

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

AT JACKSON

FILED
December 19, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

THERESA WEBB,)
)
 Plaintiff-Appellee,) No. 02-S-01-9603-CH-
00029)
)
 v.) MADISON CHANCERY
 COURT)
) No. 50025
 THE QUAKER OATS COMPANY,)
)
 Defendant-Appellant)

FOR APPELLANT:

FOR APPELLEE:

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MEMORANDUM OPINION

Members of Panel

Lyle Reid, Associate Justice, Supreme Court
F. Lloyd Tatum, Special Judge
Joe C. Loser, Jr., Special Judge

MODIFIED

Tatum, Judge

MEMORANDUM OPINION

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 of findings of fact and conclusions of law.

In the first issue, the defendant/appellant, Quaker Oats Company, states that the trial court erred in awarding permanent partial disability benefits to the body as a whole rather than the scheduled members allegedly injured - the arms. As will hereinafter be shown, the injury in this case consisted of carpal tunnel syndrome to each of plaintiff-employee's arms. It is well settled that an award of permanent partial disability for an injury to a scheduled member is exclusively controlled by the rate established by the legislature for that member and is not permitted as an award to the body as a whole. *Wade vs. Aetna Casualty and Surety Company*, 735 S.W.2d 215 (1987); *Jenesco vs. Creamer*, 584 S.W.2d 191 (1970). The arms are scheduled members and each arm is given the value of two hundred weeks under the statute and both arms have a value of four hundred weeks. Tenn. Code Ann. 50-6-207(3)(A)(ii)(m) and (w). The body as a whole also has a value of four hundred weeks. The trial court found that the plaintiff sustained 40% permanent partial disability to the body as a whole and did not make a rating with the respect to the arms. The first issue is sustained.

In the next issue, the appellant states: "Assuming that the trial court did not err in awarding permanent partial disability benefits to the body as a whole, whether an award of 40% to the body as a whole is

supported by a preponderance of the evidence?"

The trial court awarded benefits for one hundred and sixty weeks which represents 40% permanent partial disability to both arms or to the body as a whole.

The plaintiff was forty-three years of age at the time of trial. She completed high school and also had taken college classes in typing, computers, algebra and psychology. She had a work history of department store work, waitress, production work in a factory, and working at an H & R Block Income Tax Outlet preparing tax returns. At the time of trial, she was employed at a supermarket in Bolivar, Tennessee, checking groceries, occasionally stocking shelves and straightening the products on the shelves. She testified that she was unable to perform the above-mentioned prior work and gave specific and logical reasons as to why she could not perform each job.

She began working for Quaker Oats on September 26, 1994, stacking waffles. This job required her to grab four waffles in each hand and put them into slots. She did this one hundred and twenty times a minute all day. Her regular shift was eight hours a day but she was often required to work twelve hours a day. She worked six or seven days a week.

About the second week she worked at Quaker Oats, her hands began to swell. She reported this to her supervisor on two occasions but he told her that the swelling would not continue. She was taken off of twelve hour shifts and placed on only eight hour work shifts.

When the pain, swelling and numbness in both hands and wrists,

became worse she was referred to Dr. Paul Schwartz, a company approved physician. Dr. Schwartz treated her conservatively for a time but when the pain, swelling and numbness continued Dr. Schwartz referred the plaintiff to Dr. John Sparrow, a surgeon at the Jackson Clinic. Dr. Sparrow also treated her conservatively, but when her difficulties continued, Dr. Sparrow sent her to Dr. Ron Bingham for nerve conduction study tests. Those studies showed media nerve compression and carpal tunnel syndrome. At this point, Quaker Oats discharged the plaintiff stating that she was not able to perform her job duties.

After the plaintiff was discharged, Dr. Sparrow performed left carpal tunnel release on February 6, 1995, and a right carpal tunnel release on April 5, 1995. On May 3, 1995, Dr. Sparrow released her with no restrictions. When he released her, Dr. Sparrow did not repeat EMG studies and performed no grip strength testing. Apparently he did not consider grip strength loss in determining permanent impairment. Dr. Sparrow testified that some doctors agreed with the AMA Guidelines with respect to rating disability due to the loss of grip strength and others do not. Dr. Sparrow did not agree with AMA Guidelines in this regard.

Dr. Sparrow said that the last time he saw the plaintiff was June 2, 1995, at which time she was "still improving." He testified that there is no way of determining loss of grip strength and that he would not be surprised if she was still suffering pain. He stated that pain and grip strength are subjective; therefore, he did not consider these symptoms in assessing impairment.

The plaintiff's attorney sent her to Dr. Joe Boals, an orthopedic

surgeon in Memphis, and Dr. Robert J. Barnett, an orthopedic surgeon in Jackson.

Dr. Boals, testifying by deposition at the instance of the defendant, stated that he saw the plaintiff on August 8, 1995. He concluded "that she did have some residuals from carpal tunnel release bi-laterally but that she had very little grip strength loss." He testified that the plaintiff had normal grip strength on the left, according to national averages, and she had five pounds decrease on the right. He testified that the plaintiff suffered 5% permanent partial impairment to the right "upper extremity" and 0 impairment on the left.

Dr. Boals testified that the AMA tables reflect strength of an average person. He testified that the plaintiff appeared to be very strong and that "her statement that grip strength is less than it was is consistent with anyone's common sense." He also stated "her problems may be more than the disability rating reflects." He testified that the plaintiff should avoid repetitive work, heavy gripping, but could work on a light to moderate level.

Dr. Robert J. Barnett stated that the plaintiff had diminished grip strength in both hands. He testified that her loss of grip in the right hand was forty to fifty-five pounds. She was right handed but her left hand grip strength was more than her right hand grip strength. Dr. Barnett testified that she had 10% permanent partial impairment to the right arm and 5% to the left.

The plaintiff testified that she was 5' 7" tall and weighted 235 pounds. She has a large frame and is a very strong person. Before her injury, she chopped wood with an axe and split it with a mallet. She

helped move heavy items, such as a refrigerator, sofa and heavy couch. She was as strong as the average man and had strong grip in both hands, which she has lost. She is disabled more in her right hand than the left.

She testified that she cannot open a jar of pickles and has much pain and difficulty with her right hand in turning things, for example, door knobs. She cannot do repetitive work and she described much restriction in lifting and doing other forms of work. At the time of trial, she was earning \$4.50 per hour at the supermarket in Bolivar, Tennessee. She earned \$7.50 per hour at Quaker Oats. Her testimony was corroborated by her husband and her daughter.

Joe French, health and safety manager for Quaker Oats, testified that he manages workers' compensation cases for Quaker Oats. He testified that the plaintiff cannot be reemployed by Quaker Oats because of her wrist difficulty. She was discharged before surgery was performed because she could not do her job.

Appellate review is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). This tribunal is required to conduct an independent examination of the evidence to determine where the preponderance of the evidence lies. *Wingert vs. Government of Sumner County*, 908 S.W .2d 921 (1995).

Where the trial judge has seen and heard witnesses, especially if issues of credibility and weight to be given oral testimony are involved, on review considerable deference must still be accorded to

those circumstances. *Townsend vs. State*, 826 S.W.2d 434 (Tenn. 1992). However, this tribunal is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. *Seiber vs. Greenbriar Industries, Inc.*, 906 S.W.2d 444 (Tenn. 1995). All of the medical proof in this case was by deposition. The other evidence was by oral testimony.

As previously stated, the trial judge assessed the 40% disability rating to the body as whole and not to both arms. In calculating the vocational disability of injuries to both arms, the trial judge should first determine the disability of each arm separately, then average those disabilities to arrive at a single disability for the "loss of two arms other than at the shoulder." *Drennon v. General Electric Co.*, 897 S.W.2d 243 (Tenn.1994).

On our *de novo* review, we find that the preponderance of the evidence establishes that the plaintiff has 50% permanent partial vocational disability of the right arm and 25% to the left arm, resulting in 37.5% vocational disability of two arms. The judgment is modified accordingly.

Costs are adjudged against Quaker Oats for which execution may issue if necessary.

CONCUR: F. LLOYD TATUM, JUDGE

LYLE REID, ASSOCIATE JUSTICE

JOE C. LOSER, JR., JUDGE

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Defendant/Appellant.

) MADISON CHANCERY
) NO. 50025
)
) Hon. Joe C. Morris,
) Chancellor
)
) NO. 02S01-9603-CH-

) MODIFIED

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JUDGMENT ORDER

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 fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Appellant, and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 19th day of December, 1996.

PER CURIAM

(Reid, J., not participating)

