

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

October 9, 2001 Session

**DARYL K. COLLINS v. TOWER AUTOMOTIVE PRODUCTS
COMPANY, d/b/a TOWER AUTOMOTIVE**

**Direct Appeal from the Chancery Court for Madison County
No. 57071 Joe C. Morris, Chancellor**

No. W2001-00480-WC-R3-CV - Mailed November 8, 2001; Filed December 17, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court found Plaintiff suffered permanent impairment and awarded Plaintiff twenty-two percent (22%) permanent partial impairment to each upper extremity. Defendant asserts that the award of twenty-two percent (22%) was excessive and not supported by the evidence. From our review of the trial record, we affirm the trial court's judgment as modified.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court is Affirmed as Modified.

L. TERRY LAFFERTY, SR. J., delivered the opinion of the court, in which JOE C. LOSER, JR., SP. J., and JANICE M. HOLDER, J., joined.

Deana C. Seymour, Jackson, TN, for the appellant, Tower Automotive Products Company, Inc., d/b/a Tower Automotive.

George L. Morrison, III, Jackson, TN, for the appellee, Daryl Collins.

MEMORANDUM OPINION

TRIAL TESTIMONY

Daryl Collins, age 39, married with two sons, has been employed at Tower Automotive Company, Inc., d/b/a Tower Automotive, hereinafter Defendant, for the past 17 years. Plaintiff's education consists of a high school diploma and an associate's degree from Jackson State

Community College. Plaintiff's duties were primarily welding heavy truck parts. In 1998, Plaintiff began suffering from pain in both his right and left wrists. Plaintiff advised Defendant in January of 1999, and underwent conservative treatment. Defendant furnished him with the names of three physicians and was seen by Dr. Lewis Murphy, who referred Plaintiff to Dr. Ronald Bingham for a nerve conduction examination. Dr. Bingham referred Plaintiff to Dr. Michael Cobb when the test indicated median neuropathy at both wrists, consistent with carpal tunnel syndrome. Dr. Cobb advised Plaintiff that carpal tunnel release may be necessary for both wrists. On January 20, 2000, Dr. Cobb performed carpal tunnel release on the right wrist and then on February 8, 2000, carpal tunnel release was performed on Plaintiff's left wrist. Plaintiff returned to restricted duty for six weeks before Dr. Cobb released him to regular duty as a welder.

Although Plaintiff returned to regular duty, he stated that his hands still hurt every day, however surgery did correct the numbness. He advised the plant nurse, Debbie Bowlin, that his hands hurt occasionally while grinding parts. At home, Plaintiff stated that he had difficulty playing (wrestling) with his eight-year-old son. Due to vibration, he cannot use a weed eater for long periods of time because of numbness. When asked about his grip strength, Plaintiff responded, "As far as grip strength, I've lost quite a bit of grip strength. It's things that I just took for granted before." Plaintiff estimated that he lost thirty percent (30%) grip strength in his hands since the injury. During cross-examination, Plaintiff agreed that he had received a pay raise since his return to work and is now making a higher hourly rate. Also, Plaintiff acknowledged that he participated in little league activities, throwing a football with his son, and taking a family vacation to Disney World.

In behalf of Defendant, co-workers of Plaintiff, Kenneth Gilbert, Jeff Lowery, and supervisor, Sam Luter, testified that Plaintiff was a welder in heavy truck building. All agreed that Plaintiff returned to work, did a fine job, never made any complaints and was a good worker. Luter stated that Plaintiff could do various jobs in the plant. Also, Luter agreed that he had come to work feeling bad, but never complained to his co-workers.

MEDICAL EVIDENCE

For the record, the C-32 form of Dr. Michael Cobb was made an exhibit. Dr. Cobb's report reflect that Plaintiff was referred to him by Dr. Ronald Bingham as the result of a nerve conduction examination. The examination indicated a diagnosis of carpal tunnel syndrome on December 19, 1999. Dr. Cobb saw Plaintiff on January 12, 2000, with a complaint of pain, numbness in both hands, with the right hand worse than the left. Dr. Cobb diagnosed Plaintiff with severe carpal tunnel syndrome, both hands, and recommended surgery for the best chance of a recovery. Otherwise, if decompression of the nerve is delayed, there is more chance that Plaintiff will have some permanent neuropathy. On January 20, 2000, Dr. Cobb performed endoscopic carpal tunnel release on the right hand. On February 1, 2000, Plaintiff's only complaint was soreness to the right hand following surgery. Plaintiff was ordered to commence grip exercises.

Plaintiff agreed to undergo the same procedure on his left hand. On February 8, 2000, Dr. Cobb performed endoscopic carpal tunnel release on the left hand. Dr. Cobb's report reflects that

on February 18, 2000, Plaintiff was to start grip exercises on the left hand, and Plaintiff was furnished a note permitting a return to work, but with restrictions of avoiding vibratory tools, no lifting greater than 20 pounds, and no repetitive grasping or wrist motion. On March 6, 2000, Plaintiff advised Dr. Cobb that he still had some soreness in his left hand after doing some strenuous yard work. He had a good range of motion and fair grip. Dr. Cobb advised Plaintiff that he could return to light duty work for six weeks. On March 30, 2000, Plaintiff had generalized soreness on the left, and good range of motion and grip. As of April 27, 2000, Plaintiff had no residual numbness or tingling, but still had some discomfort of the base of the left hand, none of the right and the right hand is better than it was. The examination indicated that Plaintiff had good grip and has returned to regular work.

Dr. Cobb opined that Plaintiff had zero percent (0%) permanent impairment.

At the request of counsel, Dr. Joseph C. Boals, III, an orthopedic specialist, examined Plaintiff on June 28, 2000. Dr. Boals obtained Plaintiff's medical history, including his two surgeries for carpal tunnel syndrome, and noted that Plaintiff complained of some decreased grip strength and soreness in his hands while performing his job. The physical examination indicated a negative Phalen's test bilaterally, grip strength measurements showed an average grip strength of 97 pounds on the right and 99 pounds on the left. In utilizing Table 34, page 65, of the AMA Guidelines for an impairment rating, Dr. Boals opined that Plaintiff suffered an impairment rating of ten percent (10%) of each upper extremity. Plaintiff was to avoid repetitive work and heavy gripping.

In his cross-examination deposition, Dr. Boals stated that he uses strength data supplied by the Jamar Company, a device used for testing. Dr. Boals stated that 118 pounds was a normal grip strength. Dr. Boals stated that the 118 pounds was not based on any charts contained in the AMA Guidelines, because the guides are statistically incorrect, old, outdated and therefore he does not use them anymore. Dr. Boals acknowledged that had he used the AMA Guidelines, Plaintiff would have had a normal grip strength. Dr. Boals agreed that grip strength could improve up to a year following surgery.

LEGAL ANALYSIS

Defendant asserts that the trial court's award is excessive and is not supported by a preponderance of the evidence. Furthermore, this Court should give greater weight to the opinion of Dr. Michael Cobb, treating physician, since Dr. Cobb's opinion as to impairment is based upon the AMA Guidelines to the Evaluation of Permanent Impairment as required by Tennessee Code Annotated § 50-6-204(d)(3). Dr. Boals, Plaintiff's expert, did not base his opinion on the AMA Guidelines, but on guides supplied by the Jamar Company. Therefore, Plaintiff's vocational disability as a result of this injury is minimal, if any.

Appellate review of findings of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is

otherwise. Tenn. Code Ann. § 50-6-225(e)(2). This standard requires this Panel to conduct an independent examination of the record to determine where the preponderance lies. *Story v. Legion, Ins. Co.*, 3 S.W.3d 450, 451 (Tenn. Sp. Workers Comp. 1999); *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991). Where the trial court has seen and heard the witnesses, especially where issues of credibility are involved, a reviewing court must give considerable deference to the trial court's findings. *Ferrell v. Cigna Property & Cas. Ins. Co.*, 33 S.W.3d 731, 734 (Tenn. 2000). No such deference is warranted in reviewing documentary proof. *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783-84 (Tenn. 1999). The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony, if any. *Story*, 3 S.W.3d at 456; *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990).

When medical testimony may differ, it is within the discretion of the trial court to determine which expert testimony to accept. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. Sp. Workers Comp. 1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990). The medical expert proof in this record consists of the C-32 Standard Form Medical Report of Dr. Michael Cobb, the C-32 form of Dr. Joseph Boals, III, and the cross-examination deposition of Dr. Boals. The trial court found in its findings that Dr. Cobb had assessed a 0 percent (0%) impairment to Plaintiff although Dr. Cobb believed that Plaintiff had a very severe carpal tunnel condition. Dr. Boals opined that Plaintiff had a ten percent (10%) disability to each upper extremity due to loss of grip strength.

The extent of an injured worker's disability is an issue of fact. *Jaske v. Murray Ohio Mfg. Co., Inc.*, 750 S.W.2d 150, 151 (Tenn. 1988). Also, we are aware of the requirements of Tennessee Code Annotated § 50-6-204(d)(3) - determination by physicians for the degree of anatomical impairment based upon the American Medical Association Guides to Evaluation of Permanent Impairment or the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment. In his C-32 form, Dr. Cobb found on April 27, 2000, after a TPD, that Plaintiff demonstrated a good grip on his exam. Dr. Cobb opined, utilizing the AMA Guides, that Plaintiff's percentage of impairment was zero percent (0%). In contrast, Dr. Boals, utilizing the AMA Guides in his C-32 form, opined that Plaintiff sustained a ten percent (10%) impairment to each upper extremity. Dr. Boals stated:

In my opinion this gentleman's impairment is based upon the anatomic change which results from carpal tunnel surgery that is best reflected by his grip strength loss. At his age of 38, he should have an average grip strength of approximately 118 pounds. His strength index on the right is 19 and on the left 16. This would qualify him under Table 34, page 65, of the AMA Guidelines for an impairment rating of 10% of each upper extremity.

He should avoid repetitive work and heavy gripping in the future to prevent recurrence.

In his cross-examination deposition by Defendant, Dr. Boals testified that he gave Plaintiff a grip strength test. Plaintiff was found to have ninety-seven (97) pounds of grip strength on the

right and ninety-nine (99) pounds on the left. This determination was based upon strength data supplied by the Jamar Company. Dr. Boals agreed that the 118 pound average grip strength was not based upon any charts contained in the AMA Guidelines because they are outdated, statistically incorrect and old.

As suggested by Defendant, the statute, Tennessee Code Annotated § 50-6-204(d)(3), clearly provides the guidelines physicians are required to use in determining anatomical impairment. In *Sandra G. Jackson v. Goodyear Tire & Rubber Co.*, No. W1999-01691-WC-R3-CV, 2001 WL 303508 (Tenn. Sp. Workers Comp. 2001), a Panel of this Court ruled that Dr. Boals' opinion regarding grip strength should be disallowed for failure to comply with the statutory requirement of Tennessee Code Annotated § 50-6-204(d)(3). As in *Jackson*, our inquiry does not end. Dr. Boals opined that Plaintiff's impairment is based upon an anatomic change which results from carpal tunnel surgery. Plus, Plaintiff is to avoid repetitive work and heavy gripping in the future. Apparently, the trial court found the expert opinion of Dr. Boals more pertinent as to some impairment.

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 the employee's capacity to work at the kinds of employment available in the employee's disabled condition. The employee's own assessment of his or her physical condition cannot be disregarded. The trial court is not bound to accept physicians' opinions regarding the extent of Plaintiff's disability, but should consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability. *Walker v. Saturn Corp.*, 986 S.W.2d 204, 207-08, (Tenn. 1998).

In reviewing the trial court's decision, the trial court commented on Plaintiff's long employment history, his age, educational background and although still working, still suffers from pain, soreness and a loss of grip strength. Plaintiff, based upon his prior work experience, before injury, now believes he has lost thirty percent (30%) grip strength in his current work. An injured employee is competent to testify as to his own assessment of his physical condition and such testimony should be regarded in assessing vocational disability. *McIlvain v. Russell Stove Candies, Inc.*, 996 S.W.2d 179 (Tenn. 1999). From our independent review of the record, and consideration of applicable law, we cannot say that the evidence preponderates against the trial court's finding as to the extent of Plaintiff's permanent disability.

CONCLUSION

We find that the portion of Dr. Boals' testimony relating to Plaintiff's loss of grip strength should be disregarded. However, with such disregard, there are sufficient facts in the record to support the vocational impairment awarded by the trial court. We note that the trial court made separate awards to each arm. Tennessee Code Annotated § 50-6-207(3)(A)(ii)(w) provides scheduled benefits for the loss of two (2) arms, therefore, we modify the award to twenty-two percent (22%) permanent partial disability to both arms which will neither increase nor decrease the award but will conform the trial court's judgment to the statute.

For the above reasons, the judgment of the Chancery Court of Madison County is affirmed as modified. Costs on appeal are taxed to Defendant.

L. TERRY LAFFERTY, SENIOR JUDGE

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No. 57071**

No. W2001-00480-WC-R3-CV - Filed December 17, 2001

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 on appeal are taxed to the Appellant, Tower Automotive Products Company, d/b/a Tower Automotive, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM