IN THE SUPREME COURT OF TENNESSEE
WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, SEPTEMBER 1997 SESSION

FILED

February 18, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

SHARON GAIL JONES	)	ANDERSON CIRCUIT
	)	
Plaintiff/Appellee	)	
	)	
VS.	)	Hon. James B. Scott,
	)	Circuit Judge
MODINE MANUFACTURING	)	
COMPANY and SENTRY	)	
INSURANCE COMPANY	)	
	)	
Defendants/Appellants	)	NO. 03S01-9703-CV-00028

For the Appellants:

George H. Buxton III
31 East Tennessee Ave.
Oak Ridge, Tenn. 37830

For the Appellee:

Roger L. Ridenour
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108 S. Main St.
Clinton, Tenn. 37717-0530

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

Members of Panel:

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

AFFIRMED.

THAYER, Special 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.

The appeal has been perfected by defendants, Modine Manufacturing Company and Sentry Insurance Company, from a decision of the trial court awarding plaintiff, Sharon Gail Jones, 45% permanent partial disability to her right arm.

Two issues are being raised by the employer and insurance company. First, it is argued the award is excessive. Second, it is insisted the trial court was in error in holding defendants liable for charges and expenses of Dr. Paul T. Naylor, an orthopedic surgeon.

Plaintiff is 42 years of age and a high school graduate. During September 1995 she began to have problems with her hand and arm tingling and being painful. She reported the problem to her employer and was sent to see Dr. R. Alan Rice, a family practitioner. Dr. Rice eventually referred her to Dr. Joseph C. DeFiore, an orthopedic surgeon.

Dr. DeFiore saw her three times. One visit was during November 1995 and the other two visits were during December of the same year. Plaintiff testified that all he did was to give her a cortisone shot and advised her to return to light duty work. She returned to work but still had the same problems. At her last visit, she said he advised her to change jobs and released her. The doctor testified she had a carpal tunnel syndrome injury and was of the opinion she had no medical impairment. He admitted releasing her and recommending that she should not do repetitive work as she had performed in the past.

Plaintiff testified she was laid-off about January 1996 and was never called back to work. During this month, counsel filed a motion requesting her employer to designate a panel of three orthopedic surgeons for treatment.

Plaintiff continued to have problems with her injury while off from work and sought treatment from Dr. Paul T. Naylor, another orthopedic surgeon. Dr. Naylor saw her three times also: April 18, 1996, September 19, 1996 and October 14, 1996. He also found she was suffering from a carpal tunnel syndrome injury and told plaintiff that surgery was necessary to relieve some of her problems. The doctor was

of the opinion she had a 10% medical impairment to her right arm and she should avoid repetitive assembly-line work where grasping and lifting was involved.

The motion filed in January 1996 came on to be heard on October 14, 1996, the same day of her last visit to Dr. Naylor. Although the motion requested the designation of three physicians, the order overruling the motion merely stated the court was denying the request for treatment by Dr. Naylor but if it later appeared that additional treatment by Dr. Naylor was necessary, the court would reexamine the request.

The case came on to be finally heard on November 25, 1996, when the court found the claim compensable; fixed the award and found the treatment rendered by Dr. Naylor to be necessary and ordered plaintiff to be reimbursed for this medical expense. Sometime after entry of the final judgment, plaintiff filed a motion requesting authorization for surgery by Dr. Naylor and the court granted the relief requested.

Dr. Craig Colvin, a vocational rehabilitation counselor, testified plaintiff was about 65-70% vocationally disabled. Dr. James Calvin Roberson, also a vocational consultant, found the disability to be in the range of 15-20%.

The review of the case is de novo accompanied by a presumption of the correctness of the findings of fact unless we find from our review the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

The first issue claims the award of 45% disability to the right arm is excessive. Plaintiff testified that she was still having difficulty with her hand and arm even though she was not working. She stated she did not have any strength in her right hand to grip; that her arm felt heavy at time and she was not able to do housework.

In considering her age, education, prior work experience, medical impairment and all other factors one must take into consideration, we cannot say the evidence preponderates against the amount of the award.

The second issue challenges the holding of the trial court in requiring defendants to be liable for expenses of Dr. Naylor, pre-trial and post-trial. We do not find any merit to this argument. When the employee reported the injury to her employer, plaintiff testified she was not advised of a panel of three physicians from which a choice could be made. She was merely referred to Dr. Rice. Defendants

did not introduce any conflicting evidence on this point. During argument at the trial court, counsel for defendants stated a list of three physicians was furnished a few days after Dr. Naylor's deposition was taken on October 25, 1996. We find this would have been after the three visits to Dr. Naylor and about one month before the trial. However, statements of counsel in the argument stage of a trial do not constitute evidence and we must conclude there is no admissible evidence indicating compliance with the provisions of our statute, T.C.A. § 50-6-204(a)(4).

This subsection of the statute provides:

> "The injured employee shall accept the medical benefits afforded hereunder; provided, that the employer shall designate a group of three (3) or more reputable physicians or surgeons not associated together in practice, if available in that community, from which the injured employee shall have the privilege of selecting the operating surgeon or the attending physician; . . . ."

Since we must conclude a list of three physicians was not furnished to plaintiff, the question arises as to whether she acted in good faith in seeking a physician of her choice. We think she was justified in seeking treatment from Dr. Naylor. Our review of the record indicates the employee was led to believe Dr. DeFiore could not help her further and the discharge of the patient seems to be evidence supporting this belief.

In the case of *Forest Products v. Collins,* 534 S.W.2d 306 (Tenn. 1976), the employee was not furnished a list or panel of three physicians but was referred to a single "company doctor" who after examination, dismissed her and directed she return to work. The court held the employee acted reasonably in seeking medical treatment of her choice and the employer was liable for such treatment. *See also Employers Insurance of Wausau v. Carter,* 522 S.W.2d 174, 176 (Tenn. 1975) for a similar ruling.

Therefore, we hold the evidence does not preponderate against the findings of the trial court. The judgment is affirmed in all respects. Costs of the appeal are taxed to defendants.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
E. Riley Anderson, Chief Justice

_____
John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

SHARON GAIL JONES,	(	
	(	
Plaintiff-Appellee,	(	Anderson Circuit
	(	No. 95LA0502
	(	
	(	Hon. James B. Scott,
v.	(	Judge
	(	
	(	S. Ct. No. 03S01-9703-CV-00028
	(	
MODINE MANUFACTURING COMPANY	(	
AND SENTRY INSURANCE COMPANY,	(	
	(	
Defendants-Appellants.	(	AFFIRMED.

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 will be paid by the defendants-appellants, for which execution may issue if necessary.

IT IS SO ORDERED this 18th day of February, 1998.

PER CURIAM

Anderson, C.J. - Not participating.