

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

FILED

April 21, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

MOLLY FAYE SMALLMAN,)	
)	HAMBLEN CIRCUIT
Plaintiff/Appellant)	
)	NO. 03S01-9607-CV-00079
v.)	
)	HON. BEN K. WEXLER,
SHELBY WILLIAMS INDUSTRIES,)	JUDGE
INC.,)	
)	
Defendant/Appellee)	

For the Appellant:

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For the Appellee:

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MEMORANDUM OPINION

Members of Panel:

E. Riley Anderson, Justice
John K. Byers, Senior Judge
Roger E. Thayer, Special Judge

AFFIRMED

BYERS, 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 trial court below awarded plaintiff 17% permanent partial disability to each arm. Plaintiff appeals, arguing that the evidence preponderates in favor of a higher award.

We affirm the judgment of the trial court.

Plaintiff, who was 44 years of age at the time of the trial, has an eighth-grade education. Her previous work history has been mostly in factory assembly work. She has worked as an upholsterer of furniture for the defendant since 1984. She testified that her work requires her to pad the furniture and then cover it with fabric of some sort, which requires her to constantly pull the fabric and tack it into place with a staple gun. In the spring and summer of 1994, plaintiff began to notice some pain and swelling in her wrists and hands. She reported her problems to her employer in August and her employer referred her to Dr. Wayne L. McLemore, an orthopedic surgeon.

Dr. McLemore diagnosed plaintiff with bilateral carpal tunnel syndrome related to her work activities. He attempted conservative treatment but that was unsuccessful. He then performed bilateral carpal tunnel releases with satisfactory results. He assigned plaintiff a four percent permanent impairment to each upper extremity. He testified that he did not impose any restrictions upon the plaintiff because he did not want to make it difficult for her to return to work. However, he opined that she did have some restrictions: she should avoid repetitive pulling and wrist-bending activities, heavy lifting and vibrating tools. After plaintiff returned to work in February 1995, she returned to him on July 25, 1995 with complaints of continued pain and swelling. He testified that he advised her to change her employment if it became a regular problem for her.

Plaintiff's attorney referred her to Dr. Gilbert Hyde, also an orthopaedic surgeon, for an independent medical evaluation. He felt that she had continued

entrapment of her median nerve along the carpal tunnel based on her continued complaints of pain and swelling and mildly positive Tinel's and Phalen's tests. He assigned her a 10% impairment rating and advised that she avoid repetitive movement of her hands and wrists, vibration and lifting more than 20 to 25 pounds.

Dr. Norman Hankins, a vocational evaluator, assessed plaintiff's vocational disability at 55% to 60% in the Morristown and Knoxville labor markets under Dr. McLemore's restrictions and 75% to 80% under Dr. Hyde's restrictions. He testified that plaintiff reads at a fifth grade level and performs math at a sixth grade level.

Plaintiff testified that she has returned to her former job and that she continues to work but with pain and swelling. She testified that a co-worker assists her with heavy lifting and sometimes with pulling fabric. Both she and the defendant's personnel manager testified that plaintiff has never been warned or "counseled" that she is not making sufficient production. In fact, the personnel manager testified that plaintiff made 98% of production in the last eight weeks of 1995. He testified that 85% of production was the average for the upholstery department for that same period.

Our review is *de novo*, accompanied by the presumption that the trial court's findings of fact are correct. T.C.A. § 50-6-225(e)(2).

In determining the extent of vocational disability, the trial court must consider many factors, including job skills, education, age, training, and job opportunities for persons under the plaintiff's restrictions. *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990). The question for the trial court is not whether the employee is able to return to her previous work but whether her earning capacity in the open labor market has been diminished by her residual impairment from her work-related injury. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 458 (Tenn. 1988).

Appellant argues that the trial court was overly influenced by plaintiff's return to her previous work. However, a return to previous employment is a factor that the trial court can consider, although not a controlling one. *Corcoran*, 746 S.W.2d at 459. Our in-depth review of the record does not convince us that the evidence

preponderates against the trial court's finding as to the extent of plaintiff's vocational disability.

We affirm the trial court's judgment and tax the cost of appeal to the plaintiff/appellant.

John K. Byers, Senior Judge

CONCUR:

E. Riley Anderson, Justice

Roger E. Thayer, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

MOLLY FAYE SMALLMAN)	HAMBLEN CIRCUIT
)	No .94 CV 338
Plaintiff/Appellant,)	
)	
vs.)	Hon. Ben K. Wexler,
)	Judge
)	
SHELBY WILLIAMS INDUSTRIES)	
)	
Defendant/ Appellee.)	03S01-9607-CV-00079

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Worker' Compensation 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 act and conclusions of law are adopted and affirmed, and the decision of the Panel is made the Judgment of the Court.

Costs on appeal are taxed to the Plaintiff/Appellant Molly Faye Smallman, and surety, Tammy J. Stanley, for which execution may issue if necessary.

04/21/97

