IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION PANEL
AT NASHVILLE
July 2001 Session

MICHAEL BRUCE HARRIS v. MAGOTTEAUX, INC., et al.

Direct Appeal from the Circuit Court of Giles County
No. 9979 & No. 9980, Hon. Jim T. Hamilton, Judge

No. M2000-03201-WC-R3-CV – Mailed - October 15, 2001
Filed - December 18, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employer appeals the trial court's calculation of the workers' compensation award of permanent partial disability benefits using the employee's total medical impairment rating, as opposed to using only the medical impairment rating arising from the most recent injury. In addition, the employer's previous insurance carrier challenges the trial court's finding that it is equally liable along with the current insurance carrier for the employee's most recent injury and the employee's future medical benefits. The Panel concludes the award should be modified in part and reversed in part. We modify the trial court's judgment, finding that the employee is entitled to workers' compensation benefits solely for his most recent injury and award a 12% permanent partial disability to the body as a whole. An employee cannot combine a claim for a new injury with a claim for reconsideration of a pre-existing workers' compensation award when the employee sustains an additional injury. We reverse the trial court's judgment, finding that Home Insurance Company, the previous insurance carrier, is not liable for benefits arising from the second injury.

Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right; Judgment of the Circuit Court Modified in Part and Reversed in Part.

GAYDEN, SP. J., delivered the opinion of the court, in which DROWOTA, J., and LOSER, SP. J., joined.

Joseph W. Henry, Jr., Henry, Henry & Speer, Pulaski, Tennessee, for the appellant, Magotteaux, Inc.

Rankin P. Bennett, Cookeville, Tennessee, for the appellee, Michael Bruce Harris

William M. Billips, Ortale, Kelley, Herbert & Crawford, Nashville, Tennessee, for the appellee, Home Insurance Company and Home Indemnity Company

MEMORANDUM OPINION

The employee/appellee, Michael Bruce Harris, is a forty-year-old high school graduate, with no further schooling. He is married and has one child who is in the 12th grade. Since graduating from high school in 1978, the employee has held and performed jobs requiring a great deal of physical exertion. The employee worked at his first job at Torrington/Fafnir from 1978 until 1988 as a material handler and equipment operator. In 1988, he started work for Magotteaux, Inc., the employer/appellant, as a field services technician. This job required the employee to drive a truck to various and distant locations throughout the country, erect equipment for the customer, and be on standby around the clock until the customer was satisfied. The employee would dismantle the machinery once the customer was finished and transport the equipment to the next location. The employee worked for the employer for 9½ years until his dismissal on January 11, 1999. Some time after the loss of his job, the employee and a friend borrowed $850,000 to open a retail package liquor store. The employee is presently working at this liquor store.

While on the job working for the employer, the employee suffered two injuries to the same place in his back. No dispute exists as to whether the employee was on the job at the time of the injuries. Both injuries resulted in a ruptured disc on the right side at the L4/5 level of the spine and required laminectomies. The first injury occurred on June 13, 1994. Dr. Verne Allen, the neurosurgeon who performed the first laminectomy, assigned a 10% medical impairment rating in accordance with the Fourth Edition of the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment. After the first injury, the employee returned to his job at the same or greater pay. He received a workers' compensation award in the amount of 25% permanent partial disability to the body as a whole. The trial court reached this number by multiplying the 10% medical impairment rating 2½ times, as allowed in Tenn. Code Ann. § 50-6-241(a)(1)(2000).

The employee suffered his second injury on March 21, 1998, on a job site in Pennsylvania. Dr. Vaughan Allen, a neurosurgeon, performed the second laminectomy and assigned an additional 2% medical impairment rating in keeping with the Fourth Edition of the AMA Guides. In his deposition, Dr. Allen agreed that the total physical impairment rating of these two laminectomies would be 12% medical impairment to the body as a whole. The employee returned to work, again at the same or greater pay. Dr. Vaughan Allen placed restrictions on the employee's physical activities; specifically, no lifting over thirty pounds on a repetitive basis, fifty pounds occasionally, no repetitive bending, and no driving a truck for two hours without getting out and moving around. Dr. Allen ordered the employee not to drive a truck in the capacity he had been doing before the second injury.

The employee filed two complaints for workers' compensation following his second injury.

In his first complaint, he asked for reconsideration and an increase of the permanent partial disability award granted in 1996 for the 1994 injury. The employee's employment with Magotteaux had terminated within 400 weeks of the day the employee returned to work after his first injury in 1994. His second complaint is a separate suit seeking workers' compensation benefits for the 1998 injury. The trial court granted the employee's request that his claims be consolidated.

The trial court awarded employee an additional 47% permanent partial disability benefit, translating to an award of $112,596. The court reached this number by combining the 10% medical impairment rating from the 1994 injury with the additional 2% medical impairment rating from the 1998 injury. The 12% total medical impairment rating was then multiplied six times per Tenn. Code Ann. § 50-6-241(b). From the new permanent partial disability total, the court deducted the pre-existing workers' compensation award for the 1994 injury (25% permanent partial disability). In addition, the court found both Home Insurance Company, the insurance carrier for the 1994 injury, and Kemper Insurance Company, the carrier at the time of employee's 1998 injury, equally liable for this injury and for any of employee's future medical expenses resulting from this injury.

An employee may not enlarge a previous workers' compensation award when the employee sustains additional injuries. Sections 50-6-207(3)(F)(2000) and 50-6-241(a)(2) and (b) of the Tennessee Code Annotated are the applicable statutes in this appeal. Section 50-6-207(3)(F) of the Tennessee Code states in relevant part:

> If an employee has previously sustained an injury compensable under this section for which a court of competent jurisdiction has awarded benefits based on percentage of disability to the body as a whole and suffers a subsequent injury not enumerated above, the injured employee shall be paid compensation for the period of temporary total disability and only for the degree of permanent disability that results from the subsequent injury.

Section 50-6-241(a)(2) allows the court to reconsider, upon the filing of a new claim, the issue of industrial disability, provided the employee's employment with the pre-injury employer has terminated and the claim is filed within one year of the loss of employment and 400 weeks of the day the employee returned to work following the injury.

The employee incorrectly asserts that Tenn. Code Ann. § 50-6-241 controls over Tenn. Code Ann. § 50-6-207(3)(F), where the statutes conflict. This assertion is contrary to the holding of the Court in Brewer v. Lincoln Brass Works, 991 S.W.2d 226 (Tenn. 1999). In Brewer, the Court held: "a petition to enlarge a previous award under § 50-6-241(a)(2) is not the appropriate vehicle to use when a worker sustains additional injuries or additional anatomical impairment." Id. at 229. The employee inappropriately combines a claim for reconsideration of the award for his 1994 injury with a new claim for his 1998 injury. Pursuant to Tenn. Code Ann. § 50-6-207(3)(F), he is entitled to workers' compensation solely for his 1998 injury. In computing the

award for permanent partial disability, the court may award up to six times the medical impairment rating from the 1998 injury alone under Tenn. Code Ann. § 50-6-241(b). Section 50-6-241(b) of the Tennessee Code allows the court to award the employee up to a maximum of six times the medical impairment rating if "the 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 injury."

The medical impairment ratings from the employee's 1994 and 1998 injuries cannot be combined to calculate his workers' compensation benefits for his most recent injury. The Court has held that an award for workers' compensation benefits is not based on the total medical impairment rating, but rather the medical impairment rating from the most recent injury. Parks v. Tennessee Municipal League Risk Management Pool, 974 S.W.2d 677 (Tenn. 1998). The Court remarked:

> We believe the language of Tenn. Code Ann. § 50-6-207(3)(F) is unambiguous and that its meaning and its intended effect is clear. An employee who has received compensation for prior injuries based on a percentage of disability to the body as a whole and is later injured shall be paid "only for the degree of permanent disability that results from the subsequent injury."

Id. at 679, quoting Tenn. Code Ann. § 50-6-207(3)(F). The Court recently cited the Parks decision with approval and reaffirmed it in Clifton v. Komatsu America Manufacturing Corp., 38 S.W.3d 550 (Tenn. 2001). Under the reasoning in Parks, only the additional 2% medical impairment rating from the 1998 injury may be used to determine the employee's permanent partial disability benefits.

This Panel concludes that the proper calculation of the employee's workers' compensation award should employ only the additional 2% medical impairment rating from the 1998 injury. The trial court's use of the 12% total medical impairment rating is contrary to the plain meaning of Tenn. Code Ann. § 50-6-207(3)(F) as well as the Court's holdings in Parks and Clifton. Parks, 974 S.W.2d at 678, Clifton, 38 S.W.3d at 554.

The employer's next issue questions whether the trial court's use of the six-times multiplier is "excessive" especially since employer disputes the court's findings of fact that employee had been fired. The trial court noted:

> The defendant contends that plaintiff was fired because he wilfully and voluntarily refused to work the available jobs that were offered to him or that might have been awarded him had he bid on the same. The plaintiff, however, alleges that he bid for several jobs, such as the grinder job, where he took and passed a test and was very familiar with the grinder job. He bid for the installer job and did not get this job. He further testified that he wanted to continue working for the defendant.

The court found the employer had terminated the employee and applied the six-times multiplier. Tenn. Code Ann. § 50-6-241(b). Because appellate review in a workers' compensation case is *de novo* upon the record with a presumption that the findings of the trial court are correct, this Panel affirms the court's finding that the employer fired the employee. Tenn. Code Ann. § 50-6-225(e)(2)(2000).

This Panel reverses the trial court's decision to hold Home Insurance Company equally liable with Kemper Insurance Company. Because the employee may not assert a claim for reconsideration of his 1994 injury on account of his 1998 injury, Home Insurance Company cannot be held liable for any further costs besides the 25% permanent partial disability benefits handed down in 1996. Kemper Insurance Company is solely liable for the permanent partial disability benefits from the 1998 injury.

In conclusion, the employee's medical impairment ratings from both the 1994 and 1998 injuries cannot be joined in calculating his disability benefits resulting from his most recent injury. As the employee suffered an additional injury in 1998, he may not petition the court to reconsider and enlarge his workers' compensation award for his earlier injury in 1994. Additionally, Home Insurance Company should have no further liability in this matter. The Panel modifies in part the trial court's judgment and awards the employee benefits based upon a 12% permanent partial disability to the body as a whole for his 1998 injury. The panel reverses in part the trial court's order and holds Kemper Insurance Company (and not Home Insurance Company) liable for the employee's 1998 injury. Costs of appeal are taxed to the employer, Magotteaux.

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HAMILTON V. GAYDEN, JUDGE

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JUDGMENT ORDER

This case is before the Court upon motion for review filed by the plaintiff-appellee, Michael Bruce Harris, 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.

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 are taxed to the defendant-appellant, Magotteaux, Inc., and its surety for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Drowota, J., not participating