IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
January 23, 2012 Session

VICKI MARSH v. FARRAR HOLLIMAN AND MEDLEY ET AL.

Appeal from the General Sessions Court for Warren County
No. 11112GSWC Larry G. Ross, Judge

No. M2011-00812-WC-R3-WC - February 29, 2012
FILED MAY 17, 2012

The only issue before the trial court was the apportionment of liability between the employer and the Second Injury Fund. The employee had two compensable injuries prior to the injury that rendered her permanently and totally disabled. The trial court found that those injuries had caused 85% permanent partial disability. Based on that finding, it held the employer liable for 15% of the award and the Second Injury Fund liable for 85% of the award. We find that the trial court incorrectly applied Tennessee Code Annotated section 50-6-208(a)(1)(2008), and modify the award accordingly.[1]

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

WALTER C. KURTZ, SR.J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR, J. and J.S. DANIEL, SP.J., joined.

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

John W. Barringer and Michael L. Haynie, Nashville, Tennessee, for the appellees, Farrar Holliman & Medley and Companion Property and Casualty Insurance Company.

B. Keith Williams and James R. Stocker, Lebanon, Tennessee, for the appellee, Vicki Marsh.

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[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.

MEMORANDUM OPINION

Second Injury Fund and the Issue

This case involves principles related to the apportionment of liability between the employer and the Second Injury Fund. *See generally*, Tenn. Code Ann. § 50-6-208 (2008). The injury at issue in this case took place in August 2007.

In *Seiber v. Reeves Logging*, 284 S.W.3d 294, 299-300 (Tenn. 2009), the Supreme Court reviewed the history and purpose of the Second Injury Fund:

> When it was originally enacted in 1919, the Workers' Compensation Law did not include what we know today as the Second Injury Fund. The General Assembly did not create the Second Injury Fund until 1945. The purpose of the Second Injury Fund is to encourage employers to employ workers who have permanent physical disabilities. *See Brown v. John Martin Constr. Co.,* 642 S.W.2d 145, 147 (Tenn. 1982); *Arnold v. Tyson Foods, Inc.*, 614 S.W.2d 43, 44 (Tenn. 1981). These permanent physical disabilities may be from any cause or origin and need not have been compensable under the Workers' Compensation Law. Tenn. Code Ann. § 50-6-208(a)(1); *Watt v. Lumbermens Mut. Cas. Ins. Co.*, 62 S.W.3d 123, 129 (Tenn. 2001); *Allen v. City of Gatlinburg*, 36 S.W.3d 73, 76 (Tenn. 2001).
>
> The Second Injury Fund is now an essential part of the Workers' Compensation Law. *Travelers Ins. Co. v. Austin*, 521 S.W.2d 783, 786 (Tenn. 1975). Since 1945, it has encouraged employers to hire workers with permanent physical disabilities by limiting the employers' workers' compensation liability exposure in two ways. First, Tenn. Code Ann. § 50-6-208(a)(1) guarantees that employers will not be held liable for the effects of pre-existing permanent physical disabilities. *Hollingsworth v. S & W Pallet Co.*, 74 S.W.3d 347, 355 (Tenn. 2002). Accordingly, with regard to employees who become permanently and totally disabled, employers are responsible only for the work-related disability that would have resulted from the subsequent injury had the earlier physical disability not existed. *Bomely v. Mid-America Corp.*, 970 S.W.2d 929, 934 (Tenn. 1998). Second, for injuries arising on or before June 30, 2006, Tenn. Code Ann. § 50-6-208(b)(1)(A) limits the employers' liability exposure for a subsequent injury causing permanent disability to the body as a whole to no more than the difference between

> 100% disability to the body as a whole and the percent of disability to the body as a whole attributable to the prior award. *See Scales v. City of Oak Ridge*, 53 S.W.3d 649, 655 (Tenn. 2001); *Reagan v. Am. Policyholders' Ins. Co.*, 842 S.W.2d 249, 250 (Tenn. 1992).
>
> The Second Injury Fund was created to "ensure the economic well-being of . . . employees" who sustain subsequent, work-related physical injuries by providing funds to pay for the workers' benefits that their employers are not required to pay. It is funded by a tax on the workers' compensation insurance premiums paid by properly insured employers. Tenn. Code Ann. §§ 50-6-208(c), -401(b) (2008). While Tenn. Code Ann. § 50-6-116 (2008) directs us to give the Workers' Compensation Law a remedial, equitable construction in favor of an injured employee, the interpretation of Tenn. Code Ann. § 50-6-208, which governs the allocation of liability between the employer and the Second Injury Fund, does not affect either the employee's eligibility for workers' compensation benefits or the amount of benefits to which the employee is entitled. In circumstances where the Second Injury Fund is not required to pay workers' compensation benefits, the employer is liable for the total amount of benefits to which the employee is entitled. Tenn. Code Ann. § 50-6-208(a)(4).

Id. at 299-300 (footnotes omitted); *see generally,* Thomas A. Reynolds, *Tennessee Practice: Tennessee Workers' Compensation Practice and Procedure with Forms* § 14:12 (6th ed. 2005) (Second Injury Fund).

The first requirement of Tenn. Code Ann. § 50-6-208(a)(1) is "that the employee has previously sustained a permanent physical disability." Reynolds, *supra*, § 14:12, at 249-250.

> The second requirement is that the employee "becomes permanently and totally disabled through a subsequent injury." Of course, the "subsequent injury" resulting in permanent total disability must satisfy the coverage formula. The third requirement is that the employer must establish that the employer "had actual knowledge of the permanent and preexisting disability at the time that the employee was hired or at the time that the employee . . . was retained in employment after the employer acquired such knowledge." This requirement is consistent with the purpose of the Second Injury Fund, which is to encourage the employment of persons with permanent disabilities. When these

> requirements are met, the employer is liable only for the disability that would have resulted *independently* from the "second injury," and the Second Injury Fund provides the additional compensation for the permanent total disability.

Id. at 250-52 (emphasis added) (footnotes omitted).

It is the issue of an "independent" assessment of the injury that is the issue in this case.

In fact, the Second Injury Fund states that the issue is:

> Whether the trial court incorrectly apportioned liability for the judgment between the codefendants and the Second Injury Fund?

Employer agrees that the issue is:

> Whether the Trial Court correctly apportioned the permanent total disability award between Farrar, Holliman & Medley and the Second Injury Fund in a manner that reflects Ms. Marsh's significant pre-existing disability and the intent of the Second Injury Fund statute.

Employee takes no position on the dispute between the Second Injury Fund and Employer but wants the issue settled so Employee can start to receive her benefits.

Factual and Procedural Background

Vicki Marsh ("Employee") was employed as a legal assistant by the firm of Farrar Holliman and Medley ("Employer") from 2000 until 2007. She sustained the injury at issue in this case on August 20, 2007, while assisting another employee in moving a large box containing a file. At that time, she felt a popping sensation in her right shoulder. Her injury was accepted as compensable. She was treated thereafter by several doctors, including a Dr. Kaminsky and a Dr. Kuhn.

Employee was evaluated by Dr. Ronald Wilson, a neurologist. Dr. Wilson testified by deposition and was the only physician to testify concerning the case. Dr. Wilson opined that Employee initially suffered an injury to the "long thoracic nerve," and subsequently had further injury to her brachioplexus (a group of nerves below the clavicle and above the chest). The latter injury was possibly caused by a surgical procedure for the thoracic nerve injury. Dr. Wilson testified that Employee "essentially has no functional use of her right

arm." She had atrophy of the right deltoid, biceps, triceps and forearm muscles. She also had "no reflexes in her right upper extremity," and "decreased sensation in several parts of her right arm." Dr. Wilson opined that Employee retained a 59% anatomical impairment to the body as a whole due to this injury.

Employee had sustained two previous work injuries. In June 2004, she sustained a compensable injury to her neck, which required surgery. Her treating physician placed a twenty-five-pound lifting restriction on her activities. She was able to return to work for Employer. Her worker's compensation claim was settled based upon 62.5% permanent partial disability to the body as a whole. In May 2005, she developed bilateral epicondylitis. Employer disputed the compensability of the condition. She settled the 2005 workers' compensation claim arising from that condition based upon 9.73% permanent partial disability to both arms. She was able to return to work at her previous job.

Employee testified that with occasional assistance, she was able to perform her normal job duties after returning to work from the 2004 neck injury. She worked forty or more hours per week after her return until her August 2007 injury. She used over-the-counter medications such as Tylenol or ibuprofen to control her pain. She did not believe that she would have been able to return to her previous employment positions as a bartender, sales clerk, and basketball and softball coach.

After the 2007 shoulder injury she returned to work briefly. However, she was eventually terminated because her employer could not accommodate additional restrictions placed upon her activities and because of her use of narcotic medication prescribed to control her pain.

The parties stipulated most of the issues prior to trial, including the fact that Employee was permanently and totally disabled. The sole issue presented to the trial court was the apportionment of the award between Employer and the Second Injury Fund. The trial court found that Employee had 85% disability as a result of her prior injuries and an additional 15% disability as a result of the 2007 injury. On that basis, Employer was assigned 15% of the permanent disability award, and the Second Injury Fund was assigned 85% of the award. The Fund has appealed, contending that the trial court erred in its method of apportioning liability and in its result.

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 the trial court has

heard in-court testimony, considerable deference must be afforded in reviewing the trial court's findings of credibility and assessment of the weight to be given to that testimony. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). When 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 depositions, and the reviewing court may draw its own conclusions with regard to those issues. *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. *Seiber,* 284 S.W.3d at 298.

Analysis

The trial court explained its apportionment as follows:

> I've got to look at the effects of the last injury. I think that's correct. And, the Court intends to do that. The Court feels that without this last injury, this lady would not have been under restrictions. The prior two injuries made it difficult for her. But, she kept on working. And, she is to be commended for that and not chastised for that. She kept working with these restrictions.
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> And, who's to know really what effects those first two injuries had on the last injury, whether or not she would have been injured had she not had the first. There's just no way to know. And, I'm not sure any Court can just pick it out of the air. It's just one of those things. I guess it's sort of like a boxer who is up against the ropes. And, he just keeps getting hit and getting hit and getting hit. And, finally, he gets hit and knocked out. And, which one knocked him out? Well, I don't know. It was a combination of all of them. And, I think it would probably be the Court's position in this.
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> But, the Court does find that this lady is one hundred percent disabled. And, finds the best as this Court can, and anybody that looks at it can look at it differently, that the prior injury had a cumulative effect that made her 85 percent disabled. And, would attribute 15 percent as to the last one.
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> She was severely, severely disabled prior to the last

> injury. And, she was only able, in this Court's opinion, to have a job because her employer accommodated her and kept her there, which is what the law says that it wishes for the employer to do.
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> And so, based on that, them continuing to accommodate her, she did continue to work. Had it not been for the Farrar firm employing her, I'm not sure she would have been able even then to find a job anywhere.
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> So again, I agree with you sir, that it's this Court's opinion that is exactly what the Second Injury Fund was set up for. And, that's what we need to use it for.

The apportionment of the award in this case is governed by Tennessee Code Annotated section 50-6-208(a)(1) (2008), which provides:

> 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, the employee shall be entitled to compensation from the employee's employer or the employer's insurance company only for the disability that would have resulted from the subsequent injury, and the previous injury shall not be considered in estimating the compensation to which the employee may be entitled under this chapter from the employer or the employer's insurance company; provided, that in addition to the compensation for a subsequent injury, and after completion of the payments for the subsequent injury, then the 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.

Our Supreme Court has directed that when applying this section:

> [I]t is essential that the trial court determine the extent of disability resulting from the subsequent injury without consideration of the prior injury. In other words, the trial court must find what disability would have resulted if a person with no preexisting disabilities, in the same position as the plaintiff,

had suffered the second injury but not the first.

Allen v. City of Gatlinburg, 36 S.W.3d 73, 77 (Tenn. 2001) (citations omitted).

It is clear from the trial court's remarks that it did not make an assessment of the disability caused by the August 2007 injury independent of the effects of Employee's prior injuries. Instead, it determined the amount of disability caused by the instant injury by considering the prior injuries and assigned liability for the remainder to Employer. This approach would be appropriate under Tennessee Code Annotated section 50-6-208(b). *See Bomely v. Mid-Am. Corp.*, 970 S.W.2d 929, 935 (Tenn. 1998). However, that statute is applicable only to injuries occurring before July 1, 2006. *See* Tenn. Code Ann. § 50-6-208(b)(1)(D). We therefore conclude that the trial court erred in its method of apportioning liability for the award in this case. We do not take issue with the finding of permanent total disability, only with the apportionment finding.

Prior to the injury at issue, Employee was able to continue at her previous employment. It was necessary for Employer to accommodate the effects of those injuries, primarily by permitting additional breaks and providing assistance in lifting heavy files. However, once accommodated, Employee was able to work forty hours or more per week. She was able to control her symptoms with over-the-counter medications. After the August 2007 injury, she has not been able to work at all. Her right arm, as described by Dr. Wilson, is not functional. The muscles of her arm are atrophied, and she also has diminished sensation. She is required to use narcotic pain medication to control her symptoms. Her anatomical impairment alone is 59% of the right upper extremity. In consideration of these facts, we conclude that the evidence preponderates against the trial court's finding that the August 2007 injury caused an additional 15% permanent partial disability to the body as a whole.

When all expert medical evidence is presented by deposition, as it is in this case, the court may draw its own conclusions about the testimony's weight and credibility. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 2007); *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676-677 (Tenn. 1991). After engaging in this review of the expert testimony, this court concludes that the evidence preponderates in favor of a finding that the August 2007 injury caused a 70% permanent disability to the body as a whole. Pursuant to Tennessee Code Annotated section 50-6-208(a)(1), Employer is liable for 70% of the permanent total disability award. The Second Injury Fund is liable for the remainder.

Conclusion

The judgment of the trial court is affirmed as modified. The case is remanded to the

trial court for entry of an order consistent with this opinion. Costs are taxed to Farrar Holliman & Medley and Companion Property and Casualty Insurance Company, for which execution may issue if necessary.

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WALTER C. KURTZ, SENIOR JUDGE

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No. 11112GSWC

No. M2011-00812-SC-WCM-WC - Filed May 17, 2012

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Farrar, Holliman & Medley et al, 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.

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 to Farrar, Holliman & Medley et al, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

KOCH, William C., Jr.., J., Not Participating