IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
(July 25, 2006 Session)

SHARON NORRIS LITTLE vs. AEROSPACE CENTER SUPPORT, AS A JOINT VENTURE OF COMPUTER SCIENCE CORPORATION, AND UNITED REGIONAL MEDICAL CENTER vs. AMERICAN INTERNATIONAL GROUP, INC.

Direct Appeal from the Chancery Court for Franklin County
No. 17,683, Jeffrey Stewart, Chancellor

No. M2006-00471-WC-R3-CV - Mailed - March 2, 2007
Filed - May 10, 2007

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employee suffered carpal tunnel injuries to both upper extremities. The trial court found that the employee was entitled to a permanent partial disability award of 30% to each upper extremity. The trial court assigned liability for the benefits upon the last insurer for the employee's previous employer, finding that the employee's condition had not been aggravated or advanced by her job duties with her subsequent employer. The insurance company appealed. We affirm the trial court in all respects.

Tenn. Code Ann. § 5-6-225(e) (1999) Appeal as of Right; Judgment of the Franklin County Chancery Court Affirmed.

JEFFREY S. BIVINS, SP. J., delivered the opinion of the court, in which WILLIAM N. BARKER, CHIEF JUSTICE, and HOWELL N. PEOPLES, SP. J., joined.

Charles W. Dooley, Esq. and Carmen Y. Ware, Esq., Pioneer Building, 801 Broad Street, Third Floor, Chattanooga, Tennessee 37402-2621, for the Appellant, American International Group, Inc.

Robert G. Norred, Jr., Esq., Spears, Moore, Rebman & Williams, Chattanooga, Tennessee, for the Appellee, Sharon Norris Little.

Clancy J. Covert, Esq., Luther-Anderson, PLLP, Chattanooga, Tennessee, for the Appellee, Aerospace Center Support, pursuant to its contract with CNA Insurance Co.

Robert R. Davies, Esq., Davies, Humphreys & Evans, PLC, Nashville, Tennessee, for the Appellee, United Regional Medical Center.

MEMORANDUM OPINION

I. Facts

The Plaintiff, Sharon Norris Little ("Little"), was 55 years old at the time of the trial in this case. Little graduated from high school. Over the course of a number of years, Little attended classes at Falls Business College, Motlow State Community College, and Cumberland University; however, she never earned any degree from any of these institutions.

While attending Falls Business College, Little obtained employment with Rooney & Gleeves, an insurance agency in Nashville. At Rooney & Gleeves, Little's responsibilities included typing, filing, answering a phone, and other clerical duties. This job lasted less than one year. Little then worked approximately six weeks for a shirt factory in Manchester, Tennessee. Little sewed cuffs on long-sleeve shirts in this job. After leaving the shirt factory, Little was employed by the Coffee County Farm Bureau as a receptionist. Her responsibilities there included filing, answering the phone, and typing. Little has previously worked in the deli department at Red Food Stores. Little also worked for Holland Farm Supply and Mathison Insurance Agency in clerical jobs prior to her employment at Arnold Air Force Base.

Little began her employment at Arnold Air Force Base in June of 1983 as an "intermittent" employee. She became a permanent employee in January of 1984.[1] Computer Science Corp. ("CSC") contracted with Arnold Air Force Base to perform certain functions. CSC was the actual employer of Little. Little continued working for CSC until CSC lost its contract with Arnold Air Force Base in September, 2003. As a result of CSC's loss of this contract, Little's last date of work for CSC was September 15, 2003. Her official employment with CSC ended on September 30, 2003. After losing her job with CSC, Little enrolled at Shelbyville Technology Center and studied to become a certified nurse's assistant. Little successfully completed this training. In January 2004, Little began working at United Regional Medical Center ("URMC") as a certified nurse's assistant. CNA Insurance Company ("CNA") provided workers' compensation insurance coverage to CSC until August 1, 2003. American International Group, Inc. ("AIG") provided workers' compensation insurance coverage to CSC from August 1, 2003 through the time Little last worked for CSC on September 15, 2003, and until her employment actually ended on September 30, 2003.

Little's first permanent position with CSC was as an engineering clerk. Her responsibilities in this position were clerical in nature, including typing, filing and answering the phone. She then transferred to the payroll department, working there from 1986 trough 2001. She held various positions within the department. Her responsibilities included typing, filing, answering phones, correcting paychecks, figuring paychecks and using an adding machine. In March 2001, Little moved to the software unit and began using a keyboard for the majority of her job duties.

Little first experienced pain and swelling in her left arm in 1999. Little visited the dispensary

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[1] The initial named defendant in this action is Aerospace Center Support, as a joint venture of Computer Science Corp. and United Regional Medical Center.

at Arnold with these complaints. In August 2000, Little began experiencing pain in her right hand, fingers, and forearm. Little also visited the dispensary for these complaints. On this occasion, the dispensary referred Little to physical therapy. By October 2000, these complaints were resolved, and she reported no further such symptoms. In August 2002, Little again began experiencing pain in her right elbow. Little presented herself to the dispensary with these complaints and then saw her primary care physician, Dr. Cottrell. Dr. Cottrell treated Little conservatively for tendinitis. Dr. Cottrell did not have an EMG study done, nor did he refer Little to a specialist or indicate any need for surgery. The complaints again seemed to resolve. Little never missed any work at CSC as a result of any of these complaints.

In late January or early February 2004, after she had begun working for URMC, Little began experiencing numbness and tingling in both hands and wrists. URMC referred Little to the URMC emergency room. She visited there on February 17, 2004. In the emergency room, Little was seen by Dr. Saliva, a URMC emergency room physician. Dr. Saliva tentatively diagnosed Little with bilateral carpal tunnel syndrome. URMC subsequently referred Little to Dr. Douglas Weikert, a board certified orthopaedic surgeon at Vanderbilt Medical Center. Dr. Weikert specializes in the treatment of injuries and diseases of the hand and upper extremity. Little first saw Dr. Weikert in March 2004. Dr. Weikert confirmed the diagnosis of Carpal tunnel. Dr. Weikert also opined that the short period of employment at URMC was unlikely to have caused Little's condition. Dr. Weikert, however, did note that Little had never experienced any numbness, tingling, or swelling prior to her employment with URMC. Dr. Weikert placed work restrictions upon Little of no lifting above 10 pounds and limited pushing and pulling with her hands. Little subsequently underwent an EMG and nerve conduction studies which indicated bilateral carpal tunnel syndrome. Dr. Weikert performed carpal tunnel release surgery on Little's right wrist on November 30, 2004. He performed the same procedure on her left wrist on February 3, 2005.

Dr. Weikert treated Little for these conditions through August 2005. Dr. Weikert ultimately opined that Little retained a 3% permanent medical impairment to each upper extremity as a result of the bilateral carpal tunnel syndrome. Dr. Weikert also placed permanent restrictions upon Little of no overhead lifting above 20 pounds and a 50 pound occasional lifting limit. Dr. Weikert also testified repeatedly that Little's four to six week period of employment at URMC did not cause, aggravate, or exacerbate her conditions.

Little also underwent an independent medical evaluation by Dr. McKinley Lundy. Dr. Lundy is board certified in occupational medicine and is a certified independent medical examiner with the American Board of Independent Medical Examiners. Dr. Lundy contradicted Dr. Weikert's opinion. Dr. Lundy specifically opined that Little's bilateral carpal tunnel syndrome was caused, aggravated, or exacerbated by her employment with URMC. Dr. Lundy further noted that there was no objective medical evidence prior to September 30, 2003, indicating that Little suffered from carpal tunnel syndrome. Dr. Lundy further testified that Little's duties at URMC were the most significant factors that brought about her carpal tunnel symptoms. Dr. Lundy testified that Little had undergone a de-conditioning process with regard to the use of her hands at URMC. This de-conditioning theory was based upon Little's use of her hands at URMC in performing activities for which she was not accustomed, particularly forceful activities such as pumping an air bulb to obtain blood pressures, squeezing wash cloths, and lifting patients, that she performed on a regular basis at URMC. She had

not been required to perform these types of activities in her clerical positions at CSC. Dr. Lundy did agree with Dr. Weikert's assessment that Little suffered a 3% permanent medical impairment to each upper extremity.

The trial court conducted a final hearing in this matter on November 11, 2005. Little was the only live witness presented at trial. The deposition testimony of Dr. Weikert and the deposition testimony of Dr. Lundy were introduced as exhibits at trial. At the conclusion of the trial, the trial court made extensive findings of fact and conclusions of law on the record. The trial court found Little to be a credible witness. The trial court ultimately accepted the opinion of Dr. Weikert as to the cause of Little's carpal tunnel. The trial court concluded that the injuries were related to Little's 19 years of repetitive work with CSC. The trial court also specifically concluded that the evidence did not establish that her condition was caused or aggravated by her employment at URMC. Accordingly, the trial court placed liability upon the carrier for CSC at the time her employment ceased with CSC. The trial court specifically found Little's last day of work at CSC to be September 15, 2003.[2] Therefore, the trial court found AIG to be liable for Little's claims in this action. AIG then filed this appeal.

II. Issues

AIG presents the following issues on appeal:

1. Whether the trial court erred in finding that Little's injuries were not caused or aggravated by her employment at URMC, and therefore, placing the correct date of injury as September 15, 2003?

2. Whether Little must prove that her injuries were caused or aggravated during the time period that AIG provided workers' compensation insurance to CSC?

3. Whether the trial erred in finding that Little was entitled to award of permanent partial disability benefits of 30% to each upper extremity?

III. Standard of Review

The standard of review in a workers' compensation case 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. *Tenn. Code Ann. § 50-6-225(e)(2)*. *See also Layman v. Vanguard Contractors, Inc.*, 183 S.W.3d 310, 314 (Tenn. 2006). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in

[2] Although the finding of the last day of work to be September 15, 2003, was implicit in the trial court's initial ruling, the trial court expressly made this finding in its ruling on a Motion to Alter or Amend.

workers' compensation cases to determine whether the preponderance of the evidence lies. *Vinson v. United Parcel Service*, 92 S.W.3d 380, 383-84 (Tenn. 2002). When the trial court has seen the witnesses and heard the testimony, especially when issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's findings of fact. *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 71 (Tenn. 2001). This Court, however, is in the same position as the trial judge in evaluating medical proof that is submitted by deposition, and may assess independently the weight and credibility to be afforded to such expert testimony. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002). Questions of law are reviewed *de novo* without a presumption of correctness. *Perrin v. Gaylord Entertainment Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

IV. Analysis

AIG first contends that the trial court erred in not applying the "last injurious injury" rule in this case, and therefore, placing liability upon URMC for Little's claims. As the parties correctly point out, resolution of this issue requires careful consideration of the Tennessee Supreme Court's opinion in *Mahoney v. NationsBank of Tennessee, N.A.*, 158 S.W.3d 340 (Tenn. 2005).[3] In *Mahoney*, the Court addressed the proper analysis to utilize in determining liability between succeeding employers in cases involving gradually occurring injuries. The plaintiff in *Mahoney* began working for Boatmen's Bank in 1991. She suffered an on-the-job wrist injury in 1996 and was diagnosed with carpal tunnel syndrome. On January 1, 1997, Boatmen's Bank merged with NationsBank. The specific issue addressed by the Supreme Court centered on whether the resulting employer in a merger of two employers may be held liable for a gradually occurring injury. The *Mahoney* Court noted that it is necessary to fix a date of injury in gradually occurring cases in order to determine when the statute of limitations begins to run, what the employee's compensation rate should be, and which of two succeeding employers or insurance carriers should bear the liability for an employee's claim. *Id.* at 344-45.

The *Mahoney* Court expressly addressed the application of the "last injurious injury" rule in cases involving gradual injuries such as carpal tunnel syndrome. The "last injurious injury" rule generally operates to place liability on the last employer for an employee's workers' compensation claim "if working conditions at the last employer aggravated the employee's pre-existing injury." *Id.* at 346. (citing *Baxter v. Smith*, 211 Tenn. 347, 364 S.W.2d 936, 942-43 (1962)). The Court first held that the "last injurious injury" rule does apply to gradually occurring injuries. The Court then opined as follows:

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[3] The Tennessee Supreme Court recently overruled *Mahoney* on the issue of using the date of notice of injury, as opposed to the last day worked, to determine whether the current or former employer was liable for an employee's benefits. *See Building Materials Corp. D/b/a GAF Materials Corp. v. Britt,* _____ S.W.3d _____ (Tenn. 2007), No. M2005-00918-SC-WCM-CV, 2007 WL 171768 at *4-5 (Tenn., Jan. 24, 2007). We have carefully reviewed and considered the *Britt* decision and have concluded that *Mahoney* remains good law on issues related to the "last injurious injury" rule. The "last injurious injury" rule holdings of *Mahoney* are the relevant issues for this appeal.

> To determine whether a subsequent employer is responsible for a gradually-occurring injury that began at a prior employer, we must consider whether the employee's condition was aggravated or advanced due to working conditions at the second employer.

Id.

Thus, application of the teachings of *Mahoney* to the instant case requires us to determine whether Little's condition was aggravated or advanced due to her working conditions at URMC. The trial court carefully and thoroughly considered this issue. The trial court noted that Dr. Weikert was "unflappable" in his opinion that Little's carpal tunnel injuries were caused by her 19 years of work with CSC. Dr. Weikert clearly testified that Little's work at URMC did not aggravate or advance her condition. On the other hand, Dr. Lundy opined that Little's work at URMC did aggravate her injuries. The trial court accepted the opinion of Dr. Weikert over Dr. Lundy. The trial judge has the discretion to conclude that the opinion of one expert should be accepted over that of another expert. *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991).

The record supports the trial court's conclusion. As the trial court correctly noted, Dr. Weikert is a board-certified orthopaedist specializing in hand and wrist injuries. Dr. Weikert has extensive experience with carpal tunnel injuries and in performing surgeries relating to carpal tunnel. Moreover, Dr. Weikert was the treating physician for Little for these injuries. On the other hand, Dr. Lundy's practice focused on internal medicine. He is certified in occupational medicine; however, he has never performed any hand surgery and has never treated anyone for carpal tunnel. Under these circumstances, we find that the trial court did not abuse its discretion in accepting the opinion of Dr. Weikert over the opinion of Dr. Lundy. Accordingly, we affirm the trial court's finding that CSC, as opposed to URMC, bears liability for Little's injuries in this case.

Having determined that CSC is liable for Little's injuries, we next must decide which insurance company is responsible for these claims. CNA provided workers' compensation insurance coverage to CSC until August 1, 2003. AIG provided workers' compensation insurance coverage to CSC from August 1, 2003, through the time Little last worked for CSC on September 15, 2003, and until her employment formally ended with CSC on September 30, 2003.

The trial court essentially applied the "last day worked" rule. As a result, it placed liability upon AIG. The "last day worked" rule operates to "fix a date certain when the employee knows or should know that he or she sustained a work-related injury so that workers with gradual injuries will not lose the opportunity to bring claims." *Bone v. Saturn Corp.*, 148 S.W.3d 69, 73 (Tenn. 2004).[4] The Tennessee Supreme Court also has utilized the "last day worked" rule to determine which of two insurers of the same employer is liable for payment of a workers' compensation claim. In *Barker v.*

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[4] In *Britt*, the Tennessee Supreme Court also overruled *Bone* on the issue of using the date of notice of injury, as opposed to the last day worked, to determine an employee's applicable compensation rate. *Britt,* _____ S.W.3d _____ (Tenn. 2007), No. M2005-00918-SC-WCM-CV, 2007 WL 171768 at *4-5 (Tenn., Jan. 24, 2007). *Bone* remains good law for the cited proposition.

Home-Crest Corp., 805 S.W.2d 373 (Tenn. 1991), the Court noted that an employee suffering from carpal tunnel syndrome suffered new trauma by the repetitive movements of her hands each day at work. *Id.* at 376. As a result, the *Barker* Court concluded that the date of injury for purposes of determining which insurance company would be liable should be fixed as the date the employee could no longer perform her job. *See also Mahoney*, 158 S.W.3d at 345.

The instant case presents a somewhat more complicated issue because Little's employment with CSC ceased on September 15, 2003, not because of her carpal tunnel injuries, but because she lost her job when CSC's contract was not renewed by Arnold Air Force Base. Indeed, at the time of her last date worked with CSC, Little apparently experienced few, if any, symptoms related to CTS. AIG contends that the "last day worked" rule should not be applied in this case because Little's employment with CSC did not cease due to her carpal tunnel injuries.

While we recognize that this case presents a factual situation somewhat different than that found in most cases applying the "last day worked" rule, we find that application of the "last day worked" rule in this case is appropriate.[5] Although the reason for Little's last day worked with CSC is not attributable to her carpal tunnel injuries, she was continuing to suffer a new injury each day she worked at CSC. *See Lawson v. Lear Seating Corp.*, 944 S.W.2d 340, 343 (Tenn. 1997); *Barker*, 805 S.W.2d at 376. In this case, Little's job duties did not change after August 1, 2003, the date upon which CNA's insurance coverage ceased. Therefore, Little continued to suffer new injuries each day until she ceased employment on September 15, 2003. Given that AIG was the insurer on September 15, 2003, we conclude that AIG is the proper carrier to bear liability in this case.

AIG asserts the additional argument that it cannot be held liable for Little's injuries unless it is proven that her injuries were caused or aggravated during the time period that AIG provided coverage to CSC. In essence, AIG cites *Mahoney* for the proposition that a subsequent *insurer* of the same *employer* is responsible for a gradually occurring injury that began during the coverage of a prior insurer only if the employee's condition was aggravated or advanced due to working conditions during the time of coverage by the subsequent insurer. We disagree. *Mahoney* addressed the issue of a subsequent *employer*, not a subsequent *insurer*. Therefore, *Mahoney* does not support AIG's position on this issue.[6]

Moreover, we expressly decline to extend the *Mahoney* holding to cover subsequent *insurers* of the same employer, as opposed to subsequent *employers*. First, any such extension of *Mahoney* is within the purview of the Supreme Court, not this Panel. Second, we find that any such extension of *Mahoney* would place an unfair burden upon employees. Such an extension would mean that an employee would face this issue in many gradually occurring injury cases in which an employer had more than one workers' compensation insurance carrier. Undoubtedly, imposition of this requirement would result in constant disputes between the different insurance carriers. As a result,

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[5] We also find this conclusion consistent with the general approach under the Workers' compensation Law adopted by the *Britt* Court.

[6] We again note that *Mahoney* remains good law on issues relevant to this appeal..

the employee could go uncompensated for a significant period of time while the two insurance companies disputed liability between themselves. This situation would occur even when it is undisputed that the employee has suffered a compensable claim. The creation of such a conundrum for the employee would be antithetical to the purposes of the Workers' Compensation Law. The Workers' Compensation Law must be interpreted in a manner designed to protect workers and their families from the economic devastation that can result from workplace injuries. *Tenn. Code Ann. § 50-6-116*. Therefore, we reject AIG's contention that Little must prove that her injuries were caused or aggravated during the time period that AIG provided workers' compensation insurance coverage to CSC.

Lastly, AIG contends that the trial court erred in awarding Little permanent partial disability benefits of 30% to each upper extremity. The extent of an employee's permanent partial disability is a question of fact. *Dope v. Murray Ohio Mfg. Co.*, 750 S.W.2d 150, 151 (Tenn. 1988). The Tennessee Supreme Court recently directly addressed the applicable measure of permanent partial disability benefits for a scheduled member in *Lang v. Nissan North America, Inc*., 170 S.W.3d 564 (Tenn. 2005). The *Lang* Court opined as follows:

> We must bear in mind the distinct roles which anatomical impairment and vocational disability play in scheduled member cases. Significantly, vocational disability is "not an essential ingredient to recovery for the loss of use of a scheduled member." It is well settled that an employee may recover for injury to a scheduled member without regard to loss of earning capacity.

Id. at 569-70. Evidence concerning vocational disability is relevant but only as a factor for the court to consider in determining the loss of use of a scheduled member. *Duncan v. Boeing Tennessee, Inc.*, 825 S.W.2d 416, 417-18 (Tenn. 1992).

Both Dr. Weikert and Dr. Lundy agreed that Little suffered a 3% medical impairment to both upper extremities. Little is 55 years old. She graduated from high school and attended a number of college classes over a number of years. The trial court found that Little had a "fair amount of education," was in "good health," and was "capable of doing a lot of things." At the time of trial, Little was employed as a part-time teller at Franklin County United Bank. She generally worked between 22 and 26 hours per week.

Little testified that she continued to have problems with her arms and wrists.[7] She has trouble counting money because of a lack of grip strength. She experiences problems using a stapler and a hole punch. She also testified that, although she does not have any remaining numbness or tingling, she still has problems with the arms and wrists swelling. She has difficulty opening cans and caps. She needs assistance in lifting heavy pots and pans and must both hands to pour milk from a gallon container. She does not believe she could perform the job duties she had performed with her

[7] The trial court expressly found Little to be a credible witness. In making this credibility determination, the trial court noted that, at times, Little only remembered some of her complaints after reviewing notes made by the dispensary. The trial court determined that this did not undermine her credibility.

employment at CSC. She does not believe that she could work as a full-time teller because of her arm and wrist problems. Little also testified that she had difficulty driving a truck or driving long distance in a car. After consideration of all of this evidence, the trial court concluded that Little was entitled to an award of permanent partial disability benefits of 30% to each upper extremity. We find that the evidence does not preponderate against this conclusion. Accordingly, this issue is without merit.

V. Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed. The costs of the appeal are taxed to the appellant, American International Group, Inc.

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JEFFREY S. BIVINS, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

SHARON NORRIS LITTLE ET AL. v. AMERICAN INTERNATIONAL GROUP, INC.

No. M2006-00471-SC-WCM-WC - Filed - May 10, 2007

ORDER

This case is before the Court upon the motion for review filed by American International Group, 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 American International Group, Inc., for which execution may issue if necessary.

PER CURIAM

BARKER, CJ, not participating