

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
AUGUST 2, 2004 Session

**CARMON G. PHILLIPS V. NISSAN MOTOR MANUFACTURING  
CORPORATION, U.S.A. and ROYAL SUNALLIANCE INSURANCE  
COMPANY**

**Direct Appeal from the Circuit Court for Dekalb County  
No. 8175            John J. Maddux, Jr., Judge**

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**No. M2003-00858-WC-R3-CV - Mailed: January 14, 2005  
Filed - February 15, 2005**

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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 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 determined that the employee retained a 28% permanent disability to both arms. The employer asserts that the evidence presented at trial shows that the employee suffered no injury to his left arm in 2001. Additionally, the employee asserts that the amount of vocational disability awarded is inadequate. For the reasons set forth below, we affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (3) Appeal as of Right; Judgment of the Circuit Court  
Affirmed**

STAFFORD, SP. J. delivered the opinion of the court in which DROWOTA, C.J., and SCOTT, SP. J. joined.

Kenneth M. Switzer and Katherine Dent Boyte, Ruth, Howard, Tate & Sowell, Nashville, TN, for the appellant, Nissan Motor Manufacturing Corporation, U.S.A.

Michael L. Underhill and William L. Underhill, Underhill, Blackwell, Underhill & Givens, Madison, TN, for the appellee, Carmon G. Phillips.

## MEMORANDUM OPINION

### FACTS

The employee, Carmon G. Phillips (hereinafter known as Phillips) is a fifty-seven year old man who completed the tenth grade. He has not attained a GED nor completed any technical training. Prior to his employment with the defendant, Nissan Motor Manufacturing Corporation, U.S.A (hereinafter known as Nissan) Phillips worked as a gas pump attendant, a machine operator, a box maker, an assembly line worker, a shift leader, and a machine tester.

Phillips went to work for Nissan in 1985 as a production technician. In 1990, Phillips was diagnosed with work-related bilateral carpal tunnel syndrome. That year, he underwent a carpal tunnel release on the left hand, which was more symptomatic than the right had. Following the surgery, Dr. Larry P. Laughlin opined that Phillips would retain a 3% permanent partial impairment to the left upper extremity and no impairment to the right upper extremity. Phillips filed a workers' compensation claim as the result of the injury and in 1991, settled his claim based on an award of 13.6 % to the body as a whole.

In June 1990, Phillips returned to full duty at Nissan. Approximately two and a half years later, he moved from the assembly line position to a product quality position. The product quality position required Phillips to use his hands but did not entail the use of power tools. Phillips remained in the product quality position until June 2001, at which point he returned to his position as an assembly technician. This position entailed a seven-job rotation with continuous use of pneumatic air guns.

Phillips testified that he worked pain free between his return to work in 1990 and November 2001. In November 2001, Phillips began experiencing pain in his arms and wrists. He complained about these problems to his area manager, Roger Flippen, and initially sought medical attention in March 2002.

Phillips met with the treating physician, Dr. Phillip Coogan, an orthopedic surgeon, on May 23, 2002. Dr. Coogan diagnosed Phillips with carpal tunnel and arthritis in his hands, with the carpal tunnel symptoms primarily in his right hand. On June 18, 2002, Dr. Coogan performed a carpal tunnel release on Phillips' right hand. On July 29, 2002, Dr. Coogan released Phillips to work with no restrictions.

On August 13, 2002, Phillips returned to his regular seven-job rotation as a production technician. Shortly after returning to work, Phillips began experiencing pain and was unable to perform his normal job duties. He retired from Nissan in September 2002 at the age of 55, citing an inability to perform his normal duties.

## MEDICAL EVIDENCE

The testimony of Dr. Phillip Coogan and Dr. David Gaw was presented by deposition. Dr. Coogan first saw Phillips on May 23, 2002, on a referral from Dr. Robert Clendenin. Dr. Coogan testified that Phillips was complaining of aching and swelling in his hands with pain worse on the right than left. Dr. Coogan diagnosed Phillips with carpal tunnel and osteoarthritis in his hands. Dr. Coogan testified that an EMG test performed by Dr. Clendenin was consistent with mild to moderate carpal tunnel syndrome on the right with no evidence of carpal tunnel syndrome on the left. In June 2002, Dr. Coogan performed a carpal tunnel release on Phillips' right arm. Following the surgery, Dr. Coogan assigned a 4% permanent partial impairment to Phillips' right arm based on the Fifth Edition AMA Guidelines.

Phillips was seen by Dr. Gaw on October 17, 2002, for purposes of an independent medical evaluation. After examining Phillips, Dr. Gaw found objective evidence of bilateral carpal tunnel syndrome. Dr. Gaw testified that he found a 5% impairment to each upper extremity and a total of 6% to the whole person. Dr. Gaw opined that Phillips sustained a 2% impairment to his left arm related to the 2001 injury in addition to the impairment remaining from the 1990 injury.<sup>1</sup> Dr. Gaw also testified that he would have assigned Phillips a 5% rating following the 1990 surgery because he thinks 5% is what the usual carpal tunnel rating should be. Additionally, Dr. Gaw testified that EMGs show false readings on occasion.

## LEFT ARM INJURY

The trial court found that Phillips sustained a gradual injury to both arms. Nissan asserts that the trial court's finding of an injury to Phillips' left arm is unsupported by the evidence and thus erroneous.

When medical testimony differs, it is within the discretion of the trial judge 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).

[W]here the issues involve expert medical testimony and all the medical proof is contained in the record by deposition, as it is in this case, then this Court may draw its own conclusions about the weight and credibility of that testimony, since we are in the same position as the trial judge. With these principles in mind, we review the record to determine whether the evidence preponderates against the findings of the trial court.

Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); see also Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992) (when testimony is presented by deposition, this Court is

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<sup>1</sup>Dr. Laughlin assigned Phillips' left arm a 3% impairment rating following the 1990 surgery.

in just as good a position as the trial court to judge the credibility of those witnesses.) The trial court chose to accredit the testimony of Dr. Gaw regarding the injury to Phillips' left arm. We find no reason to disagree with the trial court's decision.

### **VOCATIONAL DISABILITY**

The trial court determined that Phillips suffered a 28% permanent disability to both arms. Phillips asserts that the evidence presented at trial established a vocational disability rating of 57% to each arm.

The extent of an injured worker's disability is an issue of fact. Jaske v. Murray Ohio Mfg. Co., 750 S.W.2d 150, 151 (Tenn. 1988). In Walker v. Saturn Corp., 986 S.W.2d 204 (Tenn. 1998), the Supreme Court discussed the factors to utilize in determining vocational disability and stated in pertinent part:

The panel correctly held that a vocational impairment is measured not by whether the employee can return to [his] former job, but whether [he] has suffered a decrease in [his] ability to earn a living. This court stated in Corcoran that a vocational disability results when "the employee's ability to earn wages in any form of employment that would have been available to him in an uninjured condition is diminished by injury."

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 [his] capacity to work at the kinds of employment available in [his] disabled condition. Further, the claimant's own assessment of [his] physical condition and resulting disabilities cannot be disregarded. The trial court is not bound to accept physicians' opinions regarding the extent of the plaintiff's disability, but should consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability.

Walker, 986 S.W.2d at 208 (internal citations omitted).

Phillips testified that he could no longer perform his job at Nissan because of his pain. He also testified that he retired from Nissan earlier than planned because of his inability to perform his duties. Additionally, Phillips said that he would not be able to return to any of his previous jobs in his current physical condition.

In asserting that the vocational disability rating should be higher, Phillips relies heavily on the testimony of John McKinney, a vocational rehabilitation expert. Mr. McKinney testified that Phillips' vocational disability rating is 57%, a figure he calculated based on Phillips' age, education, job skills, and local employment opportunities. Expert testimony is one factor among many to be considered by the court in determining vocational disability. See Tenn. Code Ann. § 50-6-241(a)(1); see also Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 458-59.

We find that the trial court properly applied the relevant factors in determining the extent of Phillips' vocational disability. We are to presume the correctness of the trial court's findings unless the preponderance of the evidence is otherwise. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315, 315 (Tenn. 1987). We find that the evidence does not preponderate against the trial court's judgment.

The judgment of the trial court is affirmed and the costs are taxed to the defendant, Nissan Motor Manufacturing Corporation, U.S.A.

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J . STEVEN STAFFORD, SPECIAL JUDGE

IN THE SUPREME COURT OF 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 appeals 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 will be paid by the defendant, Nissan Motor Manufacturing, U.S.A., for which execution may issue if necessary.

**IT IS SO ORDERED.**

**PER CURIAM**