

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 22, 2003 Session

STEPHANIE SANSOM v. LOOKOUT KNITWEAR, LLC, ET AL.

**Direct Appeal from the Chancery Court for Hamilton County
No. 99-0645 Honorable W. Frank Brown III, Chancellor**

Filed September 15, 2003

No. E2002-02226-WC-R3-CV

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court awarded the employee 60 percent permanent partial disability to her left arm and found her shoulder injury to be compensable but no permanent injury. The judgment is affirmed as to the award of 60 percent disability to the arm and the allowance of temporary total disability benefits; the judgment is reversed as to the shoulder injury and the commutation of periodic benefits; and the judgment allowing reimbursement of medical expenses is modified.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court is Affirmed in Part; Reversed in Part; and Modified in Part

ROGER E. THAYER, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J. and JOSEPH M. TIPTON, SP. J., joined.

Robert J. Uhorchuk, of Chattanooga, Tennessee, for Appellants, Lookout Knitwear, LLC, and The Hartford Insurance Group.

Fred S. Clelland, of Chattanooga, Tennessee, for Appellee, Stephanie Sansom.

MEMORANDUM OPINION

In this case the employer, Lookout Knitwear LLC, and its insurance carrier, The Hartford Insurance Group, have appealed from the trial court's action in awarding the employee, Stephanie Sansom, benefits for injuries to her left arm and shoulder.

Facts

_____The employee, a thirty-four-year-old high school graduate, began working for Lookout Knitwear LLC during July 1997. She had previously worked for about one year in the same plant with another company that ceased operations because of financial conditions. Under both employers, she was employed as a seamer where she operated a machine which would seam the toe of socks. In September 1997, she began having problems with both hands aching and she started using a wrist band and continued working. She was laid off during November 1997 but returned to work during January 1998. She testified she noticed her condition improved during the layoff period but got worse after returning to work. The employer sent her to see Dr. Stohler and she said he told her to get off the machine she was operating. Her job was changed and she started what she described as “banding work.” This involved working on an assembly line moving along boxes of socks after they were weighed and sending them to a banding machine. She stated the boxes were heavy enough to cause further problems with her hands and she stopped this work. Eventually she was offered another job which she said she was not capable of doing because of her condition. Also she declined another job because she did not want to work on Sunday. She was terminated during October 1998 because she could not perform the jobs available.

She testified her shoulder also bothered her and it felt like there was a knot in it. Her main complaint was with her left hand and she said she was left-handed. The problem with her right hand seemed to clear and is not an issue on appeal. She testified her employer sent her to see Dr. Stohler and Dr. Hayes and that after seeing them, she was told by her employer her problem was not work-related. She began seeing other doctors who were paid under a general health and accident insurance policy. After leaving Lookout Knitwear, she tried to find work which did not involve repetitive use of her hands and she did some part-time substitute teaching. She also went back to school and obtained an associate’s degree. She continued to have problems with her hand and shoulder and eventually had surgery on the left hand and numerous treatments by a chiropractor for her shoulder.

Medical Evidence

Dr. Dennis L. Stohler, an orthopaedic surgeon, saw Ms. Sansom on March 27, 1998 at the request of her employer. He testified by deposition and stated his final diagnosis was compressive neuritis in the left medial and ulnar nerve at the wrist; that he recommended she use wrist splints and prescribed medication; he advised her to look for other type work and imposed restrictions of not pushing, pulling or lifting over twenty pounds; and he stated her condition could be permanent but he could not say based on the limited visits he saw her.

Dr. Cauley W. Hayes, a hand surgeon, saw Ms. Sansom on May 21, 1998 at the request of the insurance company to obtain a second opinion. Dr. Hayes testified by deposition and indicated she had complaints of hand-arm pain and shoulder pain. All of his testing produced negative results for carpal tunnel syndrome injury. He stated since he could not find evidence of tendinitis or carpal tunnel injury which would warrant surgery, he referred her to Dr. Benson.

Dr. Suzanne E. Benson, a physical medicine and rehabilitation and electrodiagnostic doctor,

testified by deposition and stated she first saw the patient on December 12, 1998 and she was still complaining of left wrist pain and some shoulder pain; that from her examination and testing, she noticed her grip strength in her left hand was less than in the right hand; her final diagnosis was myofascial pain involving the muscles and osteoarthritis of wrists, elbows and shoulders; as to causation questions, she said the osteoarthritis was due to the aging process and that she did not have an opinion of whether the wrist problem was work-related but that the patient's history of getting better during the layoff period seemed to relate the problem to her work. The doctor also admitted she had signed a medical certificate for unemployment benefit purposes stating that her condition was work-related. During later examination, she explained that she intended to convey the thought that this condition was present while working but did not mean the cause of same was work-related.

Dr. Robert D. Mastey, a board certified orthopaedic surgeon specializing in hand and upper extremity problems, testified by deposition and stated he first saw the employee on July 23, 1999 and that she was still complaining of wrist and shoulder pain. He determined that she was suffering from a TFCC injury to her left wrist and said that TFCC means triangler fibrocartilage complex and that this cartilage was similar to that in the knee in that it helps redistribute weight in the wrist; that she had left pisotriquetral synovitis which involved two bones in the wrist that can get inflamed with use; and she also had left rhomboid muscle trigger point which involves one of the muscles in her back which connects the spine to the scapula. The doctor testified further that he performed surgery on her wrist on May 11, 2000, which improved her condition but did not completely resolve her hand symptoms; he was of the opinion that she had a 6 percent medical impairment to her left arm and that her work activities at Lookout Knitwear could have "greatly contributed" to cause all of her wrist problems. Finally, he was of the opinion her shoulder pain was due to the aging process and was not work-related and he referred her to Dr. Circolone, a chiropractor, for treatment of the shoulder problem.

Dr. Nicholas Circolone, the chiropractor, personally appeared in the trial court and testified he first saw Ms. Sansom on May 23, 2001, which was several years after she stopped working for Lookout Knitwear. In treating the shoulder problem, he stated he began some manipulations with certain injections and that this did not resolve the problem. He then began further manipulation under anesthesia and he testified the result was a break of the fibrous adhesion and that she was 99.9 percent pain free. He was of the opinion her work activity had caused the shoulder problem. However, because of the success of the treatment, he stated she had no medical impairment of her shoulder and was not in need of further treatment.

Findings of the Trial Court

The trial court found the wrist injury was compensable and awarded the employee 60 percent permanent partial disability to her left arm. Temporary total disability benefits were awarded for the period of time from May 11, 2000 to June 23, 2000. As to the shoulder injury, the court found the claim was compensable but there was no permanent injury. The court allowed the employee to recover the sum of \$4338.27 for reimbursement of medical expenses she had paid or was liable to pay. Also the court directed the award of periodic benefits was to be commuted to a lump sum.

Standard of Review

The case is to be reviewed *de novo* accompanied by a presumption of the correctness of the findings of fact unless we find the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2).

Issues on Appeal

A number of issues are being raised on appeal. It is contended the trial court was in error (1) in finding the arm and shoulder injuries were work-related, (2) in fixing the award of permanent disability at 60 percent to the left arm, (3) in allowing temporary total disability benefits, (4) in directing the periodic award of benefits be commuted to a lump sum, and (5) in directing the defendants to reimburse the employee for certain medical expenses.

Analysis: Compensable Claims Issue

_____ The trial court found both the arm and shoulder injuries were compensable. An award of 60 percent permanent partial disability was fixed to the left arm. As to the shoulder injury, the court ruled there was no permanent injury. Appellants contend the doctors they sent the employee to see did not find any evidence of an injury and/or permanent disability and that this evidence preponderates against the trial court's findings on the compensable issues.

In connection with the award to the left arm, we find that Dr. Stohler declined to comment on whether the employee had sustained a permanent injury since he only saw her for a short period of time. However, he did recommend she change jobs and imposed restrictions which to us infers her work activity was causing problems. Dr. Hayes examined her for a second opinion and found no evidence of injury but his findings were in direct conflict with the testimony of Dr. Mastey who performed surgery and actually saw the condition she was suffering from. The trial judge is clothed with the authority and discretion to decide which evidence is acceptable when it is in conflict. *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278 (Tenn. 1991); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 894 (Tenn. 1990). The award of 60 percent disability was based on evidence of a 6 percent medical impairment. Dr. Mastey testified the surgery improved her condition but did not resolve all of her symptoms. The extent of vocational disability is a question of fact to be determined from all the evidence, including lay and expert testimony. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 629 (Tenn. 1999). Anatomical impairment is a separate and distinct finding from vocational disability and is but one factor to be considered in determining the extent of vocational disability. *George v. Building Materials Corp.*, 44 S.W.3d 481 (Tenn. 2001); *Wilkes v. Resource Authority of Sumner County*, 932 S.W.2d 458 (Tenn. 1996). When fixing disability to a scheduled member, loss of use is the main objective. *Duncan v. Boeing Tenn. Inc.*, 825 S.W.2d 416 (Tenn. 1992). We do not find the evidence to preponderate against the award of 60 percent disability to the arm.

In connection with the finding of the trial court that the shoulder injury was compensable,

the only evidence supporting this finding of a temporary injury was the testimony of chiropractor Circolone. His opinion was in direct conflict with Dr. Mastey's opinion that the condition was due to aging. The record indicates Ms. Sansom had visited Dr. Circolone's office 115 times while under his care and that his many and numerous office notes did not contain any statement about any work activity and/or history of her work duties or her condition being work related. In examining the qualifications of each doctor, we find the evidence preponderates against the finding of the trial court that the shoulder injury was compensable and reverse this part of the ruling.

Analysis: Temporary Total Disability Issue

The trial court awarded the employee temporary total disability benefits for about a six weeks period of time. This began on May 11, 2000, the day of her surgery, and continued until June 23, 2000, the day the doctor removed her cast and gave her a removable splint. Appellants challenge this allowance of benefits and insist there should have been no award for temporary total because after leaving employment with Lookout Knitwear she had worked for another employer and that such reemployment as a matter of law terminated any temporary total benefits. The only authority cited for this position is the case of *Smith v. Asplundh Tree Expert Co.*, 2000 LEXIS 511 (Tn W.C. Panel Aug. 3, 2000).

As a general rule, temporary total disability benefits are allowed when it is established (1) the employee was totally disabled to work by a compensable injury, (2) that there was a causal connection between the injury and the inability to work, and (3) the duration of that disability. Temporary total benefits end when the employee becomes able to work at any employment permitted by the nature of his/her injuries or when the employee has reached maximum recovery or improvement. *Lock v. National Union Fire Ins. Co.*, 809 S.W.2d 483 (Tenn. 1991).

In the Smith case, the employee had injured his arm and voluntarily quit working during August 1992 because he said the work was aggravating his injury. He then worked for several different employers through 1994. The trial court allowed temporary total benefits from May 1992 (injury date) to November 1995, when he reached maximum medical improvement. The employee did not have any surgery and the essence of the holding in the Smith case was that the employee did not establish he was totally disabled for a temporary period of time.

The facts in the present case are different and are not controlled by the Smith case ruling. Ms. Sansom was terminated during October 1998 because her employer felt she could not perform any of the work available due to her condition. She testified that during the year 1999, she attempted to find employment but was not successful except for doing some substitute teaching in Hamilton County during the flu season. She finally came under the care of Dr. Mastey, who performed surgery on May 11, 2000. She does not contend she was totally disabled at any point in time prior to the surgical procedure. Once temporary total benefits begin, the rule states it shall cease when the employee is able to return to work or when the employee reaches maximum medical improvement. There is no evidence that either event occurred during the short period of time the trial court allowed these benefits. We find the evidence does not preponderate against the court's finding on this issue

and affirm the holding.

Analysis: Commuted Award Issue

The award of 60 percent disability to the left arm was commuted by the trial court to a lump sum award. Tennessee Code Annotated § 50-6-229 provides that a court in determining whether to commute an award of benefits, the court shall consider (1) whether the commutation will be in the best interest of the employee and (2) whether the employee has the ability to wisely manage and control the commuted award. *Edmonds v. Wilson County*, 9 S.W.3d 106 (Tenn. 1999). Lump sum awards are an exception to the general purposes of our workers' compensation law, and as such, commutation should occur only in exceptional circumstances, and not as a matter of course. *Henson v. City of Lawrenceburg*, 851 S.W.2d 809 (Tenn. 1993).

In our search of the record, we do not find where the employee ever requested that her award be commuted. Nor is there any evidence from the employee or her husband regarding their financial condition or her ability to wisely manage and control a commuted award. This part of the judgment is reversed as we hold it was error to commute an award without any application being made by the employee and without any evidence to establish the conditions set forth in the statute. However, it would appear that most of the periodic award will have accrued by the time this judgment becomes final.

Analysis: Medical Expenses Issue

The trial court awarded the employee the total sum of \$4338.27 for reimbursement of medical expenses. After the employee saw Drs. Stohler and Hayes, appellants determined she did not have a work-related injury and declined to furnish further medical treatment. The expenses in question were incurred when she sought medical treatment on her own and pursuant to seeing Dr. Benson, Dr. Mastey and Dr. Circolone. All of these medical expenses were processed and paid under a general health and accident insurance policy through the husband's employment and each item of expense is the amount paid by the employee after insurance benefits were paid.

Generally, medical charges and expenses by a physician or medical provider designated and authorized by the employer or workers' compensation insurer are presumed to be reasonable and necessary. *Crump v. B & P Const. Co.*, 703 S.W.2d 140 (Tenn. 1986). However, if a physician or provider is not authorized by the employer or workers' comp insurer, then those medical expenses may be recoverable but the employee must prove the charges were necessary and reasonable in amount. *William v. Delvan Delta, Inc.*, 753 S.W.2d 344 (Tenn. 1988).

Dr. Benson testified the medical expenses incurred in connection with her examination and treatment were necessary and reasonable in amount. Likewise, Dr. Mastey testified his medical

charges and the various hospital charges were necessary and reasonable. There was no evidence to

support the reimbursement on the prescription drugs in the sum of \$187.15 and the chiropractor payment of \$622.05 is disallowed because we have determined the shoulder condition was not work-related. Accordingly, we modify the ruling on this issue to reduce the award by \$809.20 thereby affirming a recovery in the sum of \$3529.07.

Conclusion

The judgment of the trial court is affirmed as to the award of 60 percent permanent partial disability to the left arm and the allowance of temporary total disability benefits; the judgment of the trial court finding the shoulder condition was a compensable claim and ordering the commutation of periodic benefits is reversed; and the judgment directing reimbursement of medical expenses is modified to allow a recovery of \$3529.07.

Costs of the appeal are taxed to the employer and insurance company.

ROGER E. THAYER, SPECIAL JUDGE

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STEPHANIE SANSOM V. LOOKOUT KNITWEAR, LLC, ET AL.
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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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the employer, Lookout Knitwear, LLC., and insurance company, The Hartford Insurance Company, for which execution may issue if necessary.