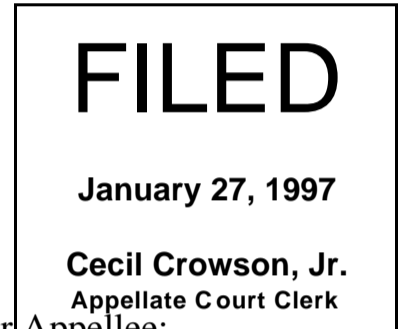


IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT JACKSON
(August 29, 1996 Session)

JERRY T. MATHENY,) LAKE CIRCUIT
)
Plaintiff-Appellant,) Hon. J. Steven Stafford,
) Judge.
v.)
) No. 02S01-9604-CH-00034
INSURANCE COMPANY OF)
NORTH AMERICA,)
)
Defendant-Appellee.)



For Appellant:

David Hardee
Hardee, Martin & Jaynes
Jackson, Tennessee

For Appellee:

Jack F. Marlow
Marlow & Alrutz
Memphis, Tennessee

MEMORANDUM OPINION

Members of Panel:

Lyle Reid, Associate Justice, Supreme Court
F. Lloyd Tatum, Special Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED

Loser, Judge

MEMORANDUM OPINION

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. The issue in this appeal is whether the trial court erred in not enlarging an award, pursuant to Tenn. Code Ann. section 50-6-241(a)(2). As discussed below, the panel has concluded the judgment should be affirmed.

The injury in question occurred on September 5, 1992 to the claimant's neck. The claimant was treated by a physician who assigned a permanent impairment rating of eight percent to the body. The claimant returned to work at a wage equal to or greater than the wage he was receiving at the time of the injury and was awarded permanent partial disability benefits on the basis of two and one-half times the impairment rating, or twenty percent to the body as a whole, paid in a lump sum. The award was made on March 22, 1994.

On May 9, 1994, the claimant suffered another injury to his neck at work. From that injury, superimposed upon two previous injuries, including the one in question, he was found to be one hundred percent permanently disabled and awarded benefits accordingly. Because of the disability resulting from the most recent injury, the claimant is unable to return to work. The claimant contends he is therefore entitled to have the previous award enlarged.

For injuries arising after August 1, 1992, by Tenn. Code Ann. section 50-6-241(a)(1), in cases where an injured worker is entitled to permanent partial disability benefits to the body as a whole and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award the employee may receive is two and one-half times the medical impairment rating. By Tenn. Code Ann. section 50-6-241(a)(2), if the injured worker thereafter loses his or her pre-injury employment, the court may, upon proper application made within one year of the employee's loss of employment, and if such loss of employment is within four hundred weeks of the day the employee returned to work, enlarge the award to a maximum of six times such impairment rating, allowing the employer credit for permanent partial disability benefits already paid for the injury.

The only reasonable interpretation of subsection (2) is that if the injured worker's later loss of employment is causally related to the injury for which an award has been made, the trial judge has the discretion to enlarge the award, if the application is timely made. Any other interpretation would be inconsistent with the long standing rule that an employer takes the employee as

he or she is. In this case, the loss of employment was caused by a new injury, superimposed upon the one in question. We therefore find the trial judge properly exercised his discretion by declining to enlarge the previous award.

The judgment is accordingly affirmed. Costs on appeal are taxed to the plaintiff-appellant.

Joe C. Loser, Jr., Judge

CONCUR:

Lyle Reid, Associate Justice

F. Lloyd Tatum, Judge

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

JERRY T. MATHENY,)	Lake Circuit
)	Trial Court No. 3774
Plaintiff/Appellant,)	
)	
VS.)	Hon. J. Steven Stafford,
)	Judge
)	
INSURANCE COMPANY OF)	
NORTH AMERICA,)	No. 02S01-9604-CH-00034
)	
Defendant/Appellee.)	Affirmed.

FILED

January 27, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

JUDGMENT ORDER

This case is before the Court upon a 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 will be paid by the plaintiff/appellant and his surety, for which execution may issue if necessary.

IT IS SO ORDERED this ____ day of January, 1997.

PER CURIAM

Reid, J., Not Participating