finding in this regard.

We have reviewed the deposition testimony of the doctors who testified in this case. Our conclusion, based upon the tests that were performed and the explanations given as to their meaning, is that the plaintiff does suffer from residual carpal tunnel syndrome as testified to by Dr. Landsberg. It follows that the restrictions imposed by Dr. Landsberg are more likely to be appropriate. We further agree with the trial court that Dr. Caldwell's assessment of plaintiff's vocational disability is based on a firmer foundation than the opinions offered by Mr. Cox largely because Dr. Caldwell did not impose a strained interpretation on the wording used by Dr. Landsberg as did Mr. Cox. In our opinion, to interpret a restriction against a frequent activity to mean the person can engage in that activity two-thirds of a work shift is contrary to the ordinary use of that word unless one has made an independent determination of the doctor's intent.

While we agree with the foregoing conclusions of the trial court, we candidly admit this panel may have reached a somewhat different result with regard to the extent of Mr. Hudson's permanent injury. It is not our function, however, to replace the trial court's judgment with our own. The legislature has given the trial court the presumption of correctness unless we find the evidence preponderates against the trial judge's findings which we cannot do.

Accordingly, the judgment of the trial court is affirmed with the costs taxed to the appellant.

DONALD P. HARRIS, SENIOR JUDGE

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JUDGMENT

This case is before the Court upon the motion for review filed by The Aerostructures Corporation and Travelers Insurance Company, Inc. pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to The Aerostructures Corporation and Travelers Insurance Company, Inc., for which execution may issue if necessary.

DROWOTA, C.J., NOT PARTICIPATING