

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 23, 2009 Session

**KATHY MELISSA CANTRELL v. NISSAN NORTH AMERICA, INC., ET
AL.**

**Appeal from the General Sessions Court for Warren County
No. 9921-GSWC Larry G. Ross, Judge**

**No. M2009-00534-WC-R3-WC - Mailed - January 27, 2010
Filed - March 2, 2010**

Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. The trial court awarded workers' compensation benefits for gradual injuries to the employee's hands, arms, shoulders and left knee. On appeal, her employer asserts that the trial court erred by finding that she had complied with the notice statute, Tenn. Code Ann. § 50-6-201(b), and also by finding that she had sustained her burden of proof on the issue of causation. We conclude that sufficient notice was given. In addition, we conclude that the evidence preponderates against the trial court's finding of a causal relationship between the employee's work and her left knee injury. We affirm the findings of causation concerning her other injuries.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the General
Sessions Court Modified**

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the Court, in which GARY R. WADE, J., and WALTER C. KURTZ, SR. J., joined.

Randolph A. Veazey and Janice O. Mize, Nashville, Tennessee, for the appellants, Nissan North America, Inc., and Royal & Sunalliance Insurance Company.

Barry H. Medley and Frank Farrar, McMinnville, Tennessee, for the appellee, Kathy Melissa Cantrell.

MEMORANDUM OPINION

Factual and Procedural Background

Kathy Cantrell (“Employee”) was an assembly line worker for Nissan North America (“Employer”) from March 1992 to December 2002. In this workers’ compensation action, she alleged that she sustained gradual injuries to her shoulders, arms, hands, thumbs and left knee as a result of repetitive activities at work.

While she worked for Employer, she had several extended leaves of absence for psychological problems, and for a non-work injury to her left knee. She was terminated in December 2002. She filed a lawsuit under the Americans with Disabilities Act over her termination. A summary of her work for Employer and the circumstances of her termination are set out in a Sixth Circuit opinion concerning that action, Cantrell v. Nissan North America, Inc., 145 Fed. Appx. 99, 100-103, 2005 WL 1869724, at *1-4 (6th Cir. 2005).

Employee testified that she first noticed symptoms in her thumbs in approximately 1994. She received splints from Employer’s medical department. Her symptoms improved at that time. Thereafter, she began having problems with her thumbs, hands, wrists, and right elbow in 2000 or 2001. Her job at that time involved sanding and placing tape over portions of unfinished auto bodies. She also used a “sealer gun.” She described these jobs as requiring repetitive use of her hands and arms. A co-worker, Virginia Hitt, testified that she witnessed Employee tell Rick Douglas, described as a plant manager, that “[h]er fingers were hurting, her thumb, and it was the jobs she was doing.” Upon prompting by counsel, Ms. Hitt testified that Employee also mentioned her elbow and shoulder. This occurred on an unspecified date. Ms. Hitt testified that she witnessed part of a similar conversation between Employee and another supervisor, Russell Rigsby.

Employee did not receive medical treatment for any condition of her hands, arms or shoulders until March 2003. At that time, she consulted Dr. Douglas Haynes, an orthopaedic surgeon, concerning her wrists. On May 28, 2003, she gave written notice to Employer of injuries to her “right elbow, bilateral hands/wrists/arms, left knee.” It does not appear that she requested medical treatment prior to that date. The notice does not request medical treatment. Employer did not provide medical treatment, other than the braces described above, which were supplied to her by its medical department.

Employee fractured her left wrist in June 2003 as a result of a fall. Dr. Craig Morrison, an orthopaedic surgeon, performed a surgical repair of the wrist, using a metal plate and screws. In March 2004, she consulted Dr. Michael Milek, an orthopaedic hand specialist for possible right carpal tunnel syndrome. She completed a patient intake form at

that time which contained the question “Is this a work-related injury?” Her response was “No.” At trial, she testified that she answered the question in this way because she did not consider her symptoms to be related to the job she had at that time, working in a supermarket deli.

Dr. Milek performed a right carpal tunnel release and ulnar nerve transposition on July 14, 2004. In May 2005, Employee reported to Dr. Milek that her “left side is now giving her trouble.” Dr. Milek determined that she had carpal tunnel syndrome and basal thumb arthritis. He performed corrective surgery on July 25, 2005. He diagnosed basal thumb arthritis on the left side. He performed surgeries in December 2005 and March 2006 to address that condition.

Employee had injured her knee in 1986. That injury required an “open” surgical repair. The nature of the injury and the identity of the doctor who performed the surgery do not appear to be in the record. It does appear that this was not a work injury. Her symptoms increased at some time in the 1990's. Dr. Burton Elrod performed a second surgery on the knee in 1999, to treat her arthritic condition, and to remove a staple from the 1986 surgery. Employee testified at trial that she believed her work for Employer had caused her symptoms to worsen. However, there is no evidence that she made a workers' compensation claim at that time. In June 2003, she consulted Dr. Morrison (the physician who treated her wrist fracture) for left knee symptoms. His diagnosis was arthritis. In January 2004, she returned to Dr. Morrison, reporting that she had gone back to work on a part-time basis and was experiencing increased pain in the knee. He discussed the possibility of knee replacement surgery with her.

After her termination in December 2002, Employee worked as a photographer's assistant, and also at a supermarket deli. At the time of trial, she had been employed for two years as a teacher's assistant. As previously mentioned, she filed a disability discrimination lawsuit against Employer. Her deposition was taken in that lawsuit in September 2003. At that time she was asked to list her health problems. She testified that she had depression and difficulty sleeping. She referred to her left knee problems, describing that condition as “chronic degenerative joint disease.” She also mentioned her June 2003 wrist injury. She did not disclose any other health problems at that time.

Sharon Poole, a co-worker of Employee gave testimony, similar to that of Ms. Hitt, that Employee told Rick Douglas that “her hands, thumbs, and arm was hurting her.” She stated that this conversation took place in 2000 or 2001.

James Boles, a Human Resources Manager for Employer, testified concerning the reasons for Employee's termination. He stated that he interviewed her at the time of her

termination. She did not advise him of any physical problems or workers' compensation injuries at that time.

Andrew Travis, who was Employee's supervisor from approximately 2000 until her termination, testified that he met with Employee at least three times per year while she was under his supervision. He stated that she did not advise him at any time that she had a work injury to her hands, wrists, arms or shoulders.

Dr. Walter Wheelhouse conducted an IME on December 19, 2007 at the request of Employee's attorney. He testified by deposition. He opined that she had bilateral carpal tunnel syndrome, right ulnar neuropathy, CMC joint arthritis, degenerative joint disease of the left knee and tendinitis/impingement syndrome of the right shoulder. He further opined that all of these conditions were either caused or aggravated by her work for Employer. He assigned anatomical impairments totaling 20% to the body as a whole for her hand and arm conditions. The individual impairments were: 11% to each arm for basal thumb arthritis and the corrective surgery; 5% to each arm for residual carpal tunnel syndrome; 4% to the right arm for ulnar sensory loss; and 2% to the body as a whole for right shoulder tendinitis. He assigned an additional impairment of 30% to the left leg, which converts to 12% to the body as a whole. Using the combined values table of the Guides, these combine for 30% impairment to the body as a whole.

On cross-examination, Dr. Wheelhouse testified that he had very limited knowledge concerning Employee's work activities, or other activities, after she was terminated by Employer. He agreed that he did not know the number of repetitions of any particular work activity that Employee performed during a shift. He also did not know whether or not she changed jobs during her shift (she did), or how much standing or walking was required in her job. He did not think any portion of the impairment resulting from her arthritic knee could be assigned to her 1986 or 1999 surgeries, stating that it was possible she had no impairment as a result of those procedures.

Dr. David Gaw performed an IME on April 8, 2008 at the request of Employer's attorney. His diagnoses were similar to those of Dr. Wheelhouse. He opined that it was "more likely than not that the type of work [Employee] did for [Employer] was either the primary cause of or it significantly advanced a pre-existing condition such as arthritis of the basal thumb joints and it is more likely than not the cause of the other upper extremity problems." However, concerning her left knee, he testified "I don't believe it's related to the work that she did [for Employer]. She has an arthritic condition in the knee that probably started after the surgery in '86, but I don't think the work she did . . . significantly impacted that arthritic knee." He further opined that Employee's work as a cashier and deli worker, after her termination by Employer, could have worsened her basal thumb arthritis and carpal

tunnel syndrome. He also agreed that she had never sought or received medical treatment for her right shoulder.

Dr. Gaw assigned an impairment of 23% to the body as a whole to Employee for her hand and arm problems. The individual impairments were: 5% to each arm due to carpal tunnel surgery; 11% to each arm for basal thumb arthritis and corrective surgery; 2% to the right arm due to loss of motion of the thumb; 3% to the left arm due to loss of motion of the thumb; 2% to the right arm due to carpal tunnel surgery; and 2% to the right upper extremity due to shoulder motion loss. Although he did not consider her left knee arthritis to be work-related, he assigned an impairment of 10% to the left leg (4% to the body as a whole) for that condition.

Employee was fifty-two years old. She was a high school graduate and had also completed cosmetology school. Prior to working for Employer, she had worked for Magnetek, testing motors, and as a cosmetologist. After her termination, she had worked as a security guard, as a substitute teacher, and as a cashier and food preparer at a supermarket deli. At the time of trial, she was a teacher's assistant.

The trial court found that all of Employee's injuries were caused or aggravated by her employment. It found that she had given sufficient notice of her injuries. It found that she had a meaningful return to work. It made separate awards for each condition, which totaled 138.4 weeks (34.6% to the body as a whole).¹ Employer has appealed, contending that the trial court erred by finding that Employee gave timely notice of her injuries, and by finding that Employee sustained compensable permanent injuries to her right and left arm, right and left thumb, right elbow, and left knee.

Standard of Review

The standard of 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) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Madden v. Holland Group of Tenn., Inc., 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own

¹The trial court did not apply the concurrent injury rule. Tenn. Code Ann. § 50-6-207(3)(C) (2008 & Supp. 2009). Neither party has raised this issue on appeal.

conclusions with regard to those issues. Foreman v. Automatic Systems, Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

(1) Notice

Employer contends that Employee did not give timely notice of her injuries, as required by Tenn. Code Ann. § 50-6-201(b) (2008). Basically, Employer argues that the evidence presented at trial by Employee on this issue was vague, and that the statements which she and her co-workers described in their testimony were not sufficient to put it on notice that she was claiming that she had sustained a work-related injury. In order to satisfy this requirement, “the notice must reasonably convey to the employer that the employee has suffered an injury arising out of and in the course of the employment.” Jones v. Sterling Last Corp., 962 S.W.2d 469, 471 (Tenn. 1998). Taken at face value, the evidence is that on at least two occasions, sometime during 2000 or 2001, Employee told appropriate supervisory personnel that her hand and arms, and possibly her knee, were hurting, and that she believed her pain was related to her work. Although one of her supervisors gave contradictory testimony, the trial court explicitly accepted Employee's evidence as true. We agree with the trial court's observation that the notice given by Employee “may have been different than what [Employer] would have liked,” and that the relationship between Employee and Employer was “troubling and difficult.” Those factors may have caused or contributed to a failure by Employer to fully comprehend or accept the substance of Employee's attempts to communicate her problems. Nevertheless, we cannot say that the evidence preponderates against the trial court's finding that the information conveyed by Employee was sufficient, in the circumstances of this case, to satisfy the requirements of section 50-6-201(b).

(2) Causation

Employer also contends that the evidence preponderates against the trial court's conclusion that Employee satisfied her burden of proof on the issue of causation of each of her claimed injuries. In support of this contention, it points to several items in the record which would tend to cast doubt upon the existence of a relationship between Employee's injuries and her work for Employer. These include the absence of any mention of shoulder complaints in the medical records, of any diagnosis or medical treatment for carpal tunnel syndrome prior to 2003, and of any left arm symptoms prior to 2005. Employer also argues that her work activities after her December 2002 termination could have aggravated her pre-existing conditions, according to the testimony of Dr. Gaw.

We note that both Dr. Wheelhouse and Dr. Gaw testified that Employee's hand and arm problems were caused or aggravated by her work for Employer. Although Dr. Wheelhouse had very limited knowledge of her work activities, his opinion regarding causation of these conditions was consistent with that of Dr. Gaw. Further, while Dr. Gaw agreed that it was possible that her subsequent activities could have worsened her condition, his testimony on the subject falls well short of opining that such a post-employment aggravation actually occurred, or was even probable under the circumstances. We therefore conclude that the evidence does not preponderate against the trial court's finding that Employee's hand and arm injuries were work-related.

The causation argument concerning Employee's alleged left knee injury presents a much closer case. There is no dispute that her left knee was damaged at least six years before she was hired by Employer. Although she testified at trial that she believed her work activities contributed to the need for surgery in 1999, she did not make a workers' compensation claim at that time, and there is no medical evidence in the record to support that contention. Dr. Wheelhouse opined that a causal relationship existed. However, his knowledge of her activities was, as previously noted, limited. Dr. Gaw opined that her work did not advance her condition in any way, although it may have caused an increase in symptoms. Resolution of this issue turns upon the relative credibility of the two doctors. Because both doctors testified by deposition, we are able to reach our own conclusions concerning that question. Foreman, 272 S.W.3d at 571.

Two surgical procedures had previously been performed on Employee's knee. The first procedure, in 1986, was an "open" surgery, and included the placement of a staple in the joint. The second procedure, in 1999, was also an open procedure, for treatment of arthritic changes in the knee and removal of the aforementioned staple. A June 2001 clinical note of Dr. Elrod, who performed the second procedure, described her condition as a "full-thickness injury of the medial femoral condyle and patellofemoral joint."

Dr. Wheelhouse assigned 30% anatomical impairment to the left leg due to the arthritis in Employee's left knee. He attributed all of this impairment to her work activities for Employer, and was unwilling to state that she had any permanent impairment as a result of those two procedures or the conditions that caused the need for them.

Dr. Gaw opined that Employee's arthritic knee was neither caused by nor advanced by her work for employer. In his report, he stated that "the patient's work activities may have increased her pain but the work activities were not a significant causative factor in her development of the arthritis." In his deposition, he testified that "arthritis is not caused by, in and of itself, by walking or standing or squatting. That's a condition we don't know exactly the etiology of, but it's not related to standing or walking . . ."

In light of Employee's twenty-year history of knee pain and surgery, we find that Dr. Wheelhouse's attribution of all of her impairment to her work, and his corresponding reluctance to accept the premise that she had at least some pre-existing impairment, lessens the credibility of his testimony on the subject. On balance, we find that Dr. Gaw's testimony is more consistent with the other medical evidence contained in the record. We therefore conclude that the evidence preponderates against the trial court's finding that Employee sustained a compensable injury to her knee. The trial court awarded 30% PPD to the left leg for that condition, equating to sixty weeks. The judgment will therefore be reduced by that amount.

Conclusion

The judgment is modified by finding that Employee's alleged left knee injury is not compensable, and to reduce the award of permanent partial disability benefits to seventy-eight and four-tenths weeks. It is affirmed in all other respects. Costs are taxed one-half to the appellants, Nissan North America, Inc. and Royal & Sunalliance Insurance Company, and their surety, and one-half to Kathy Melissa Cantrell, for which execution may issue if necessary.

JON KERRY BLACKWOOD, 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 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 will be taxed one-half to the appellants, Nissan North America, Inc. and Royal & Sunalliance Insurance Company, and their surety, and one-half to Kathy Melissa Cantrell, for which execution may issue if necessary.

PER CURIAM