

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT KNOXVILLE
OCTOBER 9, 2002

**CYNTHIA ELLEN WALKER V. ADVANCE TRANSFORMER COMPANY,
THE TRAVELERS INDEMNITY COMPANY, and SUE ANN HEAD,
Administrator of Workers' Compensation, Department of Labor for the State
of Tennessee**

**Direct Appeal from the Morgan County Chancery Court
No. 00-146 Frank V. Williams, Chancellor**

Filed May 2, 2003

No. E2001-03074-WC-R3-CV

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e) for hearing and reporting of findings of fact and conclusions of law. The Second Injury Fund claims the trial court erred (1) in failing to make specific finding of the extent of the employee's disability attributable to a scheduled member as a percentage of her total disability, and (2) by ordering the Second Injury Fund to pay permanent and total disability benefits to age 65 after the employer paid 60 weeks of benefits for the injury to a scheduled member. We modify in part, reverse in part and remand.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Morgan County Chancery Court is modified in part and reversed in part.

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, JUSTICE, and JOHN K. BYERS, SR. J., joined.

Paul G. Summers, E. Blaine Sprouse, Nashville, Tennessee, for the Appellant, The Second Injury Fund.

Arthur G. Seymour, Robert L. Kahn, Frantz, McConnell & Seymour, LLP, Knoxville, Tennessee, for the Appellee, Advance Transformer Company and The Travelers Indemnity Company.

MEMORANDUM OPINION

Facts

Cynthia Ellen Walker injured her left arm on June 27, 2000 in the course and scope of her employment with Advance Transformer Company (“Advance”). Ms. Walker had pre-existing work-related and non-work related medical conditions, and the arm injury resulted in her permanent, total disability. Ms. Walker had received a worker’s compensation award in 1993 of 20 percent to both arms for bilateral carpal tunnel syndrome. In 1998, she received a 10.85 permanent partial disability settlement for a 1996 injury to her left shoulder. She had undergone several other surgeries, including two cervical operations and two knee surgeries. Dr. Michael A. McKay treated Ms. Walker for the left arm injury, diagnosed as a fractured distal radius extending into her wrist joint. He assigned a 15 percent medical impairment to the left upper extremity, which translates to nine percent whole body impairment under the AMA Guides. Dr. Rodney Caldwell, Ph.D., a vocational expert, testified that Ms. Walker was already 55-60 percent vocationally disabled when she sustained the June 27, 2000 injury.

The trial court found that the case was governed by Tenn. Code Ann. § 50-6-208(a)(1). It found Ms. Walker to be permanently totally disabled and fixed the vocational disability for the injury to the left arm at 30 percent. It ordered the employer, Advance, to pay 30 percent of 200 weeks, or 60 weeks of benefits, for the left arm injury, and the remaining balance of the total disability award to be paid to age 65 by the Second Injury Fund (“Fund”).

Standard of Review

The standard of review in a worker’s compensation case is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). Questions of law are reviewed *de novo* without a presumption of correctness. *Smith v. U.S. Pipe & Foundry Co.*, 14 S.W. 3d 739, 742 (Tenn. 2000)

Issues

1. Did the trial court err in failing to make a determination of the percentage of vocational disability attributable to Ms. Walker’s last injury as a percentage of her total disability?
2. Did the trial court err in failing to properly apportion liability for Ms. Walker’s permanent total disability?

Discussion

I.

The Fund correctly states that the 30 percent awarded by the trial court for the injury to the left arm, a scheduled member, equates to a 15 percent disability to the body as a whole. *Scales v. City of Oak Ridge*, 53 S.W.2d 3d 649, 656-57 (Tenn. 2001). Citing the testimony of Dr. Caldwell that Ms. Walker was already 55-60 percent vocationally disabled, the Fund contends that a more reasonable percentage of vocational disability for her last injury to her left wrist would be in the range of 40-50 percent vocational disability to the whole body. The trial court found this to be a section 208(a)(1) case.

“In such a case, the employer pays only for the disability that results from the subsequent injury that rendered the employee permanently and totally disabled, without consideration of any prior injuries. In other words, an employer under subsection (a) is responsible only for that disability that would have resulted from the subsequent injury had the earlier injury or injuries not existed.”

Bomely v. Mid-America Corp., 970 S.W.2d 929, 934 (Tenn. 1998).

Dr. MacKay testified that the left arm fracture was a “mild displacement,” that her primary complaint was pain, and that he advised her to use the arm “within the tolerance of her pain.” Asked what effect the left arm injury had on Ms. Walker’s ability to return to work, Dr. Caldwell responded: “Well, it seems like that was, I guess, the proverbial straw that broke the camel’s back. She had had a number of problems; carpal tunnel, two cervical surgeries, the left shoulder. She had had two surgeries on her left knee in 1988, . . .”

In making a determination of vocational disability, the trial court considers all pertinent factors, including lay and expert testimony, the employee’s age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant’s disabled condition. Tenn. Code Ann. § 50-6-241(c); *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000). In section 208(a)(1) cases, the percentage of disability awarded for prior injuries has no bearing on the determination of the effects of the second injury. *Allen v. City of Gatlinburg*, 36 S.W.3d 73 (Tenn. 73 (Tenn. 2001). In fixing the vocational disability for the injured arm, the trial court was not permitted to consider the prior injuries or surgeries. Thus, Dr. Caldwell’s opinion of her pre-existing disability was not relevant. Upon our review of the record, we are unable to state that the evidence preponderates against the trial court’s assessment of disability for the left arm injury. We, however, modify the finding of the trial court to reflect that Advance’s liability for the left arm injury is based on a disability of 15 percent to the body as a whole.

II.

The Fund contends that the trial court erred in apportioning the liability between Advance and the Fund for the permanent and total disability benefits. The trial court limited the liability of Advance to 60 weeks of benefits for the injury to a scheduled member, and ordered the Fund to be liable for the remaining judgment for permanent and total disability to age 65. We reverse the trial court. After converting the scheduled member award to a percentage of the body as a whole, “awards of permanent and total disability are apportioned between the employer and the Fund based on a percentage of the total number of weeks to age 65.” *Watt v. Lumbermen’s Mut. Cas. Ins. Co.*, 62 S.W.3d 123, 132 (Tenn. 2001); *Bomely*, 970 S.W.2d at 931-32; *Scales*, 53 S.W.3d at 657. We find that Advance is liable for the first 15 percent of the liability for the award of permanent and total disability to age 65, and the Fund will be liable for the balance of the liability.

Disposition

The judgment of the trial court is modified in part, reversed in part and the case is remanded for any necessary proceedings in accordance with this opinion. Costs of the appeal are taxed against the Advance Transformer Company and its insurer, The Travelers Indemnity Company.

Howell N. Peoples, Special Judge

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ET AL.**

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JUDGMENT

This case is before the Court upon the motion for review filed by Advance Transformer Company and the Travelers Indemnity Company 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Advance Transformer Company and the Travelers Indemnity Company, and sureties, for which execution may issue if necessary.

BARKER, J., NOT PARTICIPATING