

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE  
(March 20, 1997 Session)

**FILED**  
**September 12, 1997**  
**Cecil W. Crowson**  
**Appellate Court Clerk**

BRENDA GAIL HOWELL,	)	LAWRENCE CHANCERY
	)	
Plaintiff-Appellee,	)	Hon. James L. Weatherford,
	)	Judge.
v.	)	
	)	No. 01S01-9609-CH-00176
MURRAY, INC.,	)	
	)	
Defendant-Appellant.	)	

For Appellant:

Ben Boston  
Christopher V. Sockwell  
Lawrenceburg, Tennessee

For Appellee:

Hershell D. Koger  
Pulaski, Tennessee

MEMORANDUM OPINION

Members of Panel:

Adolpho A. Birch, Jr., Chief Justice, Supreme Court  
John K. Byers, Senior Judge  
Joe C. Loser, Jr., Special Judge

AFFIRMED AS MODIFIED

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 appellant employer insists (1) the award of permanent partial disability benefits based on sixty percent to the body as a whole is excessive, (2) the trial court applied an incorrect compensation rate, and (3) the trial court erred in commuting the award to a lump sum. The lump sum issue was withdrawn during oral argument. As discussed below, the panel has concluded the award of permanent partial disability benefits and the compensation rate should be modified.

Because both issues are fact driven, 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). This tribunal is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v Government of Sumner County, 908 S.W.2d 921 (Tenn. 1995).

The claimant is forty-six years old with an eleventh grade education. She was injured at work when a box hit her in the head, injuring her neck, on October 16, 1992. Dr. Rex Arendall operated on her neck and assessed her permanent medical impairment from the injury and surgery at fifteen percent to the whole body. He prescribed a permanent lifting restriction of fifteen pounds and instructed her to avoid repetitive pushing, pulling or lifting over that weight. Her injury was superimposed upon pre-existing carpal tunnel syndrome and some other conditions.

A second opinion was obtained of eleven percent permanent medical impairment. A vocational expert assessed her occupational disability at twenty-five percent from the neck injury alone and sixty percent considering both injuries. The claimant returned to work at a wage equal to or greater than her pre-injury wage but later resigned or was laid off because of pain in her hands. She has seen a number of other doctors, but we do not find in the record any medical impairment ratings except those of Dr. Arendall and Dr. Bacon, which we have already noted.

(1)

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). In making determinations, the courts are to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities for the disabled, and capacity to work at types of employment available in the claimant's disabled condition. *Id.*

If the injured employee thereafter loses his pre-injury employment, the court may, upon proper application made within one year of such loss of employment, and if such loss of employment is within four hundred weeks of the day the employee returned to work, enlarge the award to a maximum of six times the medical impairment rating, allowing the employer credit for permanent partial disability benefits already paid for the injury. Tenn. Code Ann. section 50-6-241(a)(2). The preponderance of the evidence in this case is that the claimant's later loss of employment was unrelated to her neck injury. In such cases, the award may not be enlarged.

From a deliberate consideration of the record, the briefs and the law governing the issue presented, we are of the opinion that the evidence preponderates against an award based on sixty percent permanent partial disability to the body as a whole and in favor of one based on thirty-seven and one-half percent to the body as a whole. The judgment is modified accordingly.

(2)

The weekly compensation rate for an injured employee's permanent partial disability is an amount equal to sixty-six and two-thirds percent of the employee's average weekly wage. Tenn. Code Ann. section 50-6-207(3)(a)(II). An employee's average weekly wage is an amount equal to the employee's earnings in the employment in which he was working at the time of the injury, during the fifty-two weeks immediately preceding the injury, divided by fifty-two. Tenn. Code Ann. section 50-6-102(a)(1)(A). Days lost because of sickness or other fortuitous circumstances should be deducted. Russell v. Genesco, 651 S.W.2d 206 (Tenn. 1983).

The claimant earned \$8,994.51 during the fifty-two weeks immediately preceding her injury but lost six weeks because of fortuitous circumstances. The trial judge fixed her weekly compensation rate at \$193.44.

As best we can determine from the record, the claimant lost six of the preceding fifty-two weeks because of fortuitous circumstances. We have therefore divided \$8,994.51 by 46 and arrived at an average weekly wage of \$195.53. Her weekly compensation rate is sixty-six and two-thirds times \$195.53 or \$130.35. The judgment is modified accordingly.

As modified, the judgment of the trial court is affirmed. Costs on appeal are taxed to the parties, one-half each.

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Joe C. Loser, Jr., Judge

CONCUR:

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Adolpho A. Birch, Jr., Chief Justice

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John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

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BRENDA GAIL HOWELL,	)	LAWRENCE CHANCERY
	)	NO. 6819-94
PLAINTIFF/APPELLEE,	)	
	)	JAMES L. WEATHERFORD,
v.	)	JUDGE
	)	
MURRAY, INC.,	)	S. CT. #01S01-9609-CH-00176
	)	
DEFENDANT/APPELLANT.	)	AFFIRMED AS MODIFIED

JUDGEMENT 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.

Costs will be paid by the parties, one-half each, for which execution may issue if necessary.

It is so ordered this 12th day of September, 1997.

PER CURIAM

Birch, J. - Not Participating