

**IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
KNOXVILLE, SEPTEMBER 1998 SESSION**

<b>FILED</b>  March 29, 1999  Cecil Crowson, Jr. Appellate Court Clerk
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<b>ANNE KAY METIER CIRCUIT</b>	)	<b>ANDERSON</b>
	)	
<b>Plaintiff/Appellee,</b>	)	
	)	<b>No. 03S01-9710-CV-00122</b>
<b>v.</b>	)	
	)	<b>Anderson County Circuit</b>
<b>DICO TIRE, INC.,</b>	)	<b>Court No. 96LA0311</b>
	)	
<b>Defendant/Appellant.</b>	)	<b>Hon. James B. Scott, Jr., Chancellor</b>

**For the Appellants:**

Weldon E. Patterson  
Spicer, Flynn & Rudstrom  
First Tennessee Plaza, Suite 1209  
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**For the Appellees:**

Bruce D. Fox  
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Clinton, Tennessee 37717-0530

**MEMORANDUM OPINION**

**Members of Panel:**

E. Riley Anderson, Chief Justice  
Roger E. Thayer, Special Judge  
John S. McLellan, III, Special Judge

AFFIRMED

McLELLAN, Special Judge

This worker's 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 employer, Dico Tire, Inc, has appealed from the action of the trial court and raises three issues. The first issue is whether the trial court erred in finding in favor of the plaintiff on the issue of notice. The second issue is whether the trial court erred on the finding in favor of the plaintiff on the issue of statute of limitations. The third issue is whether the trial court erred in awarding the plaintiff 30% disability to her upper extremities.

The complaint was filed on July 9, 1996, contending the plaintiff sustained a carpal tunnel injury to her right wrist on or about July 12, 1995. During discovery, it was learned that the plaintiff was claiming the same condition with her left extremity and an amended complaint was filed. The compensability of both extremities was at issue at the time of trial. The plaintiff missed two or three days of work as a result of surgery and by reason of that period of time stipulated that plaintiff did not seek temporary total disability benefits.

As to the notice issue, the trial court held that although the employee failed to give written notice to her employer of her injuries within thirty days as required by T.C.A. § 50-6-201, that the employer had actual notice of the employee's injuries and that under the facts written notice is "reasonably" excused. The plaintiff asserts she gave actual notice to management personnel and identifies Mr. Don Henderson, a co-worker and supervisor, Neil Metier who was the husband of plaintiff and who was deceased at the time of trial, Mark Bright, Thomas Duncan and a plant nurse. Plaintiff contends some of these witnesses were available and not called by the employer to refute her evidence thereby invoking the "missing witness rule."

On the second issue, the trial court found that the plaintiff's gradual injury did not result in a disability from work until July, 1995 and it was from that date that the clock begins to tick on the statute of limitations. Defendant contends that although the plaintiff had surgery on July 12, 1995 that this date was not shown to increase or decrease plaintiff's medical impairment nor plaintiff's own knowledge about the causal relationship of her medical condition and her work. The plaintiff contends that the last day of work should be date from which the disability is

imputed in all cases involving carpal tunnel syndrome and relies upon the case of *Lawson v. Lear Seating Corporation*, 944 S.W.2d 340, 342 (Tenn. 1997).

As to the third issue, defendant contends that plaintiff's testimony, medical testimony and testimony of Dr. Craig Colvin, whose vocational disability takes into account Dr. Gilbert Hyde's restrictions as a non-treating physician, preponderates against the 30% disability award to plaintiff's upper extremities. The trial court found that plaintiff had surgery for her carpal tunnel condition in her right hand in July, 1995 and has been diagnosed with the same condition in her left hand. The trial court further found that the plaintiff was making only a fraction of her previous salary and is restricted on the repetitive use of her hands. The plaintiff contends that the employee's disability should not be diminished due to the fact that she is still employed in a position in Human Resources because her employer accommodates her disability and she continues to perform her job's essential functions. Plaintiff asserts that while it is correct that she is employed in a similar capacity, her work is performed with pain and discomfort and with an annual reduction in pay in excess of \$10,000.00. Plaintiff contends the award of the trial court is reasonable under all the proof in the case.

The plaintiff worked for the defendant for approximately twenty years. Plaintiff's initial employment in 1976 was as a personnel secretary and thereafter as a combination plant nurse and later benefits administrator which included matters of insurance, worker's compensation benefits, medical insurance benefits, and retirement benefits. The plaintiff was the person responsible for seeing that employees file worker's compensation claims, process their claims properly, and receive the benefits they are entitled to.

At the time of plaintiff's surgery, plaintiff's husband was the manager of the maintenance department in 1995. At that time Mark Bright was the Human Resources Director and Thomas Duncan was the Safety Director. In March, 1995 the plaintiff's problems increased to where her hands started getting numb and stinging and the pain became unbearable whereupon she was examined by Dr. Archer W. Bishop, Jr. who diagnosed carpal tunnel and recommended surgery. Plaintiff advised her husband who was in a supervisory or management position and to whom employees could report work related injuries. The plaintiff discussed her condition and surgery with Mr. Bright, Mr. Duncan and with Don Henderson who was also a supervisor. Plaintiff went into surgery July 12, 1995 and missed only two or three days prior to returning to work. In order

to be able return to work, plaintiff's left hand had a wad of gauzes around it big enough to fit her hand with a brace around the bandages that went almost to her elbow. Plaintiff testified this allowed her to use a pen to sign her name. Plaintiff's testimony was not rebutted that the Human Resources Director joked with the plaintiff because of the employment position she was in and also because her husband was working there suggesting that it was not a good thing to file a compensation claim as she had been given a challenge by the corporate office in Quincy, Illinois to reduce worker's compensation claims by 50%. The plaintiff did not feel she could file a worker's compensation claim without causing severe repercussions. Evidence was also not rebutted that Mr. Duncan, the Safety Director, had provided her with braces for her wrist, pads, and a special keyboard to relieve the stress of carpal tunnel. The trial court found that written notice of the injury was "reasonably" excused under the facts of this case and that plaintiff gave actual notice of her injury.

Our review of the findings of the 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.2nd 584 (Tenn. 1991). On the issue of notice, the trial judge found that unrefuted testimony was to the effect that the plaintiff was conforming with the managerial and corporate policy of the defendant in keeping worker's compensation claims suppressed and discouraged as to a reasonable explanation for plaintiff's not filing written notice of her claim. The trial court further found that plaintiff gave actual notice of her injury to her employer and that the employer showed no prejudice by the employee's failure to give written notice of injury. The employee was treated by Dr. Archer Bishop who was the doctor to whom the employer routinely sent its employees in cases involving worker's compensation claims. Additionally, the defendant failed to produce any testimony to contradict the testimony of the plaintiff insofar as it relates to the Director of Safety, Thomas Duncan, or as far as it relates to the Human Resources Manager, Mark Bright, to the effect that they were aware that she was suffering from carpal tunnel syndrome which was work related. Both were still employed by the defendant at the time of trial and could have been called upon to offer testimony disputing that of the plaintiff. Evidence of actual knowledge of plaintiff's accidental injury is such that it was incumbent upon the defendant to have Mr. Bright and/or Mr. Duncan deny it if in fact they had such knowledge.

This issue turns on the creditability and weight to be accorded the oral testimony given by the plaintiff at trial as well as having all the elements necessary to invoke the missing witness rule. *Sweeney v. State*, 768 S.W.2nd 253, 259 (Tenn. 1989); *Jones v. The Hartford Accident & Indemnity Co.*, 811 S.W.2nd 516, 521 (Tenn. 1991).

Implicit in the trial court's holding is the finding that the plaintiff's testimony was sufficiently creditable to carry her burden of proof and in as much as at least one of defendant's supervisors attempted to accommodate the plaintiff by providing pads, braces, and a different computer keyboard to relieve the stress in her wrist constitutes circumstantial evidence of actual knowledge that plaintiff sustained an injury. The evidence does not preponderate against the trial court's findings that the defendant had actual notice of plaintiff's work related injury and a reasonable excuse for failure of the plaintiff to give written notice.

The employer next contends the trial court was in error in choosing the surgical date of one extremity as the date to commence the statute of limitations.

In rendering his Opinion, the trial judge found that the gradual injury did not result in a disability from work until July, 1995 when the plaintiff had surgery for her carpal tunnel condition on her right hand and that she was diagnosed with the same condition in her left hand. When the trial judge has made a determination based upon testimony of witnesses whom he has seen and heard, great difference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2nd 315 (Tenn. 1987). The plaintiff has testified as to the increase of her symptoms to the point that the pain became unbearable and she sought the medical advice of Dr. Bishop who recommended surgery. The findings of the trial court which are dependent upon determining the creditability of witnesses are entitled to great weight. *Town of Alamo v. Forcum-James Co.*, 327 S.W.2nd 47, 49 (1959).

Plaintiff contends that her condition was such that she did not become unable to work until July 12, 1995 when she had surgery and that the accidental injury should be considered to have occurred at this time. It is plaintiff's position that she suffered a gradual injury and that her case should be controlled by decisions of the Supreme Court in *Barker v. Home-Crest Corp.*, 805 S.W.2nd 373, (Tenn. 1991) and *Brown Shoe Co. v. Reed*, 350 S.W.2nd 65, (Tenn. 1961). We conclude the facts of the present case should be controlled by the rulings in the *Barker* and

*Brown Shoe Company* cases.

In *Barker* the court held the employee had sustained a gradual injury and that the accidental injury occurred during March, 1989 when the plaintiff became unable to work and surgery was performed. The plaintiff first had symptoms of numbness and tingling in her hands in May, 1988 and was diagnosed as having a probable carpal tunnel injury. Testing in June revealed a bilateral severe carpal tunnel syndrome and cortisone injections were given. In July the employee seemed to be doing better and visits continued in August and October when surgery was recommended. Finally, the employee's condition became so painful she could not continue working and surgery was performed during March, 1989. The Supreme Court noted that where the injury occurs gradually from repeated work-related incidents, Tennessee was in accord with the majority of jurisdictions holding the accidental injury occurred when the employee's condition reached the point that the employee could no longer work at his/her job. In the *Brown Shoe Company* case, the court ruled that the date of the accidental injury was the date on which the condition finally prevented the employee from performing his work.

Therefore, we find and hold that the plaintiff was suffering from a gradual injury due to repetitive work-related movements of her hands and that she never became disabled to work until July 12, 1995, at which time the accidental injury is considered to have occurred and that her complaint for worker's compensation benefits was filed July 9, 1996 within one year of the accidental injury.

Defendant next contends that plaintiff's own testimony, when supported by the medical testimony and testimony of Dr. Craig Colvin, preponderates against the disability award given by the trial court of a 30% disability to her upper extremities. Dr. Archer Bishop assigned a 5% permanent impairment to the employee's right upper extremity and due to his failure to see her for over a year, he assigned no impairment to her left upper extremity. Dr. Gilbert Hyde, an orthopedic surgeon, examined the plaintiff and opined the plaintiff sustained a 5% permanent physical impairment to each of her extremities with regard to the carpal tunnel syndrome. Dr. Hyde placed restrictions or limitations on the plaintiff, to avoid additional injury, in that she should avoid repetitive motion activities with regard to her hands and wrists and also avoid lifting activities over 30 - 35 pounds. Utilizing an alternative method other than the AMA Guides for calculating impairment for carpal tunnel base injury, Dr. Hyde characterized plaintiff's carpal tunnel symptoms

as mild with median nerve entrapment at the wrist level resulting in a 10% impairment to the upper extremities. Dr. Hyde's diagnosis of carpal tunnel was based on history and subjective complaints of the plaintiff and testing was negative for median nerve entrapment.

Dr. Craig Colvin, an associate coordinator and associate professor at the University of Tennessee in the rehabilitation counselor training program, opined that the plaintiff has an occupational disability of approximately 40%. Dr. Colvin based his opinion upon plaintiff's work history of being an occupational nurse, highly skilled in the human resource section of administration of two organizations; her capacity to understand and carry out verbal and written instructions in accordance with state and federal laws; carrying out the mandates of her employer; consideration of the limitations set forth by Dr. Bishop and Dr. Hyde to avoid repetitive motion of the hands, the wrist with a lifting restriction of 30 - 35 pounds; and all of the jobs available to her before this carpal tunnel and all jobs available to her now with transferable skills. Dr. Colvin noted that the plaintiff's present employment is physically less stressful than her former employment with Dico. The employer has presented no evidence to contradict the testimony of Dr. Colvin. In making determinations of vocational disability, the court shall consider all pertinent factors, including lay and expert testimony, employees age, formal education, skills and training, local job opportunities, and capacity to work in types of employment available in claimant's disabled condition. Tenn. Code Ann. § 50-6-241 (a) (1). The preponderance of the evidence supports the trial judge's award of 30% disability to her upper extremities.

The judgment of the trial court is affirmed with costs assessed to the appellant.

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John S. McLellan, III, Special Judge

CONCUR:

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E. Riley Anderson, Chief Justice

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Roger E. Thayer, Special Judge



IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

**FILED**  
March 29, 1999  
Cecil Crowson, Jr.  
Appellate Court  
Clerk

ANNE KAY METIER	)	Anderson County
Circuit	)	
	)	No. 96LA0311
Plaintiff/Appellee	)	
	)	Hon. James B. Scott, Jr.,
v.	)	Chancellor
	)	
DICO TIRE, INC.	)	S. Ct. No. 03-S-01-9710-CV-00122
	)	
Defendant/Appellant	)	AFFIRMED

JUDGMENT ORDER

This case is before the Court upon defendants' 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 is not well-taken and should be denied; 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 defendant-appellant and surety, for which execution may issue if necessary.

PER CURIAM

Anderson, C.J., not participating