

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 29, 2007 Session

**SHEILA REECE v. J. T. WALKER INDUSTRIES INC. d/b/a RITE
SCREEN, INC.**

**Direct Appeal from the Chancery Court for Carter County
No. C26188 G. Richard Johnson, Chancellor**

No. E2006-01555-WC-R3-WC - Mailed November 7, 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 of findings of fact and conclusions of law. The employee developed bilateral carpal tunnel syndrome as a result of her employment. The trial court awarded her 50% permanent partial disability to both hands. The employer has appealed, contending the award is excessive. We modify the award to 50% permanent partial disability to both arms, and affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2006) Appeal as of Right; Judgment of the Chancery

Court Modified

JERRY SCOTT, SR. J., delivered the opinion of the court, in which GARY R. WADE, J. and JON KERRY BLACKWOOD, SR. J., joined.

Jennifer P. Keller and Philip R. Baker, Johnson City, Tennessee, for the Appellant, J.T. Walker Industries d/b/a Rite Screen, Inc.

Gary L. Goldstein, Johnson City, Tennessee, for the Appellee, Sheila Reece.

MEMORANDUM OPINION

Factual and Procedural Background

Sheila Reece worked for her employer, J. T. Walker Industries Inc., d/b/a Rite Screen, Inc., as a production worker from March 2003 until October 2004, where she assembled window screens. In January 2004, she began having symptoms of pain and numbness in her hands. She

reported this to her employer and was referred to a local emergency room where she was referred to David R. Hardin, M.D., an orthopaedic surgeon. Ms. Reece's diagnosis was bilateral carpal tunnel syndrome with her right being worse than her left.

Dr. Hardin performed a right carpal tunnel release on May 19, 2004, and Ms. Reece was off work until July 6, 2004, when Dr. Hardin placed her on light duty. Some conflict arose concerning what jobs she was able to perform during that period. In August, she went on leave under the Family Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.* (1999), for problems unrelated to her work injury. Dr. Hardin released her to full duty on August 25, 2004, when he found that she had no permanent partial disability whatsoever. She sought a second opinion through her employer, and her care was eventually transferred to John L. Holbrook, M.D. Dr. Holbrook diagnosed her condition as deQuervain's tendinitis on the right side, and he performed surgery to correct that condition on November 10, 2004.¹ He later performed a left carpal tunnel release on March 2, 2005. On July 12, 2005, he concluded that she had no permanent partial disability from the left carpal tunnel syndrome and had reached maximum medical improvement. Based on those conclusions, he released her to full duty.

Ms. Reece was terminated on October 29, 2004 for being absent on three consecutive days without reporting for work or calling in.² She contended at trial that her absences were caused by her work-related condition and sought additional temporary disability benefits for that period. The trial court did not award those benefits, but the employer chose not to appeal that issue. Since Ms. Reece was released by Dr. Holbrook, she has not worked, nor sought employment.

Ms. Reece was fifty years old at the time of trial. She attended school through the 10th grade. She took the GED examination, but did not pass. Her work experience includes over 20 years as a sewing machine operator, two years as press operator in an auto parts factory and a short period of time as a cashier in a retail store. She testified at trial that she had no plans to apply for work in the future.

Dr. Hardin testified by deposition. At the time he released Ms. Reece from his care, she had a normal "two point discrimination" test and normal strength in her right hand.³ He

1 Dr. William E. Kennedy testified that deQuervain's tendinitis is "well known to be caused by cumulative trauma" of the repetitive type of work that she did at Rite Screen, but he did not find any "physical impairment as a result of that disease."

2 Even though Ms. Reece was terminated, her employer's workers' compensation carrier paid all of her treatments and surgical procedures.

3 The two point discrimination test was described by Dr. Hardin as "sharp and dull test, light touch in the fingers." Dr. Kennedy described the test as "the ability of an individual to detect two points as two points instead of one point, that are at a measured distance from each other. As in this case, four millimeters, which is - - which is normal." Dr. Kennedy explained that "[t]his means that she had normal sensation in all of the fingertips of all of the digits in both hands."

conducted no other tests to determine whether she had any permanent partial disability and placed no permanent restrictions upon her activities because he found no anatomical impairment.

Dr. Holbrook testified by deposition. Before he released Ms. Reece from his care, his nursing assistant conducted an in-office form of electromyography (EMG) testing using a device known as a Nervepace Digital Electroneurometer (the NDE). Based on the EMG test, he found no anatomical impairment and placed no permanent restrictions on her activities.

William E. Kennedy, M.D., conducted an independent medical examination at the request of Ms. Reece's attorney. In his examination, she had positive Phalen's and Tinel's tests, suggestive of recurrent carpal tunnel syndrome.⁴ He found 9% anatomical impairment to each upper extremity. He suggested that she observe a lifting limit of twenty pounds occasionally, ten pounds frequently and that she avoid repetitive use of her hands.

Dr. Norman E. Hankins, Ed.D., a vocational disability evaluator and a partner of Dr. Kennedy, also testified by deposition. Based upon tests which he administered, he found that Ms. Reece has an IQ of 81, can read on a seventh grade level and can perform arithmetic on an eighth grade level. He opined that she had a vocational impairment of 70% based upon Dr. Kennedy's restrictions. He conceded that she had no vocational impairment based upon the opinions of Dr. Hardin and Dr. Holbrook.

The case was tried on May 22, 2006, and the trial court ruled from the bench, awarding Ms. Reece 50% permanent partial disability to both hands, which are scheduled members with a value of 400 weeks for the loss of both hands. Tenn. Code Ann. § 50-6-207(3)(A)(ii)(x) (2005).

Issues Presented

The employer admits compensability, but contends that the trial court's permanent partial disability award is excessive and that Ms. Reece has no disability whatsoever.

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)(Supp. 2005); 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

⁴ The Phalen's test applies pressure to the median nerve at each of the wrists to detect changes in the sensation in the hand. The Tinel's test is executed by digital tapping on the median nerve at the wrist to measure changes in the sensation of her fingers and thumbs.

the trial courts in workers' compensation cases to determine where the preponderance of the evidence lies. Vinson v. United Parcel Serv., 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).

Analysis

The employer contends that the award was excessive and offers five reasons for that assertion: (1) the treating physicians assigned no impairment and placed no restrictions upon the former employee; (2) the testimony of the vocational evaluator should not be considered because he was not shown, and therefore did not consider, the opinions of the treating physicians; (3) the trial court relied upon an impermissible factor, i.e. the demise of the garment industry, in assessing disability; (4) the employee is motivated not to return to work because it is the sole cause of her alleged vocational disability; and (5) there is case law from similar cases demonstrating that the 50% vocational disability is "clearly" excessive.

"The question of the extent of an injured worker's permanent disability is a question of fact." Jaske v. Murray Ohio Mfg. Co., 750 S.W.2d 150, 151 (Tenn. 1988). On appeal, workers' compensation cases are then reviewed de novo upon the record from the trial court accompanied by a presumption of correctness unless the evidence preponderates otherwise. Vinson, 92 S.W.3d at 383. An employee's own opinion concerning her physical condition and the extent of her disability is competent testimony and must be considered. Fritts v. Safety Nat. Cas. Corp., 163 S.W.3d 673, 680 (Tenn. 2005). In this case, the employee testified concerning her limitations and the trial court made a specific finding that she was a credible witness. That finding is entitled to "considerable deference" by this panel. Houser, 36 S.W.3d at 71.

Moreover, the record contains a number of undisputed facts which support the conclusion that the employee sustained a major disability. These include her injury, her level of education, her unskilled work history, her relatively limited reading ability and her age.

The medical evidence is conflicting. Dr. Hardin and Dr. Holbrook found that Ms. Reece had no permanent impairment, and placed no permanent restrictions upon her activities. Dr. Kennedy assigned 9% impairment to each upper extremity and suggested limitations upon her use of her hands. When expert medical testimony conflicts, the trial judge has discretion to determine which to accept. Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. 1996). Factors which may be considered are the qualifications of the experts, the circumstances of their examinations, the information available to them, and the evaluation of the importance of that

information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). A reviewing court is able to make its own evaluation of expert proof which is submitted by deposition. Richards, 70 S.W.3d at 732. We have conducted the required independent evaluation of the medical depositions.

This was a hotly contested and well tried workers' compensation case. Dr. Kennedy is board certified in orthopaedic surgery and is also board certified as an independent medical examiner. To receive his board certification as an independent medical examiner in 1996, he was required to properly perform independent medical examinations (IMEs), and that training included an emphasis on the use of the American Medical Association's Guides to the Evaluation of Permanent Physical Impairment ("*A.M.A. Guides*"). He is required to "go through additional training," be retested and be recertified every five years. Much of the direct examination and cross examination of the three medical doctors related to their knowledge of page 495 of the 5th edition of the "*A.M.A. Guides*," which is one of the two statutorily approved manuals physicians must use to make impairment ratings in workers' compensation cases, unless the condition is not listed in either book. Tenn. Code. Ann. § 50-6-352(a)(1) and (b).

Page 495 of the "*A.M.A. Guides*" was admitted as an exhibit. The examination and cross examination of all three physicians related to their interpretation of the two paragraphs on that page, specifically, which of the three possible scenarios applied to Ms. Reece. As to the scenarios, the manual provides:

If, after an *optimal recovery time* following surgical decompression, an individual continues to complain of pain, paresthesias, and/or difficulties in performing certain activities, three possible scenarios can be present:

1. Positive clinical findings of median nerve dysfunction and electrical conduction delay(s): the impairment due to residual CTS is rated according to the sensory and/or motor deficits as described earlier.
2. Normal sensibility and opposition strength with abnormal sensory and/or motor latencies or abnormal EMG testing of the thenar muscles: a residual CTS is still present, and an impairment rating not to exceed 5% of the upper extremity may be justified.
3. Normal sensibility (two-point discrimination and Semmes-Weinstein monofilament testing), opposition strength, and nerve conduction studies: there is no objective basis for an impairment rating.

American Medical Association, Guides to the Evaluation of Permanent Physical Impairment 495 (Linda Cocchiarella & Gunnar B. J. Andersson eds., 5th ed. 2001).

Both Dr. Hardin and Dr. Holbrook rated Ms. Reece under scenario three. Dr. Kennedy rated her under scenario one. Dr. Hardin administered only the two-point discrimination test, but

did not administer Semmes-Weinstein monofilament testing or nerve conduction studies. Dr. Holbrook administered only a nerve conduction study with the NDE. He was cross-examined about a medical journal article, which asserted the opinion of the American Association of Electrodiagnostic Medicine, that “all of the literature reviewed in this article and describing the NDE (and another similar device) is flawed” and “that the NDE, as well as the (newer device), are experimental and are not effective substitutes for standard electrodiagnostic studies in clinical evaluation of patients with suspected CTS (carpal tunnel syndrome).” William S. David, M.D. et al., Literature Review: Nervepace Digital Electroneurometer in the Diagnosis of Carpal Tunnel Syndrome, *Muscle & Nerve*, March 2003, at 378.

Dr. Kennedy expressed his misgivings about Dr. Holbrook’s diagnosis of no permanent disability by using only the reading from the NDE. He also expressed his disagreement with Dr. Hardin’s diagnosis of no permanent disability based on only the two-point discrimination test. Dr. Kennedy was very articulate about the “*A.M.A. Guides*” and their application to Ms. Reece. He administered the two-point discrimination test by which the patient is required to attempt to discriminate two points four millimeters apart as two points rather than one. She was found to have normal sensation in all of the fingertips of all of the digits on both hands. He administered the Tinel’s test and the median nerve compression test. The Tinel’s sign was positive on the right hand involving the thumb, index finger and middle finger. On the left hand, the Tinel’s sign was positive involving the middle and ring fingers. The Phalen’s test was positive on both the right and left sides. The Finkelstein test was positive on the right and negative on the left.

One important point Dr. Kennedy made was that “[i]t takes at least six months after the surgery for carpal tunnel release to be at maximum medical improvement.” Yet Dr. Hardin evaluated Ms. Reece 53 days after her surgery and Dr. Holbrook evaluated her 121 days after her surgery, and both found no permanent impairment even before she had not reached maximum medical improvement.

Based on the depositions, Dr. Kennedy was clearly the most qualified to testify about the application of the “*A.M.A. Guides*.” The other two doctors performed cursory examinations of Ms. Reece even before she reached her maximum medical improvement and opined she had no permanent partial disability. The information gleaned by Dr. Kennedy could have been found by Dr. Hardin and Dr. Holbrook had they performed the tests of anatomical impairment required by the “*A.M.A. Guides*.” Hence, like the trial judge, we find that Dr. Kennedy was clearly the most credible and his testimony deserved the most weight. We therefore conclude that the trial court correctly accredited Dr. Kennedy’s testimony.

In the course of issuing the ruling from the bench, the trial court observed that Ms. Reece’s primary work experience had been as a sewing machine operator in the garment industry. The trial court then went on to note the decline of that industry in the East Tennessee region in recent years. On that basis, the employer argues that the trial court relied upon an impermissible factor in assessing permanent partial disability in this case. There is no evidence

on this subject in the record. However, the contraction of the apparel industry is a recognized phenomenon. See, e.g., Bureau of Labor Statistics, U.S. Dep't of Labor, Textile, Apparel, and Furnishings Occupations, in Occupational Outlook Handbook (2006-07), available at <http://www.bls.gov/oco/pdf/ocos233.pdf>. Information concerning the labor market for persons with an employee's skills and experience is an appropriate matter for consideration in determining permanent partial disability. Roberson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986). Consequently, we find no error in the trial court's remarks.

In further support of its contention that the award is excessive, the employer submits a Special Workers' Compensation Panel decision, Herald v Granite State Ins. Co., No. 01S01-9503-CH-00042, 1995 WL 746635 (Tenn. Workers' Comp. Panel December 15, 1995), in which an award of 40% permanent partial disability to both arms for carpal tunnel syndrome was reduced by the panel to 10%. That decision cited, among other things, the employee's lack of motivation to return to work as a reason for reduction of the award. Id. at *2.

The Herald decision is instructive, but hardly conclusive, regarding the extent of this employee's disability. We note that there are numerous recent panel decisions which affirmed awards similar to the award in this case and based upon similar facts. See, e.g., Haney v. Magna Int'l, Inc., No. E2006-00151-WC-R3-CV., 2007 WL 705046 (Tenn. Workers' Comp. Panel March 9, 2007); Fisher v. Plus Mark, Inc., No. E2005-00992-WC-R3-CV, 2006 WL 1703761 (Tenn. Workers' Comp. Panel June 22, 2006); and Collins v. Mid-S. Unif. Serv., Inc., No. M2005-00264-WC-R3-CV, 2006 WL 1815104 (Tenn. Workers' Comp. Panel May 12, 2006). Examination of these and other decisions lead us back to the initial premise of our analysis that the extent of disability is a question of fact. As such, each case must be viewed on the basis of all the facts in the record. As we are required to do, we have conducted an independent review of the record in this matter in order to determine where the preponderance of the evidence lies. On the basis of that review, we find that the evidence does not preponderate against the findings of the trial court concerning the extent of disability sustained by Ms. Reece as a result of her compensable injury.

Finally, we note that the trial court assigned the award of permanent partial disability to both hands, which are scheduled members with a value of four hundred weeks of benefits for total loss. Tenn. Code Ann. § 50-6-207(3)(A)(ii)(x). Disability resulting from carpal tunnel syndrome is properly assigned to the arm or arms. See, e.g., Estes v. Bridgestone Americas Holdings, Inc., No. M2006-00834-WC-R3-CV, 2007 WL 906722 (Tenn. Workers' Comp. Panel March 23, 2007). We therefore modify the award of benefits to 50% permanent partial disability to both arms, in accordance with Tennessee Code Annotated section 50-6-207(3)(A)(ii)(w) (2005), for which the benefits for their total loss is also 400 weeks. Thus, the modification does not affect the amount of the award.

Conclusion

In light of the foregoing, the judgment is modified to award 50% permanent partial disability to both of Ms. Reece's arms. In all other respects, the judgment of the trial court is affirmed. Costs are taxed to the appellant, J. T. Walker Industries Inc. d/b/a Rite Screen, Inc. and its surety, for which execution may issue if necessary.

JERRY SCOTT, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

**SHEILA REECE V. J. T. WALKER INDUSTRIES INC. D/B/A RITE
SCREEN, INC.**

Carter County Chancery Court

No. C26188

December 11, 2007

No. E2006- 01555-WC-R3-WC

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, J. T. Walker Industries Inc. d/b/a Rite Screen, Inc., for which execution may issue if necessary.