

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
June 25, 2007 Session

**DEBBIE BUCKINGHAM v. FIDELITY & GUARANTY INSURANCE CO.,  
ET AL.**

**Direct Appeal from the Criminal Court for Wilson County  
No. 05-0448 J. O. Bond, Criminal Court Judge**

**No. M2006-01587-WC-R3-WC - Mailed - September 21, 2007  
Filed - October 25, 2007**

This worker's compensation appeal has been referred to the Special Workers' Compensation Appeals Panel pursuant to Tennessee Code Annotated section 50-6-225(e)(3). The trial court awarded eighty percent permanent partial disability to each arm, arising from employee's carpal tunnel syndrome. The employer, Convergys Corp., contends that the trial court erred in determining the date of injury, failed to apply the last-injurious-injury rule, and erroneously found that notice was timely. We affirm, as modified, the trial court's judgment.

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

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which WILLIAM M. BARKER, C.J., and RICHARD E. LADD, SP. J., joined.

Jennifer L. Williams, Brentwood, Tennessee, for the appellants, Fidelity & Guaranty Insurance Co. and Convergys Corporation.

William Joseph Butler, Frank Farrar, Lafayette, Tennessee, for the appellee, Debbie Buckingham.

Hal W. Wilkins, Nashville, Tennessee, for the appellee, Kmart Corporation.

**MEMORANDUM OPINION**

## I. FACTUAL AND PROCEDURAL BACKGROUND

The employee, Debbie Buckingham, was forty-seven years of age at the time of trial. She completed her schooling through the tenth grade and later received a General Educational Development diploma. Ms. Buckingham had not received any special occupational, educational, or skills training. Her work history included primarily data entry and labor jobs. She has held positions as a waitress, cashier, nanny, assistant apartment house manager without supervisory responsibilities, and mail room attendant.

Ms. Buckingham began working for Sprint in 1999. Her primary job function was receiving incoming customer service calls. Ms. Buckingham testified that Sprint's computers automatically displayed the callers' account information, but she was sometimes required to perform data entry functions dependent upon an individual caller's needs. Sprint's policy was to allow its customer service employees to answer a customer's inquiry from memory if the employee readily knew the correct answer. Only if the employee could not provide the correct answer from memory was he or she required to research the customer's request for information on the computer. Ms. Buckingham testified that she spent approximately fifteen percent of each work day at Sprint performing data entry functions at a computer.

Ms. Buckingham worked for Sprint until February 28, 2004, when Convergys Corporation ("Convergys") took over operations at the same location. Without interruption, she began working for Convergys on March 1, 2004. Ms. Buckingham testified that there were significant policy changes when Convergys assumed operations. Under Convergys's management, callers' personal account information did not automatically appear on the computer screen when calls came in. It was necessary for Ms. Buckingham to manually enter a callers' identifying data to retrieve their account histories. In addition, Convergys's policy did not allow Ms. Buckingham to respond to customers' inquiries from memory. Instead, she was required to research each request for information on the computer. Ms. Buckingham testified that, primarily because of these policy changes, she spent the entirety of each work day at Convergys performing data entry functions on a computer.

In October 2003, Ms. Buckingham saw Dr. Gregory White for right shoulder pain. During the visit, she also complained of pain in her right hand. At trial, she attributed the pain in her hand and shoulder to "lung[ing] her horses."<sup>1</sup> Dr. White referred Ms. Buckingham to Dr. Michael Moore for the pain in her hand. In November 2003, Dr. Moore conducted an electromyogram ("EMG") on Ms. Buckingham's right hand. The results of that EMG were described as revealing "early stage II carpal tunnel syndrome." Ms. Buckingham received no further treatment. She testified that she did not experience any significant symptoms of carpal tunnel syndrome until May 2004.

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<sup>1</sup> According to Ms. Buckingham's testimony, some horse trainers exercise their horses by connecting them to a rope lead, and guiding them in a circular pattern. The trainer leading the horse may be injured if the horse acts up or resists the circular pattern.

In May 2004, Ms. Buckingham began experiencing significant pain, numbness and tingling in her hands, wrists and forearms. She testified that these symptoms became more severe during June 2004. Her symptoms remained constant after June 2004, neither more nor less frequent or severe. Ms. Buckingham took over-the-counter pain relievers to help her tolerate these symptoms.

Ms. Buckingham testified that she began seeking other employment in June or July 2004 because there were rumors that Convergys was closing its local operation, and she feared she would become unemployed. In July 2004, Ms. Buckingham began working part-time at a Kmart pharmacy ("Kmart"). She also continued to work part-time for Convergys until September 25, 2004, when Convergys discontinued its Nashville operations. Ms. Buckingham then began working full-time at Kmart and continued that employment through the date of trial.

Ms. Buckingham visited Dr. White again on May 10, 2005 because of the pain, numbness and tingling she was experiencing in both hands. During that visit, Dr. White or his assistant informed her that she had a permanent injury to both hands which would require further treatment. Dr. White referred Ms. Buckingham to Dr. Scott Baker for an EMG of both hands.

Shortly after her return to Dr. White's office on May 10, 2005, Ms. Buckingham consulted an attorney. Ms. Buckingham's attorney sent written notice of her injury to Sprint and Convergys on May 23, 2005. Suit was filed two days later.

Dr. White testified by deposition. Comparing the results of Ms. Buckingham's EMGs in 2003 and 2005, Dr. White concluded that her carpal tunnel syndrome had permanently worsened between the two tests. Although he could not identify, within a reasonable degree of medical certainty, the exact time or activity that caused Ms. Buckingham's injuries, Dr. White testified that repetitive use of a keyboard for long hours can cause carpal tunnel syndrome. He opined that repetitive performance of Ms. Buckingham's duties at Kmart, such as opening and closing pill bottles and operating cash registers, could also lead to carpal tunnel syndrome.

At the request of her attorney, Dr. Walter W. Wheelhouse evaluated Ms. Buckingham on April 10, 2006. He diagnosed bilateral carpal tunnel syndrome and opined, based on Ms. Buckingham's work history, that her injuries either occurred or worsened in May 2004. Dr. Wheelhouse assigned a five percent medical impairment rating to both of Ms. Buckingham's arms in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth edition.

Dr. Rodney Caldwell, a vocational expert, testified at trial. He conducted vocational tests on Ms. Buckingham in March 2006. Based on Ms. Buckingham's work history and her performance on the vocational tests, Dr. Caldwell believed she had sustained an eighty to eighty-five percent vocational disability.

The trial court found that Ms. Buckingham sustained permanent injury "in May and into June of 2004," while working at Convergys, and that her duties at Kmart did not aggravate or exacerbate the injury. The court found that Ms. Buckingham did not learn that her injury was permanent and work-related until May 2005, and that notice to the employer was timely. The trial court also found an eighty percent permanent disability to each of Ms. Buckingham's arms and ordered 320 weeks of permanent partial disability benefits (160 weeks for each arm) to be paid solely by Convergys.

From this judgment, Convergys has appealed contending that the trial court erred by establishing the date of injury as "May/June 2004." Convergys also contends that the trial court erred by failing to impose liability on Kmart pursuant to the last-injurious-injury rule and further erred in its finding that Ms. Buckingham gave timely notice of her injury.

## II. 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) (Supp. 2006). 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. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where 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 conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

## III. ANALYSIS

### *A. Date of Injury*

The trial court found that Ms. Buckingham's injury occurred in May and June 2004. The court's finding was based primarily upon Ms. Buckingham's trial testimony and Dr. Wheelhouse's deposition testimony. Convergys argues that Bone v. Saturn Corp., 148 S.W.3d 69 (Tenn. 2004), is controlling and compels setting the date of injury as September 25, 2004, the last day Ms. Buckingham worked. In Bone, the Tennessee Supreme Court determined that the date of injury in a gradual injury case, for the purpose of establishing the employee's compensation rate, was the earlier of the date the employee filed a written notice of injury with the employer or the last day the employee was able to work with the injury. Id. at 73-74. After the parties in this case filed their briefs, however, Bone was overruled by Building Materials

Corp. v. Britt, 211 S.W.3d 706 (Tenn. 2007). Britt can be interpreted as holding that the "last-day-worked rule" is the singular test for determining the date of injury in gradual injury cases. Id. at 713. In so holding, Britt reaffirmed Lawson v. Lear Seating Corp., 944 S.W.2d 340, 343 (Tenn. 1997) and Barker v. Home-Crest Corp., 805 S.W.2d 373, 373-74 (Tenn. 1991).

In Lawson, the issue was when the statute of limitations should begin to run in cases involving gradual injury, such as carpal tunnel syndrome. The Court characterized each day that an employee with carpal tunnel syndrome continued to work as "a new injury in that it further aggravated Claimant's condition . . ." Lawson, 944 S.W.2d at 342 (quoting Brooks Drug, Inc. v. Workmen's Comp. Appeal Bd. (Patrick), 636 A.2d 246, 249 (Pa. Commw. Ct. 1993)). To prevent injured employees who continue to work from being barred by the statute of limitations, the court expressly rejected setting the date of injury as the date on which carpal tunnel syndrome is diagnosed or manifests itself. Id. Therefore, the Court held that the date of the employee's injury was the day she "was no longer able to work because of her injury." Id. at 343.

In Barker, the Court concluded that the last-day-worked rule also applies when determining which of two successive employers is liable for payment of benefits arising from an employee's carpal tunnel syndrome. Notably, in Barker the Court also considered, but declined to adopt, the date the employee's carpal tunnel syndrome manifested itself as the date of injury. Barker, 805 S.W.2d at 375. The proper date of injury was the "date the employee's condition was sufficiently severe to prevent her from working." Id. at 374.

In 2004, the Tennessee legislature amended Tennessee Code Annotated section 50-6-241 to provide that for injuries occurring after July 1, 2004, the permanent partial disability benefits for certain scheduled members, including injuries to the arm, were capped at 1.5 times the impairment rating where the employee returned to work for the pre-injury employer at the pre-injury rate of compensation. Tenn. Code Ann. § 50-6-241(d)(1)(A). The employee was limited to 6 times the impairment rating where the employee did not return to work for the pre-injury employer. Tenn. Code Ann. § 50-6-241(d)(2)(A).

In this case, Ms. Buckingham argues that the trial court correctly set the date of injury at "May/June 2004" because the trial testimony supported that finding. She also contends that the trial court was not bound to apply the last-day-worked rule because of the Panel's decision in Bradbury v. Pathway Press, No. E2005-01612-WC-R3-CV, 2006 WL 1976728 (Tenn. Workers' Comp. Panel July 17, 2006). In Bradbury, we considered the date of injury for an employee's gradually occurring osteoarthritis for purposes of the statute of limitations. Id. at \*2. We held that the statute of limitations did not begin running until the employee knew she had sustained a work-related injury. Id. (citing Banks v. United Parcel Serv., Inc., 170 S.W.3d 556, 563 (Tenn. 2005)). The Panel explained: "When construing time limits . . . we have favored a construction that preserves a worker's right to benefits . . ." Id. (quoting Banks, 170 S.W.3d at 563). Accordingly, Ms. Buckingham argues, we should construe the 2004 amendments to Tennessee Code Annotated section 50-6-241 so as not to apply the caps for scheduled members to an

injury that manifested itself prior to the amendment's effective date in order to preserve the benefits to which she would have been entitled.

Initially, we would note that the "bright line last-day-worked rule" adopted in Britt would fix the date of injury in this case on September 25, 2004. Britt, 211 S.W.3d at 713. While there is some question as to whether Britt should be applied retroactively, that issue is inapposite to the present case, since under a Bone analysis, the date of injury would be Ms. Buckingham's last day worked because she had not given Convergys written notice of her injury prior to that time. Bone, 148 S.W.3d at 73-74. Moreover, in our view, we are not at liberty to ignore the precedent established by the operative language in Lawson and Barker. Lawson emphasized that carpal tunnel syndrome results in new trauma every day the employee works. Lawson, 944 S.W.2d at 343. Accordingly, Ms. Buckingham was deemed to have sustained an ongoing injury every day she performed data entry functions at Convergys. Ms. Buckingham testified that she began experiencing symptoms of carpal tunnel syndrome in May 2004, which the trial court found was the date of injury. The Court in Lawson, however, squarely declined "to adopt . . . the date the injury 'manifests itself'" as the date of injury. Id. at 342. The correct "date from which compensation flows is the last date worked by the claimant." Id. Similarly, the Court in Barker declined to adopt the date the injury manifested itself as the date of injury, opting for the "date the employee's condition was sufficiently severe to prevent her from working." Barker, 805 S.W.2d at 374. We, therefore, are compelled to find the trial court erred by setting the date of injury as "May/June 2004." Under the last-day-worked rule, the appropriate date was September 25, 2004, the last day Ms. Buckingham worked for Convergys.

In light of our finding that Ms. Buckingham's injury occurred after July 1, 2004, and because she did not return to her employment with Convergys after September 25, 2004, her award is governed by Tennessee Code Annotated section 50-6-241(d)(2)(A). According to that provision, Ms. Buckingham may not receive more than six times her medical impairment rating of five percent to each arm. The trial court found that Ms. Buckingham had an eighty percent vocational disability because of her level of education and work history. She had obtained a GED diploma and primarily had held positions requiring data entry and jobs performing labor that required substantial use of her hands. Both Ms. Buckingham and Dr. Caldwell testified that, in the future, she would be unable to perform such jobs for any appreciable period of time. We are, therefore, satisfied the maximum allowable award of thirty percent permanent partial disability to each arm is appropriate.

#### *B. Applicability of the Last-Injurious-Injury Rule*

Under the last-injurious-injury rule, an injured employee's last successive employer bears full liability for the employee's disability benefits if working conditions at the last employer aggravated the employee's pre-existing injury. Riley v. INA/Aetna Ins. Co., 825 S.W.2d 80, 81-82 (Tenn 1992); McCormick v. Snappy Car Rentals, Inc., 806 S.W.2d 527, 530-31 (Tenn. 1991). Liability will not attach to an injured employee's last successive employer if the employee's

symptoms from the earlier injury merely persist. Barker, 805 S.W.2d at 375. A permanent aggravation or exacerbation of the employee's injury must occur at the second employer. Id.

Convergys argues that Dr. White's testimony established Kmart's liability according to the last-injurious-injury rule. In his deposition, Dr. White compared the results of Ms. Buckingham's 2003 and 2005 EMGs. He reached the broad conclusion that Ms. Buckingham's carpal tunnel syndrome worsened between the two tests. Dr. White opined that Ms. Buckingham's data entry duties at Convergys or her pharmaceutical duties at Kmart could each potentially lead to carpal tunnel syndrome. However, Dr. White could not pinpoint a time, activity, or event in the two-year interim that would have caused, aggravated or exacerbated Ms. Buckingham's carpal tunnel syndrome. Dr. White's testimony fails to establish that Kmart should be held liable under the last-injurious-injury rule.

Ms. Buckingham contends that the last-injurious-injury rule is not applicable in this case, pointing to Dr. Wheelhouse's deposition testimony, and her own trial testimony. Dr. Wheelhouse opined that Ms. Buckingham's duties at Convergys caused her carpal tunnel syndrome in May 2004, and that her symptoms had merely persisted since then. Dr. Wheelhouse was unfamiliar with Ms. Buckingham's duties at Kmart so he offered no opinion on whether repetitive performance of those duties could have aggravated or exacerbated her carpal tunnel syndrome.

Ms. Buckingham's trial testimony was consistent with Dr. Wheelhouse's deposition testimony. Ms. Buckingham testified that she began experiencing symptoms of carpal tunnel syndrome in May 2004, while she was working for Convergys and continuously using the keyboard for data entry. She experienced the same symptoms but more severely during June 2004. After June 2004, Ms. Buckingham's symptoms did not subside or become worse; "they stayed the same." Ms. Buckingham testified that, in July 2004, she began working part-time for both Convergys and Kmart. Her job at Kmart included using a keyboard, but only about five percent of the time.

The trial court obviously credited Ms. Buckingham's testimony, as well as the opinion of Dr. Wheelhouse. The court found that the last-injurious-injury rule did not apply because Ms. Buckingham's carpal tunnel syndrome was not aggravated or exacerbated after June 2004, or at any time on account of her working conditions at Kmart. Based upon our independent review of the record, we are unable to conclude that the evidence preponderates against that finding.

### *C. Notice*

Convergys argues that Ms. Buckingham provided untimely notice of her carpal tunnel syndrome. Tennessee Code Annotated section 50-6-201(b) governs notice in gradual injury cases as follows:

(b) In those cases where the injuries occur as the result of gradual or cumulative events or trauma, then the injured employee or such injured employee's

representative shall provide notice to the employer of the injury within thirty (30) days after the employee:

(1) Knows or reasonably should know that such employee has suffered a work-related injury that has resulted in permanent physical impairment; or

(2) Is rendered unable to continue to perform such employee's normal work activities as the result of the work-related injury and the employee knows or reasonably should know that the injury was caused by work-related activities.

Subsection (b)(1) relieves an employee, who has suffered a gradually occurring injury, of the notice requirement until the employee knows or reasonably should know that the injury is work-related and has caused permanent physical impairment. Banks, 170 S.W.3d at 561. Because the cause and permanency of gradually-occurring injuries is not always immediately apparent, the notice period has been considered tolled "until the diagnosis is confirmed by a physician." Id. (citing Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 169-70 (Tenn. 2002); Pentecost v. Anchor Wire Corp., 695 S.W.2d 183, 186 (Tenn. 1985)).

Convergys contends that Ms. Buckingham's testimony shows that she knew her injury was permanent and work-related in May 2004. Particularly, Convergys excerpts the following testimony:

Q: So are you saying that for the first two months of working for Convergys you weren't having problems, and then two months in, you start having problems?

A: That was my worst time, in May [2004] and June [2004], yes. That was when I knew something was wrong.

This testimony does not demonstrate that Ms. Buckingham knew or should have known in May 2004 that her injury was work-related and had caused permanent physical impairment. It merely indicates that she "knew something was wrong." Furthermore, Ms. Buckingham testified shortly thereafter that she did not know she had a "permanent injury condition" until she was evaluated by Dr. White on May 10, 2005. That testimony is corroborated by the deposition testimony of Dr. White.

The trial court found that Ms. Buckingham first knew she had a work-related injury that caused permanent physical impairment on May 10, 2005. The evidence does not preponderate against that finding. Ms. Buckingham's attorney notified Convergys of her injury on May 23, 2005. We, therefore, conclude notice was given within the time required by section 50-6-201(b).

## V. CONCLUSION

The judgment of the trial court is modified to reflect September 25, 2004 as the date of injury. The award of permanent partial disability benefits is modified to thirty percent for each arm. The trial court's judgment is affirmed in all other respects. The costs of this appeal are assessed one-half against Fidelity & Guaranty Insurance Co. and one-half against Debbie Buckingham.

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DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
JUNE 25, 2007 SESSION

**DEBBIE BUCKINGHAM v. FIDELITY & GUARANTY INSURANCE CO.,  
ET AL.**

**Criminal Court for Wilson County  
No. 05-0448**

**No. M2006-01587-WC-R3-WC - Filed - October 25, 2007**

**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 will be paid one-half against Fidelity & Guaranty Insurance Company and one-half against Debbie Buckingham, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM