

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

**RACHEL JEANETTE McCORMICK v. YASUDA FIRE & MARINE  
INSURANCE COMPANY, ET AL.**

**General Sessions Court for Warren County  
No. 6315-GSWC**

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**No. M1998-00162-WC-R3-CV - Decided June 2, 2000**

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**JUDGMENT**

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 Defendant Yasuda Fire & Marine Insurance, et al, for which execution may issue if necessary.

**IT IS SO ORDERED.**

**PER CURIAM**

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

**RACHEL JEANETTE McCORMICK v. YASUDA FIRE & MARINE  
INSURANCE COMPANY, ET AL.**

**Appeal from the General Sessions Court for Warren County  
No. 6315-GSWC Larry G. Ross, Judge**

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**No. M1998-00162-WC-R3-CV - Mailed - May 1, 2000  
Filed - June 2, 2000**

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This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with the Tenn. Code Ann. Section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The Appellant, Calsonic Yorozu Corporation (hereinafter "CYC") raises seven issues arguing that the trial court erred by (1) failing to find Plaintiff's claim was barred by Plaintiff's voluntary intoxication and willful disregard of safety procedures, (2) holding that part of Plaintiff's disability was due to bilateral carpal tunnel syndrome, (3) not applying the "concurrent injury rule", (4) holding Plaintiff gave adequate notice of her bilateral carpal syndrome to Defendants, (5) awarding compensation for unauthorized medical treatment, (6) improperly ordering a lump sum award, and (7) entering its judgment contrary to the Rules of Civil Procedure.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the General  
Sessions Court Affirmed**

GAYDEN, J., delivered the opinion of the court, in which BIRCH, J., and WEATHERFORD, SP. J., joined.

Bruce Timothy Pirtle, McMinnville, Tennessee, for the appellants, Yasuda Fire & Marine Insurance Company and Calsonic Aeries Corporation, Inc.

Frank D. Farrar and William J. Butler, Lafayette, Tennessee, for the appellee, Rachel Jeanette McCormick.

**MEMORANDUM OPINION**

On August 19, 1996, Plaintiff filed a complaint for workers' compensation. In the complaint

she alleged an amputation of the tip of a finger on her left hand and also alleged that she was suffering from carpal tunnel syndrome in both of her arms from the repetitive motion of her job; she alleged that the carpal tunnel syndrome manifested prior to the amputation.

April 18, 1996 is the date Plaintiff amputated part of a finger on her left hand. Plaintiff testified that prior to the amputation accident she had been asked to help a co-worker who believed her spot welder machine was malfunctioning. Plaintiff placed her finger on the side of an electrode located on the co-worker's spot welder while simultaneously holding down a solenoid switch with a screwdriver or file. Plaintiff testified she did not put her finger between the electrodes but had her finger on the backside of the electrodes and when her screwdriver or file slipped, the electrodes were activated. The electrodes came up and her left finger slipped between the electrodes resulting in the left finger amputation just above the first joint.

The Defendant asserts that the procedure followed by the Plaintiff in her attempt to check her co-worker's machine was in wilful violation of company safety rules and policy; Defendant contends that Plaintiff was checking the machine with her finger when she had been trained and instructed to use a file only.

Plaintiff, however, testified that the practice of holding down the solenoid switch in the manner that she did, in order to check for burrs on the electrodes, was a common practice. She also testified that many of her co-workers and supervisors did the same thing and that she was never taught to do otherwise. During Plaintiff's testimony she identified several of the co-workers and supervisors who practiced the same maneuver in order to check for electrode problems; however, she did not call any of the co-workers or supervisors as witnesses to corroborate her testimony.

The Defendant called only one witness to refute Plaintiff's testimony that it was a customary practice to check the electrodes in the manner that she did. However, Defendant's only witness was a person in higher management who would be less likely to know what employees did on the line in their everyday activities. Defendant did not call any of the co-workers named by the Plaintiff to refute Plaintiff's testimony that the procedure she utilized was customary.

The Defendant now contends that Plaintiff's failure to call the witnesses she named supports Defendant's contention that Plaintiff did not carry her burden of proof. The Defendant refers to the "absent witness rule" as a basis for an inference that the named witnesses' testimony would be unfavorable to the Plaintiff because she failed to call them as witnesses to elicit their respective testimony.

The rule reads in part:

T.P.I.--Civil 2.04--Absence of Witness or Evidence . . . You may conclude that the testimony of the witness may be adverse to that party who failed to offer it only if you find all of the following elements:

1. That it was in the power of a party to produce a witness on an

issue in this case, but that party has failed to produce the witness; and

2. The witness was uniquely under the control of the party and could have been produced by the exercise of reasonable diligence; and

3. The witness was not equally available to an adverse party or the witness was likely to be biased against an adverse party because of a relationship to the party who would be expected to produce the witnesses; and

4. The witness' testimony would not be merely cumulative; and

5. A reasonable person under the same or similar circumstances would have produced the witness if the testimony would be favorable; and

6. No reasonable excuse for the failure has been shown . . .

We are of the opinion that the "absent witness rule" is inapplicable to the facts of this case, as the witnesses were not equally available to the Plaintiff nor were they uniquely under the control of the Plaintiff, as they were to the Defendant. To the contrary, it appears to this Panel that under the facts and circumstances of this case, that the Defendant could have called the fellow co-workers as witnesses, and the failure of the Defendant to do so could raise the inference of unfavorable testimony against the Defendant.

The Defendant next raises the defense of voluntary intoxication as an affirmative defense to the complaint. The pertinent statute governing voluntary intoxication and wilful violation of a known safety rule is Tenn. Code Ann. Section 50-6-110(a) & (b)(Supp. 1998) which reads in part that:

No compensation shall be allowed for an injury or death due to the employee's wilful misconduct or intentional self-inflicted injury due to intoxication or illegal drugs, or wilful failure to use a safety appliance or perform a duty required by law. . . If the employer defends on the ground that the injury arose in any or all of the above stated ways, the burden of proof shall be on the employer to establish such defense.

At the time of the accident Plaintiff was taking prescription medications Xanax, Soma, Darvocet, and Prozac. These drugs could have impaired her ability to operate the machinery which resulted in the amputation. There was evidence that prior to the incident she was acting "flighty" and "erratic". After the accident, Plaintiff tested positive for benzodiazepines.

However, Plaintiff had a history of taking medications which was well know to the Defendant. A few months prior to the accident, on January 25, 1996, Plaintiff tested positive to a drug screen at work. Again, on December 2, 1996, while on light duty after the accident, Plaintiff behaved erratically and again failed a drug screen at work. After this drug screen, Plaintiff entered drug rehabilitation. Defendant also asserts that, having paid for Plaintiff's drug rehabilitation, it

should not be required to pay for an injury caused by her drug problems. Irrespective and poignantly, all of the drugs consumed by the Plaintiff were legally prescribed.

The testimony reflects that the Plaintiff provided the company nurse with a list of her legally, medically prescribed medicine prior to the accident, as mandated by the company policy. Thus the company knew the Plaintiff was on several medications. It seems incongruous that the Defendant could now be heard to complain that Plaintiff was operating a spot welder under the influence of medications when the company knew of her drug usage in the first place.

The trial judge found that the Plaintiff did not act wilfully. We agree. Even if the Plaintiff had acted unreasonably dangerous, in the manner that she did, that is not enough to invoke the avoidance of workers' compensation benefits provided for wilfulness. *Bryan v. Paramount Packing Corp.*, 677 S.W.2d 453 (Tenn 1984). We are of the opinion the Defendant did not carry the burden of proof that the Plaintiff acted wilfully. See *Rogers v. Kroger Co.*, 832 S. W. 2d 538 (Tenn 1992).

On both the issues of voluntary intoxication, as a ground to avoid paying benefits, and disregard of safety rules, the trial court was the judge of the credibility of the witnesses. Credibility is the central consideration under the contested facts of this case, and the trial court should not be reversed on this issue absent abuse of discretion. *Elmore v. Travelers Insurance Company*, 824 S.W.2d 541 (Tenn. 1992). The trial judge's determination of the credibility of Plaintiff and her witnesses should be upheld.

Other issues raised by the Defendant are whether the trial court erred in awarding permanent partial disability to the Plaintiff for carpal tunnel syndrome in both arms from repetitive use at work; whether there was adequate notice given to the employer of the carpal tunnel syndrome claim; whether the trial court erred in awarding the plaintiff 100% permanent partial disability to the plaintiff's left finger and 40% permanent partial disability to each arm; whether the award should have been in lump sum and; whether the trial court failed to enforce the "concurrent injury rule"; whether the court erred in ordering the defendant to pay for plaintiff's reasonable and necessary future medical expenses relating to her finger and both arms.

Three out of four physicians testified the Plaintiff suffered from carpal tunnel syndrome or carpal tunnel compression in both arms and also testified as to the degree of impairment.

Records from Dr. Robert Landsberg diagnosed Plaintiff with bilateral carpal tunnel syndrome on October 14, 1996, and rated her at 10% to each arm. Plaintiff was then examined by Dr. John R. Thompson on October 14, 1997. He diagnosed carpal tunnel compression, as opposed to carpal tunnel syndrome. He also rated her at 10% to each arm. Plaintiff next saw Dr. Sammy Mack Smith on November 3, 1997, who agreed with Dr. Landsberg that she had carpal tunnel syndrome and that she had a permanent partial disability rating of 10% to each arm. However, at Defendant's request, Plaintiff was evaluated by Dr. Leon S. Ensalada, who found no abnormalities. The trial court found in favor of Plaintiff's physicians, their diagnosis and cause of the injuries as related to her job. The trial court is at liberty to chose between conflicting medical opinions. *Landers v. Fireman's Fund Ins. Co.*, 775 S.W. 2d 355 (Tenn. 1989).

In addition, Plaintiff testified that she would be unable to perform any of her previous employment without difficulty due to her bilateral carpal syndrome disability and restrictions. Plaintiff's past work history involved the use of her hands, and the nature of her current impairment would hinder all of her past job requirements; past jobs included farming, sewing work, a cook, dishwasher, waitress, housekeeping, assembly line work, welding and brazening. Plaintiff contends that the medical evidence, the testimony presented, and her education and employment history all support the trial court's award of permanent partial disability. We find no error in the trial judge awarding the Plaintiff 40% permanent partial disability to each arm.

Defendant asserts that the Plaintiff failed to prove she gave notice of her carpal tunnel injury to Defendant. Although Plaintiff testified that she began experiencing problems in October, 1996, she did not report the problem and did not see a doctor for her condition until after she filed her complaint alleging that condition. She testified that she did not know the nature or extent of her carpal tunnel syndrome until she was diagnosed by her physician.

As pointed out by the Defendant, Plaintiff alleged she sustained carpal tunnel syndrome in her both her hands in her complaint before she was diagnosed with the condition by the first physician. This appears to be an inconsistency, yet the trial judge had the benefit of hearing and viewing the witnesses; the record discloses the Plaintiff did complain earlier to the Defendant that her hands and wrists were giving her trouble. "An employee's reasonable lack of knowledge of the nature and seriousness of his injury has been held to excuse his failure to give notice within the 30-day period as described in Tenn. Code Ann. Sec. 50-6-201." *Pentecost v. Anchor Wire Corp.*, 695 S.W. 2d 183 (Tenn. 1985).

The trial court chose to believe the Plaintiff's testimony that she suffered injury to both hands as a result of her job duties; the trial court also accepted her testimony that she did not know the extent or nature of the injury until advised by her first physician. The trial court is entitled to couple the lay testimony with the medical proof. To reiterate, the trial court may accept the most plausible medical evidence and is at liberty to accept the expert testimony of one side as opposed to countervailing expert testimony on the other side. The record establishes that there was adequate medical proof to justify the trial court's ruling that Plaintiff suffered the injuries on the job and that Plaintiff was justified in not giving exact notice, beyond her previous general notice of difficulty with her hands, as she did not know the extent and nature of her injuries. *Accord, Landers v. Fireman's Fund Ins. Co.*, 775 S.W. 2d 355( Tenn. 1989).

Defendant also argues that Plaintiff's failure to call witnesses, fellow co-workers, supervisors and the company nurse in support of her testimony that she complained of her hand problems to them creates an inference that those witnesses would not have supported her position. Again, to reiterate we refer to T.P.I. 2.04. In short, under the circumstances of this case, the Plaintiff was not in control of her co-workers. Therefore there could be no reasonable inference that Plaintiff's failure to call witnesses, that were her co-workers, and to whom she allegedly made statements confirming prior notice of her carpal tunnel syndrome condition, would be adverse to her. And it is noted, the Defendant did not call the witnesses, co-workers, named by the Plaintiff as having knowledge of her complaints.

The trial court's order did not make Defendant liable for any of Plaintiff's past medical expenses but, instead, requires Defendant to pay for reasonable and necessary future medical expenses. The fact that Plaintiff's treatment was initially unauthorized does not render future treatment by her chosen physician unauthorized. Plaintiff has never requested a panel of physicians or a doctor from Defendant. Plaintiff has never sought medical treatment from Defendant but filed a complaint alleging her condition even before obtaining a diagnosis.

Defendant complains that the trial court's award of disability for Plaintiff's finger and arm violated the concurrent injury rule of Tenn. Code Ann Section 50-6-207(3)(c) which states,

When an employee sustains concurrent injuries resulting in concurrent disabilities, such employee shall receive compensation only for the injury which produced the longest period of disability, but this section shall not affect liability for the concurrent loss of more than one (1) member for which members compensations are provided in the specific schedule. . .

Instead, Defendant urges that Plaintiff's award should be assigned to the body as a whole. Defendant further argues that the 2.5 multiplier should apply to limit the award to no more than two and one half Plaintiff's impairment rating as the Plaintiff remains employed by the Defendant.

The concurrent injury rule does not apply here because she sustained separate injuries at different times to different members. In addition, the rule does not apply because her carpal tunnel injuries were to separate scheduled members, versus unscheduled members. Accordingly, Plaintiff's award should not be limited to 2.5 times her impairment rating.

Defendant maintains that exceptional circumstances warranting a lump sum award do not exist in this case. A lump sum award was proper where Plaintiff demonstrated she had the ability to wisely manage it, there was no need for periodic payments, and it was in her best interest. *Accord, Edmonds v. Wilson Co.*, No. 96-235 (Tenn. filed Dec. 20, 1999). The trial court did not abuse its discretion in awarding a lump sum.

Lastly, Defendant argues that Plaintiff's counsel drafted the trial court's order, making findings of facts and conclusions of law that were not specifically instructed by the trial court; therefore, no effect should be given to the trial court's order.

The Supreme Court ruled that the trial court's Final Decree complied with Rule 58 of the Tennessee Rules of Civil Procedure. Moreover, the transcript quoted by Defendant in support of its argument has not been included in the record and, therefore, cannot be used to support Defendant's argument. Finally, in the opinion of the Panel, nothing irregular surrounding the circumstances of the entry of judgment occurred.

The court finds in favor of the Plaintiff and assesses costs to the Defendant.