

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
March 7, 2006 Session

CYNTHIA A. FISHER v. PLUS MARK, INC.

**Direct Appeal from the Circuit Court for Greene County
No. 02-CV-285 Benjamin K. Wexler, Judge**

Filed June 22, 2006

No. E2005-00992-WC-R3-CV - Mailed May 15, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court 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. The trial court awarded the Employee a 50 percent vocational disability for bilateral carpal tunnel syndrome. The Employer appeals asserting that the award is excessive. The judgment of the trial court is affirmed.

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

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the court, in which WILLIAM M. BARKER, C. J., and HOWELL PEOPLES, SP. J., joined.

Jeffrey C. Taylor, Morristown Tennessee, attorney for appellant, Plus Mark, Inc.

J. Russell Pryor, Greeneville, Tennessee, attorney for appellee, Cynthia Fisher.

MEMORANDUM OPINION

Factual Background

The Employee, aged fifty-one at time of trial, left high school, but obtained her GED. Before her employment at Plus Mark, Inc. in 1998, she had worked as a cashier at convenience stores and as an assembly line worker.

Employee's initial responsibilities with Plus Mark were to pull defective bows from the assembly line. She also worked as a check and utility worker. The work at Plus Mark was seasonal, usually lasting from May through November.

In September 2000, the Employee experienced pain in her hands while she was working on the line. She was initially seen by her family doctor and taken off work for one week. After returning to work, she continued to experience pain. The Employee notified her supervisor, but continued to work. The pain caused her to get behind on her work which would anger the other workers and cause her embarrassment and depression. Eventually, the Employee, who was experiencing persistent symptoms of carpal tunnel syndrome, went to Human Services to arrange for medical treatment.

Dr. Gorman, an orthopedic specialist, saw the Employee on February 2, 2002. He testified by deposition that he treated her conservatively, recommending splints and a five pound lifting restriction. When Employee's pain persisted, Dr. Gorman prescribed steroid injections. When it became obvious that the conservative treatment was not alleviating the Employee's pain, Dr. Gorman testified that he recommended staged carpal tunnel release. Surgery was performed on the Employee's right hand on April 12, 2001, and on the left hand on August 17, 2001. Dr. Gorman testified that he saw the Employee several times thereafter before releasing her for regular duty on September 29, 2001. She returned to her old job on the line, but continued to experience pain. The Employee testified that she tried to get an appointment with Dr. Gorman but was unsuccessful. After missing a significant amount of time from work, she was terminated on October 4, 2001, for excessive absenteeism.

The Employee then worked three weeks during the Christmas season as a cashier at Wal-Mart. In 2002, she babysat for her niece. The Employee testified she applied for employment at Five Forks and that when she disclosed that she had carpal tunnel syndrome, she was told that she could not do the job at Five Forks. The Employee has not worked since her job at Wal-Mart.

Employee testified that she has trouble holding things, sometimes dropping dishes at home and food in the grocery store; that it takes her longer to do her housework; that her hands become numb; that she it is difficult for her to pick up coins; that she had to give away her pet because of the inability to perform routine duties required for its maintenance, and that she is discouraged and depressed.

Medical Evidence

In his deposition, Dr. Paul Gorman testified he first saw the Employee on November 9, 2000. The Employee had been referred to him by the Employer's workers' compensation carrier. After a physical examination, Dr. Gorman concluded that the Employee was suffering from bilateral carpal tunnel syndrome and chronic tobaccoism. He ordered a nerve conduction study while treating the patient conservatively. This treatment included splints and bilateral steroid injections. The nerve studies revealed mild median neuropathy at both wrists. Dr. Gorman saw the Employee again on November 22 and December 21, 2000. During this time, the Employee had been on a seasonal layoff but had experienced persistent symptoms in spite of her layoff status. Dr. Gorman next saw the Employee on February 1, 2001. On this visit, Dr. Gorman recommended staged carpal tunnel

release. The first surgery, on her right hand, was performed on April 12, 2001. The surgery on the left hand was performed on August 17, 2001. Dr. Gorman saw the Employee on August 22, September 24, and October 29, 2001. A postoperative nerve conduction study was performed by Dr. Mark McQuad which revealed an improvement in both nerves' electrical conduction to near normal limits, but slightly prolonged and not normal conduction. Dr. Gorman opined that the Employee reached maximum medical improvement on December 3, 2001. Utilizing page 455, chapter sixteen of the *Fifth Edition of the AMA Guidelines*, Dr. Gorman found that the second paragraph pertained to the Employee's conditions. He opined that the carpal tunnel syndrome had resolved but that there was a residual slowing of the electrical conduction. He opined that the Employee had a 2 percent permanent partial impairment on the left and 1 percent on the right hand. The range of impairment within this guideline was 0-5 percent, with 5 percent being the maximum. Dr. Gorman opined that the Employee's impairment was at the lower end, and that the Employee did not retain any permanent physical restrictions. He based this finding on the fact that the Employee would be able to do manual labor without forceful and repetitive wrist flexion, gripping, or pinching. Dr. Gorman testified that the Employee did not need any further treatment and she was released without restrictions.

Dr. William E. Kennedy, an independent medical examiner, testified by deposition. He first saw the Employee on September 23, 2003 for an evaluation. Along with the Employee's history, Dr. Kennedy reviewed the records from Takoma Adventist Hospital, office records of doctors Gorman and McQuad, medical records from the Medical Group in Greeneville, Tennessee and electrodiagnostic studies of Dr. Harry Stumm, a neurologist.¹ Dr. Kennedy performed a physical examination looking for signs of residuals for the Employee's carpal tunnel syndrome. He found no physical signs of inflammatory arthritis which could contribute to carpal tunnel syndrome. He performed three tests commonly used for testing for residuals. The Tinel sign was negative. The medial nerve compression test was positive on the right after 30 seconds; on the left hand, the test caused mild tingling in the palm and was negative. The Phalen's test was negative. Dr. Stumm's conduction studies revealed the motor nerves to be normal but the findings of the sensory nerves indicated peak latency in milliseconds. The studies were consistent with a finding of residual moderate carpal tunnel syndrome on both sides. Using the same Guidelines as Dr. Gorman, Dr. Kennedy opined that the Employee had a permanent partial disability of 5 percent to both hands. Dr. Kennedy took into consideration that the Employee still had electrodiagnostic evidence of carpal tunnel syndrome nearly two years after surgery. Dr. Kennedy testified that this indicated permanent changes within the median nerve in both wrists. These changes made her more vulnerable to additional injuries. Dr. Kennedy also took into consideration that the Employee had not been working since October 2001. Therefore, she had not been engaged in repetitive use of the hands which would have resulted in positive findings in the three tests. Dr. Kennedy recommended that the Employee not engage in vigorous pushing or pulling, rapid repetitive motions with either hand or positioning either hand with the wrist in extreme flexion or extension. The Employee also should not attempt to hold or grip objects longer than one minute. He imposed a weight limitation of 20 pounds.

¹ Dr. Stumm had performed a nerve conduction study on the Employee on June 25, 2003.

Ruling of the Trial Court

The trial court found that the Employee sustained a work-related injury and as a result retained a 50 percent vocational disability. From these findings the Employer has appealed.

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 the 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 court has seen and heard the witnesses especially if issues of credibility and weight to be given to oral testimony are involved, considerable difference must be afforded these circumstances on review since the trial court 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 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 these issues. *Orman v. William Sonoma, Inc.*, 803 S.W.2d 672, 675 (Tenn. 1991).

Analysis

There is a dispute between Dr. Gorman and Dr. Kennedy as to the percentage of permanent partial disability as a result of the carpal tunnel syndrome as well as the restrictions she suffers as a result of her disability. Both doctors relied upon the same AMA Guidelines to place her disability within paragraph 2, page 495, chapter sixteen of the *Fifth Edition*. Whereas Dr. Gorman described her injury as mild carpal tunnel symptoms, Dr. Kennedy described the condition as moderate. Dr. Gorman released the Employee with no restrictions, but Dr. Kennedy felt that there was a risk of further injury and placed restrictions on her activities. Dr. Kennedy relied on an electrodiagnostic test performed June 10, 2003 by Dr. Stumm in arriving at his evaluation of a 5 percent permanent partial disability and testified that Dr. Stumm's test had built-in controls to verify its findings. Dr. Gorman found that test to be unreliable. Dr. Kennedy testified that the Employee had permanent changes within the median nerves in both wrists. In reviewing the expert testimony, we conclude that the opinions of Dr. Kennedy are more credible and that a permanent partial disability rating of 5 percent is warranted.

Excessiveness of the Award

The extent of vocational disability is a question of fact for the trial court and must be determined from all of 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 but one factor to be considered in determining the extent of vocational disability. *George v. Building Materials Corp.*, 44 S.W.3d 481 (Tenn. 2001). In this connection, the usual factors of the employee's age, education, work experience and opportunity in the open

labor market may also be considered. *Orman v. William Sonoma, Inc.*, 803 S.W.2d 672, 678 (Tenn. 1991). The trial court found that the Employee had stopped work; that Dr. Kennedy placed several work restrictions; that there was still some injury to her nerves and, that there was a risk of increased vulnerability for additional injuries. It should be noted that the Employee had no vocational training. Her post employment was either as a cashier or assembly line worker. Both types of employment require use of her wrists. Even though she performed baby sitting functions for one year, we do not conclude that factor to be significant in assessing her vocational possibilities. When we considered the award of 50 percent vocational disability in relation to the many factors that the trial court must consider, we cannot say the evidence preponderates against the finding of the trial court.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to the Employer.

JON KERRY BLACKWOOD, 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 appellant, Plus Mark, Inc., for which execution may issue if necessary.