IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
June 10, 2003 Session

KATHERINE ELAINE SONS v. ZURICH AMERICAN GROUP

Direct Appeal from the Chancery Court for Tipton County
No. 17,876 Martha B. Brasfield, Chancellor

No. 2002-02244-WC-R3-CV - Mailed August 27, 2003; Filed October 9, 2003

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. In this appeal, the employee insists the trial court erred in its application of the successive injury rule and by applying the caps contained in Tenn. Code Ann. § 50-6-241(a) to the medical impairment resulting only from her most recent injury. The employer's insurer insists the evidence preponderates against the trial court's finding that the employee is permanently disabled to any extent. As discussed below, the panel concludes the successive injury rule is inapplicable and the extent of the employee's permanent disability must be determined in accordance with established rules relating to pre-existing conditions.

Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the Chancery Court Vacated; Cause Remanded

LOSER, SP. J., delivered the opinion of the court, in which HOLDER, J., and GOLDIN, SP. J., joined.

Joseph H. Crabtree, Jr., Stewart & Wilkinson, Memphis, Tennessee, for the appellant, Katherine Elaine Sons

Ronald L. Harper and R. Scott Vincent, Memphis, Tennessee, for the appellee, Zurich American Group

MEMORANDUM OPINION

The employee or claimant, Ms. Sons, initiated this civil action to recover workers' compensation benefits for a work related back injury. The employer's insurer, Zurich American, denied liability. After a trial on the merits, the trial court awarded the employee, among other things, permanent partial disability benefits based on 10 percent to the body as a whole. The employee has appealed contending the award is inadequate.

Appellate review 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. § 50-6-225 (e)(2). This tribunal is not bound by the trial court's findings but instead conducts an independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). 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, because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). Extent of vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn. 1999). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 367 (Tenn. 1998).

The claimant is sixty years old and has a tenth grade education. She obtained a GED certificate in about 1973, but has no other formal education.

She began working in 1979 at a nuclear power station. Her job was to wash protective clothing. Later in the same year, she began working as a labor foreman in construction work. Her work through 1990 consisted of very strenuous, very heavy labor. Her duties included, but were not limited to running conduit and wiring in buildings. She returned to Covington in 1990 and tended a bar. In 1994, she was hired by Dyncorp, a general maintenance company which performed general maintenance at the old navy base in Millington. Around June 1, 1998, the maintenance contract was awarded to J. A. Jones Management, at which time the claimant went to work for the employer, J. A. Jones. She worked mostly with electrical lines and performed many of the duties that an electrical worker with Memphis Light, Gas & Water would perform. She would roll and unroll lines, replace poles, replace lights and fixtures inside buildings and install new wiring. She also worked with air conditioners, replacing filters and cleaning ducts. All of the tasks were heavy and strenuous work requiring lifting, bending, twisting, turning, etc.

In May 1998, the claimant developed foot problems and underwent a surgical procedure on her feet. After this surgical procedure, she began experiencing back pain. A diagnostic test revealed a ruptured disc. At the time, neither the foot problems nor the back problems were work related. On May 18, 1998, Dr. Dowen E. Snyder performed corrective surgery on her lower back, removing large fragments of disc at two levels. She returned to work in July of the same year. However, she experienced pain both during and after work. On September 15, 1998, the claimant returned to Dr. Snyder with complaints of recurrent pain in her back and left hip and leg. She also described an incident involving a fall from a treadmill, in which she landed on her lower back. The treadmill event caused no additional pain. The doctor prescribed an epidural block, medication, rest and therapy. When the pain didn't wane, Dr. Snyder ordered a second magnetic imaging resonance test.

On September 30, 1998, the claimant stepped in a hole at work and suffered immediate and

different "screaming" pain. She continued working. The MRI ordered earlier was conducted on October 26, 1998 which revealed another large herniated disc affecting a nerve root. Corrective surgery was performed the same day. She returned to work on December 21, 1998 and worked until July 2000 when she ended her employment with the employer. Since that time, the claimant has worked for two different companies. At the time of the trial, she was not working. She testified that she could not return to maintenance work because of her back injury. The trial court expressly found the claimant to be a credible witness.

Ms. Sons was referred to Dr. Joseph Boals for an examination and evaluation of her medical impairment. Dr. Boals opined, using appropriate guidelines, that she retained a medical impairment of 13 percent, of which 4 percent was attributable to the work related injury and consequent surgery. At the trial, the appellee argued that the 4 percent impairment rating was applicable. The claimant contended the 13 percent impairment rating was applicable. The trial court, citing the "Last Injurious Injury Rule," held the applicable impairment rating to be 4 percent and awarded permanent partial disability benefits based on 10 percent, or two and one-half times the medical impairment rating, to the body as a whole.

The employee contends, and the appellant now concedes, the last injurious injury rule is not applicable to this case. We agree.

Under the successive, or last injurious, injury rule, where an employee is permanently disabled as a result of a combination of two or more accidents occurring at different times and while the employee was working for different employers, the employer for whom the employee was working at the time of the most recent accident is generally liable for permanent disability benefits. Baxter v. Smith, 211 Tenn. 347, 364 S.W.2d 936, 942-3 (1962). The same doctrine applies where the employee's permanent disability results from successive injuries while the employee is working for the same employer, but the employer has changed insurance carriers. Indiana Lumberman's Mut. Ins. Co. v. John David Ray, 596 S.W.2d 816, 819 (Tenn. 1980). The carrier which provided coverage at the time of the last injury is liable for the payment of permanent disability benefits. Id. The rule is inapplicable to these facts because the employee has suffered only one work related injury. Moreover, even if the rule were deemed applicable, it should not be construed as a limitation on the extent of the employer's liability.

The claimant argues that the multiplier contained in Tenn. Code Ann. § 50-6-241(a) is not necessarily applied to the medical impairment rating for the most recent injury. Again we agree. An employer takes an employee as the employee is, with all defects and diseases, and assumes the risk of having a weakened condition aggravated by an injury which might not affect a normal person. Express Personnel Services, Inc. v. Belcher, 86 S.W.3d 498, 500 (Tenn. 2002). On that authority, we conclude the trial court erred in limiting the claimant's permanent partial disability award to two and one-half times the medical impairment rating for the most recent injury.

The appellee contends the evidence preponderates against the trial court's finding of permanency. From our independent examination of the record, we are not persuaded the evidence

preponderates against the trial court's finding that permanency was established by the testimony of the claimant and Dr. Boals.

The judgment is therefore vacated and the cause remanded for consideration in accordance with the above principles. Costs are taxed to the appellee.

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JOE C. LOSER, JR.

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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 fact 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 Appellee, Zurich American Insurance Group, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM