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

FRED PETITT v. ASSOCIATED GENERAL CONTRACTORS SELF-INSURED WORKERS' COMPENSATION TRUST

Direct Appeal from the Chancery Court for Hamilton County
No. 98-0291 W. Frank Brown III, Chancellor

No. E1999-00367-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 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 appellant-insurance fund appealed the trial court's award of 35% disability to the body as a whole under T.C.A. § 50-6-241(a)(2) after a reconsideration hearing. On appeal, appellant argues the award was improper because it was not established that the loss of employment was causally related to his injury and that the increased award was excessive. Judgment of the trial court is affirmed as recent ruling in *Niziol v. Lockheed Martin Energy Systems, Inc.* by the Supreme Court controls the reconsideration issue and award was reasonable and not excessive.

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

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

Jeff B. Kopet, Chattanooga, Tennessee, for the appellant, Associated General Contractors Self-Insured Workers' Compensation Trust.

Herbert Thornbury, Chattanooga, Tennessee, for the appellee, Fred Petitt.

OPINION

Background

This action was instituted by the employee, Fred Petitt, requesting the court to reconsider a 14% award of permanent partial disability pursuant to the provisions of T.C.A. § 50-6-241(a)(2).

The employee had sustained a work-related back injury on February 15, 1996, while moving certain equipment when he slipped and fell on a slick surface where kerosene had spilled. An action for workers' compensation benefits was filed and later settled and was court approved wherein the award was capped under T.C.A. § 50-6-241(a) which imposes a maximum award of two and one-half times the medical impairment. After being off for about six weeks, the employee returned to work and continued to work until January 1998, when he was laid-off by his employer, Grant-Neal Electric.

Upon reconsidering the award of the settlement, the trial court enlarged the award by increasing same to 35% disability to the body as a whole.

Issues on Appeal

The appellant insurance fund argues the trial court was in error in enlarging the award under subsection (a)(2) of the statute because the employee's loss of employment was not causally related to his injury and also that the award of disability was excessive under the proof submitted. The employee contends the award should have been fixed at the maximum six times the medical rating.

Reconsideration Issue

T.C.A. § 50-6-241(a)(2) generally provides that the courts may reconsider an award of industrial disability when (1) the employee is no longer employed by the pre-injury employer, (2) the application for reconsideration of the award is made to the appropriate court within one year of the employee's loss of employment, and (3) the loss of employment is within 400 weeks of the day the employee returned to work.

The insurance fund cites and relies on two decisions of the Special Worker's Compensation Appeals Panel to support its argument that an award cannot be increased at a reconsideration hearing unless it is established the loss of employment was causally related to the injury sustained by the employee. These Panel decisions are *Matheny v. Insurance Company of North America,* NO. 02S01-9604-CH-00034, filed January 27, 1997 at Jackson and *Howell v. Murray, Inc.*, NO. 01S01-9609-CH-00176, filed September 12, 1997, at Nashville.

In the *Matheny* case, the employee returned to work at a wage equal to or greater than the wage he was receiving at the time of the injury and the award of disability was capped at two and one-half times the medical impairment. Sometime later he suffered a new and distinct injury and was found to be totally disabled. In his attempt to have the first award enlarged, the Panel affirmed the trial court in declining to enlarge the award indicating in the decision that the loss of employment had to be casually related to the injury.[1]

[1]The Supreme Court later held in *Brewer v. Lincoln Brass Works, Inc.,* 991 S.W.2d 226 (Tenn. 1999) that a petition to enlarge a previous award under T.C.A. § 50-6-241(a)(2) was not the appropriate vehicle to use when a worker sustains additional injuries or additional anatomical

In the *Howell* case, the trial court awarded the employee 60% disability to the body as a whole after the employee had returned to work at a wage equal to or greater than the wage rate she was receiving at the time of the injury. The medical evidence indicated impairment ratings of 15% and 11%. The Panel found she later either resigned or was laid off because of pain in her hands (not related to her neck injury). The award was reduced to 37.5% under argument the award was excessive and also noting that the loss of employment was unrelated to her neck injury.

The employee cites the ruling of a Panel decision in the case of *Braden v. Modine Mfg. Company, Inc., et.al.*, NO. 03S01-9702-CV-00123, filed January 20, 1999, at Knoxville and a recent case of *Niziol v. Lockheed Martin Energy Systems, Inc.*, 8 S.W.3d 622 (Tenn. 1999) which was decided by the Supreme Court.

In *Braden* the Panel held that an award capped under subsection (a)(1) of the statute could be increased and that it was not necessary under the statutory language to show the loss of employment was casually related to the injury when the employment relationship was terminated by the employer. In accord with this conclusion, see also the Panel decision in *Harris v. Sabh-Mor Flo Industries*, NO. 03S01-9712-CH-00142, filed March 24, 1999 at Knoxville.

While these Panel decisions did appear to be in conflict concerning the reason for the loss of employment, we find the conflict has been resolved by the decision of the Supreme Court in the case of *Niziol v. Lockheed Martin Energy Systems, Inc., supra.*

In *Niziol* the employee's award of disability of 27.99% was increased to 50% disability after a reconsideration hearing. The evidence indicated that the worker was later laid off by the employer and the termination from employment was unrelated to his injury. The Supreme Court held that a petition to reconsider an award could be filed where the award was reconsidering a court-approved settlement and further that the statutory language did not require a worker to prove that the injury was related to the loss of employment.

Therefore, we find this issue has been resolved and that the trial court was correct in reconsidering the award under subsection (a)(2) of the statute.

Excessive Award

The insurance fund contends the increased award of 35% disability is excessive. In this connection, we find the employee was 33 years of age and was a high school graduate. He had also completed an apprentice program over a period of several years where he qualified as an inside journeyman wireman or electrician. His treating doctor found he had sustained a lumbar strain with a 7-10% medical impairment. A vocational consultant found his vocational disability to be in the range of 63-65% even with new training.

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impairment.

He testified he could not perform the usual tasks of his occupation. He said he could not climb ladders, could not dig ditches, could not work on large wire pulls, could not do heavy lifting and could not crouch for more than a few minutes. He also said he was still having severe pain in his low back when he did any physical activity and that he was working with a rehabilitation specialist to attempt to qualify for a different type job. The defendant insurance fund did not offer any evidence that conflicted with the employee's testimony or the evidence of the doctor or rehab consultant.

The review of this issue is *de novo* accompanied by a presumption of the correctness of the findings of fact unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2). The evidence does not preponderate against the increased award of the trial court.

Inadequate Award

The employee contends the increased award should have been the maximum six times the medical impairment rather than five times impairment. The determination of an award is primarily the function of the trial court and this determination is not to be overturned unless the evidence is of such quality to justify a different conclusion. We find this contention to be without merit also.

Conclusion

The basic facts of this case are identical to the facts of the *Niziol* case and the *Niziol* decision controls the reconsideration issue in the present action. Issues relating to excessive or inadequate award are without merit. The judgment of the trial court is affirmed. Costs of the appeal are taxed to the defendant insurance fund.

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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 to the defendant, Associated General Contractors Self-Insured Workers' Compensation Trust and surety, Jeff B. Kopet, for which execution may issue if necessary.

08/11/00