IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(February 12, 1999 Session)

FILED

June 15, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

TERESA BARHAM,	)	
	)	
Plaintiff/Appellee,	)	
	)	**CHESTER COUNTY CHANCERY**
v.	)	
	)	**NO. 02S01-9807-CH-00065**
GRINNELL CORPORATION,	)	
	)	**HONORABLE JOE C. MORRIS,**
Defendant/Appellant.	)	**CHANCELLOR**
	)	

For the Appellee:

[illegible]

For the Appellant:

[illegible]

MEMORANDUM OPINION

MEMBERS OF PANEL:

JUSTICE JANICE M. HOLDER
SENIOR JUDGE L. T. LAFFERTY
SPECIAL JUDGE J. STEVEN STAFFORD

AFFIRMED

STAFFORD, SPECIAL JUDGE

OPINION

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) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

Review of the findings of fact made by the trial court is *de novo* upon the record, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Stone v. City of McMinnville*, 701 S.W.2d 611, 613 (Tenn. 1985). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial court in a worker's compensation case. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 454 (Tenn. 1988). However, considerable deference must be given to the trial judge, who has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved. *Jones v. Hartford Accident & Indem. Co.*, 701 S.W.2d 616, 618 (Tenn. 1985).

The trial court found that the plaintiff suffered a 15% permanent partial disability to the right arm. The defendant asserts that the trial court erred in assessing any vocational disability. Alternatively, the defendant asserts that the vocational disability determined by the trial court is excessive. We find that the evidence does not preponderate against the finding of the trial court and affirm the judgment.

FACTS

The plaintiff is a thirty-seven-year-old female. She completed the ninth grade but did not attend school after starting the tenth grade. Since leaving school, she has received an additional high school education and training.

In 1991, the plaintiff began work for the defendant as a hard machine shed unit threader. She was subsequently transferred to end of the line work where she has worked primarily as a preform tripper.

Prior to her employment with the defendant, the plaintiff cooked and cleaned houses, worked as a janitor at the high school and worked as a sewing machine operator.

In 1994, the plaintiff had surgery on her right hand for carpal tunnel.

In the early part of 1997, the plaintiff began having pain in her right forearm and thumb. Her thumb would lock or stick in place and she would have to pull it apart. Her arm also began to swell. As a result of this, she went to see Dr. John Sparrow. Dr. Sparrow diagnosed the plaintiff as suffering from de Quervain's disease. On July 30, 1997, Dr. Sparrow performed surgery on the plaintiff's right arm. He opined that the plaintiff had suffered no impairment as the result of the surgery and did not restrict her activities in any way.

On March 9, 1998, the plaintiff was seen by Dr. Robert J. Barnett for an independent medical evaluation. Dr. Barnett opined that the plaintiff had suffered a 5% permanent partial disability to the right arm due to tenosynovitis. He stated that the plaintiff should avoid strenuous, repetitive use of her right arm and restricted her in climbing, handling, fingering and feeling.

The plaintiff testified that she was better for a couple of weeks after her surgery but that she now suffers from the same problems she had before the surgery. She continues to have pain and swelling and her thumb still locks. She has no sensation in her arm. She believes that she does 15% to 20% less work now than she did before the injury.

The plaintiff testified that she could not work as a sewing machine operator full time now because of the swelling in her hand. She also is unable to mow her entire yard without her hand swelling.

The plaintiff works a full forty-hour shift for the defendant and works overtime as well. Her hand does not hurt every day nor does it swell every day. She was only off work three days for her surgery. She testified that she does not like to miss work.

George Trice, the plaintiff's supervisor, testified that the plaintiff is one of his better employees. He stated that if the plaintiff is placed on a hard job, her hand will be swollen the next day. He will then restrict her work for two or three days before she can be placed back on normal duty. He testified that the plaintiff was not to the point where she could perform some of the things required in his department. Mr. Trice testified that some of the boxes the plaintiff must lift weigh as much as forty pounds. He also stated that the defendant expects each packer to average packing 750 boxes per day and that the plaintiff does the average.

ANALYSIS

The medical evidence introduced in this case consisted entirely of the medical records and reports of Dr. Bennett and Dr. Spencer. Dr. Bennett opined that the plaintiff had suffered a 10 percent partial disability to the right arm. Dr. Spencer opined that the plaintiff had suffered no impairment. In all but the most obvious cases, the plaintiff must establish the permanency of a work-related injury by expert testimony. *Corcoran*, 141 S.W.2d at 451.

When medical testimony differs, it is within the discretion of the trial judge to determine which expert testimony to accept. *Kellerman v. Food Lion, Inc.*, 931 S.W.2d 533, 535 (Tenn.1996); *Johnson v. Midwesco, Inc.*, 903 S.W.2d 694 (Tenn.1995).

> [W]here the issues involve expert medical testimony and all the medical proof is contained in the record by deposition, as it is in this case, then this Court may draw its own conclusions about the weight and credibility of that testimony, since we are in the same position as the trial judge . . . . With these principles in mind, we review the record to determine whether the evidence preponderates against the findings of the trial court.

Krick v. City of Lawrenceburg, 933 S.W.2d 713, 715 (Tenn.1996); see also *Elmore v. Travelers Ins.*, 844 S.W.2d 641, 644 (Tenn.1992) ("where testimony is presented by deposition, this Court is in just as good a position as the trial court to judge the credibility of the witnesses."). The trial court accredited the medical records of Dr. Bennett. We find no convincing reason to disagree with the finding of the trial court.

The defendants also challenge the trial court's finding of disability assessed by the trial court. The measure for injured worker's disability is an issue of fact. *Jaske v. Murray Ohio Mfg. Co.*, 751 S.W.2d 451, 453 (1988). The Supreme Court recently discussed vocational disability in *Walker v. Saturn Corp.*, 977 S.W.2d 129 (Tenn.1998). In *Walker*, the plaintiff claimed to have suffered a work-related injury to both her right and left arms. She received a disability rating on her left arm from a medical provider but did not receive one on her right arm. The plaintiff's treating physician diagnosed the plaintiff as suffering from right cubital tunnel syndrome, recommended surgery and placed certain permanent restrictions against repetitive flexion activities and gripping or pinching. Even though no vocational expert gave the plaintiff a disability rating to her right arm, the trial court found that she had suffered an 18% vocational disability to both arms. The Special Workers' Compensation Appeals Panel affirmed the Supreme Court reversed the award. The Court found that the medical testimony did not support an award of any permanent disability to the right arm and that

an award of 15% permanent partial disability to the left arm was excessive and unsupported by the evidence. The Panel awarded the plaintiff a 10% permanent partial disability to the left arm.

The Supreme Court reversed the Panel decision and reinstated the trial court's award of 15% permanent partial disability to both arms. The Court stated that:

> 'The anatomical impairment rating is certainly indispensable to a trial court's finding of a permanent vocational impairment. In fact, anatomical impairment is distinct from the ultimate issue of vocational disability that the trial court must assess. A employee should not be denied compensation solely because she is unable to present a witness who will testify to the exact percentage of her medical impairment. As a result, the Panel erred in finding no disability to the plaintiff's right arm based solely on the lack of an anatomical rating to that scheduled member. (Citations omitted.)
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> * * *
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> The Panel correctly held that vocational impairment must be measured not by whether the employee can return to her former job, but whether she has suffered a decrease in her ability to earn a living. See Corcoran, 746 S.W.2d at 451. This Court stated in Corcoran that a vocational disability results when 'the employee's ability to earn wages in any form other employment that will have been available to him in an uninjured condition is diminished by an injury.' Id. at 454.
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> In assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and her capacity to work at the kinds of employment available in her disabled condition. Further, the chancellor's own assessment of her physical condition and resulting disabilities cannot be disregarded. The trial court is not bound to accept physicians' opinions regarding the extent of the plaintiff's disability, but should consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability. (Citations omitted.)

Walker 114 S.W.2d at 117-18.

The plaintiff is a thirty-seven year old woman with a ninth grade education. She continues to have pain and swelling as a result of her injury and is in essentially the same condition as she was prior to her surgery. She has sensation in her arm and believes that she has 15% to 20% less work use than she did before the surgery. Her supervisor credibly testified about her hand swelling, her need for breaks, and her inability to perform some of her job duties. The plaintiff also testified about her inability to perform some of her prior job duties and her need for breaks.

We find that the trial court correctly determined that the plaintiff suffered a compensable injury to her right arm. We also find that the trial court properly applied the relevant factors in

[illegible] determining the appropriate amount of emotional distress suffered by the plaintiff. We are to presume the correctness of the trial court's findings unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 36-6-113(g)(1); *Humphrey v. Witherspoon* [illegible]. We find that the evidence does not preponderate against the judgment of the trial court.

The judgment of the trial court is affirmed. The costs of this appeal are taxed to the defendant.

J. STEVEN STAFFORD, SPECIAL JUDGE

CONCUR:

JANICE M. HOLDER, JUSTICE

L.T. LAFFERTY, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

TERESA BARHAM,	)	**CHESTER CHANCERY**
	)	**NO. 9240**
Plaintiff/Appellee,	)	
	)	**Hon. Joe C. Morris,**
vs.	)	**Chancellor**
	)	
GRINNELL CORPORATION,	)	**NO. 02S01-9807-CH-00065**
	)	
Defendant/Appellant.	)	**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 Appellant, Grinnell Corporation, for which execution may issue if necessary.

IT IS SO ORDERED this 15th day of June, 1999.

PER CURIAM