

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

February 28, 2002 Session

JEWEL POWERS v. JOHNSON CONTROLS, ET AL.

**Direct Appeal from the Chancery Court for Henderson County
No. 13749 Joe C. Morris, Chancellor**

No. W2001-00524-WC-R3-CV - Mailed May 7, 2002; Filed June 11, 2002

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. In this appeal, the Second Injury Fund insists (1) the claim is barred by the one-year statute of limitations, (2) the employer is judicially estopped from asserting it had actual notice of the employee's pre-existing disability, when it denied such knowledge in its answer, and (3) the trial court erred in its apportionment of liability between the Fund and the employer. As discussed below, the panel has concluded the judgment should be affirmed

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

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and L. TERRY LAFFERTY, SR. J., joined.

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

Ricky L. Boren, Jackson, Tennessee, for the appellee, Jewel Powers

John D. Burleson and L. Beth Williams, Jackson, Tennessee, for the appellee, Johnson Controls

MEMORANDUM OPINION

The employee or claimant, Jewel Powers, commenced this civil action on February 14, 2000 seeking workers' compensation benefits for an injury by accident arising out of and in the course of

her employment with the employer, Johnson Controls, in May 1998. She averred that the injury, superimposed upon a preexisting disability, rendered her permanently and totally disabled. She sued both the employer and the Second Injury Fund.

The employer denied any knowledge of a preexisting disability, denied that a compensable injury occurred in May 1998 and affirmatively averred the claim was barred by the one-year statute of limitations. The Second Injury Fund also alleged the claim was barred by the statute of limitations.

After a trial on the merits, the trial court awarded, inter alia, permanent total disability benefits, which it apportioned 32.5 percent to the employer and 67.5 percent to the Fund. Because the claimant was more than sixty years old at the time of her injury, benefits are payable for 260 weeks. The Fund does not contest the trial court's finding that the claimant is permanently and totally disabled by the combined effects of the two injuries.

For injuries occurring on or after July 1, 1985, appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. 1995). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 367 (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, 178 (Tenn. 1999). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 62 (Tenn. 2001). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998).

The claimant first injured her left shoulder in 1996 or 1997 and lost some time from work. Her orthopedic surgeon diagnosed and surgically repaired a torn left rotator cuff. The surgeon followed her for a period of time before releasing her with some permanent restrictions. She neither sought nor received any workers' compensation benefits for the injury, but did receive some employer funded disability benefits. Those benefits were for a non-work related injury, although the record is not clear as to whether that injury was work related. Because of the employer's policy of disallowing employees to work with medical restrictions, she could not return to her former production line job. Despite that policy, the claimant, with the help of a functional evaluation study

was able to persuade her supervisor, John Brothers, to return her to work.

In May 1998, the claimant fell over a hand jack at work, landing painfully on her right shoulder. She reported the occurrence to the employer, but continued working until January 1999, when she was forced to quit because of the severity of the pain. She has not worked since.

Through a series of referrals, the claimant returned to the surgeon who had treated the first injury, Dr. Randy Fly. On February 19, 1999, Dr. Fly performed rotator cuff surgery on her right shoulder. However, the surgery failed to relieve her symptoms. Dr. Fly estimated her permanent impairment from the right shoulder surgery to be 10 percent to the shoulder and referred her to a neurosurgeon.

The neurosurgeon, Dr. William Lee Moffatt, through diagnostic testing, found a cervical spur, a failed rotator cuff repair and symptoms of carpal tunnel syndrome. Dr. Moffatt performed a cervical discectomy and fusion, as well as additional shoulder surgery in an effort to relieve the pain and other symptoms. At trial, Dr. Moffatt testified the claimant is “one hundred percent functionally and anatomically disabled” from work and that her inability to work is permanent. The claimant testified that she continues to suffer disabling pain and cannot work.

The Fund’s first contention is that the claim is time-barred. An action by an employee to recover benefits for an accidental injury, other than an occupational disease, must be commenced within one year after the occurrence of the injury.¹ Tenn. Code Ann. § 50-6-224(1). Actions against the Second Injury Fund in cases not involving prior workers’ compensation awards must be commenced within one year after occurrence of the injury or, if the employer has made voluntary payment of compensation benefits within that period, within one year after cessation of benefits. Pearson v. Day Intern., Inc., 951 S.W.2d 375, 378 (Tenn. 1996). The running of the statute of limitations is suspended until by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained. Ogden v. Matrix Vision of Williamson County, Inc., 838 S.W.2d 528 (Tenn. 1992). It is the date on which the employee’s disability manifests itself to a person of reasonable diligence - not the date of accident - which triggers the running of the statute of limitations for an accidental injury. Hibner v. St. Paul Mercury Ins. Co., 619 S.W.2d 109 (Tenn. 1981).

The Fund contends the claimant knew she had an injury on the day she fell in May 1998, because she reported the injury to the employer. The Fund further contends the claimant knew her injury was disabling because she had previously suffered a similar injury to her left shoulder and was left with permanent restrictions. The argument overlooks the fact that the claimant continued working until January 1999, when she did become unable to work. The trial court found that the statute began to run on February 14, 1999, the date of the claimant’s unsuccessful rotator cuff surgery. Giving considerable deference to the actual and implicit findings of the trial court, we

¹ See also Tenn. Code Ann. § 50-6-203.

cannot say the preponderance of the evidence is otherwise. February 14, 1999 is the day when a person of reasonable diligence would know, under the facts of this case, that she was permanently disabled.

Additionally, the uncontradicted testimony of Brothers is that the employer paid short and long term disability benefits to the claimant until receiving notice of the filing of this civil action. Thus, per the rule in Pearson, the action was timely.

The Fund next contends the employer is judicially estopped from proving at trial that it knew of the claimant's preexisting disability after denying such knowledge in its answer. In creating the Second Injury Fund, the legislature set forth certain requirements to be met in order for an employee to receive benefits from the Second Injury Fund. The requirements are (1) that at the time of his on-the-job injury, the employee was working for an employer who had properly insured his workers' compensation liability, and (2) that the employer had knowledge of the permanent and pre-existing physical impairment at the time that the employee was hired or at the time the employee was retained in employment after the employer acquired such knowledge, but in all cases prior to the subsequent injury. Tenn. Code Ann. § 50-6-208(a)(2).

At trial, both the claimant and Brothers testified, without objection, that the employer knew of her preexisting disability. Issues not raised in the trial court may not be raised for the first time on appeal. Simpson v. Frontier Community Credit Union, 810 S.W.2d 147, 153 (Tenn. 1991). Moreover, when issues not raised by the pleadings are tried by expressed or implied consent of the parties, they are treated in all respects as if they had been raised in the pleadings. Tenn. R. Civ. P. 15.02. Thus, by failing to object to the admission of evidence showing knowledge of the prior injury by the employer, the appellant impliedly consented to the answer being amended to conform to the proof. See Farrar v. Farrar, 553 S.W.2d 741 (Tenn. 1977). The contention is without merit.

Finally, the Fund contends the evidence preponderates against the trial court's apportionment of permanent disability benefits between it and the employer. 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 his 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(a)(1).

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. Perry v. Sentry Ins. Co., 938 S.W.2d 404, 407 (Tenn. 1996). In such case, it is important

for the trial judge to make an explicit finding of fact regarding the extent of vocational disability attributable to the subsequent or last injury, without consideration of any prior injuries, for the employer is responsible only for the disability that would have resulted from the subsequent injury, had the earlier injury not existed, and the Fund is liable for the remainder of the award. Allen v. City of Gatlinburg, 36 S.W.3d 73, 77 (Tenn. 2001). Under subsection (a), a permanently and totally disabled employee is entitled to recover from the Second Injury Fund the amount whereby an award for permanent total disability exceeds the award for the subsequent injury. Minton v. State Industries, Inc., 825 S.W.2d at 76-77 (Tenn. 1992).

The trial court in the present case explicitly found the extent of the claimant's disability attributable to the last injury to be 32.5 percent to the body as a whole. Giving due deference to the findings of the trial court, we are unable to say the preponderance of the evidence is otherwise.

For those reasons, the judgment of the trial court is affirmed. Costs are taxed to the appellant, Second Injury Fund.

JOE C. LOSER, JR.

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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 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 to the Appellant, Second Injury Fund, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM