

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

August 27, 2007 Session

**SHARON PRINCE v. STATE STREET BANK & TRUST CO. and
AMERICAN ZURICH INSURANCE COMPANY**

**Direct Appeal from the Circuit Court for Bedford County
No. 9687 Lee Russell, Judge**

**No. M2006-02503-WC-R3-WC - Mailed - January 9, 2008
Filed - February 12, 2008**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and a report of findings of fact and conclusions of law. Employee developed bilateral carpal tunnel syndrome as a result of her employment. The trial court awarded 55% permanent partial disability to the right arm and 35% permanent partial disability to the left arm. Her employer has appealed, contending that the award is excessive. We conclude that the evidence in the record does not preponderate against the trial court's award, and affirm the judgment.

**Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right;
Judgment of the Circuit Court Affirmed**

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and DONALD P. HARRIS, SR. J., joined.

Gordon C. Aulgur, Nashville, Tennessee, for the appellants, State Street Bank & Trust Co. and American Zurich Insurance Company.

Stanley Davis, Nashville, Tennessee, for the appellee, Sharon Prince.

MEMORANDUM OPINION

Factual and Procedural Background

Sharon Prince ("Employee") worked for State Street Bank & Trust Company ("Employer") in its operations facility, processing payments and transactions. This job involved

a substantial amount of keyboard work. Employee developed bilateral carpal tunnel syndrome and deQuervain's tendinitis. Compensability is not disputed.

Employee reported her problem to Employer, and was referred to Dr. Barry Callahan, an orthopaedic surgeon. He testified by deposition. Dr. Callahan first saw Employee on November 13, 2003. At that time, Employee was pregnant. It was decided to delay further treatment until after the birth of Employee's child. A right carpal tunnel release was eventually performed on April 14, 2004. Surgery to treat the deQuervain's tendinitis was performed at the same time. A left carpal tunnel release was performed on January 3, 2005. Dr. Callahan ordered repeat EMG studies in May 2005. At that time, he assigned impairment of 5% to each arm. He placed no permanent restrictions on her activities.

Dr. C. M. Salekin, a neurologist, conducted an IME of Employee in September 2005 at the request of her attorney. He also testified by deposition. Based upon his review of records and an examination of Employee, Dr. Salekin opined that Employee had residual symptoms of bilateral carpal tunnel syndrome and residual symptoms of deQuervain's tendinitis on the right side. He assigned 5% permanent impairment to each arm for the carpal tunnel syndrome, and an additional 7% impairment to the right arm for the deQuervain's. He suggested that she should avoid repetitive motion at the wrist to avoid aggravating her symptoms.

At the time of trial, Employee was thirty-eight years old. She had a B.S. in Business Administration. She had worked in the financial industry for sixteen years. Her previous employers included the Federal Reserve Bank, Bankers' Trust, Deutsche Bank and Employer. She testified that all of her jobs had required extensive use of computer and ten-key keyboards. Employee testified that she continued to have symptoms, including numbness, tingling and weakness. She did not believe that she could perform any of the jobs she had previously held, because she could not perform the repetitive keyboard activity required in those jobs. Employee no longer worked for Employer at the time of trial. Although there is no evidence in the record explaining when or why this occurred, there is a statement in a pre-trial brief to the effect that Employer closed the facility where Employee worked. In any event, Employee had not applied for any jobs since her work with Employer ended.

The trial court awarded 55% permanent partial disability to the right arm and 35% permanent partial disability to the left arm. Employer has appealed, contending that the award is excessive.

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. 2007). 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). 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 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). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

Analysis

The only issue at trial was the extent of permanent disability. That is also the only issue on appeal. Extent of disability is a question of fact. Jaske v. Murray Ohio Mfg. Co., Inc., 750 S.W.2d 150, 151 (Tenn. 1988). In assessing the extent of permanent disability a court "shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition." Tenn. Code Ann. § 50-6-241(b) (1999); see also Walker v. Saturn Corp., 986 S.W.2d 204, 208 (Tenn. 1998).

The record contains several factors which provide a basis for the trial court's award. Foremost among these, Employee's entire work history is in a single industry. The restrictions suggested by Dr. Salekin undoubtedly eliminate from Employee's consideration a significant number of jobs in that industry and others. His impairment rating also supports the award. In addition, Employee's own testimony concerning her current abilities cannot be disregarded. Whirlpool, 69 S.W.3d at 170.

While the trial court was concerned regarding Dr. Callahan's testimony that he had placed no post-surgery restrictions on Employee, the court went on to find that Dr. Salekin's testimony was very credible and his training and experience made him very familiar with the use of the AMA Guides 5th Edition and he uses it frequently. When expert medical testimony conflicts, the trial court has discretion to determine which to accept. Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel 1996).

The extent of vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn. Workers' Comp. Panel 1999). Here the trial court evaluated the testimony of the expert witnesses, as we are required to do, to determine where the preponderance of the evidence lies. After such review we conclude the evidence does not preponderate against the judgment of the trial court. Accordingly, we affirm the judgment of the trial court.

Conclusion

The judgment is affirmed. Costs are taxed to the appellants, State Street Bank & Trust Co. and American Zurich Insurance Company, and their sureties, for which execution may issue if necessary.

ALLEN W. WALLACE, SENIOR 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 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 by the Appellants, State Street Bank & Trust Co. And American Zurich Insurance Company, and their sureties, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM