IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, SEPTEMBER 1998 SESSION

INEZ BRADEN	)	ANDERSON
CIRCUIT	)	
Plaintiff/Appellee	)	
V.	)	
MODINE MANUFACTURING COMPANY, INC. and SENTRY INSURANCE COMPANY	)	No. 03S01-9702-CV-00019
	)	No. 03S01-9710-CV-00123
Defendants/Appellants	)	
and	)	
DINA TOBIN, DIRECTOR OF SECOND INJURY FUND	)	
Defendant/Appellee	)	Hon. James B. Scott, Circuit Judge

For the Appellants:

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For the Appellees:

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

Members of Panel:

Charles D. Susano, Judge
Roger E. Thayer, Special Judge
John S. McLellan, III, Special Judge

AFFIRMED. THAYER, Special 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.

At the time of the trial below, three claims for benefits were at issue. They were: (1) a claim for a back injury in 1994, (2) a claim for an ankle injury in 1995, and (3) a claim under T.C.A. § 50-6-241 to reconsider the back injury award of 1994.

The trial court made the following awards: (1) 12 ½% permanent partial disability to the body as a whole for the 1994 back injury, (2) 100% permanent disability to the left leg, and (3) increased the 12 ½% back injury award to 55% to the body as a whole.

The employer, Modine Manufacturing Company, Inc., and the insurance carrier, Sentry Insurance Company, have appealed from the rulings of the trial court with respect to the 100% award to the left leg and the 55% award to the body as a whole.

Our review of these cases is de novo on the record of the trial court accompanied by a presumption of the correctness of the findings of fact unless we find the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

The employee, Inez Braden, was 55 years of age at the time of the first trial and had completed the eighth grade. She began working for Modine in 1979 and worked for about 16 ½ years before being terminated by her employer as a result of a general lay-off of employees during January 1996.

1994 Injury

Plaintiff testified that during March 1994 she sustained an injury to her back when she was leaning over to obtain a piece of equipment. She was off work for awhile; received therapy treatment; and returned to light duty work. She testified she eventually returned to regular “rotation work” which was prohibited by her medical restrictions and this made her back hurt more. Dr. Robert C. Jackson, testified by deposition and stated she suffered from a strain and gave a 5% medical impairment. He also noted there were degenerative disc changes and said this made it easier to sustain a straining type injury. He opined she should only do light duty work on a

permanent basis. Since she returned to work at her regular wage or greater rate, the trial court capped the award at 12 ½% to the body as a whole. Defendants do not appeal from this award of benefits.

1995 Injury

Plaintiff testified that on about March 30, 1995 she was in the process of stepping down from a platform at work and stepped with her foot "kind of sideways" when she noticed her foot ache and burn. Several co-workers testified she had complained of hurting her ankle on this occasion. Several days later, a visit to the hospital emergency room indicated she had broken her left ankle. She returned to work during September 1995 and worked in the office for two months and then returned to her regular type work which she said was difficult to perform but she continued to work until she was laid off. She told the trial court her ankle injury made it difficult to work as she could only stand for short periods of time.

Dr. Gregory K. Hoover, an orthopaedic surgeon, testified by deposition and stated he first saw her on April 3, 1995 and she gave him a history of having fallen going down or off of a platform. He said she had a fracture just above the ankle; that during the healing of the fracture, there was an angulation problem (misalignment); that she had numerous other physical problems such as degenerative arthritis in both knees, arthritis in the kneecap joint of the left knee and very severe arthritis of her right ankle. The doctor gave a 12% medical impairment to left leg for the work-related injury. He opined she had a total of 26% medical impairment to the whole body for all physical problems not related to work activity.

Two management employees of Modine testified Ms. Braden complained of hurting her ankle at work but never explained how it happened. Dr. Alan Rice, the company doctor who saw her on March 30, 1995, testified his records did not contain a history of the event.

The employer and insurance carrier argue the trial court was in error in finding the employee had injured her left ankle as a result of her work activity. We do not find any merit to this contention. All of the evidence on this issue was before the trial court on oral testimony and the court accepted the employee's version of the events in question. Thus, the trial court was in a better position to judge credibility and weigh evidence. *Landers v. Fireman's Fund Ins. Co.,* 775 S.W.2d 355, 356 (Tenn.

1989). We are also of the opinion the record indicates she twisted her ankle as a result of being required to work on the platform and do not accept the argument the event was non-compensable because of being classified as an idiopathic occurrence.

With reference to the award of 100% to her left leg, plaintiff testified she could stand for only short periods and she did not believe she could work at any job she had held in the past. Two vocational disability consultants testified. One witness gave her 100% vocational disability as a result of the ankle injury. The other witness gave a 100% vocational disability rating but said it was difficult to separate the work-related injury from the non-work disabilities.

The trial court found Ms. Braden was totally disabled as a result of this last injury when combined with her non-work disabilities but only awarded benefits of 100% to the left leg because the proof was not sufficient to show the employer had proper notice of the non-work disabilities as required by T.C.A. § 50-6-208(a)(2). From our examination of the record, we do not find the evidence preponderates against the trial court's conclusion on this point. We also find the award of 100% to the left leg is reasonable under the proof.

1996 Reconsidered Award

A separate action was filed seeking a modification of the award of 12 ½% disability to the body as a whole for the 1994 back injury. This suit was filed pursuant to the provisions of T.C.A. § 50-6-241(a)(2) and was instituted within the time period allowed by the statute. A hearing was held several months after the adjudication of the 1994 and 1995 claims. In reconsidering the original award of 12 ½% disability, the trial court re-examined the medical evidence which was submitted by deposition at the original trial and also heard testimony of the employee, a vocational witness and a witness employed by Modine. The court concluded the 12 ½% award was not an adequate award and fixed the award at 55% to the body as a whole.

Defendants contend the trial court was in error in modifying the award and especially in exceeding the statutory cap of six times the medical impairment. Defendants also contend plaintiff's loss of employment was not causally related to the back injury.

Dr. Robert C. Jackson was of the opinion Ms. Braden had a 5% medical impairment as a result of a strain and noted that degenerative disc changes made this easier to occur. His restrictions of permanent light duty work made it difficult to return to regular "rotation work" but she said she did so rather than to be disqualified.

Witness Craig Colvin, a vocational consultant, testified during the first trial and also again at the reconsideration hearing. He said she was 55-65% vocationally disabled due solely to the back injury and she had no transferable job skills and no reasonable employment opportunities available locally considering her condition.

Dr. Archer W. Bishop, an orthopaedic surgeon, testified he saw plaintiff on one occasion on March 7, 1995 and was of the opinion the back strain had healed although she still had complaints of back pain. He said there was no permanent impairment due to the back injury but gave 15% impairment due to scoliosis and degenerative disc disease. He noted she was overweight and felt her work restrictions were due to non-work disabilities.

Where there is conflicting medical testimony concerning an injury, the trial judge has discretion to conclude that the opinion of a particular expert should be accepted over that of another expert and that one expert's testimony contains a more probably explanation than another expert's testimony. *Thomas v. Aetna Life & Cas. Co.,* 812 S.W.2d 278 (Tenn. 1991).

The trial court is vested with the primary duty and authority to fix a reasonable award of benefits and it is not subject to being overturned on appeal unless the evidence preponderates against same.

We find the 55% award of disability to be reasonable under the evidence. The award is in excess of the maximum statutory cap (six times impairment) but we find the provisions of T.C.A. § 50-6-242 have application and the statutory caps can be exceeded as clear and convincing evidence supports the conclusion (1) the employee lacks a high school diploma or general equivalency diploma, (2) she has no transferable job skills from prior background and training, and (3) she has no reasonable employment opportunities available locally considering her permanent medical condition.

Defendants also contend the award of increased disability was improper because it was not shown the loss of employment was causally related to the injury

in question citing as authority a Workers' Compensation Panel decision in the case of *Brown v. State,* No. 01S01-9502-BC-00020, filed November 22, 1995, at Nashville. We do not find this decision to be controlling as employee Brown voluntarily terminated his employment and the Panel held the employee could not escape the 2 ½ times impairment cap without showing a causal connection between his injury and loss of employment. In the present action, the employer has terminated the employment relationship thereby qualifying the employee for relief under the statute. Under these circumstances, we do not find the causal connection principle to be a factor.

The evidence does not preponderate against the 55% award of disability.

Liability of Second Injury Fund

The first trial resulted in findings by the trial court that the employee was entitled to 12 ½% disability to the body as a whole for the back injury and 100% disability to the left leg, which converted to 50% disability to the body as a whole. These two awards total 62 ½% disability and the court held there was no liability against the Second Injury Fund since the total of the awards did not exceed 100%.

The second trial resulted in finding the employee was entitled to 55% disability to the body as a whole for the back injury (less any prior payments) and when this modified award was combined with the converted award of 50%, the total was 105%, and the court ruled the Second Injury Fund was liable for 5% of the award.

We do not find any error in these rulings.

The judgment of the trial court is affirmed and the costs of the appeal are taxed to the employer and insurance carrier.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
Charles D. Susano, Judge

_____
John S. McLellan, III, Special Judge

FILED

January 20, 1999

Cecil Crowson, Jr.
Appellate Court
Clerk

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 on appeal are taxed to the appellant.

IT IS SO ORDERED this ____ day of _____, 1998.

PER CURIAM