

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 13, 2004 Session

BOBBY L. BYRGE v. ZURICH SERVICES CORP., ET AL.

**Direct Appeal from the Circuit Court for Anderson County
No. A1LA0578 James B. Scott, Jr., Judge**

Filed January 14, 2005

No. E2004-00624-WC-R3-CV - Mailed December 7, 2004

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. The trial court awarded the employee 55 percent permanent partial disability for the loss of one arm and one leg, a combined scheduled injury, without separately computing each scheduled injury award. Defendants insist it was error to award benefits in this manner. Judgment of the trial court is affirmed.

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

ROGER E. THAYER, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J., and HOWELL N. PEOPLES, SP. J., joined.

Timothy W. Conner and Joshua A. Wolfe, Knoxville, Tennessee, for Appellants, Zurich Services Corp. and Senior Flexonics, Inc.

Bruce D. Fox, Clinton, Tennessee, for Appellee, Bobby L. Byrge.

MEMORANDUM OPINION

This appeal has been perfected by the insurance carrier and employer from a ruling of the trial court awarding the employee 55 percent permanent partial disability for loss of one arm and one leg under Tenn. Code Ann. § 50-6-207(3)(A)(ii)(ee).

Brief Facts

Plaintiff, a 49 year old high school graduate, was injured at work on June 24, 2001 when he

fell on a concrete floor causing injuries to his right arm and right leg. He was taken to the hospital where he was admitted for surgery on his arm and sometime later had surgery on his leg.

At trial, he was complaining of not having feeling in some of his fingers; said he could not grip anything well and had a tingling sensation in his fingers. As to the leg injury, he testified his knee would swell up often and especially after walking. He also said he had pain.

The medical evidence was presented by the depositions of the treating doctor and a doctor who performed an independent medical examination. Dr. Duncan L. McKellar Jr., an orthopaedic surgeon, performed the several surgical procedures and testified plaintiff had a posterior dislocation of the right elbow and associated radial head fracture, an olecranon fracture and an ulnar palsy injury due to the dislocation. He said the leg injury involved a tear of the medial meniscal of the right knee. The doctor gave a 2 percent impairment to the right leg and a 38 percent impairment to the right arm. Dr. Robert Haralson, also an orthopaedic surgeon, performed the independent medical exam and assessed impairment at 2 percent to the right leg and 16 percent to the right arm.

Two vocational disability assessment witnesses testified. One was of the opinion the employee had a 75-80 percent vocational disability and the other witness fixed the vocational disability at 17 percent.

The trial court found the disability to be 55 percent for the loss of one arm and one leg under Tenn. Code Ann. § 50-6-207(3)(A)(ii)(ee). The record does not indicate how the court arrived at this combined award.

Standard of Review

The standard of review of factual issues in a worker's compensation case is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the trial court's findings. Tenn. Code Ann. § 50-6-225(e)(2). The review of legal issues is *de novo* without any presumption in favor of the ruling. *Tucker v. Foamex*, 31 S.W.3d 241, 242 (Tenn. 2000).

Analysis

Defendants insist the trial court was in error in failing to evaluate the two injuries separately in order to show how the award of disability was arrived at and also it is claimed the award is excessive.

Tennessee Code Annotated §50-6-207(3)(A)(ii)(m) provides for a scheduled injury for loss of an arm with benefits to be paid for a period of 200 weeks. Subsection (o) of the same statute allows for loss of a leg with benefits to be paid for a period of 200 weeks. Subsection (ee) of the statute provides for the loss of one arm and one leg with benefits to be paid for a period of 400 weeks.

Defendants cite the cases of *Queen v. New York Underwrites Ins. Co.*, 435 S.W.2d 122 (Tenn. 1968) and *Lock v. National Union Fire Ins. Co.*, 809 S.W.2d 483 (Tenn. 1991) in support of their claim the court did not properly compute the award of disability.

We have examined these cases and find the decisions do not support the basis of the appeal.

In the *Queen* case, the court was dealing with arm and foot injuries. The trial court found the disability for the loss of the arm was 45 percent and the disability for loss of the foot was 30 percent and that the mean average between the two percentages was 37 and one-half percent. The employee was then awarded a judgment for a combined scheduled injury of an arm and a foot of 37 and one-half percent of 400 weeks. The Supreme Court upheld the award and ruled it was proper to list the scheduled members together as one scheduled injury and that the trial court was not required to compute the award separately and then add the sums for a total award. In this case the separate computation of an arm and a foot would have resulted in less benefits than an allowance under the schedule for combined loss of the two members.

In the *Lock* case, there were two separate accidents resulting in injuries to the arm and foot. The trial court fixed the awards separately under the schedule of injuries statute and did not combine the two together. On appeal, the judgment was modified to provide the percentages of disability should be averaged and the award should be based on 400 weeks under the combined loss of two scheduled members pursuant to Tenn. Code Ann. § 50-6-207(3)(A)(ii)(dd).

These two cases still do not reach the narrow issue of whether the trial court must for the record evaluate the injuries separately before fixing an award of disability for the combined loss of two scheduled injuries.

In the case of *Liberty Mut. Ins. Co. v. Maxwell*, 46 S.W.2d 67 (Tenn. 1932) the Supreme Court affirmed a ruling of the trial court that awarded the employee 90 percent for the combined loss of an arm and a leg and stated it was not necessary to evaluate the disabilities separately under the schedule of injuries statute.

In insisting that the award in the present case should be modified, we note defendants recognize that the result to the plaintiff would not be affected since a separate computation of benefits would amount to the same award as the computation for the combined injuries. Thus, we find it difficult to accept the argument defendants' rights have adversely been affected by the court's ruling. Defendants merely want the court to explain how it arrived at the 55 percent disability. We believe this to be unnecessary and affirm the court's ruling on this particular issue.

It is also insisted the award of disability is excessive. From our independent review of the case, we do not find the evidence to preponderate against the conclusion of the trial court.

Conclusion

The judgment of the trial court is affirmed. Costs of the appeal are taxed to the defendants.

ROGER E. THAYER, SPECIAL 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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellant, Zurich Services Corp., et al., for which execution may issue if necessary.