

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
December 14, 2009 Session

**LINDA PRINCINSKY v. PREMIER MANUFACTURING SUPPORT
SERVICES ET AL.**

**Appeal from the Circuit Court for Maury County
No. 12284 Jim T. Hamilton, Judge**

**No. M2009-00207-WC-R3-WC - Mailed - July 13, 2010
Filed - September 23, 2010**

In this workers' compensation action, the employee, Linda Princinsky, sought reconsideration for a compensable injury that she sustained in 2002. Following the injury, she was able to return to work for her pre-injury employer. Her workers' compensation claim was settled for two and one-half times the anatomical impairment in accordance with Tennessee Code Annotated section 50-6-241(a). In 2005, she sustained another work-related injury, and was unable to return to her job. She entered into a court-approved settlement of that claim based upon 40.5% permanent partial disability to the body as a whole. She then sought reconsideration, pursuant to Tennessee Code Annotated section 50-6-241(a)(2), of the settlement of her 2002 injury. The trial court found that she was permanently and totally disabled as a result of that injury and awarded benefits accordingly. Employer and the Second Injury Fund have appealed.¹ We affirm the trial court's finding that Ms. Princinsky was rendered permanently and totally disabled by her 2002 injury, but conclude that the trial court erred in failing to offset from its award 272 weeks of benefits previously paid by the employer for the 2002 and 2005 injuries. We, therefore, modify the award and remand the case to the trial court for the entry of an appropriate judgment consistent with this opinion.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court
Affirmed as Modified**

DONALD P. HARRIS, SR. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, J., and JAMES F. BUTLER, SP. J., joined.

Terry L. Hill and Colin M. McCaffrey, Nashville, Tennessee, for the appellants, Premier Manufacturing Support Services, Inc. and Travelers Insurance Company.

¹ Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; and Joshua Davis Baker, Assistant Attorney General, for the appellant, Tennessee Department of Labor and Workforce Development, Second Injury Fund.

Larry R. McElhaney II, Nashville, Tennessee, for the appellee, Linda Princinsky.

MEMORANDUM OPINION

Factual and Procedural Background

This appeal arises from a petition for reconsideration brought pursuant to Tennessee Code Annotated section 50-6-241(a)(2) (1999). The employee, Linda Princinsky, worked for Premier Manufacturing Support Services (“Premier”), a contractor which provided janitorial services at the Saturn plant in Spring Hill, Tennessee. In November 2002, she sustained an injury to her neck, right elbow and right arm. She missed work for a short time. Surgery was not necessary to treat her injury. Dr. Barry S. Callahan, her treating physician, assigned an impairment of 5% to the body as a whole, and assigned restrictions of no repetitive use of the right arm and no lifting more than twenty to twenty-five-pounds. Dr. Walter W. Wheelhouse, an evaluating physician, assigned 11% impairment to the body as a whole, and recommended she be restricted from lifting over twenty-five pounds with her arm at her side, repetitive gripping with the right hand, and sudden jerking motions of her head. Premier was able to accommodate these restrictions, and she returned to her previous job, at the same rate of pay. Her workers’ compensation claim was settled for 27.5% permanent partial disability to the body as a whole, providing her with 110 weeks of benefits. The settlement was approved in November 2004.

In November 2005, Ms. Princinsky sustained a compensable injury to her left shoulder and arm. She had surgery on her left shoulder and left elbow as a result of that injury. Her treating physician placed a ten-pound lifting restriction on her activities. Premier was not able to accommodate that restriction, and Ms. Princinsky was terminated. Her workers’ compensation claim for that injury was settled based upon 40.5% permanent partial disability to the body as a whole, which was 4.5 times the anatomical impairment resulting from the injury and surgery, and provided her with 162 weeks of benefits.

On November 20, 2007, Ms. Princinsky filed this petition for reconsideration under Tennessee Code Annotated section 50-6-241(a)(2), contending that she was permanently and totally disabled as a result of the 2002 injury. Premier responded that it had previously paid Ms. Princinsky 282 weeks of benefits for various compensation awards; that it should, therefore, be liable for no more than an additional 118 weeks; and that it was entitled to a setoff for the amounts previously paid. Following the response of Premier, Ms. Princinsky amended her complaint to add the Second Injury Fund.

At the trial of the case, Ms. Princinsky testified that Premier had accommodated the restrictions imposed because of her 2002 injury by obtaining a smaller mop bucket and smaller mops

for her to use, by providing her with assistance to lift heavy trash bags, by allowing her to use a smaller buffing machine, and by excusing her from operating a fork lift truck and “sweeper scrubber.” She also testified that she did not believe that she was capable of obtaining or holding any job. On cross examination, she admitted that she had not received medical treatment for her right arm or neck since approximately 2003. She admitted that she had worked without interruption between the 2002 and 2005 injuries, and stated that she would still be working for Premier if the 2005 injury had not occurred.

Ms. Princinsky was 57 years old on the date of trial. She had attended school into the eleventh grade. Her only additional schooling or training consisted of short training programs offered by Premier on topics such as cardiopulmonary resuscitation and operating a fork lift. She began working for Premier in 1997. Her prior work experience included being a sales clerk for two plumbing supply businesses, and operating mixing machines for a paint manufacturer. After losing her job with Premier, she worked briefly in a school cafeteria. She left that job after only a few weeks because she was unable to lift and carry metal pans containing food to and from the steam table. She had applied for a janitorial job online, but was not hired. She had made no additional efforts to find work, and testified that she did not think that she was able to work on a full-time basis. She reported having headaches, and swelling and redness in her right elbow. She was limited in her ability to perform household chores and do yard work.

Rebecca Williams, a rehabilitation counselor and a vocational evaluation specialist, certified by the Commission on Certification of Work Adjustment and Vocational Evaluation Specialists, testified on behalf of Ms. Princinsky. Based upon tests which she administered, Ms. Williams testified that Ms. Princinsky was able to read at an eighth grade level, write at the seventh grade level, and perform arithmetic at a fifth grade level. According to Ms. Williams, Ms. Princinsky had no transferable job skills. Because her previous employment in the plumbing supply business occurred more than fifteen years previously, she would not be considered as having transferable job skills from that employment. She testified that the restrictions placed upon Ms. Princinsky by Drs. Callahan and Wheelhouse significantly impacted her ability to be gainfully employed. Because Ms. Princinsky was right hand dominant and could not repetitively use that hand, she was, in Ms. Williams’ opinion, eliminated from most sedentary jobs such as working as a cashier. She testified that, based upon the twenty-five-pound lifting restriction imposed by Dr. Callahan, and the additional restrictions suggested by Dr. Wheelhouse, that Ms. Princinsky had lost access to 99% of the jobs previously available to her. Of the few jobs she could do, some were not available in the Nashville, Davidson County, statistical area. In view of the labor market in that area and the availability of workers, Ms. Williams believed that no one would hire someone with Ms. Princinsky’s restrictions.

The trial court found that Ms. Princinsky had made a meaningful return to work after the 2002 injury, but that this injury had rendered her permanently and totally disabled. It found that she had been terminated by Premier on November 7, 2007, and awarded her benefits from that time until she reached 66 years of age on May 17, 2017, for a total of 496.86 weeks. Premier has appealed, contending that Ms. Princinsky’s claim for permanent total disability benefits is barred by res

judicata and collateral estoppel, and that the trial court erred by finding Ms. Princinsky to be permanently and totally disabled. The Second Injury Fund joins in the appeal and asserts that the trial court's refusal to recognize that Ms. Princinsky's claims are barred by res judicata and collateral estoppel will result in a double award of benefits to her.

Standard of Review

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given to the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the deposition, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

Analysis

Res Judicata/Collateral Estoppel

Premier and the Second Injury Fund contend that Ms. Princinsky's claim that she was totally disabled by the 2002 injury is barred by the judgment approving the settlement of the claim for the 2005 injury. Premier argues that she could have, and should have, pursued her claim for permanent total disability in that lawsuit. By agreeing that she was 45% partially disabled, Premier alleges, Ms. Princinsky implicitly agreed that she was not totally disabled. The Second Injury Fund argues the failure of the trial court to recognize those doctrines will result in a double award of benefits to Ms. Princinsky. Ms. Princinsky argues that res judicata is not applicable because "[i]t cannot be said that the issue of permanent total disability for [the 2002] injury or reconsideration at all for that injury could have been brought in the [2005 injury] suit." In our view, the argument of the Second Injury Fund is most applicable to the facts of this case.

In Clark v. Lowe's Home Ctrs., 201 S.W.3d 647 (Tenn. 2006) the Tennessee Supreme Court held that reconsideration of a prior award under Tennessee Code Annotated section 50-6-241(a)(2) is not precluded by a subsequent work-related injury for which the employee seeks compensation. In that case, an employee of Lowe's Home Centers, Inc. (Lowe's), suffered a work-related injury to his right shoulder in 1994. His claim for benefits was settled for 17.5% permanent partial disability to the body as a whole. In 2000, the employee suffered a second injury to his right shoulder, his right arm and his neck. This claim was settled for 46.72% permanent partial disability to the body as a

whole and within the limits of the cap contained in Tennessee Code Annotated section 50-6-241. Id. at 648. In 2003, the employee sustained a third injury to his right hand and arm. Thereafter, he was terminated by Lowe's. He filed suit seeking workers' compensation benefits for the third injury and a suit seeking reconsideration of the award for the second injury. Id. at 649.

In the reconsideration suit, the trial court enlarged the award by 214 weeks, giving the employee a total of 400 weeks. The award of permanent total disability benefits was apportioned between Lowe's and the Second Injury Fund. The Second Injury Fund appealed, alleging the employee was not entitled to a reconsideration of the second injury because he sought workers' compensation benefits for the third injury. Id. The Tennessee Supreme Court disagreed. Noting that the employee had been found permanently and totally disabled as a result of the third injury, id., the Court nonetheless held that he was entitled to "seek[] a reconsideration of the [s]econd [i]njury based upon his original impairment rating for the [s]econd [i]njury but without regard to the multiplier that originally limited his award." Id. at 651. The Court did not address the issue of a double recovery of benefits.

In Turner v. HomeCrest Corp., 226 S.W.3d 273 (Tenn. 2007), the Tennessee Supreme Court did address the issue of whether an employee may seek a double recovery of workers' compensation benefits. In that case, the employee sustained two separate injuries.² The first was an acute injury to her neck after which she returned to work. Id. at 274. A few months later, she was found to have carpal tunnel syndrome. She continued to work, on a modified basis, for almost two years after her first injury. At that time, cervical fusion surgery was performed on her neck, after which she was terminated from her employment. Later, carpal tunnel releases were performed on her hands. Id. at 275. Two lawsuits were filed seeking recovery for each of the employee's injuries. The lawsuits were consolidated for trial. The trial court found the employee to be permanently and totally disabled as a result of a combination of the cervical injury and the pre-existing back injury, and awarded 60% vocational disability to the body as a whole as a result of the employee's carpal tunnel injuries and the resulting hypertension. Id. at 276.

The Tennessee Supreme Court reversed the award in the carpal tunnel case, stating:

An employee can suffer several injuries and receive different awards, and those awards can exceed 100% thereby implicating the provisions of the Second Injury Fund, see Tenn. Code Ann. § 50-6-208(b); but absent rehabilitation, once an employee is found permanently and totally disabled, that employee is receiving all of the vocational disability benefits available under the law. Without rehabilitation, the employee's entitlement to any **further** vocational disability benefits ends upon the finding of permanent and total disability. Partin v. Old Republic Ins. Co., 580 S.W.2d 775, 776 (Tenn. 1979). With certain exceptions not applicable here, the relevant statute provides that employees who are permanently and totally disabled are

²Prior to the two injuries involved in this case, the employee sustained a back injury but no suit was filed to recover workers' compensation benefits.

entitled to receive vocational disability benefits until that employee “is, by age, eligible for full benefits in the Old Age Insurance Benefit Program under the Social Security Act” Tenn. Code Ann. § 50-6-207(4)(A)(i) (2005). An employee who is receiving benefits pursuant to this statutory provision is receiving all of the vocational disability benefits available pursuant to law. Such an employee is, in effect, receiving benefits which are substantially equivalent to what that employee would have received had he or she continued working until retirement age.

Id. at 279-80. Thus the Court held that the finding of permanent total disability in the first case barred the employee from recovering in the second case, apparently through collateral estoppel.

The Supreme Court, in Turner, recognized that it has long been a part of Tennessee workers’ compensation law that an employee who has been previously adjudged permanently and totally disabled can be rehabilitated, return to gainful employment, and thereafter suffer a second compensable injury. Quoting Industrial Carving Co. v. Hurst, 447 S.W.2d 871, 873 (Tenn. 1969), the Court stated:

It is not inconceivable that an employee, though previously adjudged permanently and totally disabled and fully compensated therefor, may rehabilitate himself and return to work. In so doing he renews his wage-earning capacity and if he suffers a subsequent injury then he is deprived of this **newly acquired capacity** and should be compensated for such loss.

Turner, 226 S.W.3d at 277 (emphasis added). There is no hint in the record before us that Ms. Princinsky had, in any way, rehabilitated herself or obtained a “newly acquired capacity” for wage-earning. The restrictions on her activities, upon which the finding of permanent total disability was based, were the same as they had been at the time she settled her prior workers’ compensation claim. It is only because of the accommodations made by Premier that Ms. Princinsky was able to work. According to Ms. Princinsky’s vocational expert, Rebecca Williams, Premier had accommodated Ms. Princinsky after her neck and right arm injury to such a level that she was not performing the essential functions of a custodial type of job. She further testified that a new-hire employer would not make those same accommodations.

Applying Turner to the case before us, had Ms. Princinsky tried her reconsideration case before settling the case for her subsequent injury, she clearly would have been barred from seeking recovery for the subsequent injury once the trial court determined her to be permanently and totally disabled. In our view, this principle should apply regardless of the order in which the claims are pursued. An employee should not be allowed to receive more than the benefits for permanent and total disability by first obtaining benefits for a subsequent injury and then pursuing benefits for permanent and total disability in a reconsideration case. In our view, based upon the holding in Turner, Ms. Princinsky was barred from again receiving the benefits she had already obtained for the subsequent injury, once the court found her to have been permanently and totally disabled in the reconsideration case. Accordingly, the award determined by the trial court should have been offset

by the 272 weeks of benefits previously paid by Premier in the initial claim and subsequent injury cases.³

Permanent and Total Disability

The trial court found that Ms. Princinsky had a meaningful return to work after the 2002 injury. That finding appears to be inconsistent with Ms. Princinsky's assertion that she was totally disabled as a result of that injury. She cites Atkinson v. Signage, Inc., No. M2002-01491-WC-R3-CV, 2003 WL 21782292, at *2 (Tenn. Workers Comp. Panel Aug. 4, 2003), for the proposition that "employment after injury is a factor to be considered in determining whether an employee is permanently and totally disabled, but that fact is to be weighed in light of all other considerations." In Atkinson, the employer had created a new job for the employee, based upon the restrictions placed upon him due to his injury. The panel affirmed the trial court's finding that he was, nonetheless, totally disabled. *Id.*; see also Cage v. Yasuda Fire & Marine Ins. Co. of Am., No. W2004-01669-SC-WCM-CV, 2005 WL 1412135 (Tenn. Workers' Comp. Panel June 16, 2005) (worker receiving income due to the generosity of his church but was unemployable in the open market properly found to be permanently and totally disabled)

However, the circumstances in which an individual who is working may be found permanently and totally disabled are exceedingly rare, as discussed in Rhodes v. Capital City Insurance Co., 154 S.W.3d 43 (Tenn. 2004):

It would be an extremely rare situation in which an injured employee could, at the same time both work and be found permanently and totally disabled. In order for such a situation to occur, the evidence would have to show that the employee was not employable in the open labor market and that the only reason that the employee was currently working was through the magnanimity of his or her employer.

Id. at 48. The evidence presented at trial in this case did not indicate that Ms. Princinsky's return to work after her 2002 injury was merely the result of the magnanimity of Premier. She used smaller buckets and mops, and did not operate certain machines. Nevertheless, she testified that she gave Premier "a good day's work," and "earn[ed] [her] money." See Conaway v. U.S. Pipe & Foundry Co., No. M2006-01177-WC-R3-WC, 2007 WL 2141537 (Tenn. Workers' Comp. Panel July 26, 2007). However, there is evidence that some magnanimity was involved based upon Ms. Williams' testimony that the work Ms. Princinsky was able to do was not consistent with other persons performing custodial duties and that no other employer would make the accommodations that Premier had. Thus, the trial court could have and did find Ms. Princinsky was not employable in the labor market open to her.

³Tennessee Code Annotated section 50-6-241(a)(2) provides that in enlarging a previous award, the trial court must give the employer credit for prior benefits paid to the employee in permanent partial disability benefits.

The Second Injury Fund makes the additional argument that Ms. Princinsky's award on reconsideration should have been limited to a maximum of six times the anatomical impairment (a total of 66%) including the previous 23.5% award, based upon the cap contained in section 50-6-241(b). The trial court found that Ms. Princinsky had proven three of the four factors set out in Tennessee Code Annotated section 50-6-242 (1999 & Supp. 2004), and that therefore the "cap" of six times the anatomical impairment contained in section 241(a) did not apply. The Fund argues that "the plain language" of section 241(a)(2) limits awards on reconsideration to the maximum permitted by sec 241(b). The pertinent portion of the statute states as follows: "In enlarging a previous award, the court must give the employer credit for prior benefits paid to the employee in permanent partial disability benefits, **and any new award remains subject to the maximum established in subsection (b).**" Tenn. Code Ann. § 50-6-241(a)(2) (emphasis added). Our Supreme Court, however, has taken a position contrary to that of the Second Injury Fund. In Nelson v. Wal-Mart Stores, Inc., 8 S.W.3d 625, 631 (Tenn. 1999), it specifically held that section 50-6-242 applies to reconsideration actions brought pursuant to section 50-6-241(a)(2). See also Leab v. S & H Mining Co., 76 S.W.3d 344, 352 (Tenn. 2002) (holding that on an initial determination of disability, the trial court is not limited by the multipliers contained in Tennessee Code Annotated section 50-6-241(b) where the requirements of section 50-6-242(1) are satisfied).

Section 242(a) permits an injured employee to receive an award in excess of the six times impairment cap, if he or she is able to prove three of the following four specified elements by clear and convincing evidence.

- (1) The employee lacks a high school diploma or general equivalency diploma or the employee cannot read or write on a grade eight (8) level;
- (2) The employee is fifty-five (55) years of age or older;
- (3) The employee has no reasonably transferable job skills from prior vocational background and training; and
- (4) The employee has no reasonable employment opportunities available locally considering the employee's permanent medical condition.

In this case, it is not disputed that Ms. Princinsky was not fifty-five years old at the time she reached maximum medical improvement from her 2002 injury. In order to satisfy the requirements of section 242, she was therefore required to prove the three remaining elements by clear and convincing evidence. Ms. Williams testified that Ms. Princinsky was able to write at only a seventh grade level, had no transferable job skills, and was unemployable in the current labor market in the Nashville, Davidson County, statistical area. Her testimony was not rebutted. The trial court found that Ms. Williams' testimony was credible and that it satisfied the three remaining elements. In view of the deference we must give to the trial court with regard to credibility, we are unable to find that the evidence preponderates against the trial court's findings that Ms. Princinsky was permanently and

totally disabled as a result of her 2002 injury and that she had proven three of the four required elements found in Tennessee Code Annotated section 50-6-242(a).⁴

Conclusion

The trial court's judgment that Ms. Princinsky is permanently and totally disabled as a result of her 2002 injury is affirmed. The judgment should, however, be reduced by the 272 weeks of benefits previously paid by the employer for the 2002 and 2005 injuries. The case is remanded to the trial court for the entry of a judgment consistent with this opinion.

DONALD P. HARRIS, SENIOR JUDGE

⁴Because the facts are not before us, we express no opinion about whether a suit for reconsideration of a prior injury is the proper vehicle when it is the second injury that causes an employee to become permanently and totally disabled.

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AT JACKSON

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SERVICES, INC. ET AL.**

**Circuit Court for Maury County
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No. M2009-00207-SC-WCM-WC - Filed - September 23, 2010

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Linda Princinsky pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed one-half to Linda Princinsky and one-half to Premier Manufacturing Support Services, Inc., for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Cornelia A. Clark, J., not participating