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

KNOXVILLE, SEPTEMBER 1998 SESSION

JAMIA B. GARDNER	)	ANDERSON CIRCUIT
	)	
Plaintiff/Appellee	)	
	)	
V.	)	
	)	
MODINE MANUFACTURING COMPANY, INC. and SENTRY INSURANCE CO.	)	Hon. James B. Scott, Jr., Circuit Judge
	)	
Defendants/Appellants	)	
	)	
and	)	
	)	
DINA TOBIN, DIRECTOR OF THE SECOND INJURY FUND	)	
	)	
Defendant/Appellee	)	No. 03S01-9710-CV-00127

For the Appellants:

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For the Appellees:

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

Members of Panel:

Charles D. Susano, Jr., Judge
Roger E. Thayer, Special Judge
John S. McLellan, III, Special Judge

AFFIRMED AS MODIFIED AND REMANDED.

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

The employer, Modine Manufacturing Company, Inc., has appealed from the action of the trial court in awarding the employee, Jamia B. Gardner, 80% permanent partial disability to each arm. The trial court dismissed the case against the Second Injury Fund.

On appeal the employer contends (1) there was no evidence of a permanent injury to the employee's left arm, (2) the award of 80% to each arm was excessive and (3) the trial court was in error in dismissing the case against the Second Injury Fund. The Second Injury Fund also contends the awards of disability are not supported by the evidence but insists the court was correct in holding it was not liable for payment of benefits.

Jamia B. Gardner was 51 years of age at the time of the trial and had completed the 9th grade. She dropped out of school when she was 15 years old testifying there was not enough money to send all of the children in her family and she thought it was more important for her brother to finish school than herself. She does not have any vocational training but had worked as cashier, waitress, hospital employee and at some other non-skilled employment. She has worked for Modine for about 25 years. Some years ago she sustained an injury to her shoulder and received an award of workers' compensation benefits based on 40% disability to the body as a whole.

In the present case, she has sustained injuries as a result of the repetitive nature of her work. She had surgery on her right arm during August 1996 and after some period of time, she was released to return to work with certain restrictions. After trying to work at several different jobs, she testified she was terminated from working because the restrictions prevented her from doing what was necessary. Later during her direct examination, she testified she was still officially an employee but was on medical leave. She has not worked anywhere since leaving employment. At the trial below, she was still complaining of pain in both arms; she said she had difficulty sleeping at night; that if she did anything of a repetitive nature with her arms, swelling occurred; and that she was not aware of any job that she was now able to do.

She came under the medical care of Dr. Geron Brown and Dr. Edward K. Kahn, who are associated together. Both doctors concluded she was suffering from tenosynovitis of both arms. Dr. Kahn testified by deposition and said he performed the surgery on her right wrist and that the surgery relieved her of some of the symptoms. He said surgery was not performed on the left wrist because there were no objective findings. He indicated she was still complaining of pain in both arms and he felt her work activities caused chronic tendonitis of both wrists and forearms. He testified this condition was not covered by the A.M.A. Guides to the Evaluation of Permanent Impairment but he was of the opinion she had a 5% medical impairment to each arm. Upon releasing her to return to work, he imposed restrictions on her work activity of no lifting over ten pounds and no work which required repetitive action to her arms. He opined there was no chance she could work in any job where this type of repetitive action was involved.

Two vocational consultants testified orally before the trial court. Witness Rodney E. Caldwell was of the opinion Mrs. Gardner was 95% vocationally disabled. Michael T. Galloway did not give a vocational rating in percentage terms but testified he thought she could do work as a salesperson or work as a restaurant hostess.

The case is to be reviewed de novo accompanied by a presumption of the correctness of the findings of fact unless we find the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

The first issue raises a question as to whether the evidence is sufficient to establish a permanent injury to the left arm. This dispute arises from an answer Dr. Kahn gave while being cross-examined. The question and answer were:

> "In your opinion to within a reasonable degree of medical certainty did you find any permanent injury to her left hand, wrist or arm? Answer: No."

On redirect examination the doctor was asked why he answered "no" to this question in view of his other statements of disability to left arm. He stated he gave a "no" answer to the question because he did not have any objective findings such as swelling she had to the right arm but she did have subjective complaints of pain to the left arm. At another point during cross-examination by counsel for the Second Injury Fund, he was asked again about the same conflicting statements and he replied:

> "I think the question asked me by the counsel was either not a good question or I did not answer it adequately. The patient did not have any objective findings, however, in the AMA Guidelines, particularly with spine injuries, there are some categories for subjective complaints of pain where there really is not much in the way of objective findings and I would put Ms. Gardner's wrist and forearm pain in that same category."

Our review of the medical testimony of Dr. Kahn indicates his 5% impairment rating to the left arm was based on subjective findings and we find this to be competent evidence to support an award of permanent disability when considered with all of the other evidence in the record. See T.C.A. § 24-7-114 and *Cates v. Better-Bilt Aluminum Prods. Co.,* 607 S.W.2d 476 (Tenn. 1980).

The second issue requires us to examine the record and determine whether the 80% award to each arm is excessive when the medical impairment rating was only 5%. Medical impairment rating and legal vocational disability awards are completely separate and distinct issues. *Wilkes v. Resource Authority of Sumner County,* 932 S.W.2d 458 (Tenn. 1996).

In determining vocational disability, the trial court is required to consider many factors in fixing an award. The real test is whether there has been a decrease in the employee's capacity to earn wages in any line of work available to the employee, age, education, skills, training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition. *Orman v. Williams-Sonoma, Inc.,* 803 S.W.2d 672, 678 (Tenn. 1991). In determining whether the employee's capacity to earn wages has been decreased, this is to be examined in relation to the open labor market and not whether the employee is able to return and perform the job held at the time of the injury. *Clark v. National Union Fire Ins. Co.,* 774 S.W.2d 586, 588 (Tenn. 1989).

We must also observe that the trial court is in a better position to judge credibility and weight evidence where witnesses have testified orally. *Landers v. Fireman's Fund Ins. Co.,* 775 S.W.2d 355 (Tenn. 1989).

Considering the facts that plaintiff has limited education, no vocational training and cannot work in a job that requires repetitive motion of her arms, we believe her chances in the open labor market would be rather small. The expert vocational evidence seems to support this conclusion. We cannot say the evidence preponderates against the awards fixed by the trial court.

The last issue concerns the action of the court in holding the Second Injury Fund was not liable for any part of the awards. The employee contends the trial court was in error in not applying the provisions of T.C.A. § 50-6-208(b) after converting or equating the scheduled member awards to the body as a whole. In support of this contention it is argued that awards of 80% to both arms would convert to 80% to the body as a whole based on the number of weeks benefits would be payable under our statute. The employer agrees with the argument and says the converted 80% to the body as a whole when combined with the prior 40% award to the body as a whole would total 120%, requiring the Fund to be liable for 20% of the last awards.

The Fund takes a different position on this issue. It contends the evidence is not sufficient to convert or equate the scheduled member awards to the body as a whole as the medical evidence did not address this question.

Our analysis of the case of *Henson v. City of Lawrenceburg,* 851 S.W.2d 809 (Tenn. 1993) requires us to agree with the Fund's position. In this case the Supreme Court stated the legislative history of our statute (T.C.A. § 50-6-208) clearly demonstrated that the overriding purpose of the statute was to encourage the employment of persons with a previous permanent physical disability by limiting the employer's workers' compensation liability and that in order to accomplish this purpose, it was necessary to convert or equate a scheduled member award to a percentage of the body as a whole by reference to the AMA Guidelines.

We find that subsection (b) of the statute would have application to the facts of this case since the prior 40% award of benefits was approved by a court and that if upon remand it is determined the prior award and the converted award exceed 100%, then the Fund would be liable for any excess over 100%. A remand of the case is necessary to determine the conversion under the AMA Guidelines.

The judgment is modified in part and as modified is affirmed and remanded. Costs of the appeal are taxed equally to defendants.

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Roger E. Thayer, Special Judge

CONCUR:

_____
Charles D. Susano, Jr., Judge

_____
John S. McLellan, III, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

FILED

December 8, 1998

Cecil Crowson, Jr.
Appellate Court
Clerk

JAMIA B. GARDNER,	) ANDERSON CIRCUIT
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Defendant-Appellant.	)
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DINA TOBIN, DIRECTOR OF THE	)
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JUDGMENT ORDER

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 facts and conclusions of law are adopted and affirmed, and the decision of the Panel is made the Judgment of the Court.

Costs on appeal are taxed equally to the defendants,for which execution may issue if necessary.

12/08/98