IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT JACKSON

FILED

March 4, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

CYNTHIA J. BOWERS LOGUE,	)	
	)	NO. 02-S-01-9603-CH-00030
Plaintiff-Appellee,	)	
	)	
v.	)	SHELBY CIRCUIT
	)	NO. 48290-6 T.D.
LEAF, INC. and AETNA LIFE and CASUALTY INSURANCE COMPANY,	)	HON. GEORGE H. BROWN, JR.
	)	JUDGE
Defendants-Appellant,	)	

FOR APPELLANT:

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FOR APPELLEE:

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MEMORANDUM OPINION

Members of Panel

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

REVERSED IN PART

MODIFIED IN PART
OTHERWISE 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.

The defendants/appellants Leaf, Inc. and its insurance carrier, Aetna, present issue: (1) that the court erred in awarding the plaintiff permanent disability of 80% to the right upper extremity; (2) that the court erred in awarding permanent disability benefits in a lump sum.

In an informal manner, the plaintiff/appellee, Logue, presents issue that the trial court erred in limiting the defendants' liability for future medical expense to a period of eighteen months from the date of trial and restricting future medical expenses to certain doctors or groups specified in the judgment.

The judgment must be modified and partly reversed for the reasons and to the extent hereinafter specified.

The employee, Cynthia J. Bowers Logue, developed tendinitis in her right elbow, which manifested itself about January 17, 1987. She had been working for her employer, Leaf, for about five years. Her work required constant bending of both elbows while keeping up with a machine. She was referred to Dr. James McAfee, the company doctor, and he kept her from working from January 29, 1987, to March

4, 1987, when she went back to work. She continued to work until April 3, 1987, when she left due to pain in her right arm.

On April 15, 1987, she obtained a job for another company answering the telephone. She quit this job when Leaf called her back to work on July 10, 1987. She continued to work for Leaf this second period from July 10, 1987, to August 4, 1987, when severe pain resumed. Dr. McAfee referred the employee to Dr. Owen Tabor, an orthopedic surgeon who did a Bosworth surgical procedure on the right arm on November 3, 1987. Dr. Tabor released her to return to work on April 2, 1988, but Dr. McAfee, the company doctor, would not release her for work. She resumed work for other companies, including jobs as a desk clerk for a motel, delivering pizzas in an automobile, cashier in a book store and cafeteria and other similar jobs. Even though she did not use the right elbow very much, she had to quit all of these jobs because of extreme pain. It pained her to write a check with her right hand and to drive an automobile. She worked on these various jobs until September, 1994, and, according to her testimony, the pain continued to become progressively worse until 1987. She testified that she had to work and endured the pain from necessity.

When Dr. McAfee refused to permit the employee to return to work on April 2, 1988, as directed by Dr. Tabor, the employer placed her on leave of absence. Dr. McAfee informed the employer that if she continued to work, she would develop a permanent impairment to the right arm.

The plaintiff testified that she could not remove pans from the oven and it was necessary for her to put them in at a time when they

would be ready for removal when her husband came home. The evidence reflected that she could not turn the wheels on a riding lawn mower and that at times she could not comb her hair due to pain in the right arm. Her husband testified that when she returned to her home after working on the job she had after leaving Leaf, she would come home crying.

On February 15, 1994, she first saw Dr. Tewfik E. Rizk, director of the Pain and Arthritis Center at St. Joseph Hospital in Memphis. He had a specialty in chronic pain and arthritis problems.

Dr. Rizk testified that she had calcific tendinitis or calcific epicondylitis, because recent x-rays showed calcification. He testified that she had a 10% permanent impairment to the right arm according to the American Medical Association Guides to the Evaluation of Permanent Impairment. He explained:

> Functionally, she has problems to use that arm to make a living in any labor force. So although the anatomical impairment here of the joint is 10%, functionally she is not able to function. That would be a major problem.

He testified that she could lift up to 20, 25 pounds "once or twice." She could dress and undress, comb her hair and drive her car. He testified that in addition to the calcification which was seen by x-ray, there was swelling of the soft tissue of the elbow, indicating post-traumatic degenerative joint disease. These are objective symptoms. Dr. Rizk testified by deposition.

By stipulation, medical records of Dr. Riley Jones and Dr. Owen Tabor were read into evidence instead of testifying.

Dr. Tabor, made an entry on 3-21-88 that the employee demonstrated a full range of motion with excellent grip strength. He indicated that she had reached maximum improvement and that there was no basis for further treatment. He discharged her, noting that she may resume "full activities as consistent with her comfort." March 13, 1988, apparently was the last time that Dr. Tabor saw the employee. On 5-31-89, he made a note "estimate 0% (none) impairment rating."

Dr. Jones was treating the employee for an injury to the upper neck and back. These injuries were sustained in an automobile accident. During the course of the treatment, she complained on April 7, 1987, of pain in the right arm. It does not appear from the medical record that Dr. Jones attempted to treat her for this pain as he indicated that she was being seen by other doctors for this. No specific treatment or examination was mentioned. He continued to treat her for the neck and back difficulty and on June 27, 1989, made a notation that "She has full range of motion. She is doing very well, having no real problems from an orthopedic standpoint. She will be seen on a PRN basis, no permanent impairment." It does not appear that the June 27, 1989, notation had reference to the plaintiff's arm. This notation apparently was with reference to her neck and back.

We first address the appellants' issue stating that the trial court erred in awarding permanent partial disability of 80% to the right upper extremity.

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 of the evidence lies. *Wingert vs. Government of Sumner County*, 1908 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 situated 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). In the same context, we hold that this tribunal is as well situated as the trial judge to gauge the weight, worth and significance of medical records when used as evidence in lieu of testimony. As stated, Dr. Rizk testified by deposition and the medical records of the other doctors were read into evidence by stipulation.

First, we agree that the trial judge erred in rating the disability of the employee to her right upper extremity. The arm is a scheduled member but the "upper extremity" is not. The workers' compensation statute makes no reference to an "extremity". This is a medical term and includes the shoulder. The shoulder is not a scheduled member and an injury to the shoulder is rated to the body as a whole. See *Continental Insurance Companies vs. Pruitt*, 541 S.W.2d 594 (Tenn.1976).
The employee's injury was restricted to the right arm and the award must be based upon disability to the arm. It is obvious that the trial judge meant that the disability rating applied to the arm and not to the

right upper extremity; however, these two terms are not synonymous.

We have carefully reviewed the entire record and find that the preponderance of the evidence does not support the award based on 80% permanent partial disability to the right arm. We find that the preponderance of the evidence establishes that the employee has 65% permanent partial disability to the right arm as a result of this injury. The judgment is modified accordingly.

In the second issue, the employer stated that the court erred in awarding any permanent disability benefits in a lump sum. We agree.

T.C.A. §50-6-229 requires that before ordering an award to be paid in a lump sum, the trial court must find that the commutation will be in the best interest of the employee, and such court shall also consider the ability of the employee to wisely manage and control the commutated award. There was no evidence or finding that these two factors existed. Therefore, this portion of the judgment is reversed and any unaccrued compensation must be paid periodically. However, the portion of the judgment admitting the attorney fees to be paid in a lump sum is affirmed.

The employee in its issue states that the trial court erred in limiting the liability of the defendants for medical expenses to a period of eighteen months and naming specific doctors who may be consulted. It is now well settled that an employee is entitled, under the provisions of Tenn. Code Ann. 50-6-204, to recover any reasonable and necessary medical expenses in the future which may be incurred

as a result of a compensable injury. See *Lindsey vs. Strohs Companies, Inc.*, 830 S.W.2d 899 (Tenn.1992) and the cases therein cited. It is also settled that the employer may designate the treating physicians. The trial judge has no discretion to limit the time in which the employee may receive medical treatment at the employer's expense. This issue is sustained and the portion of the judgment attempting to make these limitations as to medical expenses is reversed.

The judgment of the trial court is reversed in part and modified in part. It is affirmed as corrected.

Costs are adjudged against the appellants.

_____

F. LLOYD TATUM, JUDGE

CONCUR:

_____

LYLE REID, ASSOCIATE JUSTICE

_____

JOE C. LOSER, JR., JUDGE

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	)	
	)	
Appellants.	)	

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JUDGMENT ORDER

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well-taken and should be denied; 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 on appeal are assessed to the appellant.

IT IS SO ORDERED this ____ day of _____, 1996.

PER CURIAM

Reid, J. - Not participating.