IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE FEBRUARY 1997 SESSION

MADIA J. BLANKEN,	)	JEFFERSON CIRCUIT
	)	
Plaintiff/Appellee	)	NO. 03S01-9607--CV-00081
	)	
v.	)	BEN W. HOOPER, II
	)	JUDGE
PHILIPS CONSUMER ELECTRONICS CORPORATION,	)	
	)	
Defendants/Appellants	)	

For the Appellant:

Arthur G. Seymour, Jr.
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For the Appellee:

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M E M O R A N D U M O P I N I O N

Members of Panel:

Justice E. Riley Anderson
Senior Judge John K. Byers
Special Judge Roger E. Thayer

AFFIRMED

BYERS, Senior Judge

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.

Plaintiff injured her left arm at work on February 28, 1992. When surgery did not improve the condition or decrease her pain she became markedly depressed.

The trial court found that plaintiff's depression was related to her arm injury and awarded her 100 percent permanent total disability based on the two conditions.

We affirm the judgment of the trial court.

Plaintiff injured her left arm gradually at work in February, March and April of 1992. She was left hand dominant and her work required that she use a staple gun repetitively. Dr. Joseph C. DeFiore, Jr., orthopedic surgeon, treated her left elbow and shoulder from April 13, 1992 through January 24, 1994.

When Dr. DeFiore first saw plaintiff, he found tenderness over the left lateral epicondyle area and in her left shoulder, with no specific abnormalities on x-ray. He diagnosed tendinitis of the left shoulder and lateral epicondylitis, or tennis elbow. Plaintiff also reported being extremely depressed, primarily because of the elbow problem. A work-related low back injury contributed to her depression, but we do not consider that injury, which was non-suited at trial.

Dr. DeFiore advised plaintiff to avoid use of a staple gun at work, which he thought was causing some of her irritation, gave her a TENS unit for pain control and prescribed exercises. Plaintiff returned to work with the limitation that she do only nonrepetitive, non-overuse work with the left upper extremity. The work she was assigned, though much less harmful according to Dr. DeFiore, still required her to constantly reach with her left hand and arm in order to spray television cabinets with an air pressure gun.

Plaintiff continued to have pain in the elbow and therefore had cortisone injections on three occasions, with no improvement. Bone scan found arthritis in the shoulder joint.

Plaintiff was deposed by defendant on October 19, 1992, and it was apparently here that both parties' counsel learned from plaintiff about antidepressant medications given to her by her family physician on a continuing basis since her first

work-related [back] injury in 1991. Plaintiff's counsel requested defense counsel to provide a list of psychologists or psychiatrists, and defense counsel replied, "She'll have to go back to one of the family doctors, or one of the original panel doctors and they'll make the referral." Defense counsel further advised, "Just see Dot. She'll set up an appointment with one of them." Plaintiff testified that she asked Dot [company nurse] for a referral to a psychiatrist and Dot refused. Doug Linebarger, Human Resources Manager, testified that Dot would not have had authority to make such a referral. Moreover, we note that plaintiff had been receiving antidepressant medications from an employer-approved family practitioner who had never felt it necessary to refer her to a psychologist or psychiatrist.

When plaintiff saw orthopedic surgeon Dr. Sidney L. Wallace three months later (December 8, 1992) for alleged work-related back problems, he found that in addition to her back problems, she was "quite depressed . . . slightly tearful . . . very slow and lethargic in her movement . . . and speech . . . obvious difficulty with short term memory . . . " He told plaintiff she needed to consult a psychiatrist about the depression.

On August 2, 1993 Dr. DeFiore performed surgical release of the muscles and annular ligament and removal of the "bump of bone" off the side of her elbow ("tennis elbow procedure"). Postoperatively, plaintiff started an exercise and strengthening program. She continued to complain of pain in the elbow and the shoulder. Dr. DeFiore placed her on anti-inflammatory medication, which she found she could not take because of stomach complications. Therefore, pain relief was not obtained.

By November, 1993, she had reached maximum medical improvement of the elbow, but had continuing pain in both the elbow and the shoulder. X-ray showed post-surgical arthritic changes in the shoulder joint. Dr. DeFiore referred her to his partner, Dr. Mathien, who specializes in shoulder injuries, for evaluation.

Dr. Mathien saw plaintiff on December 17, 1993 and opined she had some rotator cuff tendinitis and impingement syndrome but he did not feel there was any surgical remedy at that time. He gave her a steroid injection and told her there was nothing further he could do.

Dr. DeFiore last saw plaintiff on January 24, 1994. He opined she had reached maximum medical improvement as to the left arm and ordered a functional capacity evaluation. He opined that any type of repetitive activity, especially with the shoulder, should be avoided. He limited her lifting activities to occasionally 11 pounds, frequently eight pounds, and continuously four pounds. He recommended she have a one-handed type of job, mainly using her right hand. He assessed seven percent impairment of the left upper extremity based on the AMA Guides to the Evaluation of Permanent Impairment.

Plaintiff first saw Dr. Martin Gebrow, psychiatrist, on November 8, 1993. At trial, she testified that she had never seen a psychiatrist until . . . "Well, I got some depressed after I hurt my back, and then after I hurt my arm and seeing I wasn't going to be able to use my arm, I was threatening to kill myself."

Dr. Gebrow's record of plaintiff's first office visit indicates she was having crying spells, poor sleeping, decreased ability to concentrate, thoughts of suicide, poor memory, and having to push to get anything done. He diagnosed major depression caused by unremitting chronic pain from work-related injuries. Her depression was increased by the fact that she could not work, which caused her financial condition and her self-esteem to deteriorate.

Dr. Gebrow continued seeing plaintiff up to the time of trial, and opined that she was actually getting worse, not better, because of the unremitting pain, the stress of having the employer refuse to pay her medical bills, and the prospect of an upcoming trial. When he last saw her before trial, he noted chronic pain, depression with suicidal ideation, decreased intellectual functioning, disorganization of thought and impaired ability to concentrate due to depression and anxiety. He opined she was Class IV, Markedly Depressed, that she would continue to be depressed and require treatment, and that she would improve only if her pain decreased. He opined her prognosis was poor and she was totally and permanently disabled from work.

The trial court found plaintiff to be permanently and totally disabled as a result of the left arm injury and psychiatric condition.

The employer appeals, raising two issues:

> I. THE MEDICAL EVIDENCE OF A MENTAL/EMOTIONAL IMPAIRMENT COULD NOT SUSTAIN AN AWARD FOR DISABILITY BENEFITS UNDER THE TENNESSEE WORKERS' COMPENSATION LAW.
>
> II. THE TRIAL COURT ERRED IN AWARDING THE COSTS ASSOCIATED WITH TREATMENT BY DR. GEBROW.

Our review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2). *Stone v. City of McMinnville,* 896 S.W.2d 584 (Tenn. 1991).

The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. *Worthington v. Modine Mfg. Co.,* 798 S.W.2d 232, 234 (Tenn. 1990).

Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. *See Humphrey v. David Witherspoon, Inc.,* 734 S.W.2d 315 (Tenn. 1987). Plaintiff's testified that she did not return to work after her shoulder surgery because she was unable to work. The employer's Human Resource Manager testified that if plaintiff had attempted to return to work he would have given her work she could do. He stated that the company's policy is to find work that an injured worker can do on a trial basis, so that she can earn income and have social contacts, thereby hopefully improving her physical condition and her depression. Although acknowledging that the employer would not have allowed her to do "half work" indefinitely, he testified that they would have worked with her to improve the situation. The trial judge found plaintiff to be "a 22-year honest employee of the defendant." He found her lay testimony to be credible and that what she told her psychiatrist was consistent with the medical reports of her other doctors.

The medical evidence of disability was presented by plaintiff through three depositions and copies of medical records. Defendant presented no medical evidence.

Dr. DeFiore's deposition addressed only plaintiff's arm injury because that is the only condition he treated. He assessed 7 percent permanent partial disability to the left upper extremity according to the AMA Guides.

Dr. Gebrow was deposed twice, on January 5, 1995 and again on June 28, 1995. At the first deposition he opined that plaintiff was markedly depressed but he declined to assess permanent total disability, stating that her psychiatric condition would improve if "we" can get rid of the symptoms and pain from her injuries.

When he was deposed six months later, Dr. Gebrow opined that plaintiff had not improved and he thought she was probably "as good as she'll get." Her pain was worse, and she complained bitterly about it. She could not get pain relief because she could not take non-steroid anti-inflammatory medication. Her depression was worse and she was becoming more reclusive. She had more frequent crying spells, could not sleep, and in his office was quiet and non-spontaneous. He felt her prognosis was poor. He opined she was permanently and totally disabled.

Where the expert medical testimony is presented by deposition, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. INA,* 884 S.W.2d 446 (Tenn. 1994).

Our independent review of the three medical depositions reveals that the plaintiff was indeed markedly depressed with a poor prognosis for recovery. Defendant has provided absolutely no expert medical proof to rebut Dr. Gebrow's assessment to that effect. Therefore, the plaintiff has proved, by a preponderance of the lay evidence, and by all of the unrebutted medical evidence, that she is totally and permanently vocationally disabled.

Defendant argues that the costs associated with the treatment by Dr. Gebrow is not compensable because he was not an approved physician. The evidence is abundant that plaintiff needed psychiatric care, that an approved orthopedic surgeon directed her to get such care, that she told the company nurse she needed the care, and that the company nurse refused to, and in fact had no authority to, make the

necessary referrals. We agree with the trial court that plaintiff met her responsibility under TENN. CODE ANN. §50-6-204 and the defendant failed to meet its responsibility. Therefore the trial court did not err in awarding costs and future medical expenses for plaintiff's treatment by Dr. Gebrow.

We affirm the judgment of the trial court.

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John K. Byers, Senior Judge

CONCUR:

_____
E. Riley Anderson, Justice

_____
Roger E. Thayer, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

MADIA J. BLANKEN,	)	JEFFERSON CIRCUIT
	)	No.12,278
Plaintiff/Appellee,	)	
	)	
vs.	)	Hon. Ben Hooper, II,
	)	Judge
	)	
	)	
PHILIPS CONSUMER ELECTRONICS CORPORATION	)	
	)	
	)	
Defendants/Appellantss.	)	03S01-9607-CV-00081

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Worker' Compensation 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 act 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 taxed to the defendants/appellants and surety, Frantz, McConnell & Seymour for which execution may issue if necessary.

04/23/97