

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT Knoxville
February 26, 2007 Session

**CAROLYN S. CHANDLER V. CRACKER BARREL OLD COUNTRY STORE, INC.
AND GALLAGHER BASSETT SERVICES**

**Direct Appeal from the Chancery Court for Knox County
No. 159830-1 John F. Weaver, Chancellor
Filed June 13, 2007**

No. E2006-00956-WC-R3-WC - Mailed May 8, 2007

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 findings of fact and conclusions of law. The trial court awarded the Plaintiff eighty-five percent vocational impairment for each arm for a bilateral carpal tunnel work injury. The employer has appealed contending that the trial court erred in awarding eighty-five percent vocational impairment to each arm in light of the employee's work history subsequent to the work-related injury. The employer also contends that the trial court erred by inappropriately weighing the testimony of the employee's vocational expert in assessing the eighty-five percent vocational disability. Finally, the employer asserts that the trial court erred in admitting the testimony of Rodney Caldwell, PhD. After a careful review of the record, we conclude that the trial court should be affirmed.

**Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right;
Judgment of the Chancery Court Affirmed**

J. S. (STEVE) DANIEL, Sr. J., delivered the opinion of the court, in which WILLIAM M. BARKER, C.J., and JON KERRY BLACKWOOD, Sr. J., joined.

James T. Shea, IV, Knoxville, Tennessee, for the appellant, Cracker Barrel Old Country Stores, Inc. and Gallagher Bassett Services.

Bruce David Fox and John A. Willis, Clinton, Tennessee, for the appellee, Carolyn S. Chandler.

OPINION

I. Facts and Procedural History

Ms. Carolyn Chandler worked for Cracker Barrel in Knox County, Tennessee for fourteen years in two separate seven-year increments. On May 29, 2003, Ms. Chandler reported bilateral

problems with her hands as a result of repetitive activities as a backup cook. Apparently, a backup cook is responsible for cooking everything from the time the store opens until it closes except for items which are grilled or deep fried. Therefore, Ms. Chandler's work activities included making cornbread, biscuits and anything that was put into the oven while cooks did the actual deep frying and grilling. As a part of her work activities, she was constantly kneading dough and rolling and cutting biscuits, as well as doing other repetitive activities. These activities were within the course and scope of Ms. Chandler's employment, and caused her to develop carpal tunnel syndrome in her right and left hands. These injuries were promptly reported to her employer. Cracker Barrel afforded Ms. Chandler medical care and she selected Dr. Joseph C. DeFiore, a board certified surgeon, to treat her work-related injuries. Dr. DeFiore performed bilateral carpal tunnel releases and necessary follow-up care. Dr. DeFiore ordered a Functional Capacity Evaluation to be performed. That evaluation revealed a marked diminution in Ms. Chandler's use of her hands and ultimately led to restrictions on her work activities. Those restrictions included a limitation of light duty work only and the lifting of no greater than ten pounds and nonrepetitive activities. Dr. DeFiore opined that Ms. Chandler had suffered a five percent anatomical disability to each of her arms.

Ms. Chandler underwent an independent medical evaluation by Dr. Duncan L. McKellar, a board certified orthopedic surgeon, who after performing this examination, concluded that Ms. Chandler suffered a permanent medical impairment of six percent anatomical disability to her right arm and a five percent anatomical disability to her left arm. Dr. McKellar also adopted the findings of the Functional Capacity Evaluation.

After her surgery, Ms. Chandler attempted to return to the job of backup cook but was unable to carry out the duties of that job because of continuous swelling in her hands and the fact that she started dropping objects. Cracker Barrel reassigned Ms. Chandler to a hostess position but reduced her pay from \$9.50 per hour to \$7.25 per hour. After the Functional Capacity Evaluation revealed that Ms. Chandler was unable to carry more than ten pounds regularly and was limited to fingering activities only occasionally, Cracker Barrel terminated Ms. Chandler for what were deemed "risk management" reasons.

On November 23, 2003, Ms. Chandler filed a workers' compensation petition seeking workers' compensation benefits for her work-related injuries. This case was tried March 10, 2006. At that time, Ms. Chandler was fifty-three years of age. Ms. Chandler has an eighth grade education and believes that she has a GED but could find no record to verify that educational milestone. Ms. Chandler has no additional formal education or training. Her work history has been in the restaurant industry or as a cashier.

After dismissal from Cracker Barrel, Ms. Chandler obtained a cashier's job at a convenience store where she worked for approximately one year before she was terminated. At the time of the trial, she was working as a part-time cash register operator a few hours a week. The record demonstrates that subsequent to her dismissal and through her own industry, she has been employed in some job activity eighty-five percent of the time. However, the jobs have been at much lower pay rates than she earned prior to her injury.

The evidence presented at trial included medical records of Dr. DeFiore, the deposition testimony of Dr. Duncan L. McKellar, the in-person testimony of the Plaintiff, Ms. Chandler and Dr. Rodney E. Caldwell, the vocational expert. The Defendant presented no proof. The only issue litigated was the extent of vocational disability. Ms. Chandler testified about the effects of the injury on her ability to perform work activities with her hands. She stated that as a result of her injuries, she had problems buttoning buttons and in holding objects such as a coffee cup. According to her, she would suddenly lose her grip and drop the cup. In addition, she testified that she had difficulty in picking up objects and putting dishes away. She could not pick up and hold pots or pans such as an iron skillet in her kitchen. She still experiences sharp pains in the thumb and numbness in her entire hand and fingers. In her left hand, she feels a tingling sensation. As a result of these symptoms, she finds it difficult to sleep at night. To assist at night with the pain, she wears hand braces to stabilize her hands. Ms. Chandler explained that when she attempted to return to Cracker Barrel and do her duties as a back-up cook, her hands were swollen and were in constant pain, that she dropped items on a regular basis and as a result, was at risk of burning herself from her inability to hold the cooking utensils.

Over Cracker Barrel's objection, the court allowed Dr. Rodney Caldwell to testify as a vocational expert. Dr. Caldwell has a bachelor's degree in Business Administration from the University of Kansas, a master's degree in vocational rehabilitation, job development and job placement from Drake University and a Ph.D in vocational psychology from Walden University. Dr. Caldwell is engaged in a vocational rehabilitation consulting business in the Knoxville area and has testified as a vocational expert in numerous federal and state courts. On voir dire by counsel for Cracker Barrel, Dr. Caldwell testified that there had been no study dealing with the accuracy of his vocational estimates or to determine if his vocational estimates were in compliance with other vocational experts in the field.¹ Counsel for Cracker Barrel objected to Dr. Caldwell being allowed to testify as an expert. This objection was overruled by the trial court.

Dr. Caldwell then testified about the procedure which he followed in making his vocational

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Q: Dr. Caldwell, I know that you've testified in courts in the past and in cases I've participated in. Let me ask you, in regard to your vocational estimates, has there ever been any study indicating how accurate your estimates are?

A: Any Study?

Q: Any study.

A: Not that I know of.

Q: Have you ever had anyone review your estimates of vocational loss to determine if they are in compliance with other experts in your field?

A: No.

Q: Do you know if they are higher or lower?

Mr. Fox: Your Honor, objection. This would be cross-examination after he offers his testimony as opposed to voir dire on his qualifications as a vocational expert.

Mr. Shea: This is voir dire pursuant to the Daniel versus CSX case.

evaluation of Ms. Chandler. This procedure followed a standard practice of vocational experts which had been developed over the last twenty years. The process used a methodology of assessing vocational disability which relied upon a determination of a loss of access to the labor market. This method, according to Dr. Caldwell, requires the expert to develop a profile of the subject's qualifications prior to an injury which would include their education, work history, and the physical and mental demands of their prior work. After the profile is determined, it is used to determine what types of work a person was qualified to perform. Then, looking at any restrictions that they may have as a result of the injury, an evaluation of job opportunities which would be available in their diminished state is made. Two primary sources of information are used to determine the number of available jobs. One is from United Stat Publishing which publishes information from the Bureau of Labor Statistics. This publication breaks down jobs by training demands, and categorizes each job as unskilled, semiskilled or skilled. Within those categories, the jobs are further classified based upon their physical demand categories; sedentary, light, medium and heavy, as well as other physical demand categories set out by the Department of Labor. In addition, standard definitions are available from the Department of Labor defining jobs that can be broken down by those particular categories.

In evaluating Ms. Chandler, Dr. Caldwell conducted an interview in which he determined that she had an eighth grade education and perhaps a GED. He reviewed her work background. He also took a general history of her medical condition and medical history and reviewed the medical records from Dr. Degnan, Dr. DeFiore and Dr. McKellar, as well as the Functional Capacity Evaluation from Associated Therapeutics, Inc. Dr. Caldwell administered both the Wide Range Achievement Test as well as the Minnesota Manual Dexterity Test. The first test assessed Ms. Chandler's reading and arithmetic abilities and the latter her manual dexterity. On the Wide Range Achievement Test Ms. Chandler was found to read at the twelfth grade level but her arithmetic scores were at the seventh grade level. On the Minnesota Manual Dexterity Test, which tested both manual and finger dexterity, she was found to lack the ability to use her hands for sustained activities. These findings were consistent with the Functional Capacity Evaluation which recommended that Ms. Chandler should only engage in occasional fingering activities. These test results, according to Dr. Caldwell, demonstrate that Ms. Chandler does not have the hand speed or dexterity to perform most production or clerical jobs. He made this finding within a reasonable degree of professional certainty. Dr. Caldwell concluded that Ms. Chandler had a vocational disability of eighty-five to ninety percent. It was his conclusion that there were sixteen thousand eight hundred jobs available to her in the Knoxville area prior to her injury. He testified that, after the injury, she would be unable to perform the functions of fourteen thousand two hundred eighty to fifteen thousand one hundred twenty of those jobs.

At the conclusion of the trial, the Court issued its judgment from the bench, awarding her eighty-five percent vocational impairment to each scheduled member and ordered those benefits to be paid in a lump sum. Cracker Barrel timely appealed and asserts that the trial court erred in allowing Dr. Caldwell to testify as an expert contending that he fails to meet the standards established for qualification as an expert under the provisions of current Tennessee law. In the alternative, the employer contends that the award was excessive in consideration of Ms. Chandler's post injury work history. Finally, the employer contends that the trial court erred by inappropriately

weighing the testimony of the vocational expert in assessing its award when all other evidence indicated Plaintiff's vocational disability was significantly less than the award.

II. Standard of Review

Review of the findings of fact made by 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. Tenn. Code Ann. § 50-6-225(e)(2) (2005). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. The standard governing appellate review of the findings of fact of a trial judge requires this "panel to examine in depth the trial court's factual findings and conclusions." GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. Workers' Comp. Panel 2001). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's factual findings. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002); Townsend v. State, 826 S.W.2d 434, 437 (Tenn. 1992). Our standard of review of questions of law is de novo without a presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003). When medical testimony is presented by deposition, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000); Houser v. Bi-Lo, Inc., 36 S.W.3d 68, 71 (Tenn. 2001).

III. Admissibility of Vocational Expert Testimony

Cracker Barrel contends that the trial court erred in admitting the testimony of Dr. Rodney Caldwell as a vocational expert. Its position is that he should have been prohibited from testifying because he failed to demonstrate that his methodology had been subjected to testing or that the methodology had been determined to have a known or potential rate of error. Because of that, Cracker Barrel argues Dr. Caldwell's testimony failed to meet the requisite standards for admission under Tenn. R. Evid. 702 and 703 as required in McDaniel v. CSX Transp., Inc., 955 S.W.2d 257 (Tenn. 1997). The employer's assertion is that the vocational testimony lacked trustworthiness in that the opinions were not based on scientific fact which could "substantially assist the trier of fact."

Decisions as to the qualifications, admissibility, relevancy and competency of expert testimony are matters left to the trial court's discretion. McDaniel, 955 S.W.2d at 263. As was pointed out in Brown v. Crown Equipment Corp. 181 S.W.3d 268, 273 (Tenn. 2005), an appellate court may not overturn the trial court's rulings admitting or excluding expert testimony unless the trial court abused its discretion. A trial court abuses its discretion if it applies an incorrect legal standard or reaches an illogical or unreasonable decision that causes an injustice to the complaining party. State v. Stevens, 78 S.W.3d 817, 832 (Tenn. 2002). The standard for determining the admissibility of scientific evidence requires a construction of Tenn. R. Evid. 702 and 703 as stated in McDaniel v. CSX Transp. Inc., 955 S.W.2d 257, 263-64 (Tenn. 1997). First, the scientific

evidence must be found to be relevant under the provisions of Tenn. R. Evid. 401. When this occurs, Tenn. R. Evid. 702 provides as follows:

If scientific, technical or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

And Tenn. R. Evid. 703 states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

These two rules of Tennessee evidence establish the standard for admissibility of scientific evidence and require an analysis of the unique language of those particular rules. Tenn. R. Evid. 702 requires the scientific evidence “substantially” assist the trier of fact. Tenn. R. Evid. 703 requires the trial court to disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of “trustworthiness.” Both of these requirements are unique to the Tennessee Rules as opposed to the Federal Rules of Evidence. McDaniel at 264-65.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), overruled previous case law and concluded that Fed. R. Evid. 702 superceded previous common law establishing the standard for expert proof in federal courts. In that decision, a partial list of factors which the United States Supreme Court deemed relevant to an inquiry of the trustworthiness of expert testimony included, whether the theory or technique had been tested, whether it had been subject to peer review or publication, whether there is known or potential rate of error, and whether it is generally accepted in the relevant scientific field. 509 U.S. at 593-94, 113 S.Ct. at 2796-98.

Although the answer to these questions may be helpful in determining whether the expert testimony would “substantially” assist the trier of fact or “lacks trustworthiness,” there is no requirement that those factors be considered in each case before allowing expert testimony. Brown v. Crown Equipment Corp., 181 S.W.3d 268, 275 (Tenn. 2005). The court stated:

We continue to emphasize, however, that these factors are nonexclusive and that a trial court need not consider all of the factors in making reliability determination. Rather, the trial court enjoys the

same latitude in determining how to test the reliability of an expert as the trial court possesses in deciding whether the expert's relevant testimony is reliable. Kumho Tire Co., 526 U.S. at 152, 119 S.Ct. 1167. The objective of the trial court's gatekeeping function is to ensure that "an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* Furthermore, upon admission, expert testimony will be subject to vigorous cross-examination and countervailing proof. Stevens, 78 S.W.3d at 835; McDaniel, 955 S.W.2d at 265. The weight of the theories and the resolution of legitimate but competing expert opinions are matters entrusted to the trier of fact. See McDaniel, 955 S.W.2d at 265.

Applying these principles to the present case, we must determine whether the trial judge abused his discretion in the admission of the vocational disability testimony. A similar objection was raised in the case of Hatmaker v. Allied Industrial Equip., Inc., No. E2005-02519-WC-R3-CV, 2006 Tenn. Lexis 896 (Tenn. Workers' Comp. Panel October 9, 2006). In that case, a panel of this court reviewed the methodology employed by Dr. Caldwell and found it appropriate to admit that testimony. In that case as in this case, Dr. Caldwell obtained information regarding the Plaintiff's age, education, work background and medical history.

In assessing Ms. Chandler's educational abilities, Dr. Caldwell administered the Wide Range Achievement Test. He reviewed the medical records of Dr. Degnan, Dr. DeFiore and Dr. McKellar. He explained his methodology of determining vocational disability and discussed the significance of the different elements or factors. In rendering his opinion, Dr. Caldwell analyzed the relevant labor market as it related to the Plaintiff's age, education, work history and work restrictions. Based upon all of this information, Dr. Caldwell testified that Ms. Chandler had sustained an eighty-five to ninety percent vocational disability. As in Hatmaker, we find that the trial court "may make a finding of reliability if the expert's conclusions are sufficiently straightforward and supported by a 'rational explanation which reasonable [persons] could accept as more correct than not correct.'" Stevens, 78 S.W.3d at 834 (quoting Wood v. Stihl, 705 F.2d 1101, 1107-08 (9th Cir. 1983)). We, therefore, find no abuse of discretion in the trial court's admission of the vocational expert's testimony. We also conclude that no error was committed in the admission of this testimony as a result of the lack of the evidence of Dr. Caldwell's methodology having been tested as to its rate of error in the general scientific community. Such is not a prerequisite under Tennessee law for the admission of expert testimony but is one of many considerations that the court may consider in its gatekeeping functions.

IV. Improper Weighing of Vocational Disability Expert Testimony in the Determination of Vocational Disability

Cracker Barrel also asserts that the trial court erred in the weight given to the vocational

disability expert's opinion when considering the work history of Ms. Chandler subsequent to her work-related injury. Specifically, Cracker Barrel takes the position that the trial court erred in making its vocational award by putting too much weight on the vocational expert's determination of disability in light of Ms. Chandler's post injury work history that she has been employed at some job eighty-five percent of the time. Tennessee Code Annotated section 50-6-241(b) provides that a trial court is to determine vocational disability considering all pertinent factors, "including lay and expert testimony, the employee's age, education, skills and training, local job opportunities and capacity to work at types of employment available in claimant's disabled condition." As stated in Walker v. Saturn Corp., 986 S.W.2d 204, 208 (Tenn. 1998), "vocational impairment is measured not by whether the employee can return to her former job but whether she has suffered a decrease in her ability to earn a living."

Our review of the record supports the trial court's finding that Ms. Chandler has suffered a significant decrease in her ability to earn a living. With her work limitations, she has been unable to obtain any response in better than twenty job applications and Cracker Barrel terminated her employment both as a backup cook and hostess citing "risk management determination." The record reflects that the trial court considered Ms. Chandler's age, her eighth grade education and lack of a verified GED, lack of training, as well as the anatomical impairment ratings and vocational ratings. These are appropriate criteria. Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990). Finally, it was appropriate for the trial court to have considered Ms. Chandler's testimony concerning the swelling of her hands and her lack of ability to perform functions with her hands and it was appropriate to consider the claimant's assessment of their own physical abilities. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975); Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 776 (Tenn. 1972). Therefore, we find no error in the trial court's determination as to vocational disability and conclude that the record supports the vocational disability determined as to each extremity.

V. Conclusion

After a careful review of the record, we conclude that the judgment of the trial court should be affirmed. Costs of this appeal are taxed to the appellant, Cracker Barrel and its sureties, for which execution may issue if necessary.

J. S. DANIEL, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

**CAROLYN S. CHANDLER V. CRACKER BARREL OLD COUNTRY
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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, Cracker Barrel and its sureties, for which execution may issue if necessary.