IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT JACKSON

FILED

January 23, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

JANICE BRUCE,	)	
	)	NO. 02S01-9604-CV-00042
Plaintiff-Appellee,	)	
	)	
v.	)	Henry County Circuit
	)	NO. 180
TECUMSEH PRODUCTS COMPANY,	)	
	)	Honorable Creed McGinley,
Defendant-Appellant,	)	Judge

FOR APPELLANT:

David W. Hessing
117 East Wood Street
Paris, Tennessee 38242

FOR APPELLEE:

Robert T. Kenton III
346 East main Street
Huntingdon, Tennessee 38344

MEMORANDUM OPINION

Members of Panel

Lyle Reid, Associate Justice, Supreme Court
F. Lloyd Tatum, Special Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED

Tatum, Judge

MEMORANDUM OPINION

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 of findings of fact and conclusions of law.

This is an appeal by the defendant/employer, Tecumseh Products Company, from a judgment in favor of the plaintiff/appellee, Janice Bruce, awarding workers' compensation benefits based on 45% permanent partial disability to the body as a whole. The judgment also held the defendant responsible for medical expenses incurred by plaintiff for the care and treatment provided by Dr. Terry O. Harrison and Dr. Ray W. Hester, physicians not selected by the defendant.

The defendant presents three issues for review:

> 1. Did the trial court err in finding that the limitation of two and one-half (2-1/2) times the anatomical rating set out in T.C.A. Section 50-6-241(a)(1) did not apply to this cause?
>
> 2. Does the evidence preponderate against the trial court's finding that Plaintiff sustained a forty-five (45%) percent permanent partial disability to the body as a whole?
>
> 3. Did the trial court err in finding that Tecumseh should be responsible for the medical expenses incurred by Plaintiff for the care and treatment provided by Dr. Terry O. Harrison and Dr. Ray W. Hester?

Before addressing the issues, we will discuss the evidence found in the record.

The plaintiff is a lady thirty-one years of age at the time of trial.

She completed high school and before her employment for the defendant, she worked as a cashier in a hardware store and did office work. She worked for the defendant for nine years as a production worker. Her work required her to pick up motors, weighing from twenty to forty pounds each, placing them on a machine and then placing the motors on the production line. She picked up from three hundred and fifty to seven hundred motors per day, depending on which line she was working. It is not entirely clear, but apparently she was required to lift each motor twice.

In September, 1993, the plaintiff began experiencing pain in both arms, numbness in both hands and pain in her right shoulder and neck. She testified that she reported her condition to her employer who offered her a choice of physicians. She selected Dr. Jim Robertson who gave her medication but she did not improve. Dr. Robertson then sent her to Dr. Dwight Norman for treatment. X-rays of the shoulder were normal and Dr. Norman then referred her to Dr. Michael Cobb.

Dr. Cobb treated the plaintiff for a period of time and she was then sent to Dr. Robert H. Miller, an orthopedic surgeon with Campell's Clinic in Memphis, Tennessee. Dr. Miller desired a nerve conduction study but the employer sent the plaintiff to Dr. Ron Bingham of Jackson, Tennessee to conduct these tests. The plaintiff testified that the defendant refused her request to continue to see Dr. Miller.

The plaintiff was then sent to Dr. Glenn Barnett, a neurosurgeon with Semmes Murphy Clinic in Jackson, Tennessee, after Dr. Bingham had diagnosed carpel tunnel syndrome in both arms. Dr. Barnett performed surgery on both arms in May and June, 1994. She testified

that she continued to have pain with her neck and shoulders, as well as her arms and hands.

Dr. Barnett released the plaintiff for work on June 28, 1994, and she worked until October, 1994. On September 20, 1994, she returned to Dr. Barnett for further treatment and he advised her that he had nothing further to offer to her. The defendant placed the plaintiff on group disability from October 24, 1994, through April 2, 1995.

On April 3, 1995, she returned to her work and quit after two days. She testified that there was no job that she could do for Tecumseh. She testified that she quit because she couldn't do the lifting and straining due to her injuries.

At the time of trial, she was working part time as a teller at McKenzie Banking Company. She testified that her neck, shoulders and arms continued to hurt and that both arms are "real weak" but her hands are not numb since her surgery. She testified that if offered a full time job at the bank, she intends to attempt to do the work.

The plaintiff testifies that she walks three miles every other day, mows the yard with a riding lawn mower, cooks, washes clothes and dishes and drives a car with her arms down. She testified that she cannot do her work as a teller without hurting in her neck, shoulders and arms. She testified that she cannot help her husband wash the car, play frisbee with the children or do anything using her arm and neck muscles. When she does anything stressful, she must go to bed.

The plaintiff's husband corroborated her testimony, adding that

his wife is mentally depressed because she is unable to do things she could do previously. He massages her neck and back with a massaging machine nearly every night. Before this difficulty came on, she was a very cheerful person.

By stipulation, reports and records of doctors were submitted in evidence in lieu of their testimony. No doctor testified either by deposition or oral testimony but the reports and records of eight doctors were submitted.

We will not attempt to burden this opinion with detail discussion of all of these medical reports. In summary, Dr. Robertson thought that she had a muscle strain of the shoulder. His associate, Dr. Norman, made x-rays of the shoulder which were normal and referred the plaintiff to Dr. Cobb. Dr. Cobb's impression was right shoulder strain with scapular snapping syndrome and after treating her with medication and physical therapy, he referred her to Dr. Miller. Dr. Miller diagnosed her as having fibromyalgia and ordered nerve condition study which was done by Dr. Ron Bingham. Dr. Bingham's testing resulted in positive findings of carpel tunnel syndrome in both hands and wrists.

The plaintiff was then referred to Dr. Glen Barnett who performed surgery on both arms. Dr. Barnett was of the opinion that the plaintiff sustained 5% anatomical impairment to each arm. Apparently he found no permanent impairment because of the difficulty in the plaintiff's neck and shoulder area, stating that these difficulties "are difficult to completely define."

After she was discharged by Dr. Barnett and the defendant refused further medical treatment, the plaintiff went to Dr. Terry O. Harrison, her family physician. Dr. Harrison was of the opinion that the plaintiff's pain in the back, neck and shoulders is secondary to the repetitive motion of her job. He referred her to Dr. Ray W. Hester.

Dr. Hester opined June 20, 1995, that plaintiff had reached maximum medical improvement and had sustained a 10% impairment to the body as a whole as a result of her neck, hands and arms. His diagnosis was chronic pain. He placed restrictions of no bending from the waist while standing, no working with her hands out in front of her and no repetitive lifting over 3-4 pounds. He stated that she had chronic tendinitis.

Under the first issue, we must determine whether the limitations of two and one-half times the anatomical rating as set in T.C.A. § 50-6-241(a)(1) applies. That code section provides:

> 50-6-241. Maximum permanent partial disability award for causes arising on or after August 1, 1992 - Reconsideration of industrial disability issue.
>
> (a) (1) For injuries arising on or after August 1, 1992, in cases where an injured employee is eligible to receive any permanent partial disability benefits, pursuant to § 50-6-207(3)(A)(i) and (F), and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is two and one-half (2-1/2) times the medical impairment rating determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent impairment (American medical Association), the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community. In Making determinations, the 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.

The defendant argues that since the plaintiff returned to work from June 28, 1994, to October 24, 1994, and two days in April, 1995, before she terminated her employment, the above code section applies.

The trial judge in his findings, stated that some of the doctors released her to return to her job "because of the carpel tunnel" he also observed that there was indications from Dr. Miller and other doctors "that essentially she needed to find some other line of work because of her condition." The trial court found that "there was not a meaningful return to work, that, quite simply, this lady was not capable of performing her employment duties there at Tecumseh."

T.C.A. § 50-6-241(a)(1) is not construed in any published cases. In our opinion, this code section is not applicable when an employer offers an employee a job equal to or greater than the wage the employee was receiving at the time of injury, and the employee is unable to sustain such employment because of the injury. On the other hand, an employee cannot avoid the effect of this code section by refusing an offer of employment which he or she is able to do. An unsuccessful trial by an employee to resume employment will not invoke the provisions of the above code section when it later develops that the employee cannot continue the employment because of the accidental injury.

This code section must be construed in *pari materia* with T.C.A. § 50-6-241(a)(2):

> In accordance with this section, the courts may reconsider upon the filing of a new cause of action the issue of industrial disability. Such reconsideration shall examine 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. Such reconsideration may be made in appropriate cases where the employee is no longer employed by the pre-injury employer and makes application to the appropriate court within one (1) year of the employee's loss of employment, if such loss of employment is within four hundred (400) weeks of the day the employee returned to work. In enlarging a previous award, the court must give the employer credit for prior benefits paid to the employee in permanent partial disability benefits, and any new award remains subject to the maximum established in subsection (b).

When, as in this case, the employee is at the time of trial and at the time of filing suit no longer employed and comes within the time frame of § (a)(2), there is no logic or purpose in entering judgment within the two and one-half times medical impairment limit of (a)(1), then entertaining another proceeding pursuant to (a)(2). It is the preferred practice to dispose of the matter in one proceeding as the able trial judge did in this case. All of the proof was before him to enable him to determine whether the plaintiff was physically capable of performing the duties of her pre-injury employment and to render judgment accordingly.

The plaintiff's testimony that she was unable to do this work is abundantly corroborated by the medical proof. We find that the trial court's holding that the plaintiff was not capable of performing her duties at Tecumseh is supported by a preponderance of the evidence. The defendant argues that the trial court's finding is refuted by the fact that the plaintiff applied for a job as a bank teller before terminating her employment. While the plaintiff testified that even this work was some what painful, we must observe that this type work is not nearly as

demanding physically as the employment with the defendant. The first issue is without merit.

The defendant argues that the evidence preponderates against the trial court's finding that plaintiff sustained a 45% permanent partial disability to the body as a whole.

Appellate review is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. T.C.A. §50-6-225(e)(2). This tribunal is required to conduct an independent examination of the evidence to determine where the preponderance lies. *Wingert vs. Government of Sumner County*, 908 S.W.2d 921 (Tenn.1995).

Where the trial judge has seen and heard witnesses, especially if issues of credibility and weight to be given oral testimony are involved, on review considerable deference must still be accorded to those circumstances. *Townsend vs. State*, 826 S.W.2d 434 (Tenn.1992). However, this tribunal is as well suited to gauge the weight, worth and significance of deposition testimony as the trial judge. *Seiber vs. Greenbriar Industries, Inc.*, 906 S.W.2d 444 (Tenn.1995). This is also true with respect to medical reports and records when they are in evidence by stipulation. As stated, the medical proof in this case was by copies of medical records and reports. All of the other evidence was by oral testimony.

We find that the plaintiff not only had permanent partial disability

to both arms as a result of the carpel tunnel syndrome but she also suffered permanent partial disability in her neck and shoulder area. The arms are scheduled members but the neck and shoulders are not scheduled so disability to this area is applied to the body as a whole. The defendant does not insist that the disability be limited to the arms and does not complain of the trial court's finding of disability to the body as a whole. We have carefully reviewed the entire record and find that the preponderance of the evidence establishes that the plaintiff sustained 45% permanent partial disability to the body as a whole.

In the third issue, the defendant states that the trial court erred in finding that it should be responsible for medical expenses incurred by plaintiff for the care and treatment provided by Dr. Terry O. Harrison and Dr. Ray W. Hester.

Under T.C.A. § 50-6-204 the employer is required to furnish free of charge to the employee all medical expenses. The statute requires that the employer select three physicians and that the employee accept the services of one of them.

The plaintiff accepted the services of all physicians referred to her by the defendant. The last physician that she saw was Dr. Barnett who performed surgery on her arms and after treating her advised her that there was nothing else that he could do for her. Her neck and shoulders were still giving her pain and impairment as well as her arms. After being discharged by Dr. Barnett, she requested to see another doctor but this request was refused by defendant. She then consulted her family doctor, Dr. Ray W. Hester who referred her to Dr. Terry O. Harrison. Further treatment from these doctors did not improve the

plaintiff's condition.

The evidence is undisputed that after her discharge by Dr. Barnett and before seeing her family doctor, the plaintiff gave notice that she desired further treatment in compliance with T.C.A. § 50-6-204. See *Greenlee vs. Care Inn of Jefferson City*, 644 S.W.2d 679 (Tenn.1983). The employer refused further medical treatment. The question is whether the plaintiff was justified in seeking further treatment. *Pickett vs. Chattanooga Convalescent and Nursing Home, Inc.*, 627 S.W.2d 941 (Tenn.1982).

We think that the preponderance of the evidence establishes that this lady was justified in seeking further treatment. She was still having much difficulty with her arms, neck and shoulder. A second or further opinion as to whether any other treatment would be beneficial is certainly a justified and rational desire of any person so situated as the plaintiff. As it turned out, the effort of these doctors did not materially assist the plaintiff but she did not know this at the time she sought the further treatment. We find this issue in favor of the plaintiff.

It results that the judgment of the trial court is affirmed. Costs are adjudged against the defendant/appellant.

_____
F. LLOYD TATUM, JUDGE

CONCUR:

_____
LYLE REID, ASSOCIATE JUSTICE

_____

JOE C. LOSER, JR., JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

JANICE BRUCE,	)	HENRY CIRCUIT
	)	NO. 180
Plaintiff/Appellee,	)	
	)	Hon. Creed McGinley,
vs.	)	Judge
	)	
TECUMSEH PRODUCTS COMPANY,	)	NO.02S01-9604-CV-00042
	)	
Defendant/Appellant.	)	AFFIRMED.

FILED

January 23, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

JUDGMENT ORDER

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 Appellant, and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 23rd day of January, 1997.

PER CURIAM

(Reid, J., not participating)