

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
March 15, 2001 Session

**ARTHUR RAY WHITE v. MAYTAG CLEVELAND COOKING
PRODUCTS, ET AL.**

**Direct Appeal from the Chancery Court for Bradley County
No. 99-227 Jerri S. Bryant, Chancellor**

**No. E2000-01451-WC-R3-CV - Mailed - May 2, 2001
FILED: JUNE 13, 2001**

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 Second Injury Fund has appealed an award of total disability where the employer was ordered to pay 20 percent of the award and the Second Injury Fund was to pay the remaining 80 percent. Judgment of the trial court is affirmed.

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

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

Paul G. Summers, Attorney General and Reporter, and E. Blaine Sprouse, Assistant Attorney General, of Nashville, Tennessee, for the Appellant, State Second Injury Fund.

Denny E. Mobbs, of Cleveland, Tennessee, for Appellee, Maytag Cleveland Cooking Products.

Bert Bates, of Cleveland, Tennessee, for Appellee, Arthur Ray White.

OPINION

The trial court found the employee to be totally disabled and apportioned the 100 percent award of disability by requiring the employer to pay 20 percent of the award and the Second Injury Fund to pay the remaining 80 percent. The Second Injury Fund has appealed the ruling of apportionment and insists the larger portion of the award should have been allocated to the employer.

Facts

The employee, Arthur Ray White, was forty-three years of age and is a high school graduate. He began working for Maytag Cleveland Cooking Products during 1983 and was first employed as a utility worker. At the time of his injury on September 3, 1998, he was working as an oven inspector and was injured while bending down when he felt a pop in his back.

He testified he had a congenital condition which he understood involved his spine and the nerves and muscles in his legs resulting in a deformity of his feet. He stated he had never had a real problem from this condition but some “people thought I did, you know, the way I walked.” His employer was aware of the condition as it was disclosed during the initial employment interview.

After the back injury, he testified he could not stand for a very long period of time and he could not sit longer than five minutes. He said his injury was painful. He eventually returned to work but was terminated during November 1999 due to his absentee record which was caused by the back injury. At the time of the trial, he said he was using a cane because of a balance problem in walking.

Dr. James P. Stone, an orthopedic surgeon, testified by deposition and stated he first thought the employee had sustained a back strain but later determined he suffered from a herniated disc as a result of the incident at work. He discussed the possibility of surgery with the employee but he declined to have surgery. Dr. Stone said the congenital condition was known as Charcot-Marie-Tooth Syndrome and that each foot showed stigmata of this long standing condition with a high arched foot and a claw forefoot; and that this pre-existing condition could limit his ability in standing or walking and it would affect his balance and gait.

The doctor also testified that his back condition improved some but he never regained the level of being completely free of back pain. With reference to impairment ratings, he determined the employee had a 7 percent impairment as a result of the back injury and a 47 percent impairment as a result of the congenital condition. He said he did not know how the employee could have performed his work duties with the pre-existing condition. He placed restrictions on the employee as a result of the back injury.

A vocational disability consultant testified the employee was totally disabled.

Standard of Review

An appellate review in a workers' compensation case is *de novo* with a presumption of the correctness of the findings of the trial court unless we find the preponderance of the evidence is against the conclusion of the court. Tenn. Code Ann. § 50-6-225(e)(2).

Analysis

The Second Injury Fund argues the trial court was required under Tenn. Code Ann. § 50-6-208(a) to determine the percentage of disability resulting from the last injury for which the employer would be responsible without consideration of any pre-existing permanent disabilities and that since the employee had been able to work without significant problems, the employee had no prior vocational disability and the trial court should have apportioned the larger part of the award to the employer. The employee contends the higher impairment rating due to the pre-existing physical disability justified the trial court's award of greater disability to the state fund.

The rule has been stated many times that in fixing permanent legal disability, the trial court must consider many factors including the employee's age, education, work experience, local job opportunities, etc. and this is to be examined in relation to the open labor market and not whether the employee is able to return and perform the job held at the time of the injury. *Orman v. Williams-Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991); *Clark v. National Union Fire Ins. Co.*, 774 S.W.2d 586, 588 (Tenn. 1989). Medical impairment ratings are to be considered also.

The basic purpose of the Second Injury Fund is to encourage the employment of persons with permanent physical disability by limiting to some extent the employer's workers' compensation liability. *Burris v. Cross Mountain Coal Co.*, 798 S.W.2d 746 (Tenn. 1990).

Limiting the exposure of the employer to the immediate consequences of the second injury encourages the employment of handicapped persons. *Wiseman v. E'Con Mills, Inc.*, 517 S.W.2d 191, 193 (Tenn. 1974).

We do not agree with the statement that the employee had no prior vocational disability because he was able to work despite his disability. Such conclusion would sharply conflict with the basic purpose of our statute. The apportionment of the award of total disability is primarily a question of fact for the trial court to resolve. From our independent review of the record, we cannot say the evidence preponderates against the apportionment ordered.

Conclusion

The judgment of total permanent disability is affirmed. Costs of the appeal are taxed to the Second Injury Fund.

ROGER E. THAYER, SPECIAL JUDGE

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Bradley County Chancery Court
No. 99-227

No. E2000-001451-WC-R3-CV - Filed: June 13, 2001

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.

Costs on appeal are taxed to the appellant, State Second Injury Fund, for which execution may issue if necessary.

06/13/01