IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED

February 18, 1998

Cecil W. Crowson
Appellate Court Clerk

LAVONNA HODOSI,	(	
	(	
Plaintiff-Appellee,	(	Franklin Circuit
	(	No. 9055
	(	
	(	Hon. J. Curtis Smith,
v.	(	Judge
	(	
	(	S. Ct. No. 01S01-9608-CV-00166
	(	
CKR INDUSTRIES, INC. AND THE	(	
YASUDA FIRE & MARINE INSURANCE	(	
COMPANY OF AMERICA,	(	
	(	
Defendants-Appellants.	(	MODIFIED AND REMANDED.

JUDGMENT ORDER

This case is before the Court upon motion for review 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, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review was not timely filed and should, therefore, be dismissed; 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 equally by the plaintiff-appellee and the defendants-appellants, for which execution may issue if necessary.

IT IS SO ORDERED this 18th day of February, 1998.

PER CURIAM

Drowota, J. - Not participating.

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS COMPENSATION APPEALS PANEL

AT NASHVILLE

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LAVONNA HODOSI,	)	FRANKLIN CIRCUIT
	)	
Plaintiff/Appellee	)	NO. 01S01-9608-CV-00166
	)	
v.	)	HON. J. CURTIS SMITH,
	)	JUDGE
CKR INDUSTRIES, INC. and	)	
THE YASUDA FIRE & MARINE	)	
INSURANCE COMPANY OF	)	
AMERICA,	)	
	)	
Defendants/Appellants	)	

For the Appellant:

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For the Appellee:

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

Members of Panel:

Justice Frank F. Drowota, III
Senior Judge William H. Inman
Special Judge Joe C. Loser, Jr.

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.

This is a carpal tunnel syndrome case involving the employee's right hand. A surgical procedure on July 10, 1995 was successful in alleviating symptoms.

The issue at trial was the extent of permanent disability.

The only medical proof offered was the depositional testimony of Dr. Richard A. Bagby, Jr., an orthopedic surgeon who performed the surgery. He testified that the plaintiff had a five percent impairment to her right arm.

The trial judge found that the plaintiff had a 40 percent disability to her right arm. The employer appeals, insisting that the award is excessive under the proof.

Review of the findings of fact made by 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. CODE ANN. § 50-6-225(e)(2); *Stone v. City of McMinnville,* 896 S.W.2d 584 (Tenn. 1991). However, where, as in this case, the medical testimony by Dr. Bagby is presented by deposition, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. INA,* 884 S.W.2d 446 (Tenn. 1994).

The plaintiff is a 43 year old assembly line employee. She began work for the defendant in September 1991 "trimming parts for automobile door sills." After about two years, she began to develop "trouble with her hands" for which she sought treatment. She continued employment, and on October 19, 1994, she suffered an onset of pain in her right arm, accompanied by a loss of gripping strength. She promptly reported her difficulties to the employer. The employer promptly arranged for medical treatment by a neurologist, who referred her to Dr. Bagby.

Conservative treatment did not allay the symptoms, and surgery was recommended and subsequently performed.

The plaintiff testified that she was attending college with the intent to earn a business technology degree. Her testimony concerning present symptomatology was abbreviated; she testified that when she took notes, "I'm having some pain in my wrist up to my elbow," and that she had a "loss of strength, grip," in her dominant right hand. She conceded that she left her job with the defendant voluntarily and that Dr. Bagby prescribed no limitations or restrictions on her activities.

Dr. Bagby testified on direct examination that the plaintiff had complete relief of the numbness and tingling as a result of the carpal release, but she would probably have a loss of grip strength of 30 to 35 percent in her right hand, resulting in five percent permanent impairment based upon the *American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Ed.*

In an effort to persuade Dr. Bagby to upwardly revise his opinion of the extent of the plaintiff's impairment, he was questioned about an illustrative example concerning a forklift mechanic who experienced carpal tunnel syndrome which was surgically corrected. His occupation was changed to that of a salesman, and his only symptoms were transient numbness in his thumb and index finger after 40 minutes of driving a vehicle. Tests revealed a 60 percent strength loss. The *Guides* record the impairment as ten percent.

Dr. Bagby was asked if the *Guides* dictated that "Mrs. Hodosi's rating be a ten percent impairment to the upper extremity?" He responded:

> "Well, I guess so to some extent. I guess that it's just hard for me to convert from the old *Guides* to the new *Guides,* and I think that probably hers isn't quite as bad as the man's example there, but I would have to acknowledge the thrust of your point."

On cross-examination, Dr. Bagby reiterated his opinion that the plaintiff had a five percent impairment to her right arm and that he did not recommend a job change.

The trial judge expressed the view that Dr. Bagby was equivocal in his five percent rating, and found that, as per the example of the forklift mechanic, the plaintiff had a ten percent impairment. We have reviewed the *Guidelines* and particularly the illustrative example of the mechanic who changed his employment to that of a salesperson on account of his carpal tunnel syndrome. It will be noted that the salesman had a loss of grip strength of 60 percent - twice

as much as the plaintiff - and unlike the plaintiff, he had numbness in his thumb and index finger, after - again unlike the plaintiff - driving a vehicle for forty minutes. It seems apparent that the example is inapposite for these and a litany of other reasons as well. In any event, Dr. Bagby reiterated his rating of five percent impairment, and the doubling of it rests on grounds even too tenuous for purposes of workers' compensation. Whether Dr. Bagby misapplied or misinterpreted the *Guidelines* is generally subject to other expert testimony, and there was none offered in this case.

In making determinations, the court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition. TENN. CODE ANN. § 50-6-241(a)(1); *Miles v. Liberty Mutual Ins. Co.,* 795 S.W.2d 665 (Tenn. 1990). The plaintiff is 43 years old, has between 60 and 100 hours of office technology training, is attending college successfully, was released to return to work without restrictions of any kind, and voluntarily quit her job. There is no evidence of a lack of employment opportunities. We can find no basis in this record for a judicial finding of 40 percent disability to the plaintiff's right arm, and accordingly find that the evidence preponderates against such finding.

We find from a preponderance of the evidence that the plaintiff has a 20 percent permanent partial disability to her right arm, and the judgment is modified accordingly. In light of this modification, the issue regarding the propriety of a lump sum award is moot. Costs are assessed to the parties evenly, and the case is remanded.

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William H. Inman, Senior Judge

CONCUR:

_____

Frank F. Drowota, III, Justice

_____
Joe C. Loser, Jr., Special Judge