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

FILED

May 26, 1999

Cecil Crowson, Jr.
Appellate Court
Clerk

TIMOTHY W. COX,	)	
	)	
Plaintiff/Appellee	)	CAMPBELL CHANCERY
	)	
v.	)	NO. 03S01-9706-CH-00063
	)	
HARTFORD ACCIDENT & INDEMNITY COMPANY,	)	HON. BILLY JOE WHITE, CHANCELLOR
	)	
Defendant/Appellee	)	
	)	
and SUE ANN HEAD, DIRECTOR OF THE DIVISION OF WORKERS' COMPENSATION CLAIMS, TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND,	)	
	)	
Defendant/Appellant	)	

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M E M O R A N D U M O P I N I O N

Members of Panel:

Chief Justice E. Riley Anderson
Senior Judge John K. Byers
Special Judge Roger E. Thayer

REVERSED AND DISMISSED

BYERS, Senior Judge

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. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

After conducting two separate hearings on this case, the trial court found that the plaintiff was totally and permanently disabled. The trial court further held that the insurance carrier would be liable for 75 percent of the plaintiff's disability and the Second Injury Fund would be liable for 25 percent of the plaintiff's disability.

The Second Injury Fund presents the following issues for our review:

I. Whether obesity is a compensable preexisting permanent physical disability to warrant recovery from the Second Injury Fund under Tenn. Code Ann. § 50-6-208(a).

II. Whether the trial [court] erred in holding the Fund liable for 25% of the award.

We reverse the judgment of the trial court holding the Second Injury Fund liable and dismiss the Second Injury Fund from this case.

BACKGROUND ON THE FIRST HEARING

At the time of the first hearing on June 14, 1994, the plaintiff was 33 years of age, stood over six feet tall, and weighed close to 400 pounds. He testified that most of his family is overweight and that he has always been a large person. The plaintiff's wife testified that her husband has lost some weight in the past but that he has always been heavy. After graduating from high school, the plaintiff's employment history included working as a small engine repairman, heavy equipment operator, carpenter, factory worker, meat processor, sewing machine operator, and tire builder. The plaintiff eventually returned to school and obtained an associate's degree in accounting from Draughon's College.

Draughon's College placed the plaintiff with Monday Realty, where he worked over four years as a bookkeeper three days a week and as a maintenance worker two days a week. When the plaintiff was hired by Monday Realty, he weighed approximately 310 pounds. He testified that he had some normal limitations due to his weight and that his employer made accommodations for him in that respect. For example, the plaintiff did not have to do any roofing work or crawl under houses.

On February 26, 1992, the plaintiff was repairing a screen door at a rental property when the porch collapsed and he fell with his legs pinned between the steps, causing him to jerk his back and scrape his legs. After the accident, he went home, but he could not sleep that night and could barely walk the next day. He returned to work the next day and reported the injury to his employer. Thereafter, the plaintiff was seen and treated by a series of doctors.

The plaintiff testified that prior to the injury to his back he did normal activities with his wife and kids. Since the injury, he just lies around, takes medication, and feels miserable. He testified that he is unable to concentrate on any job function and that he is unaware of any job he could perform in his condition. Further, the plaintiff testified that he has become depressed and suicidal as a result of the problems associated with the work injury.

Dr. Archer W. Bishop, Jr.[1], an orthopedic surgeon, testified by deposition on June 29, 1993. He first saw the plaintiff on February 28, 1992 and recorded a history of him falling and injuring his back when a porch collapsed under him. Dr. Bishop found that the plaintiff's x-rays were normal but that he had facet arthropathy in his back, which is normal wear and tear in the joints of the back due to the aging process. Dr. Bishop opined that this facet arthropathy was neither caused nor advanced by the plaintiff's work injury.

Dr. Bishop reviewed a CAT scan which revealed some bulging at the L4-L5 levels of the plaintiff's spine, but normal myelogram results led him to believe that the plaintiff did not have a ruptured disc or surgical problem. Dr. Bishop found that the plaintiff reached maximum medical improvement on May 27, 1992, the last time he saw him. Dr. Bishop opined that the plaintiff did not have any permanent partial impairment or restrictions as a result of the work injury.

Dr. William E. Kennedy, an orthopedic surgeon, gave a telephonic deposition on July 2, 1993. He first saw the plaintiff on July 14, 1992 at the request of the plaintiff's counsel and became his treating physician thereafter. The plaintiff gave him a history of falling and injuring his back when a porch collapsed on the job. After reviewing the plaintiff's x-rays, CT scan, and myelogram, Dr. Kennedy determined

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[1] The plaintiff had previously seen Dr. Bishop in 1984 when he injured his back while working at Powell Valley Foods. However, the plaintiff recovered without disability and did not file a workers' compensation claim.

that the plaintiff had painful degenerative disc disease of the L4-L5 disc levels. He also noted a disc bulge at the L4-L5 disc levels of the plaintiff's spine which caused him to recommend additional tests. On May 4, 1993, a multiple level discography was performed and showed abnormalities and evidence of injury in the L4-L5 disc levels. Dr. Kennedy recommended surgical stabilization of the two painful discs.

Dr. Kennedy last saw the plaintiff on June 11, 1993 and determined that he had not reached maximum medical improvement. He opined that the plaintiff sustained a 21 percent permanent partial impairment to the whole person as a result of the work injury (15 percent for loss of range of motion and seven percent for disc pathology that had not received surgery). Dr. Kennedy recommended that future employment for the plaintiff should not require the following: repeated bending, stooping, squatting, heavy lifting, working over rough terrain, excessive ladder climbing or stair climbing, vigorous or strenuous pushing or pulling, or repeated and vigorous jostling such as operating machinery over rough terrain or working above the level of the shoulders.

Dr. Paul R. Kelley, board certified in psychiatry and neurology, testified by deposition on March 30, 1994. Upon a referral from Dr. Kennedy, Dr. Kelley met with the plaintiff and recorded the history of him injuring his back when the porch collapsed. He opined that the plaintiff is suffering from depression that is secondary to and caused by the work injury. Dr. Kelley placed the plaintiff in a Class 5 impairment rating according to the *AMA Guides*, which means that he is totally impaired. He explained that the plaintiff cannot concentrate on an assigned task and that he can only cooperate, follow instructions, or work with others to a limited extent. Dr. Kelley testified that obesity is an impairment, opining that 50 percent of the plaintiff's impairment is related to the pain from the work injury and 50 percent is due to his weight problem.

Dr. Robert E. Finelli, a neurosurgeon, testified by deposition on May 23, 1994. He examined the plaintiff on March 22, 1994 at the request of the insurance carrier. Dr. Finelli reviewed the plaintiff's medical records from several doctors and agreed with all but Dr. Kennedy that the plaintiff was not a surgical candidate. He explained that Dr. Kennedy based his conclusion that the plaintiff needed surgery on a discogram, a procedure which Dr. Finelli thinks is unreliable. Dr. Finelli further found

that the plaintiff was histrionic and that his x-rays, myelogram, and CT scan were absolutely normal.

Dr. Finelli opined that the plaintiff was at maximum medical improvement and that he had a zero percent medical impairment from a neurological perspective. He explained his opinion by stating that the *AMA Guides* normally allow a five percent impairment for lumbosacral pain due to longevity, but that they also allow the doctor to lower that rating where there are significant psychological factors interfering with treatment. Dr. Finelli believed that the plaintiff does have psychological problems and stated that he would defer to the psychologists on impairment for those problems.

Dr. Norman E. Hankins, a vocational expert, testified by deposition on June 10, 1994. He conducted a vocational assessment of the plaintiff on July 6, 1992. He tested the plaintiff and found that he was reading on a fourth grade level, spelling on a third grade level, and doing arithmetic on a sixth grade level. Based on the restrictions of Dr. Kennedy and Dr. Kelley and his own findings, Dr. Hankins opined that the plaintiff suffers from a 100 percent vocational disability.

At the completion of the first hearing, the trial judge stated that he was unable to assess the plaintiff's disability based on the available medical evidence. Accordingly, he ordered two new panels of doctors (three orthopedic surgeons and three psychiatrists) to review the plaintiff. In addition, he ordered six months of psychiatric treatment and temporary benefits to be restored.

BACKGROUND ON THE SECOND HEARING

The second hearing of this case was conducted on September 23, 1996. Bob Monday, the plaintiff's employer, testified at trial. Mr. Monday stated that the plaintiff appeared to have a weight problem when he presented himself for employment and that they discussed how accommodations would have to made for his limited condition. Mr. Monday testified that he did not require the plaintiff to climb ladders, work on roofs, or lift things. Mr. Monday confessed that he did not want to hire the plaintiff at first but that he did so after observing his good attitude towards work.

Dr. Jerry Lemler, a psychiatrist and family physician, testified at trial. He conducted a mental status examination of the plaintiff at the request of the plaintiff's counsel. Dr. Lemler diagnosed the plaintiff with major depression, single episode,

severe, without psychotic features. He explained that the plaintiff's depression is directly related to the work injury and his obesity. Under the *AMA Guides,* he placed the plaintiff in a Class 4 marked impairment rating. Dr. Lemler explained that this class translates into a 50 to 75 percent impairment rating to the body as a whole under the second edition of the *AMA Guides.* He found that the plaintiff could not concentrate on any particular assigned work for an eight hour day and that he could not respond to supervision or work with fellow workers on a consistent basis.

Dr. William E. Kennedy testified in a second telephonic deposition on September 18, 1996. After the first deposition was taken in July 1993, he continued to treat the plaintiff and even attempted to perform surgery in October 1993. Dr. Kennedy explained that he was unable to perform the surgery because the plaintiff was too large to be safely positioned on the operating table. Afterwards, he prescribed a treadmill and industrial corset for the plaintiff and recommended that he use a wheel chair. He stated that the plaintiff had been diligent in following his instructions and recommendations.

Dr. Kennedy determined that the plaintiff reached maximum medical improvement on May 21, 1996, the date of his last visit. Based on his overall evaluation of the plaintiff, Dr. Kennedy opined that the plaintiff sustained a 21 percent permanent physical impairment to the whole person as a sole result of the work injury under the *AMA Guides.* Dr. Kennedy also stated that "based on [the plaintiff's] preexisting, underlying degenerative disc disease, and more particularly, his morbid obesity, he had an eight percent permanent physical impairment which existed prior to his injury." He explained that the plaintiff's preexisting obesity was made worse by the work injury. Dr. Kennedy found that the plaintiff's total impairment was 27 percent to the body as a whole.

Dr. Lane M. Cook, the plaintiff's treating psychiatrist, testified by deposition on September 17, 1996. He first saw the plaintiff on October 27, 1994 and last saw him on August 27, 1996. He noted that the plaintiff was not depressed prior to the work injury. Dr. Cook diagnosed the plaintiff with major depression, single episode, moderately severe and with a pain disorder with associated physical and psychological features, all of which he opined was causally related to the work injury. Under the *AMA Guides,* he placed the plaintiff in a Class 3 moderate impairment

rating. Dr. Cook rated the plaintiff with a 50 percent permanent psychiatric impairment to the body as a whole based on the second edition of the *AMA Guides.* He admitted that this method has been determined to be inexact, subjective, and improper under the current *AMA Guides.* He found that the plaintiff cannot sustain or concentrate on an assigned work task for eight hours and that he cannot tolerate ordinary stress or work pressure. Dr. Cook determined that the plaintiff reached maximum medical improvement on May 14, 1996, but he opined that the plaintiff cannot return to his previous occupation or do any type of work.

Dr. Cook noted that the plaintiff's massive obesity is worsening his back problems and that he is literally eating himself to death. For a short while, the plaintiff was admitted to a psychiatric unit and took Fen-Phen for weight control, but neither program worked for him. Dr. Cook agreed that the plaintiff's obesity would be a permanent impairment from a physical point of view if he was unable to lose weight. He further agreed that the plaintiff's overweight condition, which prohibited him from having surgery, contributed to his depression and aggravated or exacerbated his pain. Dr. Cook considered the plaintiff's inability to perform certain job activities due to his obesity an impairment but not a disability.

The plaintiff's father and sister testified at trial. They stated that they are overweight and have been since childhood. The plaintiff, now 36 years of age and 430 pounds or more, testified at trial again. He testified that his pain and depression have increased since the first hearing. He stated that he has tried to modify his eating habits and to do everything the doctors have asked him to do. He knows that his weight is preventing him from having surgery. The plaintiff testified that he is still not aware of any gainful work he could do in his condition.

At the conclusion of the second hearing, the trial court made the following findings:

> The Court doesn't have really, any trouble in the facts finding that obesity is a pre-existing disability in this case. The Court and a lot of people I know have overweight problems. Those do not rise to the extent of a disability, but three hundred and twenty pounds on this man's frame with the previous back injury was a disability.
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> The employer testified that he really didn't want to hire him. He doesn't want to discriminate, of course, but he really didn't want to hire him, and the man said, give me a chance and I'll produce. That's when an employer should hire people, and he did. But he was observant of his weight at three hundred and twenty pounds. He now weighs four hundred and thirty.

> The Court, certainly, has no difficulty reaching the conclusion that he's now totally and permanently disabled. The only difficulty I have is in a division. There are two or three different ways of looking at the facts in this case on a division of disability.
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> If you start looking back at the overweight, Dr. Cook said he was overweight, but not depressed at the time of the injury. The obesity, he said, didn't have a great deal to do with the depression, that the pain caused the depression, and then goes on and says that obesity is a disability. With that, if you follow that contention, you can say that the pain from the back injury causes the depression, and the depression is a great deal of the disability that totals him.
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> But if you turn around and look at it the way the Second Injury Fund wants me to do, and correctly so, I think, look at the last injury and assess the disability only from it, you have a rather simple back injury, as I understand the facts in this case, probably, on a hundred-and-sixty pounder wouldn't have created much of problem, could have had surgery and not a lot of disability to it. This obesity stacked on top of that creates a real problem.
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> So, there's two or three different ways of looking at the way the percentages could be handled. But the Court's going to, generally, follow what Dr. Kennedy said, in that, he assessed a ratio of twenty-two to eight, that's about a three-to-one ratio. So, it would be a twenty-five Second Injury, seventy-five to the employer.
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> . . .
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> And to make this issue just clear on the point, in the event of appeal, which probably would be helpful to everybody, except the plaintiff, the language in the A Section [of Tenn. Code Ann. § 50-6-208], in my opinion, covers obesity and diseases of that nature -- disabilities of that nature.

ANALYSIS

The issue in this case involves the construction of Tenn. Code Ann. § 50-6-208(a)(1), which is a question of law to be reviewed by this Court *de novo* with no presumption of correctness. *Perry v. Sentry Ins. Co.,* 938 S.W.2d 404, 406 (Tenn. 1996); *Beare Co. v. Tennessee Dept. of Revenue,* 858 S.W.2d 906, 907 (Tenn. 1993).

Tenn. Code Ann. § 50-6-208(a)(1) provides the following:

> If an employee has previously sustained a permanent physical disability from any cause or origin and becomes permanently and totally disabled through a subsequent injury, such employee shall be entitled to compensation from such employee's employer or the employer's insurance company only for the disability that would have resulted from the subsequent injury, and such previous injury shall not be considered in estimating the compensation to which such employee may be entitled under this chapter from the employer or the employer's insurance company; provided, that in addition to such compensation for a subsequent injury, and after completion of the payments therefor, then such employee shall be paid the remainder of the compensation that would be due for the permanent total disability out of a special fund to be known as the "second injury fund" therein created.

The Supreme Court has outlined that "under section (a), the prerequisites for imposing liability on the Second Injury Fund are a prior injury, either compensable or

noncompensable, which caused permanent disability and a subsequent compensable injury which rendered the employee permanently and totally disabled." *Perry v. Sentry Ins. Co.,* 938 S.W.2d 404, 406 (Tenn. 1996); *Minton v. State Indus., Inc.,* 825 S.W.2d 73, 77 (Tenn. 1992).

In construing the meaning of Tenn. Code Ann. § 50-6-208(a)(1), we do not conclude that obesity is a "permanent physical disability from any cause or origin" within the meaning of the Workers' Compensation Act. To construe this section otherwise, this Court would be required to expand the statute's coverage beyond what appears to be the legislative intent.

Regarding the findings of fact made by the trial court, this Court's review is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Stone v. City of McMinnville,* 896 S.W.2d 548, 550 (Tenn. 1995).

In this case, the trial judge held that the Second Injury Fund was liable for 25 percent of the plaintiff's total and permanent disability award. Apparently, the trial judge made this decision based on his finding that certain medical evidence established that the plaintiff's obesity is a disability within the meaning of the statute.

Based on a careful review of the record, in particular the medical testimony, we find that the evidence preponderates against the findings of the trial court. Therefore, we reverse the trial court's finding that the Second Injury Fund is liable for 25 percent of the 100 percent award to the plaintiff, and we dismiss the Second Injury Fund from this case.

The cost of this appeal is taxed to the plaintiff.

_____
John K. Byers, Senior Judge

CONCUR:

_____
E. Riley Anderson, Chief Justice

_____
Roger E. Thayer, Special Judge

IN THE SUPREME COURT OF TENNESSEE

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Cecil Crowson, Jr.
Appellate Court
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TIMOTHY W. COX	)	Campbell County Chancery
	)	No. 113,080
Plaintiff/Appellant	)	
	)	
v.	)	
	)	
HARTFORD ACCIDENT & INDEMNITY COMPANY	)	Hon. Billy Joe White, Chancellor
	)	
Defendants	)	
	)	
and	)	
	)	S. Ct. No. 03-S-01-9706-CH-00063
SUE ANN HEAD, DIRECTOR OF THE DIVISION OF WORKERS' COMPENSATION CLAIMS, TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND	)	
	)	REVERSED AND DISMISSED
Defendant/Appellee	)	

JUDGMENT ORDER

This case is before the Court upon defendants' 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 plaintiff/appellant, for which execution may issue if necessary.

PER CURIAM

Anderson, C.J., not participating