

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

November 22, 2002 Session

**ROSIE FULLER v. WAL-MART STORES, INC., ET AL.**

**Direct Appeal from the Chancery Court for Madison County  
No. 57503 Joe C. Morris, Chancellor**

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**No. W2002-00745-WC-R3-CV - Mailed January 9, 2003; Filed February 13, 2003**

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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 trial judge found the plaintiff had suffered a 90 percent disability to her body as a whole as a result of an injury to her legs and back. The award was apportioned at 75 percent to the employer and 15 percent to the Second Injury Fund because the plaintiff had a previous injury to her leg which amounted to a 25 percent permanent partial disability, which was paid by Wal-Mart. We modify and affirm the judgment.

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

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J. and JOE C. LOSER, SP. J., joined.

Jay L. Johnson, Jackson, Tennessee, attorney for appellant, Wal-Mart Stores, Inc.

David Hardee, Jackson, Tennessee, attorney for appellee, Rosie Fuller.

Paul G. Summer, Attorney General and Reporter; E. Blaine Sprouse, Assistant Attorney General, for the appellee, State of Tennessee.

**MEMORANDUM OPINION**

In 1997, the plaintiff developed tarsal tunnel syndrome in her right leg. She was placed in a brace to support her right leg. In September of 1999, the plaintiff started having pain in her left leg. Dr. Wormbrod placed a brace on the left leg as well. Further, the plaintiff began to experience

back pain. The plaintiff fell on July 4, 2000, while at work and represented she injured both legs and her back.

The plaintiff continued to work for the defendant throughout the time of her leg problem and was still working at the time of trial. The defendant assigned her to work at a light-duty job which accommodated the medical restrictions set by physicians. A supervisor testified that plaintiff was a good employee and there was no plan to discharge her. The plaintiff received two raises after her disability and is making more than she was prior to her injuries.

### **Medical Evidence**

Dr. James Warmbrod, an orthopedic surgeon, was the plaintiff's treating physician. He described the tarsal tunnel syndrome condition the plaintiff suffered and was of the opinion this could be caused by her long hours of standing on concrete in her job. He placed restrictions on long periods of standing, weight lifting, etc., and recommended that she do only sedentary jobs. Dr. Warmbrod did not fix any medical impairment rating, nor did he testify as to a date of maximum medical improvement. He testified the plaintiff might require surgery in the future. He was, however, reluctant to do surgery for various reasons. He was of the opinion the back pain the plaintiff suffered was because her gait was altered as a result of wearing the braces.

Dr. Riley Jones, an orthopedic surgeon, filed a C-32 form, basically stating the plaintiff's problems were not related to her work and gave no impairment rating.

Dr. Robert Barnett, an orthopedic surgeon, evaluated the plaintiff and confirmed Dr. Warmbrod's opinion of the injuries. Dr. Barnett found the plaintiff had sustained a 44 percent whole body disability. This included a 5 percent rating because of back pain, 15 percent for the left leg problem and 30 percent for the previous injury to the plaintiff's right leg.

There is no medical evidence in the record to show the plaintiff sustained any injury to her right leg which would be compensable as a result of the fall of July 4, 2000.

### **Findings at Trial**

The trial judge found the case involved injury to both legs and also to the plaintiff's back. He found the plaintiff had to alter her gait since she began wearing a brace on her right leg in 1999. He found the injury at work on July 4, 2000, aggravated her three prior injuries.

The trial court found the plaintiff reached maximum medical improvement on June 20, 2000, the date Dr. Warmbrod placed work restrictions on her.

The trial judge found the plaintiff had sustained a 90 percent whole body disability as a result of the injury and because of the previous disability, which was 25 percent to the body as a whole. The trial court concluded that the defendant must pay 75 percent or 360 weeks of the award and the

Second Injury Fund must pay 15 percent or 60 weeks of the award.

The defendant raised the following issues on appeal:

1. The trial court erroneously found that the Plaintiff had reached maximum medical improvement, and as such, no award of permanent partial disability benefits should have been awarded.
2. The trial court erroneously utilized a rating of 44 percent permanent impairment to the body as a whole from Dr. Robert Barnett, when Dr. Barnett's rating included permanent impairment for a previously compensated injury, and the correct rating from Dr. Barnett with regard to the Plaintiff's new injuries was 19 percent permanent impairment to the body as a whole.
3. The Plaintiff's recovery, if any, should be limited to no more than two and one-half times the anatomic impairment rating of 19 percent provided by her independent medical evaluation, or a maximum of 47.5 percent permanent partial disability to the body as a whole.
4. The trial court erroneously ordered Wal-Mart Stores, Inc., to pay 300 weeks of permanent partial disability benefits when the maximum award of permanent partial disability benefits that could be paid by Wal-Mart Stores, Inc., is limited to no more than 275 weeks of benefits based upon the prior award given to Plaintiff.

The Second Injury Fund raised the following issues:

1. The trial court erred in awarding Ms. Fuller 90 percent permanent partial disability because she clearly had a meaningful return to work. Using the proper physical impairment rating of 19 percent to the body as a whole, the most she could recover under Tenn. Code Ann. § 50-6-241(a)(1) is 47.5 percent permanent partial disability.
2. Pursuant to Tenn. Code Ann. § 50-6-208(b), which governs this case, when an injured employee has received one or more prior workers' compensation awards, the Second Injury Fund is only liable for the percent of disability that exceeds 100 percent. If the trial court's award stands, then the Second Injury Fund is liable for that portion of the total of award which exceeds 100 percent.

### **Discussion**

The trial judge found that the plaintiff had reached maximum medical impairment on June 20, 2000. This is the date Dr. Warmbrod placed work restrictions on the plaintiff. There is no recitation of maximum medical improvement in the record. However, this appears to be the sense of Dr. Warmbrod's June 20, 2000 action. We conclude, therefore, the trial judge did not err in

reaching the conclusion that June 20, 2000, was the date of maximum medical improvement.

The trial judge found the plaintiff had sustained a 44 percent impairment rating as a result of her injuries in this case and fixed the vocational impairment at 90 percent. The trial judge then found this amount of disability coupled with the previous disability to the right leg made the plaintiff totally and permanently disabled and apportioned the award as 75 percent to the employer and 15 percent to the Second Injury Fund.

Dr. Barnett found the plaintiff had sustained a 5 percent impairment to her back and 15 percent impairment to the body as a whole because of the left leg injury. When combined in accordance with the combined value table of the AMA Guidelines, the impairment rating for the left leg and the back injury would be 19 percent. We find therefore that the record shows the plaintiff has sustained a 19 permanent partial injury to the body as a whole as a result of the injury to her left leg and back. Dr. Barnett's deposition indicated he considered the right leg problems a result of the first injury.

The plaintiff is continuing to work for the defendant. Therefore under the provisions of Tenn. Code Ann. § 50-6-241 (a)(1) the plaintiff may only recover two and one-half times the medical impairment rating: the result being the plaintiff is entitled to recover only 47.5 percent for her current injuries. Because this award, coupled with the previous award for the injury to the plaintiff's right leg does not exceed 100 percent, the employer is liable for the entire award and the Second Injury Fund is dismissed from this case.

We enter judgment for the plaintiff of 47.5 percent vocational disability, and remand the case to the trial court for entry of such orders as are necessary to carry out this judgment.

The costs of this appeal are taxed to the plaintiff.

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JOHN K. BYERS, SENIOR JUDGE

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**JUDGMENT ORDER**

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 Appellee, Rosie Fuller, for which execution may issue if necessary.

**IT IS SO ORDERED.**

**PER CURIAM**