IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE

STELLA LOUISE FLATT, Plaintiff/Appellee v. OSHKOSH B'GOSH, INC. and TRAVELERS INSURANCE COMPANY Defendants/Appellants	JACKSON COUNTY CIRCUIT No. 0S01-9608-CV-00168 HON. BOBBY CAPERS, JUDGE

FILED

August 28, 1997

Cecil W. Crowson
Appellate Court Clerk

FOR THE APPELLANTS:

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FOR THE APPELLEE:

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MEMORANDUM OPINION

MEMBERS OF PANEL:

FRANK F. DROWOTA,III, ASSOCIATE JUSTICE, SUPREME COURT
WILLIAM H. INMAN, SENIOR JUDGE
WILLIAM S. RUSSELL, RETIRED JUDGE

AFFIRMED AS MODIFIED RUSSELL, SP. J.

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated Section 50-6-225 (e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The plaintiff suffered bilateral carpal tunnel syndrome as the result of working for years at a sewing job for the defendant employer. The trial judge held that she should recover compensation for permanent partial vocational disability in the amount of 80% to each arm.

The only issue presented upon this appeal is whether or not the percentage of disability awarded is appropriate under the evidence.

The plaintiff was 49 years old at the date of this trial. She worked in the garment industry continuously since her graduation from high school, and is the mother of two adults. She worked for the defendant company from January of 1989 through May of 1994. She first sought medical attention from a Dr. Hudson for her upper extremity pain in 1993. She subsequently saw an orthopaedic surgeon, a Dr. Barnes; and subsequently was sent to another orthopaedic surgeon, Dr. Paul A. Abbey, M.D. We have by deposition only Dr. Abbey's testimony.

The plaintiff underwent a protocol of physical therapy for two or three weeks, and then returned to work doing a job requiring a reduced use of her hands and wrists. Some lifting was required and this exacerbated her pain. She sought more treatment from Dr. Abbey, then returned to work a second time, working only four hours a day. She subsequently quit her job. She testified that her condition worsened after she was no longer working at the garment factory. She has not sought other employment, and opined that she would never again be able to work in a garment factory. She quit work in May of 1994 and did not go back to Dr. Abbey or any other doctor until April of 1995, and that visit was for evaluation for purposes of the trial.

Plaintiff does sewing at home on craft items. Her housework she testified, is difficult. She contends that her condition has continued to worsen since she quit work. She has not sought other work.

Plaintiff presented Frank Edwards, a counsellor in vocation and rehabilitation, who testified as a vocational expert. He based his evaluation upon the medical documentation that was provided to him, including the deposition of Dr. Paul Abbey, and what he learned in one interview of the plaintiff. He opined that "the likelihood of her sustaining any type of significant gainful employment is marginal", and estimated her vocational disability from 85 to 95 percent. He saw her for 45 minutes to an hour, administered no personality or intelligence or other tests.

Dr. Paul Arthur Abbey, M.D., orthopaedic surgeon who specializes in hand surgery, first saw the plaintiff on December

20, 1993. Her complaints were pain, numbness and stiff fingers involving both hands. She had previously been seen by a Dr. Barnes, who had recommended surgery; and she was sent to Dr.Abbey in response to her request for a second opinion. Dr. Abbey's diagnosis was moderate right carpal tunnel syndrome and moderate left carpal tunnel syndrome.

Dr. Abbey saw her again on January 31, 1994. Her condition was substantially the same. Dr. Abbey recommended light duty; consisting of no grabbing over ten pounds, minimal wrist motion, rotation of jobs and continuation of the use of splints.

Dr. Abbey saw her again on February 21, 1994. She was not working at that time. Her pain had improved but her "tingles" had not. Dr. Abbey prescribed physical therapy.

He next saw her on March 14, 1994. Her wrist and forearm discomfort had improved but her "tingles" persisted. He opined that she had reached maximum medical improvement. His impression was that she had resolving right wrist tendinitis and bilateral carpal tunnel syndrome (right greater than left). He suggested that she return to work at that time, with her hours and duties restricted.

Dr. Abbey saw her on May 11, 1994, after she had returned to work at a new assignment and for shorter hours. She was having pain. Dr. Abbey on this occasion made her prior restrictions permanent. He had previously, on April 13, 1995, given her a 10 percent impairment to each upper extremity, due to entrapment neuropathy of the median nerve in both wrists. He also testified

that if she had surgery "she may even have a 0 percent impairment rating, if the tingles go away". Dr. Abbey was of the opinion that surgery would in all likelihood improve the plaintiff's condition. Directly quoting Dr. Abbey: "By history, it sounds like she would be a good candidate, but Ms. Flatt has not opted as far as I know to undergo surgical intervention". He found her grip strength to be normal, no muscle atrophy, and she had a normal sensory examination. Dr. Abbey said that the plaintiff could probably occasionally lift 20 to 30 pounds, but not more than 10 repetitively.

We have carefully reviewed and weighed all of this evidence. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tennessee Code Annotated Section 50-6-225 (e)(2).

In determining a worker's industrial disability, the courts will consider, in addition to anatomical impairment as assessed by a medical expert, many other pertinent factors, including the worker's age, job skills, education and training, the duration of disability and job opportunities for the disabled. Hinson v. Wal-Mart Stores, Inc., 654 S.W. 2d 675 (Tenn. 1983).

It is our judgment that the evidence preponderates against an award based on eighty percent to each upper extremity and in favor of a judgment based upon fifty percent to each upper extremity. The judgment is modified accordingly; and, as so modified, the judgment of the trial court is affirmed.

Costs on appeal are taxed equally between the employee and the employer.

WILLIAM S. RUSSELL, SPECIAL JUDGE

CONCUR:

FRANK F. DROWOTA, III,
ASSOCIATE JUSTICE

WILLIAM H. INMAN, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STELLA LOUISE FLATT	)	Jackson County
	)	No. 1131-0-175
Plaintiff/Appellee	)	
	)	Hon. Bobby Capers,
vs.	)	Judge
	)	
OSKKOSH B'GOSH, INC. and	)	Supreme Court
TRAVELERS INSURANCE COMPANY	)	No. 01-S-01-9608-CV-00168
	)	
Defendants/Appellants	)	Affirmed as Modified

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.

Cost are apportioned evenly between the parties. One half of the costs are assessed against the appellant, one half against the appellee, and execution may issue if necessary.

It is so ordered this 28th day of August, 1997.

PER CURIAM

Drowota, J., not participating