IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

PATRICIA JONES,	)	
	)	MAURY COUNTY
APPELLEE	)	
	)	HON. JIM T. HAMILTON
v.	)	JUDGE
	)	
ROSEWOOD MANOR, INC.,	)	NO. 01S01-9710-CH-00219
	)	
APPELLANT	)	AFFIRMED

JUDGMENT

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 appellant, for which execution may issue if necessary.

It is so ordered.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(July 20, 1998)

PATRICIA M. JONES,	)	MAURY CHANCERY
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Hon. Jim T. Hamilton,
	)	Judge
ROSEWOOD MANOR, INC.,	)	
	)	
Defendant-Appellant	)	No. 01S01-9710-CH-00219

For Appellant:

Jill A. Hanson
Levine, Mattson, Orr & Geracioti
Nashville, Tennessee

For Appellee:

Steve C. Norris
Nashville, Tennessee

MEMORANDUM OPINION

Members of Panel:
Ben Cantrell, Special Justice
William H. Inman, Senior Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED

Loser, 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. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The issues on appeal are whether (1) the trial court erred in applying the six times cap permitted by Tenn. Code Ann. section 50-6-241(b) rather than the two and one-half times cap authorized by Tenn. Code Ann. section 50-6-241(a)(1) and whether (2) the trial court erred in giving weight to Dr. Gaw's medical opinion as to medical impairment over that of Dr. Lanford. The employer further contends the evidence preponderates against the award. As discussed below, the panel has concluded the award should be affirmed.

The employee, Patricia Jones, worked for Rosewood Manor, Inc. from July 5, 1993 to November 22, 1994. On October 23, 1993, Ms. Jones injured her spine while lifting a patient in the course and scope of her employment as a Certified Nurses' Technician. She completed her shift that day, notified defendant Rosewood Manor, Inc. the following morning, and sought medical treatment.

Dr. Gregory Lanford diagnosed Ms. Jones as suffering from a ruptured disc at C5-6, causing a compression of the spinal cord and exiting nerve root. On January 8, 1994, Dr. Lanford performed an anterior cervical diskectomy. Dr. Lanford determined she had reached maximum medical improvement on April 21, 1994. Ms. Jones was released to return to work with restrictions of no more than fifteen pounds frequent lifting and minimum overhead work. Further, Ms. Jones was instructed to minimize repetitive bending, lifting, and stooping. Dr. Lanford opined the employee would retain a nine percent permanent impairment to the body as a whole, using the Range of Motion Model based on the American Medical Association Guidelines.

On April 23, 1994, Ms. Jones returned to work for Rosewood Manor, Inc. Her new duty, within her medical restrictions, was to bathe patients. She earned the same hourly wage she had been paid prior to the work-related injury. However, after only three months, Ms. Jones was transferred to do the laundry in eight-hour shifts. The laundry work required Ms. Jones to frequently lift weight in excess of Dr. Lanford's medical restrictions. On November 22, 1994, Ms. Jones left the facility for the final time.

The circumstances of the plaintiff's termination of employment are unclear. Ms. Jones articulated her frustration in having to perform a job outside her doctor's restrictions. She further maintained that Rosewood Manor, Inc. initially promised to "straighten out" the matter. She also maintained she was incapable of performing the work. Regardless, Ms. Jones received a letter from Rosewood Manor, Inc. terminating her employment. Ms. Jones has neither returned to work nor looked for gainful employment.

In February of 1997, Dr. David Gaw saw Ms. Jones during a one-time examination. Using the Injury Model of the American Medical Association Guidelines, he opined a fifteen percent permanent impairment rating to the body as a whole. Dr. Gaw imposed restrictions similar to those of Dr. Lanford. Dr. Gaw testified that the AMA Guidelines have two standards for rating spinal impairment, the Injury Model and the Range of Motion Model. He added that the AMA Guidelines specifically state that the Injury Model is the preferred standard to use unless the patient has an unusual condition. He further explained that if the Range of Motion model were used, the physician should measure lost range of motion and add additional percentages of impairment

based on that measured loss; something Dr. Lanford did not do.

After a trial on the merits, the trial court entered its final judgment, including detailed findings of fact and awarding Ms. Jones workers' compensation benefits based on ninety percent permanent partial disability to the body as a whole, totaling $35,960.40. Our review of the case 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. Tenn. Code Ann. section 50-6-225(e)(2).

(1)

Rosewood Manor, Inc. contends that the trial court erred when it found that the plaintiff did not have a "meaningful return to work," within the design of Tenn. Code Ann. section 50-6-241(a)(1). The plaintiff admittedly returned to work at Rosewood Manor, Inc. after her injury, earning as much as she was prior to her injury. Her post-injury employment with Rosewood Manor lasted from April 23, 1994 through November 22, 1994, or approximately seven months. However, "there must be an assessment of whether the return to work is meaningful in the sense of the ability of the employee to perform the duties of the work to which he returns." Hale v. ABB Combustion Engineering, 1996 WL 99298 (Tenn.). Relevant factors include: "the employer's offer to return to work, the nature of the work to be performed in relation to the restrictions, if any, placed on the employee by a doctor, whether the refusal of an employee to return to work is reasonable or unreasonable in light of the nature of the work offered vis-à-vis the medical restrictions placed on the employee, and if the employee returns and then leaves, the reason for leaving the job." Id. at 4.

In Forrest v. Henry I. Siegel Co., 23 TAM 15-5 (January 30, 1998), this panel held that the cap of two and one-half times the anatomical rating did not apply when the employee returned to work and "toughed it out" for nearly two years before quitting because of her inability to perform the work comfortably. An employee should not be punished for her perseverance in the face of pain. In the case at bar, the total length of time Ms. Jones returned to work at Rosewood Manor was seven months. The mere fact that an employee returns to work for a substantial period does not subject her to the two and one-half times cap, when the assigned work exceeds the capacity to perform her assigned duties. Ms. Jones testified that she was frustrated and could not perform the work assigned. While there is conflicting testimony concerning Ms. Jones' reason for leaving, the trial judge saw and heard the claimant and her lay witnesses on the subject; and where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987). We find that the evidence does not preponderate against the trial court's finding that Ms. Jones did not have a meaningful return to work. Thus, an award not exceeding six times the medical impairment rating is appropriate. See 50-6-241(b).

(2)

As for Rosewood Manor's second contention that Dr. Lanford's opinion was given insufficient weight, the Tennessee Supreme Court has recognized it is within the discretion of the trial judge to determine which expert medical testimony to accept. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-7

(Tenn. 1983). The trial judge is allowed to consider, among other things, the qualifications of the experts and the information available to them. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). The difference of opinion between Dr. Gaw and Dr. Lanford is not based on any different perception of the patient's condition, but is based on different opinions about how to use the AMA Guidelines. Thus, we find it was well within the court's discretion to utilize Dr. Gaw's fifteen percent impairment rating to the body as a whole over Dr. Lanford's nine percent impairment rating to the body as a whole. Additionally, the evidence fails to preponderate against the findings of the trial judge.

For the above reasons, the judgment of the trial court is affirmed. Costs on appeal are taxed to Rosewood Manor, Inc., the defendant-appellant.

_____
Joe C. Loser, Jr., Special Judge

CONCUR:

_____
Ben Cantrell, Special Justice

_____
William H. Inman, Senior Judge