IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT JACKSON
(November 27, 1996 Session)

EVERLYN HICKS,	HARDEMAN CHANCERY
Plaintiff-Appellant,	Hon. Dewey C. Whitenton, Chancellor.
v.	
LARRY BRINTON, JR., DIRECTOR DIVISION OF WORKERS' COMPENSATION, DEPARTMENT OF LABOR,	No. 02S01-9607-CH-00067
Defendant-Appellee.	

For Appellant:

Steve Taylor
Memphis, Tennessee
Reporter

For Appellee:

Charles W. Burson
Attorney General and

Dianne Stamey Dycus
Senior Counsel
Nashville, 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. The employee, Hicks, contends the evidence preponderates against the trial court's finding that she is less than permanently and totally disabled from her work-related accident and that the trial court erred in not applying Tenn. Code Ann. section 50-6-208(a). As discussed below, this panel concludes the trial court should be affirmed in both respects

The employee or claimant is sixty-two years old and has an eighth grade education. She has worked for the employer, Harmon Automotive, since 1973. In 1983, she injured her hand at work and received an award of permanent partial disability benefits.

Her present claim grows out of a second injury suffered by her on May 6, 1993, when she injured her back while lifting a box of mirror bases. As a result of this injury, she received back surgery and was released to return to light duty work in January of 1994. She did return to work in May of the same year, when light duty work became available. In the same month, she again injured her back. She testified that she is no longer able to work. She has settled with her employer and that settlement is not involved in this appeal.

The chancellor found the claimant to be less than permanently and totally disabled and dismissed her claim against the Second Injury Fund. 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). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Presley v. Bennett, 860 S.W.2d 857 (Tenn. 1993). 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).

An employee who has previously become 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 or her employer only for the disability that would have resulted from the subsequent injury. Tenn. Code 50-6-208, Cameron v. Kite Painting Co., 860 S.W.2d 41 (Tenn. 1993). However, such employee may be entitled to recover the remainder of the benefits allowable for permanent total disability from the Second Injury Fund. Id.

If the injured employee has one or more prior awards under the Workers' Compensation Act, and the combination of all such awards equals or exceeds one hundred percent permanent partial disability to the body as a whole, then the Second Injury Fund will pay the benefits due the employee in excess of one hundred percent. Tenn. Code Ann. section 50-6-208(b). Subsection (a) has no application in such cases, and the chancellor was correct in not applying it to the facts and circumstances of this case, there having been a prior award.

When an injury, not otherwise specifically provided for in the Act, totally incapacitates a covered employee from working at an occupation which brings him or her an income, such employee is considered totally disabled. Tenn. Code Ann. section 50-6-207(4)(B).

Four doctors testified in this case about the claimant's medical impairment as a result of her injury. The operating surgeon released her to return to work after surgery and a recovery period and estimated her impairment from the injury in question at seven to eight percent to the whole body, and from her combination of injuries at fifteen to sixteen percent. Three others assigned a permanent medical impairment rating of ten percent to the whole body. The record contains conflicting expert medical testimony as to the extent of the claimant's industrial disability. From our independent examination of the record, we do not find the evidence to preponderate against the finding of the trial judge that the claimant is not permanently and totally disabled as defined by the Act.

The judgment of the trial court is consequently affirmed. Costs on appeal are taxed to the plaintiff-appellant.

_____

Joe C. Loser, Jr., Judge

CONCUR:

_____

Lyle Reid, Associate Justice

_____

Cornelia A. Clark, Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

EVERLYN HICKS,	)Hardeman Chancery
	)No. 10028
Plaintiff/Appellant,	)
	)Hon. Dewey C. Whitenton
V.	)
	)
	)S. Ct. No. 02-S-01-9607-CH-00067
LARRY BRINTON, JR., DIRECTOR	)
DIVISION OF WORKERS'	)
COMPENSATION, DEPARTMENT OF	)
LABOR,	)
	)
Defendant/Appellee.	)Affirmed.

JUDGMENT ORDER

This case is before the Court upon motion for review 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, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well-taken and should be denied; 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.

Cost will be paid by plaintiff/appellant, and surety,

for which execution may issue if necessary.

It is so ordered this _____ day of _____, 1997.

PER CURIAM

Reid, J., not participating