

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

November 1, 2001 Session

**KAY E. DUNCAN v. MODINE MANUFACTURING CO., INC. and JIM
FARMER/THE SECOND INJURY FUND**

**Direct Appeal from the Circuit Court for Anderson County
No. 99L-A0437 James B. Scott, Judge**

Filed February 28, 2002

No. E2000-02995-WC-R3-CV

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 trial court found that in the current work-related injury the plaintiff sustained an 80 percent permanent partial disability to the body as a whole and a 15 percent permanent partial disability to the body as a whole as a result of an aggravation of her pre-existing depression. The plaintiff had previously sustained a work-related carpal tunnel injury and received an award of 35 percent for the injury, which was stipulated to convert to 17.5 percent. The trial court found the plaintiff's current 95 percent disability coupled with her pre-existing right arm condition rendered her permanently and totally disabled in accordance with Tennessee Code Annotated § 50-6-207(4)(A)(i). The trial court assessed 82.5 percent of the award to the defendant employer and the balance to the Second Injury Fund. We affirm the judgment of the trial court and remand the case to the trial court for entry of such orders as are necessary to carry out the judgment.

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

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J. and W. NEIL THOMAS, III, SP. J., joined.

Michael J. Mollenhour, Knoxville, Tennessee for the appellant, Modine Manufacturing Co. Inc.

Roger L. Ridenour, Clinton, Tennessee, for the appellee, Kay E. Duncan.

E. Blaine Sprouse, Nashville, Tennessee, for the appellee, Second Injury Fund.

MEMORANDUM OPINION

Review of the findings of fact made by the trial court 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); *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial court in workers' compensation cases. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

Facts

The plaintiff, 57 years of age at the time of trial, left school in the 9th grade. She has worked previously as a hotel housekeeper and as a linen sorter at a laundry. Prior to her work-related injury, she had worked for the defendant employer for 30 years in an assembly line position. In 1989 she received a workers' compensation settlement of 35 percent¹ to the right arm for a carpal tunnel injury. This case involves both a cumulative physical injury to the plaintiff's right shoulder and exacerbation of the plaintiff's pre-existing depression.

The plaintiff suffered a torn right rotator cuff within the course and scope of her employment. She was treated surgically. Shortly before the plaintiff was to return to work, the defendant employer advised her it would be unable to accommodate her. The plaintiff has not returned to work with any employer since that time. She also claims to have suffered an aggravation of her pre-existing depression as a result of her shoulder injury and job loss.

Medical Evidence

Physical Injury

Dr. Randall Robbins, an orthopedic surgeon, testified by deposition. He first saw the plaintiff on December 30, 1998, upon referral from another physician in his practice. He ordered an MRI, which revealed a torn rotator cuff on the plaintiff's right side. Surgery was performed on April 22, 1999. The plaintiff then underwent physical therapy. In September of 1999, Dr. Robbins noted the plaintiff could return to work as long as she avoided repetitive use of her right arm. He also ordered a Functional Capacity Examination and assessed a medical impairment rating of 8 percent to the upper extremity or 5 percent to the whole body. The Functional Capacity Examination showed the plaintiff was unable to perform light work on a sustained eight hour basis. Dr. Robbins adopted the restrictions contained in the Functional Capacity Examination but stated that as long as the plaintiff worked within the restrictions, she could work a full day.

¹ For purposes of this case the parties have stipulated that the award converts to 17.5 percent.

Aggravation of Pre-existing Condition

The plaintiff has a 13 year history of treatment for chronic depression. Dr. Pamela Bridgeman, the plaintiff's general physician, provided treatment for the plaintiff's depression over a period of several years. On May 23, 2000, the plaintiff told Dr. Bridgeman about feeling increased stress due to her job loss. At that visit, Dr. Bridgeman testified she found the plaintiff to be moderately depressed and felt the plaintiff would have trouble working "based on the level of depression [observed] that day." Dr. Bridgeman also testified that "prior to this point, [the plaintiff's] depression was doing well"

The plaintiff was first treated by Dr. Donald Catron, a psychiatrist, on October 13, 1999. He saw the plaintiff twice in December of 1999 and twice in January and March of 2000. He testified by deposition. Dr. Catron noted a history of depression that was periodically managed by medication. He testified she appeared upset by her job loss, which he treated with anti-anxiety medication. The plaintiff apparently became somewhat worse between December of 1999 and January of 2000 and was placed on an anti-depressant. By March of 2000, the last time Dr. Catron saw the plaintiff, he testified that she appeared improved. With the caveat that having only seen the plaintiff four times, he felt unable to provide an accurate impairment rating, Dr. Catron testified he believed the plaintiff's medical impairment rating would be mild to moderate depression or 25 to 30 percent to the body as a whole when expressed numerically. Dr. Catron stated the plaintiff's depression alone would not make her totally unable to function in the workplace, but in combination with her physical state, she would be disadvantaged in the competitive workplace.

Vocational Evidence

Dr. Rodney Caldwell, Ph.D., a vocational expert, testified at trial for the plaintiff. He saw the plaintiff on September 19, 2000, and performed an evaluation. He tested the plaintiff and found she could read at a 12th grade level and perform arithmetic at a 7th grade level. After reviewing the medical evidence and performing a job analysis, Dr. Caldwell opined that, based on the restrictions from the Functional Capacity Examination, the plaintiff was unable to perform any competitive work.

Ms. Terry Albert, a certified vocational rehabilitation counselor, testified at trial for the defendant employer. Ms. Albert has a masters degree in rehabilitation and works primarily in assisting people who leave the military find jobs. She testified that she had given testimony in divorce cases a couple of times and had testified in the last three or four years in a couple of workers' compensation cases. Ms. Albert saw the plaintiff on September 19, 2000. She reviewed the medical evidence and administered several tests. Ms. Terry also performed a labor market survey. She opined the plaintiff could perform sedentary type jobs that do not require extensive pushing and pulling. She testified that the computer program she used identified 112 jobs available for the plaintiff; she could not say whether the available jobs were full or part-time position. Ms. Albert testified she was aware of the no eight-hour days at a light level of work restriction in the Functional Capacity Evaluation, but she assumed the plaintiff could work an eight-hour day at the sedentary

level. She opined that the plaintiff had a 57 percent vocational disability.

The trial court found the plaintiff had suffered a 95 percent permanent partial disability with 80 percent attributable to her shoulder injury and 15 percent attributable to aggravation of her pre-existing depression. The trial court found the plaintiff's current 95 percent disability coupled with her pre-existing right arm condition rendered her permanently and totally disabled under Tennessee Code Annotated § 50-6-207(4)(A)(i). The trial court apportioned 82.5 percent of the award to the defendant with the balance to the Second Injury Fund and ordered the compensation payable until the plaintiff reached age 65.

Discussion

The defendants contend the plaintiff's pre-existing depression was not exacerbated by her work-related injury and that she is not permanently totally disabled.

The plaintiff has a history of depression that predates her work-related injury. An employer is responsible for workers' compensation benefits, even though the claimant may have been suffering from a serious pre-existing condition or disability, if the employment causes an actual progression of the pre-existing condition. *Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483 (Tenn. 1997). However, to be compensable, the pre-existing condition must be advanced; there must be anatomical change in the pre-existing condition, or the employment must cause an actual progression of the underlying disease. *Sweat v. Superior Indus., Inc.*, 966 S.W.2d 31, 33 (Tenn. 1998). The medical evidence preponderates in favor of the trial judge's finding that the plaintiff's pre-existing condition was aggravated. The plaintiff's depression clearly became worse after her injury and job loss as is demonstrated by the testimony of Drs. Bridgeman and Catron.

In view of the holding in *Ivey v. Trans Global Gas & Oil*, we must determine whether the trial court's finding of 15 percent vocational disability attributable to the mental injury is supported by the evidence because it is based on a medical impairment given to the body as a whole rather than as a percentage of impairment to a scheduled member. 3 S.W.3d 441 (Tenn. 1999). Mental injuries are to be compensated as scheduled injuries. TENN. CODE ANN. § 50-6-207(3)(A)(ii)(ff); *Ivey v. Trans Global Gas & Oil*, 3 S.W.3d at 441. However, where the injury involves more than one member of the body, one of which is scheduled and the other of which is not scheduled, benefits are allowable on the basis of a percentage of disability to the body as a whole. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333 (Tenn. 1996; *Continental Ins. Co. v. Pruitt*, 541 S.W.2d 594, 596 (Tenn. 1976). Since this case involves a non-scheduled member as well as the scheduled mental injury, we affirm the finding of 15 percent impairment for the aggravation of the plaintiff's pre-existing mental injury. However, given Dr. Catron's medical impairment rating of 25 to 30 percent to the whole body, we also believe 15 percent would accurately reflect an appropriate number for a scheduled member medical impairment rating for loss of mental faculties.

We now turn to the issue of permanent total disability.

Any award of permanent total disability must be in compliance with the statutory definition of total disability contained in Tennessee Code Annotated section 50-6-207(4). The statute defines permanent total disability as follows:

When an injury not specifically provided for in this chapter as amended, totally incapacitates the employee from working at an occupation which brings him an income, such employee shall be considered “totally disabled,” and for such disability compensation shall be paid as provided in subdivision (4)(A)

TENN. CODE ANN. § 50-6-207(4)(B) (Supp. 2001).

As the statute and case law make clear, the legal definition of permanent total disability does not correlate directly with the meaning of permanent and total medical disability. *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000). The inquiry must “focus on the employee’s ability to return to gainful employment.” *Davis v. Reagan*, 951 S.W.2d 766,767 (Tenn. 1997). Accordingly, “[t]he assessment of permanent total disability is based upon numerous factors, including the employee’s skills and training, education, age, local job opportunities, and his capacity to work at the kinds of employment available in his disabled condition.” *Robertson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986).

The employer argues that the relatively low medical impairment rating does not support a finding of permanent total disability. However, a rating of anatomical disability by a medical expert is one of the relevant factors, but “the vocational disability is not restricted to the precise estimate of anatomical disability made by a medical witness.” *Henson v. City of Lawrenceburg*, 851 S.W.2d 809, 812 (Tenn. 1993). A finding of permanent total disability does not require a high medical impairment rating.

The defendant employer also claims the trial court erred in failing to accord more weight to Ms. Albert’s testimony. However, where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge’s determination. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). We do not find that the evidence preponderates against the trial judge in this regard. Ms. Albert clearly had limited experience and could not support some of her findings with anything more than her assumptions about the plaintiff’s capabilities. We do not find it erroneous on the part of the trial judge to have accorded less weight to her findings and more weight to the findings of Dr. Caldwell who determined the plaintiff to be permanently and totally disabled.

The evidence supports the trial court's finding that the plaintiff is permanently totally disabled within the meaning of Tennessee Code Annotated section 50-6-207(4). We, therefore, affirm the judgment of the trial court and remand the case to the trial court for entry of such orders as are necessary to carry out the judgment.

The costs of this appeal are taxed to the defendant employer.

JOHN K. BYERS, SENIOR JUDGE

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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 Judgment of the Court.

Costs on appeal are taxed to the defendant employer, Modine Manufacturing Company, Inc. for which execution may issue if necessary.