IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(June 29, 1998 Session)

DOROTHY MARABLE, Plaintiff-Appellee, v. KEY INDUSTRIES, INC. and TRAVELERS INSURANCE COMPANY, Defendants-Appellants.	)	HOUSTON CHANCERY Hon. Robert E. Burch, Chancellor. No. 01S01-9709-CH-00209

For Appellants:

Sean Antone Hunt
Spicer, Flynn & Rudstrom
Nashville, Tennessee

For Appellee:

Stacy A. Turner
Clarksville, Tennessee

M E M O R A N D U M O P I N I O N

Members of Panel:

Frank F. Drowota, III, Associate Justice, Supreme Court
William H. Inman, Senior Judge
Joe C. Loser, Jr., Special Judge

MODIFIED AND AFFIRMED

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 employer, Key, and its insurer, Travelers, insist the chancellor erred in (1) awarding benefits as a percentage to the body as a whole, (2) making an award in excess of six times the highest medical impairment rating and (3) awarding benefits based on one hundred percent to the body as a whole. As discussed below, the panel has concluded the award should be modified down to one based on forty-eight percent to the body as a whole.

Our 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. section 50-6-225(e)(2). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Spencer v. Towson Moving and Storage, Inc., 922 S.W.2d 508 (Tenn. 1996).

The employee or claimant, Marable, was 62 years old at the time of the trial. She has less than a high school education. She worked in Key's shirt factory for 23 years, sewing stays in collars of dress shirts. She has suffered three separate work related injuries, all three of which are the subject of this litigation.

(1)

The employer and its insurer contend first that because the claimant has three separate injuries to three separate scheduled members, or to two separate scheduled members if the arms are considered together, the claimant's injury should somehow be considered a scheduled injury and recovery limited to a percentage of weeks provided in the statutory schedule. From a consideration of the authorities cited and others, we respectfully disagree.

Where a worker's only injury is to a scheduled member, he may receive only the amount of compensation provided by the schedule for his permanent disability. Genesco, Inc. v. Creamer, 584 S.W.2d 191 (Tenn. 1979). This claimant has three separate injuries to three separate members, all of them scheduled separately. If an employee suffers permanent partial disability to two members listed together as a scheduled injury, it is proper to compute the period of disability according to the schedule. Queen v. New York Underwriters Ins. Co., 222 Tenn. 235, 435 S.W.2d 122 (1968). While both arms are listed together as a scheduled injury, we find no listing in the schedule for both arms and a foot. See Tenn Code Ann. section 50-6-207(3)(A)(II).

In all other cases of permanent partial disability, benefits are payable according to the percentage of disability to the body as a whole, which is valued at four hundred weeks; Tenn. Code Ann. section 50-6-207(3)(F); Kerr v. Magic Chef, 793 S.W.2d 927 (Tenn. 1990); and an injury to three or more members of the body, whether or not any of the members is included in the schedule, is not a scheduled injury and, in such case, benefits are allowable to the body as

a whole. Tennlite, Inc. v. Lassiter, 561 S.W.2d 157 (Tenn. 1978). Where an injury is to more than one member, one of which is scheduled and the other of which is not scheduled, benefits are also allowable on the basis of the percentage of disability to the body as a whole. Continental Ins. Co. v. Pruitt, 541 S.W.2d 594, 596 (Tenn. 1976). The extent of an injured worker's disability is an issue of fact. Jaske v. Murray Ohio Mfg. Co., 750 S.W.2d 150 (Tenn. 1988).

From a consideration of those authorities, the panel concludes the chancellor did not err in awarding benefits based on a percentage of the body as a whole.

(2)

By the remaining issues, the employer and its insurer contend the award of benefits based on one hundred percent permanent partial disability to the body as a whole is excessive under the circumstances. While the issues involve questions of fact, it is necessary to consider legislative considerations and their effect upon the facts of this case.

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 that the employee may receive is two and one-half times the medical impairment rating pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment, the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment, or, in cases where an impairment rating by any appropriate method is used and accepted by the medical community. 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 worker thereafter loses his or her pre-injury employment, the court may, upon proper application made within one year of the employee's 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 such 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).

If the offer from the employer is not reasonable in light of the circumstances of the employee's physical disability to perform the offered employment, then the offer of employment is not meaningful and the injured employee may receive disability benefits up to six times the medical impairment. Newton v. Scott Health Care Center; 914 S.W.2d 884(Tenn. 1995). On the other hand, an employee will be limited to disability benefits of

not more than two and one-half times the medical impairment if his refusal to return to offered work is unreasonable. Id. The resolution of what is reasonable must rest on the facts of each case and be determined thereby. Id.

For injuries occurring on or after August 1, 1992, where an injured worker is entitled to receive permanent partial disability benefits to the body as a whole, and the pre-injury employer does not return 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 six times the medical impairment rating determined pursuant to the above guidelines. Tenn. Code Ann. section 50-6-241(b).

Where the injury is superimposed upon a pre-existing condition or injury, the multipliers are applied to medical impairment resulting from the most recent injury. Tenn. Code Ann. section 50-6 207(3)(F); Parks v. Tennessee Municipal League Risk Management Pool, _____ S.W.2d _____ (Tenn. 1998). If a court awards a multiplier of five or greater, then the court must make specific findings of fact detailing the reasons for its award, considering all relevant factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities and capacity to work at types of employment available in claimant's disabled condition. Tenn. Code Ann. section 50-6-241(c).

Notwithstanding the above limitations, a court may award permanent partial disability benefits, not to exceed four hundred weeks, in appropriate cases where permanent medical impairment is found and the employee is entitled to receive the maximum award of two and one-half or six times the medical impairment. In such cases, Tenn. Code Ann. section 50-6-242 requires the trial court to make a specific documented finding, supported by clear and convincing evidence, that on the date the employee reached maximum medical improvement, at least three of the following four circumstances existed:

> (1) The employee lacked a high school diploma or general equivalency diploma or could not read or write on a grade eight level;
>
> (2) The employee was age fifty-five or older;
>
> (3) The employee had no reasonably transferable job skills from prior vocational background and training; and
>
> (4) The employee had no reasonable employment opportunities

The opinion of a vocational expert is generally necessary to establish that the employee had "no reasonably transferable job skills from prior vocational background and training" or "the employee had no reasonable employment opportunities available locally considering the employee's permanent medical

condition," or both. Ingram v. State Industries, Inc., 943 S.W.2d 381 (Tenn. 1995). "Clear and convincing evidence" means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. Middleton v. Allegheny Elec. Co., Inc., 897 S.W.2d 695 (Tenn. 1995).

Ms. Marable was born November 25, 1934. As already noted, she has less than a high school education. She worked for Key Industries, Inc. for twenty-three years.

In June of 1992, she injured her left foot when a metal chair fell across her foot. The accident fractured her little toe and left her with tendinitis in her foot. She was treated by three different physicians. The doctors taped her toes together and prescribed rest and leg elevation. She continued to work and was not left with any permanent impairment.

On June 10, 1994, she fell at work and injured her left hand, which injury resulted in a trigger thumb, or Quervain's syndrome, for which she was surgically treated. Thereafter, she gradually developed bilateral carpal tunnel syndrome with lateral epicondylitis on the right and ulnar neuropathy on the left, and was treated conservatively by Dr. McLaughlin, who made an impairment rating of ten percent to the left upper extremity and five percent to the right upper extremity and, on December 27, 1994, declared her to have reached maximum medical improvement and released her to return to work, but to avoid repetitive gripping with the hands or repetitive motion of the left elbow.

She returned to work for a few days but was unable to perform the duties assigned to her because of disabling pain. She has not worked since.

Dr. Richard Fishbein examined the claimant. He estimated her permanent impairment to be eight percent to the whole person. The doctor restricted her from any type of hand intensive work with the left hand, from pushing, pulling or manipulating heavy objects with either hand and from running, jumping, climbing or prolonged walking or standing.

We find in the record no expert testimony as to whether the claimant has reasonably transferable job skills from prior vocational background and training or whether she has any reasonable employment opportunities. The circumstances of this case are such that it should not be exempt from the general requirement for expert testimony, particularly in light of her relatively mild medical impairment.

The claimant testified she cannot keep her grandchildren as she did before the injuries. Her husband testified that she cannot dress herself, cook, clean, sweep, sew or make crafts as she did before the injuries. A neighbor of the claimant corroborated the husband's testimony.

The chancellor found, apparently from a mere preponderance of the evidence, that the employee was over fifty-five years of age, possessed no transferable job skills and lacked a high school education or a G.E.D., and did not read on an eighth grade level. Thus, the trial court's award exceeds the statutory multipliers, though not based on clear and convincing evidence, as required. In the absence of such finding and in the absence of expert testimony

as to the lack of reasonably transferable job skills, the panel concludes the trial court erred in exceeding the multipliers.

Nevertheless, we are persuaded that the employee, because of her age, lack of education and training and further because of her pre-existing conditions, is severely disabled and entitled to an award based on six times the medical impairment resulting from the most recent injury, as the statutes permit. The judgment is accordingly modified to provide for an award based on forty-eight percent to the body as a whole.

As modified, the judgment of the trial court is affirmed. Costs on appeal are taxed to the defendants-appellants.

_____

Joe C. Loser, Jr., Special Judge

CONCUR:

_____

Frank F. Drowota, III, Associate Justice

_____

William H. Inman, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

DOROTHY MARABLE,	*}*	*HOUSTON CHANCERY*
	}	*No. Below 4-299*
Plaintiff/Appellee	*}*	
	}	*Hon. Robert E. Burch*
vs.	*}*	*Chancellor*
	}	
	}	*No. 01S01-9709-CH-00209*
KEY INDUSTRIES, INC. AND TRAVELERS INSURANCE,	*}*	
	}	
	}	*MODIFIED AND AFFIRMED*
Defendant/Appellants	*}*	*AFFIRMED*

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, Defendants/Appellants and Surety, for which execution may issue if necessary.

IT IS SO ORDERED on November 10, 1998.

PER CURIAM