

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

September 15, 2006 Session

**VIVIAN LAROSE JOHNSON v. COCA-COLA ENTERPRISES, INC.,
ET AL.**

**Direct Appeal from the Circuit Court for Shelby County
No. CT-005026-03 Jerry Stokes, Circuit Judge**

No. W2005-02864-SC-WCM-WC - Mailed January 29, 2007; Filed April 12, 2007

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employee, Vivian Larose Johnson, sought workers' compensation benefits for carpal tunnel injuries to both hands and a separate injury to her back. The trial court found the employee had sustained a work related injury and that she had sustained a sixty percent permanent partial disability to the body as a whole without specifying the validity of her separate claims. The employer, Coca-Cola Enterprises, Inc. (Coca-Cola), has appealed, alleging the trial court erred in finding Ms. Johnson's claim for benefits for the injury to her back had been filed within the limitations period established by Tennessee Code Annotated section 50-6-203(a), and in awarding Ms. Johnson sixty percent permanent partial disability as a whole. We agree, reverse in part and remand the case to the trial court for determination of the remaining claims.

**Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Trial Court
Reversed in part, and Remanded.**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and ROBERT E. CORLEW, III, SP. J., joined.

Betty Ann Milligan, Memphis, Tennessee, for the Appellants, Coca-Cola Enterprises, Inc., and Constitution State Service Company

Vivian Larose Johnson, Memphis, Tennessee, pro se.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

In 1998, Vivian Johnson went to work for Coca-Cola as a full service driver. Her job included loading and unloading trucks and filling drink machines. In January of 1999, she noticed, at the end of the day, that she was having a sharp throbbing pain in her arm. She reported the condition to Coca-Cola. The fingers on her right hand were swollen and she experienced numbness in two fingers and the thumb. Ms. Johnson testified that she then injured her left hand in mid-February, 1999. Because she could not use her right hand, she increased the use of the left and began experiencing symptoms similar to those she had experienced in the right. She was referred to Dr. Arsen Manugian, a board certified orthopaedic surgeon, whom she first saw on February 26, 1999.

Dr. Manugian testified by deposition that Ms. Johnson's chief complaint was bilateral wrist and hand pain. She related to Dr. Manugian that on January 6, 1999, while pulling out a case of Coke, she began experiencing pain in her right wrist and numbness in the right hand. She continued to work with progressively worsening symptoms. She denied any previous similar problems. Her right wrist was minimally tender on the palm side of the hand with no atrophy or muscle wasting. She had a positive Tinel's and carpal tunnel compression test. These are tests designed to detect nerve irritation. She had normal sensation and no weakness of muscle function. The left wrist symptoms were similar but less pronounced. Dr. Manugian took x-rays of her wrists that were essentially normal. Dr. Manugian's impression was that she had bilateral mild carpal tunnel syndrome, the right worse than the left.

Dr. Manugian testified carpal tunnel syndrome is a condition where a nerve is compressed on the front of the wrist. It gives one sensations of pain and tingling in the hand. Dr. Manugian further testified that where carpal tunnel syndrome is progressive and ongoing, it can result in muscle atrophy, weakness, and pain that is severe and unrelenting. Ms. Johnson had none of those symptoms. Dr. Manugian allowed her to return to work wearing wrist splints and suggested further evaluation. Dr. Manugian ordered an EMG which suggested carpal tunnel syndrome in the right hand. He suggested surgery, but Ms. Johnson was reluctant to have it done. Her right hand was placed in a cast. She returned and reported she had been lifting cases of Coca-Cola product and her hand symptoms had worsened. Dr. Manugian imposed a three to five pound weight restriction, but her symptoms did not improve. Dr. Manugian felt the only option left was the surgical release of the median nerve.

A carpal tunnel release was performed on April 6, 1999. Dr. Manugian observed that the nerve had some flattening indicating it had been compressed. She also had inflammatory swelling around the carpal tunnel. By April 12, the numbness was very much improved, but Ms. Johnson was apprehensive about using her hand. Dr. Manugian suggested she return to work and started her on physical therapy.

Ms. Johnson returned to Dr. Manugian on May 3, 1999, with multiple complaints. The hand appeared to have no swelling and her median nerve function appeared to be satisfactory. She did exhibit a little weakness of grip which is not uncommon following surgery. She returned May 10, again with multiple complaints. During that visit she exhibited anger at continuing to have pain in both hands and arms. Ms. Johnson also stated that the surgery had not changed any of her symptoms. She claimed to have swelling in both hands because she had been worked too hard. Upon examination, however, Dr. Manugian observed no demonstrable swelling in either hand. She had a negative carpal tunnel compression test and a negative Tinel's test. She had normal sweating and a normal two point discrimination. Dr. Manugian suggested Ms. Johnson come back in a week, but she stated that she wanted to have a second opinion.

Dr. Manugian made arrangements for Ms. Johnson to see Dr. Wilkinson¹, a hand specialist. According to the report Dr. Manugian received from Dr. Wilkinson, she complained of pain in the area of the wrist, both the front and the back, extending all the way to her shoulder. She also reported swelling in her hand when she used it, but Dr. Wilkinson noted no swelling or redness. His examination revealed some voluntary resistance to passive motion of her wrist, but with distraction she had excellent and full range of motion of her shoulder, elbow, wrist, fingers and thumb. She had normal sweating. Dr. Manugian explained that sweating is a very sensitive test of nerve function. One of the earliest signs of nerve damage is the loss of the ability to sweat. Dr. Wilkinson felt that she had no real objective findings and that there was no reason to expect she would not fully recover.

Ms. Johnson returned to Dr. Manugian on May 26 and had a normal examination with the exception of a slight weakness of grip. Her grip strength had actually improved and Dr. Manugian had released her to return to her regular job. He felt that she had reached her maximum medical improvement and gave her a one percent (1%) impairment rating to the right upper extremity. He did not believe she had any impairment on the left side. Dr. Manugian was of the opinion that Ms. Johnson got a good result from her carpal tunnel surgery.

Ms. Johnson returned to Dr. Manugian on June 4, 1999. She stated that she was unable to do her regular job and related a multitude of complaints of pain, swelling, and numbness in both hands. On examination, there was no swelling, no abnormality of skin texture, and all findings were normal. With distraction she had good grip strength and no atrophy of her forearm muscles. She complained that she could not use her arms, but her muscles revealed no evidence of any loss of circumference. According to Dr. Manugian, if one does not use his or her extremities, one will lose muscle bulk. None of Ms. Johnson's complaints could be substantiated by physical findings.

Ms. Johnson returned to Dr. Manugian on August 12, August 17, August 24, and October 28, 1999. On each occasion, she complained of bilateral hand and wrist pain especially when working. On each occasion Dr. Manugian's examination revealed no abnormal findings. There was no evidence of swelling, discoloration or numbness. She had good function of her wrist and fingers and normal range of motion. Dr. Manugian released her to return to full duty.

¹Dr. Wilkinson is deceased.

On November 4, 1999, according to Ms. Johnson, she was pulling a case of drinks up some steps, and experienced a sharp pain in her back radiating both into her neck and shoulders and into her buttocks. She reported this incident to her supervisor and was again eventually referred to Dr. Manugian. Ms. Johnson has not returned to work at Coca-Cola since the day after she injured her back. The reason she has not returned to work at Coca-Cola, according to Ms. Johnson, is because a Dr. Horne said that she was not able to sit or stand for long periods of time.

Dr. Manugian saw Ms. Johnson again on November 15, 1999, for treatment of her mid and lower back. Ms. Johnson told Dr. Manugian about the November 4 incident. She denied any upper or lower extremity numbness or weakness or previous similar problems. She had no nerve function abnormalities and exhibited normal reflexes and normal sensation. X-rays of the lumbar and thoracic spine were essentially normal. Dr. Manugian's impression was that she had a back sprain but no nerve injury. He prescribed physical therapy.

Ms. Johnson was asked to return the following week, but her next visit to Dr. Manugian was January 19, 2000. She had been hospitalized for psychiatric problems during the interim. On that date, she was weeping and complaining of bilateral hand pain and persistent pain in the lower back. She reported radiation of the pain into the right leg and foot. Dr. Manugian noted a positive carpal tunnel compression test on the left and injected her left carpal tunnel. He ordered an MRI of her back that revealed some arthritis at the lower lumbar level, but no evidence of a ruptured disc. When Ms. Johnson continued to complain of persistent pain, Dr. Manugian ordered a functional capacity evaluation.

When she returned following the functional capacity evaluation, Ms. Johnson was using crutches with a very non-physiological gait. The report of her functional capacity evaluation indicated she had demonstrated sub-maximal performance. There were multiple inconsistencies and no objective findings. Dr. Manugian did not feel Ms. Johnson had sustained any significant permanent injury to her back and saw no reason why she could not return to her previous employment. She was released back to full regular work.

Dr. James C. Varner, an orthopaedic surgeon, testified by deposition that he first saw Ms. Johnson on February 21, 2000. She presented for a second opinion evaluation of her lower back injury. Ms. Johnson described to Dr. Varner the November 4, 1999, incident and complained of pain in her lower back radiating into the right lower extremity or leg. She indicated her leg would give way on her. The MRI evaluation of the lumbar spine demonstrated some degenerative or arthritic changes between the L4 and L5 vertebrae. There was no evidence of narrowing of the spinal canal, and Ms. Johnson had no evidence of a herniated or ruptured disc. She ambulated with crutches on presentation. She exhibited a limp in the right lower extremity on ambulation without the crutches. She described pain in the lower lumbar spine and in the muscle on either side of the spine. There was no swelling or spasm noted. There was no evidence of sensory deficit on examination of the muscles in her lower extremities, and she had equal reflexes in both lower extremities. Based upon Dr. Varner's examination and review of her medical records, he did not see anything that would indicate Ms. Johnson had any type of nerve problem, ruptured disc, or cervical pathology. Dr.

Varner believed she should be released to resume her regular duties and that there was no evidence of permanent impairment.

Dr. William Bourland, an orthopaedic surgeon with a sub-specialty in hand surgery, testified by deposition that he first saw Ms. Johnson on September 21, 1999. She complained of aching pain in the right arm especially when she tried to use it. She reported swelling in the right hand and felt that it was swollen on the day of Dr. Bourland's examination. She stated she was having numbness over the back of the right hand. There was no indication in Dr. Bourland's notes of any complaint regarding the left hand. Upon examination, Dr. Bourland noted a well healed incision in the mid-palmar aspect of the right hand. She had a negative Tinel's sign at the wrist. She had a negative Phalen's test. Dr. Bourland found no evidence of swelling in the right forearm and no evidence of tendinitis or a problem with the median nerve. She had grip strength of thirty-five on the left and ten to fifteen on the right. However, rapid alternating strength showed sixty-five on the left and forty-five on the right.

Dr. Bourland testified the negative Tinel's and Phalen's tests were strong indications that she was not having significant problems with carpal tunnel syndrome. According to Dr. Bourland, the difference between Ms. Johnson's normal and rapid alternating grip strengths indicated she was not giving maximal effort and that he was not getting an accurate number. Dr. Bourland was able to obtain the results of a nerve conduction study of the right hand, done about three weeks prior to her visit. It revealed a normal nerve conduction study of the right upper extremity. Because a nerve conduction study is a very sensitive test with regard to carpal tunnel syndrome, Dr. Bourland was of the opinion Ms. Johnson's surgery had been a success and there was no reason why she should not return to full work. Dr. Bourland did not assess any permanent impairment as a result of the carpal tunnel surgery, but noted that Dr. Manugian had assessed her at a one percent impairment and he saw no reason to add anything to that.

Dr. Joseph C. Boals, III, an orthopaedic surgeon, testified by deposition that he first saw Ms. Johnson on July 13, 2004. Ms. Johnson provided Dr. Boals an extensive medical history. She told him that her job was filling drink machines using her hands repetitively. Over time, she developed symptoms of numbness and pain associated with this job and reported it on January 6, 1999. Ms. Johnson underwent a right carpal tunnel release on April 6, 1999. The operation was not beneficial to Ms. Johnson and she continued to have ongoing symptoms in both hands. She refused to have surgery on the left due to the bad result on the right.² In November 1999, she sustained an injury while pulling cases of drinks up steps and developed severe back pain. Dr. Boals noted that Ms. Johnson used a walker to ambulate, and wore splints on both hands. She claimed some right side weakness with shooting pain down the right leg and numbness to the knee.

Dr. Boals indicated that the flattening in the median nerve observed by Dr. Manugian indicated a probability of a long standing carpal tunnel syndrome. In the opinion of Dr. Boals it was

²Dr. Manugian testified he reviewed his records and found no evidence that Ms. Johnson had been offered surgery for left carpal tunnel or that she had refused surgery.

pressure on the nerve over a period of time that made it flat and indicated she may not get a good result.

Dr. Boals' examination indicated there was a two plus positive compression test of both wrists and decreased sensation to monofilament testing in the median nerve distribution bilaterally, meaning she had some diminution of sensation to touch in the area of the distribution of the nerve. Dr. Boals x-rayed Ms. Johnson's back which showed moderate degenerative changes. Dr. Boals reviewed EMG studies of both upper extremities and the right lower extremity and all were within normal limits.

Dr. Boals diagnosed Ms. Johnson as having residual damage following her right carpal tunnel release, ongoing carpal tunnel syndrome in the left hand, chronic lumbar pain secondary to strain aggravating her pre-existing arthritis and a possible superimposed stroke. Dr. Boals testified that, assuming the accuracy and honesty of Ms. Johnson's history, the work injuries would have caused her problems except for the stroke. Dr. Boals assigned her twenty percent impairment of the right upper extremity and ten percent impairment of the left. Dr. Boals noted that according to *Campbell's Operative Orthopaedics*, it has been established that the EMG-nerve conduction study is unreliable, especially following post-operative cases. He testified, however, that in order to find a residual nerve blockage after release, the AMA Guides require a positive post-operative EMG.

Dr. Boals assigned an eight percent impairment for the chronic lumbar strain, taking the upper limits of the range because of Ms. Johnson's radicular complaints. Dr. Boals opined that Ms. Johnson should avoid repetitive work and heavy gripping with both hands. According to Dr. Boals, she should avoid prolonged walking, standing, stooping, squatting, bending, climbing, and repetitive flexion, extension, or rotation of the back.

According to Ms. Johnson, she continues to have problems, including pain in both arms, numbness and swelling in her fingers, and pain in her back. She testified she could not stand more than ten or fifteen minutes and that she experienced swelling and pain in her legs. She described popping and cracking in her neck and aching in the bones around her ankles when she tried to walk. She was unable to do housework because of the pain and numbness, was unable to sleep because of the pain, and did not believe she could perform any of her previous employments.

The trial court found Ms. Johnson to be a credible witness and that she "sustained a work related anatomical disability of 20% to the body and a vocational rating of 60% to the body as a whole." At her stipulated compensation rate of \$323.35 per week, plaintiff was awarded a total judgment in the amount of \$77,604.00. From this judgment, Coca-Cola has appealed.

II. ANALYSIS

Coca-Cola first alleges that Ms. Johnson's claim for injury to her back was barred by the statute of limitations. The facts related to this issue are not in dispute. It was stipulated at trial that the last voluntary medical benefit paid by Coca-Cola was for services rendered by Dr. James C.

Varner and was made on May 26, 2000, for an office visit that took place on April 20, 2000. Ms. Johnson, however, did not file suit for workers' compensation benefits until May 31, 2001. At trial, Coca-Cola stipulated that an appointment was made for Ms. Johnson to be evaluated by Dr. Varner on March 1, 2001. Ms. Johnson did not keep that appointment and no payment was made to Dr. Varner by Coca-Cola. Where the only dispute between the parties is the conclusion to be reached from the undisputed facts and evidence, the question on appeal is one of law. Thus, our review of the trial court's conclusion with regard to this issue is *de novo* with no presumption of correctness. See Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

At the time of Ms. Johnson's back injury, Tennessee Code Annotated section 50-6-203 provided, in part:

“ . . . if within the one year period voluntary payments of compensation are paid to the injured person or the injured person's dependants, an action to recover any unpaid portion of the compensation, payable under this chapter, may be instituted within one (1) year from the later of the date of the last authorized treatment or the time the employer shall cease making such payments, . . .

(a) The right to compensation under the Workers' Compensation Law shall be forever barred, unless, within one (1) year after the accident resulting in injury or death occurred, the notice required by § 50-6-202 is given the employer and a claim for compensation under the provisions of this chapter is filed with the tribunal having jurisdiction to hear and determine the matter; provided, that if within the one-year period voluntary payments of compensation are paid to the injured person or the injured person's dependants, an action to recover any unpaid portion of the compensation, payable under this chapter, may be instituted within one (1) year from the latter of the date of the last authorized treatment or the time the employer shall cease making such payments, . . .

(b) For purposes of this section, the issuing date of the last voluntary payment of compensation by the employer, not the date of its receipt, shall constitute the time the employer ceased making payments and an employer or its insurer shall provide such date on request. . . “

Tenn. Code Ann. § 50-6-203 (Supp. 1998).

While the trial court gave no reason for its conclusion that Ms. Johnson filed within the statutory period, it must have determined that the March 1, 2001 appointment with Dr. Varner was the “date of the last authorized treatment” specified in the statute. In Crowder v. Klopman Mills, 627 S.W.2d 930, 932 (Tenn. 1982), the Tennessee Supreme Court stated that “it is well settled that the action of an employer in merely referring an employee to a physician for examination and evaluation does not constitute the voluntary furnishing of medical services within the purview of [Tennessee Code Annotated section 50-6-203] so as to toll or waive the statute of limitations.”

(citing Union Carbide Corp., Food Prods. Div. v. Cannon, 523 S.W.2d 360 (Tenn. 1975); Webb v. Rossville Home and Auto Supply Co., 483 S.W.2d 579 (Tenn. 1972)). Later, in Blocker v. Reg'l Med. Ctr., 722 S.W.2d 660, 662-63 (Tenn. 1987), the Tennessee Supreme Court again stated that “mere referral” by the employer to a physician for evaluation or examination of an employee is not of itself voluntary provision of compensation. Rather, the expenses of medical care or treatment “actually rendered” by a physician to whom the employee has been referred by the employer constitutes voluntary compensation within the meaning of Tennessee Code Annotated section 50-6-203, whether or not those expenses have been paid. Id. Thus, we must conclude Ms. Johnson’s claim for benefits related to an injury to her back was not timely filed and, thus, was barred by the provisions of Tennessee Code Annotated section 50-6-203. Therefore, the trial courts award was erroneous to the extent that it was based upon Ms. Johnson’s back injury.

Because we conclude that the trial court considered the back injury in making its award, we conclude that the trial court erred in awarding Ms. Johnson a disability of sixty percent to the body as a whole. The trial court did not specify how it came to its award by assigning separate values for the carpal tunnel injury or injuries and the back injury. However, it is clear that the court must have included the back injury in the workers’ compensation award because the award was to the body as a whole. An award based solely on a carpal tunnel injury would be to a scheduled member. In the case before us there was a dispute as to whether Ms. Johnson sustained a permanent impairment as to one or both hands and the extent of her disability related to any such impairment. Therefore, we find the trial court erred in awarding Ms. Johnson a disability of sixty percent to the body as a whole and remand the case to the trial court for further findings related to the carpal tunnel issues.

III. CONCLUSION

The ruling of the trial court that Ms. Johnson filed her claim for workers’ compensation benefits for an injury to her back within the statute of limitations is reversed and the portion of Ms. Johnson’s claim relating to her back is dismissed. Ms. Johnson’s claims for benefits related to carpal tunnel injuries are remanded to the trial court for determination. The costs of this appeal are taxed one-half to Vivian Larose Johnson and one-half to Coca-Cola Enterprises, Inc.

DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
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**VIVIAN LAROSE JOHNSON v. COCA COLA ENTERPRISES, INC., AND
CONSTITUTION STATE SERVICE COMPANY, ET AL.**

**Circuit Court for Shelby County
No. CT-005026-03**

No. W2005-02864-SC-WCM-WC - Filed April 12, 2007

ORDER

This case is before the Court upon the motion for review filed by Vivian Larose Johnson pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed one-half to Vivian Larose Johnson and one-half to Coca-Cola, for which execution may issue if necessary.

PER CURIAM

HOLDER, J., Not Participating