IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(October 22, 1996 Session)

STEPHEN H. BAXENDALE, Plaintiff-Appellant, v. UNIVERSAL UNDERWRITERS' INSURANCE COMPANY and MID-STATE AUTOMOTIVE DISTRIBUTORS, INC., Defendants-Appellees.	)	DAVIDSON CHANCERY Hon. Irvin H. Kilcrease, Chancellor. No. 01S01-9605-CH-00097

For Appellant:

Daniel C. Todd
Evans & Todd
Nashville, Tennessee

For Appellees:

Martin D. Holmes
Stewart, Estes & Donnell
Nashville, Tennessee

M E M O R A N D U M O P I N I O N

Members of Panel:

Frank F. Drowota, III, Associate Justice, Supreme Court
Robert S. Brandt, Senior Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED AS MODIFIED

Loser, Judge

MEMORANDUM OPINION

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, Baxendale, contends (1) the award of permanent partial disability benefits is inadequate and (2) the trial court erred in computing his compensation rate. The employer and its insurer contend the trial court erred in finding the employee suffered a compensable injury by accident on June 6, 1994. As discussed below, the panel has concluded the award of permanent partial disability benefits should be modified and the judgment otherwise affirmed.

The claimant is a thirty-five year old laborer with a ninth grade education. He failed a test for a GED. At the time of the claimed injury, he was earning $6.39 per hour.

Beginning in October of 1992, he suffered back pain at work, but continued working while being conservatively treated for pain. At one time the treating physician assigned to him a four percent permanent whole person impairment rating. He was awarded permanent partial disability benefits based on ten percent to the body as a whole and returned to work as a laborer at the same wage rate he was earning before the injury.

On June 6, 1994, he became disabled to work because of severe back pain and was diagnosed as having suffered a gradually developing ruptured disc. The doctor surgically removed the ruptured disc and estimated his permanent whole person impairment at nine percent, from appropriate guidelines. After recovering from the surgery, the claimant again returned to work at the same wage as before the disabling injury, but with significant lifting, bending, stooping and twisting restrictions.

Another orthopedic surgeon evaluated the claimant and assigned a whole person impairment rating of ten percent, using different but equally appropriate guidelines. The claimant continued to suffer back pain while working as a warehouseman.

Upon consideration of the above facts, the chancellor awarded permanent partial disability benefits on the basis of ten percent to the body as a whole for the June 6, 1994 injury, and fixed the claimant's compensation rate at $159.47 per week. 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 tribunal 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 (Tenn. 1995).

Injury by Accident

By the Tennessee Workers' Compensation Law, injuries by accident arising out of and in the course of employment which cause either disablement or death of the employee are compensable. Tenn. Code Ann. section 50-6-102(a)(5). "Injury" includes whatever lesion or change to any part of the system that produces harm or pain or lessened facility of the natural use of any bodily activity or capability. See Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993) and authority cited therein.

Where a condition gradually develops over a period of time, resulting in a definite, work-connected, unexpected, fortuitous injury, it is compensable as an injury by accident. Brown Shoe Co. v. Reed, 209 Tenn. 106, 350 S.W.2d 65 (1961). The date of injury for a gradually occurring injury has been fixed as the date on which the claimant was forced to quit work because of severe pain. Barker v. Home-Crest Corp., 805 S.W.2d 373, 374 (Tenn. 1991).

From our independent examination of the record and a consideration of the applicable principles of law, the panel finds the evidence fails to preponderate against the chancellor's finding that the claimant suffered a compensable injury by accident on June 6, 1994.

Extent of Permanent Disability

The employer takes the 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 he had not had the pre-existing conditions. Rogers v. Shaw, 813 S.W.2d 397 (Tenn. 1991). The opinion of a qualified expert with respect to a claimant's clinical or physical impairment is a factor which the courts will consider along with all other relevant facts and circumstances, but it is for the courts to determine the percentage of the claimant's industrial disability. Pittman v. Lasco Industries, Inc., 908 S.W.2d 932 (Tenn. 1995).

For injuries occurring on or after August 1, 1992, in cases where an injured worker is entitled to permanent partial disability benefits to the body as a whole and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award the employee may receive is two and one-half times the medical impairment rating. Tenn. Code Ann. section 50-6-241(a)(1).

From our independent examination of the record and a consideration of the applicable principles of law, the panel finds the evidence to preponderate against an award based on ten percent permanent partial disability to the body as a whole, as a result of the June 6, 1994 injury, and in favor of one based on twenty-two and one-half percent to the body as a whole from that injury. The judgment is modified accordingly.

Compensation Rate

For injuries occurring on June 6, 1994, the compensation rate is sixty-six and two-thirds percent of the employee's average weekly wage at the time of the injury, subject to a maximum. Tenn. Code Ann. section 50-6-102(a). The maximum is apparently not threatened in this case. "Average weekly wage" means the earnings of the injured employee in the employment in which he was working at the time of the injury during the fifty-two weeks immediately preceding the date of the injury, divided by fifty-two. Id.

Using the statutory formula, the chancellor fixed the claimant's compensation rate at $159.47. The claimant contends he is entitled to the rate he would have received prior to his first injury, because of the earlier finding that the employer returned him to work at the same or greater wage than he was receiving before the first injury.

We respectfully reject that contention as being contrary to the statutory scheme. The evidence fails to preponderate against the chancellor's finding with respect to the employee's compensation rate.

As modified, the judgment of the trial court is affirmed. Costs on appeal are taxed one-half each to the plaintiff-appellant and the defendants-appellees.

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Joe C. Loser, Jr., Special Judge

CONCUR:

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Frank F. Drowota, III, Associate Justice

_____

Robert S. Brandt, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STEPHEN H. BAXENDALE,	}	*DAVIDSON CHANCERY*
	}	*No. 94-2846-III(I) Below*
Plaintiff/Appellant	}	
	}	*Hon. Irvin H. Kilcrease,*
vs.	}	*Chancellor*
	}	
UNIVERSAL UNDERWRITERS' INSURANCE COMPANY and MID-STATE AUTOMOTIVE DISTRIBUTORS, INC.,	}	*No. 01S01-9605-CH-00097*
	}	
Defendants/Appellees	}	*AFFIRMED AS MODIFIED*

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 will be paid by one-half by Plaintiff/Appellant and Surety; and one-half by Defendants/Appellees for which execution may issue if necessary.

IT IS SO ORDERED on January 17, 1997.

PER CURIAM