

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE

**BOBBY WILLIAM SMITH**

**v.**

**FINDLAY INDUSTRIES, INC., et. al.**

Direct Appeal from the Chancery Court of Warren County  
No. 7010, Charles D. Haston, Chancellor

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No. M2000-02327-WC-R3-CV - Mailed - July 16, 2001  
Filed - August 20, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with the Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting findings of fact and conclusions of law. The employer/appellant contends the trial court erred in 1) awarding 100% permanent partial disability to the right upper extremity, and 2) computing the employee's average weekly wage and benefit rate. As discussed herein, the panel has concluded that the judgment awarding 100% permanent partial disability to the right upper extremity should be affirmed, and that the determination of the average weekly wage and benefit rate is incorrect and should therefore be remanded to the trial court.

**Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right; Judgment of the Chancery Court Affirmed and Remanded**

Frank G. Clement, Jr., Sp. J., delivered the opinion of the court, in which Frank F. Drowota III, J., and Ben H. Cantrell, Sp. J., joined.

Patrick A. Ruth and Michael L. Parsons, Ruth, Howard, Tate & Sowell, Nashville, TN, for the appellants, Findlay Industries, Inc., *et. al.*

William J. Butler, Farrar & Holliman, Lafayette, TN, for the appellee

## Memorandum Opinion

Bobby William Smith (“Smith”), the employee/appellee, injured his right wrist on July 16, 1999, while working for Findlay Industries (“Findlay”), the employer/appellant. Smith was injured while operating a “press” when the cutting blade severed tendons, an artery and a nerve in his wrist.

Smith was immediately transported to the emergency room of Riverpark Hospital in McMinnville. He was initially treated by Dr. Donald Arms who attempted to surgically repair injuries to his tendons, an artery and a nerve. Smith was released from the hospital only to return due to continuing bleeding from the laceration. Dr. Richard Rogers assumed treatment of the employee at this point.

Dr. Rogers continued to treat Smith until December, 1999. Dr Rogers concluded that Smith had a 40% permanent partial impairment to the right upper extremity.

Dr. S. M. Smith, an orthopedic surgeon, conducted an independent medical examination on March 1, 2000. After reviewing the plaintiff’s prior medical records and conducting an impairment examination, Dr. Smith concluded that the employee had a 58% permanent partial impairment to the right upper extremity. This rating assigned impairment due to loss of nerve function, lost range of motion and a lack of ulnar artery function.<sup>1</sup>

Dr. Smith testified that there was “a possibility that [Mr. Smith] will sustain an amputation of the hand since one of the two major arteries is already occluded.” He further opined that if Smith sustained an amputation of his right hand, the permanent partial impairment to the right upper extremity would increase to 92%. Dr. Smith stated that Smith could return to work but placed certain restrictions on him, including no repetitive flexion or extension of the fingers of the right hand, no use of vibratory tools with the right hand, no working in extreme cold, and no lifting over 5-10 pounds with the injured arm.

As neither party sought a deposition from Dr. Rogers, the only medical testimony in the record is that of the examining physician, Dr. Smith.

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<sup>1</sup>It appears the rating by Dr. Rogers only took into account the loss of nerve function for there was no reference in his file to loss of range of motion or lack of ulnar artery function.

Smith returned to work at Findlay on August 16, 1999, under numerous restrictions, working at a desk job with his right hand elevated on a velcro pillow. By October 27, 1999, Smith had returned to a regular job at Findlay but was physically unable to perform the jobs he had previously held; however, with training, he was able to operate a “Gerber” machine, which only required him to use the uninjured left arm. Smith is under permanent work restrictions of no repetitive flexion or extension of the fingers, no grasping or gripping, no use of vibratory tools, no working in extreme cold, and no lifting over 5 to 10 pounds with the injured arm.

As a Gerber machine operator, Smith’s wage at Findlay is based on 140% production. Ironically, his present compensation is higher than his compensation prior to the injuries at issue. Moreover, Smith has not lost any time from work at Findlay since he returned to regular duty in October, 1999.

Smith is a 34-year-old manual laborer with a ninth-grade education and no special training or skills. Smith’s previous jobs included the following labor: work in a nursery digging balls and pulling bushes, glue sprayer, trimmer, punch operator, truck loader, loading hay, cutting and selling wood, pulling lumber and driving a skidder. Smith testified that he would be unable to find work anywhere else if he were forced to leave his current job at Findlay.

The trial court found that Smith had a 100% permanent partial disability to the right upper extremity and awarded a judgment of \$59,922 payable at a rate of \$299.61 per week.

Our review is de novo with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. Code Ann. 50-6-225(e)(2).

Findlay argues that the trial court’s award of 100% permanent partial disability to the right upper extremity is excessive. Findlay contends that the test for determination of Smith’s vocational disability is whether there has been a decrease in the employee’s capacity to earn wages in any line of work available to the employee. Corcoran v. Foster Auto GMC Inc., 746 S.W.2d 452, 459 (Tenn. 1998) (citing Orman v. William Sonoma Inc., 803 S.W.2d 677, 678 (Tenn. 1991)). Referencing the Orman test, Findlay contends that Smith’s work restrictions are only relevant to his right arm and then, only in limited situations, giving him the capacity to earn wages in numerous jobs. Specifically, Findlay contends that there is no justification for awarding a vocational disability for Smith is earning more now than before the accident.

We believe Findlay's reliance on Orman is misplaced. The test for determining disability to scheduled members, as is the case here, is set forth in Duncan v. Boeing Tennessee, Inc., 825 S.W.2d 416 (Tenn. 1992). Contrary to Findlay's argument, the Duncan court held "... that vocational disability is not an essential ingredient to recovery for the loss of use of a scheduled member . . ." Duncan, 825 S.W.2d at 417 (citing Oliver v. State, 762 S.W.2d 562, 566 (Tenn. 1988)). Moreover, Duncan stated that "... one suffering such a . . . disability is entitled to compensation for the partial loss of the use of the scheduled member of his body without regard to the loss of earning power or wages" under Tenn. Code Ann. § 50-6-207(3). Duncan, 825 S.W.2d at 417 (*emphasis added*). "... [A] worker does not have to show vocational disability or loss of earning capacity to be entitled to the benefits for the loss of use of a scheduled member." Oliver, 762 S.W.2d at 566. Accordingly, we find Findlay's reliance on Orman misplaced as the Orman test is only relevant to an injury to the body as a whole, not injuries to scheduled members. Orman, 803 S.W.2d at 674-75.

The assessment of vocational disability is to be based upon pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at the type of employment available in his disabled condition. Corcoran, 746 S.W.2d at 459. The record provides lay testimony of the severity of the employee's injuries, his limited education, and lack of special training and job skills. Furthermore, the record contains evidence which supports the examining physician's medical impairment rating of 58% and the treating physician's medical impairment rating of 40%. Moreover, the deposition by the examining physician illustrates that if Smith's condition continues to deteriorate, his right hand may be amputated, increasing the examining physician's impairment rating from 58% to 92%.

The trial judge's award fell within the statutory maximum permanent partial disability award that an employee may receive, being two and one-half (2 ½) times the medical impairment rating. Tenn. Code. Ann. § 50-6-241(a)(1). Based on these factors, we find that the evidence does not preponderate against the trial judge's decision in awarding Smith 100% permanent partial disability to the right upper extremity.

\_\_\_\_\_ As an additional issue, Findlay challenges the trial court's computation of Smith's average weekly wage and benefit rate at \$299.61 per week . Findlay contends that the rate contains improper deductions for sick days, vacation days, personal time off, and days when the employee did not work due to a lack of work.

At the hearing, Counsel for the appellant and appellee conceded that the calculations submitted at trial were incorrect. Moreover, the record does not contain sufficient information for this Court to make an accurate determination. Accordingly, it is necessary to remand the issue concerning the average weekly wage and benefit rate to the trial court for determination.

Therefore, the judgment awarding Smith benefits and compensation based upon a one-hundred percent (100%) permanent partial disability is affirmed. Determination of Smith's average weekly wage and benefit rate, however, is remanded to the trial court .

Costs on appeal are taxed to the appellant, Findlay Industries, Inc.

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Frank G. Clement, Jr., Special Judge

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**JUDGMENT**

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 the appellant, Findlay Industries, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM