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

(July 20, 1998 Session)

RICHARD MAY,	)	NO. 01S01-9709-GS-00193
	)	
Plaintiff/Appellee	)	WARREN GENERAL SESSIONS
	)	
v.	)	
	)	HON. BARRY MEDLEY
LIBERTY MUTUAL INSURANCE	)	JUDGE
COMPANY and SOUTHERN	)	
MANUFACTURING GROUP,	)	
	)	
Defendants/Appellants	)	

For the Appellant:
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For the Appellee:
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M E M O R A N D U M O P I N I O N:

Members of Panel:

Judge Ben H. Cantrell
Senior Judge William H. Inman
Special Judge Joe C. Loser, Jr.

AFFIRMED **INMAN, Senior 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.

Richard May filed this complaint alleging permanent partial disability after a mold dropped on his left hand at work, causing a crush injury. The trial court found he had sustained 45% permanent partial disability to the left arm and awarded temporary total, permanent partial, mileage and medical benefits, as well as discretionary costs.

Southern Manufacturing Group ["Southern"] appeals and presents for our review the issues of (1) whether the preponderance of the evidence supports a lesser amount of permanent partial disability, and (2) whether the weekly benefit rate should be $204.76 rather than $226.52.

On May 6, 1996, Mr. May was injured while working for Southern when his hand was crushed between two halves of a large metal mold weighing approximately 150 pounds. He notified his employer immediately and went to see Dr. Gregory Wiley, whom he selected from the employer's list of approved physicians. After a brief period of conservative treatment, Dr. Wiley referred Mr. May to Dr. Ramotsumi Makhene, a board-eligible plastic surgeon who also practices reconstructive surgery with a subspecialty in hand surgery.

Dr. Makhene saw Mr. May on July 31, 1996 and noted swelling of his left hand and a nodule on the back of his hand above the knuckle, along with limited range of motion. He diagnosed tendinitis and prescribed a splint, anti-inflammatory medication, and occupational therapy.

On August 28, 1996 Dr. Makhene surgically removed the mass from Mr. May's hand and advised him to remain off work until September 30, 1996. Post-operatively, Mr. May was treated with ultrasound, pain medication and continuing occupational therapy. He returned to light work in early October and was released to return to regular duty with no restrictions on November 27, 1996, at which time Dr. Makhene's records indicate Mr. May told him that he had no problems using his hand at work. He did not return to see Dr. Makhene.

Dr. Makhene testified that the injury did not involve the wrist, arm, elbow, forearm or shoulder, just the hand, and that Mr. May had not sustained any permanent partial impairment as a result of his work accident.

Mr. May saw Dr. S. M. Smith for an independent medical evaluation on February 11, 1997,[1] at which time he complained of difficulty with flexion in the index, long finger and thumb and problems gripping with the left hand. He had been over-using the left hand because of an unrelated injury to his right shoulder, and therefore Dr. Smith declined to assess the extent of permanent impairment. He asked Mr. May to return for a repeat examination after his right shoulder healed and restricted him temporarily to limited gripping, no repetitive gripping, and no lifting over 15 pounds with the left upper extremity.

When Mr. May returned on March 18, 1997, he had not recovered from the right shoulder problem. Dr. Smith again delayed making an assessment as to any permanent impairment from the work injury to his left hand.

Mr. May returned to Dr. Smith on June 10, 1997 for evaluation. He conducted various objective tests, including lateral pinch (tested three times on each hand), grip strength testing with Jaymar Dynamometer on each hand, and

[1]His depositional testimony indicated 2/11/96 but medical records are dated 2/11/97.

rapid exchange grip strength testing. These tests showed Mr. May's grip strength in the right hand was essentially normal, while the left was markedly decreased. Comparison of these results with the results of testing done at Riverpark Hospital on September 17, 1996 showed a degree of similarity which indicated Mr. May was making a good effort.

Dr. Smith applied Table 34, page 3/65 of the *AMA Guidelines, 4th Edition,* and opined Mr. May had reached maximum medical improvement and had two permanent impairments: (1) permanent loss of grip strength, and (2) permanent decrease of wrist flexion. He assessed permanent impairment, using the *AMA Guidelines, 4th Edition,* thusly:

> "decreased range of motion gives a 2% permanent partial impairment to the upper extremity based on limited flexion from figure 26, page 3/36. The determination of the examinee's percentage of strength loss is found to be 60%, which on table 34 falls into the second category giving a 20% impairment to the upper extremity. Taking the 20% impairment due to loss of strength and adding it to the 2% for loss of wrist flexion gives an impairment of 22% to the left upper extremity."

Dr. Smith assigned permanent work restrictions of no repetitive flexion of the fingers, no repetitive flexion or extension of the wrist, minimal gripping with the left hand, no repetitive gripping with the left hand, and no use of vibratory tools.

Southern argues that the trial court erred in awarding 45% permanent partial disability to the left upper extremity because Mr. May's injury is limited to the left hand. That argument is based on an unusual question posed to Dr. Smith at deposition and his answer, which we reproduce here:

> Q: "Mr. Humphreys and I were talking prior to the deposition and he and I, to some extent, were both trying to look in the latest AMA Guides to determine if there is a way to convert this upper extremity impairment to a hand. We all know, I think, that the upper extremity

> involves the shoulder, or forearm, wrist, I believe, and hand. Of course, I'm going by memory, if I'm not mistaken. If we were to cut out the forearm and the shoulder and just limit it to, say, the wrist and the hand, *I guess the wrist is really part of the arm*, but if we were to convert it to the hand, is there any way that you can look at the AMA Guidelines, the latest one and, I guess the word is interpolate, whatever you need to do to see if we can assign an impairment only to the hand?"
>
> A: (Reviewing AMA Guides.) "Let's see. If we go to table 2, *what this table is meant to do is* form the relationship of impairment to the hand to the impairment of the upper extremity. We can extrapolate backwards, this is on page 3/19. If we have a 22 percent impairment to the upper extremity, this converts to a 24 percent impairment to the hand. *I've never had to do that before, but this table seems to apply to it."*

Figure 26 on page 3/36 of the *AMA Guidelines to the Evaluation of Permanent Impairment,* 4th Edition, is styled "*Upper Extremity Impairments Due to Lack of Flexion and Extension of Wrist Joint" [emphasis added]*. Dr. Smith applied that provision to Mr. May's objectively quantified ten degree decrease of wrist flexion and assessed 2 percent permanent impairment to the upper extremity, which is exactly as the table provides.

In making determinations, the court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition. TENN. CODE ANN. § 50-6-241(a)(1); *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986).

Mr. May is 45 years old with an 8th grade education and no vocational training. His has prior work experience as a farmer, tractor-trailer and dump truck driver, pipeline layer, cable runner, boom operator, lumber stacker and tow motor operator. He testified that his inability to flex his fingers, flex his left wrist or grip with both hands would preclude these types of employment.

He also has prior work experience driving a pick-up truck and glueing and painting plugs. He testified that with his limitations, he felt he would be able to drive a pick-up truck for short periods and would be able to perform the glueing and painting job.

Applying these criteria, we find the trial court's award of 45 percent permanent partial disability of to his left arm is supported by the preponderance of the evidence.[2]

Southern next contends that the trial court erred in setting Mr. May's weekly benefit amount at $226.52.

Southern's secretary, Carol Hobbs, filed an Employers' First Report of Injury with the Department of Labor, whereupon Liberty Mutual calculated Mr. May's weekly benefit amount at $233.34 based on an average weekly wage of $350.00 as indicated by Ms. Hobbs in that Report. By the time of trial, Southern had paid all temporary total benefits due except for one and one-half days, at the rate of $233.34 per week.[3]

Ms. Hobbs testified at trial, however, that Mr. May's average weekly wage was $307.12 and therefore his weekly benefit amount was $204.76. For documentation, she presented a list of gross weekly wages, dates paid and hours worked which she had prepared *on the morning of trial* at the request of Southern's counsel. (Exhibit 5). She testified that she arrived at the new weekly benefit amount by adding the total of the gross paychecks Mr. May received for each of his last 52 weeks of employment and dividing by 52, then multiplying

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[2]We reject Southern's attempt to re-interpret ["interpolate"] the *AMA Guidelines*, which only medical experts are entitled to do under T.C.A. § 50-6-204(d)(3).

[3]The total amount paid as of the date of trial was $1,399.86, based on a weekly benefit rate of $233.33.

by 66-2/3%.[4] When the trial judge questioned Ms. Hobbs about the discrepancy between the rate given on her Employers' First Report of Injury and the rate given at trial, she testified essentially that the Employers' Report asked for the hourly wage, which she listed as $8.75 per hour, and the insurer apparently assumed the average weekly wage and weekly benefit amount from that information ($8.75/hr X 40 hrs = $350 x 66-2/3% = $233.33). But when she was asked by employer's counsel on the morning of trial to prepare an exact accounting, she discovered the "correct" weekly benefit amount.

Mr. May, using a copy of Ms. Hobbs' list of his gross wages and his personal records, then made notations on her list indicating occasions when he had worked less than 40 hours owing to sickness, snow or lack of work. That document was introduced into evidence as Exhibit 7 and, though confusing, with its numerous notations and figures placed thereon by Mr. May and his counsel, appears to show a loss of 181 hours due to sickness, plant shut-down or snow. Based on his calculation, Mr. May contends that his weekly benefit amount should be $224.26.[5]

T.C.A. § 50-6-102(a)(1)(A) provides:

> "Average weekly wages" means the earnings of the injured employee in the employment in which the injured employee was working at the time of the injury during the period of fifty-two (52) weeks immediately preceding the date of the injury divided by fifty-two (52); but if the injured employee lost more than seven (7) days during such a period when the injured employee did not work, although not in the same week, then the earnings for the remainder of such fifty-two (52) weeks shall be divided by the number of weeks remaining after the time so lost has been deducted.

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[4]Exhibit 5 is the list of gross weekly paychecks, along with several adding machine tapes and a handwritten notation "Rate: $204.76."

[5]Which he calculated: "181 hours lost divided by 40 hours per week = 4.525 weeks. 52 - 4.525 = 47.475 weeks. $15,970.05 total wages divided by 47.475 weeks = 336.39 average weekly wages x 66-2/3% = **$224.26.**"

This statute has consistently been interpreted by our Supreme Court to mean that average weekly wage is to be computed by "totaling the actual wages for the relevant 52-week period and dividing by 52. Lost days shall be deducted from the 52-week period to the extent sickness, disability, or some other fortuitous circumstances caused the loss." *Russell v. Genesco,* 651 S.W.2d 206 (Tenn. 1983).

The trial judge found that Mr. May's average weekly wage was $226.52. As we have seen, the evidence offered on this issue was confusing. Mr. May's calculation of 181 lost hours cannot be duplicated and is not persuasive; Southern's calculations did not take into consideration any lost hours, but it is certain that the correct average is some amount less than $350.00 and more than $307.52, the two amounts furnished by Southern. We are disinclined to substitute our judgment for that of the trial judge, and we cannot find that the evidence preponderates against his finding.

The judgment of the trial court is affirmed in all respects, with costs assessed to the appellant.

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William H. Inman, Senior Judge

CONCUR:

_____
Ben H. Cantrell, Judge

_____
Joe C. Loser, Jr., Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

RICHARD MAY,	}	*WARREN GENERAL SESSIONS*
	}	*No. 6329-GSWC Below*
Plaintiff/Appellee	}	
	}	*Hon. Barry Medley*
vs.	}	*Judge*
	}	
LIBERTY MUTUAL INSURANCE	}	
COMPANY and SOUTHERN	}	*No. 01S01-9709-GS-00193*
MANUFACTURING GROUP,	}	
	}	
Defendants/Appellants	}	*AFFIRMED*

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 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 Defendants/Appellants and Surety for which execution may issue if necessary.

IT IS SO ORDERED on October 12, 1998.

PER CURIAM