

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
February 2003 Session

CORA JEAN EARLS v. CALSONIC YOROZU CORPORATION, INC.

**Direct Appeal from the Chancery Court for Warren County
No. 7291 Charles D. Haston, Chancellor**

**No. M2002-01309-WC-R3-CV - Mailed - May 23, 2003
August 26, 2003**

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, the employer insists (1) the evidence preponderates against the trial court's findings as to notice, permanency, causation and extent of permanency, (2) the trial court erred in the application of Tenn. Code Ann. §§ 50-6-207(3) and 50-6-241; (3) the trial court erred by delegating its adjudicatory function to the Clerk and Master, and (4) the trial court erred in assessing discretionary costs against the defendant. As discussed below, the panel has concluded the award of permanent partial disability benefits should be reduced to one based on two and one-half times the employee's medical impairment rating, or 30 percent to the body as a whole.

Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the Chancery Court Affirmed as Modified

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, C.J., and JAMES L. WEATHERFORD, SR. J., joined.

B. Timothy Pirtle, McMinnville, Tennessee, for the appellant, Calsonic Yorozu Corporation

Barry H. Medley, Farrar, Holliman & Medley, McMinnville, Tennessee, for the appellee, Cora Jean Earls

MEMORANDUM OPINION

The employee or claimant, Ms. Earls, initiated this civil action to recover workers' compensation benefits for an allegedly work related injury. The employer denied liability and averred the employee failed to give notice as required by law. Following trial on March 26, 2001, the trial court awarded her, among other things, permanent disability benefits based on 35 percent

to the body as a whole. The employer has appealed.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2002 Supp.). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. 1995). The standard governing appellate review of findings of fact by a trial court requires the Special Workers' Compensation Appeals Panel to examine in depth a trial court's factual findings and conclusions. GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 61 (Tenn. 2001). The extent of an injured worker's vocational disability is a question of fact. Seals v. England/Corsair Upholstery Mfg., 984 S.W.2d 912, 915 (Tenn. 1999). Where the medical testimony in a workers' compensation case is presented by deposition, the reviewing court may make an independent assessment of the medical proof to determine where the preponderance of the proof lies. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 367 (Tenn. 1998).

The claimant is a 55 year old right handed woman with a twelfth grade education and no special skills or training. She has experience as a production worker and paper shuffler and has worked for the employer, Calsonic for approximately eleven years on production lines. At the time of her claimed injury, she was required to work with parts that were then placed in a box and moved to another position on the line. Her job consisted of continuously looking down and forward and running a welder. She would hold the part in her left hand and use the right hand to push buttons for the welder. She was bent over at the neck for her entire shift. She had a previous neck strain in 1996 or 1997 which resolved completely without any specific intervention.

On February 24, 2000, while so engaged, she felt a new onset of pain. She reported it to her employer the next day and was given a list of physicians from which she chose Dr. Bryan Chastain, whom she saw on February 29th. The doctor diagnosed cervical radiculopathy with degenerative changes in the cervical spine, for which he has provided conservative care. Dr. S. M. Smith, who examined and evaluated her, testified by deposition that her condition was causally related to her work for the employer and prescribed permanent restrictions. Dr. C. Robinson Dyer, who also examined and evaluated the claimant, estimated her permanent impairment to be 9 percent to the body as a whole and opined her injury was probably causally connected to her work on the employer's assembly line. Dr. Smith said 12 percent. He also prescribed permanent restrictions. Ms. Earls has returned to work for the employer on a different production line at a wage equal to or greater than the her pre-injury wage. She testified that she would not be able to perform any of the duties of her former jobs and is severely limited in her daily activities.

The employer contends the claimant failed to give timely written notice of her injury.

Immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, an injured employee must, unless the employer has actual knowledge of the accident, give written notice of the injury to his employer. Tenn. Code Ann. § 50-6-201. Where the employer denies that a claimant has given the required written notice, the claimant has the burden of showing that the employer had actual notice, or that the employee has either complied with the requirement or has a reasonable excuse for her failure to do so, for notice is an essential element of her claim. Aetna Cas. and Sur. Co. v. Long, 569 S.W.2d 444, 449 (Tenn. 1978). It is significant that written notice is unnecessary in those situations where the employer has actual knowledge of the injury. George v. Building Materials Corp., 44 S.W.3d 481, 485 at n 1 (Tenn. 2001). McKinney v. Berkline, 503 SW.2d 912, 915 (Tenn. 1974), relied on by the appellant, is a case in which the Supreme Court affirmed the trial court's disallowance of the employee's claim for failure of proof that any notice was given of a work related injury. It is not applicable to the facts of the present case. Mrs. Earls, whose credibility was not questioned by any witness, testified, without contradiction, that she gave verbal notice to her supervisor on February 25, 2000 and was given a list of three physicians from which she chose her treating physician. Hence, the employer had actual knowledge of her injury and was not prejudiced by the failure of timely written notice. The issue is accordingly resolved in favor of the appellee.

The employer next contends the evidence preponderates against the trial court's findings that the claimant's injury was causally related to her employment and that she was permanently impaired and disabled by it. Under the Tennessee Workers' Compensation Law, injuries by accident arising out of and in the course of employment which cause either disablement or death of the employee, are compensable. Tenn. Code Ann. § 50-6-103(a); McCurry v. Container Corp. of America, 982 S.W.2d 841, 843 (Tenn. 1998). "Injury" has been defined as including "whatever lesion or change to any part of the system (that) produces harm or pain or lessened facility of the natural use of any bodily activity or capability." An injury is compensable, even though the claimant may have been suffering from a serious pre-existing condition or disability, if a work-connected accident can be fairly said to be a contributing cause of such injury. An employer takes an employee as the employee is, with all defects and diseases, and assumes the risk of having a weakened condition aggravated by an injury which might not affect a normal person. 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. Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993) (citations omitted).

Compensable disabilities are divided into four separate classifications: (1) temporary total disability, (2) temporary partial disability, (3) permanent partial disability and (4) permanent total disability. Tenn. Code Ann. § 50-6-207. When an injured employee's partial disability is adjudged to be permanent, the employee is entitled to benefits based on a percentage of disability rather than the amount the employee is able to earn in her partially disabled condition. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 457 (Tenn. 1988).

In all but the most obvious cases, causation and permanency may only be established through expert medical testimony. Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (1991). Both

elements were established by the expert medical testimony of two different experts. The trial court did not err in accepting their testimony. It is within the discretion of the trial court to conclude that

the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-7 (Tenn. 1983). Moreover, any reasonable doubt concerning the cause of the injury should be resolved in favor of the employee. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 168 (Tenn. 2002). From a consideration of those principles and giving due deference to the findings of the trial court, we cannot say the evidence preponderates against that court's findings with respect to causation and permanency. The appellant's reliance on cases in which workers' claims were dismissed for insufficient proof of a compensable injury is misplaced.

The appellant's contention that the trial court awarded separate and cumulative awards in violation of Tenn. Code Ann. § 60-6-207(3) is without merit. The trial court's award, as stated in the amended judgment, is one based on 35 percent to the body as a whole.

The employer next contends the award is excessive in that it exceeds the multipliers imposed by Tenn Code Ann. § 50-6-241. In cases where an injured worker is entitled to permanent partial disability benefits to the body as a whole and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is two and one-half times the medical impairment rating pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment or the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment. Tenn. Code Ann. § 50-6-241(a)(1). Our independent examination of the record reveals that the highest impairment rating for the claimant was Dr. Smith's estimate of 12 percent to the body. Thus her maximum recovery for permanent partial disability benefits is one based on two and one-half times 12 percent, or 30 percent to the body as a whole. The award is reduced and judgment modified accordingly.

The appellant next contends the trial was conducted by the clerk and master, not the trial judge. Although the trial judge signed an order of reference, the only proof in this record is the court reporter's certificate at the end of the transcript of evidence, in which she certifies the transcript to be true and complete. The transcript reflects that the trial was conducted by Judge Charles D. Haston, who also signed the judgment. In the absence of other evidence, we accept the court reporter's certificate as true.

The appellant finally contends the trial court erred in awarding discretionary costs to the appellee. From our independent examination of the record, we cannot say the trial court abused its discretion in the assessment of costs.

As modified, the judgment of the trial court is therefore affirmed. Costs are assessed the parties, one-half each.

JOE C. LOSER, JR.

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Calsonic Yorozu Corporation, Inc., 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.

It appears to the Court that the motion for full court review was not timely filed and this Court is therefore without jurisdiction to consider the merits of the motion. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed one-half to each party, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Frank F. Drowota, III, C.J., not participating