IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 24, 2005 Session

GARY CLARK v. STANDARD IRON, INC. and LUMBERMAN'S CASUALTY INSURANCE COMPANY v. SUE ANN HEAD, ADMINISTRATOR OF THE SECOND INJURY FUND FOR THE STATE OF TENNESSEE.

Appeal from the Chancery Court for Coffee County, Tennessee
No. 01-484; Hon. John W. Rollins, Judge*

No. M2004-00710-WC-R3-CV - Mailed - June 28, 2005
Filed - July 29, 2005

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with the provisions of Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The Second Injury Fund has appealed the action of the trial court, which determined that the Employer, Standard Iron, Inc., was responsible for payment of 25% of the award to the Worker, Gary Clark, and that the Second Injury Fund was responsible for payment of 75%. Upon our consideration of all of the evidence, we find that the trial court properly determined all issues, but we find that the award should be modified.

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

ROBERT E. CORLEW, SPECIAL JUDGE, delivered the opinion of the court, in which ADOLPHO A. BIRCH, JUSTICE, AND DONALD P. HARRIS, SENIOR JUDGE, joined.

Paul G. Summers, Diane Stamey Dycus, and Richard M. Murrell, Nashville, Tennessee, for the Appellants, Sue Ann Head, Administrator of the Second Injury Fund for the State of Tennessee.

Gerard M. Siciliano and Preston A. Hawkins, Luther-Anderson, P.L.L.P., Chattanooga,, Tennessee, for Appellees, Standard Iron, Inc. and Lumberman's Mutual Casualty Insurance Company.

J. Bartlett Quinn, Chambliss, Bahner & Stophel, P.C., Chattanooga, Tennessee, for Appellee, Gary Clark.

*All proceedings in the trial court were conducted before the Honorable John W. Rollins, Judge, though the final judgment was entered by Honorable Gerald W. Ewell, Retired Judge, in the absence of Judge Rollins.

MEMORANDUM OPINION

FACTUAL BACKGROUND

The facts before the trial court were largely undisputed. The Worker suffered a tragic injury. All parties stipulated that, due to the injury, coupled with prior injuries suffered by the Worker, he was totally and permanently disabled such that he was entitled to compensation under the workers' compensation law until he reached age 65. Because the worker was 58 years of age at the time of trial, he was entitled only to some 436 weeks of compensation. The only issue for determination by the trial court was the portion of the permanent vocational disability which should be paid by the employer and the portion which should be paid by the Second Injury Fund.

The Worker began working for his pre-injury employer after more than 13 years in the Army, where he was a heavy equipment operator. After discharge from the Army, he then worked as a truck driver for a number of companies. He also worked for a number of years as a diesel mechanic.

While in the military, the Worker sustained substantial injuries. In Vietnam, he was exposed to the substance known as "Agent Orange." Though there is no evidence of causal connection, the Worker blames this encounter for the total failure of his thyroid gland to function. He further sustained a hearing loss for which the Army has determined a 10% vocational disability. The Worker testified that he is totally deaf in his right ear. He was, however, equipped with hearing aids at trial, though the transcript shows that the Worker had difficulty hearing, even so. His

most significant injury, however, occurred in Germany, where the Worker hurt his back and was then hospitalized for eight months, underwent surgery, and then was retired from the service due to his disability, which the military assessed at 60% to the back. He underwent surgery to remove a herniated disc at the L4-L5 level.

While he worked for Vulcan Materials, the Worker sustained an elbow injury which required surgery to reattach a nerve, but the evidence does not show that there was any award of permanent disability as a result of this injury. Subsequently, while he worked for Double Cola, the Worker sustained a rotator cuff injury which required two surgeries and which resulted in a court-approved award for vocational disability of 24%, apportioned to the body as a whole.

The Worker then began to work for the Employer, Standard Iron, Inc. The proof shows that although the Worker had a number of aches and pains, he proceeded to carry out all of his responsibilities for the Employer without significant accommodation or any significant absenteeism. He successfully passed multiple Department of Transportation physical examinations in order to maintain his commercial driving privileges, though the Worker testified that he explained in detail his prior injuries and medical treatments to both his Employer and each health care provider. Prior to the current injury, the Worker continued to hunt and fish with some degree of regularity. Significantly, though he worked frequently in pain, he was not restricted by any physician either in or out of the workplace, and he had few absences from work.

On July 10, 2001, while the Worker was unloading aluminum in Marietta, Georgia, in the course and scope of his duties for the Employer, the Worker felt sudden discomfort in his shoulder. He never returned to work, despite reaching maximum medical improvement on August 25, 2003. As a result of this injury, the Employer was required to expend some $110,000 for medical treatment for some seven specialists who treated the Worker. The Worker underwent arthroscopic surgery on his right shoulder immediately after his injury. He had a subsequent surgery to remove herniated discs at the C4-C5 and C5-C6 levels and underwent fusion of his neck in these two places. Further shoulder surgeries were performed on two separate dates. Hardware, including a steel plate and screws were installed. Following this injury, the Worker has been unable to return to work. He can no longer hunt and fish. He cannot climb, sit for long periods of time, or ride in a boat. He has difficulty turning his head. He requires help dressing in some outfits and

cannot shave himself or comb his hair. He needs accommodation when bathing. He cannot walk for long periods of time and has limited ability to carry. He has lost substantial function of his dominant right hand and now performs most tasks with his left hand. He has inferior finger and manual dexterity. He can sleep only for approximately four hours at a time and is comfortable sleeping only on his left side. When he sleeps, his shoulder hurts and his hand swells.

STANDARD OF REVIEW

Our 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). Conclusions of law established by the trial court come to us without any presumption of correctness. Watt v. Lumbermens Mutual Casualty Insurance Co., 62 S.W.3d 123, 127 (Tenn. 2001).

ISSUE

The parties all agreed that the Worker was totally and permanently disabled. The issue raised on appeal is the extent to which the Employer and the Second Injury Fund should contribute to the award of permanent total disability.

FORMULA FOR DETERMINING LIABILITY OF THE SECOND INJURY FUND

Apportionment of responsibility for payments to injured workers between employers and the Second Injury Fund is a frequent subject of discussion, both in the trial courts, before the various Workers' Compensation Panels, and before the full Supreme Court. In making the determination of liability, we are governed by the provisions of Tennessee Code Annotated section 50-6-208. Though often misunderstood, this statute must be closely scrutinized, for it provides the formula which is binding in the consideration of the liability of the Second Injury Fund. This statute first recognizes that it is the duty of the Second Injury Fund to provide relief for employers when a worker sustains a permanent injury, the disability award for which, when combined with other injuries that the worker has previously sustained, exceeds 100%. In making this determination, the court should consider the impact upon the present injury of all prior conditions, injuries, and disabilities suffered by

the worker. The statute provides that there are two different ways in which the liability of the Second Injury Fund occurs. First, when the worker is before the court seeking compensation for an injury, the total of which, when combined with all other injuries, conditions, and disabilities from which the worker suffered before, from any source, work-related or not, exceeds a vocational disability rating of 100%, the Second Injury Fund has liability. This is generally called an "a" case, because these circumstances are discussed in Tennessee Code Annotated section 50-6-208(a). The second situation is somewhat simpler. Where the worker is before the court seeking compensation for an injury, which, when combined with other work-related injuries for which a court has awarded compensation, exceeds 100%, then the Second Injury Fund has liability. This is generally called a "b" case, because these circumstances are discussed in Tennessee Code Annotated section 50-6-208(b).

Though the application of the two rules are slightly different, the first step in either case is the determination of the vocational disability of the worker as a result of the injury or condition then before the trial court, requiring the employer to take the Worker as it finds him, considering all permanent physical disabilities "from any cause or origin, either compensable or noncompensable." Scales v. City of Oak Ridge, 53 S.W.3d 649, 655 (Tenn. 2001). The court should consider the factors which should be contemplated in any worker's compensation action, including the worker's age, education, job skills and training, job opportunities in the community, the capacity to worker to work at the types of jobs available in his disabled condition, and the anatomical impairment rating. See Hickman v. Continental Baking Co., 143 S.W.3d 72, 75 (Tenn. 2004).

If the trial court finds that the worker is permanently and totally disabled (100% vocational disability), then the court should consider whether the worker had prior injuries, conditions or disabilities which were permanent in nature. If so, the court should determine that this is an "a" case. The trial court must then make an independent determination concerning the vocational disability of the worker which the court made earlier, but this time the court must hypothetically consider the amount of compensation which would have been due to the worker for the injury for which he seeks compensation without considering any of the prior injuries or conditions. Allen v. City of Gatlinburg, 36 S.W.3d 73, 77 (Tenn. 2001); Bomely v. Mid-America Corp., 970 S.W.2d 929, 934 (Tenn. 1998); Perry v. Sentry Insurance Co., 938 S.W.2d 404, 407 (Tenn. 1996). The difference between this calculation and the 100% which the court found earlier is the liability of the Second Injury Fund under the provisions

of Tennessee Code Annotated section 50-6-208(a), provided the evidence shows that the employer "had actual knowledge of the permanent and preexisting disability at the time that the employee was hired or at the time that the employee was retained in employment after the employer acquired such knowledge." Tenn. Code Ann. § 50-6-208 (a) (2). Where the proof shows that the employer has no such actual knowledge with regard to a prior injury, condition or disability, the employer continues to have responsibility for compensation for the subsequent injury in light of the prior circumstances of which the employer had no actual knowledge. Tenn. Code Ann. § 50-6-208 (a) (3).

The trial court should then determine whether this is also or is alternatively a "b" case. In order to do this, the court must simply consider the vocational disability rating which it has found for the injury before the court, then add to that number the percentages of all vocational disability ratings under the workers' compensation law that the worker has previously received for other injuries or conditions. The court should consider only the awards that are proven before the court. To be considered, prior awards must be extrapolated to the body as a whole. If the total of all vocational disability awards exceeds 100%, then this is a "b" case. The amount by which this total exceeds 100% is the amount of liability of Second Injury Fund. The statute creates no requirement that the employer have actual knowledge of prior court-approved awards. Tenn. Code Ann. § 50-6-208 (b).

The last step, then is to determine whether the case before the court may be both an "a" and a "b" case. If not, the consideration is concluded, and the trial court should then order the division of liability between the Second Injury Fund and the employer which it has found. If, however, the case is both an "a" and a "b" case, the court must then consider under which formula the liability of the employer is less, and then order the payments to be made under the category which is more favorable to the employer. Scales, supra, at 656; Bomely, supra, at 935; Perry, supra, at 407.

LIABILITY OF THE SECOND INJURY FUND IN THIS CASE

Applying the rules which we just discussed to the case at bar, we initially find that the trial court has determined that the Worker is totally and permanently disabled. The parties so stipulated and under our duty to review that determination, we find that the preponderance of the proof amply supports that finding. We also find that the

Worker suffered from a number of problems prior to the injury in question, some of which were work-related and some of which were not. Thus, this is an "a" case.

Because this is an "a" case, we must then determine, hypothetically, the percentage of vocational disability which the Worker would have suffered as a result of this injury, without considering any of the prior injuries or conditions. The record does not reflect that the trial court specifically announced this determination. Broadly construing the ruling of the trial court, however, it appears to us that by implication, the trial court determined that this is an "a" case, and that the Worker's injury then before the court caused only 25% vocational disability when the prior injuries were not considered. We must conduct our own independent examination of the record to determine where the preponderance of the evidence lies. Phillips v. A& H Construction Co., Inc., 134 S.W.3d 145, 149 (Tenn. 2004). Thus, we have determined that we should make our own evaluation of the Worker's disability, hypothetically, as a result of the injury before the court, without considering the Worker's prior disabilities, rather than remanding the case to the trial court for this determination.

In making the determination of the disability which the Worker would have suffered as a result of the injury now before us, without considering the other prior injuries, conditions, or disabilities, we have, of course, considered the worker's age of 58 years. We have considered his education, and have recognized that he attended formal education only through the ninth grade, though he has since obtained his GED. He has no other formal education. We have considered the Worker's job skills and training, and we find that he has spent his total working life either in the military or as a truck driver. We have considered the capacity of the Worker to be gainfully employed in his disabled condition, and we find that he is unable to be a truck driver as a result of the injury currently before the court. Further, given the physical limitations which are discussed above, we do not find that the Worker has any realistic capacity to work. To the extent demonstrated by the evidence, we have considered the availability of jobs within the local community within the Worker's capacity to work, and, based upon the evidence before the trial court, there are very few. Further, we have recognized the extensive medical restrictions placed upon the Worker and the anatomical impairment ratings of 18% and 28% to the body as a whole provided by McKinley Lundy, D.O., who testified by deposition, and Craig Humphreys, M.D., whose opinion was presented by the introduction of Form C-32. Further, we have considered the testimony of Julian M. Nadolsky, Ed.D., a vocational

expert, who presented his written report and testified before the court, and the testimonies of the Worker and his wife. In making this determination, then, it appears to us that, hypothetically, not considering the Worker's prior injuries, conditions, or disabilities, that the Worker would be entitled to 70% vocational disability due to this injury.

Thus, according to the formula outlined above, we subtract the 70% which we found that the Worker would be entitled to receive due to the injury now before us when we do not consider the prior injuries, conditions, or disabilities, from the 100% which was stipulated to be appropriate when considering the prior injuries, conditions, and disabilities. We thus find that the liability of the Second Injury Fund is 30% and the liability of the Employer is 70% under the provisions of Tennessee Code Annotated section 50-6-208(a). Parenthetically, it is significant to note that the focus of the statute is not initially on the prior injuries, conditions, and disabilities from which the Worker suffered. Thus, the trial court should not initially focus on the disabilities of the worker prior to the injury before the court. Allen v. City of Gatlinburg, supra, at 77 (Tenn. 2001) (concluding that "disability awarded for the prior injury has no bearing" on the award). It is improper to consider the prior disabilities and subtract those from 100% in order to make the determination of the vocational disability occasioned by the injury then before the court without considering the prior injuries, conditions, or disabilities. Id. This may have been the error committed in this case at trial. We note that it appears that much of the proof before the trial court in this cause surrounded the Worker's prior problems. Those prior injuries, conditions, and disabilities are significant, but only after the initial determination is made as to the disability, hypothetically, suffered by the Worker due to the injury then before the court without considering those prior issues.

We then have proceeded to consider the provisions of section (b), which we find to be a simpler determination. We find that this also is a "b" case. The only evidence in the record of a prior court-approved permanent disability is an award determined by the Circuit Court for Hamilton County from 1993 where the Worker was awarded 24% vocational disability while he was employed by Double Cola. We have noted also that the record reflects a determination by the Army that the Worker was 70% disabled when he was discharged from the Army. Our law has established, however, that while we should consider disability awards from other states, we should not consider determinations of disability from organizations within our veteran's administration or armed forces. Huddleston v. Hartford Accident & Indemnity Co.,

858 S.W.2d 315, 318 (Tenn. 1993) (concluding that awards from other states which are "valid and enforceable" may be considered as they are "the functional equivalent of court-approved in-state awards); Cox v. Martin Marietta Energy Systems, 832 S.W.2d 534, 538 (Tenn. 1992) (holding that determinations of veteran's administration should not be considered). Adding the 24% then, to the 100% which we have found to be the Worker's disability here, we find the total disability to be 124%. Because this amount exceeds 100% by 24%, the liability of the Second Injury Fund under Section (b) then is 24%, and the liability of the employer is 76%.

Having found that this is a case where the provisions of section (a) and section (b) both apply, we then have determined that under the provisions of section 50-6-208(a), the liability of the Employer is slightly less. Thus, we determine that the liability of the Second Injury Fund is 30%, and the liability of Employer is 70%.

SUMMARY

Based on the foregoing, we affirm the decision of the trial court, as modified. We modify the determination with respect to the liability of the Employer and the Second Injury Fund, finding that the Employer is responsible for 70% of the award to the Worker, and the Second Injury Fund is liable for 30% of the award. This cause will be remanded to the trial court for such further proceedings as may be necessary under the terms of this opinion.

The costs on appeal will be taxed against the Employer, Standard Iron, Inc.

ROBERT E. CORLEW, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
MARCH 24, 2004 SESSION

GARY CLARK v. STANDARD IRON, INC. And LUMBERMAN'S CASUALTY INSURANCE COMPANY v. SUE ANN HEAD, ADMINISTRATOR OF THE SECOND INJURY FUND FOR THE STATE OF TENNESSEE

Chancery Court for Coffee County
No. 01-484

No. M2004-00710-WC-R3-CV - Filed - July 29, 2005

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 appeals 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 Employer, Standard Iron, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM