

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(June 27, 1996 Session)

LARRY COLEMAN,) SHELBY CIRCUIT
)
Plaintiff-Appellee,) Hon. Kay S. Robilio,
) Judge.
V.)
) No. 02S01-9602-CV-00021
KIMBERLY-CLARK CORPORATION,)
)
Defendant-Appellant.)

FILED

September 11, 1996

Cecil Crowson, Jr.

Appellate Court Clerk

For Appellant:

For Appellee:

McDonald Kuhn
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B. J. Wade
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MEMORANDUM OPINION

Members of Panel:

Lyle Reid, Associate Justice, Supreme Court
Joe C. Loser, Jr., Special Judge
Billy Joe White, Special Judge

AFFIRMED AS MODIFIED

Loser, 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. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employer contends the award of permanent partial disability benefits is excessive and that the trial judge "erred in failing to use the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, to review the anatomical impairment assigned by" the operating surgeon. The employee contends the award is inadequate. The panel has concluded the judgment should be affirmed as modified herein.

The employee or claimant, Larry Coleman, is 52 and a high school graduate with no other training or education. He has worked all his adult life as an unskilled worker. On November 17, 1992, the fork lift which he was operating for the employer fell out of a truck bed to a parking lot, injuring him.

He was treated and released at an emergency room and returned to work with pain. He ultimately was referred to a neurosurgeon, whom he first saw on January 26, 1993. The doctor diagnosed a herniated lumbar disc and prescribed an epidural block for the relief of pain. When conservative care no longer relieved the claimant's pain, surgery was performed. Since the surgery, he has continued to have disabling leg and back pain and numbness. The operation was the claimant's second for a ruptured disc in the low back, the other having occurred some seventeen years earlier.

The claimant cannot sit or stand for long periods of time and has severely limited ability to bend forward. The operating surgeon assigned a permanent impairment rating of eighteen percent to the whole body, from the injury and surgery superimposed on his pre-existing spinal stenosis, using the AMA guidelines. Mr. Coleman does not think he can return to any kind of work. He has not worked since the surgery.

A vocational expert examined the claimant and his medical records. The expert opined that the claimant has no transferable job skills and that he has no employability. The expert's opinion is based in part, however, on a hip problem which is not shown to have pre-existed the injury at work or to have been caused by the injury at work.

We find no countervailing medical or vocational testimony in the record.

The trial judge found the claimant's permanent industrial disability to be eighty-eight percent to the body as a whole and awarded benefits on that basis. Appellate 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).

The claimant argues that he is permanently and totally disabled and, by Tenn. Code Ann. section 50-6-207(4)(A)(1), is entitled to the payment of disability benefits at his compensation rate until age 65. When an injury, not otherwise specifically provided for in the act, totally incapacitates a covered employee from working at an occupation which brings him an income, such employee is considered totally disabled. Tenn. Code Ann. section 50-6-207(4)(B).

The employer argues that the award is excessive because the vocational expert's opinion is based in part on a medical report of a hip injury which is not shown to be related to the injury at work. Unless admitted by the employer, the employee or claimant has the burden of proving, by competent evidence, every essential element of his claim. Mazanec v. Aetna Ins. Co., 491 S.W.2d 616 (Tenn. 1973). In all but the most obvious cases, causation may only be proved by expert testimony. Floyd v. Tennessee Dickel Distilling Co., 225 Tenn. 65, 463 S.W.2d 684 (1971).

The employer's second contention, citing Smith v. Liberty Mutual Insurance Company, et al, 762 S.W.2d 883 (Tenn. 1988) is that the trial judge is obliged to interpret the AMA guidelines and substitute her conclusions as to the extent of the claimant's medical impairment for those of the operating surgeon. We do not so construe Smith v. Liberty Mutual Insurance Company. The trial did not err in accepting the operating surgeon's opinion of the extent of medical impairment.

Nevertheless, once the causation and permanency of an injury have been established by expert testimony, the courts may consider many pertinent factors, including age, job skills, education, training, duration of disability and job opportunities for the disabled, in addition to anatomical impairment, for the purpose of evaluating the extent of a claimant's permanent industrial disability. Tenn. Code Ann. section 50-6-241(a)(2). Where a worker's only injury is to a scheduled member, he may receive only the amount of compensation provided by the statutory schedule for his permanent disability. Genesco, Inc. v. Creamer, 584 S.W.2d 191 (Tenn. 1979). In all other cases of permanent partial disability, benefits are payable according to the percentage of disability to the body as a whole, which has a value of four hundred weeks. Tenn. Code Ann. section 50-6-207(3)(F).

We have carefully reviewed the record and, from a consideration of the pertinent factors established by the proof in this case, are persuaded that the evidence preponderates against an award based on eighty-eight percent to

the body as a whole and in favor of one based on one hundred percent to the body as a whole, entitling the claimant to receive benefits at his weekly compensate rate for four hundred weeks. The judgment of the trial court is modified accordingly.

Interest may be awarded on accrued but unpaid disability benefits. Tenn. Code Ann. section 50-6-225(h)(1). When an award is affirmed on appeal, such interest is to be calculated from the date of the trial court's judgment. McClain v. Henry I. Siegel Co., 834 S.W.2d 295 (Tenn. 1992).

As modified, the judgment of the trial court is affirmed. The case is remanded to the trial court for calculation of interest on accrued but unpaid benefits and such other proceedings, if any, as may be appropriate. Costs on appeal are taxed to the defendant-appellant.

Joe C. Loser, Jr., Judge

CONCUR:

Lyle Reid, Associate Justice

Billy Joe White, Judge