IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 9, 2001 Session

DARRA McMILLIN v. McKENZIE SPECIAL SCHOOL DISTRICT, ET AL.

Direct Appeal from the Circuit Court for Carroll County
No. 3622 Julian Guinn, Judge

No. W2000-02165-WC-R3-CV - Mailed May 22, 2001; Filed July 12, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court pursuant to Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the Second Injury Fund (the Fund) insists the trial court erred in (1) awarding permanent total disability benefits and (2) apportioning the award between the Fund and the employer. The employer insists (1) the employee's injury is not compensable, (2) the trial court erred in commuting one-half of the award to a lump sum, and (3) the trial court erred in awarding the employee a scooter and special bed. As discussed below, the panel has concluded judgment should be modified by reducing the lump sum, because it exceeds the statutorily allowed maximum, but otherwise affirmed.

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

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and W. MICHAEL MALOAN, SP. J., joined.

Paul G. Summers, Attorney General & Reporter, and E. Blain Sprouse, Assistant Attorney General, Nashville, Tennessee, for the appellant, Second Injury Fund.

J. Arthur Crews, II, Jackson, Tennessee, for the appellee/appellant, McKenzie Special School District.

Donna Brown Wilkerson and Ricky Boren, Jackson, Tennessee, for the appellee, Darra McMillan.

MEMORANDUM OPINION

The employee or claimant, Darra McMillan, became a polio victim when she was eight years

old and has used full leg braces and crutches to assist her in walking since that time. On the day of trial, she was forty-nine years old with a bachelor's degree and teacher certifications. She taught school from 1972 until she was injured at work in 1996. She worked in a dental office from 1988 until her injury and was serving her third term on the McKenzie City Council at the time of the trial.

On the evening of November 14, 1996, the claimant and her students were to have a study session in anticipation of a chemistry examination scheduled for the next day. The only key she had was one for an outside door, requiring her to ascend some steps before entering the classroom for the study session. As she ascended the steps, she stumbled on one of them and fell, her lower back striking one of the concrete steps and severely injuring her back. Over the next few weeks, she attempted to return to work, but was unable to do so on a full-time basis. Her last day of teaching was in January 1996.

Dr. Alan Hilibrand performed spinal surgery on her and fused virtually her entire spine. He estimated her permanent impairment from the fall and subsequent surgery at 22 percent to the whole person and restricted her from walking more than 10 to 20 feet without significant assistance or the use of a wheelchair. She takes morphine for her pain.

Dr. Joseph Boals examined and evaluated the claimant. Dr. Boals estimated her permanent medical impairment at 35 percent as a result of the fall at work and 77 percent overall. He said that she should not drive because of her medication, needs someone with her at all times in case she falls and should avoid an unprotected environment. Dr. Leon Ensalada, who also examined and evaluated the claimant, estimated her permanent impairment from the fall at work to be 20 percent to the whole person.

The claimant is now bound to a wheelchair. She requires help to get in and out of a car and cannot travel anywhere alone unless it is within scooter distance of her home. She suffers considerable and constant pain and stays heavily medicated. She testified at trial that there are days that she just sits and cries because of the pain. She cannot return to her job as a chemistry teacher because of its physical requirements, has difficulty concentrating and suffers from some anxiety. She has to sleep in a recliner and cannot raise herself without help. A licensed practical nurse lives with her and provides the necessary assistance.

She has not returned to work at the dental office. She did not resign from the City Council and continued to attend some meetings, but she testified that she did not intend to seek another term because she did not feel up to it.

Upon the above summarized facts and circumstances, the trial court found the claimant to be permanently and totally disabled and apportioned the award 30 percent to the employer and 70 percent to the Fund. One-half of the award, or 464.5 weeks, was commuted to a lump sum. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The panel is not bound by the trial court's findings but conducts an independent

examination of the evidence to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. Sp. Workers Comp. 1995). Extent of vocational disability is a question of fact. Collins v. Howmet Corp., 970 S.W.2d 941, 943 (Tenn. 1998). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 177 (Tenn. 1999). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Orman v. Sonoma, Inc., 803 S.W.2d 672, 676-77 (Tenn. 1991).

The Second Injury Fund contends the award of permanent total disability benefits is excessive because the claimant has a college education and was able to work before the injury without accommodations, because the operating surgeon said in a report that part-time work as a tutor was a possibility, because ADA requires employers to make accommodations for disabled workers and because Dr. Ensalada said she should be able to get out of her wheel chair. The employer ignores the issue. The employee correctly responds that the Fund did not contest the issue at trial and that the trial court accepted and considered the testimony of the claimant that she is in constant pain for which she takes narcotic pain medication and that she has anxiety and difficulty in concentrating because of it. The trial judge found the claimant's anxiety to be "most apparent to the court."

When an injury, not otherwise specifically provided for in the Act, totally incapacitates a covered employee from working at an occupation which produces an income, such employee is considered totally disabled. Tenn. Code Ann. § 50-6-207(4)(B), See also Prost v. City of Clarksville, 688 S.W.2d 425, 427 (Tenn. 1985). The definition focuses on an employee's ability to return to gainful employment. Davis v. Reagan, 951 S.W.2d 766, 767 (Tenn. 1997). The fact of employment after injury is a factor to be considered in determining whether an employee is permanently and totally disabled, but that fact is to be weighed in light of all other considerations, including the employee's skills and training, education, age, local job opportunities, capacity to work at the kinds of employment in his or her disabled condition, rating of anatomic disability by a medical expert and the employee's own assessment of his or her physical condition and resulting disability. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000). From our independent examination of the record and in consideration of the cited authorities, we cannot say that the evidence preponderates against the trial court's finding of permanent total disability. For that reason, considering the devastating effect of the combination of her conditions, and because the Fund chose not to contest the issue at the trial level, the first issue is resolved in favor of the claimant.

The Fund next contends the trial court erred in its apportioning liability of 30 percent to the employer and 70 percent to the Fund, because the claimant was not disabled before the injury despite her pre-existing condition. We are not persuaded by the argument. An employee who has previously become physically disabled from any cause and who, as a result of a later compensable injury, becomes permanently and totally disabled, may receive disability benefits from her employer or its

insurance company only for the disability that would have resulted from the subsequent injury. However, such employee may be entitled to recover the remainder of the benefits allowable for permanent total disability from the Second Injury Fund. Tenn. Code Ann. § 50-6-208.

The Second Injury Fund is liable under subsection (a) of Tenn. Code Ann. § 50-6-208 if (1) an employee has previously suffered a permanent physical disability from any cause or origin, and (2) the employee becomes permanently and totally disabled as the result of a subsequent compensable injury. Under that subsection (a), the prerequisites for imposing liability on the Second Injury Fund are a prior injury, either compensable or non compensable, which caused permanent disability and a subsequent compensable injury which rendered the employee permanently and totally disabled. Minton v. State Industries, Inc., 825 S.W.2d 73, 76-77 (Tenn. 1992). The fact that the claimant was working before her work-related injury does not establish an absence of partial disability. Disabled persons often work despite their handicaps. The Fund was created by the legislature to encourage the hiring of the disabled by relieving an employer who knowingly hires a disabled person or retains an employee after discovering the employee has a physical disability of part of the liability for workers' compensation benefits by shifting liability for payment of benefits to the Fund. Arnold v. Tyson Foods, Inc., 614 S.W.2d 43, 44 (Tenn. 1981).

Thus the real question to be resolved is whether the evidence preponderates against the trial court's award of 30 percent permanent partial disability from the work-related injury and in favor of a higher award. The employer contends, of course, that it does not. There is no magic formula for making that determination. Trial courts must weigh and evaluate both lay and expert testimony, as well as physical evidence, including the manner and demeanor of witnesses who testify in person. In consideration of the appropriate factors and from our independent examination of the evidence, we cannot say that the evidence preponderates against the trial court's apportionment between the Fund and the employer. The issue is resolved in favor of the employer.

The employer argues that the injury is not compensable because it did not arise out of the employment, but was the result of an idiopathic fall. An accidental injury arises out of one's employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury, Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993). The Supreme Court of Tennessee has consistently followed the rule that where epilepsy, or other physical disturbances, suddenly and without expectation, occur and contribute to cause an injury to an employee while at work, the same should be held compensable, provided that there is another hazard, incident to the employment, which is generally known to exist and which is shown to be the immediate cause of the accident. Tapp v. Tapp, 192 Tenn. 1, 236 S.W.2d 977, 980 (1951). In the present case, the hazard was the set of steps the claimant was trying to ascend with the use of crutches her pre-existing physical condition required her to use. The evidence fails to preponderate against the trial court's finding of compensability. The issue is resolved in favor of the employee.

The employee asserts that the employer's next contention, that the trial court erred in commuting one-half of the disability award to a lump sum, was waived by the employer when it did not make a timely objection in the trial court. Upon application by a party and approval by a proper court, benefits which are payable periodically may be commuted to one or more lump sum payments, if the court finds such commutation to be in the best interest of the employee and the employee has the ability to wisely manage and control the commuted award. Tenn. Code Ann. § 50-6-229(a). In no event may the commuted portion of an award for permanent total disability benefits exceed the value of 100 weeks of the employee's benefits. Tenn. Code Ann. § 50-6-207(4)(A)(ii). We hold that the 100 week maximum is mandatory and therefore not subject to waiver. Scales v. Winston, 760 S.W.2d 952, 953 (Tenn. App. 1988). Accordingly, the judgment is modified by reducing the commuted sum to 100 weeks.

Finally, the employer argues that the trial court erred by awarding, as medical benefits, a scooter and special bed because there is "no evidence in the record" that the items were medically necessary. To the contrary, we find in the record prescriptions for both items, signed by the treating physician. From our independent examination of the record, we find no countervailing evidence. When a covered employee suffers an injury by accident arising out of and in the course of his employment, his employer is required to provide, free of charge to the injured employee, all medical and hospital care which is reasonably necessary on account of the injury. Such care includes medical and surgical treatment, medicine, medical and surgical supplies, crutches, artificial members and other apparatus, nursing services or psychological services as ordered by the attending physician, dental care, and hospitalization. Tenn. Code Ann. § 50-6-204(a)(1). The issue is resolved in favor of the employee.

For the above reasons, the judgment is modified by reducing the lump sum award to 100 weeks of the employee's disability benefits, but otherwise affirmed. Costs are taxed one-half to the Second Injury Fund and one-half to McKenzie Special School District.

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JOE C. LOSER, JR.

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Circuit Court for Carroll County
No. 3622

No. W2000-02165-WC-R3-CV - Filed July 12, 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 fact 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 one-half to the Appellant, Second Injury Fund, and one-half to the Appellee/Appellant, McKenzie Special School District, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM