

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 22, 2010 Session

GAIL TUTEN v. JOHNSON CONTROLS, INC., ET AL.

**Appeal from the Chancery Court for Henderson County
No. 22602 James F. Butler, Chancellor**

No. W2009-1426-SC-WCM-WC - Mailed May 28, 2010; Filed August 25, 2010

Employee developed carpal tunnel syndrome while employed as a factory worker by Johnson Controls, Inc. ("JCI"). After employee gave notice of her injury and received some treatment, Manufacturers Industrial Group ("MIG") bought the factory and became her employer. She had surgery on both arms and returned to work, but was then permanently laid off. Employee brought an action against both JCI and MIG for workers' compensation benefits due to injuries sustained to her right and left hands and wrists. JCI and MIG each argued that the other should be liable for her workers' compensation benefits. The trial court found that MIG was liable and awarded 48% permanent partial disability to both arms. MIG appealed.¹ It contends that the trial court erred by assigning liability to it and by adopting the impairment rating of a physician chosen through the Medical Impairment Registry. MIG further argues that the award was excessive. We affirm the judgment of the trial court.

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

D. J. ALISSANDRATOS, SP. J., delivered the opinion of the Court, in which JANICE M. HOLDER, C. J., and ALLEN W. WALLACE, SR. J., joined.

Jeffrey G. Foster and David E. Goudie, Jackson, Tennessee, for the appellant, Manufacturers Industrial Group.

Edward L. Martindale, Jr., Jackson, Tennessee, for the appellee, Gail Tuten.

¹ Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law.

John W. Barringer, Jr. and David M. Drobny, Nashville, Tennessee for the appellee, Johnson Controls, Inc.

MEMORANDUM OPINION

Factual and Procedural Background

Gail Tuten (“Employee”) began working for Johnson Controls, Inc. (“JCI”), a manufacturer of automotive seat components, in October 1996. She worked as a “booth operator” for approximately six years before moving to a job on the assembly line that consisted primarily of attaching metal parts together with small screws using a “torque gun.” In 2004, she began to have numbness, pain, and other symptoms in her hands. She consulted her primary care physician, and a nerve conduction study was performed, the results of which were negative. She received no additional treatment.

By July 2006, her symptoms had worsened significantly. She notified her employer, who referred her to Dr. Wren, a primary care doctor. Dr. Wren prescribed splints and medication. He also ordered a new nerve conduction study. Although the test was scheduled on two occasions, it was not performed. Dr. Wren moved out of the area during this period of time, which may have caused the delay in scheduling the test. Employee received no additional medical care during this time.

On January 1, 2007, MIG purchased JCI’s facility and became Employee’s employer. Employee continued to perform the same job that she had done for JCI. However, her rate of pay and number of hours were reduced.

Employee continued to have pain and numbness in her hands. She reported her ongoing problems to the human resources department and was sent for evaluation to Dr. Warren, a primary care doctor, in April 2007. A nerve conduction study was performed. Employee was then referred to Dr. Harold Antwine, an orthopaedic surgeon, for further evaluation and treatment.

Dr. Antwine testified by deposition. He recommended cortisone injections. This treatment had only a temporary effect. In July 2007, Employee was moved from the assembly line to a job operating a welding machine. She testified that this job placed much less stress on her hands. Her symptoms continued, and Dr. Antwine recommended surgery. A carpal tunnel release procedure was performed on Employee’s right hand in December 2007, and on her left hand in January 2008. Dr. Antwine released her from his care in March 2008. He placed no restrictions upon her activities and assigned no impairment. He stated that he assigned no impairment because he “didn’t see any permanent or residual neurologic

deficit.” He testified that repetitive use of a torque gun “could have been a contributing factor” to Employee’s carpal tunnel syndrome and that each day she used the torque gun on the job would potentially advance or aggravate the condition.

Dr. Samuel Chung performed an independent medical examination (“IME”) at the request of Employee’s attorney on April 9, 2008. Using tables 16-10 and 16-15 from the Fifth Edition of the AMA Guides, he assigned a permanent impairment of 10% to each arm. This impairment was based upon “ongoing symptoms of intermittent numbness, pain, and some degree of weakness in grip.” Dr. Chung opined that Employee’s work after she became employed by MIG did not cause further damage to her median nerve, because “most of her damage was already done prior to moving on to MIG.”

MIG requested an impairment evaluation through the Medical Impairment Registry (“MIR”) process. Dr. Alan Pechacek was selected to perform that evaluation. After reviewing the relevant medical records, he examined Employee on February 24, 2009. Using the same section of the AMA Guides as Dr. Chung had used, he concluded that she had a 16% impairment to each arm as a result of her work injury. On cross-examination, Dr. Pechacek agreed that no post-surgical nerve conduction studies of Employee had been performed and that the section of the AMA Guides that he had used could be read to require such tests. He did not agree, however, that the Guides mandated such tests.

Employee returned to work for MIG after she was released by Dr. Antwine in March 2008. She continued to work for MIG until September 2008, when she was laid off as part of a plant-wide reduction in force. Although she actively sought employment, she remained unemployed at the time of the trial. She was forty-two years old and a high school graduate with no additional education or specialized training. Before being hired by JCI, she had worked as a waitress and as a sewing machine operator. She testified that her symptoms improved after the two surgical procedures. However, she continued to have numbness and occasional pain in her hands. She had some difficulty opening bottles and jars, and performing household activities. Her hands sometimes caused her to awaken at night. On such occasions, she used the splints that had previously been prescribed for her.

The trial court found that the last injurious injury occurred in July 2007, when Employee was moved from the assembly line to welding. That event occurred after MIG became her employer, and MIG therefore was found liable for workers’ compensation benefits associated with her injury. The trial court further found that Dr. Pechacek’s impairment rating had not been rebutted by clear and convincing evidence, adopted that rating, and awarded 48% permanent partial disability (“PPD”) to both arms. MIG has appealed, contending that the trial court erred by assigning liability to it, rather than to JCI,

and by adopting the impairment rating of the MIR physician. It also contends that the award is excessive.

Standard of Review

The standard of review of findings of fact is “de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise.” Tenn. Code Ann. § 50-6-225(e)(2) (2008). With regard to credibility and weight afforded to witness testimony, we give considerable to the trial court who sees and hears the witness. Madden v. Holland Group of Tenn., Inc., 277 S.W.3d 896, 900 (Tenn. 2009). “When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues.” Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A trial court’s conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

1. Last injurious injury

The trial court found:

It does not make sense that [Employee] can allege a gradual injury from a repetitive trauma by using the torque gun and that the injury stopped occurring on January 1, 2007, even though she continued using the torque gun until July 2007. [Employee’s] last day using the torque gun was in June, or July 2007, with MIG. She was restricted by Dr. Antwine after that. She did not miss work until she became employed by MIG as a result of her [carpal tunnel syndrome]. It is inescapable to the Court, while financially detrimental to [Employee], that her employment at MIG did in fact advance, or aggravate, her carpal tunnel syndrome to the point where she had to stop doing the job she was doing and ultimately have surgery.

For that reason, the Court finds that MIG must bear the liability for [Employee’s] vocational disability.

MIG contends that the evidence preponderates against this finding. In support of its contention, it notes that Employee worked fewer hours and fewer days per week after it became her employer; that she testified that her symptoms did not significantly worsen after the change; that Dr. Chung testified that the damage to her median nerve had already occurred while she was employed by JCI; and that Dr. Antwine's testimony on the subject was equivocal.

In circumstances involving a compensable condition spanning consecutive employers, we look to the last injurious injury rule to determine which employer is liable for the employees condition. The last injurious injury rule provides that "in determining which of two successive insurers is liable in a workers' compensation case, the insurer at the time of the employee's last injurious exposure is liable for the injury." Bldg. Materials Corp. v. Britt, 211 S.W.3d 706, 713 (Tenn. 2007).

In support of the trial court's finding, JCI points to the testimony of Dr. Antwine that continuing use of the torque gun could aggravate her carpal tunnel syndrome, and it points to the testimony of Dr. Chung that "[a]ny kind of vibration and repetitive motion would worsen the situation and condition." JCI also cites two recent panel decisions in which we held that liability for gradually occurring injuries was correctly assigned to a later employer. Seals v. Vanguard of Manchester, LLC, No. M2008-00744-WC-R3-WC, 2009 WL 585945 (Tenn. Workers' Comp. Panel Mar. 09, 2009); Smallen v. ArvinMeritor, Inc., No. E2007-02179-WC-R3-WC, 2009 WL 564424 (Tenn. Workers' Comp. Panel Mar. 5, 2009).

We conclude that the evidence in this record does not preponderate against the trial court's finding on this issue. To the contrary, the idea that Employee would continue to sustain harm as long as she continued to perform the activity that harmed her in the first place is a reasonable interpretation of the medical evidence. Dr. Chung's testimony provides a basis for reaching a different conclusion, but it is not so compelling that it requires such a conclusion. The assignment of liability to MIG is affirmed.

2. Rebuttal of MIR Impairment

MIG also contends that the trial court erred by adopting the impairment rating of Dr. Pechacek, the MIR doctor. Tennessee Code Annotated section 50-6-204(d)(5) provides that the impairment assigned by a doctor selected through the MIR process "shall be presumed to be the accurate impairment rating," unless rebutted by clear and convincing evidence. Tenn. Code Ann. § 50-6-204(d)(5) (2008 & Supp. 2009). MIG asserts that this burden was satisfied through its cross-examination of Dr. Pechacek. Specifically, it contends that the section of the AMA Guides on which he based his rating requires post-surgical nerve conduction studies, which were not performed. Dr. Pechacek agreed that the Guides mention

such studies but nevertheless testified that his interpretation of the Guides was appropriate. There is no evidence from any other source, such as other medical testimony, that supports MIG's interpretation of the Guides. Indeed, Dr. Chung based his impairment rating on the same section of the Guides used by Dr. Pechacek. Dr. Antwine did not refer to any specific section of the Guides in his testimony, nor did he opine that post-surgical studies were necessary for impairment to be assigned.

In Beeler v. Lennox Hearth Prods., Inc., No. W2007-02441-SC-WCM-WC, 2009 WL 396121 (Tenn. Workers' Comp. Panel Feb. 18, 2009), we held that, for the purposes of this section, "clear and convincing evidence" means "evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." Id. at *4 (quoting Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.3 (Tenn. 1992)). A straightforward interpretation of this standard favors, or even requires, the presentation of affirmative evidence that an MIR physician had used an incorrect method or an inappropriate interpretation of the AMA Guides to overcome the statutory presumption. There is no such evidence in this case.

3. *Excessive Award*

Finally, MIG argues that the award of 48% PPD to both arms is excessive. It notes that Employee was able to return to her pre-injury job, though she was subsequently laid off for economic reasons, and that she had no permanent restrictions from Dr. Antwine.

Employee completed high school, but had no additional education or specialized training. All of her work experience is relatively unskilled. Although she diligently attempted to find work after being laid off, she was unable to do so for over a year and remained unemployed when the trial occurred. Although she has no permanent restrictions, her un rebutted testimony was that she continued to have symptoms and had difficulty using her hands for activities requiring grasping. Based on this evidence, we are unable to conclude that the trial court's assessment of her vocational disability was incorrect.

Conclusion

The judgment of the trial court is affirmed. Costs of this appeal are taxed to Manufacturers Industrial Group, and its surety, for which execution may issue if necessary.

D. J. ALISSANDRATOS, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

GAIL TUTEN v. JOHNSON CONTROLS, INC. ET AL

**Chancery Court for Henderson County
No. 22602**

No. W2009-01426-SC-WCM-WC - Filed August 25, 2010

JUDGMENT ORDER

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

It is so ORDERED.

PER CURIAM

Holder, Janice M., C.J., Not Participating