

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 23, 2008 Session

RENE BURNS v. RANDSTAD NORTH AMERICA, L. P., ET AL.

**Direct Appeal from the Circuit Court for Wilson County
No. 14826 John D. Wootten Jr., Judge**

**No. M2007-02431-WC-R3-WC - Mailed - October 1, 2008
Filed - November 4, 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 § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. In this case, the trial court ruled that the employee, Ms. Rene Burns, sustained a 49% permanent partial disability to the hand. The employer asserts that the trial court erred because it considered Ms. Burns' disfigurement and alleged fear of equipment as part of the vocational disability award. Consequently, the employer contends that the trial court's award was excessive. We agree and modify the award to 35% permanent partial disability.

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

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., J., and WALTER C. KURTZ, SR. J., joined.

Kent E. Krause and Jason A. Lee, Nashville, Tennessee, for the appellants, Randstad North America, L.P. and ACE American Insurance Company

Jill T. Draughon, Nashville, Tennessee, for the appellee, Rene Burns

MEMORANDUM OPINION

Factual and Procedural Background

Rene Burns ("Ms. Burns") worked for Randstad North America ("Employer") as a laborer. Ms. Burns' job required her to catch car parts that came off a press and pack them. At times, employees had to remove extra steel from the press. On February 9, 2005, she was helping to hold up the machine when it collapsed on her right index finger, removing part of her finger tip.

Ms. Burns was taken to the emergency room at University Medical Center. Dr. Earl Dwayne Lett, a plastic and reconstructive surgeon, diagnosed the injury as a partial amputation of the nondominant right index finger and performed emergency surgery. The “distal one-third” of the bone in the finger had to be removed.

Following the initial operation, Ms. Burns had several follow-up visits with Dr. Lett. In March 2005, Dr. Lett performed a second surgery and recommended Ms. Burns for occupational therapy. Ms. Burns received therapy for approximately four months. During her treatment with Dr. Lett, Ms. Burns also complained of anxiety. The doctor noted that she was “emotionally labile and tearful.” Dr. Lett felt Ms. Burns’ depression and anxiety were related to her trauma and referred her to a Dr. Pare. The record does not disclose Dr. Pare’s medical specialty, nor does it contain any testimony or office notes from Dr. Pare. Furthermore, the record contains no testimony from Ms. Burns that she ever saw Dr. Pare.

Ms. Burns reached maximum medical improvement on January 5, 2006. After that date, she did not return to Dr. Lett for any treatment. At the time of the trial, Ms. Burns worked full-time for a new employer stocking shelves. She continued to experience pain in her finger and had difficulty grasping objects on the new job.

Dr. Lett assigned to Ms. Burns a three percent impairment of the right index finger, which results in one percent impairment of the hand based upon the AMA Guidelines. Dr. Lett based this impairment rating on Ms. Burns’ hook nail deformity, sensitivity changes in the distal tip of the finger, and sensory changes associated with scarring.

On April 23, 2007, Dr. David W. Gaw, an orthopaedic physician, conducted an independent medical evaluation of Ms. Burns. Dr. Gaw assigned a thirty-seven percent impairment rating to the index finger, which translates to seven percent impairment to the hand. Dr. Gaw determined that there were three components to Ms. Burns’ impairment based on AMA Guidelines. She suffered seventeen percent impairment to the index finger from loss of movement of the end joint; twenty percent impairment due to amputation; and four percent impairment from sensory deficit. Using the combined values table of the Guides, these impairments totaled thirty-seven percent. At deposition, Dr. Lett confirmed that Dr. Gaw’s method of figuring the impairment rating under AMA Guidelines was an acceptable method. The trial court found Dr. Gaw’s impairment rating to be “more precise” and used the number as a factor to determine vocational disability. However, Dr. Gaw did not test grip strength in Ms. Burns’ hand.

In her discovery deposition, Ms. Burns testified that she preferred not to return to her job as a cashier because she did not want to work with the public. At trial, however, Ms. Burns testified that she could not work as a cashier because she was afraid to be around any moving parts or machines. In closing arguments, counsel for Ms. Burns stated that nervousness and anxiety caused Ms. Burns problems with being around machinery. Counsel for the Employer objected because there was no evidence to support this assertion. Ms. Burns’ attorney reminded the court that Ms. Burns testified during trial about her nervousness and anxiety around machinery. The trial court overruled the objection.

During her testimony, Ms. Burns showed her finger to the trial judge. The court found her to be a credible witness and found that she had suffered a 49% permanent partial disability to the hand. In making this award, the trial court discussed several factors. Specifically, the court mentioned Dr. Gaw's impairment rating; Ms. Burns' testimony; the limitations on her daily life; the appearance of her hand; her anxiety with being around moving parts and machinery; her age; her education; and local job opportunities.

At the time of the trial, Ms. Burns was fifty-one years old, unmarried and had no children. She was a high school graduate with no vocational training. She had previously worked as a stocker, cashier, receptionist, assembly line packer, assembly line picker, and material handler.

Issues Presented

Employer asserts that the trial court erred by considering Ms. Burns' anxiety or fear of equipment as part of the vocational disability award because there was no medical proof on the issue. In addition, Employer contends that the trial court erred in considering both disfigurement and anatomical impairment in determining the overall vocational disability of Ms. Burns. Consequently, Employer argues that the trial court's rating of 49% impairment to the hand 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) (2005). The trial court is given considerable deference where the credibility and weight of a witness's testimony are concerned because the trial judge has observed the witness' demeanor and heard in-court testimony. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). 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).

Analysis - Anxiety

Employer argues that the trial court's consideration of the plaintiff's anxiety without appropriate medical proof affected the assessment of Ms. Burns' vocational disability. In making an award for permanent partial disability benefits, the court will "consider all pertinent factors including lay and expert testimony, the 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(d)(1)(A) (2004). Causation and permanency of a work-related injury must be shown in most cases by expert medical evidence. *Tindall v. Waring Park Ass'n*, 725 S.W.2d 935, 937 (Tenn. 1987). Specifically, medical expert testimony is required to establish the permanence of any mental or nervous disorders. *Sluss v. Huskey & Huskey Contractors*, No. 03S01-9205CV00047, 1992 WL 340597, at *2 (Tenn. Workers' Comp. Panel November 23, 1992).

In its ruling from the bench, the trial court discussed several factors including those factors outlined by statute. The court also mentioned Ms. Burns' anxiety, stating, "I have to consider your testimony, ma'am, your limitations on your daily lives, the appearance, your anxiety with being around moving parts and machinery, anything that one would use in certain occupations." The court then stated:

given [Ms. Burns'] injury, and given these factors that I have outlined that are in our law here, I find that you have sustained a 49 percent disability to the hand or to the body as a whole as a result of the injury that arose in the course of employment with the [Employer] in this case in 2005.¹

In his deposition testimony, submitted as part of the trial record, Dr. Lett testified that he referred Ms. Burns to Dr. Pare for her anxiety. However, Ms. Burns did not present any evidence that she had consulted Dr. Pare for her anxiety or fear of moving parts. The record does not contain any testimony or office notes from Dr. Pare. Dr. Lett mentioned that Ms. Burns complained of anxiety and mentioned in his office notes that the anxiety was related to her trauma. He also testified that Ms. Burns "developed an episode where she was having anxiety and depression as a result of her trauma . . . in March, and so [he] sent her for a referral" However, Dr. Lett asserted that he did not treat Ms. Burns for her depression or anxiety.

In short, there is no evidence to support a finding that Ms. Burns sustained any psychological disability. The wording of the trial court's ruling, especially its explicit reference to anxiety in the same sentence in which it announced its award, leads us inevitably to the conclusion that the award was based in part upon that factor.

Analysis - Disfigurement

Tennessee Code Annotated section 50-6-207(3)(A)(ii)(1) provides compensation for permanent partial disability to the hand. Benefits shall be paid "for the loss of a hand sixty-six and two-thirds percent of the average weekly wages during one hundred fifty (150) weeks." As interpreted by the Tennessee Supreme Court in *Owens v. Vulcan*, 503 S.W.2d 87, 90 (Tenn. 1973), this statute does not allow an employee to collect compensation in the instance where a disfiguring injury results "from the same accident at the same point on the body," but does allow compensation where the injuries are distinct at different locations.

In its oral ruling, the court noted the "scarring on the middle finger, on the left side of that middle finger" and "the way the nail in this case was curved . . . outward and downward." The trial court thought of the nail as a "hangnail that is never going to be any better." Thus, the trial court described the injury as a "disability of consequence, especially for a lady, because women in this day and age take pride in their hands and their nails" Immediately thereafter, the trial court rendered its decision in Ms. Burns' case.

¹ The record shows that the trial court later clarified its ruling. The court determined Ms. Burns sustained 49% impairment to the hand, not the body as a whole.

As noted above, the court weighed several factors including those outlined in Tennessee Code Annotated section 50-6-241(c). In particular, the trial court considered the “appearance” of Ms. Burns’ finger. The disfigurement in this case was to Ms. Burns’ finger, which was also the location of the injury compensated for as a scheduled member. Because the disfigurement was not a separate injury at a different location, any disfigurement to the finger can not be the basis of an award. As with Ms. Burns’ anxiety, the wording of the trial court leads us to the conclusion that the trial court did consider disfigurement as a factor.

Because the trial court based its award in part upon improper factors, we conclude that it is necessary to modify the award. Based upon our examination of the record, we find that Mrs. Burns sustained a permanent partial disability of thirty-five percent (35%) to the hand.

Conclusion

The award of benefits awarded to Ms. Burns for permanent partial disability is modified to 35% to the hand. The judgment is affirmed in all other respects. Costs are taxed to Rene Burns and her surety, for which execution may issue if necessary.

JON KERRY BLACKWOOD, 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 Rene Burns and her surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM