

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
October 13, 2000 Session

THOMAS GAMMONS v. PETERBILT MOTORS COMPANY, ET AL.

**Direct Appeal from the Criminal Court for Macon County
No. 98-45 J. O. Bond, Judge**

**No. M1999-02575-WC-R3-CV - Mailed - January 17, 2001
February 20, 2001**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court found the plaintiff had sustained a permanent partial disability to his right arm of sixty percent, which would entitle him to one-hundred twenty weeks of partial permanent disability. The defendant argues the trial judge erred in setting the amount of the award because the treating physician fixed the medical impairment rating at six percent, and the independent medical examiner fixed the rate at thirty-four percent; the trial judge used neither of these ratings to reach the amount awarded. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, J. and TOM E. GRAY, SP. J., joined.

Patrick A. Ruth, Nashville, Tennessee, for the appellant, Peterbilt Motors Company.

William Joseph Butler and Frank D. Farrar, Lafayette, Tennessee, for the appellee, Thomas Gammons.

OPINION

The trial court found the plaintiff had sustained a permanent partial disability to his right arm of sixty percent, which would entitle him to one-hundred twenty weeks of partial permanent

disability.¹ The defendant argues the trial judge erred in setting the amount of the award because the treating physician fixed the medical impairment rating at six percent, and the independent medical examiner fixed the rate at thirty-four percent; the trial judge used neither of these ratings to reach the amount awarded.

Biography and Facts

At the time of trial, the plaintiff was twenty-seven years of age and had a twelfth grade education. He had worked for several construction companies.

In October of 1996 the plaintiff sustained an injury to his right shoulder. He did not report this injury. Surgery was performed on the plaintiff's shoulder, and he returned to work for the defendant.

On June 23, 1997, the plaintiff's right shoulder was injured again in the course of his employment with the defendant.

Medical Evidence

As a result of the June injury the plaintiff was seen and treated by Dr. Stephen M. Neely, M.D., an orthopaedic surgeon. He was also examined by Dr. C. R. Dyer, M.D., an orthopaedic surgeon, on December 12, 1998.

Dr. Neely first treated the plaintiff by limiting his activities, by rehabilitation therapy and with medication. Dr. Neely continued to treat the plaintiff and eventually recommended surgery because the plaintiff had experienced no improvement in his condition. The plaintiff's surgery was performed on February 20, 1998. Dr. Neely rated the plaintiff's medical impairment at six percent to the right arm.

Dr. Dyer reviewed the plaintiff's records and examined the plaintiff; he found the plaintiff suffered a thirty-four percent medical impairment rating to the right upper extremity (arm).

Dr. Neely's restrictions upon the plaintiff's return to work for the defendant were that he not lift more than fifty pounds, that he engage in no repetitive overhead motion, that he limit the use of the "huck gun" (a work tool) to less than one-third of the total work time and forbade use of it in an outstretched or overhead position.

¹ The medical evidence indicates a whole body injury could be present. The parties do not raise this issue in this appeal.

Discussion

We note at the outset that a worker does not have to show vocational disability to recover for an injury to a scheduled member. *Duncan v. Boeing Tenn. Inc.*, 825 S.W.2d 416 (Tenn. 1992). Further, the limiting of an award for whole body injuries does not apply to scheduled member injuries.

We do not find, as the defendant insists, that the trial court erred in not selecting the evaluation of either six percent of Dr. Neely or the thirty-four percent evaluation of Dr. Dyer. Nothing requires that this be done, especially in a scheduled member injury case.

The record shows the trial judge considered all the relevant testimony, lay and expert, in reaching a judgment in this case.

The evidence does not preponderate against the judgment of the trial court, and we affirm the same.

The costs of this appeal are taxed to the defendant.

JOHN K. BYERS, SENIOR JUDGE

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JUDGMENT

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 the defendant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM