



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's insurer, National Union, asserts that the evidence preponderates against the trial court's findings that (1) the claimant's injury was one arising out of her employment, (2) the claimant is permanently and totally disabled, and (3) the claimant gave the required notice to the employer. The Second Injury Fund (the Fund) asserts that the evidence preponderates against the trial court's finding that (1) the claimant is permanently and totally disabled and (2) the claimant is entitled to more than twenty-two weeks of temporary total disability. The panel has concluded that the judgment should be modified as set forth below.

The employee or claimant, Reva Pitts, is thirty-nine and has a high school education. She has some computer training. From a previous injury she received a workers' compensation based on forty percent to the body as a whole.

In her duties as a tire builder for the employer, Dico Tire, Inc., she operated a machine by pushing foot pedals. As a result, she gradually developed foot pain in both feet, which, on July 24, 1992, Dr. James Engblom diagnosed as tarsal tunnel syndrome, superimposed on other foot maladies.

The doctor operated on both feet and estimated her permanent impairment at fourteen percent to both feet. She reached maximum medical improvement for her left foot on August 3, 1992 and for her right foot on November 6, 1992.

Dr. Catherine Gyurik, a psychiatrist, began evaluating the claimant on July 28, 1993, and diagnosed recurrent depression chronologically related to her foot problems. The doctor did not testify the claimant was permanently impaired by her mental condition. Dr. Norman Hankins, a vocational expert, testified that the claimant was eighty-one percent disabled from the foot injury and subsequent surgery, based on restrictions from a physical therapist.

The chancellor found the employee to be permanently and totally disabled and apportioned forty percent of the award of disability benefits to the Fund and sixty percent to the employer. Additionally, the chancellor awarded temporary total disability benefits from May 21, 1992 to August 22, 1992, and from September 4, 1992 through November 6, 1992.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of the correctness of findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2). The standard requires this tribunal to conduct an independent examination of the evidence to determine where the preponderance lies. Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1991).

When an injury, not otherwise specifically provided for in the Workers' Compensation Act (the Act), totally incapacitates a covered employee from working at an occupation which brings her an income, such employee is considered totally disabled. Tenn. Code Ann. section 50-6-207(4)(B); Prost v. City of Clarksville, 688 S.W.2d 425 (Tenn. 1985). In order for an award of permanent disability to lie, the claimant must present medical proof that her injuries are permanent.

The only medical proof of a permanent injury is that she has a permanent impairment of her feet. An injury to both feet is one "otherwise specifically provided for in the Act." Tenn. Code Ann. section 50-6-207(3)(A)(z). From a consideration of the pertinent factors, including the claimant's skills, training, education, age, local job opportunities and the claimant's capacity to work in her partially disabled condition, to the extent that those factors have been proved, the panel finds that the evidence preponderates in favor of an award based on forty percent to both feet. The judgment is modified accordingly.

The period of temporary total disability found by the chancellor represents the period of time necessary for the claimant to have surgery and recuperate from that surgery. The evidence fails to preponderate against that finding. The award of temporary total disability benefits is accordingly affirmed.

Where an injured employee has one or more prior awards under the Act, and the combination of all such awards equals or exceeds one hundred percent permanent partial disability to the body as a whole, then the Fund will pay the benefits due the employee in excess of one hundred percent. Tenn. Code Ann. section 50-6-208(B); Sitz v. Goodyear Truck Tire Center, 762 S.W.2d 886 (Tenn. 1988). Scheduled member awards are equated to a percentage of the body as a whole for the purpose of determining whether a new permanent partial disability award, when added to a prior award, exceeds one hundred percent. Henson v. City of Lawrenceburg, 851 S.W.2d 809 (Tenn. 1993).

Because the total of the claimant's prior award and this award, which equates to one based on forty percent to the body as a whole, do not exceed one hundred percent, the judgment against the Second Injury Fund is

reversed.

Costs on appeal are taxed to the plaintiff and National Union, one-half each.

CONCUR:

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Joe C. Loser, Jr., Judge

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Penny J. White, Associate Justice

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William H. Inman, Senior Judge