IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT JACKSON
(November 27, 1996 Session)

RHONDA MAY,	)	BENTON CIRCUIT
	)	
Plaintiff-Appellee,	)	Hon. C. Creed McGinley,
	)	Judge.
v.	)	
	)	No. 02S01-9606-CV-00060
GREAT CENTRAL INSURANCE COMPANY,	)	
	)	
Defendant-Appellant.	)	

For Appellant:

William F. Kendall
Robert B. Vandiver
Waldrop & Hall
Jackson, Tennessee

For Appellee:

Terry J. Leonard
Hicks & Leonard
Camden, Tennessee

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

Members of Panel:

Lyle Reid, Associate Justice, Supreme Court
Joe C. Loser, Jr., Special Judge
Cornelia A. Clark, Special Judge

AFFIRMED

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 employer's insurer contends the award of permanent partial disability benefits based on forty percent to the body as a whole is excessive. As discussed below, the panel has concluded the judgment should be affirmed.

The employee or claimant, May, is thirty years old and has a tenth grade education. She has no vocational training. She has worked in garment production and as a cashier and stocker for Save-A-Lot, the employer.

On March 30, 1994, she felt a sharp pain in her lower back while lifting a pallet of flour at work. She has seen several doctors and received conservative care. Diagnostic tests revealed a herniated disc in her lower back, superimposed on pre-existing degenerative lumbosacral joint disease. She is overweight and has carpal tunnel syndrome, also pre-existing. One of the doctors assigned her a whole person permanent medical impairment rating of ten percent, using appropriate guidelines.

The claimant returned to work on September 19, 1994 at the same wage she was receiving before the injury, but was medically restricted from lifting anything weighing more than twenty pounds, from standing more than forty-five minutes to one hour without a five to ten minute break, or from sitting more than forty-five minutes to one hour without a five to ten minute break. She was assigned to the meat department, where her work required her to exceed those limitations. She quit on October 30, 1994. She is presently working as a cashier for another food store, at a lower wage.

The trial court awarded permanent partial disability benefits based on forty percent to the body as a whole. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987).

For injuries arising 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). If the offer from the employer is not reasonable in light of the circumstances of the employee's physical disability to perform the offered employment, then the offer of employment is not meaningful and the injured employee may receive disability benefits up to six times the medical impairment. Newton v. Scott Health Care Center, 914 S.W.2d 884 (Tenn. 1995).

On the other hand, an employee will be limited to disability benefits of not more than two and one-half times the medical impairment if her refusal to return to offered work is unreasonable. Id. The resolution of what is reasonable must rest on the facts of each case and be determined thereby. Id.

The trial judge weighed and evaluated conflicting oral evidence concerning the facts and circumstances of the claimant's return to work for the employer and found there was no meaningful return. From our independent examination of that evidence, it fails to preponderate against that finding. Thus the two and one-half times multiplier does not apply to the facts of this case.

Once the causation and permanency of an injury have been established by expert testimony, the trial judge may consider many pertinent factors, including age, job skills, education, training, duration of disability and job opportunities for the disabled, in addition to anatomical impairment, for the purpose of evaluating the extent of a claimant's permanent disability. Tenn. Code Ann. section 50-6-241(a)(2). Moreover, 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 she had not had the pre-existing conditions. Rogers v. Shaw, 813 S.W.2d 397 (Tenn. 1991).

From our independent examination of the evidence, it fails to preponderate against an award based on forty percent permanent partial disability to the body as a whole. The judgment of the trial court is affirmed. Costs on appeal are taxed to the defendant-appellant.

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Joe C. Loser, Jr., Judge

CONCUR:

_____

Lyle Reid, Associate Justice

_____

Cornelia A. Clark, Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

RHONDA MAY,	)	BENTON CIRCUIT
	)	NO. 3498
Plaintiff/Appellee,	)	
	)	Hon. C. Creed McGinley,
vs.	)	Judge
	)	
GREAT CENTRAL INSURANCE COMPANY,	)	
	)	NO. 02S01-9606-CV-00060
	)	
Defendant/Appellant.	)	AFFIRMED

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 Appellant, and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 23rd day of January, 1997.

PER CURIAM

(Reid, J., not participating)