IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(May 23, 1997 Session)

---

SHARON RIVERS,

Plaintiff/Appellee,

VS.

NO. 02S01-9612-CV-00105

CIGNA PROPERTY AND CASUALTY COMPANIES,

MADISON CIRCUIT
HONORABLE WHIT S. LAFON

Defendants/Appellant.

---



FOR APPELLANT:

Robert O. Binkley, Jr.
Rainey, Kizer, Butler, Reviere & Bell
Jackson, Tennessee

FOR APPELLEE:

Steve Taylor
Memphis, Tennessee

MEMORANDUM OPINION
Mailed June ____, 1997

Members of Panel:

Janice M. Holder, Associate Justice, Supreme Court
Robert A. Lanier, Circuit Judge
Don R. Ash, Circuit Judge

**AFFIRMED AS MODIFIED**

Lanier, Judge

MEMORANDUM OPINION

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 of findings of fact and conclusions of law.

The first issue presented to the Court is whether or not the trial court erred in finding that the plaintiff was entitled to benefits for permanent partial disability based upon fifty percent (50%) to the left lower extremity.

It is not disputed that the claimant sustained an accidental injury arising out of and in the course of her employment with the defendant on January 24, 1995, when her left foot became crushed between pieces of equipment. She did not have a fracture but had a crush injury of the soft tissue to the left foot. She was placed in a cast and given medication and recommendations for exercise and warm soaks. She eventually returned to work around March 1, 1995. She was under the treatment of the physician provided by the employer but was released to resume her work and she did resume her regular work as a stacker machine operator for approximately one year. She continued to have complaints of pain and irritation in her ankle from time to time and saw the company doctor. Some time after July 11, 1995, her supervisor told her that the employer would not be responsible for her doctor's bill for the preceding visit to the company doctor. Subsequent to that, however, she returned to see the company doctor, who saw her without expense to her. He felt that she reached maximum medical recovery on July 25, 1995 and opined that she had not suffered any permanent impairment. He concluded that she had sustained a soft tissue injury without any fracture or disarrangement of the joint. On January 17, 1996, Plaintiff's attorney referred her to a rheumatologist in Memphis without prior notice or consultation with the employer. She was subsequently seen and treated by the rheumatologist. She had been satisfied with the treatment given to her by the company doctor before her supervisor told her that his bill would not be paid.

The rheumatologist has testified that the claimant suffered a fifteen percent (15%) permanent impairment to her left lower extremity. He based his opinion upon his

observations, attempting to relate them to the American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Ed., although he was unable to find any specific provision for her type of injury in the Guides. He extrapolated from existing guidelines for other portions of the body. The employer's attorney has asserted that there were guidelines more appropriate which should have been used, and has attached copies of what purport to be those guidelines to the appellate brief. However, as no such information is in the record, the Court may not consider those assertions by the employer's counsel.

Claimant has continued to work for the same employer, sometimes working 48 hours per week, and has never refused any overtime because of her injury. She has received a promotion and a raise and is now employed driving a tow motor forklift. She is no longer on her feet as much as she was previously.

The Court is required to review the evidence in this case *de novo*, with a presumption of the correctness of the finding of the facts of the trial judge, unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2). Applying that standard to the evidence in this case, we find there is evidence, based upon the rheumatologist's testimony that she had developed some arthritis and effusion as well as crepitus in the joint of her ankle. He was of the opinion that she had sustained a fifteen percent (15%) permanent partial impairment. On the other hand, the Court must take into consideration that she sustained no broken bones, has returned to work and not only been able to perform her work in a vigorous manner but has received a promotion and additional pay. The Court also notes that the rheumatologist was not able to find a provision in the AMA Guides for his opinion, although he did explain his manner of calculating the disability. The company doctor, whose qualifications consisted of primarily of family practice, was of the opinion that the worker would have no permanent impairment, but he had not seen her for a considerable time.

While generally, the ability of an employee to work does not deprive him or her of benefits for injury to a scheduled member, the fact of employment after an injury, the earning power of the injured worker, and his or her earnings are to be taken into consideration along with all other factors involved. Duncan v. Boeing, 825 S.W.2d 416

(Tenn. 1992). Based upon all of the foregoing, we are of the opinion that the evidence preponderates against an award of fifty percent (50%) to the left leg and that such award should be modified to twenty-five percent (25%) of the left leg.

The second issue presented to the Court is whether or not the medical expense of the rheumatologist is the obligation of the employer. Generally, a worker must accept the medical services tendered to him or her by the employer. When the worker seeks the medical services of a physician not furnished by the employer, justification must be shown by the worker. Generally, the worker must show either inadequate treatment beyond a mere disagreement as to the course of treatment, as well as the worker's notification to the employer of dissatisfaction with the treatment. In the present case, the only justification offered by the worker for abandoning her employer's physician and seeking one of her own is the statement to her by her supervisor. However, after that statement, she returned to see the company physician and was received by him without difficulty. Therefore, she owed her employer at the very least a request for a different physician. In fact, as stated above, she said that she had no complaint about the treatment by the company physician. For those reasons, the fee for services by the rheumatologist, Dr. Rizk must be borne by the worker.

Finally, complaint is made by the worker of the trial court's assessment of half of the discretionary costs to the worker. Of course, the fees charged to the claimant by the treating physician or a specialist to whom the employee was referred for giving testimony by oral deposition are required to be paid by the employer when the employee is the prevailing party, unless "the interest of justice require otherwise." T.C.A. § 50-6-226(c)(1). In this case, although we have found the service fee for treatment by Dr. Rizk to be unauthorized medical, his testimony was valuable to the Court and, as this Court believes the worker is entitled to an award, she is considered to be "the prevailing party," so as to support award of those expenses against the employer. As to any other discretionary costs, provided under TRCP 54, the increasing weight of appellate decisions seems to suggest that the prevailing party should be awarded such expenses as are outlined in TRCP 54, unless the amounts thereof are found to be unreasonable. As the latter are not in dispute in this case, Plaintiff is

awarded the discretionary costs in question.

The judgment of the trial court is thus affirmed, as modified hereby. Costs on appeal are taxed to the defendants/appellants.

_____
Robert A. Lanier, Circuit Judge

CONCUR:

_____
Janice M. Holder, Associate Justice

_____
Don R. Ash, Circuit Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

| | | |
|---|---|---|
| SHARON RIVERS, | ) | MADISON CIRCUIT |
| | ) | NO. C-95-323 |
| Plaintiff/Appellee, | ) | |
| | ) | Hon. Whit LaFon, |
| vs. | ) | Judge |
| | ) | |
| CIGNA PROPERTY AND CASUALTY COMPANIES, | ) | NO. 02S01-9612-CV-00105 |
| | ) | |
| | ) | |
| Defendant/Appellant. | ) | AFFIRMED AS MODIFIED. |



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 18th day of August, 1997.

PER CURIAM

(Holder, J., not participating)