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

FILED

May 8, 1998

Cecil W. Crowson
Appellate Court Clerk

J. C. PENNEY, INC.,	)	DAVIDSON CHANCERY
	)	
Plaintiff/Appellee	)	NO. 01S01-9707-CH-00167
	)	
	)	CAROL MCCOY
DEBRA SUE CRAWFORD,	)	CHANCELLOR
	)	
Defendant/Appellant	)	

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 Janice M. Holder
Senior Judge William H. Inman
Special Judge William S. Russell

AFFIRMED
as 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 employee filed this complaint for a determination of the benefits available to the defendant on account of asserted compensable injuries to her arms/hands, i.e., carpal tunnel syndrome. The Chancellor awarded benefits for a three percent permanent partial disability to each arm. The employee appeals, and presents two issues for review, which we restate as whether the award was inadequate, and whether the employee should have been allowed to state an opinion concerning her ability to perform certain jobs.

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 548, 550 (Tenn. 1995).

Ms. Crawford is 37 years old. She is a high school graduate, five feet three inches tall and weighs 295 pounds, according to the IME, Dr. David Gaw.

She began working as a customer service representative in the telemarketing division of J.C. Penney Company in 1990, where she remains employed. In January 1995 she reported symptoms of hand pain to her employer who referred her to Dr. James Lanter, orthopedic specialist. Dr. Lanter first saw her on February 22, 1995 and diagnosed her condition as tendinitis with possible carpal tunnel syndrome. He recommended a reduction in her working hours to 32 per week, and continued to see her through February 21, 1996. During this time Dr. Lanter's treatment was extensive; he obtained two EMG's and nerve conduction studies which indicated mild bilateral carpal tunnel syndrome, not progressive. He continued treating her for more than a

year, apparently carefully, and recommended that she not have surgery. He reaffirmed his opinion that her working hours should be reduced, but assigned her no impairment.

Ms. Crawford was released by Dr. Lanter in February 1996 and she has not returned for further treatment.

Ms. Crawford testified that since being diagnosed in 1995 she has continued to work, having missed only one day. She works not less than 24 nor more than 30 hours per week, depending upon the available work. She performs a sedentary job satisfactorily, using a computer terminal, monitor and keyboard on which she types orders from customers. She testified that although she continues to work, she has pain in her neck and shoulders and that her hands become numb, making it difficult to write. She has difficulty doing household chores, mostly on account of the numbness in her hands.

She was referred by her counsel to an IME, Dr. David Gaw, who testified that she had a five percent impairment to each arm, or six percent to the whole body, on account of the carpal tunnel syndrome for which she will likely require future medical treatment. He opined that the only way to control her symptoms was to control the repetitive use of her hands, and that she should wear wrist supports.

The employer has a benefit program for its employees who, under appropriate circumstances, are entitled to sick pay. Ms. Crawford was paid $6,013.00 pursuant to this benefit plan because she was unable to work as many hours as normally, owing to the work restrictions imposed by Dr. Lanter. The plan prohibits double compensation, that is, an employee is not entitled to receive both sick pay and workers' compensation for the same illness or injury.

If an employee recovers sick pay and future events reveal that the inability to work was job-related and compensable under workers' compensation, with an award of benefits, the employee may be required to reimburse or refund the benefits received under the sick plan.

The appellant argued that the compensation award was thus subrogable, and that this fact somehow redounded against her. Neither theory is correct. The plan nowhere provides for subrogation; an employee who actually receives double benefits may be required to refund the benefits paid under the plan.

The appellant argues that the trial judge erred in not allowing her to testify concerning her ability to perform prior tasks. When asked specific questions about job requirements at prior work places, she answered before objection was made ["What difficulties would you have working at Tennessee Woolen Mills" Answer: I couldn't."] The Chancellor thought such testimony was speculative, but RULE 701(a), TENN. RULES OF EVIDENCE, provides that a lay witness may express an opinion that is rationally based on perception and which would be helpful to an understanding of testimony or the determination of a fact in issue. We think the opinion of the appellant that she could no longer perform certain tasks was admissible on the issue of determining the extent of vocational disability.

Following a careful consideration of the evidence we conclude that the judgment should be modified to award benefits based upon a fifteen percent permanent disability to each arm. Costs are assessed to the employer.

_____

William H. Inman, Senior Judge

CONCUR:

_____
Janice M. Holder, Justice

_____
William S. Russell, Special Judge

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J. C. PENNEY, INC.,	}	*DAVIDSON CHANCERY*
	}	*No. 95-1805-II Below*
Plaintiff/Appellee	}	
	}	*Hon. Carol McCoy,*
vs.	}	*Chancellor*
	}	
DEBRA SUE CRAWFORD,	}	*No. 01S01-9707-CH-00167*
	}	
Defendant/Appellant	}	*AFFIRMED AS MODIFIED.*

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 the employer, J.C. Penney, Inc., for which execution may issue if necessary.

IT IS SO ORDERED on May 8, 1998.

PER CURIAM