

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
(April 27, 2000 Session)

JOE M. MASSENGILL, SR. v. LIBERTY MUTUAL INSURANCE CO.

**Direct Appeal from the Circuit Court for Anderson County
No. 87LA0349 James B. Scott, Jr., Circuit Judge**

**No. E1999-01180-WC-R3-CV - Mailed - July 6, 2000
Filed: August 11, 2000**

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 to the Supreme Court of findings of fact and conclusions of law. The appellant-employer appealed the trial court's ruling awarding appellee-employee 75 percent permanent disability benefits to his right arm. On appeal, appellant argues the award should have been fixed to the body as a whole since the injury was mainly to the employee's right shoulder. Judgment is modified to fix the award at 12 percent disability to the body as a whole as an injury to an extremity or shoulder is not a scheduled member.

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

THAYER, SP. J., delivered the opinion of the court, in which ANDERSON, C. J., and BYERS, SR. J., joined.

James T. Shea, IV, Knoxville, Tennessee, for the appellant, Liberty Mutual Insurance Co.

Roger L. Ridenour, Clinton, Tennessee, for the appellee, Joe M. Massengill, Sr.

OPINION

Facts

The employee, Joe Massengill, Sr., was 47 years of age and had completed the 9th grade. He was employed as a general laborer by Ideal Masonry on May 27, 1997, when he was injured as he slipped and fell while getting out of the bed of a truck. He said his body twisted as he fell to the ground. He did not return to work as his employer could not accommodate his physical restriction of light duty work. He was out of work for some period of time but at the time of the trial he was

employed as a security guard working a forty hour week at a rate of pay less than what he earned at Ideal Masonry. His medical treatment was anti-inflammatory drugs and physical therapy. In 1994 he had a prior injury to his right shoulder but it had apparently healed without any difficulty.

In describing his injury to the trial court, he testified as follows:

- Q. Where is your pain located?
A. About right - - - around my - - - it's burning in my shoulder and going down my right arm.
Q. Okay. You're indicating back on the rear of your shoulder?
A. That's right, yes.
Q. Is that where your pain is generally located?
A. It's in the same spot, right in - -
Q. I see. Right upon your shoulder, the - -
A. About the middle of - -
Q. - - -what's called the scapula, right behind - -
A. About middle of the shoulder blade.
(page 28, line 16 to page 29, line 6)

Dr. Randall Robbins, an orthopedic surgeon, testified by deposition and stated he treated plaintiff for his injury and he found tenderness over his shoulder; that his diagnosis was an injury to the muscles surrounding the medial area of the scapula. He did not give any medical impairment but did place him on medium physical demand level of work due to his inability to use his arm in lifting.

Dr. Geron Brown, also an orthopedic surgeon, testified by deposition and stated he examined plaintiff almost a year after the accident and that he reviewed certain medical records. He found plaintiff had a loss of abduction of the right shoulder as his ability to raise his arm out to the side of his body at the shoulder was 140-150 degrees out of a normal 180 degrees. His diagnosis was scapular and trapezius muscle strain, right shoulder. He was of the opinion he had a 2 percent medical impairment of the upper right extremity.

Issues on Appeal

Although the trial court made an oral finding that the disability should be fixed at 75 percent to the right upper extremity, the judgment reflected the award was 75 percent to the right arm. The insurance carrier, Liberty Mutual Insurance Company, has appealed and argues the award should have been fixed to the body as a whole and not to a scheduled member.

Analysis

In Tennessee Code Annotated § 50-6-207(3), which provides for awards of permanent partial

disability, the legislature has specifically designated rates of recovery for permanent impairment of certain parts of the body, i.e. scheduled members. Permanent partial disability to areas not specifically enumerated as scheduled members are to be assessed as a percentage of the body as a whole. Tenn. Code Ann. § 50-6-207(3)(F); *Smith v. Empire Pencil Co.*, 781 S.W.2d 833 (Tenn. 1989).

In *Continental Ins. Companies v. Pruitt*, 541 S.W.2d 594 (Tenn. 1976), the Supreme Court noted that the statute does not contain any reference to the word “extremity” and that several dictionary definitions state the word “arm” is defined as that area between the shoulder and the wrist or hand; the Court stated that if the injury extends beyond the arm and into the shoulder area to a significant extent, it is not a scheduled injury and compensation is governed by that subsection of the statute which fixes compensation for disability to the body as a whole. *See also Chapman, v. Clement Bros., Inc.*, 435 S.W.2d 117 (Tenn. 1968).

Conclusions

The review of the trial court’s ruling is *de novo* under Tennessee Code Annotated § 50-6-225(e)(2) with a presumption of the correctness of the findings of fact unless we find the preponderance of the evidence is otherwise. Where the facts are not in dispute, a question of law is reviewed without the presumption in favor of the ruling. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 89, 91 (Tenn. 1993).

The testimony of the employee and both doctors clearly indicates the injury in question is primarily to the right shoulder with some limitation on the use of the arm. There is no evidence in the record confining the injury to the right arm. Under our caselaw the meaning of the word “extremity” is not the same meaning as the word “arm” and when an injury is to the shoulder, it is not a scheduled member but must be allocated to the body as a whole.

Therefore, we modify the judgment entered by the trial court to reflect the permanent disability is fixed to the body as a whole. Since the disability is fixed in this manner, the provisions of Tennessee Code Annotated § 50-6-241 (multiplier statute) control the maximum award. The two and one-half times medical impairment rating under subsection (a)(1) would not apply as the employee did not return to work earning the same or greater wages. Thus, the award would be capped under subsection (b) at six times the impairment rating. The 2 percent medical impairment given by Dr. Brown would result in the maximum cap of 12 percent to the body as a whole.

We find the evidence supports the maximum multiplier of six times impairment and modify the award to 12 percent permanent partial disability to the body as a whole. Our statutory reason is because the employee is an unskilled worker by trade and he cannot perform most of the jobs he worked at prior to this injury. In fixing the award, we have also reviewed the case under the provisions of Tennessee Code Annotated § 50-6-242 (increased benefits on establishing three of four factors) and find he does not qualify for any relief under this statute.

The judgment is modified to award plaintiff permanent partial disability benefits of 12 percent to the body as a whole. Costs of the appeal are taxed equally to the parties.¹

¹At the trial below, the employer was willing for the court to fix the award of disability to the right arm but became dissatisfied when the award was much higher than anticipated.

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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 Judgement of the Court.

Costs on appeal are taxed equally to the parties for which execution may issue if necessary.

08/11/00