

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 15, 2010 Session

LINDA LEE KENNEY v. SHIROKI NORTH AMERICA, INC. ET AL.

**Appeal from the General Sessions Court for Warren County
No. 10333-GSWC Larry G. Ross, Judge**

**No. M2009-02484-WC-R3-WC - Mailed - January 26, 2011
Filed - February 28, 2011**

The employee alleged that she sustained carpal tunnel syndrome and a right shoulder injury as a result of repetitive work activities. She was examined by several doctors provided by her employer, each of whom found that she had no permanent work injury. She sought and received treatment on her own with a physician who treated her for shoulder impingement and carpal tunnel syndrome. This doctor assigned permanent impairment but also testified that those conditions were not work-related. An evaluating physician assigned permanent impairment and testified that the conditions were work-related. Employee was a part-owner of an upholstery business during a period of time prior to the onset of her symptoms. Her testimony concerning the nature of her work for that business was inconsistent. The trial court found that she had not sustained her burden of proof and entered judgment for her employer. She has appealed, contending that the evidence preponderates against the trial court's findings. We affirm the judgment.¹

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

WALTER C. KURTZ, SR.J., delivered the opinion of the Court, in which CORNELIA A. CLARK, C.J., and JON KERRY BLACKWOOD, SR.J., joined.

Sonya W. Henderson, Murfreesboro, Tennessee, for the appellant, Linda Lee Kenney.

Mary Dee Allen, Cookeville, Tennessee, for the appellees, Shiroki North America, Inc. and

¹ 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.

Strategic Comp Services.

MEMORANDUM OPINION

Factual and Procedural Background

Shiroki North America, Inc. (“Employer”) is a manufacturer of auto seats. Linda Kenney (“Employee”) began working there as a temporary employee in late 2003 or early 2004. She became a full-time employee in May 2004. Her testimony describing the various jobs she performed for Employer is somewhat confusing. It appears that she was an inspector for about three months. She then attached electric motors to a frame using a screw gun, which required her to move pans of parts weighing twenty-five to thirty-five pounds. Later she worked in a job assembling “links,” which also involved using a screw gun.

Prior to being hired by Employer, Employee and her husband operated an upholstery business. She continued to work in the business up to the time of trial. In her trial testimony, Employee gave varying accounts of the extent of her work for that business. She stated during direct examination that she had actually sewn upholstery in 2001, 2002, “and a little bit in 2003,” and she implied that the business had not operated since that time. However, during cross-examination, she conceded that she and her husband continued to advertise in the Yellow Pages and had signs advertising the business in their yard at or near the date of trial. She then testified that her husband continued to operate the business but her contributions were primarily clerical. She later admitted that she had testified in her deposition that she continued sewing for the business until 2007.

In October 2004, Employee developed pain in her right wrist. She reported the condition to Employer. She was initially referred to a Dr. Lowery and then to Dr. Phillip Coogan, an orthopaedic surgeon specializing in treatment of the hand. Dr. Coogan testified by deposition. He saw Employee on three occasions. He was not able to make a definitive diagnosis because Employee’s symptoms were not consistent over time. He ordered an EMG, which showed borderline carpal tunnel syndrome. However, this result was not consistent with her physical examination, which was negative for carpal tunnel syndrome. Dr. Coogan provided conservative treatment, including a cortisone injection into the wrist on October 28, 2004. Employee did not return to him until 2007. Also, Employee did not inform Dr. Coogan of her participation in the upholstery business.

Employee returned to work for Employer. In 2006, she had an incident in which she mashed her thumb in a press, and she was treated by Dr. Toney Hudson. She continued to work and was eventually released without impairment or restrictions.

In March 2007, Employee reported to Employer that she felt pain and numbness in her right hand and arm. She was referred to Dr. James Talmage, an occupational medicine physician and partner of Dr. Hudson. Dr. Talmage testified by deposition. Employee told him that she had continued to have symptoms in her right hand since 2004. Dr. Talmage performed a new EMG study which showed no change from the 2004 test ordered by Dr. Coogan. The results of her physical examination were not consistent with carpal tunnel syndrome. Dr. Talmage prescribed conservative treatment, including light duty work and physical therapy. He also administered a repeat cortisone injection to the right wrist. However, according to Employee, none of these measures provided substantial relief. Dr. Talmage opined that she had no permanent impairment and placed no restrictions upon her activities. Employee told Dr. Talmage about her participation in the upholstery business and stated that she worked four to five hours on some weekends sewing auto and boat seat upholstery. Dr. Talmage testified that this activity would place significant stress on her wrists and hands.

Employee requested a second opinion. She selected Dr. Coogan from a list provided to her. He had seen her in 2004 and reexamined her on May 31, 2007. He concurred with Dr. Talmage's opinion that Employee had no permanent impairment and required no restrictions.

Employee requested a third opinion. She was referred to Dr. Scott Baker, a physiatrist. Dr. Baker examined her on June 25, 2007. He also concluded that Employee had no permanent impairment and required no permanent restrictions. Dr. Baker testified that Employee did not tell him about her participation in the upholstery business.

Prior to seeing Dr. Baker, on June 4, 2004, Employee consulted Dr. Donald Arms, an orthopaedic surgeon. Employee consulted Dr. Arms on her own, using her health insurance. She initially complained of problems in her right shoulder, arm, and hand. Dr. Arms found that she had signs of right shoulder impingement and carpal tunnel syndrome. He advised her that because she was seeking treatment through private health insurance, he would treat her conditions as unrelated to her employment. After a period of conservative treatment, Dr. Arms performed a distal clavicle excision and acromioplasty of the right shoulder and right carpal tunnel release in August 2007. He followed her through September 2007, and then did not see her again until she returned for an impairment evaluation in 2009. Dr. Arms opined that she retained a 16% impairment of the right upper extremity for the conditions which he had treated. He testified that Employee considered her problems to be work-related, but he considered them to be the result of the aging process. Employee first told Dr. Arms about the upholstery business at the time of the 2009 evaluation.

Dr. David Gaw, an orthopaedic surgeon, performed an examination at the request of

Employee's attorney on November 5, 2007. He opined that Employee had a permanent anatomical impairment of 18% of the right upper extremity as a result of her various conditions. Based upon the history which she provided to him, he opined that her shoulder and hand problems were related to her employment. On cross-examination, he testified that Employee did not tell him about her upholstery work, and then stated that his opinion concerning causation would be affected by the fact that she engaged in sewing upholstery several times a week.

Employee was fifty-nine years old when the trial occurred. She had attended school through either the seventh, eighth or ninth grade. Her prior work experience included sewing machine operator, barmaid and a housekeeping business. She went on medical leave from Employer in June 2007 and did not return. She had not worked or sought work thereafter. She testified that she could no longer work in her garden, fish, or lift anything heavy because of pain in her right shoulder and arm and that her sister assisted her with housework.

Two vocational experts testified. James McKinney, appearing on behalf of Employee, stated that according to his testing her IQ was 78, and she was able to read and perform arithmetic at fourth grade level. He opined that she was permanently and totally disabled. Michael Galloway appeared on behalf of Employer. He found that Employee was able to read and perform arithmetic at a fifth or sixth grade level. Based upon restrictions suggested by Dr. Gaw and Dr. Arms, he opined that she had a 45% vocational disability. Based upon the opinions of Dr. Coogan, Dr. Talmage and Dr. Baker, who placed no restrictions upon Employee, Mr. Galloway opined that she had no vocational disability.

Prior to the testimony of Mr. McKinney and Mr. Galloway, the trial court stated that it had read the five medical depositions prior to the trial. The court stated that Employee had not satisfied her burden of proof on the issue of causation. It then permitted each side to present its expert vocational evidence as outlined above. Employee has appealed, contending that the trial court erred by issuing its decision before the testimony of her vocational expert was presented and by finding that she did not sustain her burden of proof.

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 to 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 Grp. 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 conclusions with regard to those issues. *Foreman v. Automatic Sys., 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. Premature Ruling

Employee first contends that the trial court erred by issuing its decision before she had completed presenting her proof. It is undisputed that the depositions of Dr. Coogan, Dr. Talmage, Dr. Baker, Dr. Arms and Dr. Gaw had been provided to the court prior to trial. Employee, her husband, and her sister had testified in person before the trial court made its finding concerning compensability, at which point the only remaining evidence to be presented by either side was the testimony of the vocational evaluators, Mr. McKinney and Mr. Galloway.

In support of her position, Employee cites *Seals v. England/Corsair Upholstery Mfg. Co.*, 984 S.W.2d 912 (Tenn. 1999). We do not find this decision to be on point. *Seals* does not involve the issue of a premature ruling, but rather the decision is concerned with issues of causation, consolidation and apportionment of liability between an employer and the Second Injury Fund. Employee argues that she was prejudiced by the timing of the trial court's decision but does not explain the nature of that prejudice, other than the fact that she received an adverse decision. She does not assert that she had any additional evidence to present concerning the issue of compensability. Employer does not cite any authority in support of the trial court's action but makes the argument that all evidence pertaining to liability had been presented, the opinions of the vocational evaluators did not address this issue, and therefore the timing of the trial court's announcement did not affect the outcome of the case.

The posture of this case at the time the trial court issued its ruling was similar to that of a bifurcated trial after the plaintiff had rested her case at the liability stage. There was no more proof to be presented on the issue of compensability. This court is of the opinion that the better practice is to wait until the end of the trial to rule. Under these circumstances, however, we conclude that the trial court's action was not erroneous. Moreover, even if the trial court's decision was announced prematurely, any error in doing so was harmless.

2. Burden of Proof

The trial court found no causation, and in so doing stated in part:

I don't have a clue about this lady. I've read all these depositions. I know she was hurt somewhere along the line. But I really don't know from what I've read and what I've heard that there's enough evidence to appropriate that injury to whatever impairment she has or may not have because she's got doctors all over the board. Well, she has four that say she doesn't have restrictions. So that doesn't fare well for your client, obviously.

And I like her. She's a nice lady. I'd love to give her some money. But when I do that then that opens up this company for future medicals forever on who knows what kind of injury. I don't know. Her answers are so guarded. And she tries so hard. And she's got so many inconsistencies. I just don't know that I'm in a position where I'm going to be able to assist her.

The trial court's remarks highlight the weaknesses of Employee's case. Her trial testimony was rambling regarding her work for Employer, the nature of her injuries, her medical treatment and her involvement in the upholstery business. Her statements were often not responsive to the questions she was asked. There were multiple inconsistencies between her testimony on direct and cross-examinations, and there were additional inconsistencies between her trial testimony and deposition testimony. Her descriptions of her work and her symptoms to the doctors who examined or treated her changed frequently. Dr. Gaw, the only physician to testify that she had sustained a work injury, agreed that she had left out important information in the history she provided to him. Dr. Arms, who performed surgeries on her shoulder and hand, testified that he discussed the question of whether or not her conditions were work-related at length with Employee and that she appeared to understand that he found them to be age-related. Dr. Coogan, Dr. Talmage and Dr. Baker flatly testified that they were unable to find any work-related condition which caused permanent impairment.

Employee argues that the trial court was obligated to view the evidence in the light most favorable to her and failed to do so. She cites Tennessee Code Annotated section 50-6-116 (2008), the equitable construction section, in support of her argument. Granted, case law requires trial courts to resolve "reasonable doubt" as to causation in favor of the employee. *See, e.g., Phillips v. A & H Constr. Co.*, 134 S.W.3d 145, 150 (Tenn. 2004). However, there are no cases which require, as Employee seems to request, that a trial court must disregard discrepancies in an employee's testimony and other evidence which tends to disprove an employee's claim. Ultimately the employee bears the burden of proving each element of her

cause of action in every workers' compensation case. *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 543 (Tenn. 1992). Having examined the record in its entirety, we conclude that the evidence does not preponderate against the trial court's finding that Employee failed to sustain her burden in this case.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Linda Lee Kenney, and her surety, for which execution may issue if necessary.

WALTER C. KURTZ, SENIOR JUDGE

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STRATEGIC COMP SERVICES**

General Sessions Court for Warren County
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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 paid by Linda Lee Kenney and her surety , for which execution may issue if necessary.

PER CURIAM