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

JOHNSON CONTROLS,	)	PERRY CIRCUIT
	)	
Plaintiff-Appellant	)	
	)	HON. DONALD P. HARRIS
v.	)	CIRCUIT JUDGE
	)	
SHELBY J. COTHAM and	)	
LARRY BRINTON, DIRECTOR,	)	
SECOND INJURY FUND	)	
	)	
Defendants-Appellees	)	NO> 01S01-9511-CV-00212

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Cecil Crowson, Jr.
Appellate Court Clerk

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M E M O R A N D U M O P I N I O N

Members of Panel:

Frank F. Drowota, III, Justice
John K. Byers, Senior Judge
Roger E. Thayer, Special Judge

MODIFIED and AFFIRMED. **THAYER, Special Judge**

This workers' compensation appeal has been referred to the Special Workers'

Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

Plaintiff, Johnson Controls, Inc., instituted suit against defendant, Shelby J. Cotham, seeking a determination as to whether the defendant employee had sustained a work-related injury which was compensable. The Circuit Judge found the claim to be compensable and awarded 100 percent permanent disability benefits apportioning 75 percent of the award to plaintiff-employer and 25 percent to the Second Injury Fund.

The employer has appealed the decision insisting defendant's knee condition was not caused by her work activities and that her tendinitis in her hand was not a permanent injury. The employee contends the evidence supports the trial court's findings and that the trial court was in error in directing the award of disability be reduced or set-off by amounts paid to her for short term disability benefits which she received for about five months.

Shelby J. Cotham is 52 years of age and has a 7th grade education. She has been employed by plaintiff for about 22 years. During most of her employment she has been on production work on an assembly line or subline assembly requiring repetitive use of her hands and prolonged periods of standing and/or sitting.

The record indicates she had suffered from osteoarthritis in her knees since 1984-1989; her hand problem first began during April, 1993; she worked through June, 1994, and did not ever return to work as she testified she could not perform her work duties while standing or sitting and that her hands would go to sleep at night; that she could not grip anything and her arm hurt. Her employer was aware of her osteoarthritis as it had resulted in her being off from work twice during the years 1992-1993.

The employer questions the trial court's findings that her osteoarthritis was aggravated by her work conditions. Two physicians testified by deposition and their testimony is in conflict on the medical questions. The trial court resolved the dispute by accepting the testimony of her treating physician.

Dr. Stephen L. Averett, an internal medicine physician, testified defendant had severe osteoarthritis in her knees and that her condition had been aggravated by her work. In response to a question as to whether the work activity merely caused more pain, he stated, "I'm saying that her work aggravated and accelerated the process of arthritis in her knees." He also said her tendinitis in both hands was a result of her repetitive motions at work. Dr. Averett had written a letter to plaintiff-employer during September, 1994, stating she was permanently and totally disabled and later in giving his deposition, he expressed an opinion in medical terms by saying she had a 25 percent medical impairment to each arm. He stated he had seen her for several years.

Dr. David S. Knapp, a physician of rheumatology, only saw defendant one time in 1993 and on a second occasion during July, 1994. He was of the opinion her work activity only increased her knee symptoms, with no permanent change of a structural nature. He found tendinitis in her left wrist but did not place any permanent restrictions on the use of her hands. He admitted she could not return to her regular job and said she should not be doing work that required her to be standing, walking and lifting or prolonged sitting on an ongoing basis.

The trial court also heard from witness Rebecca Williams, a vocational disability evaluator, who gave an opinion defendant was 100 percent vocationally disabled.

Appellate review of a trial court's decision in a case of this nature is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings of fact unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2).

An employee has the burden of proving every element of the case, including causation and permanency by a preponderance of the evidence. *Tindall v. Waring Park Assn.,* 725 S.W.2d 935, 937 (Tenn. 1987).

In cases where expert medical testimony is presented by deposition and is conflicting, the appellate court is in as good a position as the trial court in reviewing and weighing testimony and determining credibility questions and questions

concerning the weight of expert testimony. *Landers v. Fireman's Fund, Inc.*, 775 S.W.2d 355, 356 (Tenn. 1989).

From our independent review of the record, we cannot conclude the evidence preponderates against the findings of the trial court on the award of disability.

The employee has assigned error on the part of the trial court in allowing a set-off of amounts paid by plaintiff's disability insurance carrier against the workers' compensation award. In this connection, the parties had stipulated employee Cotham had received $333.60 per week in short term disability benefits from July 11, 1994 to December 11, 1994. It was also stipulated she had never been paid any workers' compensation benefits and she reached maximum medical improvement on July 8, 1994.

We agree it was not proper to allow the set-off. Since defendant's maximum medical improvement occurred shortly after leaving her employment, the award would have to be construed as one for permanent disability benefits as distinguished from temporary total disability benefits.

The question of whether an employer is entitled to a set-off of the amount of short term disability benefits paid by a company disability insurance policy against permanent disability benefits was most recently addressed in the case of *Cantrell v. Electric Power Board,* 811 S.W.2d 84 (Tenn. 1991). In this case the employer sought a set-off of $11,273. which the trial court denied. The Supreme Court held the denial of the set-off was proper against an award of permanent disability benefits as a matter of public policy and cited TENN. CODE ANN. § 50-6-114 which provides:

> "No contract or agreement, written or implied, nor rule, regulation, or other device, shall in any manner operate to relieve any employer in whole or in part of any obligation created by this law."

The opinion went on to state the statute was evidence of legislative intent to prohibit a judicially-imposed set-off which would operate to relieve the employer of statutory liability for permanent disability benefits.

The employee also claims the appeal was frivolous and that a penalty should be assessed. Although we have concurred with defendant in disposition of the issues of the case, we find the issues raised were real

and not of a trivial nature.

It results the action of the trial court is modified to disallow the claim by plaintiff for a set-off against the award of permanent disability benefits and the judgment in all other respects is affirmed. Costs of the appeal are taxed to the plaintiff-employer and sureties.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
Frank F. Drowota, III, Justice

_____
John K. Byers, Senior Judge