

**IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE AUGUST 1996 SESSION**

DORIS TABOR,)	CUMBERLAND CIRCUIT
)	
Plaintiff/Appellee)	NO. 03S01-9510--CV-00117
)	
v.)	HON. JOHN J. MADDUX, JR.,
)	JUDGE
CROSSVILLE CERAMICS)	
COMPANY, and CNA)	
INSURANCE COMPANIES,)	
)	
Defendants/Appellants)	

FILED
November 26, 1996
Cecil Crowson, Jr. Appellate Court Clerk

For the Appellants:

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MEMORANDUM OPINION

Members of Panel:

E. Riley Anderson, Justice
William H. Inman, Senior Judge
Joe C. Loser, Jr., Special Judge

MODIFIED

INMAN, Senior 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.

The plaintiff alleges that on March 7, 1994 she sustained injuries to her arms and hands during the course of her employment owing to their repetitive use; that she returned to work as a polisher for the Crossville Ceramics Company and that on March 23, 1994 she injured her neck or back while pushing a box of tiles.

The defendants admitted that the plaintiff suffered a temporary injury but denied that she sustained a permanent disability.

Thereafter, on May 24, 1995, an approved Order was entered whereby the plaintiff voluntarily dismissed "her cause of action as to her March 23, 1994 injuries" pursuant to Rule 41, Tenn. R. Civ. P. This procedure is unchallenged, and we will treat the complaint as having been amended to allege a compensable injury by accident which occurred on March 7, 1994.

The plaintiff testified that she worked as a sorter in the polishing department of the ceramics manufacturer, the kind of work that required repetitive motions of both arms. On March 7, 1994 numbness and tingling developed in both arms which she reported to her supervisor and for which she received conservative medical treatment. *She continued at her job for more than one year, leaving employment in April 1995 after allegedly suffering a neck injury.*

During the thirteen months between March 1994 and April 1995 the plaintiff was seen by a procession of physicians practicing various disciplines. Dr. Simpson, the orthopedic physician selected by the plaintiff, treated her over a period of months and concluded that she exaggerated her symptoms which were not anatomic. He testified that she suffered no impairment. His findings are supported by those of the Knoxville Neurology Clinic and the East Tennessee Orthopedic Clinic.

The plaintiff was referred by her attorney to Dr. Gorman, an orthopedic surgeon practicing in Johnson City, who testified that she had a five (5) percent impairment in each arm, and recommended avoidance of "repetitive factory work."

She was then referred by her attorney to Kelly Lenz, a physical therapist, for evaluation. The defendant objected to her testimony on grounds of irrelevance since the witness's examination and evaluation involved the alleged injuries to the neck and back to a substantial extent. Ms. Lenz' evaluation was based on three or four hours of testing, and she conceded on cross-examination that "the results were invalid." Without belaboring the point, it seems clear that the testimony of this witness should have been excluded.

Dr. Norman Hankins, a rehabilitation expert, testified that the plaintiff was 80 percent vocationally disabled; a counterpart, Dr. Rodney Caldwell, testified that the plaintiff's vocational disability was 35 percent if the medical evaluations were reliable. Other experts testified or submitted reports. The trial judge found that the plaintiff sustained a 45 percent partial, permanent disability to each arm as a result of the March 7, 1994 episode.

The employer appeals and presents for review the issues of (1) whether the trial court erred in finding that the "employer caused permanent impairment to plaintiff's arms;" (2) whether the trial court's award was excessive; (3) whether the trial court erred in admitting and relying on the testimony of Kelly Lenz, Dr. Thomas Qualls and Dr. Norman Hankins; (4) whether the trial court erred in assessing the costs of Dr. Hankins' testimony against the defendant.

We treat the first issue as alleging that the evidence preponderates against a finding that the plaintiff sustained the injuries to her arms as she claimed. Our review of the judgment of the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. TENN. R. APP. P., RULE 13(d).

I

The plaintiff continued to work for thirteen (13) months after the March 7, 1994 episode. She never missed work because of problems with her arms or hands. She quit her job in April 1995 because of an alleged back or neck injury, which was non-suited as we have shown. Her treating physician, Dr. Simpson, testified that he found no organic basis for her complaints and that she had no impairment; a

physician hired by her attorney, who saw her on two occasions, testified as to the claimed carpal tunnel syndrome and that she had a five percent impairment in each arm. While it is obvious that the trial court would have been justified in finding the issue of occurrence and injury against the plaintiff, we cannot find that the evidence preponderates against a finding of impairment, although the percentage thereof is excessive and not supported by a preponderance of the evidence. See *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). We think the evidence when viewed in the light most favorable to the plaintiff supports a finding that she has a ten percent impairment in each arm, and the judgment will be modified accordingly.

II

Error is assigned to the allowance of the testimony of Dr. Qualls, a chiropractor. It does not appear from the record that the trial court relied on this testimony, and we need not further notice it.

III

The testimony of Dr. Hankins is somewhat perplexing. He assumed that the plaintiff was unable to perform repetitive wrist-motion factory work despite the fact that she did so for thirteen months before she stopped work on account of an alleged back injury. The defendant argues that his testimony should not have been considered for any purpose. We think the anomaly inherent in his testimony presents only a matter of the weight to be accorded it, and we are as well able to judge of its worth as the trial judge. *Humphrey, supra*. We cannot find that the testimony of Dr. Hankins has no probative value; rather, its evidentiary value, while lessened by his assumption, is of some benefit to the decisional process, and we cannot find that the award of discretionary costs was an abuse of discretion.

As modified, the judgment is affirmed. The costs are divided evenly and the case is remanded.

William H. Inman, Senior Judge

CONCUR:

E. Riley Anderson, Chief Justice

Joe C. Loser, Special Judge

