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

(July 25, 2006 Session)

MARY ELLEN REAGAN v. TRANSCONTINENTAL INSURANCE CO., MANAR, INC., TENNPLASCO DIVISION, and SUE ANN HEAD, ADMINISTRATOR OF THE TENNESSEE DEPARTMENT OF LABOR SECOND INJURY FUND

Direct Appeal from the Circuit Court for Macon County
Nos. 5032 & 5143 John D. Wootten, Jr. Judge

No. M2006-00009-WC-R3-CV - Mailed - November 21, 2006
Filed - December 27, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The Second Injury Fund contends the trial court erred in (a) finding the employee gave notice of injury to her left arm and shoulder, (b) awarding separate scheduled member and body as a whole awards for one gradually occurring injury, (c) failing to find the employee permanently and totally disabled from the last injury if notice was properly given, and (d) finding that an award on appeal constituted a "prior award" for the purposes of assigning liability to the Second Injury Fund under Tenn. Code Ann. § 50-6-208(b). We modify and remand

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Macon County Circuit Court is modified and remanded.

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, CHIEF JUSTICE, and JEFFREY S. BIVINS, SP. J. joined.

Paul G. Summers, Attorney General and Reporter, Lauren S. Lamberth, Assistant Attorney General, Nashville, Tennessee for the Appellant, Second Injury Fund.

William Joseph Butler, Frank D. Farrar, Farrar, Holliman, & Butler, Lafayette, Tennessee, for the Appellee, Mary Ellen Reagan.

Sarah H. Reisner, Stacey Billingsley Cason, Manier & Herod, Nashville, Tennessee, for the Appellees, Tennplasco and CNA Insurance Companies.

MEMORANDUM OPINION

Facts

This appeal results from the consolidation of two lawsuits filed in the Circuit Court for Macon County, Tennessee by Mary Ellen Reagan against her employer, Manar, Inc., Tennplasco Division ("Tennplasco") and its insuror, CNA.[1] The first suit filed October 24, 2003 alleged work related injuries to her back occurring on or about July 28, 2003. On July 27, 2004 that suit was amended to add the Second Injury Fund as a party. A second suit was also filed on July 27, 2004 alleging a work related injury to the left upper extremity and its subparts occurring in late summer, 2003. The two suits were consolidated for trial and heard on December 2, 2005.

Ms. Reagan had made prior claims for injuries to a right shoulder and for right carpal tunnel syndrome by a suit filed in the Macon County Chancery Court. On May 6, 2005, the Chancery Court entered an Order memorializing a settlement that was reached by Ms. Reagan, Tennplasco, Federated Mutual Insurance Co. and CNA regarding her right shoulder claim. The settlement pertained to the right shoulder injury only and provided compensation based on 56 percent permanent partial disability to the body as a whole. Following a trial on August 2, 2005, the Chancery Court found Ms. Reagan also sustained a permanent partial disability of 75 percent to the right arm for right carpal tunnel syndrome; this award is currently on appeal.[2]

In the present case, the Circuit Court heard testimony from Ms. Reagan and Shelly Roark, the employer's Human Resources Manager, and read the medical depositions of Drs. Walter Wheelhouse, John Bacon, Robert Weiss, James Talmadge, and Douglas Weikert. The trial court made detailed and extensive findings of fact. As pertinent to the issues raised in this appeal, the trial court found that Ms. Reagan received injuries to her low back on or about July 28, 2003, a gradual injury to her left shoulder beginning the first part of August 2003, and problems with her left arm in the hand and wrist area in late Spring 2003 that continued to be exacerbated until she was no longer permitted to continue working in late August 2003. The court found: Ms. Reagan gave proper notice of the injuries; the injuries were separate and distinct as to both time and the parts of the body injured; and the concurrent injury rule did not apply.

The trial court found Ms. Reagan to have a 47.5 percent disability to the body as a whole as a result of the low back injury, a 30 percent disability to the body as a result of the left shoulder injury, and a 60 percent disability to the left arm (equating to 30 percent to the body as a whole). Finding that Ms. Reagan had received prior awards from the Chancery Court of 56 percent to the body as a whole for injury to her right shoulder and the equivalent of 37.5 percent for the right carpal tunnel syndrome, totaling 93.5 percent, the Circuit Court ordered the employer and its insuror to pay compensation for a disability of 6.5 percent to the body as a whole and the balance of the award to be paid by the Second Injury Fund. In making its

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[1] The Answer filed for the defendants asserted that a group of insurance companies operate under the trade name, CNA Insurance Companies ("CNA") and that one of those companies was the workers' compensation insurance carrier for the employer. Subsequent pleadings used the name, CNA Insurance.

[2] *Mary Ellen Reagan vs. Tennplasco, Federated Mutual Insurance Company, and CNA Insurance,* M2005-02020-WC-R3-CV, was argued on the same day as this case.

findings, the trial court noted that the award for the right arm was on appeal, "and subject to the possibility of the right arm Judgment being modified on appeal, this Judgment may possibly need to be revised mathematically at a later date." The trial court noted that Ms. Reagan did not claim to be permanently and totally disabled and "the Court finds that she is not permanently and totally disabled."

Issues

The appellant, Second Injury Fund, submits the following issues:

Whether the trial court erred in finding that Ms. Reagan gave notice of her alleged injury to her left arm and shoulder to Tennplasco?

Assuming, *arguendo*, that Ms. Reagan gave notice of her alleged injury to her left arm and shoulder, did the trial court err in awarding both a scheduled member award and a body as a whole award for one gradually occurring injury?

Assuming, *arguendo*, that Ms. Reagan gave notice of her alleged injury to her left arm and shoulder, did the trial court err in failing to find Ms. Reagan permanently and totally disabled?

Assuming, *arguendo*, that the trial court correctly found Ms. Reagan to be permanently partially disabled, whether, for the purposes of assigning liability to the Fund under Tenn. Code Ann. § 50-6-208(b), the trial court erred in finding that an award on appeal constitutes a "prior award?"

Standard of Review

The standard of review in a workers' 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); *Layman v. Vanguard Contractors, Inc.*, 183 S.W.3d 310, 314 (Tenn. 2006). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases to determine where the preponderance of the evidence lies. *Vinson v. United Parcel Service*, 92 S.W.3d 380, 383-4 (Tenn. 2002). When the trial court has seen the witnesses and heard the testimony, especially when issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's findings of fact. *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 71 (Tenn. 2001). This court, however, is in the same position as the trial judge in evaluating medical proof that is submitted by deposition, and may assess independently the weight and credibility to be afforded to such expert testimony. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002).

Questions of law are reviewed *de novo* without a presumption of correctness. *Perrin v. Gaylord Entertainment Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

Discussion

I

The second injury fund asserts that Ms. Reagan failed to give "proper" notice of her claim for a work related injury to her left arm and left shoulder. Shelly Roark, the human resources manager for Tennplasco, testified that Ms. Reagan gave her notice of the other claimed injuries to her low back and right shoulder, but never gave notice of the claimed injuries to her left arm and left shoulder. Ms. Reagan testified that she knew how to give proper notice for a workplace injury, but did not give the same type of notice with respect to her left shoulder or left wrist. She did, however, assert that she had informed her supervisor of the left arm and shoulder injuries. She said, "I mean, I have let them know, you know, that it was bothering me." After her back injury, Ms. Reagan returned to work in late July or early August 2003 with restrictions of no bending and no twisting. She was told to alternate standing and sitting to perform her job inspecting parts on the assembly line. She was required to reach up to the assembly line with her left hand to pull the parts for her to pack. She testified that in the middle of August 2003, her supervisor, Doug Perry, "came through and he said, you're hurting aren't you? And I said, yes, I am. I said, my left arm is getting to the point that it hurts as bad as my right arm because I favor the right arm, and I use the left one more."

After Ms. Reagan had stopped working for Tennplasco, she saw Dr. John Bacon in May 2005 for an examination of her left arm and shoulder. He diagnosed carpal tunnel syndrome in her left arm. Dr. Walter Wheelhouse subsequently agreed with that diagnosis. There is no evidence that any doctor had diagnosed left carpal tunnel syndrome before May 2005. The Amended Complaint alleging injury to her left arm and shoulder was filed on July 27, 2004.

Oral notice to the employee's supervisor is sufficient especially where the employer does not claim any prejudice from the lack of written notice. *Aluminum Company of America v. Baker*, 542 S.W.2d 819 (Tenn. 1976). See also *Kirk v. Magnavox Consumer Electronics Co.*, 665 S.W.2d 711, 712 (Tenn. 1984). At the trial of this cause, counsel for Tennplasco announced that the employer was not raising any issue concerning notice of the injury to Ms. Reagan's left arm and shoulder. The trial court expressly found Ms. Reagan to be a very credible witness and considered the notice given to Ms. Reagan's supervisor to be sufficient notice of the claim for carpal tunnel syndrome. We find no basis to disagree.

II

The Second Injury Fund next asserts that the trial court erred in making a scheduled member award for the left carpal tunnel syndrome and a separate body as a whole award for the left shoulder injury. The Fund argues that the case should be remanded for the trial court to determine one award to the body as a whole. Tenn. Code Ann. § 50-6-207(3)(C) provides:

> When an employee sustains concurrent injuries resulting in concurrent disabilities, such employee shall receive compensation only for the injury which produced the longest period of disability, but this section shall not affect

> liability for the concurrent loss of more than one (1) member, for which members' compensations are provided in the specific schedule and in subdivision (4)(B). In all cases the permanent and total loss of the use of a member shall be considered as equivalent to the loss of that member, but in such cases the compensation in and by the schedule provided shall be in lieu of all other compensation.

This provision has been held to permit only an award to the body as a whole for concurrent injuries to an arm and to the body as a whole. *Crump v. B & P Constr. Co.*, 703 S.W.2d 140, 144 (Tenn. 1986). According to Ms. Reagan, her left arm and shoulder began to hurt after she returned to work following the back injury with limitations that caused her to have to use her left hand and arm to reach up to the assembly line to do her work. Mrs. Reagan's complaint to her supervisor about the middle of August 2003 referred to overuse of both her left arm and left shoulder. Dr. Wheelhouse testified that the left carpal tunnel syndrome and left shoulder problems resulted from putting more demands on her left hand and arm following her return to work in late summer 2003. The evidence preponderates against the finding of the trial court that the injuries were not concurrent. We find that the case should be remanded to the trial court to make one award to the body as a whole for the left shoulder and left carpal tunnel syndrome.

III

Having found that the trial court erred in making separate awards for the left arm and for the body as a whole, we turn to the issue of whether the trial court erred in failing to find Ms. Reagan to be permanently and totally disabled. Dr. Walter W. Wheelhouse testified:

> Well, I didn't feel that she would ever be able to return to her former employment at Tennplasco because of the heavy physical demands that she had lifting and pushing heavy objects at work. She should avoid any bending, stooping, lifting, twisting, turning or standing, sitting or walking more than 15 minutes at a time without a break.

Dr. Wheelhouse assigned Ms. Reagan a five percent impairment for the left carpal tunnel syndrome, which converted to three percent to the body as a whole. He stated that she should avoid repetitive use of her hand and wrist, avoid repetitive gripping or use of vibratory tools, and avoid trauma to her hand and wrist. Dr. Wheelhouse assigned a seven percent whole person impairment for the left shoulder injury. He stated she should avoid repetitive reaching, lifting or pulling with her left arm, avoid lifting over eight pounds maximum, and avoid reaching or lifting overhead.

At the time of trial, Ms. Reagan was 60 years old, had graduated from high school, but had no other training or education. She had worked as a waitress, as a babysitter, and as a laborer. She testified that she would like to think that she is not permanently and totally disabled. "Without the restrictions I would - - I would love to go back to work." She thought she could work as a greeter at Wal-Mart or in a video store where she could sit and stand and not

have to do any lifting. She indicated that she was not able to mop her floor and could not do "things that is a womanly duty."

The extent of an employee's permanent disability is a question of fact. *Jaske v. Murray Ohio Mfg. Co.*, 750 S.W.2d 150, 151 (Tenn. 1988). Factors to consider in determining the extent of vocational disability include "the employee's age, education, job skills and training, the extent and duration of anatomical impairment, local job opportunities, and the employee's capacity to work at the kinds of employment available to one in the employee's disabled condition." *Cantrell v. Carrier Corp.*, 193 S.W.3d 467, 473-74 (Tenn. 2006) (citing *McIlvain v. Russell Stover Candies, Inc.*, 996 S.W.2d 179, 183 (Tenn. 1999)). In this case, no vocational expert testified concerning the employment opportunities available to Ms. Reagan in her impaired condition. The trial court is much better informed concerning local job opportunities, and we defer to the trial court in that regard.

Watt v. Lumbermens Mutual Casualty Insurance Co., 62 S.W.3d 123 (Tenn. 2001) requires, in Second Injury Fund cases, that the trial court first determine the amount of disability resulting solely from the latest injury. If the employee is permanently and totally disabled solely as a result of the latest injury, there is no basis upon which to apportion any of the award to the Second Injury Fund. Tenn. Code Ann. § 50-6-208; *Eads v. Guideone Mut. Ins. Co.*, 197 S.W.3d 737, 742 (Tenn. 2006). Thus, it becomes important in this case for the fact finder to determine whether the latest injury resulted in permanent, total disability or only permanent partial disability. We have determined that the last injury was an injury to the body as a whole. The trial court erroneously considered the left carpal tunnel syndrome to be the last injury to Ms. Reagan. We find the concurrent injury rule to require remand for the trial court to determine whether the left carpal tunnel syndrome and left shoulder injury together resulted in a permanent partial disability to the body or permanent and total disability. After such a determination, the liability, if any, of the Second Injury Fund can be determined.

IV

The final issue requires a determination whether a workers' compensation award that is on appeal can be the basis for assigning liability to the Second Injury Fund under Tenn. Code Ann. § 50-6-208(b). In this case, Ms. Reagan is receiving an award of 47.5 percent to the body as a whole for her low back injury. She has previously received a settlement based on 56 percent permanent partial disability to the body for a previous injury to her right shoulder. These two awards total 103.5 percent and would impose liability on the Fund. The award of 75 percent to the right arm (equivalent to 37.5 percent disability to the body as a whole) for right carpal tunnel is on appeal. The Fund asserts that the award that is on appeal and not "final" may not be considered by the trial court in determining liability of the Fund under Tenn. Code Ann. § 50-6-208(b)(1)(A) which provides:

> In cases where the injured employee has received or will receive a workers' compensation award or awards for permanent disability to the body as a whole, and the combination of such awards equals or exceeds one hundred percent (100%) permanent disability to the body as a whole, the employee shall not be entitled to receive from the employer or its insurance carrier any compensation

> for permanent disability to the body as a whole that would be in excess of one hundred percent (100%) permanent disability to the body as a whole, after combining awards.

Since Ms. Reagan claims compensation from the Second Injury Fund, she has the burden of proving the existence of previous awards for permanent disability to the body as a whole. Tenn. Code Ann. § 50-6-208(b)(2)(A). She has claimed and the trial court has used the right carpal tunnel award in computing the liability of the Second Injury Fund in this case.[3]

Whether an award on appeal may be considered in determining liability of the Second Injury Fund is apparently an issue of first impression. The Fund argues that an award on appeal cannot constitute a "prior award" because liability would be assigned to the Fund before the employer's liability is fully determined. An award on appeal might be increased, decreased or eliminated entirely -- all outcomes that would affect the employer's liability. We agree that, ordinarily, it would appear to be prudent to wait until the award on appeal has become final. We recognize that a reversal or modification of the right carpal tunnel award would result in further proceedings in the present case to adjust the liabilities of the employer and the Second Injury Fund.

Workers' compensation cases, however, are unlike other cases in that awards lack the finality generally characteristic of judgments. Awards are subject to review and modification and even complete suspension. *Rhea v. Park*, 211 Tenn. 589, 595, 366 S.W.2d 765, 768 (1963). Indeed, Tenn. Code Ann. § 50-6-230 permits modification of settlements and awards of compensation that exceed six months' disability by agreement of the parties or upon application of either party and proof of increase or decrease of incapacity due to the injury. *Hay v. Woosley*, 175 Tenn. 475, 478, 135 S.W.2d 933, 934 (1940); *General Shale Prods. Corp. v. Reese*, 35 Tenn. App. 423, 432, 245 S.W.2d 788, 792 (1951). We also observe that Tenn. Code Ann. §§ 50-6-203, 50-6-206 and 50-6-229 allow reopening of court approved settlements and lump sum payments within 30 days after receipt of the papers by the Workers' Compensation Department. Further, Tenn. Code Ann. § 50-6-241 imposes caps or limitations on awards of employees who return to work for the same employer at the same wage, and permits modification of those awards where the employee subsequently loses that employment within 400 weeks of the return to work. Thus, even an award that has been affirmed on appeal may be subject to later modification.

Tenn. Code Ann. § 50-6-225 (f) provides that the trial of workers' compensation cases shall be given priority over all another cases, indicating the public policy favoring the prompt disposition of such cases. If the award for carpal tunnel syndrome is reversed or modified, Rule 60.02 of the Tennessee Rules of Civil Procedure allows relief where "a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application." In this case, the trial court in its judgment also provided in pertinent part:

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[3] Ms. Reagan, subsequent to her employment with Tennplasco, was diagnosed with cancer and the trial court elected not to delay the adjudication of this case until the appeal of the prior award is final.

> It is further the finding of this Court that based upon the above and subject to the possibility of the right arm judgment being modified on appeal, this Judgment may possibly need to be revised mathematically at a later date . . .
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> It is further the finding of this Court that considering the appeal of Plaintiff's right arm injury, the Employer and its workers' compensation insurance carrier and Defendant Second Injury Fund shall pay this Judgment in full at the first opportunity to do so following the conclusion of said appeal.

Thus, the trial court preserved the right of the Second Injury Fund to have the allocation of responsibility for the award modified depending upon the ultimate disposition of the appeal. Should the award for right carpal tunnel syndrome be reversed or modified on appeal, the Second Injury Fund can obtain appropriate relief under the provisions of the trial court's judgment and/or Rule 60.02, T.R.C.P. Therefore, we remand this case for any further proceedings that may be appropriate in that regard.

Disposition

The judgment of the trial court is accordingly modified, and the case is remanded for further proceedings in accordance with this opinion. Costs of the appeal are taxed one-half to Manar, Inc., and its insuror, and one-half to the Second Injury Fund.

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Howell N. Peoples, Special Judge

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
JULY 25, 2006 SESSION

MARY ELLEN REAGAN v. TRANSCONTINENTAL INSURANCE CO., MANAR, INC., TENNPLASCO DIVISION, and SUE ANN HEAD, ADMINISTRATOR OF THE TENNESSEE DEPARTMENT OF LABOR SECOND INJURY FUND

Circuit Court for Macon County
No. 5032 & 5143

No. M2006-00009-WC-R3-CV - Filed - December 27, 2006

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 of the appeal, are taxed one-half to Manar, Inc., and its insuror, and one-half to the Second Injury Fund.

IT IS SO ORDERED.

PER CURIAM