

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

September 30, 2004 Session

CYNTHIA L. BOTTS v. STATE OF TENNESSEE

Direct Appeal from The Tennessee Claims Commission Western Division

No. 20-001-850 Nancy C. Miller Herron, Judge

No. W2003-02890-WC-R3-CV - Mailed February 24, 2005; Filed March 31, 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) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The Commissioner determined that the employee had suffered a carpal tunnel injury requiring surgery, that notice was excused, and that employee retained a permanent disability to the left third finger of fifty (50%) percent, and the left second finger of thirty (30%) percent. Employee appeals, insisting that the Commissioner erred in not making the permanent disability award to both arms. The employer appeals the finding that notice was excused. We find that the evidence preponderates in favor of the trial court's finding that notice was excused, but that the evidence preponderates against limiting the disability to the fingers of the left hand for this carpal tunnel injury. Instead, we find the employee has suffered a permanent partial disability to the left arm in the amount of thirty (30%) percent. Judgment of the Claims Commission affirmed in part and modified.

**Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of Claims
Commission Affirmed and Modified**

John A. Turnbull, Sp. J., delivered the opinion of the court, in which Janice M. Holder, J., and Joe C. Loser, Jr., Sp. J., joined.

Scott Kirk, Jackson, Tennessee, for the appellant, Cynthia L. Botts

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; and Pamela S. Lorch, Senior Council, Nashville, Tennessee, for the appellee, State of Tennessee

MEMORANDUM OPINION

The employee, Cynthia L. Botts is a forty-six year old high school graduate, who had taken additional college courses and practical nursing license. Before going to work for the State of Tennessee Northwest Correctional Facility in July of 1994, employee had worked for several years as a floor nurse and in physical therapy for Volunteer Central Hospital. She also had nursing experience in home health care and in a nursing home.

As part of her job as a nurse at the prison, employee was required to dispense medication twice daily to inmates. The medication, in pill form, was sealed in paper packages which had to be ripped apart and placed in a cup for dispensing. Employee estimated she would dispense approximately 150 pills per shift. All medical experts described her work as hand intensive, and attributed causation for her carpal tunnel syndrome to the work.

Employee began experiencing pain and stiffness in her fingers, cramping in her hands, and numbness and loss of grip strength in December of 1999. Unaware that her condition was job related, employee sought medical attention, had a nerve conduction study, and was referred to Dr. Samuel Meredith, an orthopedic surgeon. Dr. Meredith described her symptoms as textbook symptoms of carpal tunnel syndrome in both hands, and found her condition to be advanced when he first saw employee on January 12, 2000. Dr. Meredith performed carpal tunnel surgery on the right wrist and hand on January 17, 2000, and on her left wrist and hand on January 31, 2000. The carpal tunnel is an anatomically tight space bound on three sides with wrist bones, and on the palm side by the thick transverse carpal ligament. Through the tunnel run the flexor tendons to the fingers that bend the fingers down as well as the median nerve. The surgeries began with an incision in the palmar surface near the axis of the fourth ray and just proximal to the web of the thumb at the distal edge of the transverse carpal ligament. Because it was necessary to cut the ligament to release pressure on the median nerve as it runs through the wrist, a special knife was inserted into the wrist to cut the transverse carpal ligament to free the compressed median nerve.

The surgery on the right wrist had a good result with minimal residual symptoms. The result from the left wrist surgery was not as successful. Ms. Botts experienced significant pain in her second and third finger with numbness, tingling and difficulty in grasping objects. Post operative testing on the left hand demonstrated a permanent compression of, or damage to, the median nerve which enervates those fingers. Dr. Meredith testified that this was a complication of the wrist surgery.

The facts with regard to notice are as follows: Ms. Botts first sought medical attention on December 29, 1999, when she saw her primary care physician, Dr. Sherman. He ordered an EMG which was performed on January 5, 2000, and confirmed a diagnosis of bilateral carpal tunnel. Ms. Botts informed her co-workers, and on January 25, 2000, she filed, with her employer, a request for family leave under FMLA for a period of January 18 through March 18, 2000. To this request, Ms. Botts attached Dr. Meredith's diagnosis of carpal tunnel syndrome. Ms. Botts' medical expenses were paid by her health insurance provided by the State of Tennessee. On March 21, 2000, Ms. Botts informed the Administrative Services Director at the prison of her intention to file a workers' compensation claim related to her hands. On March 28, 2000, Ms. Botts completed a first report of injury form giving a date of accident of January 12, 2000. The record is devoid of evidence that the employer suffered any prejudice as a result of the delay in formal notice.

Dr. Meredith continued to follow Ms. Botts and testified by deposition that she retained a permanent impairment of 20% to the middle finger, and 30% to the ring finger of the left hand. He first listed restrictions to fine manipulations and discrimination of the two fingers, but on cross examination,

agreed with Dr. Boals that Ms. Botts should be restricted from extremes in temperature and use of vibratory tools. He further testified that his impairment rating was the equivalent of a five (5%) percent left arm impairment and that the AMA Guides to the Evaluation of Permanent Impairment would support a 5% rating.

Dr. Fred Torstrick, an orthopedic surgeon, saw Ms. Botts first on March 14, 2000, for a second opinion, and later did an independent medical exam for the employer. He confirmed the diagnosis of bilateral carpal tunnel syndrome. On his last exam on December 12, 2000, he found persistent numbness over the volar aspect of the middle and ring fingers, confirmed by nerve conduction study on January 3, 2001. He further found some numbness in the region of the wrist. Dr. Torstrick testified by deposition that Ms. Botts retained a 10% permanent partial impairment to the left middle finger, and a 30% permanent partial impairment to the left ring finger secondary to loss of sensation. He also testified she had an additional 5% permanent partial impairment to the left arm secondary to some residual carpal tunnel symptoms. He confirmed that the problem leading to the finger numbness is actually located in the wrist.

Dr. Joseph C. Boals, an orthopedic surgeon, who evaluated Ms. Botts at the request of her attorney on April 24, 2001, found numbness between the ring and long fingers on her left hand that was excessive. He was of the opinion that the post operative testing demonstrated a permanent compression of the median nerve. Dr. Boals assigned a 10% permanent partial impairment rating to the right arm and a 15% permanent partial impairment to the left arm. He also confirmed that the loss of sensation in the fingers was caused by nerve compression in the wrist. Dr. Boals testified that Ms. Botts should avoid repetitive work and heavy gripping in the future to prevent recurrence of the syndrome.

Although she did not go back to work at the prison following her surgery, Ms. Botts has continued to work in various employments including work as a car salesperson and in a nursing home. At the time of trial in October, 2003, she was still complaining of hand weakness, inability to grab and lift heavier objects, and numbness in the two fingers of her left hand. She reported dropping objects she attempted to pick up with the left hand. She also reported weakened grip strength in the right hand and pain if it was used on a regular basis.

The Commissioner found the carpal tunnel syndrome was work related. That finding is not contested on appeal. The Commissioner further found that notice was not given until March 21, 2000, therefore not within 30 days. The failure to give timely notice was excused by the Commissioner because there was no showing of prejudice to the employer. Temporary total disability payments were awarded for the period of March 21, 2000 through April 11, 2000. Finally the Commissioner awarded permanent disability of fifty (50%) percent to the left third (ring) finger and thirty (30%) percent to the left second (middle) finger, and ordered that employer pay future reasonable and necessary medical expenses.

Ms. Botts insists on appeal that the Commissioner erred in not awarding disability to the arms rather than limiting the award to the fingers. The employer insists the Commissioner erred in excusing

notice.

Standard of Review

The extent of vocational disability is a question of fact. *Story v. Legion Ins. Co.*, 3 S.W. 3d 450, 456 (Tenn. 1999). We review factual questions anew, with a presumption that the trial court's factual findings are correct, unless the evidence preponderates against those findings. See Tennessee Code Annotated Section 50-6-225 (e)(2) (Supp. 2002). Where the trial court has seen and heard the witnesses, the trial court's determination of issues of credibility and the weight to be given to oral testimony must be accorded considerable deference on review, *McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn. 1995), because the trial court had the opportunity to observe the demeanor of the witness, *Long v. Tri-Con, Ind.*, 996 S.W.2d 173, 178 (Tenn. 1999). The trial court's findings with respect to credibility may generally be inferred from the manner the court resolves conflicts in the testimony and decides the case. *Richards v. Liberty Mutual Ins. Co.*, 70 S.W.3d 729 (Tenn. 2002) *Tobitt v. Bridgestone/Firestone, Inc.*, 59 S.W. 3d 57, 61 (Tenn. 2001). Where, as here, the medical testimony is presented by deposition or other written evidence, the reviewing court may make an independent assessment of that written evidence to determine where the preponderance of that evidence lies. See *Cooper v. INA*, 884 S.W.2d 446, 451 (Tenn. 1994).

Notice

An employee is required to give notice to the employer of a work-related injury within thirty days of the injury or provide a reasonable excuse for failure to do so. In January, 2000, Tennessee Code Annotated section 50-6-201 provided:¹

Every injured employee or such injured employee's representative shall, immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, give or cause to be given to the employer who has no actual notice, written notice of the injury, and the employee shall not be entitled to physician's fees or to any compensation which may have accrued under the provisions of the Workers' Compensation law from the date of the accident to the giving of such notice, unless it can be shown that the employer had actual knowledge of the accident and no compensation shall be payable under the provisions of this chapter unless such written notice is given the employer within thirty (30) days after the occurrence of the accident, unless reasonable excuse for failure to give such notice is made to the satisfaction of the tribunal to which the claim for compensation may be presented.

¹ A 2001 amendment added a paragraph b, effective July 1, 2001, Acts 2001, Ch. 219, sec. 2. Since Ms. Botts' injury occurred in January of 2000, the amendment is not applicable.

The notice must reasonably convey to the employer that the employee has suffered an injury and is claiming that the injury is work related. *Jones v. Sterling Last Corp.*, 962 S.W.2d 469, 472 (Tenn. 1998). Once the employee is aware, or reasonably should have been aware, that she has sustained a compensable injury, the employee must comply with the notice provision, whether it is an injury from a single event or a gradual injury. *Lyle v. Exxon*, 746 S.W.2d 694, 698 (Tenn. 1988). In gradual onset injuries like carpal tunnel, the date of the accident is the date on which the injury prevents the employee from working. *Lawson v. Lear Seating Corp.*, 944 S.W.2d 340, 343 (Tenn. 1997). The time for giving notice does not begin to run until the injured employee knew, or as a reasonably prudent person should have known, that the injury was work connected. *Brown Shoe v. Reed*, 209 Tenn. 106, 350 S.W.2d 65 (1961).

There is no question that Ms. Botts informed the State of her carpal tunnel injury and furnished Dr. Meredith's diagnosis of carpal tunnel syndrome within the thirty day notice requirement. Although Ms. Botts claimed that she informed her supervisor that her injury was work related in early January, 2000, that assertion was denied by the supervisor, and this credibility issue was resolved against Ms. Botts by the Commissioner. That finding must be accorded considerable deference by this panel, and we accept it. Accordingly, the strict thirty-day notice requirement was not met by Ms. Botts.

The question remains as to whether the evidence preponderates against the Commissioner's finding that notice was excused. The State knew early on the nature of Ms. Botts' injury, who her doctor was, what the diagnosis was, that surgery was planned, and that she would be off work until March 18, 2000. The State-provided health insurance paid for Ms. Botts' surgeries. Ms. Botts claims that she did not believe her condition would be permanently disabling until the second surgery failed to provide relief, and it was clear she would not be able to return to work. As found by the Commissioner: "There was no testimony that some other conservative treatment option would have worked in place of the surgery she had in January." Accordingly, we find that the evidence does not preponderate against the Commissioner's finding that timely notice of the work-related nature of Ms. Botts' injury was reasonably excused. Notice of the precise nature of the injury within thirty days of the occurrence has been frequently excused where the severity of the injury was later manifested. See *Livingston v. Shelby Williams Ind.*, 811 S.W.2d 511 (Tenn. 1997). In addition, there has been no showing of prejudice to the employer.

Disability to the Arm

Ms. Botts insists the Commissioner erred in not making an award to the arm, but instead limited recovery to the lower scheduled members, the fingers. The injury to Ms. Botts was to the median nerve as it transversed through the carpal tunnel in the wrist. Anatomically the higher scheduled member, the arm, was injured. The physical effects of the injury, the symptoms of numbness due to damage to the nerve in the wrist, were mostly exhibited in the second and third fingers.

We have not found any officially reported decision in Tennessee which limited disability

from carpal tunnel syndrome to the fingers. In *Story v. Legion Ins.*, 3 S.W.3d 450-(Tenn. 1999), the employee, a nurse, had a carpal tunnel injury which resulted, as here, in symptoms mostly affecting the fingers. The panel affirmed the trial court in awarding disability to the arms. The unstated reason is clear. The injury is anatomically to the median nerve in the wrist, and the wrist is a part of the arm, a higher or greater member. Where a worker's only injury is to a scheduled member, she may receive only the amount of compensation provided by the schedule for her permanent disability. *GAF Bldg. Materials v. George*, 47 S.W.3d 430, 433 (Tenn. Sp. Worker's Comp.) 2001; *McIlvain v. Russell Stover Candies, Inc.*, 996 S.W.2d 179,185 (Tenn. 1999). Where an injury anatomically extends to, or causes a permanent injury to, a higher scheduled member or to an unscheduled portion of the body, the disability must be assessed to the higher scheduled member, or to the unscheduled member as the case may be. See *Only v. National Union Fire Ins. Co.*, 785 S.W.2d 348, 350, 351 (Tenn. 1990); *Federal Copper and Aluminum Co. v. Wright*; 504 S.W.2d 957 (Tenn. 1974). Since the scheduled injury for impairment to an arm exceeds that for the impairment to the hand or fingers, the greater impairment is applicable. See *Reagan v. Tennessee Mun. League*, 751 S.W.2d 842, 843 (Tenn. 1988).

The extent of an injured worker's disability is an issue of fact. *Story*, 3 S.W.3d at 456. In assessing the extent of an employee's disability, the trial court may consider the employee's job skills and training, education, age, local job opportunities, anatomical impairment rating, and her capacity to work at the kinds of employment available to her in her disabled condition. Further, the claimant's own assessment of her physical condition and resulting disabilities is relevant. See *Walker v. Saturn Corp.*, 986 S.W.2d 204, 207-08. When assessing disability to a scheduled member, the loss of the ability to use that scheduled member in available employments is to be determined without regard to loss of earning power or wages. See *Oliver v. State*, 762 S.W.2d 562, 565 (Tenn. 1988).

Ms. Botts is forty-six years old, and has a high school education with some additional college courses. She has a practical nursing license. Her work experience includes jobs as a practical nurse in a nursing home, a hospital, and in home health. Since her injury, she has worked as a car sales person, and in a nursing home. Her supervisor at the prison agreed that she could not continue her work at the prison due to her disabilities. The medical evidence supports an impairment rating of five (5%) percent to the left arm. Considering all the factors listed above, we find that Ms. Botts has suffered a permanent partial disability to the left arm of thirty (30%) percent, an award of sixty weeks of compensation at her compensation rate of \$323.10 or \$19,386.00. Attorney's fees to plaintiff's attorney are fixed at twenty (20%) percent or \$3,877.20. Since more than sixty weeks has passed since maximum medical improvement, the award will be paid in a lump sum. The award of \$969.30 in temporary total disability compensation is affirmed as is the finding of the commissioner that Ms. Botts suffered no permanent disability to the right arm. Costs are assessed against the State of Tennessee.

John A. Turnbull, Special Justice

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JUDGMENT 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 Appellee, State of Tennessee, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM