

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
November 27, 2006 Session

**MARY NELL McCRARY v. CRACKER BARREL, OLD COUNTRY  
STORE, INC.**

**Direct Appeal from the Criminal Court for Wilson County  
No. 05-0383 J. O. Bond, Criminal Judge**

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**No. M2006-00824-WC-R3-CV - Mailed: February 13, 2007  
Filed - May 9, 2007**

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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. In this case, the trial court found the employee, Mary Nell McCrary, permanently totally disabled. The employer, Cracker Barrel, Old Country Store, Inc. (Cracker Barrel), appeals alleging the trial court based its determination on inaccurate factual findings, unreliable expert testimony and inadmissible evidence. Finding no error, we affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Trial Court  
Affirmed**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which GARY R. WADE, J., and J. S. (STEVE) DANIEL, SR. J., joined.

John Thomas Feeney, Catherine L. Grant, Nashville, Tennessee, for the Appellant, Cracker Barrel, Old Country Store, Inc.

Neal Agee, Lebanon, Tennessee, for the Appellee, Mary Nell McCrary.

**MEMORANDUM OPINION**

**I. FACTUAL AND PROCEDURAL BACKGROUND**

The parties to this action for workers' compensation benefits stipulated that Ms. McCrary suffered a compensable injury to her left shoulder on January 20, 1998. She reached maximum medical improvement on November 10, 1998, and was assigned a thirty-four percent (34%)

impairment rating to the body as a whole by her treating physician, Dr. Roy Terry.

Ms. McCrary was sixty years of age at the time of the trial. On January 20, 1998, while working at the Cracker Barrel Distribution Center as an order puller, she fell over a guard rail, and very painfully landed on her left shoulder. Ms. McCrary is left-handed, so the injury was to her dominant arm. After being examined at a local clinic, she was referred to Dr. Roy Terry, an orthopedic surgeon. After reviewing the results of an MRI, Dr. Terry recommended and performed surgery.

Following surgery, the problems with her left arm worsened. She was given pain medication that was eventually replaced by a TENS unit which Ms. McCrary continues to use daily along with Tylenol. Dr. Terry released her on November 10, 1998, but restricted her from using her left arm and shoulder. She attempted to return to Cracker Barrel, but was told that the jobs there required use of both arms.

Ms. McCrary testified that she has lost much of the use and strength in her left arm. She finds it difficult or impossible to perform common tasks such as brushing her teeth and hair, dressing herself and bathing. She does none of the housework, cooking, or yard work and has difficulty answering the telephone. Ms. McCrary spends about half her day lying down or reclining, and has not worked since being released by Dr. Terry. She had an automobile accident in March 1999, in which she injured her right shoulder and has also had surgery on that shoulder.

Over the objection of Cracker Barrel, Ms. McCrary was allowed to testify that following her release by Dr. Terry, Cracker Barrel continued paying her weekly compensation for several years. According to Ms. McCrary, it was when the workers' compensation insurance carrier for Cracker Barrel indicated that after January 17, 2006, she would no longer receive these payments that she filed her lawsuit for workers' compensation benefits.

Ms. McCrary completed the eleventh grade at Mt. Juliet High School before getting married and discontinuing her education. She worked for four or five years at McFarland Hospital as a nurse's aide. Thereafter, for a time, she stayed home and took care of her son before going to work for her husband and his father in their business, McCrary and Son Excavating. Her duties there included cleaning the offices, doing light filing, and answering the telephone. When she and Mr. McCrary were divorced, she left that job and began working for Johnson's Retirement Center as a patient assistant and housekeeper. Ms. McCrary held that job for four to six years and then accepted employment from Cracker Barrel where she worked for about four years prior to her injury. Her job at Cracker Barrel involved filling, packing and shipping orders from the various Cracker Barrel stores and required that she use both arms, lifting and reaching. Ms. McCrary testified she could not do any of the jobs she had previously held. She has had no vocational training of any kind and is not good at reading or math. She described herself as being a slow learner in school. Ms. McCrary is able to write with her left hand and can pick up objects that are not heavy. She testified, however, that she was not able to do anything for a long period of time because of the pain in her shoulder and arm.

Dr. Roy Terry, an orthopaedic surgeon, certified by the American Board of Orthopaedic Surgery testified by deposition. He first saw Ms. McCrary on March 18, 1998. She had injured herself on the job with Cracker Barrel when she fell over a guard rail and landed directly on her left shoulder. Ms. McCrary had problems at that time lifting her arm over her head, complaints of pain in her shoulder with movement, and a significant loss of range of motion in the shoulder. An MRI revealed a large rotator cuff tear that was repaired surgically on June 21, 1998. Following the surgery, Ms. McCrary continued to have problems with soreness, pain, and difficulty moving the shoulder. Because of the significant tear she had experienced, Dr. Terry felt that a second surgery would not be beneficial to her and she opted not to have it done. On November 10, 1998, she was placed at maximum medical improvement. In accordance with the AMA Guides, 4th Edition, which was in effect at the time in the State of Tennessee, Dr. Terry was of the opinion she had sustained a thirty-four percent whole person impairment. According to Dr. Terry, Ms. McCrary's impairment was increased by the significant loss of strength and range of motion caused by her muscles having been damaged and pulled away from the shoulder bone. Dr. Terry voiced concern about her ability to maintain gainful employment. He was concerned that she would have to do sedentary work since the injury was to her dominant arm and she had suffered a significant loss of the ability to use that arm. Dr. Terry was of the opinion that Ms. McCrary was essentially incapacitated on the left side and restricted her from using her left arm.

Dr. Terry described Ms. McCrary as having no difficulty with dexterity in her left hand and fingers and testified she had reported no difficulty driving an automobile. Dr. Terry also treated Ms. McCrary for the injury she sustained to her right shoulder during an automobile accident in 1999 and had also performed surgery on that shoulder. He could not testify that prior to the latter accident she was unemployable.

Jane Brenton, a vocational expert, testified during the trial, in person. She has a Bachelor's Degree in psychology from Stanford, a Master's Degree in clinical psychology from Western Kentucky and a Juris Doctorate from the Birmingham School of Law. She is certified by the Social Security Administration to testify as an expert witness in their administrative proceedings. She is certified as a Senior Disability Analyst and Diplomat by the American Board of Disability Analysts. Ms. Brenton has worked in the vocational field since 1981, most extensively in vocational rehabilitation, vocational assessments, and case management.

Ms. Brenton performed an examination of Ms. McCrary on October 10, 2005. She noted that Ms. McCrary tended to guard her left arm and hand. If she needed to do anything, such as pick up a glass of water, she used both hands. Ms. Brenton administered the Wide Range Achievement Test and, again, noted Ms. McCrary appeared to be uncomfortable, used both hands in holding paper and in attempting to calculate and write the different tasks that were presented to her. As part of the examination, Ms. Brenton reviewed Ms. McCrary's medical records. She observed a report from Dr. Terry that essentially limited Ms. McCrary to some type of sedentary work requiring no use of her left arm. A history taken from Ms. McCrary revealed she had no vocational training and that the jobs she had held were entry level, unskilled jobs, involving manual labor. According to Ms. Brenton, Ms. McCrary had no transferable job skills based upon her work history.

On the Wide Range Achievement Test, Ms. McCrary demonstrated an ability to read at a third grade level, spell at a first grade level and do arithmetic or math at a fourth grade level. Ms. Brenton described Ms. McCrary's scores as being below average and, while she was not illiterate, she would have significant difficulty with jobs that required her to perform written tasks or that included spelling or following written instructions.

In Ms. Brenton's opinion, Ms. McCrary was one-hundred percent vocationally disabled. Her opinion was based upon Dr. Terry's statement limiting her to sedentary work with her non-dominant arm, Ms. McCrary's previous work experience being limited to manual labor type jobs requiring she use both arms, and the significant pain Ms. McCrary experiences on a daily basis. Ms. Brenton admitted some speculation as to whether Ms. McCrary was totally disabled due solely to her work injury and not partially as a result of the 1999 automobile accident. Ms. Brenton also testified that if Dr. Terry had not limited her to sedentary work and her only limitation was the use of her left arm, she would not have considered Ms. McCrary totally disabled provided she was able to do light or medium work.

The trial court accepted Dr. Terry's opinion as to the impairment sustained by Ms. McCrary. The trial court noted Ms. McCrary had no vocational training and that she was limited to sedentary work by her treating physician, Dr. Terry.<sup>1</sup> The trial court noted Ms. McCrary's results on the Wide Range Achievement Tests and the limitations of her intellectual skills. The court found Ms. McCrary to be a credible witness and accepted her testimony that she could not work at any occupation that would bring her an income. The trial judge believed Cracker Barrel agreed with Ms. McCrary's assessment of her inability to earn an income by continuing to pay her compensation benefits.<sup>2</sup> As a result of the foregoing, the trial court found Ms. McCrary to be permanently totally disabled.

## II. ISSUES PRESENTED FOR REVIEW

Cracker Barrel alleges the trial court erred in awarding Ms. McCrary permanent total disability benefits. This contention is predicated upon the trial court's reliance on three factors that Cracker Barrel alleges are inaccurate, unreliable or improper. First, it is alleged the trial court's finding that Ms. McCrary was restricted to sedentary work by Dr. Terry was inaccurate. Second, Cracker Barrel alleges the expert vocational testimony offered in behalf of Ms. McCrary was unreliable. Third, it is alleged the trial court erred in basing its award of permanent total disability on voluntary payments of compensation made by Cracker Barrel after Ms. McCrary had reached maximum medical improvement.

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<sup>1</sup>The trial court stated, "Dr. Terry emphatically said, you know, sedentary work based on her left arm and shoulder."

<sup>2</sup>The trial court stated, "The employer has agreed with this up to at least the ninety-nine percent level by paying her comp."

### III. ANALYSIS

Cracker Barrel's assertion that the trial court inaccurately found Ms. McCrary was restricted to sedentary work by Dr. Terry is not supported by the record before us. During his deposition testimony, we find the following question and response from Dr. Terry:

- Q. At that point (Ms. McCrary having reached maximum medical improvement) were you concerned about her ability to maintain gainful employment?
- A. Sure, I was. I was concerned that she would have to do sitting work at that point because it was her dominant arm and she couldn't use that arm very well at all. She was pretty much incapacitated on the left side.

In a report to Ms. McCrary's workers' compensation case manager dated November 10, 1998, Dr. Terry makes the following statement:

I'm concerned about what she'll do down the road, and I feel it will be difficult for her to have gainful employment unless she has some kind of sitting work which requires no real use of her arm. I believe this injury is a disabling injury to her because this is her dominant arm.

It is true that Dr. Terry testified on cross-examination that he had placed no restrictions on Ms. McCrary's ability to walk, drive, stand, sit, stoop or squat. Cracker Barrel, however, offered no evidence, expert or otherwise, that would dispel the concerns of Dr. Terry that Ms. McCrary was limited to sedentary work or that there were available jobs that someone who could not use their dominant arm and was burdened by Ms. McCrary's other limitations of ability could perform.<sup>3</sup> While we would not characterize the concerns voiced by Dr. Terry as "emphatic" statements that Ms. McCrary was restricted to sedentary work, we do feel they tended to establish that she was more probably than not limited to this type employment. Our review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2005). The evidence does not preponderate against the trial court's findings.

Next, Cracker Barrel argues that the trial court erred in relying on the testimony of the vocational expert, Jane Brenton. The bases for this argument are that Ms. Brenton's opinion was grounded upon her belief that Dr. Terry had limited Ms. McCrary to sedentary work, which Cracker Barrel alleges is erroneous; the fact that Ms. Brenton's examination occurred several years after Ms. McCrary's alleged injury and after an intervening automobile accident that further incapacitated Ms. McCrary; the failure of Ms. Brenton to administer additional tests in addition to the Wide Range Achievement Test and make other market surveys; and the failure of Ms. Brenton to validate Ms. McCrary's results on the Wide Range Achievement Test.

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<sup>3</sup>Cracker Barrel, itself, had no position for Ms. McCrary because of her inability to use her left arm.

In addressing the arguments made by Cracker Barrel, we first address the factors that serve as the basis for our opinion. First, error may not be based upon the admission of evidence unless a substantial right of the party is affected, and a timely objection or motion to strike is made. Tenn. R. Evid. 103(a). At the conclusion of all the proof, Cracker Barrel made a motion to strike Ms. Brenton's testimony based, essentially, on the same grounds presented here. Thus, our inquiry is whether a substantial right of Cracker Barrel has been affected. Second, we note the qualifications of Ms. Brenton to testify as an expert in the field of vocational disabilities. In addition to her degrees in the field of psychology from Stanford and Western Kentucky universities, she had, at the time of trial, twenty-five years experience in the field of vocational rehabilitation and case management. She is certified by the Social Security Administration to give expert testimony before that body and is further certified by the American Board of Disability Analysts as a Senior Disability Analyst. Ms. Brenton's qualifications, education and experience are evidence her methods and approach to evaluating Ms. McCrary's disability were appropriate under the circumstances of this case.

Against that background we will review the concerns enumerated by Cracker Barrel concerning Ms. Brenton's testimony. First, in rendering her opinion, Ms. Brenton relied upon the report of Dr. Terry dated November 10, 1998, in which he voiced his concern that Ms. McCrary would be limited, in view of her injury, to "some kind of sitting work." Clearly, Ms. Brenton's testimony that Ms. McCrary was totally disabled was based upon her assumption that Ms. McCrary was so limited. We have previously addressed why the trial court was justified in its finding that Ms. McCrary would be limited to sedentary work. Since the trial court was justified in finding the assumption made by Ms. Brenton was accurate, it was also justified in accepting her opinion based upon that assumption.

Cracker Barrel next asserts Ms. Brenton's testimony was unreliable in that her examination was conducted several years after Ms. McCrary's injury and after an automobile accident that resulted in Ms. McCrary suffering an additional disability. During her testimony, Ms. Brenton candidly admitted that she could not rule out the possibility that her opinion as to Ms. McCrary's total disability was affected by the injury she sustained in the automobile accident. This frank admission gave the trial court an additional consideration in evaluating the correctness of Ms. Brenton's opinions and, thus, essentially eliminated the danger her opinion might be given more weight than it deserved. See White v. Vanderbilt University, 21 S.W.3d 215, 230 (Tenn. App. 1999). It did not, in our opinion, negate the relevance of her testimony.

Cracker Barrel complains that Ms. Brenton did not administer additional tests in addition to the Wide Range Achievement Test and conduct market surveys in order to determine what employment opportunities might be available to Ms. McCrary. Again, Ms. Brenton's opinion was based upon her interpretation of Dr. Terry's November 10, 1998, report as limiting Ms. McCrary to sedentary work. Based upon that interpretation, Ms. Brenton was of the opinion additional testing of Ms. McCrary's physical abilities would not be instructive. Ms. Brenton clearly testified that if Ms. McCrary was not limited to sedentary types of employment, Ms. Brenton would not consider her totally disabled. We must assume the trial court heard and considered that testimony. Moreover, neither the trial court nor this panel can be required to speculate as to what the results of functional

capacity evaluations, market surveys or additional testing may have been. Cracker Barrel had the ability to require Ms. McCrary to submit to physical and mental examination and evaluation. See Tenn. R. Civ. P. 35.01. It obviously could have conducted its own market surveys. The mere possibility that additional testing and information might have affected the weight that was afforded evidence by the trier of fact does not render that evidence any less reliable or negate its relevance.

Cracker Barrel's final complaint with regard to the testimony of Ms. Brenton was that she failed to validate Ms. McCrary's results on the Wide Range Achievement Test. It was suggested such validation might have been accomplished by comparing the results of the test with previous writings of Ms. McCrary to determine if she used and spelled words in those prior writings that she was unable to spell or define on the test. Reference was also made to two responses on the test where Ms. McCrary was able to correctly calculate the answer to a more difficult math problem when she was unable to correctly calculate the answer to an easier one. There was no evidence from Ms. Brenton, or any other witness, that the suggested method of validation is necessary or advisable in establishing the reliability of the Wide Range Achievement Test, nor that the single incidence of inconsistent responses invalidated or reduced the efficacy of the results of that test. Consequently, there is no evidence upon which we could base a determination that the trial court erred in relying upon the results of the test in assessing Ms. McCrary's disability.

Evidence, although relevant, may be excluded by the trial court if its probative value is substantially outweighed by the danger of unfair prejudice. Tenn. R. Evid. 403. This court reviews a trial court's decision to admit or exclude evidence by an abuse of discretion standard. Mercer v. Vanderbilt Univ., Inc., 134 S.W.3d 121, 131 (Tenn. 2004) . A trial court abuses its discretion only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining. Id.; Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn.2001). Cracker Barrel has presented no basis for our determining its substantial rights have been affected or that it was unfairly prejudiced by the testimony of Ms. Brenton. We simply cannot find that the trial court abused its discretion in admitting this evidence. Similarly, in our opinion, there is no adequate ground for our holding that the trial court erred in relying upon Ms. Brenton's testimony to whatever extent it did. Cracker Barrel's assignment of error with regard to the testimony of Ms. Brenton is without merit.

Finally, Cracker Barrel alleges the trial court erred by considering the fact that they paid workers' compensation benefits to Ms. McCrary from 1998 through December 2005, as evidence Cracker Barrel thought she was totally disabled.<sup>4</sup> This assertion is based upon Tennessee Code Annotated section 50-6-205(d) which provides that where workers' compensation benefits are paid without an award, those payments "shall not be considered a binding determination of the obligations of the employer as to future compensation."

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<sup>4</sup>During the announcement of its ruling the trial court stated, "Cracker Barrel thought she was totally disabled or they wouldn't have paid her all this time. It's not like it fell through a crack. They were writing a check. They had to consider it every month when they were writing the check."

Rule 803(1.2) of the Tennessee Rules of Evidence provides that statements made by a party-opponent are generally admissible into evidence and are not excluded merely because they are in the form of an opinion. This Rule, itself, specifies that such statements are not conclusive and, thus, may be explained. While this rule may be altered by statutory provisions<sup>5</sup>, we do not interpret the statute cited by Cracker Barrel as restricting the admissibility of such evidence. As a practical matter, the trial court in a workers' compensation case must be informed of all payments of benefits made by an employer in order to render an exact judgment as to that employer's obligations. In our view, it was not an abuse of discretion for the trial court to consider the payment of benefits over several years as evidence Cracker Barrel held the opinion Ms. McCrary was seriously disabled.

There was no indication the trial court considered the payments made by Cracker Barrel as "binding" on its determination as to the extent of Ms. McCrary's disability. The court cited as additional facts that she was sixty years of age, was restricted from using her dominant left hand, was limited to sedentary work, had very limited intellectual skills, and had no vocational training as the bases for its ruling. The trial court also found Ms. McCrary to be a credible witness and accepted her testimony that she was unable to work due to the pain she experienced in her shoulder. When credibility and weight to be given testimony are involved, considerable deference is given the trial court because the trial judge had the opportunity to observe the witness' demeanor and to hear the in-court testimony. Whirlpool Corp. v. Nakthoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Cracker Barrel, itself, was not willing to employ Ms. McCrary in her condition and did not present evidence to the trial court of any job she had the ability to perform. We are satisfied the trial court properly determined Ms. McCrary was permanently totally disabled in view of the evidence presented.

#### IV. CONCLUSION

The judgment of the trial court is affirmed. The costs of this appeal are taxed against the Appellant, Cracker Barrel, Old Country Store, Inc.

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DONALD P. HARRIS, SENIOR JUDGE

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<sup>5</sup>See, e.g., Tenn. Code Ann. §40-15-105(a)(3) (2006) (which provides statements made by a defendant in a memorandum of understanding is not admissible as evidence except that it may be used for impeachment purposes).



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**No. M2006-00824-SC-WCM-CV - Filed - May 9, 2007**

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**JUDGMENT ORDER**

This case is before the Court upon the motion for review filed by Cracker Barrel Old Country Store, Inc., 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 to appellant Cracker Barrel Old Country Store, Inc., and its sureties, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Wade, J., Not Participating