IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(May 23, 1997 Session)

FILED
January 22, 1998
Cecil Crowson, Jr.
Appellate Court Clerk

JAMES DOLLAR,	)	
	)	
Plaintiff/Appellee,	)	
	)	
VS.	)	NO. 02S01-9608-CH-00071
	)	
FLORIDA STEEL CORPORATION,	)	MADISON COUNTY CHANCERY
	)	CHANCELLOR JOE C. MORRIS
Defendant/Appellant.	)	

FOR APPELLANT:
Jerry O. Potter
W. Timothy Hayes, Jr.
Memphis, Tennessee

FOR APPELLEE:
Ricky L. Boren
Jackson, Tennessee

MEMORANDUM OPINION
Mailed _____, 1997

Members of Panel:

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

MODIFIED

Ash, Judge

MEMORANDUM OPINION

This worker's 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) (1996 Supp.) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the employer, Florida Steel Corporation, contends: (1) that the trial court improperly awarded the plaintiff additional temporary total disability benefits from December 27, 1994 until October 27, 1995, and (2) that the trial court acted improperly in awarding the plaintiff permanent total benefits in the amount of 100% to the body as a whole.

STANDARD OF REVIEW

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. § 50-6-225(e)(2) (1996 Supp.). This tribunal must 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).

FACTS

The claimant, Mr. James Dollar, was sixty-four years old at the time of trial and has a high school education. Mr. Dollar's work history consists mainly of mechanical work, although he has obtained a single-engine commercial pilot's license. Mr. Dollar injured his right shoulder on June 23, 1993 while working for Florida Steel Corporation. Dr. Pechacek, of the Jackson Clinic, treated Mr. Dollar and diagnosed him as having a partial rotator cuff tear. Next, he was referred to Dr. Randy Fly who treated him conservatively. In June of 1994, Mr. Dollar was picking up a menu in a restaurant when his shoulder popped. He went back to see Dr. Fly who diagnosed Mr. Dollar as having a massive rotator cuff tear. Mr. Dollar then came under the care of Dr. Mark Harriman who diagnosed a rotator cuff tear and biceps tendon rupture. On August 24, 1994, Dr. Harriman performed surgery to repair the rotator cuff and biceps injuries. On December 23, 1994, Dr. Harriman believed that Mr. Dollar had reached maximum medical improvement. Further, Dr. Harriman opined that Mr. Dollar had a 9% impairment rating to the body as a whole and assigned two limitations: 1) no overhead working, and 2) no lifting more

than 10 pounds with his right arm. On October 27, 1995, Dr. Harriman reexamined Mr. Dollar and felt that his condition had decreased. Dr. Harriman changed Mr. Dollar's original impairment rating from 9% to the body as a whole to 24% to his upper extremity, which equated to 14% to the body as a whole. Further, he felt that October 27, 1995, was the date Mr. Dollar reached maximum medical improvement. After being released by Dr. Harriman, Florida Steel Corporation offered Mr. Dollar three (3) different types of jobs, two of which were temporary in nature.

Dr. Harriman, the treating physician, stated that the only job that was appropriate for Mr. Dollar was working on a temporary basis in the storeroom. Further, Dr. Harriman believed that Mr. Dollar's restrictions would exclude most, if not all, manual labor type employment. Moreover, he felt Mr. Dollar had a very significant injury that would greatly impact his ability to compete in the open labor market.

Dr. Barnett concluded that Mr. Dollar is 18% impaired to the body as a whole. He recommended several restrictions: 1) no use of the arm over waist level; 2) no overhead work; 3) no pushing/pulling or stretching; 4) no use of his right arm; 5) no lifting above 30 pounds below the waist; and 6) no lifting 10-20 pounds on a repetitive basis. Like Dr. Harriman, Dr. Barnett opined that Mr. Dollar would not be able to return to manual labor type employment.

The trial judge found Mr. Dollar to be 100% disabled pursuant to Tenn. Code Ann.§ 50-6-207 (1996 Supp.). Further, the trial judge awarded temporary total disability benefits from December 27, 1994, until October 27, 1995.

AWARD OF TEMPORARY TOTAL DISABILITY BENEFITS

Appellant contends the trial court acted improperly in awarding the plaintiff additional temporary total disability benefits from December 27, 1994, until October 27, 1995. Where the injury suffered by the employee results in a permanent disability, the period of temporary total disability is "cut off" when the employee has reached his maximum recovery. Simpson v. Satterfied, 564 S.W.2d 953, 955 (Tenn. 1978).

On December 23,1994, Dr. Harriman felt that Mr. Dollar was probably not going to show significant change over time and thus had reached maximum medical improvement. Further, Dr.

Harriman testified, in his deposition, that on November 24, 1994, he had placed some limitations on Mr. Dollar in order to return him to light work duty. It was at this time that Dr. Harriman imposed a ten-pound lifting restriction and advised Mr. Dollar not to work overhead or carry more than fifteen pounds.

Dr. Harriman defined maximum medical improvement as the point in time where one believes there is going to be no further improvement in the plaintiff's condition. He testified that, as of December 23, 1994, Mr. Dollar had reached maximum medical improvement. Therefore, the doctor asserted that Mr. Dollar would not need further medical treatment or therapy.

On October 27, 1995, Dr. Harriman reevaluated Mr. Dollar. At this visit, Dr. Harriman found that Mr. Dollar's condition had deteriorated since December 23, 1994. Dr. Harriman made some recommendations about work and increased Mr. Dollar's impairment rating to 14% to the body as a whole. However, Dr. Harriman did not change his opinion regarding the date Mr. Dollar reached maximum medical improvement.

The trial court erred in its awarding of temporary total disability benefits, because Mr. Dollar reached maximum medical improvement on December 23, 1994. To begin with, it is clear from reviewing the record that Dr. Harriman concluded that Mr. Dollar had reached maximum medical improvement on December 23, 1994. Dr. Harriman did not change this conclusion even after Mr. Dollar's condition worsened to such an extent that Dr. Harriman increased Mr. Dollar's impairment rating to the body as a whole. The law in Tennessee is well settled that temporary total disability benefits are terminated when the employee reaches his maximum medical improvement. Simpson v. Satterfied, 564 S.W.2d 953, 955. Therefore, Mr. Dollar is not entitled to temporary total disability benefits

AMOUNT OF DISABILITY

Appellant contends that the trial court acted improperly in awarding the Plaintiff permanent total benefits in the amount of 100% to the body as a whole. To qualify for total disability, an employee must have suffered an injury which "totally incapacitates the employee from working at an occupation which brings such employeee an income." Tenn. Code Ann. §

50-6-207(4)(B). The incapacitation referred to in this statute does not refer to the ability to return to one's pre-injury position, or even to a similar position. Prost v. City of Clarksville, Police Dept., 688 S.W.2d 425 (Tenn. 1985). Rather, an employee must be totally incapacitated from any regular, gainful employement before he meets the requirement for total disability set out in this statute. *Id.*

We find that the evidence preponderates against the trial court's award of total disability. Mr. Dollar has an injury to his rotator cuff which prevents him from raising his right arm above 90 degrees, or in lay terms, above his head. He has no injury or restrictions to his left arm or to his legs. Given this, we cannot find that Mr. Dollar is totally incapacitated from performing any regular gainful work in any occupation.

The next issue becomes whether to apply the multiplier cap of 2 ½ outlined in T.C.A. § 50-6-241(a)(1). This cap must be applied if the employee made, or was afforded the opportunity to make, any meaningful return to work. Since the employer offered Mr. Dollar the opportunity to return to work, the issue then becomes whether Mr. Dollar's refusal to accept any of these positions was reasonable. In making this assessment, we must compare the reasonableness of the employer in attempting to return the employee to work with the reasonableness of the employee in refusing to return. Newton v. Scott Health Care Center, 914 S.W.2d 844 (Tenn. 1995). If an employee's failure to return was unreasonable, his disability will be limited to the amount of his medical impairment rating multiplied by 2 1/2. Although Florida Steel offered Mr. dollar three positions to which he could return, this offer was made only after the company had classified Mr. Dollar as totally disabled and began processing him for retirement. Aetna Insurance Company accepted the application made by the defendant, which identified Mr. Dollar as disabled, and began making disability payments to Mr. Dollar. The company then attempted a settlement with him. This settlement was rejected by the chancellor, and it was after this rejection that the company made attempts to have Mr. Dollar return to work.

Two of the three positions offered Mr. Dollar were temporary. One of the positions involved operating a crane, which Dr. Harrison testified should only be done for an hour or so at a time. In fact, Dr. Harrison testified that of the three positions offered Mr. Dollar, the only one

appropriate for his functional level was working in the storeroom, which was a temporary position. In light of these facts, we find that Mr. Dollar's refusal to return to work was reasonable. Thus, the multiplier cap of 2 1/2 does not apply in this case.

For the foregoing reasons, the trial court's ruling is modified to award the plaintiff 56% disability, which is four times the impairment rating given by Dr. Harriman. The action of the trial court is further modified to disallow an additional award of temporary total benefits after December 27, 1994. Costs on appeal are taxed equally between the parties.

_____
Don R. Ash, Special Judge

CONCUR:

_____
Janice M. Holder, Associate Justice

_____
Robert Lanier, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

JAMES DOLLAR,	)	MADISON CHANCERY
	)	NO. 50672
Plaintiff/Appellee,	)	
	)	Hon. Joe C. Morris,
vs.	)	Chancellor
	)	
FLORIDA STEEL CORPORATION,	)	NO. 02S01-9608-CH-00071
	)	
Defendant/Appellant.	)	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 equally by both parites, for which execution may issue if necessary.

IT IS SO ORDERED this 22nd day of January, 1998.

PER CURIAM

(Holder, J., not participating)