

**IN THE SUPREME COURT OF TENNESSEE  
WORKER'S COMPENSATION APPEALS PANEL  
KNOXVILLE, SEPTEMBER 1998 SESSION**

<b>FILED</b>  February 16, 1999  Cecil Crowson, Jr. Appellate Court Clerk
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<b>KATHY L. RHEA,</b>	)	<b>Anderson County</b>
<b>Circuit</b>	)	
	)	
<b>Plaintiff-Appellee,</b>	)	
	)	<b>No. 03S01-9710-CV-00124</b>
<b>v.</b>	)	
	)	<b>Anderson County Circuit</b>
<b>MODINE MANUFACTURING CO.</b>	)	<b>Court No. 95 LA 0164, 0165</b>
<b>&amp; SENTRY INSURANCE CO.,</b>	)	<b>(consolidated)</b>
	)	
<b>Defendants/Appellants.</b>	)	<b>Hon. James B. Scott, Jr.</b>

**For the Appellant:**

Michael J. Mollenhour  
P. O. Box 9299  
Knoxville, Tennessee 37940

**For the Appellee:**

Roger L. Ridenour  
P. O. Box 530  
Clinton, Tennessee 37716

**MEMORANDUM OPINION**

**Members of Panel:**

Charles D. Susano, Jr., Judge  
Roger E. Thayer, Special Judge  
John S. McLellan, III, Special Judge

AFFIRMED

McLELLAN, Special Judge

This worker's 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 plaintiff, age 36 at the time of trial, has a high school degree and an additional six weeks of vocational training in the use of a computer. The plaintiff describes the training as being very limited. The plaintiff had previously worked for two years as an inspector at the Microdot Company prior to beginning her work for Modine Manufacturing in 1983. The plaintiff was terminated by her employer in January, 1996 as part of a general layoff.

The plaintiff filed two Complaints for Workers' Compensation Benefits against the defendant. The first Complaint alleged injury to her left thumb while opening a lid stuck to a plastic pitcher at work. Dr. Clifford Posman, an orthopedic surgeon, evaluated plaintiff's September, 1992 injury and in February, 1993 performed a release of the first extensor compartment known as a *De Quervain's Syndrome*. Since the plaintiff's date of hire, all of her various jobs at Modine have been assembly line work. At the time Dr. Posman performed surgery on the plaintiff's left arm, she was having difficulties with both her arms although no surgical procedure was performed on the right arm at that time. Subsequent to surgery and physical therapy, the plaintiff returned to work on restricted duty and thereafter to full duty performing assembly work described as "... squaring BMWs." This work required repetitive use of plaintiff's arms and hands while lifting approximately fifteen pounds. When asked how that type of work affected her, the plaintiff testified "I was in constant pain." Plaintiff stated that she had such pain both at work and at home regardless of which plaintiff continued to work " 'cause I had to." At the time of trial, the plaintiff had not been rehired by her employer although she contends other individuals with less seniority had been called back to work. She testified she would go back to work if offered a job at Modine. The plaintiff has made application for employment primarily with Boeing and has sought the assistance of the Tennessee Department of Employment Security but as of date of trial the plaintiff has not been employed.

Plaintiff testified she has difficulty doing daily household chores of vacuuming, mopping, putting dishes away, cooking, and taking care of her three-year old child, which activities cause pain in her shoulders and hands. She reports a loss of grip in that she has difficulty holding on to plates and dishes and difficulty opening jars, doors and similar things. The plaintiff continues to take Anaprox which was prescribed for her by Dr. Sevilla as an anti-inflammatory drug to reduce

swelling due to pain in her arms which she states hurt her five out of seven days a week. The plaintiff can drive a vehicle twenty-five to thirty miles and thereafter has pain in her shoulders.

Counsel for the plaintiff and the defendant stipulated that at the time of the hearing of this matter that the plaintiff's complaint alleging a work related injury in the month of January, 1995 and the plaintiff's second complaint alleging a work related injury on September 11, 1992 should be consolidated and the judgment consolidated as if it were one injury. Counsel further stipulated that in the month of September, 1992 the plaintiff sustained an injury within the scope and course of her employment and that the issue before the trial court was the extent of the permanent partial impairment to the plaintiff's left arm, and whether there is a permanent partial impairment to the right arm, and if so, the extent of permanent partial impairment to the right arm. The trial court found the plaintiff first noticed problems with her arms in 1992 with pain in both arms but that the pain in the left arm was more pronounced. The trial court further found that the plaintiff's condition on the left side has been diagnosed as a pinched nerve in the neck with restrictions apparently imposed as a result of "over-use syndrome." The court found "over-use syndrome" by the term to have a limiting physical impairment brought on by over-use in the work place. The trial court awarded the plaintiff a sixty percent occupational impairment rating to the left upper extremity and a thirty percent occupational rating to the right upper extremity. The employer, Modine Manufacturing Co., and insurance carrier, Sentry Insurance Co., have appealed from the Judgment of the trial court and present issues concerning whether the trial court was in error in (1) awarding sixty percent occupational impairment to the left arm and thirty percent occupational impairment to the right arm; (2) finding that the plaintiff had permanent injury to the right arm. The defendant presents the additional issue of whether the trial court erred by failing to average the vocational disability award to each arm and arrive at a single disability.

The record indicates the plaintiff first saw Dr. Clifford L. Posman, a board certified orthopedic surgeon, in September, 1992 for treatment of her left thumb injury and ultimately to perform surgery in February, 1993 for release of the first extensor compartment. The site of surgery was in the wrist. The employer stipulates that this injury occurred in the course and scope of plaintiff's employment with defendant. Dr. Posman continued treatment of the plaintiff after surgery on numerous occasions and testified that the plaintiff has had pain and numbness

primarily in the left hand and to a lesser degree in the right hand associated with weakness; tested mildly positive for carpal tunnel in both hands but more in the left than the right; fullness or swelling in both wrists; decreased sensation in certain fingers of the left and to a lesser extent to the right; and she has received conservative treatment which resulted in some improvement of the numbness, tingling and pain in both of her hands. Dr. Posman diagnosed that the *De Quervain's* was aggravated by repetitive over-use and that the dynamic left carpal tunnel syndrome is due to repetitive over-use. Dr. Posman further testified that the plaintiff has some tenosynovitis in her right upper extremity which is also related to repetitive over-use. Dr. Posman gave the plaintiff a three percent permanent impairment to the left upper extremity and a zero percent permanent impairment to the right upper extremity in that there was no pinched nerve from the neck on the right. Dr. Posman imposes permanent restrictions as a result of her work related injury of a ten pound lifting restriction to both upper extremities, fifteen minute rest breaks every two hours, and rotating jobs. Dr. Posman opined that this case did not fall into any table or characterization of the AMA Guide, Fourth Edition, Revised and based his opinion on his knowledge from treatment of the plaintiff for three years.

Dr. Evelyn A. Sevilla, a board certified neurologist, first saw the plaintiff on February 20, 1995 and continued to treat the plaintiff currently with Dr. Posman through approximately May, 1996. Dr. Sevilla's examination revealed a pinched nerve resulting from a left C-5 radiculopathy. Dr. Sevilla also considered a nerve conduction study performed by Dr. James Lynch on December 24, 1994 which revealed a minor ulna nerve neuropraxia bilaterally at the elbow and a needle examination revealed the right arm was normal. Dr. Sevilla diagnosed the plaintiff with left arm over-use syndrome and left C-5 radiculopathy. Dr. Sevilla stated it was "possible" that the plaintiff suffers from the same thing on the right arm to a "... much more minor degree than the left" arm. As to the right arm, Dr. Sevilla diagnosed over-use syndrome caused by repetitive activities from the work plaintiff used to do at Modine. Dr. Sevilla ordered a functional capacity evaluation and adopted the permanent restrictions provided in the evaluation to the effect that the plaintiff could perform only at a light physical demand level. Dr. Sevilla reported that she could not say that there is a permanent impairment to either hand, arm or wrist of the plaintiff.

The plaintiff was examined at the request of plaintiff's counsel by Dr. Craig T. Colvin an

associate professor in the vocational rehabilitation counselor training program at the University of Tennessee. Based on Dr. Posman's and Dr. Sevilla's permanent restrictions, Dr. Colvin opined that the plaintiff sustained an occupational disability as a result of the two repetitive motion injuries in the range of 60-70 percent. Dr. Rodney Caldwell examined the plaintiff at the request of defense counsel and opined that the plaintiff sustained a forty-five percent occupational disability as a result of her employment with the defendant.

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 finding, 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).

Since plaintiff's employment with the defendant in 1983, she performed numerous assembly operations necessitating repetitive use of her hands, wrist, and arms. For the period September, 1992 to January, 1996 when she was terminated, the plaintiff describes her condition as being in constant pain in her hands and in her shoulders as a consequence of various activities at work which condition also affects her with pain in performing certain household chores. Dr. Posman and Dr. Sevilla attributed plaintiff's medical condition to her employment and both imposed permanent restrictions on plaintiff's activities. Dr. Posman imposed a ten pound lifting limitation on both extremities for repetitions at the rate of once per minute, one fifteen minute rest break every two hours, and job rotation intending the restriction to be primarily against frequency and to prevent carpal tunnel syndrome. Dr. Sevilla also diagnosed an over-use syndrome and related that plaintiff's neck problem and pinched nerve occurred as a result of the repetitive use of her arms at work. Dr. Sevilla relates that this probably occurred to the plaintiff's right arm to a much less degree.

Dr. Posman opined she sustained a three percent permanent partial impairment to the left upper extremity and a zero percent permanent partial impairment to the right upper extremity as a result of her work related injury. Dr. Sevilla could not state that the plaintiff had any permanent impairment to either arm, wrist or hand. Yet Dr. Sevilla adopted the permanent limitations described in a functional capacity evaluation which limit the plaintiff to light physical demand level work. Both plaintiff and defendants' vocational experts have assessed an occupational disability as a result of the repetitive injuries in a range of 60-70 percent and 45 percent

respectively. Medical impairment rating and legal vocational disability awards are completely separate and distinct issues. *Wilkes v. Resource Authority of Sumner County*, 932 S.W. 2nd 458 (Tenn. 1996). In determining vocational disability, the trial court is required to consider the many factors in fixing an award. The real test is whether there has been a decrease in the employee's capacity to earn wages in any line of work available to the employee, considering age, education, skills, training, local job opportunities, capacity to work at types of available employment and claimant's disabled condition. *Ormond v. Williams-Sonoma, Inc.*, 803 S.W.2nd 672, 678, (Tenn. 1991). We do not accept defendant's contention that plaintiff's desire to return to work at Modine weights against the trial court's finding of disability. In determining whether the employee's capacity to earn wages has been decreased, this is to be examined in relation to the open labor market and not whether the employee is able to return and perform the job held at the time of the injury. *Clark v. National Union Fire Ins. Co.*, 774 S.W.2nd 586, 588 (Tenn. 1989).

In the trial court's Memorandum Opinion, the court noted plaintiff's testimony of problems with her arms beginning in 1992 with pain being more pronounced in the left arm than in the right arm. The plaintiff testified of "constant pain" in both arms and there is medical evidence of over-use syndrome to both arms. The trial judge is entitled to determine from all the evidence, expert and non-expert, the degree of disability. *A.C. Lawrence Leather Co. v. Loveday*, 455 S.W.2nd 141, 144 (Tenn. 1970). The trial court is in a better position to judge creditability and weigh evidence where witnesses have testified orally. *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2nd 355 (Tenn. 1989). Taking all factors into consideration, we believe plaintiff's chances in the open labor market are significantly limited. Tenn. Code Ann. § 50-6-241 (a) (1). Expert vocational evidence supports this conclusion. We can not say the evidence preponderates against the award fixed by the trial court.

The defendant in its brief contends that if this court did not reverse the trial court's findings that the plaintiff had a permanent injury to her right arm, then the awards should be combined and averaged pursuant to Tenn. Code Ann. § 50-6-207 (3) (A) (w) which allows for 400 weeks of benefits for the loss of two arms which would, by calculation, equal 180 weeks of worker's compensation benefits. The trial court awarded the plaintiff 120 weeks (60%) of worker's compensation benefits as a result of injuries plaintiff sustained to her left upper

extremity and 60 weeks (30%) of benefits as a result of partial disability to her right upper extremity which, by calculation, would equal 180 weeks of worker's compensation benefits. The court declines to combine and average the trial court's award.

The judgment entered in the trial court is affirmed in all respects with costs assessed to the appellants.

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John S. McLellan, III, Special Judge

CONCUR:

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Charles D. Susano, Jr., Judge

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Roger E. Thayer, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

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Appellate Court  
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KATHY L. RHEA, .	)	ANDERSON
	)	CIRCUIT
Plaintiff-Appellee	)	
v.	)	No. 95LA0164 & 95LA0165
	)	
	)	No. 03S01-9710-CV-00124
	)	
MODINE MANUFACTURING CO.	)	
& SENTRY INSURANCE CO.,	)	Hon. James B. Scott, Jr.
	)	
Defendants-Appellants.	)	

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 facts 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, Modine Manufacturing Co. & Sentry Insurance Co. and Michael J. Mollenhour, surety for which execution may issue if necessary.

02/16/99



