IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION PANEL
AT NASHVILLE, MARCH 1996 SESSION

FILED

April 25, 1997

Cecil W. Crowson
Appellate Court Clerk

WILDA GAIL McCARTY, Plaintiff/Appellee v. FAST FOOD MERCHANDISERS, INC., Defendants/Appellees and SUE ANN HEAD, DIRECTOR, DIVISION OF WORKERS' COMPENSATION, TENNESSEE DEPARTMENT OF LABOR, Defendant/Appellant	)	FENTRESS CHANCERY Hon. Billy Joe White, Chancellor NO. 01S01-9510-CH-00186 (No. 91-138 Below)

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MEMORANDUM OPINION

Members of Panel:

Justice Frank F. Drowota, III
Senior Judge John K. Byers
Special Judge Roger E. Thayer

AFFIRMED AS MODIFIED AND REMANDED

BYERS, Senior 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 plaintiff sustained a work-related injury to her right arm, and the trial court found she suffered a 33% vocational disability to the right arm as a result of the injury or 16.5% to the body as a whole. *See Thompson v. Leon Russell Enterprises*, 834 S.W.2d 927 (Tenn. 1992).

The plaintiff had been injured in a non-work-related car accident in 1978, and she had injured her back in a work-related accident in January of 1991. The injury to the plaintiff's back resulted in a court-approved workers' compensation award of 36.5% permanent partial disability to the body as a whole.

The injury to the plaintiff's right arm, the January 1991 injury to the plaintiff's back and the injury received in the 1978 automobile accident combined resulted in the plaintiff being found permanently and totally disabled.

The trial court held under the provisions of T.C.A. § 50-6-208(a), the plaintiff was to be compensated by the employer for the 16.5% whole body disability as a result of the injury to her arm on July 1991 and by the Second Injury Fund for 83.5% whole body disability. Because of the plaintiff's low rate of pay, the trial court, applying T.C.A. § 50-6-207(4)(A), found the plaintiff to be entitled to receive payment for 550 weeks rather than 400 weeks, the permanent total disability benefits normally applicable. The trial judge assessed all of this extra 150 weeks to the Second Injury Fund.

Our standard of review is *de novo* on the record, accompanied by the presumption that the trial court's findings of fact are correct, unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2). Where the issue is one of law, our standard of review is *de novo* without a presumption of correctness. *Bradshaw v. Old Republic Ins. Co.*, 922 S.W.2d 503, 503 (Tenn. 1996).

The Fund contends the trial court should have applied T.C.A. § 50-6-208(b) in determining whether the plaintiff was 100% disabled rather than making the determination under T.C.A. § 50-6-208(a).[1] Further, the Fund insists that if the trial court correctly apportioned the award in this case, the additional payment of 150 weeks should have been apportioned between the employer and the Fund.

The employer appeals on the issue of whether the award of 33% vocational disability to the right arm is excessive. We have examined that issue and find the record supports the award of 33% to the right arm.

The position of the Fund as to the proper application of T.C.A. § 50-6-208 in this case was correct when they filed their brief on November 22, 1995. The decision of the Workers' Compensation Appeals Panel was delayed in this case pending the determination of the Supreme Court in the case of *Perry v. Sentry Ins. Co.*, No. 03S01-9507-CH-00077 (filed at Knoxville, December 23, 1996) (for publication). In that case, the Supreme Court held that sections (a) and (b) of T.C.A. § 50-6-208 were not mutually exclusive and that a worker who had a previous non-work-related injury, a subsequent compensable work-related injury, and a current compensable injury, which in combination rendered the employee permanently and totally disabled, was entitled to recover from the Second Injury Fund even though the sum total of the previous workers' compensation award with the current award does not amount to 100% disability.

Prior to this ruling, the plaintiff in this case would have been limited to a finding that she was only 53% disabled. This would have absolved the Fund from liability in this case. However, *Perry* has resolved that issue and the Fund is liable in this case for 83.5% of the award.

We now examine the remaining issue of whether the Fund is liable for all of the 150 weeks of payment under T.C.A. § 50-6-207(4)(A) or whether this should be apportioned in accordance with the proportionate liability of the employer and the Fund.

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[1]We need not set out this statute for the discussion in this case.

In *Reagan v. American Policyholders Ins. Co.*, 842 S.W.2d 249 (Tenn. 1992), the Court held the additional payments should be thus apportioned. The plaintiff says *Reagan* is not applicable in this case because the injury in *Reagan* was to the body as a whole and the injury in this case is to a scheduled member. We see little distinction in this argument. We, therefore, find the employer is liable for 16.5% of the additional 150 weeks and the Fund is liable for 83.5% of the 150 weeks.

We affirm the judgment of the trial court, as modified to reflect proportionate liability for the employer and the Fund for the extra 150 weeks. We remand the case to the trial court for all appropriate purposes and for the assessment of the costs of appeal, which are assessed to the employer and the Fund in proportion to their liability.

_____
John K. Byers, Senior Judge

CONCUR:

_____
Frank F. Drowota, III, Justice

_____
Special Judge Roger E. Thayer

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

WILDA GAIL McCARTY,	}	FENTRESS CHANCERY
	}	No. 91-138 Below
Plaintiff/Appellee	}	
	}	Hon. Billy Joe White,
vs.	}	Chancellor
	}	
FAST FOOD MERCHANDISERS,	}	
INC.,	}	No. 01S01-9510-CH-00186
	}	
Defendant/Appellee	}	
	}	
and	}	
	}	
SUE ANN HEAD, DIRECTOR,	}	AFFIRMED AS MODIFIED
DIVISION OF WORKERS'	}	AND REMANDED.
COMPENSATION, TENNESSEE	}	
DEPARTMENT OF LABOR,	}	
	}	
Defendant/Appellant	}	

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 the employer, Fast Food Merchandisers, at a rate of 16.5%, and the Second Injury Fund at a rate of 83.5% which is in proportion to their liability in accordance with the opinion, for which execution may issue if necessary.

IT IS SO ORDERED on December 6, 2000.

PER CURIAM