

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

September 11, 2003 Session

SHIRLEY ANN BORCHERT v. EMERSON ELECTRIC COMPANY

**Direct Appeal from the Circuit Court for Benton County
No. 1CCV-480 C. Creed McGinley, Judge**

No. W2003-00111-WC-R3-CV - Mailed November 24, 2003; Filed December 31, 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 questions the trial court's findings as to permanency and extent of vocational disability. As discussed below, the panel has concluded the judgment fails to preponderate against the findings of the trial court.

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

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JOE H. WALKER, III, SP. J., joined.

Richard L. Dunlap, Paris, Tennessee, for the appellant, Emerson Electric Company

Charles L. Hicks, Camden, Tennessee, for the appellee, Shirley Ann Borchert

MEMORANDUM OPINION

The employee or claimant, Ms. Borchert, initiated this civil action to recover workers' compensation benefits from her employer, Emerson, for a work related foot injury. Emerson denied liability. After a trial on the merits, the trial court awarded, among other things, permanent partial disability benefits based on 35 percent to the leg. 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). This tribunal is not bound by the trial court's findings but instead conducts an independent examination of the record to determine where the preponderance lies.

Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). 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 was working on the employer's production line on August 24, 1999, when a piece of sheet metal, approximately one and one-half feet long and eight or nine inches wide, fell from a table top and landed on her right leg at the ankle. The ankle and foot immediately became swollen and bruised. She was taken to the Henry County Medical Emergency Room, where she was treated and referred to Dr. Bo Griffey.

Dr. Griffey treated her with antibiotics and pain medication and returned her to light duty work on September 14, 1999. He returned her to full duty on November 2, 1999. She continued to have swelling, pain and stiffness in her right ankle. She continued to see other doctors with those complaints.

On November 3, 2000, more than a year after her injury, she visited Dr. Vince Tusa. She also saw Dr. Segal, who referred her to an orthopedic surgeon, Dr. G. Blake Chandler. Dr. Chandler ordered magnetic resonance imaging, which revealed joint fusion and subcutaneous edema in the medial aspect of the injured ankle. She saw Dr. Joseph Boals, who studied her medical records, examined her and opined that she would retain some minor permanent impairment as a result of the injury. He advised her to wear an ankle brace and permanently restricted her from walking on uneven ground and from excessive stooping, squatting, standing, walking and climbing. She saw Dr. Robert Barnett, who, based on atrophy in her right calf, inability to stand on her right leg for any length of time, limited motion and a chronically swollen right ankle, estimated her permanent medical impairment to be 10 percent to the right lower extremity. She was evaluated by Dr. Amy Dunagan, who found no evidence of muscle atrophy or significant noticeable weakness.

The claimant continues to have swelling in her right foot and ankle. She cannot walk or stand for long periods of time without experiencing extreme pain from her right ankle and calf. She takes Alleve to control the pain, has tenderness and limited motion in the injured joint and walks with a limp. Because she is no longer able to perform her assigned duties, she has not worked for the employer since March 14, 2001. Her testimony in these respects was corroborated by other lay witnesses.

The appellant contends the trial court erred in admitting into evidence the testimony of Dr. Boals because there was a discrepancy between his testimony and the report of Dr. Robb Mitchell, the doctor who performed the magnetic resonance imaging test. Dr. Mitchell's report said the

peroneal tendons were intact. Dr. Boals testified there was “no mention” of the peroneal tendons in the report and suggested there was a probable tear of the peroneal tendons. The objection as to admissibility is without merit, but goes to the weight and value of Dr. Boals’s testimony. The appellant further contends the testimony of Dr. Barnett should be disregarded because Dr. Barnett disagreed with Dr. Dunagan.

When the medical testimony differs, the trial court must choose which view to believe. In doing so, the court is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). Moreover, 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). A medical or anatomic impairment rating is not always indispensable to a trial court’s finding of a permanent vocational impairment; anatomic impairment is distinct from the ultimate issue of vocational disability; and a medical expert’s characterization of a condition as “chronic” and the placement of permanent medical restrictions is sufficient to prove permanency. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998), citing Hill v. Royal Ins. Co., 937 S.W.2d 873, 876 (Tenn. 1996). When considered in light of the lay evidence, which the trial court found to be credible, the trial court did not abuse its discretion in accepting the opinions of Drs. Boals and Barnett with respect to permanency. Additionally, we are not persuaded the preponderance of the evidence is otherwise.

Once the causation and permanency of an injury have been established by expert testimony, the trial judge may consider many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomic impairment, for the purpose of evaluating the extent of a claimant’s permanent disability. McCaleb v. Saturn Corp., 910 S.W.2d 412, 416 (Tenn. 1995). Ms. Borchert was born in 1941. She has a high school education and experience in work requiring manual labor. Drs. Boals and Barnett estimated her permanent impairment to be 10 percent to the leg. She was totally disabled for several weeks. She testified that she is unable to perform her former duties with Emerson. From a consideration of the relevant factors, to the extent they were established by the evidence, we cannot say the evidence preponderates against an award based on 35 percent permanent partial disability to the leg.

The judgment is therefore affirmed. Costs are taxed to the appellant.

JOE C. LOSER, JR.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON
September 11, 2003 Session

SHIRLEY ANN BORCHERT v. EMERSON ELECTRIC COMPANY

**Benton County Circuit Court
No. 1CCV-480**

No. W2003-00111-WC-R3-CV - Filed December 31, 2003

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 on appeal are taxed to the Appellant, Emerson Electric Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM