IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

ANNE CROSSETT	*}*	*SUMNER CIRCUIT*
	}	*No. Below 14852-C*
Plaintiff/Appellant	*}*	
	}	*Hon. Thomas Goodall*
vs.	*}*	*Judge*
	}	
	}	*No. 01S01-9803-CV-00045*
BABCOCK INDUSTRIES,	*}*	
FAULTLESS CASTER DIVISION	*}*	
and THE INSURANCE	*}*	
COMPANY OF THE STATE OF	*}*	
PENNSYLVANIA	*}*	
	}	
Defendant/Appellees	*}*	*AFFIRMED*

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 plaintiff/appellant, for which execution may issue if necessary.

IT IS SO ORDERED on December 8, 1998.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE

ANNE CROSSETT, Plaintiff/Appellant v. BABCOCK INDUSTRIES, FAULTLESS CASTER DIVISION, and THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Defendants/Appellees	)	SUMNER CIRCUIT NO. 01S01-9803-CV-00045 HON. THOMAS GOODALL, JUDGE

For the Appellant:	**For the Appellee:**
William L. Underhill 509 Lentz Drive Madison, TN 37115	Frank Thomas Melanie V. Dillender LEITNER, WILLIAMS, DOOLEY & NAPOLITAN, PLLC 2300 First American Center Nashville, TN 37238

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

Members of Panel:

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

AFFIRMED INMAN, Senior Judge

O P I N I O N

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.

A judgment was entered on November 6, 1996, finding that the plaintiff had sustained a 35 percent permanent impairment to each arm as a result of repetitive, job-related activities which precipitated carpal tunnel syndrome. She was also awarded 36 weeks temporary total benefits, future medical expenses and discretionary costs.

The defendant filed a notice of appeal on November 6, 1996, and, after the case was docketed in the Supreme Court, filed a motion to remand the case to the trial court to consider a Rule 60 Motion alleging fraud and perjury by the plaintiff. The remand was granted by the Panel, and the Rule 60 Motion was heard on February 5, 1998.

Evidence offered on the hearing consisted only of a videotape made on December 6, 1996 portraying the plaintiff's physical activities during most of the day. After viewing the videotape the trial judge set the judgment aside and dismissed the complaint. The plaintiff appeals, and presents for review the propriety of the dismissal.

The plaintiff was 28 years old at the time of trial. She finished the eleventh grade, and held a variety of jobs before she was employed by the defendant on August 14, 1995. She worked until January 30, 1996, and was a probationary employee during the entire period.

She testified that on August 26, 1995, while working as a hand riveter, her hands became numb, which she reported to a fellow employee.[1]

The plaintiff was treated by Drs. Arthur Cushman and Clark Ray, and evaluated by Dr. Gaw. Her testimony is somewhat confusing and inconsistent with respect to the requirements of her job (she told Dr. Gaw that numbness developed in both hands after working only two weeks), but with respect to the claimed injury she firmly testified:

Q: Are you wearing anything that is prescribed by a doctor?
A: Yes, Sir, I am.
Q: What are they?
A: They are splints.
Q: Do you wear them continuously?
A: Yes, Sir, I do.
Q: Do you wear them when you sleep?
A: Yes, Sir, I do.
Q: What happens when you take them off?
A: My hands draw up.
Q: When you say they draw up--will you kind of help me with that a little bit. What do you mean draw up?
A: I have muscle spasms in my hands.
Q: Would they draw up like making a fist or do they go the other way?
A: Towards the forearm into - not like a fist.
Q: They draw up towards your arm?
A: Yes, Sir they do.
Q: Let me ask you this. Before you suffered this injury was there anything that you did not do around the house? Did you carry on all of your daily functions?
A: Yes, Sir, I could.

* * * * *

Q: Is there any work that you can do around the house now?
A: No, Sir, there is not.
Q: How do you eat, Ms. Crossett?
A: I insert a eating utensil between my hand and my splint.
Q: Can you cut up your meat?
A: No, Sir, I cannot.
Q: Who does that for you?
A: My mother.
Q: How do you brush your teeth?
A: I place the toothbrush between my hand and splint and brush my teeth that way.

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[1]Payroll records indicate that the plaintiff did not work on August 26, 1995. The fellow employee denied the testimony of the plaintiff.

Q: Can you actually do the job doing it that way?
A: No, Sir.
Q: Can you grip anything with your hands now?
A: No, Sir.

Dr. Ray opined that the plaintiff had a 40 percent impairment to each hand. Dr. Gaw opined that she had a ten percent impairment to each arm, because of her inability to grip or squeeze.

The award, as stated, was 35 percent vocational disability to each arm.

The videotape was made on December 6, 1996. While the trial judge referred to her testimony about her limitations as "puffing," our review of the tape impels the conclusion, agreeably to the argument of the appellant, that the trial judge was merely being polite to the plaintiff, who watched the videotape concurrently with him.

The authenticity of the videotape is not questioned. The plaintiff is photographed for a period of several hours, while she performed various activities outside her home, such as decorating her home for Christmas for over one hour. During this process, Ms. Crossett was not wearing any type of hand splints or braces, nor did her hands appear to be "drawn up" without use of any splints or braces. The videotape depicts her having no difficulty manipulating her fingers to pick up small nails and brackets and using a hammer with no difficulty. She appears not to be in any distress or have any difficulty in gripping and holding onto items. She is seen easily picking up and carrying a child's bicycle and a ladder, evidencing that she is capable of gripping even heavy objects.

In summary, the videotape directly and dramatically contradicts her testimony supporting the curtailment of activities. It also contradicts, in preponderant measure, the testimony and opinions of Drs. Ray and Gaw.

We agree with the appellee that there is no escaping the conclusion that the plaintiff misrepresented the nature and extent of her claimed injuries, and that the trial judge was correct in vacating the initial judgment. The record is replete with evidence that the plaintiff was less than candid with her physicians and with the court. She made inconsistent statements to the three physicians regarding her work duties and the date of her onset of symptoms. She also made inconsistent statements to the court in her testimony at the original trial in stating that she was unable to perform even the simplest task of brushing her teeth effectively, and that she *never took her braces off* because her hands would draw up.

Each of Ms. Crossett's treating physicians made his initial diagnosis from history provided by Ms. Crossett that she was doing highly repetitive work eight hours a day, which was a stretch, since she was a probationary employee participating in training and was under no production quota at the time that she first alleged symptoms. The record indicates that she spent a lot of time watching and learning rather than using her hands repetitively.

The trial court was confronted with conflicting medical evidence based on differing histories provided by Plaintiff. Dr. Cushman, the authorized treating physician, testified that Ms. Crossett's condition predated her employment with Faultless and was not the type of carpal tunnel that results from repetitive work. Dr. Ray testified that Ms. Crossett's condition was caused or aggravated by her work at Faultless and recommended surgery, based on her subjective complaints. Dr. Gaw, also having received inaccurate information from Plaintiff, originally thought that Plaintiff's problems were work-related, but after learning of her actual conditions of employment, he conceded that his opinion would be speculative if Ms. Crossett had not provided him an accurate history.

We affirm the judgment at the costs of the appellant, and remand the case to the trial court for all appropriate purposes. The videotape, Exhibit One to the Rule 60 hearing, will be returned to the clerk of the trial court.

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William H. Inman, Senior Judge

CONCUR:

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Frank F. Drowota, III, Justice

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Joe C. Loser, Jr., Special Judge