

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

**JUANITA BOLING, Appellee v. SAK'S INCORPORATED a/k/a HECHT'S  
and LIBERTY MUTUAL INSURANCE GROUP, and SUE ANN HEAD,  
DIRECTOR, DEPARTMENT OF LABOR, WORKERS' COMPENSATION  
DIVISION, SECOND INJURY FUND, Appellants**

**Direct Appeal from the Chancery Court of Williamson County  
No. 28582, 28318, Hon. Robert E. Lee Davies, Chancellor**

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**No. M2003-00195-WC-R3-CV - Mailed - December 1, 2003  
Filed - January 6, 2004**

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This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting findings of fact and conclusions of law. The issues presented pertain to a 71 year old employee of Sak's Incorporated who sustained two separate injuries. The employee and Sak's settled the first case, involving injuries to the left shoulder, for the maximum benefits stating in the settlement that the employee was "100% permanently partially disabled." The matter on appeal involves an injury to the back that occurred within one month of the prior injury. The trial court found the employee permanently and totally disabled from her back injury and awarded her the maximum benefits. Moreover, the trial court construed the prior order as a finding of 100% permanent total disability to the body as a whole and held the appellant, Second Injury Fund of the Department of Labor, liable for the entire award for the back injury. For reasons stated herein, the panel affirms the judgment of the trial court as modified.

**Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right; Judgment of the Chancery Court Affirmed.**

Frank G. Clement, Jr., Sp. J., delivered the opinion, in which Frank F. Drowota III, C.J., and Joe C. Loser, Jr., Sp. J., joined.

J. Frank Thomas, Leitner, Williams, Dooley & Napolitan, PLLC, Nashville, TN, for appellant, Sak's Incorporated.

Paul G. Summers and E. Blaine Sprouse, Attorney General, Nashville, TN, for appellant, Second Injury Fund.

Daniel C. Todd, Todd and Floyd, PLC, Nashville, TN, for appellee, Juanita Boling.

## Memorandum Opinion

Juanita Boling (Boling), the employee-appellee, began working at Sak's department store in 1993. Boling was 71 years old in January and February, 2001 when she sustained two injuries while working at Sak's. On January 31, 2001, Ms. Boling injured her left shoulder. She received medical treatment and returned to work while still under the care of a physician. Less than one month later, on February 27, 2001, she injured her back. Ms. Boling underwent surgery for the shoulder injury in April of 2001. She did not have surgery on her back.

Ms. Boling brought claims against her employer and the workers' compensation insurer, Liberty Mutual Insurance Company, for both injuries. Initially, she filed two civil actions against Sak's and Liberty Mutual, one action for each respective injury. Ms. Boling later filed a third action, this one against the Second Injury Fund (the "Fund").<sup>1</sup> Moreover, the defendants added the Fund as a third party defendant, seeking indemnification or contribution for any benefits Ms. Boling may receive in excess of the maximum benefits of 260 weeks.

In February of 2002, Sak's and Liberty Mutual settled the claim for Ms. Boling's shoulder injury for the maximum benefits available to an employee over the age of 60 years, being 260 weeks of compensation.<sup>2</sup> In the agreed order settling the claim for the right shoulder, the parties stated that the award to Ms. Boling of two hundred sixty (260) weeks of benefits was "essentially equivalent to one hundred percent (100%) permanent partial disability to the body as a whole." The parties did not settle the claim for Ms. Boling's back injury.

The trial court consolidated the two remaining actions, the one concerning the back injury with the plaintiff's action against the Fund. This appeal arises from the two consolidated actions. The case that was settled is not before us; however, the terms of the settlement are relevant to the issues before us and are discussed.

The claim for the back injury went to trial in October of 2002. The trial court found that Ms. Boling was rendered permanently and totally disabled from her back injuries and awarded Ms.

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<sup>1</sup>Ms. Boling initially filed two complaints for her injuries on October 22, 2001, against her employer, Sak's Incorporated, a/k/a Hechts, and its insurance carrier Liberty Mutual Insurance Company, being docket numbers 28318 and 28320. Sak's and Liberty Mutual filed an Answer on November 30, 2001. On February 27, 2002, Ms. Boling filed a third civil action, this one against the Second Injury Fund, being docket number 28582. Also on February 27, 2002, Sak's and Liberty Mutual filed a motion to add the Second Injury Fund as a third party defendant in docket number 28318. Before the trial for Ms. Boling's back injury in docket number 28318, Boling, Sak's and Liberty Mutual settled the claim concerning the left shoulder in docket number 28320. The settlement for the shoulder injury was subsequently deemed by the trial judge to constitute a settlement for 100% permanent total injury to the body as a whole.

<sup>2</sup>Workers' compensation awards to persons over the age of 60 are capped at 260 weeks. Tenn. Code Ann. § 50-6-207(A)(I). Boling was 71 years old at the time of her injuries.

Boling the maximum of 260 weeks of benefits. The trial court also determined that the prior settlement for the injury to her left shoulder constituted an award of 100% permanent total disability. Accordingly, the trial court held the Fund liable for the entire award for her back injury since Sak's and Liberty Mutual had fully satisfied their obligations to Ms. Boling when they paid the maximum benefit of 260 weeks in the prior action.

Our review is *de novo* upon the record, 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). We are not bound by the trial court's findings but, instead, conduct an independent examination of the record to determine where the preponderance of evidence lies. *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991). Nevertheless, considerable deference must be accorded to the trial court's factual findings on issues related to the credibility of witnesses and the weight to be given their testimony. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997). Conclusions of law, however, 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 only issue presented by the Fund reads as follows:

Whether, when her impairment ratings were 10% and 11% respectively, and she returned to work at the same job, Ms. Boling's settlement award for 260 weeks permanent partial disability benefits was equivalent to an award of 100% permanent total disability benefits for Second Injury Fund Statute purposes.

Boling, Sak's and Liberty Mutual settled the claim for Ms. Boling's shoulder injury for 260 weeks of benefits, referring to the award as being "essentially equivalent to one hundred percent (100%) permanent partial disability to the body as a whole." The agreed order reads in pertinent part:

That the parties have agreed that Plaintiff is subject to the caps of T.C.A. 50-6-207(4)(A)(I) as she was over the age of sixty (60) on the date of the accident, January 31, 2001. The parties have agreed that Defendants will pay and the Plaintiff will accept payment of two hundred sixty (260) weeks of benefits, *which is essentially equivalent to one hundred percent (100%) permanent partial disability to the body as a whole*, to be paid in a lump sum. (emphasis added) . . . .

Item IV of agreed order of settlement in Docket No. 28320, entered March 21, 2002.

The Fund correctly states that our Supreme Court abolished the designation "100% permanent partial disability" in *Vinson v. United Parcel Service*, 92 S.W. 3d 380, 384 (Tenn. 2002).<sup>3</sup> Consequently, the Fund argues that the previous settlement award for 260 weeks could not

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<sup>3</sup>This body of law does not recognize a finding of "100% permanent partial disability." "It goes without saying that 100% is 100%. Because the disability classification used by the trial court is supported neither by statute nor case law, we must set it aside." *Vinson v. United Parcel*

have been for “100% permanent partial” disability.

The record does not explain why Sak’s, Liberty Mutual and Ms. Boling referred to her disability from the shoulder injury as being “equivalent to a 100% permanent partial disability.” Nevertheless, the terminology was agreed to by the parties. Furthermore, that issue was not appealed. Therefore, the propriety of the disputed provision in the agreed order of settlement is not subject to our review. What is subject to our review is whether the trial judge in the two consolidated actions on appeal acted erroneously when he ruled that the prior award constituted a 100% permanent total disability.

The Fund’s argument that the settlement should not be considered an award of 100% permanent total disability focuses on two primary factors. One is the fact that the physicians opined that Ms. Boling’s disability from the shoulder injury was 10% and 11%, respectively.<sup>4</sup> The other focuses on the close proximity of the two separate permanent and total disability awards.

The fact that the physicians opined that Ms. Boling’s disability from the shoulder injury was 10% and 11%, respectively, is pertinent however it should not be viewed in a vacuum. Moreover, it must be noted that the trial judge who approved the settlement is the same judge who tried the cases on appeal. We are mindful of the fact that the trial judge had the benefit of the evidence that was previously presented to him when he was asked to approve the proposed settlement and that he had an affirmative duty to ascertain whether the proposed settlement provided to the employee substantially the benefits provided by the Workers’ Compensation Law. T.C.A. 50-6-206.

As for the second factor, the Fund specifically argues that if Ms. Boling was totally and permanently disabled from the shoulder injury she sustained on January 31, 2002, how could she have recovered sufficiently to then sustain another 100% permanent and total disability less than one month later. This is a persuasive argument for Ms. Boling had not completed rehabilitation from the first injury, however, this issue requires a close examination of the peculiar facts presented.

Of greatest significance is the fact that the surgery to repair the first (shoulder) injury occurred *after* Ms. Boling sustained the back injury. Of further significance is the fact that the shoulder surgery was not successful. It does appear that Ms. Boling was not 100% permanently and totally disabled from the first (shoulder) injury when she sustained the back injury for she was working when the back injury occurred. Had the shoulder surgery been successful, it is probable that she would not have sustained a 100% permanent total disability to the body as a whole. Nevertheless, knowing that the back injury was still at issue, the parties presented the unorthodox terminology in the settlement order to the court and the trial judge approved. Further, the same trial

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*Service*, 92 S.W.3d 380, 385 (Tenn. 2002).

<sup>4</sup>The Order approving the settlement between Sak’s and Ms. Boling for the first injury, the shoulder injury, recites that Dr. Paul Thomas gave her a permanent medical impairment rating of 10% to the body as a whole and Dr. David Gaw gave her a permanent medical impairment rating of 11% to the body as a whole.

judge later reviewed the matter again and determined that the prior settlement constituted a 100% permanent and total disability award.<sup>5</sup>

In that Ms. Boling had not rehabilitated fully from the first (shoulder) injury, it appears improbable that she sustained a 100% permanent and total disability from the second (back) injury that occurred less than thirty days after the first. Moreover, we find that the evidence preponderates against the trial court's finding of 100% for the second injury. After a close examination of the peculiar facts presented, we find that Ms. Boling's permanent and total disability award for the second (back) injury should be reduced to 85%.

Since Ms. Boling is over 60 years of age, she is limited to the maximum benefit of 260 weeks. Permanent disability benefits for employees over age 60 are to be calculated as a percentage of 400 weeks, "capped" at 260 weeks, rather than as a percentage of 260 weeks. *Peace v. Easy Trucking Co.*, 38 S.W.3d 526, 528 (Tenn. 2001). Accordingly, Ms. Boling need not be 100% permanently and totally disabled from the second injury to receive the maximum benefit of 260 weeks. Indeed, an award greater than 65% exceeds the maximum benefit a 60 year old employee can receive. Accordingly, this modification is of no economic consequence for an award of 85% permanent and total disability exceeds the "cap" of 260 weeks, which is the amount of the judgment.

The issue presented also requires that we address whether the trial judge was correct in holding the Fund liable for the entire 260 week award of benefits to Boling for the injury to her back. Tenn. Code Ann. § 50-6-208(b)(1)(B) (2002) provides:

Benefits which may be due the employee for permanent disability to the body as a whole in excess of one hundred percent (100%) permanent disability to the body as a whole, after combining awards, shall be paid by the Second Injury Fund.

An employee satisfies the requirements for recovery under Tennessee Code Annotated § 50-6-208(b)(1)(B) if the employee has received or will receive workers' compensation awards for permanent disability to the body as a whole that exceed or will exceed 100%. When the employee receives or will receive benefits that exceed 100%, the Second Injury Fund must pay the portion that exceeds 100%." *Bomely v. Mid-America Corp.* 970 S.W.2d 929, 935 (Tenn. 1998).

Boling's settlement for her first injury was for 100% permanent total disability. Therefore, the Second Injury Fund must pay any subsequent award of workers' compensation that Boling will receive for later injuries. Thus, we affirm the trial court's ruling and hold that the Fund must pay

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<sup>5</sup>This conclusion is supported by the evidence which established that Ms. Boling was 71 years old at the time of the shoulder injury, that she was unable to hang up clothes at work, that she was unable to do heavy housework, that she was unable to go grocery shopping, and she was unable to work after the surgery to the shoulder.

all of Boling's 260 week award of benefits for her back injury.<sup>6</sup>

Finally, it appears that Sak's is attempting to raise another issue, arguing that the trial court erred in allowing Boling to recover workers' compensation benefits for her back injury because she was over the age of 60 when she recovered 260 weeks of compensation for her shoulder injury and had not rehabilitated. "Sak's brings this issue to the court's attention because the Fund and Ms. Boling did not." (See page 7 of the appellee's brief of Sak's.) However, a party is not entitled to relief if the party waived error or failed to take whatever steps reasonably available to cure an error. Advisory Commission Comment to Tennessee Rule of Appellate Procedure 36(a). We find that Sak's waived its right to raise this issue on appeal and decline to review it for that reason.

The judgment of the trial court is affirmed as modified. Costs on appeal are taxed to Appellant, The Second Injury Fund.

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Frank G. Clement, Jr., Special Judge

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<sup>6</sup>This holds true even though we modified the award for the second (back) injury, reducing it to an award for 85% permanent and total disability instead of 100%, as awarded by the trial judge.

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL

**JUANITA BOLING v. SAK'S INC. a/k/a HECHT'S, ET AL.**

**Chancery Court for Williamson County  
No. 28582, 28318**

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**No. M2003-00195-WC-R3-CV - Filed - January 6, 2004**

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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 Appellant, The Second Injury Fund, for which execution may issue if necessary.

**IT IS SO ORDERED.**

**PER CURIAM**