

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
July 1, 2004 Session

MICHAEL RAY HAILEY v. E. W. JAMES & SONS, ET AL.

**Direct Appeal from the Chancery Court for Obion County
No. 23,719 William Michael Maloan, Chancellor**

No. W2003-02499-WC-R3-CV - Mailed July 29, 2004; Filed September 21, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 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 the trial court erred in its apportionment of permanent total disability benefits 35 percent to the employer and 65 percent to the Second Injury Fund. As discussed below, the panel has concluded the judgment of the trial court should be modified by apportioning 100 percent of the disability benefits to the employer and none to the Second Injury Fund.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2002) Appeal as of Right; Judgment of the Chancery Court Affirmed as Modified

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JAMES F. BUTLER, SP. J., joined.

Paul G. Summers, Attorney General and Reporter, and Dianne Stamey Dycus, Deputy Attorney General, Nashville, Tennessee, for the appellant, Sue Ann Head, Director, Workers' Compensation Division, Tennessee Department of Labor and Workforce Development, Second Injury Fund.

Alex C. Elder, Memphis, Tennessee, for the appellees, E. W. James & Sons and Royal and SunAlliance Insurance Company.

Jeffrey A. Garrety, Jackson, Tennessee, for the appellee, Michael Ray Hailey.

MEMORANDUM OPINION

The employee or claimant, Mr. Hailey, initiated this civil action to recover workers' compensation benefits for a work-related leg injury from the employer, E. W. James & Sons, and

its insurer. The Second Injury Fund was added by amendment after it developed that the claimant was permanently and totally disabled. After a trial on the merits, the trial court awarded permanent total disability benefits and apportioned those benefits 35 percent to the employer and 65 percent to the Fund. The Fund has appealed. The only issue on appeal is whether the apportionment is proper under the circumstances.

The extent of vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn. 1999). Appellate review of factual questions 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) (Supp. 2002). 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. Hill v. Wilson Sporting Goods Co., 104 S.W.3d 844, 846 (Tenn. Workers' Comp. Panel 2002). Issues of statutory construction are solely questions of law. Id. Where the trial judge has seen and heard the witnesses, the trial court's determination of issues of credibility and the weight to be given oral testimony must be accorded considerable deference on review, McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. 1995), 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, 61 (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). Where the medical testimony in a workers' compensation case is presented by deposition, the reviewing court may make an independent assessment of the medical proof to determine where the preponderance of the proof lies. Bridges v. Liberty Ins. Co. of Hartford, 101 S.W.3d 64, 67 (Tenn. Workers' Comp. Panel 2000).

When an injury, not otherwise specifically provided for in the Workers' Compensation Law, 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) (Supp. 2002). It is undisputed that the preponderance of the evidence supports the trial court's finding that the claimant is permanently and totally disabled and entitled to the benefits provided by law for his permanent total disability. The Second Injury Fund contends, however, that the evidence preponderates against the trial court's finding that the Fund should pay 65 percent of his permanent total disability benefits. We agree.

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. See

Tenn. Code Ann. § 50-6-208 (Supp. 2002). Under subsection (a) of Tennessee Code Annotated section 50-6-208,¹ 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); Sweeten v. Trade Envelopes, Inc., 938 S.W.2d 383, 385 (Tenn. 1996). Under this subsection, 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. Allen v. City of Gatlinburg, 36 S.W.3d 73, 77 (Tenn. 2001). Consequently, in such a 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, because 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. Id.

In this case, the trial court found that the claimant's disability resulting from the subsequent injury was limited to 70 percent to the leg, a scheduled member. We hold, however, that the evidence preponderates against this finding. We must therefore determine the extent of the employer's liability.

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(a)(1) If an employee has previously sustained a permanent physical disability from any cause or origin and becomes permanently and totally disabled through a subsequent injury, such employee shall be entitled to compensation from the employee's employer or the employer's insurance company only for the disability that would have resulted from the subsequent injury, and such previous injury shall not be considered in estimating the compensation to which such employee may be entitled under this chapter from the employer or the employer's insurance company; provided, that in addition to such compensation for a subsequent injury, and after completion of the payments therefor, then such employee shall be paid the remainder of the compensation that would be due for the permanent total disability out of a special fund to be known as the "second injury fund" therein created.

(2) To receive benefits from the second injury fund, the injured employee must be the employee of an employer who has properly insured such employer's workers' compensation liability or has qualified to operate under the Workers' Compensation Law as a self-insurer, and the employer must establish that the employer had actual knowledge of the permanent and preexisting disability at the time that the employee was hired or at the time that the employee was retained in employment after the employer acquired such knowledge, but in all cases prior to the subsequent injury.

(3) In determining the percentage of disability for which the second injury fund shall be liable, no previous physical impairment shall be considered unless such impairment was within the knowledge of the employer as prescribed above.

(4) Nothing in this section shall be construed to limit the employer's liability as provided by law for aggravation of preexisting conditions or disabilities in cases where recovery against the second injury fund is not applicable.

The claimant is a forty-nine-year-old high school graduate with three years of college and experience in the food industry. He most recently worked as the manager of a restaurant for E. W. James & Sons. Prior to his employment, he had back surgery to remove a cyst. In addition, he suffers from diabetes and hypertension, both of which pre-existed his employment with the employer. Before the present injury occurred, however, his diabetes and hypertension were controlled by medication, and he was able to work with few restrictions or limitations. He has not received any prior workers' compensation awards.

On June 22, 2001, the claimant slipped and fell at work, striking his left knee on the corner of a table, injuring the knee. Following corrective knee surgery, and as a complication of it, he developed blood clots and was diagnosed with deep vein thrombosis. He continues to suffer from pain and swelling in the knee for which he uses a cane and wears support stockings.

According to Dr. John Cummings, the claimant's treating physician, the claimant has some neuropathy in the leg because of the swelling. The treating physician testified by deposition that the claimant would retain a 70 percent permanent impairment to the injured leg. He also testified that the claimant had an additional 10 percent permanent impairment to the body as a whole because of his chronic vein insufficiency. This condition necessitates Coumadin therapy, which affects parts of the body other than the leg. The doctor also estimated the claimant's permanent clinical impairment from the diabetes to be 11 to 20 percent and the impairment from the hypertension to be 29 percent. He testified, however, that neither the diabetes nor the hypertension would prevent him from working. On the other hand, Dr. Cummings testified that the claimant is not capable of working because of the work-related injury and the complications that developed following surgery. It is clear from the testimony of Dr. Cummings that the claimant's pre-existing diabetes and hypertension did not adversely affect his ability to work but that he is now unable to work because of the work-related injury and complications from the treatment of this injury.

Dr. Joseph Boals, an orthopedist, conducted an independent medical evaluation for the claimant. He opined that the claimant's medical problems were caused by the work-related injury. Dr. Boals estimated the claimant's permanent anatomical impairment from the work-related injury to be 30 percent to the body as a whole, superimposed on an estimated 40 percent impairment from pre-existing conditions. Dr. Boals conceded, however, that he did not evaluate the claimant for his pre-existing conditions.

Dr. Robert Kennon, a vocational expert, testified the claimant is "practically 100 percent" disabled since the work-related injury and that, except for that injury, he could return to his job. The claimant's own testimony is that he cannot work because of the work-related injury.

From our independent examination of the record, we agree with the Second Injury Fund's argument that the preponderance of the evidence supports the conclusion that the claimant's disability was caused solely by his most recent work-related injury. As a complication of surgery, the claimant developed blood clots and was diagnosed with deep vein thrombosis. The claimant's venous disorder, and the side effects of the necessary treatment thereof, affect parts of the body other

than his injured leg. It is well established that disability resulting from medical treatment for a compensable injury is compensable under the Tennessee Workers' Compensation Law. Rogers v. Shaw, 813 S.W.2d 397, 399-400 (Tenn. 1991). Moreover, even if the claimant's pre-existing conditions contributed to his venous disorder, an employer takes an employee with all pre-existing conditions, and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability far greater than if the employee had not had the pre-existing conditions. Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. 1996). Furthermore, all of the medical expert testimony and the lay testimony support the conclusion that the claimant is 100 percent vocationally disabled due to his work-related injury. Since the employer is responsible for the disability that resulted from the subsequent injury and in this case that disability totals 100 percent, the Fund is not liable to the claimant in any amount under Tennessee Code Annotated section 50-6-208.²

For the above reasons, we conclude the employer is liable for 100 percent of the claimant's permanent total disability benefits. The Second Injury Fund is dismissed from the civil action. The judgment is modified accordingly and, as modified, affirmed. Costs are taxed to E. W. James & Sons and its insurer.

JOE C. LOSER, JR,

² Subsection (b) of section 50-6-208 is applicable if the sum of two or more awards for permanent disability to the body as a whole equals or exceeds 100 percent permanent disability. Henson v. City of Lawrenceburg, 851 S.W.2d 809, 812 (Tenn. 1993). Subsection (b) is inapplicable in this case because the claimant has no prior awards.

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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 Appellees, E.W. James & Sons and Royal and SunAlliance Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

