

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

February 28, 2002 Session

**KATHY JEAN BERRY v. SARA LEE CORPORATION d/b/a JIMMY  
DEAN SAUSAGE DIVISION, ET AL.**

**Direct Appeal from the Chancery Court for Dyer County  
No. 99-C-241 & 00-C-26 J. Steven Stafford, Chancellor**

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**No. W2001-00041-WC-R3-CV - Mailed March 27, 2002; Filed May 14, 2002**

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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. In this appeal, Defendants/Appellants asks: (1) Did the trial court err in finding that Plaintiff sustained a compensable injury to her shoulder?; (2) Did the trial court err in finding that Plaintiff sustained a second and distinct compensable injury to her right elbow?; and (3) Did the evidence presented at trial preponderate against the amount of the permanent partial disability benefits awarded by the trial court, with respect to the shoulder injury and the second right elbow injury? As discussed below, the trial court did not err and this panel has concluded that the judgment should be affirmed.

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

L. TERRY LAFFERTY, SR. J., delivered the opinion of the court, in which JOE C. LOSER, JR., SP. J., joined. JANICE M. HOLDER, J., not participating.

Kenneth R. Rudstrom, and S. Newton Anderson, Memphis, Tennessee, for the Defendants/Appellants, Sara Lee Corporation d/b/a Jimmy Dean Sausage Division, et al.

Jeffrey A. Garrety and Joseph R. Taggart, Jackson, Tennessee, for the Plaintiff/Appellee, Kathy Jean Berry.

**MEMORANDUM OPINION**

This appeal consists of two separate workers' compensation claims that have been consolidated for the purpose of review.

At trial, Kathy Jean Berry, Plaintiff, age forty-four (44), with a 10<sup>th</sup> grade education, and a veteran production worker, testified that she began working with Jimmy Dean Sausage Company in 1989. For seven (7) years, Plaintiff was a scrapper/packer and then for the past four (4) years, she packed meat boxes weighing seven (7) to twelve (12) pounds. The work was highly repetitive requiring the use of shoulders, elbows, wrists and hands. Plaintiff stated that she saw Dr. Claiborne Christian for an injury to her right elbow from the repetitive work. Dr. Christian performed surgery on her right elbow in October 1998. Upon her return to work, Plaintiff was placed on light duty and eventually returned to her regular job. However, Plaintiff's shoulder and the inside of her right arm continued to hurt, which she described as pain radiating from her shoulder to her fingertips. Plaintiff saw Dr. Christian through June 1999, receiving medication and physical therapy. In the summer of 1999, Plaintiff began working the box machine. This required Plaintiff to pull a hand jack loaded with skids of unassembled boxes, which Plaintiff placed in a machine and then caught the boxes as they came out of the machine. As a result of this work, the pain level changed in Plaintiff's shoulder and arm. She reported this problem to the plant nurse, Wannie Johnson, and requested to see Dr. Christian.

Plaintiff's request was denied by Defendant, and Ms. Johnson suggested that Plaintiff had a potassium deficiency and that she needed to consume more bananas. Plaintiff had her potassium level checked, which was found to be normal. She saw Dr. Lynn Warner, who referred her to Dr. Carl W. Huff. After treatment, Dr. Huff performed surgery on her right shoulder and elbow. After a period of time, Plaintiff returned to her job operating the box machine. At time of trial, Plaintiff still suffered some pain and numbness for which she takes Lorcet. Plaintiff has difficulty in pushing, pulling, lifting, and picking up things. Also, Plaintiff's home duties, such as vacuuming, opening jars, and her yard work have been affected. Plaintiff believes that she is not capable of returning to her former work as a scrapper or packer due to her condition. Plaintiff acknowledged that she makes more money operating the box machine, than that of a scrapper and packer.

Gregory W. Berry, Plaintiff's husband, testified that he and Plaintiff married in 1996. Prior to her first injury in 1998, his wife had no physical problems. After his wife's first injury, Plaintiff had difficulty in reaching and grabbing items. Between surgeries, Plaintiff could not do her usual house chores, such as carrying the laundry basket and washing. Mr. Berry stated that he saw no improvement in his wife's condition following her second surgery.

Gay L. Burton, friend and neighbor of Plaintiff, testified that Plaintiff, prior to her first injury, had no physical problems. Plaintiff did her own mowing, other yard work, and assisted Mrs. Burton in her yard. After the first injury, Plaintiff could no longer do her yard work or move the grill without pain. Plaintiff's condition appeared to worsen, in that she could not pick up a coffee pot or wash her clothes. After the second surgery, Plaintiff's mobility improved some, but Plaintiff was upset and frustrated over her condition.

Defendant presented no proof.

MEDICAL EVIDENCE  
DEPOSITION TESTIMONY

99-C-241 - FIRST INJURY

Dr. Claiborne Christian, a board certified orthopedic surgeon, testified that he saw Plaintiff on October 5, 1998, with complaints of pain in her right elbow. This pain had been ongoing for approximately nine (9) to twelve (12) months. This pain interfered with her home and work life. After a physical examination, Dr. Christian believed Plaintiff suffered from tennis elbow or lateral epicondylitis. Thus, the tendon connecting the forearm muscle to the top of the forearm became irritated and this condition is difficult to heal due to repeated activity. On October 27, 1998, Plaintiff had a positive Tinel's and Phalen's test of her wrist. Dr. Christian suggested surgical release, but cautioned Plaintiff that results could be unpredictable. On October 30, 1998, Dr. Christian performed surgery on the outside of the right elbow and found the tissue highly inflamed. Between November 11, 1998 and February 23, 1999, Dr. Christian saw Plaintiff three (3) to six (6) times, and she still complained of pain in her elbow. As of February 23, 1999, Dr. Christian concluded that Plaintiff had reached maximum medical improvement. Dr. Christian opined that Plaintiff's grip strength on her right was decreased compared to her left and that Plaintiff sustained a three percent (3%) permanent impairment to her right arm. Plaintiff returned to see Dr. Christian in April 1999, with complaints of pain inside her right elbow. Plaintiff was still doing her highly repetitive job for the Defendant. Dr. Christian concluded that Plaintiff would continue to have tenderness as long as she did factory type jobs. Dr. Christian opined that Plaintiff's symptoms are job related and that Plaintiff has cumulative trauma disorder from her job. In June 1999, Dr. Christian referred Plaintiff to Dr. David Johnson for an independent evaluation. Dr. Christian stated that Plaintiff has no work restrictions, but she should consider changing jobs.

Dr. Joseph C. Boals, III, a board certified orthopedic surgeon, testified that he saw Plaintiff on June 14, 1999, at request of counsel, for an evaluation. After a review of Plaintiff's medical and work history, Dr. Boals' physical examination indicated that Plaintiff lacked twenty (20) degrees of getting her arm to full extension on the right elbow and a grip strength of sixty-three (63) pounds on the left and forty-three (43) pounds on the right. Dr. Boals concluded that Plaintiff's symptoms and surgery were work related. Coupled with Plaintiff's surgery and loss of grip strength, Dr. Boals opined that Plaintiff, using the AMA Guidelines, sustained an overall impairment of twenty-four percent (24%). Plaintiff can work, however, there are restrictions in lifting, heavy gripping and should reduce repetitive work.

00-C-26 - SECOND INJURY

Dr. Carl W. Huff, a board certified orthopedic surgeon, testified that he saw Plaintiff on a referral from Dr. Lynn Warner. Plaintiff complained of pain in her right elbow, right shoulder and numbness in her right hand. These symptoms commenced approximately a year earlier. When these symptoms increased, Plaintiff was unable to perform her job adequately. Dr. Huff's physical examination revealed a small spur at the AC joint, with slight laxity of the joint (hypermobility);

painful popping when moving shoulder in wide area; mild atrophy of deltoid muscle on right side and decreased strength of shoulder muscle. As to the elbow, Dr. Huff found marked tenderness with full movement; with resistive maneuvers of elbow and wrist she experienced elbow pain; and a healed surgical incision on the outside of the elbow. For the right wrist, Plaintiff had a positive Tinel's sign and Phalen's test. X-rays of the right shoulder indicated a narrowing and spurring of the AC joint consistent with degenerative arthritis and spurs on the right elbow. Dr. Huff diagnosed Plaintiff with a peripheral nerve entrapment, impingement syndrome of the right shoulder and tendinitis. An MRI of the right shoulder was significant and an EMG to the right elbow revealed a definite entrapment of the ulnar nerve. Dr. Huff opined that these were two separate conditions. In November 1999, Dr. Huff performed surgery to the right shoulder and transposition of the ulnar nerve in the right elbow.

As to the nerve entrapment of the right elbow, Dr. Huff opined that Plaintiff's condition was a degenerative process that occurred over time and was not causally related to her work. However, Dr. Huff acknowledged that Plaintiff's ulnar nerve entrapment at work would cause symptoms of pain and numbness. Dr. Huff did not assign an impairment rating to Plaintiff's right elbow since she did not have residual neuropathy. As to the right shoulder, Dr. Huff opined that Plaintiff, at work, had pain, but opined that the natural history of her condition is the result of aging process... but "I don't think she had structural aggravation of her condition by her work activity." Dr. Huff opined, as a result of surgery to the shoulder, that Plaintiff sustained an impairment of ten percent (10%) to the upper extremity, and eight percent (8%) to the whole person, utilizing AMA Guidelines, Table 27, page 61.

Dr. Joseph C. Boals, III, a board certified orthopedic surgeon, saw Plaintiff on May 4, 2000. Plaintiff complained of an injury to her right elbow and shoulder. Her workers' compensation claim had been denied. Dr. Boals noted that Plaintiff had seen Dr. Huff and had surgery on November 4, 1999, and that Plaintiff returned to work within three (3) months. Dr. Boals diagnosed Plaintiff's complaint as residuals from open acromioplasty with resection of the distal clavicle, right shoulder, and residuals from anterior transplantation of the right ulnar nerve. Based upon Plaintiff's work and medical history, Dr. Boals opined that Plaintiff's medical condition was related to her work. Dr. Boals described this medical condition as either overuse syndrome or cumulative trauma disorder. As to the right shoulder, Dr. Boals, utilizing AMA Guidelines, Table 27, page 61, opined that Plaintiff sustained a ten percent (10%) impairment to the upper extremity and that the operation of acromioplasty carries an additional ten percent (10%) impairment rating. Dr. Boals acknowledged that there is no table in the guides for this rating. As to the transposition of the right ulnar nerve at the elbow, Dr. Boals opined that it carries a ten percent (10%) impairment. Dr. Boals stated that combining the shoulder and elbow, utilizing the tables, the overall impairment of Plaintiff is twenty-seven percent (27%). Dr. Boals stated that the twenty-seven percent (27%) equates to an impairment of sixteen percent (16%) to the body as a whole. Dr. Boals opined that Plaintiff should avoid repetitive movements at work and home, heavy gripping and overhead reaching.

Dr. Claiborne Christian, a board certified orthopedic surgeon, saw Plaintiff on October 3, 2000. Plaintiff complained of two injuries involving the right shoulder and right elbow. Plaintiff

stated that she was still working at Jimmy Dean's, her pain was the aching kind, and that she had some numbness and tingling. Plaintiff believes that these two injuries are work related. Dr. Christian's physical examination revealed a little bit of atrophy of the right deltoid. After checking for range of motion for the shoulder and elbow, Dr. Christian arrived at an impairment rating based upon those ranges of motion and the fact that Plaintiff had a distal clavicle excision. As to the right elbow, Dr. Christian opined that Plaintiff sustained a two percent (2%) impairment to the upper extremity. As to the right shoulder motion, Dr. Christian opined that Plaintiff sustained a ten percent (10%) impairment to the upper extremity, and the clavicle excision itself carried a ten percent (10%) impairment. Utilizing the combined value tables, Plaintiff sustained an impairment rating of twenty-one percent (21%) to the upper extremity, which equals a thirteen percent (13%) impairment rating to the body as a whole. Dr. Christian opined that Plaintiff's injuries were, in the absence of any other history, caused by her work. Dr. Christian did not assign any work restrictions as to the Plaintiff, but cautioned Plaintiff that she will have discomfort doing repetitive work, forceful gripping and overhead reaching.

### LEGAL ANALYSIS

Review of the findings of 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 findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2)(2000); *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial court in a workers' compensation case. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

In Cause No. 00-C-26, Defendant contends that Plaintiff failed to establish a compensable injury to her right shoulder and a second injury to the right elbow arising out of her employment. While acknowledging that Plaintiff suffered pain, Defendant submits that her job did not cause Plaintiff a physical or anatomical problem, citing *Cunningham v. Goodyear Tire & Rubber Co.*, 811 S.W.2d 888, 891 (Tenn. 1991). In its ruling, the trial court considered Plaintiff's testimony, her husband's, next door neighbor's, and primarily the depositions of Drs. Huff and Christian, and found that Plaintiff had sustained a second injury to the right shoulder and right elbow arising out of her employment.

It is well established that an injury must both "arise out of" as well as be "in the course of employment" in order to be compensable under workers' compensation. *Williams v. Tecumseh Products Co.*, 978 S.W.2d 932, 935 (Tenn. 1998); *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991); *GAF Bldg. Materials v. George*, 47 S.W.3d 430, 432 (Tenn. 2001). An accidental injury arises out of one's employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. *Id. See Fink v. Caudle*, 856 S.W.2d 952 (Tenn. 1993). A claimant must establish by expert medical evidence the causal relationship between the claimed injury and the work activity. *Williams v. Tecumseh Products Co.*, 978 S.W.2d at 935, citing *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997). Although deference

still must be given to the trial judge when issues of credibility and weight of oral testimony are involved, *Seals v. England/Corsair Upholstery Mfg. Co.*, 984 S.W.2d 912, 915 (Tenn. 1999), this Court is able to make its own independent assessment of the medical proof when the medical testimony is presented by deposition. *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000); *Henson v. City of Lawrenceburg*, 851 S.W.2d 809, 812 (Tenn. 1993).

Both Drs. Christian and Boals opined that Plaintiff's medical problems for the right shoulder and right elbow were work related. Dr. Huff disagrees that Plaintiff's work history caused her injuries. Dr. Christian testified:

Q. Do you have an opinion as to the cause of her injuries?

A. Well, that is always a difficult question to answer in this type of setting but with the lack of any history other than what she provided to me which is that she didn't have any outside activities or injuries of significance, I think that especially in these cumulative trauma type problems that almost anything that you do if you are gonna do it for 8 hours a day or 12 hours a day depending on where you work, I think is certainly contributory to some degree. Now, certainly her job is not the most repetitious or the one that involves the most forceful gripping that I have ever seen, but at the same time, I think it is hard to ignore an 8 hour a day activity and I don't understand how you can say it wouldn't be contributory at least to some degree to her problems.

Q. Would it more likely than not have been the cause of her injury?

A. Without any other history, I would say yes.

Coupled with Plaintiff's testimony about her injuries, corroborated by her husband and neighbor of nine (9) years, a review of the medical depositions in this record, and our independent examination of all the evidence, we cannot say that the evidence preponderates against the trial court's finding that these injuries are work related.

We agree with Plaintiff that she has established, by a preponderance of the evidence, that she sustained a new and different injury to the right shoulder and ulnar nerve of the right elbow. Although Defendant, in its brief, asks whether the evidence presented at trial preponderates against the amount of the permanent partial disability benefits awarded by the trial court, with respect to these injuries, Defendant has failed to cite in the brief the trial court's errors in arriving at the amount of vocational disability award. We find this issue has been abandoned and the panel need not consider it.

The judgment of the trial court is affirmed and the cost of this appeal is taxed against the Defendant.

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L. TERRY LAFFERTY, SENIOR JUDGE

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**No. W2001-00041-WC-R3-CV - Filed May 14, 2002**

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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 on appeal are taxed to the Defendant/Appellant, Sara Lee Corporation d/b/a Jimmy Dean Sausage Division, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM