

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

**RHONDA SIMMONS v. JOHN DOE INSURANCE COMPANY and
FINDLAY INDUSTRIES/GARDNER MANUFACTURING DIVISION**

**Direct Appeal from the Circuit Court for Warren County
No. 1191 Larry B. Stanley, Chancellor**

**No. M2003-02163-WC-R3-CV – Mailed: January 14, 2005
Filed - February 15, 2005**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) (2003) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court determined that the plaintiff-employee suffered a 60% vocational disability to her right upper extremity and a 30% vocational disability to her left. From these determinations, the trial court awarded a 45% disability to both hands. The defendant-employer asserts that the trial court award was excessive under the facts and applicable law. 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 panel, in which DROWOTA, C.J., and SCOTT, SR. J., joined.

Bruce Timothy Pirtle, McMinnville, TN, for the appellant, Findlay Industries/Gardner Manufacturing Division.

Barry H. Medley, Farrar, Holliman & Medley, McMinnville, TN, for the appellee, Rhonda Simmons.

MEMORANDUM OPINION

Rhonda Simmons, the plaintiff-employee, was thirty-seven years old at the time of trial. She holds a GED and has only worked as a laborer. Ms. Simmons, who has also worked in food preparation and manufacturing, had never sustained a permanent workers' compensation injury prior to working for the defendant-employer, Findlay Industries/Gardner Manufacturing Division ("Findlay").

Ms. Simmons worked in various roles for Findlay from June 6, 1997, until December 19, 2000. One of these jobs included sewing seat cushions by pulling the leather pieces together so that the notches would align. Within six months of starting this work in early 1999, she gradually experienced "numbness" and "tingling" in her hands. Ms. Simmons' right thumb swelled to the point where it could no longer move. She reported the pain to a supervisor in early August 1999.

Ms. Simmons initially sought treatment from Dr. Richard Rogers on November 11, 1999. After conservative approaches failed to resolve her problem, Dr. Rogers referred Ms. Simmons to Dr. David Martin for a second opinion concerning only her right hand and arm. Dr. Martin diagnosed Ms. Simmons with carpal tunnel syndrome in her right hand and a compressed radial nerve near her right elbow. Her right thumb was in an adducted position wherein the thumb was aligned with the plane of the other fingers instead of more normally sticking out. He believed that the injuries were work-related. On March 1, 2000, Dr. Martin operated on Ms. Simmons to relieve the pressure on her right carpal tunnel and on her right radial nerve. He stated that the surgery had alleviated the numbness and tingling in her hand, but the surgery had little effect on the radial nerve, which allows the fingers and thumb to straighten out.

On March 16, 2000, Ms. Simmons returned to work with the restriction that she not use her right hand until April 13, 2000. After returning, she missed some time from work, and Findlay subsequently fired her. Ms. Simmons contended that pain medication after the surgery caused her to sleep through her alarm. Findlay responded that she was fired for violating the company's truancy policy. The union successfully had her reinstated with compensation nearly two months later.

Ms. Simmons' employment with Findlay ceased on December 19, 2000, when the facility closed. She testified that she could neither crochet nor adequately tend her garden since the injuries. After Findlay shut down, she worked loading machine parts for two weeks before quitting because of pain in her hands. Ms. Simmons later worked at a pizza restaurant for five months before quitting because her hands again began bothering her. She next worked for approximately four months in a cafeteria before quitting from a combination of excessive hours and pain in her hands.

Gordon Doss, a certified rehabilitation counselor, testified that he performed a vocational assessment on Ms. Simmons. He stated that Ms. Simmons had been capable of performing a wide variety of jobs, but the condition now limited her options. Doss concluded that Ms. Simmons had a 60 to 65% vocational disability.

MEDICAL EVIDENCE

The depositions of Dr. Martin, Dr. Samuel Mack Smith, and Dr. Robert Landsberg were introduced

at trial. Additionally, the reports and medical records of Dr. Doug Weikert were also introduced.

On April 27, 2000, Dr. Martin determined that Ms. Simmons had reached maximum medical improvement after the surgery. He did not place any restrictions on the use of her right hand. He said that she still experienced some tingling in the right radial nerve. Dr. Martin, who saw Ms. Simmons more than ten times, diagnosed her as retaining a 2% impairment to her right upper extremity attributable to “very mild” carpal tunnel syndrome, and he provided no impairment rating for her right thumb. Dr. Martin also diagnosed a web space contracture, which involves the thumb’s becoming tighter and more difficult to move passively from its position. Dr. Martin did not see any overt signs that Ms. Simmons had feigned a right thumb injury.

In subsequent visits, Dr. Martin noted that Ms. Simmons had impairments to her right upper extremity and diagnosed that she exhibited diminished two-point discrimination across both hands.

On September 6, 2000, Dr. Smith, an orthopedic surgeon who is no longer board-certified, examined Ms. Simmons. He concluded that Ms. Simmons had a 31% permanent partial impairment to her right upper extremity and a 10% permanent partial impairment to her left upper extremity.

Dr. Martin referred Ms. Simmons to Dr. Weikert, the chief of the Vanderbilt University Hand and Upper Extremity Clinic. Dr. Weikert, who conducted his examination on April 21, 2002, could not find any physical explanation for Ms. Simmons’ limited motion in her right thumb. Dr. Weikert suggested that the patient was subconsciously holding her thumb in a particular position.

On January 16, 2002, Dr. Robert Landsberg, an orthopedic surgeon, examined Ms. Simmons and stated that she could not actively move her right thumb. Dr. Landsberg concluded that she would need permanent restrictions in the use of her upper extremities: minimal gripping or squeezing with her right hand; no repetitive gripping or squeezing with her left hand; lifting a maximum of five to ten pounds with her right hand with no repetition; lifting a maximum of ten pounds with her left hand with no repetition; and no using vibratory or pneumatic tools.

ANALYSIS

Findlay asserts on appeal that Ms. Simmons has not shown that she suffers from a vocational disability to her left extremity. In addition, Findlay contends that the finding of 60% vocational disability to the right extremity is excessive. For the following reasons, we find Findlay’s position to be without merit.

Ms. Simmons testified that she had not sustained a prior permanent workers’ compensation injury. She believes that the numbness and tingling in her hands resulted from her work for Findlay. In its brief, Findlay acknowledges responsibility for some vocational disability to Ms. Simmons’ right extremity. The analyses of Dr. Landsberg and Dr. Smith support her belief that Findlay is responsible for injuries to her left extremity.

We are required to review the trial court's record de novo accompanied by a presumption of correctness unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e); Vinson v. United Parcel Service, 92 S.W.3d 380, 383-84 (Tenn. 2002). Where the trial court 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 to the trial court's findings on review, because the trial court is the body that had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., 996 S.W.2d 173, 178 (Tenn. 1999). However, we may draw our own conclusions about the weight and credibility of expert testimony when the medical proof is presented by deposition, as it was here, because we are in the same position as the trial court to evaluate such testimony. Id.; Cooper v. Insurance Co. of North America, 884 S.W.2d 446, 451 (Tenn. 1994).

Dr. Martin, Dr. Landsberg, and Dr. Smith found anatomical disability in Ms. Simmons' right upper extremity but differed as to the extent. Dr. Landsberg and Dr. Smith examined Ms. Simmons' left extremity and found that it, too, had sustained injury. The trial court chose to accredit the testing of Dr. Landsberg and Dr. Smith regarding Ms. Simmons impairment to her left extremity. We conclude that the evidence does not preponderate against this finding.

Findlay also challenges the amount of vocational disability assessed by the trial court for Ms. Simmons' right extremity. A court should base its assessment of vocational disability upon several pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work at the type of employment available in her disabled condition. Tenn. Code Ann. § 50-6-241(b); Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 457 (Tenn. 1988). The existence and extent of a vocational disability is a question of fact that we review de novo with a presumption of correctness. Tenn. Code Ann. § 50-6-225(e)(2); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 170 (Tenn. 2002) (citing Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998)). The trial court's factual findings do not bind this Panel, which examines these findings independently to determine where the preponderance of the evidence lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991) (citing Corcoran, 746 S.W.2d at 456). Furthermore, an anatomical impairment rating does not control in assessing the degree of a claimant's vocational disability. Walker, 986 S.W.2d at 207; Bailey v. Knox County, 732 S.W.2d 597, 597-98 (Tenn. 1987).

Doss testified that Ms. Simmons suffered from a 60 to 65% vocational disability. Ms. Simmons testified that her condition prevents her from performing tasks that she could previously accomplish without pain. She has sought multiple employment opportunities and has been unable to continue in any because of the pain that she experiences. For these reasons, the trial court awarded a 60% vocational disability for injuries to Ms. Simmons' right extremity. Dr. Landsberg placed approximately one-half of the restrictions on Ms. Simmons' left side as he had to her right. Therefore, we conclude that the trial court's finding a 30% vocational disability to the left side is consistent with this vocational analysis.

We conclude that the trial court correctly determined that Ms. Simmons suffered injuries to her right

and left extremities. We also conclude that the trial court properly applied the relevant factors in determining the extent of Ms. Simmons' vocational disability. We are to presume the correctness of the trial court's findings unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e); Vinson, 92 S.W.3d at 383. In this case, we conclude 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, Findlay Industries/Gardner Manufacturing Division.

J. Steven Stafford, Special Judge

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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, Findlay Industries/Gardner Manufacturing Division, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM