

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

February 23, 2009 Session

JANIE VINCENT v. CALSONIC KANSEI NORTH AMERICA, INC., ET AL.

**Direct Appeal from the Circuit Court for Bedford County
No. 11110 F. Lee Russell, Judge**

**No. M2008-01693-WC-R3-WC - Mailed - June 12, 2009
Filed - July 13, 2009**

This workers' compensation appeal has been referred to the Special Workers Compensation Appeals Panel 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 held that Employee suffered a compensable injury to her left shoulder; that she did not make a meaningful return to work and the statutory cap therefore did not apply; and awarded her benefits based upon a vocational disability of 35% to the body as a whole. Employer and its insurance company appealed. Upon our review of the record, we affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court
Affirmed**

ALLEN W. WALLACE, SR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., J., and DONALD P. HARRIS, SR. J., joined.

Thomas W. Tucker, III, Nashville, Tennessee, for the appellants, Calsonic Kansei North America, Inc., and Travelers Indemnity Company.

Donald D. Zuccarello and Nina H. Parsley, Nashville, Tennessee, for the appellee, Janie Vincent.

MEMORANDUM OPINION

Facts

Janie Vincent ("Employee") worked on the assembly line for Calsonic Kansei North America, Inc. ("Employer"), a manufacturer of automobile components. Employee was fifty years old when the trial occurred. She had worked for Employer from 1992 until her termination in 2008. Her prior work experience included operating a machine in a shoe factory, cleaning houses, and taking care of children in an after-school care program. She is a high school graduate with no additional education. Employee is right-hand dominant.

While working for Employer as a “Technician II” in 2004, Employee suffered a compensable injury to her right shoulder. That injury resulted in two surgeries, permanent restrictions, and an award of 28% permanent partial disability to the body as a whole. Her treating physician for that injury was Dr. Jeff Adams, an orthopaedic surgeon. After the second surgery, she sought a second opinion, and was referred to Dr. Thomas O’Brien, also an orthopaedic surgeon, who became her authorized physician.

In September 2005, while she was still under Dr. Adams’ care, Employee reported that she was beginning to develop symptoms in her left shoulder. She testified that she had been using her left arm more while she was recovering from her surgeries. When she first saw Dr. O’Brien in November 2005, she reported similar symptoms to him. At that time, he opined that Employee had inflammation of her left rotator cuff.

Employee was transferred to a “Technician I” job after her right shoulder injury. This job was on “Line 131.” Employee testified that when she began working the Line 131 job, her right arm was in a sling due to her surgeries. Employee’s job on Line 131 consisted of using a handtool to press four metal clips into place on a part. Her quota was 300 parts (or 1200 clips) per day. Because her right arm was in a sling, she had to use her left hand and arm continuously to perform this job. She developed continuous pain in her left shoulder while performing this job. She testified:

[My left shoulder] started wanting to catch and pop so I went up front and told Connie [in Human Resources over workers’ compensation claims], I said, putting-using my left hand and pushing down on the clip tool is making my shoulder start hurting, because I was trying to do like 300 because they wanted 300 a day. I was trying to do them with the one hand, with my left hand, and I am right-handed, so I couldn’t use my right shoulder. She said, well, right now we don’t have any other thing to put you on. So, you know, I kept doing the job. I went back up there and I told her, I said, Connie, my shoulder is hurting.

Employee stated that the pain began in December 2005 and she reported it at that time. She also stated that she did not have any problems with her left shoulder prior to being placed on the 131 line. She completed a written injury report regarding her left shoulder in February 2006, and a workers’ compensation claim was initiated.

Employee testified that she was never videotaped while performing the Line 131 job. She stated that, during the time she remained on Line 131, her symptoms worsened. She was transferred to Line 130 after “a long time” on Line 131. Her job on Line 130 consisted of operating several presses. Karen Wolf, the nurse assigned as Employee’s case manager, videotaped Employee performing her job on Line 130. Employee stated that the videotape was made during the summer of 2007.

Employee’s left shoulder symptoms did not stop after her transfer to Line 130. Employee testified that her symptoms have continued and have not stopped since their initial onset. She described her continuing symptoms as “[p]ain, burning and then when you pull it up it pops.”

Dr. O'Brien examined Employee with respect to her left shoulder on March 30, 2006. His initial diagnosis was "mild rotator cuff inflammation in that she had a mildly positive impingement sign." He treated her with a steroid injection and home exercises. He did not perform an MRI. He did not believe that she would benefit from surgery. At that time, Dr. O'Brien considered her left shoulder problems to be related to her work. He testified that this conclusion was based upon his understanding that her job required overhead work. Employee affirmed telling Dr. O'Brien that her pain was caused by her work but denied telling him that her work was overhead.

Dr. O'Brien continued to follow Employee intermittently over the next year and a half. In April 2006, Karen Wolf, the case manager for Employee, advised Dr. O'Brien (apparently at the request of Employer or its insurer) that Employee's job did not require "any overhead, repetitive work." On the basis of that information, Dr. O'Brien changed his opinion, attributing Employee's symptoms to the aging process. Employer thereafter denied the left shoulder claim. Subsequently, in June 2007, Dr. O'Brien viewed a video recording of Employee performing her job. He testified that this confirmed his opinion that her left shoulder symptoms were not caused by her job. He assigned no impairment and no restrictions regarding Employee's left shoulder.

Dr. O'Brien acknowledged that if Ms. Wolf's description of Employee's job activities were inaccurate, it might alter his opinion with regard to causation.

Karen Wolf testified via deposition that the video recording of Employee was made to determine the effects of Employee's *right* shoulder injury on her ability to perform her job. She denied having told Dr. O'Brien that he should consider the video with respect to determining causation of Employee's left shoulder injury.

Employee acknowledged that in December 2006, she broke her foot in a non-work-related accident. She was working the Line 130 job at this time. She missed several months of work on medical leave while she recovered from her foot injury and then returned to the Line 130 job in June 2007. She also acknowledged that no physician had taken her off work because of her left shoulder.

In the summer of 2007, problems arose concerning the restrictions resulting from Employee's right shoulder injury. Employer's records apparently indicated that she had restrictions against reaching and overhead work, but no lifting restriction. Employee believed that she was not to lift weight in excess of three pounds with her right arm. Dr. O'Brien was consulted. Initially, he indicated that she had a ten pound lifting restriction. However, he subsequently revised the lifting restriction to three pounds. Employer could not accommodate that restriction. Employee was placed on medical leave in September 2007.

On March 31, 2008, Employer sent Employee a letter stating:

Let this serve as a reminder that your Medical Leave of absence is approaching the one (1) year mark.

...

If you are unable to return to work by 4-17-08 with no limitations, you will be considered to Administratively Voluntarily Resigned your position with [Employer].

Employee did not return to work. In accordance with Employer's leave policy, she was deemed to have voluntarily resigned in April 2008.

Employee had not sought employment since being terminated. She testified that she was unable to perform any of the previous jobs she had held. She further testified that there were parts of several jobs in Employer's facility, which, if combined into a single job, would have been within her restrictions. She also testified that she had given essentially the same testimony about her capabilities and limitations during the trial of the claim concerning her right shoulder.

Dr. Richard Fishbein, an orthopaedic surgeon, performed an independent medical examination in May 2007 at the request of Employee's attorney. He reviewed her previous medical records and ordered an MRI to be performed. He opined that she had "impingement of the left shoulder aggravated or caused by the repetitive nature or the stressing of her left shoulder due to the activities of her right shoulder." He further opined that Employee's injury was caused by her work activity "with repetitive use or stressing of her left shoulder." He assigned a 7% permanent anatomical impairment to the body as a whole "based on significant loss of motion and significant residual pain aggravated by performing activities of daily living." In his written report, exhibited to the deposition, 5% of the impairment was attributed to "shoulder weakness" and the remainder to residual pain. He did not place explicit restrictions upon Employee's activities, but did advise that she use "common sense," avoid excesses of overhead use, and avoid lifting more than twenty-five pounds overhead frequently. On cross-examination, Dr. Fishbein stated that he was "not sure of the exact duties" Employee performed in her job. He stated that there were "notes that say that she's doing overhead work gripping and grasping." He elaborated by saying that Employee told him she was overusing her shoulder and that work activities caused her symptoms. He was unaware that Employee had been off work, due to a non-work injury, for five months at the time he examined her.

The trial court found that Employee's left shoulder injury was work-related and compensable. The trial court specifically agreed with "Dr. O'Brien's initial determination on causation and Dr. Fishbein's one and only determination that the left shoulder was injured on the job." The trial court found that the facts Dr. O'Brien relied on prior to his meeting with Karen Wolf were "more accurate" than the ones he relied upon after his meeting with her.

The trial court also determined that Employee was terminated from her job with Employer and that she did not make a meaningful return to work. Accordingly, the trial court concluded that the statutory cap of one and one-half times her anatomical impairment did not apply.

The trial court accepted Dr. Fishbein's anatomical impairment rating of 7%. Considering Employee's age, education, work experience, the nature of her injury, and her resulting restrictions, the trial court assigned a 35% vocational disability to the body as a whole resulting from her left shoulder injury. Employee was therefore adjudged a vocational disability award of \$49,821.80.

Employer has appealed the trial court's findings regarding (1) causation; (2) non-applicability

of the statutory cap; and (3) the extent of Employee's disability.

Standard of Review

We review factual issues in a workers' compensation case de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. *See* Tenn. Code Ann. § 50-6-225(e)(2) (2008); *see also Rhodes v. Capital City Ins. Co.*, 154 S.W.3d 43, 46 (Tenn. 2004). 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 court on appeal must extend considerable deference to the trial court's factual findings. *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 71 (Tenn. 2001). When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over the other. *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675, 676-77 (Tenn. 1983). This Court, however, may draw its own conclusions about the weight and credibility to be given to expert medical testimony when it is presented by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997). With these principles in mind, we review the record to determine whether evidence preponderates against the findings of the trial court.

Analysis

I. Causation

On appeal, Employer contends that the trial court erred in its determination regarding causation. Employer asserts that Employee "suffers from a degenerative condition in her left shoulder [that is] related to age" and that the preponderance of the evidence is contrary to the trial court's determination that Employee's job caused her left shoulder injury.

The element of causation is satisfied where the "injury has a rational, causal connection to the work." *Braden v. Sears, Roebuck & Co.*, 833 S.W.2d 496, 498 (Tenn. 1992). Our courts have

consistently held that an award may properly be based upon medical testimony to the effect that a given incident 'could be' the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury.

Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997). Absolute certainty with respect to causation is not required, however, and the Panel must recognize that, in many cases, expert opinions in this area contain an element of uncertainty and speculation. *Fritts v. Safety Nat'l Cas. Corp.*, 163 S.W.3d 673, 678 (Tenn. 2005). Nevertheless, all reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. *Phillips v. A & H Constr. Co.*, 134 S.W.3d 145, 150 (Tenn. 2004); *Reeser*, 938 S.W.2d at 692.

Employee testified that she began having pain in her left shoulder while performing her job on Line 131 while her right arm was in a sling. She continued doing this job for some significant

period of time in spite of the ongoing pain. The job required repetitive reaching and pressing down with her left arm, four times per item, with a quota goal of 300 items per day. Dr. Fishbein opined that Employee's left shoulder injury was caused by the repetitive movements she was making with her left shoulder while performing her job. On taking Employee's history, Dr. O'Brien also initially concluded that her left shoulder injury was job related. He changed this opinion after speaking with Employee's case manager. He considered the videotape he viewed as confirmation of his second opinion. Karen Wolf testified, however, that the videotape had nothing to do with Employee's left shoulder injury. Moreover, the videotape portrayed Employee working on Line 130, not Line 131, the work that caused Employee's left shoulder pain. Dr. O'Brien admitted during his deposition that his second opinion regarding causation would be subject to alteration if Ms. Wolf's description of Employee's work activities was inaccurate.

The evidence does not preponderate against the trial court's conclusion regarding causation. Employer is not entitled to relief on this basis.

II. Applicability of Statutory Cap

An employee suffering an injury after June 30, 2004, that results in permanent partial disability, but who returns to work with his or her employer, is limited to an award of one and one-half times his or her medical impairment rating. Tenn. Code Ann. § 50-6-241(d)(1)(A) (2008). Whether or not an employee has made a "meaningful return to work" such that this statutory cap applies has been the subject of much litigation. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 328 (Tenn. 2008). In this case, the trial court concluded that Employee did not make a meaningful return to work and that the cap therefore did not apply. Employer contends that the trial court thereby erred.

"When determining whether a particular employee had a meaningful return to work, the courts must assess the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to either return to or remain at work." *Id.* In this case, Employer terminated Employee pursuant to its medical leave policy after it was unable to accommodate her restrictions. Employee testified that she did not want to leave her employment with Employer.

The evidence does not preponderate against the trial court's conclusion that Employee did not make a meaningful return to work. Employer sent Employee a letter advising her that, unless she was able to return to work with *no* restrictions, she would be unable to return to her employment. Employee had already been given permanent restrictions with respect to her right shoulder and had further been advised by Dr. Fishbein that she should limit her overhead work, observe an overhead lifting restriction, and use her "common sense" with respect to using her left shoulder. Employer's written demand that Employee return to work with no restrictions was an unreasonable condition for her return to work. *See Newton v. Scott Health Care Ctr.*, 914 S.W.2d 884, 886 (Tenn. Workers' Comp. Panel 1995) (reasoning that "[i]f the offer from the employer is not reasonable in light of the circumstances of the employee's physical ability to perform the offered employment, then the offer of employment is not meaningful"). The trial court therefore did not err in finding that the one and one-half multiplier did not apply to cap Employee's workers' compensation award. Employer is not entitled to relief on this basis.

III. Award

The trial court applied a multiplier of five to Employee's anatomical impairment rating of 7%, thereby assessing a 35% vocational disability. Employer argues that this is an excessive assessment.

The extent of an injured employee's vocational disability is a question of fact. *Lang v. Nissan N. Am. Inc.*, 170 S.W.3d 564, 569 (Tenn. 2005). In determining permanent partial disability benefits not subject to the statutory cap, a trial court must consider "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." Tenn. Code Ann. § 50-6-241(d)(2)(A). The trial court in this case specifically found that Employee "could not do most of the jobs that she has had up until now."

Employee was fifty years old at the time of trial, of limited education, and with limited skills and training. She testified that she was limited in her activities by the lifting, pulling, and reaching required. It hurt to swing her arms when she walked. She stated, "I can't move my arms." She can no longer vacuum the whole house. Her left shoulder hurts when she drives. Operating a computer beyond a short time hurts her shoulders. She stated that she could read and write and do math. With respect to future employment, she testified that she would "probably have to go back to school" but was not sure what her future course of employment would be. She stated that she would "try anything."

The evidence does not preponderate against the trial court's assessment of a 35% vocational disability award. Employer is not entitled to relief on this basis.

IV. Lack of Specific Findings

Tennessee Code Annotated section 50-6-241(d)(2)(B) provides that, if a trial court awards "a permanent partial disability percentage that equals or exceeds five (5) times the medical impairment rating, the court shall include specific findings of fact in the order that detail the reasons for awarding the maximum permanent partial disability." Employer complains that the trial court's findings did not comply with this provision.

We agree with Employer that the trial court could have made more extensive factual findings with respect to the factors set forth in section 50-6-241(d)(2)(A), *supra*. Nevertheless, the record contains information relevant to each of the statutorily specified factors and the information supports the trial court's application of the multiplier of five. Employer is not entitled to relief on this basis.

Conclusion

The judgment of the trial court is affirmed. Costs of this cause are taxed to appellants Calsonic Kansei North America, Inc., and Travelers Indemnity Company, and their sureties, for which execution may issue if necessary.

ALLEN W. WALLACE, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
FEBRUARY 23, 2009 SESSION

JANIE VINCENT v. CALSONIC KANSEI NORTH AMERICA, INC., ETAL

**Circuit Court for Bedford County
No. 11110**

No. M2008-01693-WC-R3-WC - Filed - July 13, 2009

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 appeals 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 are taxed to appellants, Calsonic Kansei North America, Inc. and Travelers Indemnity Company, and their sureties, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM