IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE FEBRUARY 1997 SESSION

FILED

June 3, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

WALTER L. LOWE, Plaintiff/Appellee v. JEFFERSON CITY ZINC, Defendant/Appellant and DINA TOBIN, DIRECTOR OF THE SECOND INJURY FUND, Defendant/Appellee	)	JEFFERSON CIRCUIT Hon. Ben W. Hooper II, Circuit Judge NO. 03S01-9605-CV-00060

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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
John K. Byers, Senior Judge
Roger E. Thayer, Special Judge

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.

This appeal has been perfected by the employer, Jefferson City Zinc, later identified by stipulation as Savage, Inc., from a ruling by the trial court that the employee, Walter P. Lowe, was totally and permanently disabled as a result of a work-related accident which occurred on October 22, 1992.

On appeal there are only two issues. First, the employer questions the trial court's determination of total disability and ordering benefits payable under T.C.A. § 50-6-207(4) until the employee becomes sixty-five years of age. In the second issue, the employer contends the court was in error in apportioning the award of benefits under T.C.A. § 50-6-208(a) causing the employer to be liable for 65% of the award and the state Second Injury Fund to be liable for 35% of the award.

As to the first question, the employer concedes employee Lowe is totally disabled but argues the award should not be fixed at 100% disability because the medical impairment does not exceed 12% for the last injury and that T.C.A. § 50-6-241 limits disability awards to six times the medical impairment, which would be a 72% award. In support of this reasoning, it also contends employee Lowe meets three out of the four factors set out in T.C.A.. § 50-6-242 and, therefore, the award of benefits would be payable for a period of four hundred weeks.

The trial court heard conflicting evidence from several expert medical witnesses. All of this testimony was by deposition. Dr. Robert E. Finelli, a neurosurgeon who had treated the employee for the last injury and several prior injuries, gave a 12% medical impairment for the last injury. Dr. Mark McQuain testified to a 11% impairment. Dr. William E. Kennedy, an orthopedic surgeon, gave a 20% impairment.

In addition to this evidence, the court heard testimony from Dr. Kelley Walker, a psychiatrist, who was of the opinion the employee was suffering from a depressive disorder due to his last injury. She assessed his permanent disability as a Class 3, Moderate Impairment, which means his impairment level is compatible with some but not all useful functioning. She told the court the Third and Fourth Editions of AMA

Guides to Evaluation of Permanent Impairment caution against giving numerical ratings as far as mental disorders; that Mr. Lowe would not be able to work on a regular basis; that he could not maintain concentration on any particular assigned work duties; and he could not tolerate ordinary work stress or pressure.

Dr. Norman Hankins, a vocational assessment witness, was of the opinion Mr. Lowe was 100% vocationally impaired.

In rendering a decision, the trial court found the employee was totally disabled as a result of the last injury but did not make a specific finding as to the medical impairment rating which resulted from the last injury during October 1992.

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).

In resolving disputes in medical testimony, the trial court may choose which medical testimony to accept. In doing this, the court may consider the qualifications of the experts, the circumstances of their examination, the information available to them and the evaluation of the importance of that information by other experts. *Orman v. Williams-Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991).

Where evidence is introduced by deposition, the appellate court is in as good a position as the trial court in reviewing and weighing testimony. *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989).

In reviewing the record, we are of the opinion that when the lowest medical impairment rating is combined with the testimony of Dr. Walker concerning permanent mental impairment, the employee's total impairment would be substantial enough to support a finding of total disability under the multiplier statute (T.C.A. § 50-6-241(b)) and the trial court was correct in ordering that benefits should be paid pursuant to T.C.A. § 50-6-207(4).

The second issue cites error in the apportionment of the 100% award. The employer argues that since the employee had considerable impairment prior to his last injury, the court should have held it only liable for 35% of the award rather than 65%.

Employee Lowe had sustained several work-related injuries prior to the last injury but no workers' compensation claims were made for any of the injuries. His

treating physician, Dr. Finelli, testified in 1970 he suffered from two compression fractures of the spine resulting in a medical impairment of 8% to the whole body; in 1989 he had a cervical laminectomy resulting in a medical impairment of 12%; and in 1991 he had a lumbar laminectomy with a 15% medical impairment; and that this total impairment of 35% preceded his last injury which resulted in further surgery on his neck and a fusion. Dr. McQuain was of the opinion that the prior injuries resulted in a 14% medical impairment and Dr. Kennedy allocated 30% as a pre-existing impairment.

Since the prior injuries did not result in approved workers' compensation claims, the apportionment of the award must be made under subsection (a) of T.C.A. § 50-6-208. This subsection requires the court to estimate and fix the legal disability of the employee from the last injury without consideration of the prior injuries or impairments. The Second Injury Fund then is liable for the remainder of the award. *Smith v. Liberty Mut. Ins. Co.*, 762 S.W.2d 883, 885 (Tenn. 1988).

Even though employee Lowe had several prior injuries resulting in a total medical impairment of a 14% to 35% range, there was never a judicial determination of his prior legal or vocational disability from these impairments. We also take notice that the record indicates he returned to work after each injury and testified before the trial court he would be working today except for the last injury.

The determination of legal disability resulting from the last injury is primarily for resolution by the trial court. On appeal that determination must stand unless we find the evidence preponderates against the conclusion. From our review, we cannot say the evidence preponderates against the 65%-35% allocation made by the trial court. Therefore, the judgment entered below is affirmed. Costs of the appeal are taxed to the defendant-employer and sureties.

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Roger E. Thayer, Special Judge

CONCUR:

_____
E. Riley Anderson, Justice

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John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

WALTER L. LOWE,	)	JEFFERSON CIRCUIT
	)	No. 12,857
Plaintiff/Appellee,	)	
vs.	)	Hon. Ben W. Hooper , II.,
	)	Judge
JEFFERSON CITY ZINC	)	
	)	
Defendant/Appellant,	)	No. 03S01-9605-CV-00060
	)	
DINA TOBIN, DIRECTOR, DIRECTOR OF THE SECOND INJURY FUND.	)	
	)	
Defendant/appellee	)	

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 defendant-employer, Jefferson City Zinc and
A. Benjamin Strand, Jr. surety, for which execution may issue if necessary.

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