

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

AT JACKSON
(April 18, 1996 Session)

KENNETH FULLER,)	MADISON CIRCUIT
)	
Plaintiff-Appellant,)	Hon. Whit Lafon,
)	Judge.
v.)	
)	No. 02S01-9508-CV-00076
LIBERTY MUTUAL INSURANCE)	
COMPANY, MADISON INDUSTRIES,)	
INC. and SUE ANN HEAD, DIRECTOR)	
OF THE DIVISION OF WORKERS')	
COMPENSATION, TENNESSEE)	
DEPARTMENT OF LABOR,)	
)	
Defendants-Appellees.)	

FILED
September 30, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

For Appellant:

Lisa June Cox
Jackson, Tennessee

For Appellees, Liberty Mutual
and Madison Industries:

Catherine B. Clayton
Lewis L. Cobb
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For Appellee, Sue Ann Head:

Charles W. Burson
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MEMORANDUM OPINION

Members of Panel:

Lyle Reid, Associate Justice, Supreme Court
John K. Byers, Senior Judge
Joe C. Loser, Jr., Special Judge

MODIFIED

Loser, Judge

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employee or claimant, Fuller, contends "the trial court erred in limiting his permanent total disability award to a maximum total benefit of one hundred forty-two thousand, three hundred eighty-eight dollars (\$142,388.00), as opposed to ordering lifetime benefits pursuant to Tenn. Code Ann. 50-6-207(4)(A), when the employee was found to be totally disabled." The Second Injury Fund (the Fund) contends the evidence preponderates against the trial court's finding that the claimant is permanently and totally disabled as a result of a work-related injury by accident. The panel concludes the judgment should be modified as provided herein.

The claimant has three infirmities. He has a pre-existing avascular necrosis, which was surgically treated and from which he rehabilitated himself and worked for the employer, Madison Industries; he has carpal tunnel syndrome, which he gradually developed from repetitive use of his hands at Madison Industries; and he has Raynaud's disease or mixed connective tissue disorder, vasculitis, unrelated to any on-the-job injury.

At the time of the trial, the claimant was thirty-seven years old and had a high school education and a drafting diploma. His working history includes bagging groceries, stocking shelves, operating machines, driving forklifts and production work, as well as drafting. In 1985, Dr. James Warmbrod, an orthopedic surgeon, performed hip surgery on the claimant's hips for bilateral avascular necrosis, secondary to chronic alcoholism.

The same doctor performed bilateral carpal tunnel release surgery on the claimant in 1993, after the claimant developed bilateral carpal tunnel syndrome from his work for the employer. Dr. Warmbrod assigned ten percent permanent impairment to both arms and suggested that the claimant be limited to light, sedentary work and not do repetitive work with his hands. The doctor also suggested that, because of the claimant's vasculitis in both arms, which was diagnosed after he developed carpal tunnel syndrome, that he should work in a warm environment.

Dr. Robert Winston, an internist, conducted an independent medical examination on June 21, 1994, after vasculitis had been diagnosed, and concluded that the claimant was permanently and totally disabled. The doctor assigned twelve to fifteen percent permanent impairment to each upper extremity and forty percent to the pre-existing hip condition.

The trial court found the claimant to be permanently and totally disabled as a result of all three infirmities and awarded benefits accordingly, not to exceed \$142,388.00, the maximum disability award allowable under the

Worker's Compensation Act at the time. 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. section 50-6-225(e)(2). This standard requires this tribunal to weigh in depth factual findings and conclusions of the trial court. See Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987).

An employee is considered totally disabled when an injury totally incapacitates him from working at an occupation that brings him an income. Tenn. Code Ann. section 50-6-207(4)(B). The definition contemplates employment in the open labor market and not a return to the employee's previous position. See Prost v. City of Clarksville, Police Dep't., 688 S.W.2d 425 (Tenn. 1985). The assessment of vocational disability is based on the claimant's ability to compete for employment in the open market in a disabled condition by taking all relevant factors into account. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 459 (Tenn. 1988). Among the relevant factors to be considered are the employee's skills, training, education, age, local job opportunities, and the capacity to work in employment amenable to the worker's condition. Robertson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986). A medical expert's rating of anatomical disability is a factor to be considered in determining vocational disability. Corcoran, 746 S.W.2d at 459.

This tribunal is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. See Seiber v. Greenbrier Industries, Inc., 906 S.W.2d 444 (Tenn. 1995). From the conflicting medical evidence, all of which was by deposition, and consideration of the other factors, the panel finds the preponderance of the evidence to be against an award of permanent total disability benefits.

We recognize, on the other hand, that the claimant's work-related injury is more disabling, because of the claimant's pre-existing condition, than it would have been to a healthier person. We therefore find that the evidence preponderates in favor of an award based on seventy-five percent permanent partial disability to both arms. The judgment is modified accordingly.

An employee who has become previously 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. Tenn. Code Ann. section 50-6-208. However, such employee may be entitled to recover the remainder of the benefits allowable for permanent total disability from the Fund. See Cameron v. Kite Painting Co., 860 S.W.2d 41 (Tenn. 1993).

In this case, the disability that resulted from the "subsequent injury"

is seventy-five percent to both arms, for which the employer is liable. Since the employee is not permanently and totally disabled, the case is dismissed as to the Fund. Costs on appeal are taxed to the plaintiff-appellant.

Joe C. Loser, Jr., Judge

CONCUR:

Lyle Reid, Associate Justice

John K. Byers, Judge