

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE, TENNESSEE,
February 24, 2005, Session

AILEEN PYLES v. PACIFIC COAST FEATHER COMPANY, ET AL.

**Direct Appeal from the Circuit Court for Anderson County
No. A3LA0082, James B. Scoot, Jr., Circuit Judge
Filed June 13, 2005**

No. E2004-01738-WC-R3-CV - Mailed May 5, 2005

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel 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 appeal, the employer asserts that the trial court erred in awarding to the employee a 55% permanent partial disability to the left arm and a 45% permanent partial disability to the right arm as a result of her employment with Pacific Coast Feather Company and in awarding discretionary costs including the amount of \$500.00 for an independent medical evaluation. We conclude that the evidence presented supports the findings of the trial judge and, in accordance with Tenn. Code Ann. §50-6-225(e)(2), affirm the judgment of the trial court but modify the judgment to exclude the award of the expense for an independent medical examination as a discretionary cost.

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

DONALD P. HARRIS, SENIOR JUDGE, delivered the opinion of the court, in which E. RILEY ANDERSON, JUSTICE, and ROGER E. THAYER, SPECIAL JUDGE, joined.

Thomas M. Horne, Chattanooga, Tennessee, for Appellants, Pacific Coast Feather Company and Royal & SunAlliance Insurance Company.

Roger L. Ridenour, Clinton, Tennessee, for appellee, Aileen Pyles.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND.

Aileen Pyles was fifty-two years of age at the time of trial and had been married for thirty-five years. She completed the eighth grade at Clinton Elementary School. Her work experience

primarily has been sewing for various companies and, for a time, she was a housekeeper at a senior citizen's home.

At the time she was employed by Pacific Coast Feather Co., she was in good health. About 2001 or 2002, she began having problems with her hands. The company sent her to Dr. Trent McNeeley who referred her to a surgeon. When it became apparent that surgery would be required, the workers' compensation specialist handling her case insisted that she go to Dr. Rick Parsons. Dr. Parsons performed surgery on her left hand on January 17, 2003. She has not had treatment on her right hand. After Dr. Parsons released her following surgery to her left hand, she returned to work with the restriction that she not use her left arm. The employer provided a light duty job but she had to use both hands. Her surgical incision reopened and she had it treated. Not using her left arm caused the pain in her right hand to worsen. Pacific Coast laid her off because they were going to close the plant and did not have any light jobs. Shortly thereafter she was terminated. She has made some attempt to find work since that time but has not been successful.

She has continued to have problems with her left hand following surgery. Her hand is constantly painful and prevents her from doing housework. For example, she cannot clean a bathtub because of the twisting of her hands. She is unable to do simple things such as removing laundry from a washing machine or cooking. She wears clothing that has no buttons because she is unable to manipulate them. She also has difficulty with zippers and, as a result, wears a lot of pull-on type clothing. She keeps her hair short because she cannot care for it. Her hands frequently go numb especially when she drives for any distance. As a result of inactivity, she has gained thirty to forty pounds in weight.

II. MEDICAL AND OTHER EXPERT EVIDENCE.

Dr. Cletus J. McMahon, Jr., a board certified orthopaedic surgeon with the Orthopaedic Surgeons of Oak Ridge, testified by deposition. He performed an independent medical evaluation on October 27, 2003. When he examined her, Mrs. Pyles had an obvious well-healed incision over the left carpal tunnel and the left long finger from her surgery. She had a positive Tinel's and Phalen's test in both wrists which support the diagnosis of carpal tunnel syndrome. He reviewed nerve conduction studies performed prior to her surgery that also confirmed carpal tunnel syndrome. Dr. McMahon found that she continued to have difficulty with carpal tunnel after surgery. Dr. McMahon diagnosed bilateral carpal tunnel syndrome and failed carpal tunnel release on the left. In his opinion the carpal tunnel was caused by her years of employment as a sewing machine operator. Using the *Fifth Edition of the AMA Guidelines to Permanent Physical Impairment*, Dr. McMahon felt she would retain a 5% impairment to both upper extremities. He has cautioned her against doing repetitive activities over a long period of time and lifting more than twenty-five pounds.

Testifying for the defendant was Dr. Rick E. Parsons, a board certified orthopaedic surgeon who has conducted seminars for case managers in workers' compensation matters. He first saw Mrs. Pyles on January 13, 2003. She had been referred by workers' compensation for a second opinion

concerning bilateral hand pain and numbness and also her left trigger finger. She had some symptoms in the right hand but they were not as significant as in the left. He noted the trigger finger on the long finger on the left hand. Dr. Parsons also reviewed EMG's which indicated bilateral carpal tunnel. He recommended surgical release of the left trigger finger and the left carpal tunnel. The surgery was performed on January 17, 2003.

One week after the surgery, she had minimal complaints, no triggering, and was doing well with no complaints of numbness or tingling of the hand. She returned on February 14, four weeks after the surgery, and had some residual discomfort and soreness over the palm, but no triggering. She was sent to occupational therapy for rehabilitation and was allowed to continue light duty work. She followed through with her physical therapy and was next seen by Dr. Parsons on March 18, some eight weeks after the surgery. At that time, she had some improvement as a result of the therapy but was still somewhat sore and uncomfortable when gripping and had other residual symptoms, especially in the morning. Dr. Parsons discharged her with a home exercise program and continued her on light duty.

Dr. Parsons last saw Mrs. Pyles on April 18, 2003. At that time, she stated she had some occasional stiffness in the morning, occasional night numbness, but otherwise was doing very well. Dr. Parsons felt like Mrs. Pyles had reached maximum medical improvement and discharged her with no permanent restrictions and no impairment according to the AMA Guides for minimum symptoms patients. According to Dr. Parsons, there was no objective basis for an impairment rating although he did not have further nerve conduction studies done following surgery and he indicated the last time he performed a Phalen's or Tinel's test on Mrs. Pyles was during the preoperative evaluation. Dr. Parson's also had the Clinton Physical Therapy records which indicated that upon discharge on March 14, 2003, Mrs. Pyles still had swelling and triggering of the long finger in the mornings.

Mike Galloway performed a vocational evaluation of Mrs. Pyles. He reviewed medical records from Dr. McMahan and Dr. Parsons. He noted that Dr. Parsons had given no permanent restrictions and no impairment rating. Based on Dr. Parson's findings, Mr. Galloway formed the opinion that Mrs. Pyles would have no vocational disability. Mr. Galloway also administered a Wide Range Achievement Test. The results indicated Mrs. Pyles could read at the fourth grade level and perform at the fifth grade level in math. Mr. Galloway indicated that Mrs. Pyles would have a 61% vocational disability based on Dr. McMahan's opinions.

Dr. Craig Colvin, a professor in the rehabilitation counselor training program at the University of Tennessee, with a doctorate in counselor education and disability management from the University of Virginia, testified for the plaintiff. He has testified on many occasions for injured employees and for workers' compensation insurance carriers on an almost equal basis. Dr. Colvin interviewed Mrs. Pyles and reviewed the medical records and depositions filed in the case. In the opinion of Dr. Colvin, Mrs. Pyles has sustained an occupational disability in the range of 70-80% because of the injury to her hands.

III. RULING OF THE TRIAL COURT.

The trial court found Mrs. Pyles had sustained a 55% permanent partial disability to the left arm and a 45% permanent partial disability to the right arm. The court also awarded future medical benefits and Mrs. Pyles discretionary costs, including the sum of \$500.00 for the independent medical evaluation performed by Dr. Cletus J. McMahon, Jr.

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 (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 (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 (Tenn. 1991).

V. ANALYSIS.

In making a determination as to disability, the court is required by Tenn. Code Ann. §50-6-241(c) to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and the capacity to work at types of employment available in the claimant's disabled condition. In the case before the court, the plaintiff has essentially an eighth grade education and has difficulty with reading comprehension. Her prior employment history is limited to sewing and working with her hands as a housekeeper in a senior citizen's home. She now has difficulty with ordinary daily activities such as buttoning her clothes, caring for her hair, cooking, cleaning and driving. In our view, the testimony of Dr. Cletus J. McMahon, Jr., is the more credible of the two medical doctors. Dr. Parsons found Mrs. Pyles sustained no impairment because there was no objective basis for an impairment rating. He failed, however, to administer any test that would have produced an objective result following Mrs. Pyles' surgery despite evidence of soreness, discomfort and swelling. Dr. McMahon found positive Phalen's and Tinel's tests in both hands indicating a failed left carpal tunnel release and bilateral carpal tunnel syndrome. He found that she retained a 5% permanent impairment in each arm. The finding of the trial court that Mrs. Pyles sustained a 55% permanent partial disability to the left arm and a 45% permanent partial disability to the right arm is clearly supported by the greater weight of the evidence.

The appellant alleges the trial court erred by awarding discretionary costs because the evidence did not support an award of permanent partial disability benefits. Since we have found the

greater weight of the evidence supported the trial court's determination with regard to permanent partial disability, this issue is without merit.

Finally, the appellant challenges the award of discretionary costs relating to the fee of Dr. McMahon for the independent medical evaluation. Rule 54.04 of the Tennessee Rules of Civil Procedure provides that the court in its discretion may award costs to the prevailing party not included in the bill of costs prepared by the clerk. Discretionary costs allowable include reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions and for trials, reasonable and necessary interpreter fees for depositions or trials, and guardian ad litem fees. In addition, Tenn. Code Ann. § 50-6-226(c)(1) provides as follows:

"The fees charged to the claimant by the treating physician or a specialist to whom the employee was referred for giving testimony by oral deposition relative to the claim, shall, unless the interests of justice require otherwise, be considered a part of the costs of the case, to be charged against the employer when the employee is the prevailing party."

Since neither of these provisions allow a fee for performing an independent medical examination to be taxed as discretionary costs and we know of no authority for doing so, the judgment of the trial court shall be modified to exclude this expense.

VI. CONCLUSION.

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

DONALD P. HARRIS, 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 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 appellants, Pacific Coast Feather Company and Royal & SunAlliance Insurance Company, for which execution may issue if necessary.