

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
June 28, 2005 Session

SUMMER TAYLOR v. CARHARTT, INC.,

**Direct Appeal from the Circuit Court for Benton County
No. 3 CCV - 774 Creed McGinley, Circuit Judge**

No. W2004-02446-WC-R3-CV - Mailed August 30, 2005; Filed September 29, 2005

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with the Tenn. Code Ann. Section §50-6-225 (e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The appellant, employer, argues that the trial court erred in finding that the employee sustained a permanently disabling condition while employed with the appellant and that if she did, the trial court's award of 25% permanent partial disability to each arm is excessive and is contrary to the weight of the evidence. The appellee, employee, argues that the trial court's ruling was correct and should be affirmed. For the reasons discussed below, the panel has concluded that the judgment of the trial court should be affirmed in all respects.

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

ARNOLD B. GOLDIN, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and ROBERT E. CORLEW, III, SP. J., joined.

J. Arthur Crews, II and Michael J. Cash, Waldrop & Hall, Jackson, Tennessee, for the appellant.

Charles L. Hicks, Camden, Tennessee, for the appellee.

MEMORANDUM OPINION

STANDARD OF REVIEW

The review of the findings of the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. T.C.A. §50-6-225(e)(2). Stone v. City of McMinnville, 896 S.W. 2d 548, 550 (Tenn. 1995). This court is not bound by the trial court's findings, but instead conducts its own

independent examination of the record to determine where the preponderance of the evidence lies. Galloway v. Memphis Drum Service, 822 S.W. 2d 584, 586 (Tenn. 1981).

FACTUAL BACKGROUND

The employee, Summer Taylor, filed her complaint for workers' compensation benefits alleging that she sustained injuries to both shoulders, arms, wrists and hands while in the course and scope of her employment with her employer, Carhartt, Inc. ("Appellant"). Her complaint alleged that her injuries were permanent and that she was entitled to benefits for both temporary and permanent partial disability, in addition to current and future medical care. The employer denied Ms. Taylor's claim in its entirety.

Following a trial on August 25, 2004, the court found that Ms. Taylor sustained a compensable injury to both of her arms and awarded her twenty-five (25%) permanent partial disability to each arm. The court further found that the portion of permanent partial disability which had accrued since January 21, 2003, the date she reached maximum medical improvement, through the date of trial was to be paid in a lump sum with the balance to be paid periodically. The court further found the employer responsible for unpaid medical bills to an authorized treating physician, Dr. Salazar, but that the employer was not responsible for medical treatment which she had sought on her own that was not authorized by her employer. The court further ordered that the employer would be responsible for Ms. Taylor's future medical care for the injuries to her arms and for certain mileage incurred in seeking treatment from her authorized physicians as well as for certain discretionary expenses she incurred. The Appellant has appealed from the entire award.

Ms. Taylor was 22 years old at the time of trial. She did not complete high school but obtained her GED soon after leaving school in the twelfth grade. After receiving her GED she worked at several manual labor, entry level jobs including Burger King, a nursing home carrying food trays to patients, Plumley (through Manpower Temporary Services), North 40 Truckstop and the Blackberry Patch as a waitress, in addition to her job with Appellant.

LEGAL AND MEDICAL CAUSATION

Ms. Taylor began full time employment as a seamstress for the Appellant in May, 2001. Her duties were to topstitch and sideseam bib-overalls. According to her testimony at trial, the material used to manufacture the bib-overalls is rough and thick. She was required to reach and grab the overalls from a buggy, pull them to her machine and sew them, and then throw them back onto the buggy. At the time of her injury she was sewing approximately 500 pairs of bib-overalls a day. She worked on a production based system and exceeded her production quota before suffering her work injury.

Prior to working at Carhartt she had never experienced any problems with either her arms or hands. In May, 2002, however, she began experiencing left hand and thumb pain. She reported this to her supervisor. Although her testimony at trial was that she was provided a list of doctors, and

that she chose Dr. Robert Bourne, a general practitioner, she was, according to the medical records, first seen by Chris Bryer, FNP (family nurse practitioner) with Huntingdon Medical Associates on May 16, 2002¹ for left hand and left shoulder pain. Bryer found a slight decrease in left hand grip and wrist tenderness. She was given a prescription for Vioxx and placed on light duty for one week.

Ms. Taylor saw Dr. Bourne on May 29, 2002, complaining of left arm pain of about two weeks duration. He prescribed medication including Vioxx, a Medrol Dosepak, Darvocet for pain, and Robaxin, and placed her on light duty. After a month on light duty, she returned to her regular job of top stitching and sideseaming.

A couple of months later, she began experiencing right arm pain. She again reported this to her supervisor and was given another list of approved doctors. This time she chose Dr. Sergio Salazar, a specialist in internal medicine/allergy.

Ms. Taylor saw Dr. Salazar on October 4, 2002, complaining of right hand numbness and “hand pain that sometimes [shot] from her wrist to her fingers and way up into her arm up to her elbow.” Dr. Salazar’s notes reflect that she had “a positive Tinel’s sign” and diagnosed her with Carpal Tunnel Syndrome. He prescribed additional medication including Solumedrol, Depomedrol and Naprosyn and placed her back on light duty status.

Ms. Taylor returned to Dr. Bourne on September 9, 2002, complaining of pain in both wrists. She saw him four other times between September 11 and October 28, 2002. She consistently complained of bilateral pain in her arms and wrists. Dr. Bourne’s September 20 note states “left arm worse. pain in arm and wrist - has worsened. Still doing same thing she was doing to cause the problem in the first place.” Ultimately, he referred her to Dr. Claiborne Christian, an orthopaedic surgeon.

Ms. Taylor saw Dr. Christian on November 5, 2002. Dr. Christian’s history stated that she has had problems with her left upper extremity since May and with her right for the last two months. He further stated:

She describes the fact that she has pain, numbness and tingling into her hands. She states that the left side is considerably worse than the right. It is usually an aching type pain along with numbness and tingling. She has had no direct injury that she can recall. She states that it is relieved with rest exacerbated by activity.

His physical examination found a positive Tinel’s and Phalen’s on the left, negative on the right. His diagnosis: “Tendonitis, possible carpal tunnel syndrome, left upper extremity. Tendonitis,

¹Family Nurse Practitioner Chris Bryer is associated with Dr. Sergio Salazar at Huntingdon Medical Associates. Taylor would later see Dr. Salazar for subsequent problems with her left hand.

right upper extremity.” He gave her an intracarpal injection in her left arm and placed her on light duty for two weeks.

Dr. Christian saw her again on November 19, 2002. His notes state: “She still has positive Tinel’s and Phalen’s *especially* on the left . . .” (Emphasis added) On this visit his diagnosis was bilateral carpal tunnel syndrome. In spite of this diagnosis, he released her to return to regular duty.

Ms. Taylor returned to see Dr. Christian on January 21, 2003, for reevaluation. He stated that she “continues to have bilateral hand pain with numbness and tingling.” He also stated: “I do not think there is much else I can do for her. I am certainly not trying to say that she does not have a problem.” Apparently based on repeated normal EMG studies, Dr. Christian’s final diagnosis was “a tendonitis type problem.” He declared her to be at maximum medical improvement (MMI) and released her to full duty.

Ms. Taylor testified at trial that after her release to full duty by Dr. Christian, she was hurting so badly she could not stand it. Her production went from 120% of production to 70-80% of production. After about 2-3 weeks back at full duty, she quit her job at Carhartt.

Having been released at MMI by Dr. Christian and no longer employed, Taylor sought medical treatment on her own.

On March 21, 2003, she was seen by Dr. Shankar Natarajan, a neurologist affiliated with Memphis Neurology. The history taken by Dr. Natarajan reflected that Ms. Taylor’s complaints, including shoulder pain and numbness in the upper extremities and hands, “has been going on since May, 2002.” His findings on physical examination included “mild proximal weakness . . . in the upper extremities.” Although she was scheduled for a follow-up visit, there are no records to reflect whether or not this occurred.

In May, 2003, however, Ms. Taylor was seen by another neurologist, Dr. Salman Saeed, with West Tennessee Neurology in Covington.² In a May 14, 2003, referral report, Dr. Saeed related Taylor’s history, in part, as follows:

The patient presents with complaints of bilateral upper extremity pain. The patient also has complaints of numbness and tingling in bilateral upper extremities . . . She has had these symptoms for 1 year. She says the symptoms are getting worse . . . There are complaints of motor weakness. She reports occasionally dropping things from her left hand . . . The patient describes grip weakness in both hands . . .

² The medical records reflect that the referrals to both Dr. Natarajan and to Dr. Saeed were from family nurse practitioner Deborah Wood with the Camden Medical Clinic in Camden, Tennessee.

Dr. Saeed's assessment stated that "her neurologic exam is consistent with carpal tunnel syndrome."

He ordered another EMG test. Its results were also normal.

In December, 2003, Ms. Taylor was referred by her attorney to Dr. Joseph C. Boals, III, for a medical evaluation. Dr. Boals took a history from her which reflected symptoms of pain in both hands, neck, and left shoulder, associated with her job at Carhartt and that she continued to complain of night numbness in both hands. She related to Dr. Boals that she had three nerve conduction tests (EMG) which were normal.

Dr. Boals physical examination showed a positive compression test and Phalen's test. He also found decreased sensation to monofilament testing in the distribution of the median nerve bilaterally. His diagnosis was: "Ongoing bilateral carpal tunnel syndrome mild to moderate."

Dr. Boals gave his opinion that Ms. Taylor did not have impairment for her neck and shoulder injuries. As to her hands, he stated as follows:

[I]t is clear that Ms. Taylor has bilateral carpal tunnel syndrome. Campbell's Operative Orthopaedics Tenth Edition, page 3763, states that an abnormal hand diagram, an abnormal monofilament test, a positive compression test, and night pain is the best way to make the diagnosis of carpal tunnel syndrome. EMG/nerve conduction studies according to that treatise do not increase the diagnostic value of these tests.

Ms. Taylor had positive responses to each of the above described tests. Dr. Boals assigned her a 10% impairment to each arm and stated "she should avoid heavy work and repetitive gripping."

After leaving her job at Carhartt, Ms. Taylor has worked at several less manual labor intensive entry-level jobs including Dollar General as a stocker, Kilmore Mills, Gina's Housekeeping, Exxon Shortstop, and her current job at Burger King as a cashier and sandwich maker.

At the time of trial, Ms. Taylor testified that she continues to have ongoing problems with her hands and arms including decreased grip strength bilaterally, numbness, tingling and pain. She also testified that she had lost half the grip strength in her left hand and that she has night pain in her arms which makes it difficult for her to sleep. She can also no longer do yardwork or housework.

Appellant contends that because Ms. Taylor was not diagnosed with a permanently disabling condition until approximately ten months after leaving her job with them and after working for four or five other employers, that the preponderance of the evidence does not support the trial court's

finding that it should be liable for the injuries to her hands and arms. Based on a review of the record in this case, there is not a scintilla of evidence to support a contrary finding by the trial court.

COMPENSABILITY

The only proof in this record regarding the compensability of Ms. Taylor's injuries is that she began complaining of problems with her hands and arms—albeit first the left, then the right, then both—beginning in May 2002, while employed by the Appellant. From her first visit with Family Nurse Practitioner Chris Bryer on May 16, 2002, through her visits with Drs. Bourne, Salazar, Christian, Natarajan, Saeed, Family Nurse Practitioner Deborah Woods and culminating with her evaluation by Dr. Boals, her complaints of arm and hand problems were consistent.

Appellant complains that because Ms. Taylor worked for five different employers between the time she left Carhartt and was evaluated by Dr. Boals, that it cannot be liable for her injuries because the employer for whom the employee is working at the time of the most recent injury is liable for any and all permanent disability. Deanna Lumberman's Mutual Ins. Co. v. Ray, 596 S.W.2d 816 (Tenn. 1980); Barker v. Home-Crest Corp., 805 S.W.2d 373 (Tenn.1991).

The Appellant is apparently referring to the “Last Injurious Injury Rule.” Under this rule, an employer takes the employee as he finds him and if an employee, having previously sustained an injury while working for a different employer, is injured on his new job and the new injury is causally connected to his employment, the new employer is liable for the effects of the entire injury even though the resulting disability is far greater than if the second injury were evaluated on its own. Baxter v. Smith, 364 S.W.2d 936, 943 (Tenn. 1962).

The rule is inapplicable to the present case because the only proof in this record is that Ms. Taylor's arm and hand injuries were sustained as a result of her work as a topstitcher and sideseamer seamstress at Carhartt and not as a result of her subsequent employment.

The Appellant offered no evidence that Ms. Taylor sustained a new injury or an aggravation of her preexisting injuries at a subsequent employment. If the employee's new employment does not aggravate or advance the employee's gradual occurring injuries, the employee has not suffered new or additional injuries. Unlike the fact situation in Barker, the trial court found that the symptoms occurring after Ms. Taylor left her employment at Carhartt were “simply manifestations of the original injury” she had suffered while employed there. *See, Barker*, p.375.

Not only did the Appellant *not* offer any independent expert medical testimony to support its theory, it did not even cross examine Dr. Boals. If the Appellant contends that the employee's injury occurred elsewhere or is a new injury, it must offer expert medical proof except in the most obvious cases, of which this is not one. Johnson v. Midwesco, Inc., 801 S.W.2d 804 (Tenn. 1990); Owens, Ill., Inc. v. Lane, 576 S.W.2d 348 (Tenn. 1978). The only expert medical evidence in this case on causation and permanency is Dr. Boals' opinion that Ms. Taylor sustained permanent

bilateral arm injuries as a result of her work at Carhartt. Moreover, the medical records and the employee's own testimony support this conclusion.

Without proof to the contrary, any other conclusion would be mere speculation.

PERCENTAGE OF PERMANENT PHYSICAL IMPAIRMENT

Finally, the Appellant argues that the preponderance of the evidence does not support the trial court's award of 25% permanent partial disability to each arm.

In determining an award of permanent partial disability, courts consider many factors including the employee's age, educational skills and training, local job opportunities, anatomical impairment, and the capacity to work at various types of available employment in the workers' disabled condition. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 459 (Tenn.1988).

Ms. Taylor was 22 years old at the time of trial. She did not complete high school but obtained her GED soon after leaving school in the twelfth grade. After receiving her GED she worked at several manual labor, entry level jobs in addition to her job with Appellant.

Ms. Taylor began full time employment as a seamstress for the Appellant in May, 2001. Her duties were to topstitch and sideseam heavy material bib-overalls. At the time of her injury she was sewing approximately 500 pairs of bib-overalls per day. She worked on a production based system and before suffering her work injury she exceeded her production quota. Prior to working at Carhartt she had never experienced any problems with either her arms or hands. After her injury in May, 2002, that all began to change.

All of the doctors that treated her have recognized that she was having problems with her hands and wrists, even though their actual diagnosis may have differed. Even Dr. Christian, who first saw her in November 2002 and released her in January 2003 to return to full duty without impairment or restrictions stated:

I do not think there is much else I can do for her. I am certainly not trying to say that she does not have a problem.

Dr. Boals opined that she should "either continue with conservative management or eliminate repetitive work and heavy gripping." He gave her a 10% permanent impairment to each arm.

Ms. Taylor continues to have ongoing problems with her hands and arms including decreased grip strength bilaterally, numbness, tingling, and pain. She has lost half the grip strength in her left hand and has night pain in her arms which makes it difficult for her to sleep. She can no longer do yardwork or housework. She was unable to continue performing the heavy repetitive work required of her by the Appellant and quit her job in February, 2003. She now works at Burger King as a cashier and sandwich maker.

As the Supreme Court stated in Corcoran:

Despite the employee's return to any employment, if the employee's ability to earn wages in any form of employment that would have been available to him in an uninjured condition is diminished by an injury, then that is what is meant by vocational disability for the purposes of Workers' Compensation.

Id.

The Appellant offered no proof at trial to refute either the employee's testimony or that of her expert medical witness. Their only argument is that the award is excessive. We disagree.

CONCLUSION

For the reasons stated above, the judgment of the trial court is affirmed in its entirety. The cost of this appeal is taxed to the Appellants.

ARNOLD B. GOLDIN, 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, Carhartt, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM