

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT KNOXVILLE  
June 11, 2004 Session

**RACHEL STEPHENS v. JOHN MANVILLE INTERNATIONAL, INC.**

**Direct Appeal from the Chancery Court for McMinn County  
No. 20494 Jerri S. Bryant, Chancellor**

**Filed August 25, 2004**

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**No. E2003-01068-WC-R3-CV - Mailed July 20, 2004**

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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. The trial court awarded the Plaintiff an additional 5 percent for an injury to her left arm for which she had been compensated. This award was supported essentially by the Plaintiff's testimony. She was also awarded benefits for an injury to her right arm and neck. The award for an additional 5 percent to the left arm is vacated. Otherwise, the judgment is affirmed.

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

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which E. RILEY ANDERSON, J., and ROGER E. THAYER, SP. J., joined.

Linda J. Hamilton Mowles, Knoxville, Tennessee, attorney for appellant, Johns Manville International, Inc.

Jimmy W. Bilbo, Cleveland, Tennessee, attorney for appellee, Rachel Stephens.

**MEMORANDUM OPINION**

The Claim

The Plaintiff alleged that she suffered injuries in the scope of her employment on September 20, 2000. By amended complaint she alleged that her neck and arm injuries are the result of her operation of a fork-lift over a long period of time.

### The Defense

The Defendant asserts that the claimed injuries did not arise in the course of her employment, but admitted that the Plaintiff reported a development of pain in her right hand.

### The Judgment

1. Awarded Plaintiff “an additional 5% permanent partial impairment shall be added to the left upper extremity”;
2. Awarded Plaintiff “a permanent partial disability for 50 weeks of 25% to the right upper extremity”;
3. Awarded Plaintiff 20% permanent partial impairment to her whole body;
4. Ordered that the payment “to the plaintiff of \$71,120.00 is to be paid in one lump-sum”, which after the payment of attorney fees, “shall be paid to the plaintiff in the amount of \$141.15 per month for the remainder of the plaintiff’s life.”

The incongruity of this decretal provision should be corrected upon remand of the case.

### The Issues on Appeal

1. Whether the trial court erred in awarding an additional 5% permanent partial disability to the plaintiff’s left arm;
2. Whether the court erred in awarding 20% permanent partial impairment to the body as a whole as a result of the neck injury;
3. Whether the court erred in assessing 25% permanent partial disability to the plaintiff’s right arm.

Appellate review is *de novo* on the record with the presumption that the judgment is correct unless the evidence otherwise preponderates. Rule 13(d) Tenn. R. App. P. But in worker’s compensation cases we are 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 (Tenn. 1995), and such examination must be in depth, *GAF Bldg. Material v. George*, 475 S.W.3d 430 (Tenn. 2001), keeping in mind that we must defer to the trial judge on issues of credibility and the weight of testimony in open court. *Long v. Tri-Con Ltd.*, 996 S.W.2d 173 (Tenn. 1999). As to testimony by deposition we are as well situated as the trial judge to gauge

its weight, worth, and significance. *Hohenberg Bros. Co. v. Missouri P. R Co.*, 586 S.W.2d 117 (Tenn. Ct. App. 1979).

### The Proof

The Plaintiff was fifty-one years old at the time of trial and had been an employee of the Defendant, Johns Manville, for over twenty years. She began working for Defendant in October 1979, and began driving a forklift in 1981, which she continued until February 2001. Plaintiff testified that driving the forklift required twisting in the seat to drive backwards and involved the constant use of both hands to operate the levers and steering wheel.

In February 1999, Plaintiff suffered a compensable injury resulting in a 10% permanent partial impairment to her left arm, due to entrapment neuropathy of the median nerve at her left wrist. As a result of the injury, Plaintiff had carpal tunnel release surgery performed by Dr. James A Killeffer, after which he released her to return to work without restriction. She returned to the same work at Defendant's facility eight or nine weeks thereafter. She settled her workers' compensation claim and received a 15% vocational disability award.

Plaintiff testified that she had sustained numerous injuries during her employment with the Defendant, but made no worker's compensation claims other than the February 1999 claim. One such injury was to her back in 1987 that she said still gives her problems. Plaintiff testified that because of this back injury, she cannot walk straight or sit for long periods of time even now years after the incident. She testified that in 1999 her legs collapsed and she fell and sprained her ankle, and it happened again about eight months later when she fell and broke her ankle.

With respect to the injury at issue in this case, Plaintiff testified that on September 12, 2000, she gave Jeff McNelley, safety coordinator for Johns Manville, written notice that she was experiencing pain in her right hand and wrist as well as some pain in her neck. She was already receiving authorized treatment from Dr. James Killeffer and she indicated that she would be reporting these new problems to him.

Plaintiff saw Dr. Killeffer on October 5, 2000. He is a licensed physician, board certified in neurosurgery. He found that she had some numbness in both extremities, some worsening of the discomfort in her left hand, and some pain in her right hand, as well as a couple of episodes where her legs had collapsed. He also noted that Plaintiff had "a little bit of neck pain" and suggested that she should stop doing the job that required trauma and repetitive motion of her hands to see if the symptoms would resolve. He also stated that if there were no improvement, he would get an MRI of her cervical spine.

She saw Dr. Killeffer again on October 30, 2000. Her neurologic examination was not significantly changed from the October 5 visit since she had continued pain in both hands, and he suggested an EMG and nerve conduction velocity test for both upper extremities. Significantly, at this October 30, 2000, examination, no reference was made to any neck pain.

Dr. Killeffer had EMG and nerve conduction studies conducted on November 14, 2000. On November 29, 2000, Plaintiff returned for another examination. She had been off work from October 31, 2000 to the date of this examination. At the time, Dr. Killeffer reviewed the EMG and nerve conduction velocity test results and determined that the tests demonstrated normal bilateral upper extremity sensory and motor nerve conduction and normal electromyographic exams of both upper extremities. There was no evidence of peripheral nerve entrapment, or nerve problems from the neck or shoulder. His notes also reflect that there was no complaint of neck pain at this visit. His conclusion at this point was that Plaintiff did not suffer from carpal tunnel in either of her hands.

The Plaintiff returned to work without difficulty and without restrictions after the November 29, 2000 examination. She had a follow-up appointment with Dr. Killeffer on January 16, 2001. At this time her examination revealed that she had normal sensation and strength in her right hand with no sign of atrophy of the right hand muscles. She had normal reflexes in her upper and lower extremities, and there were no signs of nerve impingement with movement of her neck. Dr. Killeffer testified that his notes specifically refer to a negative finding base on Spurling's testing, meaning that there was no sign of nerves being pinched with Plaintiff moving her neck in various directions. Based on his findings he stated that Plaintiff did not have any work-related impairment to the right hand and that there was no change or increase to this previous impairment rating to Plaintiff's left hand. He further stated that in his opinion, any neck pain that she had was not related to any underlying work injury and that no treatment was warranted.

Specifically, Dr. Killeffer testified that Plaintiff's left carpal tunnel syndrome was related to a work injury but that it had resolved in June 1999 when the release surgery was performed and he found no worsening of her left arm condition as of December 2001. He further testified that there was no permanent work-related problem involving Plaintiff's right arm, and nothing to base impairment on under any of the relevant guides with respect to Plaintiff's right had because she did not have any impairment or permanent injury to her right hand. He stated that there was nothing to base a permanent impairment on with respect to Plaintiff's neck. No additional restrictions due to a work-related injury were appropriate other than the left carpal tunnel impairment given to the Plaintiff in June of 1999. The doctor then clarified, stating: "I didn't identify any permanent work-related problems with regard to her neck or her right hand."

Concerning the AMA Guides to Evaluation of Permanent Impairment, 5<sup>th</sup> edition, Dr. Killeffer testified that he relied primarily on a totally objective assessment which was a normal EMG and nerve conduction velocity testing, and using the 5<sup>th</sup> edition of the Guides, he would give the Plaintiff a zero percent impairment rating, even to her left hand. For a carpal tunnel syndrome impairment rating under the AMA Guides, 5<sup>th</sup> edition, the person has to have positive clinical findings of median nerve dysfunction and electrical conduction delay, neither of which Plaintiff had upon examination and testing. Dr. Killeffer believed that even under the AMA Guides, 5<sup>th</sup> edition, no impairment rating would be justified.

The Plaintiff then saw Dr. Donald Gibson for an independent medical examination on the advice of her attorney. Dr. Gibson is a family physician who is not board certified in either

neurology or orthopedics.

Dr. Gibson specifically stated that on February 10, 2001, Plaintiff's primary complaints were those of upper extremities as a result of work as a material handler with Johns Manville. After having her complete a Patient Pain Drawing and a Workplace Accident form, he conducted a neuromuscular and orthopedic examination with particular attention to her arms and her grip strength in both hands. It was Dr. Gibson's opinion that Plaintiff does have right carpal tunnel syndrome. He testified that he used the AMA Guides, 5<sup>th</sup> edition, to establish the combined values of impairment, resulting in an impairment rating of 27 percent to the body as a whole.

On cross-examination, Dr. Gibson stated that his impairment rating assumed that the Plaintiff had no preexisting permanent partial impairment rating or any prior award of vocational disability. He further testified that he did not accurately follow the procedure for utilizing the charts and evaluation guides in the AMA Guides to Evaluation of Permanent Impairment, in part because he did not agree with the philosophy of the Guides. He testified:

Q: So it is a fair statement to say that some of the numbers that you've relied on in your report you do not agree with the AMA Guides?

A: I don't agree with their contradiction. . . .

Q: You opted not to use the number set out by the Guides and rather rely on your own --

A: I say that the Guides are contradictory and that's -- I don't believe I'm under a mandate to follow contradictions in guides.

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Q: Where did you come up with what her grip strength should be?

A: Based on 60 pounds as the average for a lady of her age, should be about 60 pounds, and that is in the Jamar chart that comes with the device.

Q: Do you have any idea what her grip strength was after her carpal tunnel surgery in the left hand?

A: Not unless Dr. Killeffer knows that . . . .

Q: Well, my question to you is, Doctor: Do you have any idea whether she suffered a loss of grip strength after undergoing carpal tunnel surgery on the left hand?

A: I have no information on that, that she did suffer a loss.

% % % % %

Q: I understand that you combined all your ratings to the body as a whole utilizing the combined values chart.

A: Yes.

Q: But the chronic pain factor that you list under No. 3, where did you get that rating to the upper extremity? You say Page 572, Section 18.3d. I don't see a chart and table there.

A: There is not a chart or a table. It's based on my training and experience.

Q: So again this is all subjective reporting. Although it can be challenged, you did not challenge or confirm it in any mechanism, did you?

A: That is correct. . . .

Plaintiff testified that she fell and broke her hip when her leg "gave out" and she struck the bathtub. She was hanging wallpaper border in the bathroom, standing on a two-step ladder when she put her foot on the vanity or sink. She fell, hit the bathtub on her left side, striking her knee, jarring her whole body, and breaking her hip in the process. This accident occurred in August 2001, after she left her employment with the Defendant. As a result of this fall, she had left hip surgery with the implantation of four 3 inch screws. Since then she has had difficulty with her legs collapsing as well as difficulty with activities of daily living.

After she fell, she had been treated by Dr. Stephen Dreskin for overall treatment of chronic pain management. He has treated her since January 24, 2002, after referral from her orthopedic surgeon, and he has given her two cervical epidural steroid injections. He testified that Plaintiff's primary complaint has been related to the cervical area, but that she also has pain in the low back and lower extremities. An MRI taken on January 8, 2002, subsequent to her departure from Defendant's employ and after her fall and hip surgery, gave evidence of degenerative changes chronic in nature.

Dr. Dreskin stated that he would give the Plaintiff a 15 to 18 percent impairment rating pursuant to the AMA Guides, 5<sup>th</sup> edition, under the cervical spine impairment categories, and that 10 percent of this impairment rating would be rated to her work injury. Regarding the genesis of Plaintiff's complaints of neck pain, Dr. Dreskin's office notes from April 24, 2002 reflect that she had a fall at home and she had broken her hip. The notes further indicate that the neck pain, shoulder pain, low back pain, leg pain and hand pain was due to both work and an accident at her home.

Significantly, Dr. Dreskin did not review any of Dr. Killeffer's records concerning the

Plaintiff and her treatment. He agreed that a reputable spine surgeon who was treating the patient before and after the accident would be in a better position than he for purposes of determining causation of the injury. He also stated that having the records of Dr. Killeffer at the time he was evaluating the Plaintiff would have potentially changed his opinion regarding causation because the more information that he has, the better opinion he could render. He had never considered giving the Plaintiff an impairment rating until he met with Plaintiff's attorney before his deposition for proof in this case.

He had scant knowledge about the injury that Plaintiff had at her home after leaving Defendant's employ and agreed that the fall at home and the resulting hip fracture would lead to deterioration of Plaintiff's overall health and functional ability and that this would be a contributing factor to her overall condition that she presented to him in January 2002.

Dr. Dreskin testified that the Plaintiff has degenerative changes in her neck that are not related to her work-related condition and that she has disk bulges and myofascial pain which he believes is reasonable to believe would contribute to Plaintiff's work-related condition notwithstanding the fact that he did not know the type work Plaintiff did at Defendant's premises, that he did not see the Plaintiff until subsequent to her fall and broken hip, and that he had limited medical and history information upon which to base his impairment rating opinion.

Ultimately the Plaintiff was laid off from work due to "lack of suitable work" base on her restrictions and the fact that she did not try the job offered to her.

Following this evidence, the Chancellor rendered her memorandum opinion:

1. awarding an additional five percent (5%) to plaintiff's left extremity;
2. assigning medical impairment rating at ten percent (10%) to plaintiff's right arm with a permanent vocational impairment of twenty five percent (25%) to the right arm;
3. finding that the defendant made an attempt to meaningfully return her to work;
4. finding insufficient evidence in the record to support a work-related connection to the plaintiff's neck condition, stating specifically that with an "intervening fall, there is too much question for Dreskin to go out there, although he did say 'more probably than not,' he wasn't aware of all the facts dealing with the fall. And I think Gibson came in, likewise, too late to give that opinion. So that's where I'm going with the neck . . ."

Plaintiff then moved for reconsideration on the sole issue of the denial of any award for Plaintiff's neck condition. No new evidence was submitted to the Chancellor, counsel simply presented argument on the issue and the Chancellor again reviewed the medical evidence, holding:

The MRI is in January 2002. She goes back to Killeffer at one other point, I think, in 2002. But it goes back to October 5, 2000, she did complain of a cervical problem. That was before the fall. . . .

The only testimony I have on that issue is Dr. Dreskin, and I'm quoting from him on page 11: He says 'I think more probably than not her current medical condition related to her neck is related to her working condition and part of the condition of her neck is probably not related to her working condition.' And he assigns 10 % to her neck as being related to the work condition. And because that she did complain of that in October before the fall, I am going to award her 20 % to her neck in addition to what I have already done. I am not going to disturb the hands that I had originally done in the first hearing. Like I said, I think she was offered a meaningful return to work and didn't take it, and that's why I limited her on her recovery.

### Analysis

The first issue concerns the award of an "additional 5 %" for the Plaintiff's left arm carpal tunnel syndrome which was the subject of her 1999 claim and resulted in an award of 15% vocational disability. She returned to full employment with no restrictions, and her treating physician, Dr. Killeffer, testified that she did not suffer any additional permanent partial impairment to her left arm since the initial rating in 1999. The award of an "additional 5%" was apparently based on the Plaintiff's testimony, because there is no expert testimony that her employment after 1999 aggravated the condition. The expert employed by the Plaintiff, Dr Gibson, was unaware of the Plaintiff's prior impairment and presented no testimony respecting anatomical change. We agree that the evidence preponderates against the award of an additional 5% to the Plaintiff's left arm, and the judgment is modified accordingly. *See, Sweat v. Superior Ind.*, 966 S.W.2d 31 (Tenn. 1998); *Cunningham v. Goodyear Tire and Rubber Co.*, 811 S.W.2d 888 (Tenn. 1991).

The second issue concerns the award of a "permanent partial disability for 50 weeks of 25% to the right upper extremity." The employer argues that this award is erroneous because the treating physician found no permanent impairment and the IME was not based on the AMA Guidelines.

The Plaintiff sought treatment by Dr. Killeffer in October, 2000. The following month he ordered EMG and nerve conduction tests of both of the Plaintiff's arms, and based upon these tests concluded that the Plaintiff had no impairment. In this causation we note that she had no surgery on her right hand, wrist, or arm and none is prescribed or recommended. On January 16, 2001, Dr. Killeffer re-examined the Plaintiff, who had normal sensation and strength in her right hand and he



concluded that she had no impairment to her right arm.

The IME examiner, Dr. Gibson, who is a general practitioner, examined the Plaintiff on February 10, 2001. He testified that he “performed a neuromuscular and orthopedic examination with particular attention to both upper extremities” including grip strength testing, and consulted the AMA Guidelines “with respect to . . . weakness in both hands and the tendinitis of both forearms, the loss of sensation in the fingertips of both hands.” He concluded that 15 daily activities were interfered with. He again consulted the AMA Guides pertaining to the Plaintiff’s problems and then “I added them up according to the combined values . . . and came up with an impairment rating of 27 [percent] whole person.” On cross-examination he admitted that he assumed the Plaintiff had no pre-existing, permanent partial impairment or award for vocational disability, and significantly, he made no apportionment of disability attributable to each arm. His report of physical examination, however, was admitted into evidence, without objection, in which he computed the impairment rating of the Plaintiff’s right arm on account of sensory deprivation (15 percent) and motor impairment (20 percent). The trial judge assigned a 10 percent medical impairment rating and a 25 percent permanent vocational impairment to her right arm. The Appellant argues that the testimony of Dr. Gibson cannot support an award, because he was disdainful of the AMA Guides. In this connection we observe that Tenn. Code Ann. § 50-6-204(d)(3) provides that any medical report prepared by a physician furnishing medical treatment to a claimant *shall use* the Guides. See, *Lyle v. Exxon Corp.*, 746 S.W.2d 694 (Tenn. 1988); *Humphrey v. Humphrey*, 734 S.W.2d 315 (Tenn. 1987). In the case at Bar, Dr. Gibson was not “furnishing medical treatment”, and it follows that his disdain for the Guides does not negate his opinions but only the worth of them. As mandated by precedent, we have considered this issue in depth, see, *GAF Materials, supra*, and conclude that a disturbance of the finding would essentially entail a substitution of judgment not contemplated by statute, rule or precedent. We therefore affirm the trial judge on this issue.

The Employer next argues that the finding of 20 percent permanent partial disability to the whole body attributable to a neck injury is not justified by the proof because the preponderance of the evidence does not support a causal connection between the job requirements and the alleged injury, superimposed upon a later injury which resulted in treatment for the whole person.

The trial judge initially found that the evidence was insufficient to “prove that the neck is work-related . . . I think with that intervening fall . . . Dr. Dreskin did say ‘more probably than not’, he wasn’t aware of all the facts dealing with the fall.” Upon a motion to reconsider, the Plaintiff quoted and cited the alleged findings and opinions of a Dr. Beek who was not a witness. The Defendant duly objected to this clearly inappropriate and somewhat startling action, but the objection was ignored. The trial judge again considered the testimony of Dr. Dreskin, who opined that “more probably than not her current medical condition related to her neck is related to her working condition and part of the condition of her neck is probably not related to her working condition.” The trial judge then stated “I am going to award her 20 percent to her neck.”

The Appellant takes sharp issue with this award, arguing that the testimony of Dr. Dreskin is too speculative and uncertain regarding the cause of the Plaintiff’s neck problem, and that the

unfairness of onerating the Employer for monetary liability for the injuries sustained by the Plaintiff when she fell at home is manifest. But Dr. Dreskin persisted in his opinion that the disk bulges and myofascial pain suffered by the Plaintiff were work-related, and we cannot find that the evidence preponderates against the judgment respecting this issue.

The judgment, as modified, is affirmed and the case is remanded for all appropriate purposes. Costs on appeal are taxed to appellee, Rachel Stephens.

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WILLIAM H. INMAN, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE  
AT KNOXVILLE, TENNESSEE

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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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellee, Rachel Stephens, for which execution may issue if necessary.