IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT JACKSON
(May 23, 1997 Session)

PAUL WAYNE KING,

Plaintiff-Appellee,

vs. **Docket Number 02S01-9611-CH-00100**

GOODYEAR TIRE & RUBBER COMPANY

Defendant-Appellant.

For Appellant:

Randy N. Chism
Union City, Tennessee

For Appellee:

Jeffrey A. Garrety
Garrety & Sanders
Jackson, Tennessee

MEMORANDUM OPINION

Mailed June , 1997

Members of Panel:

Janice M. Holder, Associate Justice, Supreme Court
Robert A. Lanier, Circuit Judge
Don R. Ash, Circuit Judge

AFFIRMED AS MODIFIED Lanier, Judge

MEMORANDUM OPINION

This workers' compensation appeal has been referred to this Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with T.C.A. § 50-6-225 (e) (3) for hearing and reporting of findings of fact and conclusions of law.

The first issue presented on this appeal is whether or not the requirements of T.C.A. § 50-6-241, limiting an award of permanent partial disability to 2 ½ times the medical impairment rating, should have been applied to the award in this case.

It is not disputed that the claimant sustained an accidental injury arising out of and in the course of his employment with the defendant employer when, on July 11, 1994, while working as a tirebuilder, he sustained an injury to his left shoulder. He subsequently saw Dr. James R. Wilkinson, an orthopedic surgeon. On October 6, 1994, Dr. Wilkinson performed a surgical procedure on his shoulder which involved dissecting the deltoid muscle, removing the coracoacromial ligament and changing the anatomic construct of the shoulder. Dr. Wilkinson gave his opinion that the claimant had sustained a permanent anatomical impairment of 6% to the left upper extremity due to joint crepitation, which amounted to 4% of the body as a whole. He agreed that, based upon his range of motion, his impairment should be an extra 2%. Dr. Wilkinson testified that he would expect claimant to have some weakness in his shoulder and would benefit from possibly avoiding overhead and heavy lifting and pushing and pulling away from his body. He felt that claimant could have some problems with his shoulder performing his previous job. Dr. Wilkinson's rating converts to 4% physical impairment to the body as a whole.

On January 6, 1995, claimant was released by Dr. Wilkinson to return to work, and he did return to work with the defendant employer at his previous job, earning the same wages. On May 10, 1995, claimant saw Dr. Robert Barnett one time at the suggestion of his attorney. Claimant gave a history to Dr. Barnett of popping and creaking in his shoulder, which had improved, but said that he still felt the sensation of it when he moved his shoulder.

He also complained of "some problems" working above the waist level, apparently involving some weakness in his arm or shoulder. Dr. Barnett felt that the condition had improved but was certainly not completely well at that time. He said that the claimant's main limitation would be in overhead work. He considered the crepitation "mild." He also had limited motion and weakness. He said that he would expect the claimant to "have problems" if his job involved lifting eighty pounds with the help of a hydraulic or vacuum device and if he had to lift that above a shoulder waist, almost to shoulder level. The doctor also would expect him "to have problems" with moving his arm sideways and lifting away from his body. He felt that it was possible that the claimant would continue to regain strength in his shoulder seven months after surgery. He felt that claimant should be limited in overhead work, but no other restrictions were recommended. He expected the patient to regain more strength in his shoulder. His opinion was that the claimant had sustained a 10% permanent partial disability to the arm. The parties apparently agreed that Dr. Barnett's rating would equate to 6% permanent partial impairment to the body as a whole according to the A.M.A. Tables. (Brief of Appellant, page 4; Brief of Appellee, page 7).

As mentioned above, claimant did return to work with the defendant at the same rate of pay that he was making prior to his injury and remained at that work for almost seven months without loss of time from work or returning to his treating physician. His job was basically that of building tires. It is the claimant's position that, when he returned to work, he had significant problems with pain and discomfort in doing the work and was not able to do the job as well as he did previously. He complained of pain and felt that he was putting himself at risk of injury by continuing in the same position. After this approximately seven month period, claimant decided to bid on a lower paying, less strenuous job from the claimant's point of view, giving as a reason that it would be easier on his shoulder.

The employer insists that the trial court's award of 18% permanent partial disability to the body as a whole is not permitted under these circumstances, as it exceeds the maximum permissible award under T.C.A. § 50-6-241, which is 2 ½ times the anatomical disability

rating. As the highest rating in this case is 6% to the body, it is the employer's position that the plaintiff would be entitled to no more than 15% permanent partial disability to the body as a whole.

While the amount of disability in dispute on this question is not substantial, the question raised by the employer is an important one for this panel, involving as it does a question of whether or not the law was correctly applied to the facts. Conclusions of law are subject to *de novo* review on appeal without any presumption of correctness. Presley vs. Bennett, 860 S.W.2d, 857 (Tenn. 1993).

_____ The courts must give effect to laws passed by the elected representatives of the people. The intentions of the General Assembly in enacting the law must be determined and carried out by the Court. The pertinent portion of the statute reads as follows:

> ... Where an injured employee is eligible to receive any permanent partial disability benefits . . . 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 that the employee may receive is 2 ½ (two and one-half) times the medical impairment rating determined pursuant to the provisions of the American Medical Association guides . . . in making determinations, the Court shall consider all pertinent factors, including lay and expert testimony . . .

It appears clearly to be the intention of the foregoing statute to adopt, as a matter of public policy, an arbitrary maximum in workers' compensation benefits with all of the hardships and benefits which such legislation necessarily carries with it. As in the case of statutes of limitations, the General Assembly has taken upon itself to decide what is best for the people of the State as a whole, even though circumstances may cause hardships to individuals on occasion. On the other hand, the statute is not to be used as a mere device by either the employer or employee to reach a result not intended by the law. Existing interpretations of this statute already make it clear that an employer may not unfairly restrict an employee's award of disability benefits by pretending to offer a return to the previous employment which the employee is obviously unable to carry out. On the other hand, the authorities are equally clear that the employee may not avoid the limitation on his disability award by taking upon himself the decision to not return to the previous employment for

personal or insubstantial reasons. The test of both is "reasonableness". The statute must contemplate that a person left with some permanent disability will have some degree of discomfort or inconvenience in performing his prior employment. It would be highly unusual if he did not. However, it seems to this panel that, where the employee is able to perform his previous occupation, although with some discomfort or inconvenience, and he earns the same or greater salary, he must submit to the maximum limitation placed upon the disability award by the act of the legislature.

In this case, nowhere does Dr. Barnett testify that the plaintiff cannot or should not be able to perform the job which he was performing before and after the accident and surgery in question. He merely states his opinion that there are certain things that will cause him"problems" or which should be avoided if possible. Dr. Wilkinson, the treating physician, is even less restrictive in his advice.

Therefore, it is the opinion of this panel that the plaintiff's award must be limited to 2 ½ times the highest permanent impairment rating to the body as a whole, thus entitling him to no more than 15% permanent partial disability to the body as a whole. Newton vs. Scott Health Care Center, 914 S.W.2d, 885 (Tenn. 1995).

The next issue for decision is whether or not temporary partial benefits are determined by comparing the employee's previous average weekly wage and current wage or whether they must be determined by comparing the previous basic salary wage, without consideration of other compensation, and the current wage.

The statute in question, T.C.A. § 50-6-207, provides, among other things, as follows:

> (1) TEMPORARY TOTAL DISABILITY
>
> For injury producing temporary total disability, (66 and 2/3 %) of the *average weekly wages* as defined in this chapter, subject to the maximum weekly benefit and minimum weekly benefit; provided, that if the employee's *weekly wages* are equal to or greater than the minimum weekly benefit, such employee shall receive not less than the minimum weekly benefit; and provided further, that if such employee's *average weekly wages* are less than the minimum weekly benefit such employee shall receive the full amount of such employee's *average weekly wages,* but in no event shall the compensation paid be less than the minimum weekly benefit. Where a fractional week of

> temporary total disability is involved, the compensation for each day shall be 1/7th of the amount due for a full week;
>
> (2) TEMPORARY PARTIAL DISABILITY
>
> In all cases of temporary partial disability, the compensation shall be (66 and 2/3%) of the difference between *the wage of the worker at the time of the injury* and the wage such worker is able to earn in such worker's partially disabled condition . . . payment to be made at the intervals when the wage was payable, as nearly as may be, and subject to the same maximum, as stated in subdivision (1). In no event shall the compensation be less than the minimum weekly benefit; . . .

T.C.A. § 50-6-102 provides as follows:

> (1) (A) "Average Weekly Wages" means the earnings of the injured employee in the employment in which the injured employee was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury divided by 52; but if the injured employee lost more than seven days during such period when the injured employee did not work, although not in the same week, then the earnings for the remainder of such fifty-two weeks shall be divided by the number of weeks remaining after the time so lost has been deducted; ... (D) wherever allowances of any character made to any employee in lieu of wages are specified as part of the wage contract, they shall be deemed a part of such employee's earnings;
>
> . . . (4) PERMANENT TOTAL DISABILITY
>
> (A) for permanent total disability . . . (66 and 2/3 %) of the *wages received at the time of the injury*, subject to the maximum weekly benefit and minimum weekly benefit; provided that if the employee's *average weekly wages* are equal to or greater than the minimum weekly benefit, such employee shall receive not less than the minimum weekly benefit; provided further, that if such employee's *average weekly wages* are less than the minimum weekly benefit, such employee shall receive the full amount of such employee's *average weekly wages*, but in no event shall the compensation paid be less than the minimum weekly benefit . . . [Emphasis added]

The employer complains that the trial judge awarded an amount of temporary partial disability benefits based upon the <u>average weekly wages</u> of the employee rather than his <u>base salary</u> at the time of the accident. The employer points to the fact that the term "average weekly wage" is used in some parts of the statute quoted above, while the statute on temporary partial disability benefits refers only to "the wage" of the worker.

The employer would thus urge upon this court a restrictive interpretation of the word "wage," confining it to the basic salary of a worker, regardless of what other sums he was able to earn in addition. Thus, for example, overtime, bonuses, incentive pay and other such compensation would not be considered part of the "wage" of the worker under the employer's interpretation.

In putting forth its position, the employer relies not only upon the aforesaid language of the statute, but also the case of McCracken vs. Rhyne, 264 S.W.2d 226 (Tenn. 1953). Stated succinctly, that case holds that, under the language of the statute then in effect, a worker entitled to benefits for permanent partial disability for a non-scheduled injury is entitled to comparison with his actual earnings at the time of the injury, rather than his average weekly wage. As stated, that case did not deal with the statute before us, but with one with similar language. The court noted that it had often been assumed by its predecessors that the term, "wage" meant average weekly wages. It went on to hold, however, that the term used in the statute in question must not have been synonymous with "average weekly wages" because the portions of the workers' compensations statute in which the term, "average weekly wage" appears were those (as in the case of injuries to a scheduled member) in which the injuries had no necessary connection with the worker's earning capacity. This obscure rationale would not seem to answer the question of why benefits should be calculated on one aspect of income rather than another. As in that case the ruling of the court and the selection of the meaning was for the benefit of the worker, one can only speculate that the court was following its time-honored inclination to favor the injured worker. We are respectfully of the opinion that the decision should be confined to the specific facts and statute with which it dealt, and should not be considered binding authority in this or any other case.

We are left, then, with the question of how to interpret the apparent inconsistency between the provisions of the temporary partial portion of the Act and the other portions of the Act. Once again, we must attempt to give meaning to the intention of the legislature

when it enacted this law. The law is for the benefit of the worker. All of the portions of the statute should be harmonized and read in conjunction with each other, if possible. The Tennessee Workers' Compensation Act provides a comprehensive scheme of compensation for injured workers. It is to be liberally construed to the end that workers' receive the benefits intended by the statute. It is noteworthy that the term, "average weekly wages" appears at numerous places throughout the Act, even appearing within the same paragraph in subdivision (4) of 50-6-207 and 50-6-102 as an apparent modifier of the terms "weekly wages" and "wages received at the time of the injury." Also, as quoted in the Act above, the definition of "average weekly wages" expressly includes "allowances of any character made to any employee in lieu of wages . . ." [T.C.A. § 50-6-102 (a) (1) (D)]. It has been said that the earnings of an employee include anything received by him under the terms of his employment contract from which he realizes economic gain. P. & L. Construction Company vs. Lankford, 559 S.W.2d 793 (Tenn. 1977).

Although the employer hypothecates a number of circumstances under which it fears that an employee will receive a benefit not contemplated by the Act, nothing in the Act suggests that it intends for the wages of the worker to be artificially restricted to some employer-defined sum such as the "job wage level" which the employer in this case apparently paid as a base salary. To hold otherwise could result in an employee whose income is heavily dependent upon bonuses or commissions or other such irregular compensation receiving less than the statute intends. The basic purpose of this statute is to give the worker, in those situations in which he is able to return to work but not able to earn as much as he was previously able to earn in a non-injured condition, a small sum to apply towards the difference.

Therefore, we do not consider this challenge to the trial court's ruling on the temporary partial disability benefits to be valid.

The final issue for determination is whether or not the evidence preponderates

against the award to the plaintiff of permanent partial disability in the amount awarded by the trial court.

We have heretofore discussed in some detail the medical and employment history of the claimant. Without repeating what has already been said, we note that the plaintiff did undergo significant surgery and some medical restrictions by not only the physician who saw him at the suggestion of his attorney but his treating surgeon. Adding that to the deference which we owe to the trial judge who observed the plaintiff, and based upon the entire record, we are of the opinion that this issue must be determined in favor of the worker, and his award set at the maximum allowable, 15% to the body as a whole.

Therefore, the judgment of the trial court is affirmed, as modified by this order. The costs of this appeal are taxed to the defendants-appellants.

_____
ROBERT A. LANIER, JUDGE

CONCUR:

_____
Janice M. Holder, Associate Justice, Supreme Court

_____
Don R. Ash, Circuit Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

FILED

August 18, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

PAUL WAYNE KING,	)	OBION CHANCERY
	)	NO. 18,288
Plaintiff/Appellee,	)	
	)	Hon. W. Michael Maloan,
vs.	)	Chancellor
	)	
GOODYEAR TIRE & RUBBER COMPANY,	)	NO. 02S01-9611-CH-00100
	)	
Defendant/Appellant.	)	AFFIRMED AS MODIFIED.

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 18th day of August, 1997.

PER CURIAM

(Holder, J., not participating)