IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
September 15, 2006 Session

ROBERT E. BRITTON v. CROWN TONKA WALK-INS, CROWN FIXTURES, INC., TONKA COOLERS, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, AND SUE ANN HEAD, ADMINISTRATOR TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND

Direct Appeal from the Circuit Court for Greene County
No. 03CV1061 – Honorable Ben K. Wexler, Judge
Filed March 8, 2007

E2005-02174-WC-R3-CV - Mailed December 21, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e)(3) (2005) for hearing and reporting of findings of fact and conclusions of law. The Employee appeals an award of 35% vocational disability to the left arm, and asserts that he is permanently and totally disabled. We vacate the judgment of the trial court, and remand for a new trial.

Tenn. Code Ann. § 50-6-225(e)(3) (2005) Appeal as of Right; Judgment of the Greene County Circuit Court is Vacated, and the case is Remanded.

T. E. FORGETY, JR., Special Judge, delivered the Opinion of the Court, in which WILLIAM M. BARKER, CHIEF JUSTICE, and SHARON G. LEE, Special Judge, joined.

John T. Milburn Rogers, Todd A. Shelton, Rogers, Laughlin, Nunnally, Hood and Crum, Greeneville, Tennessee, for the Appellant, Robert E. Britton.

Paul G. Summers, Attorney General and Reporter, Juan G. Villasenor, Assistant Attorney General, Nashville, Tennessee, for the Appellee, Second Injury Fund.

Jay L. Johnson, Daniel T. Swanson, Allen Kopet and Associates, PLLC, Knoxville, Tennessee, for the Appellee, Crown Tonka Walk-Ins.

MEMORANDUM OPINION

Facts

The Employee/Plaintiff, Robert E. Britton, brought this action seeking permanent partial, or permanent total disability benefits. He alleged that on December 16, 2002, he suffered an injury to the left arm, neck and/or body as a whole while in the employ of Crown Tonka. He also alleged that on September 13, 2002, he had suffered a previous injury to his right shoulder, arm, and neck while working for Crown Tonka. At the time this complaint was filed, the previous injury was the subject of another pending and unresolved suit. The Plaintiff joined the Second Injury Fund as a Defendant in this action. Crown Tonka admitted that Mr. Britton had alleged the injury of December 16, 2002, and that he had given proper and timely notice of the alleged injury. However, it generally pled lack of sufficient knowledge to respond to the other allegations of the complaint. The Second Injury Fund denied any liability and also pled in general that it had insufficient knowledge to respond. The trial court heard this case on November 23, 2004, and awarded 35% disability to the left arm only. The court found no additional disability/impairment to the neck as a result of the second injury.

At the trial, it appeared that Mr. Britton had had a diskectomy and a fusion of cervical vertebra as a result of the first injury. Dr. Richard Duncan, who treated him, assessed an 8% medical impairment to the body as a whole as a result of that injury. Dr. William E. Kennedy, who performed an independent medical exam for the Plaintiff, found a 25% impairment of the body as a whole from the first injury. At any rate, before the trial here, the Plaintiff had settled that claim on the basis of a 95% disability to the body as a whole.

In the incident of December 16, 2002, Mr. Britton suffered a severed tendon in his left arm. This was surgically repaired by Dr. Gorman, an orthopedic surgeon from Johnson City, who did not testify. The Plaintiff was given light duty work and remained with Crown Tonka until June of 2003, when he was terminated because the Employer had no work within his restrictions.

Dr. Kennedy, again the Plaintiff's independent examiner, found a 7% impairment to the left upper extremity as a result of this second injury. He also opined that the second injury aggravated the first neck injury and caused an additional 3% whole body impairment (over and above the 25% he had assessed for the first neck injury). As a result of his injuries, Dr. Kennedy placed an extensive list of restrictions upon Mr. Britton's future activities. Dr. Richard Duncan found no change in the condition of Mr. Britton's neck as a result of the second injury, though he felt he had had an additional cervical strain. Accordingly, Dr. Duncan assigned no additional impairment to the neck from the second injury. He did not testify as to the injury to Mr. Britton's left arm in the second accident. However, he placed no restrictions on Mr. Britton's activities. The Plaintiff testified extensively as to his disabilities and the restrictions in his activities. He felt that he was permanently and totally disabled. Dr. Norman Hankins, a vocational evaluator and an associate of Dr. Kennedy, performed a vocational analysis for the

Plaintiff. It was his opinion, based upon Dr. Kennedy's restrictions, that Mr. Britton was 100% vocationally disabled. Mr. Michael Galloway, a vocational expert, examined Mr. Britton and testified on behalf of the Defendants. It was his opinion, based on the records of Dr. Duncan and Dr. Gorman, and the lack of restrictions they placed on Mr. Britton, that he had zero, or minimal, vocational disability. Mr. Galloway testified he had examined Dr. Kennedy's first and second depositions, as well as his evaluation report. He was unable to form an opinion based upon Dr. Kennedy's findings, because the depositions and reports were "very inconsistent", confusing, and contradictory. One example Mr. Galloway gave was that the restrictions assigned by Dr. Kennedy had changed "multiple times". Indeed, the trial court itself noted some confusion as to Dr. Kennedy's report, saying:

> "There's four page 8s (page 8 of Dr. Kennedy's IME report was the page containing his restrictions), part of them marked out and part of them not marked out. I don't know what you go on."

However, on cross examination, Mr. Galloway admitted that the restrictions stated in Exhibit number 7 to Dr. Kennedy's deposition of November 1, 2004 (one of the page 8s of the IME report), if correct, would render Mr. Britton totally and permanently disabled.

The trial court accepted Dr. Duncan's opinion over that of Dr. Kennedy, finding that Mr. Britton had suffered no additional impairment to the neck as a result of the second injury. However, the court did award benefits for a 35% vocational disability to the left arm only by reason of the December 16, 2002 accident. The Plaintiff appeals.

Standard of Review

We review the findings of fact by the trial court *de novo*, upon the record, with a presumption of correctness, unless the evidence preponderates otherwise. *Phillips v. A & H Const. Co.*, 134 S.W.3d 145, 149 (Tenn. 2004); *Scales v. Oak Ridge*, 53 S.W.3d 649, 652 (Tenn. 2001). Questions of law, however, are reviewed *de novo* with no presumption of correctness. *Hollingsworth v. S & W Pallet Co.*, 74 S.W.3d 347, 352 (Tenn. 2002); *Parks v. Tenn. Mun. League Risk Mgt Pool*, 974 S.W.2d 677, 678-79 (Tenn. 1998). Where the expert medical testimony is in conflict, the trial court has the discretion to accept the opinion of one expert over another. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. 1996); *Bond v. American Air Filter*, 692 S.W.2d 638, 640 (Tenn. 1985). However, where the medical evidence was presented by deposition, this Court does not extend the same degree of deference to the trial court's findings on weight and credibility as it does where the lower court heard the witnesses live. Rather, we may draw our own conclusions as to the credibility and the preponderance of the evidence. *Conner Bros. Excav. Co. v. Long*, 98 S.W.3d 656, 660 (Tenn. 2003); *Tobitt v. Bridgestone/Firestone, Inc.*, 59 S.W.3d 57, 61 (Tenn. 2001)

Issues

While the parties have stated the issues somewhat differently, they may be reduced to the following:

(1) Does the preponderance of the evidence show that the Plaintiff is permanently and totally disabled?

(2) Was the trial court required to make an affirmative finding as to permanent and total disability?

Discussion

An employee is permanently and totally disabled when he suffers an on-the-job injury which totally incapacitates him from working at an occupation that brings him an income. Tenn. Code Ann. § 50-6-207(4)(B) (2005); *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000). In determining whether an employee is permanently and totally disabled, courts look at many factors, including the employee's skills and training, education and age, local job opportunities, and his capacity to work at the kinds of jobs available in his disabled condition. *Cleek*, 19 S.W.3d at 774. Benefits for permanent and total disability are generally payable until the employee reaches the age when he is eligible for Social Security. (However, with respect to injuries which occur after 60 years of age, benefits are payable for 260 weeks). Tenn. Code Ann. § 50-6-207(4)(A)(i) (2005). These benefits are not subject to the "maximum total benefit" set in Tenn. Code Ann. § 50-6-102(14). *Bomely v. Mid-America Corp.*, 970 S.W.2d 929, 933 (Tenn. 1998) *Love v. American Olean Tile Co.*, 970 S.W.2d 440, 442 (Tenn. 1998). And of course, they may exceed the 400-week benefit limitation which applies to injuries resulting in permanent partial disability to the body as a whole under Tenn. Code Ann. § 50-6-207(3)(F). Thus, permanent and total disability benefits may be payable for a far longer time, and in a far greater total amount, than permanent partial benefits. This distinction is critically important to the parties here.

As applicable here, the Second Injury Fund statute, Tenn. Code Ann. § 50-6-208, contains two separate subsections which operate quite differently.[1] In order to recover under subsection (a), the employee (1) must have sustained a permanent disability, from *any* cause, whether compensable or not, (2) must have become permanently and totally disabled due to a subsequent injury, and (3) the employer must have had knowledge of the preexisting injury prior to the second injury. Under subsection (b), the employee may recover where he has received two or more *compensation* awards for permanent disability to the body as a whole, which taken together, equal or exceed 100% permanent disability. While subsection (a) is conditioned upon a finding of permanent and total disability, subsection (b) is not. *Watt v. Lumbermen's Mut. Cas. Ins. Co.*, 62 S.W.3d 123, 129 (Tenn. 2001). Significantly however, an employee may qualify for Second Injury benefits under *both* subsections (a) and (b). *Bomely v. Mid-America Corp.*, 970 S.W.2d 929, 935 (Tenn. 1998). When this occurs, courts should apply the subsection which is

[1] The statute was amended by 2004 Tenn. Pub. Acts, Ch. 962 § 25, and 2005 Tenn. Pub. Acts, Ch. 390 §§ 15, 16, to provide that subsection (b) would not apply to injuries arising on or after July 1, 2006.

most favorable to the employer, since the Second Injury Fund seeks to encourage employers to hire previously injured employees. *Id.*

Under the trial court's judgment, there would be no issue as to Plaintiff's entitlement to benefits under subsection (b) of § 50-6-208. The award for his first injury was 95% disability to the body as a whole, and the award for the second injury – 35% disability to the left arm – equates to an additional 17.5% disability to the body as a whole. (In Second Injury Fund cases, injuries to scheduled members are converted to equivalent whole body injuries using the "number of weeks" conversion method. *Watt*, 62 S.W.3d at 128.) Thus, Plaintiff's combined awards exceed 100%. Nevertheless, the question of permanent and total disability and Plaintiff's entitlement to draw benefits until he reaches Social Security age remains. The Plaintiff points out that in *Watt* the Court said, "…trial courts in Second Injury Fund cases must first determine whether the employee has been permanently and totally disabled by the combination of two or more injuries. 62 S.W.3d at 131. Mr. Britton then reasons that the trial court erred by not affirmatively ruling on the issue of permanent and total disability.

The Defendants contend that the language from *Watt* does not require an initial determination as to permanent and total disability in this case. Rather, they argue that language was aimed primarily at the problem of calculating the extent of the Second Injury Fund's liability in a case where the employee is in fact found to be permanently and totally disabled.[2]

We note again that an employee – such as the Plaintiff here – may qualify for benefits under both subsections (a) and (b) of Tenn. Code Ann. § 50-6-208. *Bomely*, 970 S.W.2d at 935. In this case, the issue of permanent and total disability was clearly before the trial court via the pleadings, evidence, and argument of counsel. However, the court made certain comments which seem to indicate that it felt that it had only been asked to determine the disability to Mr. Britton's arm. In addition, there was substantial testimony on the issue of whether the second incident had aggravated the neck injury the Plaintiff suffered in the first accident. And, the court indicated that it made its award to the arm only because it found no aggravation of the original neck injury. This holding was perhaps based upon *Minton v. State Indus. Inc.*, 825 S.W.2d 73 (Tenn. 1992). In *Minton*, the Court did hold that where there were two awards totaling less than 100%, the employer would have to prove an aggravation of the first injury, so that it could be redefined, before he could be found permanently and totally disabled. The basis of this ruling was that unless an aggravation of the first injury were proven, the effect of a permanent and total award (where the total of both awards was less than 100%) would amount to a re-litigation of the original award. *Id* at 79. However, in *Watt*, the Court

[2] Under § 50-6-208(a) – permanent and total disability cases – the employer is liable only for the disability which results from the subsequent injury, and the Second Injury Fund is liable for the remainder of the benefits. In *Watt*, 62 S.W.3d at 129-31, we discussed the development of the case law and concluded that an employee could be permanently and totally disabled without having received disability awards totaling 100%. *Id* at 131. We also reaffirmed that upon a finding of permanent and total disability, courts must assess the disability resulting from the second injury without regard to the previous injury,or any disability award attributable to it. *Id* at 130. That assessment then fixes the liability of the employer and the Second Injury Fund.

departed from the reasoning of *Minton*. Specifically, *Watt* held that the court could find permanent and total disability based upon the synergistic effect of the two injuries, even if there had been no aggravation of the first injury. *Watt*, 62 S.W.3d at 131. While the Defendants assert that the award of benefits to the Plaintiff's arm only is an implicit finding of no permanent and total disability, we nevertheless believe that the trial court should have dealt explicitly with that issue.

The Plaintiff argues that he should be found permanently and totally disabled because his two disability awards exceed 100%, but we find that this fact alone does not dictate such a conclusion. In *Watt*, we observed that an employee need not necessarily be permanently and totally disabled in order to qualify for benefits under subsection (b) of Tenn. Code Ann. § 50-6-208. 62 S.W.3d at 129; *see also*, *Allen v. Gatlinburg*, 36 S.W.3d 73, 76 (Tenn. 2001). Moreover, we do not agree that *Vinson v. United Parcel Service*, 92 S.W.3d 380 (Tenn. 2002) supports the Plaintiff's position. In *Vinson*, we pointed out that an employee could not be 100% permanently *partially* disabled. However, that decision does not necessarily dictate that a worker who has suffered multiple injuries with awards totaling 100% or more is permanently and totally disabled. Thus, we cannot conclude that Plaintiff is entitled to permanent and total disability benefits solely because his combined awards exceed 100% to the body as a whole.

Finally, although the parties each argue that the evidence preponderates in their favor, we note – as did the trial court – that the record is unclear in some respects. Moreover, we conclude that the trial court misapprehended the applicability and operation of the Second Injury Fund statute and/or the parties' positions relative to it. Accordingly we deem it appropriate to vacate the judgment below and remand the case for a new trial.

Conclusion

The judgment of the trial court is VACATED, and the cause is REMANDED for a new trial. Costs of this appeal are adjudged one-half to Plaintiffs and one-half to Defendants.

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TELFORD E. FORGETY, JR., SPECIAL JUDGE

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Crown Tonka Walk-Ins and St. Paul Fire and Marine Insurance Company pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed one-half to the Plaintiffs and one-half to the Defendants, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Chief Justice William M. Barker, not participating.