

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

February 23, 2005 Session

RUTH HUKE v. TRINITY INDUSTRIES, INC.

**Direct Appeal from the Circuit Court for Montgomery County
No. 50200216 John H. Gasaway, III, Circuit Judge**

**No. M2004-00907-WC-R3-CV - Mailed - April 29, 2005
Filed - June 1, 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 finding that the employee suffered any permanent partial disability and in awarding to the employee sixty-four (64%) percent permanent partial disability to the body as a whole as a result of an injury sustained during the course of her employment with Trinity Industries, Inc. We conclude that the evidence presented supports 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.

P. Allen Phillips, Jackson, Tennessee, for the appellant, Trinity Industries, Inc.

William L. Aldred, Jr., Clarksville, Tennessee, for the appellee, Ruth Huke.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND.

Ruth D. Huke, was twenty-seven years of age at the time of the trial and the mother of three children. She was injured April 3, 2001, while performing her job as a welder, when she was struck by an metal angle plate in the right shoulder and was caught between the plate and a crane, causing her body to be lifted and twisted. She was taken by ambulance to Vanderbilt's Emergency Room where she was kept overnight and released. Dr. Daniel McHugh treated the

injury. The plaintiff saw Dr. McHugh on five or six occasions and underwent physical therapy for three weeks. Dr. McHugh released her on May 24, 2001, and told her that she needed to perform light duty for one week and then could return to her regular job. She went in on May 26 and spoke with Sherry Hayes, the safety advisor, who advised her she would be sweeping for a week and then return to full duty welding and fitting. Because she was struggling hard to walk and still using a cane, she did not feel she could perform the sweeping duty or return to her welding job and, as a consequence, quit her job.

A short time after June 1, 2001, she went to work at AT&T, working as a sales representative selling long distance services. She had difficulty because she had to sit for long periods of time and did not like the job. About September 10, 2001, she went to work at Trane where she was given a sit-down job observing security monitors for a twelve-hour shift. Trane moved her to roaming guard and she was required to check buildings every two hours, including walking up and down stairwells. The pain she experienced as a result of this activity caused her to leave that employment.

On March 2, 2002, the plaintiff went to work for A.O. Smith, a manufacturer of water heaters. She told A.O. Smith what Dr. McHugh had relayed to her, that she had a severe bruising of her left hip, that nothing else was wrong and she was able to return to work. During her physical at A.O. Smith on March 4, 2004, she told the doctor she wasn't having problems and on a physical information form indicated she had no back trouble and no physical limitations. She also did some welding at A.O. Smith but she did not have to lift the tanks. They were placed on rollers. She welded for about 4-6 months. She continued working there until August 2003, when she left her job because her pain was progressing.

A different description of Mrs. Huke's job at A.O. Smith was presented by defense witness, Barry Eugene Gary. Mr. Gary is presently the Trinity Marine Products Safety Environmental Manager. He previously had worked at A.O. Smith and was working there at the same time as Mrs. Huke. He described the tank inspector job at A.O. Smith, performed by Mrs. Huke, as a very physically demanding job. One has to take the tank, apply and lock plugs to make it air tight, fill the tank with air and then run a substance to detect leaks over it. If a leak is discovered, the inspector welds the tank to patch the leak. There is a significant amount of pushing and pulling from forty to sixty pounds for each tank depending on the size and length and girth of the tank. Inspectors test a tank every five to eight seconds. He stated that in his opinion the job at A.O. Smith was more demanding than the job Mrs. Huke had at Trinity because of the number of units one had to work on at A.O. Smith.

About the time Mrs. Huke went to work for A.O. Smith she began seeing Dr. Blaise Edward Ferraraccio for the pain she was experiencing. Dr. Ferraraccio prescribed a muscle relaxer but it caused her to be drowsy and reduced her driving skills. The pain became worse and radiated down her legs. Dr. Ferraraccio prescribed a pain management program, giving her morphine and phenergan. She was unable to work when she took those drugs.

Mrs. Huke related to the court that she can no longer do the dishes because she cannot stand for a sufficient length of time to complete that task. Because of her height, 6'1" tall, she

must bend or stoop to do some things a shorter person would be able to do standing erect. For that reason, she cannot do her laundry because bending over and crouching to sort clothes causes her pain. She cannot clean her bathrooms because she is unable to bend or crouch. She believes that she has lost 70-80% of her motor functions. She does not think she is able to return to work at her old job at Trinity. Her only other skills are related to "office technology." She has a high school degree and some college credit in that field. Mrs. Huke's testimony relating to her condition was corroborated by her mother, Katherine Curtis, and her husband, Joseph Huke.

II. MEDICAL EVIDENCE:

Dr. Blaise Edward Ferraraccio is licensed both as a physician and as an attorney. He is a board-certified neurologist. He has practiced in Montgomery County, Tennessee since 1984. He completed his J.D. degree in 1998 at the Nashville School of Law.

He first saw Ruth Huke on February 26, 2003. She related a work injury occurring in April 2001, where she was caught between a mechanical apparatus and her upper body was twisted to the right while her hips were fixed. Her biggest complaint was lower back pain, and mid-thoracic back pain radiating into her legs, severe enough that she had difficulty walking. Upon physical examination Dr. Ferraraccio found she had give away weakness in her upper legs and thighs and true weakness in her lower left leg. She also had a loss of sensation and the feeling in her lower left leg. When she walked, Dr. Ferraraccio noted a foot drop on the left and tight muscle spasms in her lower back and thoracic area with tenderness in her lower spine. Dr. Ferraraccio initially diagnosed muscle spasm with probable nerve root compression at L5 causing her to have the lower leg weakness. He prescribed Zanaflex, a muscle relaxer and an electromyogram (EMG).

Nerve conduction studies were done for both legs. The results were normal meaning there was no compression in the peripheral nerves as opposed to the nerve root coming from the spinal column. An EMG was performed on the left leg and the results indicated a denervation in several muscles controlled by the L5 nerve root. As a result of these findings he sent her for an MRI. The radiologist who performed the MRI interpreted a midline protrusion of the L4/L5 disc. No neural impingement was identified. However, with the patient erect, the protrusion may be more significant.

Dr. Ferraraccio referred Mrs. Huke to Dr. Richard A. Berkman for an evaluation of whether or not she was a surgical candidate. Dr. Berkman reviewed the MRI scan that had been performed at the request of Dr. Ferraraccio, thought the symptoms were out of proportion to the imaging studies and did not recommend surgery. The letter from Dr. Berkman also indicates that she has Lupus and her pain may be due to peripheral neuropathy as opposed to lumbar radiculopathy. Dr. Ferraraccio, to the contrary, believes that Mrs. Huke would improve if she has the protruding disc removed.

Dr. Ferraraccio diagnosed Mrs. Huke as having an L5 nerve root malfunction due to the disc protrusion at L4/L5 that was caused by the April 2001 accident. He opined that she had sustained a medical impairment of sixteen percent (16%) to the body as a whole. Dr. Ferraraccio

imposed restrictions of no climbing, balancing, kneeling, crawling or twisting. She was also restricted from lifting ten pounds frequently-that means no more than three hours per day-and from standing and walking more than three hours per day. He believes her impairment and these restrictions will be permanent.

Dr. Daniel J. McHugh also testified by deposition. He became licensed to practice medicine in 1995 and is a physiatrist associated with Premier Orthopaedics and Sports Medicine since 1997. He first saw Mrs. Huke in April 2001. She complained of constant back pain across her lower back and left hip girdle. She said this began on April 3 when she was standing between a crane and deck plates of a barge while welding when the crane moved and caught her right shoulder, forcing her to twist around while her hips were immobilized between the crane and the deck plate. She was treated at the Vanderbilt emergency room and subsequently underwent an MRI which revealed evidence of degenerative disc disease at L4/L5 and a posterior disc protrusion which combined with her congenital stenosis of the spinal canal resulted in some moderate central stenosis. Dr. McHugh admitted that the trauma Mrs. Huke experienced during the accident may have caused the disc protrusion.

When Dr. McHugh first saw her, she had been to physical therapy which provided some relief. She continued, however, to have constant pain but denied any numbness or weakness in either lower limb. She also denied a history of previous back problems. Dr. McHugh conducted a physical examination which revealed her walking with a limp and dragging her left foot. She reported normal sensation in both lower limbs, but demonstrated some ratchety give away weakness in every muscle group tested in the left lower limb. Dr. McHugh described her range of motion, inflection and extension of the hips, and lateral bending to be within the functional range.

Dr. McHugh testified that ratchety weakness generally occurs with either pain, inhibition or sub-maximum effort. Weakness due to a neurologic injury, generally, is a smooth giving way as the member overcome by greater strength. Another aspect of strength testing is to see if there is consistency in the patient's symptoms. He did not believe her symptoms were consistent in that she was able to get up and off the exam table although with a limp. In the opinion of Dr. McHugh, this activity required more strength than was demonstrated by his being able to overcome her lower limb strength with one hand during the strength testing. Dr. McHugh believed her pain was primarily muscular since the MRI did not demonstrate an obvious pinched nerve.

The last time Mrs. Huke was seen by Dr. McHugh was May 24, 2001. She reported that her hip pain had resolved. She still had some mild stiffness in the lower back and had improved but had no lower limb symptoms at the time. Upon physical examination she was able to walk without a limp and to rise from a seated position and to squat and rise without difficulty. She was non-tender throughout the hip girdle but did report some mild tenderness across the posterior aspect of the lower pelvis and the extreme of the lower back. Dr. McHugh recommended a transitional period of gradually increasing her activity, recommended that she restrict herself to lifting up to fifty pounds until June 4 when it would be safe to resume her normal activities. Dr.

McHugh believed Mrs. Huke did not retain a permanent impairment based on the information he had from her last visit and that permanent restrictions were not necessary.

III. THE RULING OF THE TRIAL COURT.

The Court found Mrs. Huke had sustained a sixteen (16%) percent impairment to the body as a whole as a result of the injury sustained by her in April 2001. The court further found there had not been a meaningful return to work and therefore the Court was not limited to 2.5 times the impairment rating cap. The trial judge found that she was disabled in the amount of four times her impairment or sixty-four (64%) percent to the body as a whole which was awarded in a lump sum.

IV. 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. *Lollar v. Wal-Mart Stores, Inc.*, 767 S.W.2d 143, 149 (Tenn. 1989); Tenn. Code Ann. § 50-6-225(e)(2). 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 since the trial court 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 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).

V. ANALYSIS.

The first issue raised by the appellant is whether the trial court erred in finding the appellee, Ruth Huke, sustained a permanent partial disability as the result of her April 2001 accident. Permanency in worker's compensation cases must be established by expert medical testimony. *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804 (Tenn. 1990). Since the expert medical testimony was presented by deposition, this panel is in as good a position as the trial court to evaluate that testimony and draw its own conclusions. We have done so.

Both doctors testified as to a finding of a disc protrusion into the L4/L5 space as a result of an MRI requested by each doctor. Dr. McHugh testified the disc protrusion could have been caused by the accident. Dr. Ferraraccio testified that in his opinion it was caused by the accident. In both cases the MRI failed to show nerve root impingement. The proof before the court was, however, that MRI's are given with the patient lying down. With the patient erect, more pressure is placed on the disc which may cause the protrusion to be more significant.

Dr. Ferraraccio had nerve conduction studies done for both legs which were normal. This result indicates no malfunction in the peripheral nerves that may have caused Mrs. Huke's

symptoms. He then had an electromyogram performed on Mrs. Huke's left leg. This test revealed the denervation in several muscles controlled by the L5 nerve root. Based upon this evidence, Dr. Ferraraccio was of the opinion Mrs. Huke suffers from a malfunction of the L5 nerve root caused by the disc protrusion at L4/L5.

Dr. Ferraraccio referred Mrs. Huke to Dr. Richard A. Berkman, a neurological surgeon. He reviewed the MRI scan and felt she did not need surgery and that her symptoms were out of proportion to "her imaging studies." Dr. Berkman did not testify in this case and we cannot speculate as to whether he had access to Dr. Ferraraccio's nerve conduction studies or the results of the electromyogram or whether he performed his own. Dr. Berkman raised the possibility that Mrs. Huke's problems are a peripheral neuropathy caused by lupus. That possibility was not developed during the trial and seems to be contrary to the results of Dr. Ferraraccio's peripheral nerve conduction studies.

Based upon the medical evidence, we find by a preponderance of the evidence that Mrs. Huke sustained a permanent injury as a result of the accident and that Dr. Ferraraccio's diagnosis is the more reasonable explanation of the severity of that injury and the causes of Mrs. Huke's symptoms. We affirm the trial court's finding of a permanent disability.

The appellant next raises the issue of whether the trial court erred as to the extent of the disability award. We do not find the evidence preponderates against the trial court's finding that Mrs. Huke terminated her employment with Trinity Industries because she was physically unable to perform her regular job at the time she was told she could return to that job on an unrestricted basis. When the issue is whether there has been a meaningful return to work, the court's inquiry must focus on "the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to return to work." *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625 (Tenn. 1999). We agree that it was reasonable for the plaintiff to refuse to return to her previous job because of her physical limitations and the statutory cap provided for in T.C.A. §50-6-241(a)(1) would not apply. We may also assume that since the trial court, as we do, accredited Dr. Ferraraccio's diagnosis and determination of medical impairment, it also accepted the restrictions imposed by him on the activities of the plaintiff. The trial court was also able to observe and evaluate the recitation of the plaintiff with regard to the activities she was unable to perform and the fact she believed she had lost 70-80% of her motor function. While we may have reached a different result, we cannot say that the evidence preponderates against the finding of the trial court with regard to the extent of the plaintiff's injury.

VI. CONCLUSION.

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

DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
FEBRUARY 23, 2005 SESSION

RUTH HUKÉ v. TRINITY INDUSTRIES, INC.

**Circuit Court for Montgomery County
No.50200216**

No. M2004-00907-WC-R3-CV - Filed - June 1, 2005

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 appeals 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, Trinity Industries, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM