IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, DECEMBER 1996 SESSION

FILED

March 17, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

LEA INDUSTRIES,	)	GRAINGER COUNTY
	)	
Plaintiff/Appellee	)	
	)	
v.	)	HON. CHESTER S. RAINWATER
	)	Chancellor
CHARLES HIXON,	)	
	)	
Defendant/Appellant	)	NO. 03S01-9606-CH-00067

For the Appellant

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

Members of Panel:

E. Riley Anderson, Justice
Roger E. Thayer, Special Judge
Joe C. Loser, Jr., Special Judge

MODIFIED AND AFFIRMED. **THAYER, Special 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. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The appeal has resulted from a finding by the trial court that Defendant, Charles A. Hixon, was entitled to permanent disability benefits of 17.5% to the body as a whole. The Chancellor was of the opinion the award was limited to 2-1/2 times the medical impairment rating of 7% pursuant to T.C.A. § 50-6-241(a)(1).

On appeal the employee has raised numerous issues regarding the limit of the award.

It is insisted the court was in error in not applying subsection (b) of the statute, which would fix the limit of the award at 6 times the medical impairment rating; that the court failed to apply subsection (a)(2) which would have permitted an increased award; that the court should have allowed greater benefits pursuant to T.C.A. § 50-6-242; that subsection (a)(2) is unconstitutional as it requires an employee to file a new cause of action when the employee may not have received an initial award of benefits prior to the expiration of the one year period of time.

The employer, Lea Industries, raises an issue concerning causation of the injury. It is insisted the preponderance of the evidence does not support the trial court's finding the ruptured disc was caused by the incident at work.

Employee Hixon is 49 years of age and completed the 9th grade. Most of his work experience has been in the furniture construction industry. On November 6, 1992, he was bending down to pick up some lumber when he felt pain in his back. He was taken to the hospital where he was admitted and stayed for a period of five days. About ten days after being released, he returned to work at the same rate of pay. He told the court he continued to have pain and worked under restrictions of not bending over; and not being on his feet or sitting for long periods of time. He continued like this until July 22, 1993, when he left work saying his physical condition would not permit him to continue. There is no other evidence in the record disputing his reason for leaving his employment.

He has a ruptured disc and as of the date of the trial below, he had elected to not have surgery testifying he was told surgery might help his condition and it might not. He has not looked for other employment because of his condition. The medical evidence indicates surgery would improve his condition.

There is conflict in the medical evidence in regard to the causation question. All of this evidence was presented by deposition.

Dr. Stephen E. Natelson, a neurosurgeon, testified a C.T. Scan taken on November 9, 1992 showed "an annular tear or a slight bulge to the disc at L4-5 on the left"; that another C.T. Scan taken on August 31, 1993 showed a "large ruptured disc." He was of the opinion the incident of November 6, 1992 caused the rupture of the disc and he gave the employee a 5% impairment rating to the body as a whole for the untreated ruptured disc.

Dr. David H. Hauge, a neurosurgeon, testified the C. T. Scan indicated a large ruptured disc and he felt the history of the event of November 6, 1992 was the cause of the rupture and he gave a 7% impairment rating. He also said the employee was afraid of surgery as he had friends who had not done well after similar surgery.

Dr. William J. Gutch, an orthopedic surgeon, saw defendant while he was hospitalized. His initial diagnosis was acute back strain with possible disc herniation. He later became aware of the C.T. and M.R.I. test results showing a ruptured disc.

Dr. Fred A. Killefer, a neurosurgeon, first saw defendant on August 19, 1993. He was of the opinion the November 9, 1992 C.T. Scan showed a bulging disc which was not related to the November 6th incident at work as it had been there for several years. He testified the August 31, 1993 M.R.I. results indicated a ruptured disc which he felt had occurred during May or June, 1993 when the defendant was at home and bent over to pick up his child and complained of pain.

Dr. Patricia E. Perry, a radiologist, testified the November 1992 C.T. Scan revealed a bulging disc and the August 1993 Scan indicated a dramatic difference.

Dr. Jeffrey Uzzle, a physician specializing in physical medicine and rehabilitation, testified the cause of defendant's problems was the work incident of November 6, 1992 and an aggravation of his symptoms during June 1993 when he

bent over to pick his child up and felt his back start hurting again.

The case is to be reviewed on appeal *de novo* accompanied by a presumption of the correctness of the findings of fact unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

The *de novo* review does not carry a presumption of correctness to a trial court's conclusions of law but is confined to factual findings. *Union Carbide v. Huddleston,* 854 S.W.2d 87 (Tenn. 1993).

On the causation of injury question raised by the employer, we find the trial court was faced with conflicting medical opinions. The court resolved this dispute by accepting the testimony of Dr. Natelson and Dr. Hauge over other testimony. In reviewing the record, we cannot say the evidence preponderates against this factual finding by the trial court.

The other questions in the case deal with the court's finding the award of benefits was controlled by the language of T.C.A. § 50-6-241(a)(1). If the employee sustains a compensable injury and is returned to work by the pre-injury employer at a wage greater or equal to the wage the employee was earning prior to the injury, the award of benefits to the employee shall be limited to 2-1/2 times the medical impairment rating under subsection (a)(1) of this statute. On the other hand, if the employee is not returned to work by the pre-injury employer at a wage greater or equal to the wage the employee was earning prior to the injury, the award of benefits to the employee shall be limited to six times the medical impairment rating under subsection (b) of the statute.

This statute does not and cannot define all of the circumstances which might arise in determining whether there has or has not been a "return to work" within the meaning of the statute. Therefore, the courts have been required to assess the peculiar facts of each case and construe the statute to determine its application.

Thus, the initial question under the facts of this case is whether the employee's return to work was meaningful or not. If the return to work under all the circumstances is considered to be "meaningful," then subsection (a)(1) caps the award. However, if it is determined the return to work under all of the circumstances

was not "meaningful," then subsection (b) caps the award.

In determining this initial question, we are of the opinion the provisions of subsection (a)(2) have no application. This subsection provides the industrial disability award may be reconsidered by the court when the employee is no longer employed by the pre-injury employer, the loss of employment occurs within 400 weeks of the day the employee returned to work, and a new cause of action is filed within one year of the employee's loss of employment. The reconsidered award is limited to the multiplier maximum of subsection (b).

If the initial question results in a finding that the return to work was meaningful, an employee may apply to the court to reconsider the award capped under subsection (a)(1) provided the employee qualifies with all of the requirements of (a)(2).

In the present case, the Chancellor applied subsection (a)(1) finding the employee voluntarily left his employment but made no finding as to whether or not the return to work was meaningful.

We find employee Hixon returned to his employment in an injured condition and that he attempted to work in this condition for a period of eight months. His leaving employment was obviously because of his physical condition due to the work-related injury and under all of the circumstances, we find his return to work was not meaningful in the sense of the statute. Thus, the award should not exceed the cap of 6 times the medical impairment rating under subsection (b). We concur with the finding of a medical impairment rating of 7% and fix the award of benefits at 42% to the body as a whole.

Having found the provisions of T.C.A. § 50-6-241(a)(2) have no application to the facts of present case, we do not find it appropriate to consider the numerous questions concerning this subsection raised in the briefs of the parties about the application of the statute. The constitutional attack must await the facts of a case where a party's rights are adversely affected by this subsection.

We find the award of 42% disability is reasonable under the evidence of the case and are of the opinion benefits should not be further increased under the

provisions of T.C.A. § 50-6-242.

Also, the employee's contention the trial court was in error in failing to permit him to reopen the case and submit new evidence after the trial and rendition of the decision is without merit.

The judgment of the trial court is modified to award the defendant-employee 42% permanent disability benefits to the body as a whole and as modified the judgment is affirmed. Costs of the appeal are taxed to plaintiff-employer and sureties.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
E. Riley Anderson, Justice

_____
Joe C. Loser, Jr., Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

LEA INDUSTRIES,	)	GRAINGER COUNTY
	)	NO. 98-087
Plaintiff/Appellee,	)	
	)	
vs.	)	Hon. Chester S. Rainwater
	)	Judge
	)	
CHARLES HIXON,	)	
	)	
Defendant/ Appellant.	)	03S01-9606-CH-00067

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Worker' Compensation 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 act 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 Plaintiff-employer, Lea Industries, for which execution may issue if necessary.

03/17/97