

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

FILED March 10, 1999 Cecil Crowson, Jr. Appellate Court Clerk
--

LINDA S. HOPSON)	
)	GREENE CIRCUIT
Plaintiff/Appellant)	
V.)	
PHILIPS CONSUMER ELECTRONICS)	Hon. Ben K. Wexler,
Defendant/Appellee)	Circuit Judge
and)	
DINA TOBIN, DIRECTOR OF THE)	
DIV. OF SECOND INJURY FUND)	No. 03S01-9710-CV-00141

For the Appellant:

John T. Milburn Rogers
100 South Main Street
Greeneville, Tenn. 37743

For the Appellee:

G. P. Gaby
P.O. Box 1060
Greeneville, Tenn. 37744-1060

Kathleen W. Stratton
2nd Floor Cordell Hull Bldg.
425 Fifth Ave. North
Nashville, Tenn. 37243-0499

MEMORANDUM OPINION

Members of Panel:

E. Riley Anderson, Chief Justice
Gary R. Wade, Special Judge
Roger E. Thayer, Special Judge

MODIFIED IN PART; REVERSED IN
PART and REMANDED.

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.

The appeal has resulted from the action of the trial court in awarding plaintiff, Linda S. Hopson, 55% permanent partial disability to the left arm as a result of an accident while working for defendant, Philips Consumer Electronics. The circuit judge dismissed the case against the Second Injury Fund. Plaintiff, being dissatisfied with the award of benefits, contends the award should be increased.

Linda Hopson was 42 years of age and is a high school graduate. She does not have any vocational training. She sustained a prior injury to her back during 1991 and was awarded 75% permanent partial disability to the body as a whole during a contested hearing in the Chancery Court for Greene County.

The injury in the present action occurred on defendant's production line where she was required to use an air gun and to make repetitive arm movements. Her injury was to her left wrist and she is left-handed. She underwent surgery on November 8, 1994, when Dr. Christopher T. Lechner, an orthopaedic surgeon, repaired a partial tear of the ligament and noticed she had some synovitis (swelling); she was seen on regular basis and was still complaining of pain four months later. The doctor testified by deposition and said pain that late after surgery was not normal. He x-rayed her arm and noticed changes consistent with Kienbach's disease, which is a condition where the blood supply to lunate is not normal and the bone collapses. He stated this was a painful condition and required further surgery.

The second surgery was performed on March 28, 1995 when the lunate was removed and the wrist was stabilized "by fusing three of the remaining six bones together". He also described the event as "taking the painful bone out and then to give her a stable wrist, although she knew that it would be a stiffer wrist as well". This surgery went well but she still had discomfort after a reasonable healing period and Dr. Lechner recommended she get a second opinion from another hand surgeon. Plaintiff saw Dr. Joseph C. DeFiore, Jr. and his report was introduced into evidence. He concurred with Dr. Lechner's diagnosis and treatment and stated "it is

going to be very difficult to get her back to work on a continuous basis and if anything it would be non-repetitive, light duty work”.

Plaintiff was laid-off during December 1995 and was recalled to work on May 31, 1996. The company thought there were light duty jobs she could do. When she returned to work, she testified she was hurting so bad that she left soon after reporting and never returned. She stated that her back pain and left arm pain bothered her to such an extent that she could not perform the light duty jobs the company was planning to offer her. She told the trial court it was painful for her to write a check and she always inquired in a store if they had a check writing machine at their cash register.

Dr. Lechner testified that although her permanent injury was located in her wrist, the weakness was in her entire arm and that she should not lift over one pound on a frequent basis and not over eight pounds on an infrequent basis; that if she did repetitive type work with these restrictions, she should not work on very small objects due to the limited motion in her wrist, which would make it difficult to get into position to manipulate small objects. He stated the medical impairment would be 42% to her left arm.

Dr. Norman E. Hankins, a vocational rehabilitation consultant, was to appear personally before the trial court but before his appearance, the parties stipulated that his detailed report could be admitted into evidence. He administered numerous tests, examined the medical evidence, etc., and concluded that she had a 95% vocational disability as a result of her prior back injury and the present arm injury. He opined 85% would be attributable to the prior back injury and 10% to the wrist injury. He also testified that if there had not been a prior back injury, he was of the opinion she would have a 57% vocational disability as a result of the wrist and arm injury.

Michael T. Galloway, also a vocational consultant, testified orally before the court and was of the opinion plaintiff could work as a receptionist, information clerk, security guard, inspector, a checker and an examiner. He did not estimate her vocational disability on a percentage basis.

The review of the case is de novo on the record accompanied by a presumption of the correctness of the findings of fact unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

Under this review of a workers' compensation case, the appellate court is not bound by the findings of the trial court but must make its own determination of where the preponderance of the evidence lies. *Down v. CNA Ins. Co.*, 765 S.W.2d 738 (Tenn. 1989).

The trial court fixed the award of disability at 55% to the left arm. From our independent review of the record, we are of the opinion the evidence preponderates in favor of a higher award. Although the evidence indicates the present injury substantially affects plaintiff in her ability to work and earn wages in the open labor market, the award under our statute must be fixed to a scheduled member, the left arm. Upon consideration of the numerous factors which must be applied, we fix the award at 80% to the left arm.

As to the liability of the Second Injury Fund, T.C.A. § 50-6-208(b) provides that when an employee has received or will receive a workers' compensation award or awards for permanent disability to the body as a whole, and the combination of the awards equals or exceeds 100 percent permanent disability to the body as a whole, the awards are combined. The Second Injury Fund then becomes liable for any benefits due the employee in excess of 100%. See *Burriss v. Cross Mountain Coal Co.*, 798 S.W.2d 746, 748 (Tenn. 1990). In the case of *Henson v. City of Lawrenceburg*, 851 S.W.2d 809 (Tenn. 1993), the Supreme Court held that in the limited context of determining the liability of the Second Injury Fund, the statute's purpose is accomplished by equating a scheduled member award to a percentage of the body as a whole by reference to the AMA guidelines and then applying the provisions of subsection (b).

Since we have increased the trial court's award, the ruling dismissing the Second Injury Fund must be reversed and the case remanded for the purpose of determining the converted award and applying subsection (b) to the case. If the 75% award and the converted award exceed 100%, the Second Injury Fund would be liable for the excess over 100%.

The judgment is modified to fix the award at 80% to the left arm and the case is reversed and remanded to determine the liability of the Second Injury Fund under T.C.A. § 50-6-208(b). Costs of the appeal are taxed to defendants.

Roger E. Thayer, Special Judge

CONCUR:

E. Riley Anderson, Chief Justice

Gary R. Wade, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

FILED
March 10, 1999
Cecil Crowson, Jr.
Appellate Court
Clerk

LINDA S. HOPSON,)	GREENE CIRCUIT
)	No. 96CV276
Plaintiff-Appellant,)	
)	
)	No. 03S01-9710-CV -00141
v.)	
)	
PHILIPS CONSUMER ELECTORNICS))	
)	
Defendant-Appellee.)	Hon. Benk K. Wexler
)	
and)	Circuit Judge
DINA TOBIN, DIRECTOR OF THE)	
DIV. OF SECOND INJURY FUND)	

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 facts 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 defendants, for which execution may issue if necessary.

03/10/99