

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
(July 25, 2006 Session)

**MARY ELLEN REAGAN v. TENNPLASCO, FEDERATED MUTUAL  
INSURANCE COMPANY, and CNA INSURANCE**

**Direct Appeal from the Chancery Court for Macon County  
No. 3760 C. K. Smith, Chancellor**

---

**No. M2005-02020-WC-R3-CV - Mailed - November 21, 2006  
Filed - December 27, 2006**

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 of findings of fact and conclusions of law. The employer contends the trial court erred in (a) holding the employee's right shoulder injury could not be considered in determining vocational disability resulting from carpal tunnel syndrome, (b) accrediting the testimony of one physician over that of another, (c) finding the employee sustained a 75 percent vocational disability to the arm, and (d) permitting co-defendant CNA Insurance to participate in the trial. We affirm.

**Tenn. Code Ann. § 5-6-225(e) (1999) Appeal as of Right; Judgment of the Macon County Chancery Court is affirmed.**

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, CHIEF JUSTICE, and JEFFREY S. BIVINS, SP. J. joined.

D. Brett Burrow, David M. Hannah, Brewer, Krause, Brooks, Chastain, & Burrow, Nashville, Tennessee, for the Appellants, Tennplasco and Federated Mutual Insurance Company.

William Joseph Butler, Frank D. Farrar, Farrar, Holliman, & Butler, Lafayette, Tennessee, for the Appellee, Mary Ellen Reagan.

Sarah H. Reisner, Stacey Billingsley Cason, Manier & Herod, Nashville, Tennessee, for the Appellee, CNA Insurance.

## MEMORANDUM OPINION

### Facts

On April 2, 2003, Mary Ellen Reagan filed a complaint alleging that in November 2001 she developed carpal tunnel syndrome in her right wrist, arm, elbow and hand, and tendonitis in her right shoulder in the course and scope of her employment with Tennplasco. She also alleged that she reinjured her right wrist, arm, elbow, and her right shoulder on April 9, 2002 in the course and scope of her employment. On July 18, 2003, Ms. Reagan filed an amended complaint adding Federated Mutual Insurance Company ("Federated Mutual"), Tennplasco's workers' compensation insurance carrier in November 2001, and CNA Insurance ("CNA"), Tennplasco's workers' compensation insurance carrier on April 9, 2002, as parties.

On May 6, 2005, an Order was entered memorializing a settlement that was reached by Ms. Reagan, Tennplasco, Federated Mutual and CNA. The settlement pertained to the right shoulder injury only and provided that: (a) Federated Mutual would pay compensation for 43.5 % permanent partial disability to the body and CNA would pay compensation for 12.5 % permanent partial disability to the body for a total of 56% permanent partial disability to the body as a whole; (b) CNA would be responsible for future medical expenses for the right shoulder injury; (c) Federated Mutual would not be liable for any past, present, or future medical expenses related to the right shoulder; (d) The settlement would not pertain to the claim for the right arm.

The trial court conducted a trial on August 2, 2005 on the claim for right arm carpal tunnel syndrome. At the beginning of the proceedings, counsel for Federated Mutual announced that his client had agreed to pay everything associated with the carpal tunnel claim, including discretionary costs and future medical benefits, and that there was no reason for counsel for CNA to participate in the trial. Following a discussion with the attorneys for Ms. Reagan, Federated Mutual and CNA, the trial court permitted counsel for CNA to continue to participate in the trial. After considering the medical evidence and lay testimony presented, the trial court found that Ms. Reagan sustained a permanent partial disability of 75 percent to the right arm. Liability for that injury was placed on Tennplasco and Federated Mutual. In determining the amount of disability resulting from the carpal tunnel syndrome, the trial court declined to consider evidence, offered by Federated Mutual, of impairment or disability resulting from other, subsequent injuries, including the right shoulder injury.

### Issues

The appellant, Federated Mutual, submits the following issues:

Whether the trial court erred in holding the employee's right shoulder injury could not be considered in determining the vocational disability to be attributed to carpal tunnel syndrome?

Whether the trial court erred in placing more weight on the medical testimony of Dr. Wheelhouse than that of Dr. Weikert?

Whether the trial court erred in awarding 75 percent vocational disability to the right arm?

Whether the trial court erred in allowing co-defendant, CNA Insurance to remain in the case?

### Standard of Review

The standard of review in a workers' compensation case is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Layman v. Vanguard Contractors, Inc.*, 183 S.W.3d 310, 314 (Tenn. 2006). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases to determine where the preponderance of the evidence lies. *Vinson v. United Parcel Service*, 92 S.W.3d 380, 383-4 (Tenn. 2002). When the trial court has seen the witnesses and heard the testimony, especially when issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's findings of fact. *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 71 (Tenn. 2001). This court, however, is in the same position as the trial judge in evaluating medical proof that is submitted by deposition, and may assess independently the weight and credibility to be afforded to such expert testimony. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002).

Questions of law are reviewed *de novo* without a presumption of correctness. *Perrin v. Gaylord Entertainment Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

### Discussion

#### I

Federated Mutual asserts that the trial court erred in holding that Ms. Reagan's right shoulder injury could not be considered in determining the vocational disability to be attributed to her right carpal tunnel syndrome. Counsel acknowledges that there is no case law supporting this contention, but states that the trial court erred in failing to consider the effect Ms. Reagan's right shoulder injury had on her ability to work. We note that the shoulder injury occurred approximately five months after she developed right carpal tunnel syndrome. Therefore, this is not a case in which the employee has sustained concurrent injuries and is entitled to compensation only for the injury that produced the longest period of disability. Tenn. Code Ann. § 50-6-207(3)(C).

Federated Mutual argues that Ms. Reagan was able to continue working on a full time basis after she developed right carpal tunnel syndrome until she left work due to her lower back injury and shoulder injury. It points out that Ms. Reagan admitted she did not return to work after her right shoulder injury because Tennplasco could not accommodate the restrictions placed on her for the shoulder injury. She would have been able to continue working if the carpal tunnel syndrome was the only injury. Federated Mutual states that Ms. Reagan has been

compensated for her loss of income from the shoulder injury and that further compensation for the carpal tunnel syndrome would be a windfall.

*Lang v. Nissan North America, Inc.*, 170 S.W.3d 564, 569 (Tenn. 2005) (citing *Oliver v. State*, 762 S.W.2d 562, 566 (Tenn. 1988)) holds that an employee sustaining a scheduled member injury is entitled to compensation for the partial loss of the scheduled member and is not required to prove a decrease in earning capacity. The Court emphasized the negative effects of the injury on the employee's ability to compete in the open labor market as opposed to the fact that he had not missed work. *Id.* at 570-71. Evidence of vocational disability, however, is admissible in determining the amount of scheduled member compensation. *Duncan v. Boeing Tenn. Inc.*, 825 S.W.2d 416, 417-18 (Tenn. 1992). Factors to consider include the employee's age, education, job skills and training, the extent and duration of anatomical impairment, local job opportunities, and the kinds of employment available to one in the employee's disabled condition. *Cantrell v. Carrier Corp.*, 193 S.W.3d 467, 474 (Tenn. 2006). Missing work and returning to work are also factors to consider, but are not dispositive. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 459 (Tenn. 1988). Ultimately, vocational disability is measured by the decrease in ability to earn a living. *Walter v. Saturn Corp.*, 986 S.W.2d 204, 208 (Tenn. 1998). As noted later in this opinion, the record discloses that the trial court heard evidence on the limitations and restrictions caused by the right carpal tunnel syndrome and evidence concerning how the limitations would affect Ms. Reagan in performing actions required by jobs she had held.

The trial court declined to consider the shoulder injury and stated, "I don't think it would be fair for me to give a lot of weight to this other injury, if it would make her disability greater or it would make it less. I think I have to look at this one individually and consider all the weight, and that's what I'm trying to do." We have found no authority holding that compensation paid for permanent disability resulting from a subsequent injury is to be considered in determining a proper award for a scheduled member injury. The Workers' Compensation Act is to be interpreted in a manner consistent with its remedial purpose of compensating employees for injuries sustained in the workplace. Tenn. Code Ann § 50-6-116; *Mackie v. Young Sales Corp.*, 51 S.W. 3d 554, 558 (Tenn. 2001). In our opinion, the trial court did not err in declining to consider the subsequent shoulder injury in determining the disability attributable to the carpal tunnel syndrome.

## II

The depositions of two physicians were admitted into evidence. Dr. Walter W. Wheelhouse saw Ms. Reagan for evaluation and assigned a permanent impairment of five percent to the right upper extremity. He testified that she should not frequently flex or extend her right hand, frequently grip with her right hand, use vibratory, shaking or pneumatic tools, be subject to repetitive trauma to the hand because that "would cause a worsening of her condition, and specifically, the carpal tunnel syndrome to become more symptomatic."

Dr. Douglas R. Weikert also saw Ms. Reagan for evaluation and assigned a permanent impairment of three percent to the right upper extremity. Dr. Weikert testified that she needed

no restrictions in addition to those that had been given for her right shoulder injury. He agreed that it was his “philosophy” not to place restrictions on persons with carpal tunnel syndrome. The trial judge has the discretion to conclude that the opinion of one expert should be accepted over that of another expert. *Thomas v. Aetna Life and Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1991). In this case, the trial judge commented that he felt that Dr. Wheelhouse was “more on target” and made specific reference to testimony of Ms. Reagan about the effects of the carpal tunnel syndrome on her use of her right hand and arm. Lay testimony can bolster the opinion of one expert over that of another. *Williams v. Tecumseh Products Co.*, 978 S.W.2d 932, 935 (Tenn. 1998). We find no error in the trial court placing more reliance on the testimony of Dr. Wheelhouse.

### III

The extent of an employee’s permanent partial disability is a question of fact. *Jaske v. Murray Ohio Mfg. Co.*, 750 S.W.2d 150, 151 (Tenn. 1988). When fixing disability to a scheduled member, loss of use is the main objective. *Duncan v. Boeing Tennessee, Inc.*, 825 S.W.2d 416 (Tenn. 1992). Factors to consider in determining the extent of vocational disability include “the employee’s age, education, job skills and training, the extent and duration of anatomical impairment, local job opportunities, and the employee’s capacity to work at the kinds of employment available to one in the employee’s disabled condition.” *Cantrell v. Carrier Corp.*, 193 S.W.3d 467, 473-74 (Tenn. 2006) (citing *McIlvain v. Russell Stover Candies, Inc.*, 996 S.W.2d 179, 183 (Tenn. 1999)). Ms. Reagan, age 60 at the time of the trial, has a high school education. She has worked as a babysitter, as a waitress, at a factory assembling windows for school buses, at Flex Technologies assembling small parts for knob controls for brake releases and hood releases, at Staubelstone doing assembly work, and at Tennplasco using a spray gun to paint bezels (frames) for big screen televisions. The trial court found Ms. Reagan to be a very credible witness and noted, in some detail, the physical limitations and loss of use of her right hand resulting from the carpal tunnel syndrome. According to her testimony, she cannot hold and grip a paint gun for eight hours; she cannot use her fingers to manipulate small parts at a production pace, actions required for employment at Tennplasco and for assembly work. She lacks the strength to open canned goods; she drops silverware and dishes and has sustained burns from dropping pots and pans, actions which might be required of a waitress. She cannot drive because her hand goes numb after two miles. She is unable to hang wallpaper, paint, swim, or sew, activities she engaged in prior to the injury. The record does not preponderate against the finding of 75 percent partial disability to the right arm.

### IV

Federated Mutual contends that the trial court erred in permitting CNA Insurance to continue to participate in the trial after the opening statements of counsel. While counsel for Federated Mutual did acknowledge that his client would be responsible for everything associated with the right carpal tunnel claim, including discretionary costs and future medical benefits, plaintiff’s attorney did not agree to the stipulation and insisted that one physician had charged

\$750 for giving a deposition, and that plaintiff was asking that CNA pay \$250 of that charge. Counsel for Federated Mutual then stated:

Well, I've got a motion that's pending that will need to be addressed before I can address the stipulation on the discretionary costs. He has stated correctly that – the only one disputed, as far as I'm concerned, is Wheelhouse's cost of 750 versus 500 allowed by statute. But as you will see in the motion, that is really – I think it will prove moot by the time we get done with this thing.

Without a concurrent stipulation by plaintiff's counsel that CNA would have no liability arising from the claim of right carpal tunnel syndrome, the potential liability of CNA remained in issue. In addition, counsel for Federated Mutual has failed to point out any prejudice that occurred from permitting counsel for CNA to participate in the trial. We find the trial court did not err.

#### Disposition

The judgment of the trial court is accordingly affirmed, and the case is remanded for any necessary proceedings. Costs of the appeal are taxed to the Appellants, Tennplasco and Federated Mutual Insurance Company.

---

Howell N. Peoples, Special Judge

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
JULY 25, 2006 SESSION

**MARY ELLEN REAGAN v. TENNPLASCO, FEDERATED MUTUAL  
INSURANCE COMPANY, and CNA INSURANCE**

Chancery Court for Macon County  
No. 3760

---

No. M2005-02020-WC-R3-CV - Filed - December 27, 2006

---

**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 of the appeal, are taxed to the Appellants, Tennplasco and Federated Mutual Insurance Company.

IT IS SO ORDERED.

PER CURIAM