

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
October 13, 2000 Session

**UNION BANK & TRUST CO., ET AL. v. KIRBY BOLES, and JAMES  
FARMER, DIRECTOR OF THE TENNESSEE DIVISION OF WORKER'S  
COMPENSATION, SECOND INJURY FUND, ET AL.**

**Direct Appeal from the Chancery Court for Overton County  
No. 37-596 Vernon Neal, Chancellor**

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**No. M2000-01366-WC-R3-CV - Mailed - March 30, 2001  
Filed - May 1, 2001**

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This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The Second Injury Fund appeals claiming a setoff/credit for the amount of temporary total disability benefits paid to the employee by the employer and a setoff/credit for social security contribution made by the employer. For reason stated the judgment of the trial court is affirmed, and this case is remanded

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court is affirmed.**

TOM E. GRAY, SP.J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, J. and JOHN K. BYERS, SR. J., joined.

Paul G. Summers, Attorney General and Reporter, and E. Blaine Sprouse, Assistant Attorney General, Nashville, Tennessee for the Appellant, James Farmer, Director of the Tennessee Division of Worker's Compensation Second Injury Fund.

Kelly R. Williams, Livingston, Tennessee for the Appellee, Kirby Boles.

**MEMORANDUM OPINION**

The trial court found that Kirby Boles, employee, was entitled to an award of 100% permanent and total disability to the body as a whole under Tennessee Code Annotated 50-6-207(4)(A)(i) and apportioned disability of 47% to the employer, Union Bank and Trust Company,

and 53% to the Second Injury Fund. Finding that the employee was more than 60 years of age at the time of the work related accident 260 weeks of permanent total disability were awarded in addition to all temporary total disability benefits paid.

Employee Boles was found to be currently receiving social security disability benefits by the Court, and he was ordered to inform the Second Injury Fund within thirty (30) days of receiving any social security old age insurance benefits.

The attorney representing Mr. Boles was granted a fee of \$7,300.28 which amounted to 20% of the 260 week award, and the trial court commuted to a lump sum 100 weeks of benefits.

## **BACKGROUND**

Kirby E. Boles was born on the 6<sup>th</sup> day of May, 1935. On the 9<sup>th</sup> day of March, 1996 while in the course and scope of his employment with Union Bank and Trust Company he was involved in an automobile accident.

Union Bank and Trust Company commenced this action by filing a complaint in the Chancery Court for Overton County, Tennessee at Livingston to have the Court determine the rights and responsibilities of the parties, Union Bank, plaintiff, and Kirby Boles, defendant, according to the Workers' Compensation Law, State of Tennessee. Kirby Boles filed an answer and counter-complaint.

Thirteen months after the action was commenced Union Bank and Trust Company moved the Court to add the Tennessee Department of Labor, Second Injury Fund as a Third-Party Defendant. In support of the motion, movant attached a copy of an order entered in the Circuit Court for Overton County, Tennessee on the 10<sup>th</sup> day of February, 1995 whereby Kirby E. Boles was found to have suffered a 28% permanent partial impairment to the body as a whole as a result of an accident to his left shoulder arising out of and in the course and scope of his employment at First Baptist Church, Livingston. The motion was granted, and the Second Injury Fund became a party.

No party presented testimony at trial but stipulated as follows:

1. Mr. Boles sustained a compensible injury to the body as a whole on March 9, 1996 as a result of an automobile accident arising out of and in the course and scope of his employment;
2. Mr. Boles was over the age of 60 at the time of the accident;
3. Mr. Boles was permanently and totally disabled as a result of the injury on March 9, 1996;
4. The proper weekly compensation rate of Mr. Boles is \$140.39 per week.

5. For the period from March 10, 1996 through September 5, 1999, the date of maximum medical improvement, Mr. Boles had been paid for 184.48 weeks of temporary total disability for a total dollar amount of \$25,899.10;
6. Mr. Boles received an eight week advance of permanent total disability benefits in the amount of \$1,123.12 for which Union Bank and Trust Co. is entitled to a credit on their liability;
7. Mr. Boles had previously received court approved workers' compensation awards totaling 53% permanent partial disability to the body as a whole;
8. Mr. Boles is entitled to payment of future medical benefits pursuant to T.C.A. 50-6-204.

## DISCUSSION

The Second Injury Fund raises two issues on appeal. The first issue is whether the trial court's award of 260 weeks of permanent total benefits in addition to the previously paid temporary total disability benefits already paid by the employer exceeds the amount of benefits recoverable under Tenn. Code Ann. §50-6-207(4)(A)(i). Second is whether the Second Injury Fund is entitled to an offset for the amount of social security contributions made by the employer on Mr. Boles' behalf pursuant to Tenn. Code Ann. §50-6-207(A)(4)(i).

The issues on appeal are questions of law involving statutory interpretation. Accordingly, our review is de novo with no presumption of correctness given the lower court's judgment. Spencer v. Towson Moving & Storage, Inc. 922 S.W. 2d 508, 509 (Tenn. 1996).

It is asserted by the Second Injury Fund that the trial court erred in this case by misinterpreting the term "maximum total benefits" as that term is used in the Workers' Compensation Act. Argued by the Fund is that "maximum total benefits" is statutorily defined as "the sum of all weekly benefits to which a worker may be entitled." Tenn. Code Ann. 50-6-102 (13).

Relying on Bennett v. Howard Johnsons Motor Lodge 714 S.W. 2d 273 (Tenn. 1986), and Bland Casket Co. v. Davenport, 221 Tenn. 492, 427 S.W. 2d 839 (1968) and Smith v. Liberty Mutual Ins. Co. 762 S.W. 2d 883 (Tenn. 1988) the Fund maintains that "all weekly benefits" means the combination of temporary and permanent disability benefits. These cases, Bennett v. Howard Johnson's Motor Lodge supra, Bland Casket Company v. Davenport, supra, Smith v. Liberty Mutual Ins. Co. supra, do hold that the total of all weekly benefits refers to combined temporary and permanent disability benefits and that the injured worker could receive no more than the statutory maximum for all benefits except hospital and medical expenses.

The above cases relied upon by the Fund were at points in time when the statutory language

was different from language of the statutes when Kirby Boles was injured in March, 1996.

As regards this appeal, Tenn. Code Ann. § 50-6-102(13) provides: “Maximum total benefit” means the sum of all weekly benefits to which a worker may be entitled; and

A.....

B.....

C. For injuries occurring on or after July 1, 1992, the maximum total benefits shall be four hundred (400) weeks times the maximum weekly benefit except in instance of permanent total disability.

In the case of Bomely v. Mid America Corp. 970 S.W. 2d 929 (Tenn 1998) the Fund raised several issues with respect to its liability for a portion of the award of permanent disability. Unlike this case where the employee was past his 60<sup>th</sup> birthday when injured, Bomely was 42 years old at the time of the trial. An issue in Bomely was what effect the statutory language of “maximum total benefits” defined in Tenn. Code Ann. §50-6-102 had on awards of permanent total disability under Tenn. Code Ann. §50-6-207. The Court held that the language as defined under this section of the code specifically excluded permanent total disability awards and that awards of permanent total disability under Tenn. Code Ann. 50-6-207 are not subject to the monetary cap imposed by the definition in Tenn. Code Ann. § 50-6-102.

It was stipulated that Kirby Boles was permanently and totally disabled as a result of the injury on March 9, 1996 and that he was over the age of 60 at the time of the accident. The trial court was correct in its application of Tenn. Code Ann. § 50-6-207(4)(A)(i) that permanent total disability benefits are payable for a period of 260 weeks.

The Fund’s argument that the 260 weeks includes the weeks of temporary total disability benefits is mistaken.

In Smith v. U. S. Pipe & Foundry Co. 14 S.W. 3d 739 (Tenn. 2000) the Supreme Court addressed when permanent total disability benefits begin accruing. Smith was age 61 when the injury occurred, and his benefits were capped at 260 weeks. The Court held that temporary benefits begin accruing on the date of the injury, and permanent disability benefits whether total or partial begin accruing on the date the employee attains maximum medical improvement. In reaching its conclusion the Court at page 744 stated:

As we recently recognized,

[o]ur Workers’ Compensation Act classifies compensable occupational disabilities into four distinct classifications. These classifications are: (1) temporary total disability; (2) temporary partial disability; (3) permanent partial disability; and (4) permanent total disability. This Court has previously recognized that each separate disability classification is

independent and serves a specific compensation goal.

*Davis v. Reagan*, 951 S.W.2d 766, 767 (Tenn. 1997) (internal citations omitted). Temporary total disability “refers to the injured employee’s condition while disabled to work by his injury and until he recovers as far as the nature of his injury permits...” *Redmond v. McMinn County*, 209 Tenn. 463, 468, 354 S.W.2d 435, 437 (1962); see also *Roberson v. Loretto Casket Co.* 722 S.W.2d 380, 382 (Tenn. 1986). These benefits are paid for “the healing period during which the employee is totally prevented from working.” *Gluck Bros., Inc. v. Coffey*, 222 Tenn. 6, 13-14, 431 S.W.2d 756, 759 (1968); see also *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380-383 (Tenn. 1986). Temporary total disability benefits are terminated either by the employee’s ability to return to work or the employee’s attainment of maximum medical improvement. See *Prince v. Sentry Ins. Co.*, 908 S.W.2d 937, 939 (Tenn.Sp.Workers Com. 1995); *Lock v. Nat. Union Fire Ins. Co. of Pittsburgh, Pa.*, 809 S.W.2d 483, 488 (Tenn 1991); *Fagg v. Hutch Mfg. Co.* 755 S.W.2d 446, 452 (Tenn. 1988); *Jones v. Crenshaw*, 645 S.W.2d 238 (Tenn. 1983); *Simpson v. Satterfield*, 564 S.W.2d 953, 955 (Tenn. 1978). When the period of temporary total disability ends, a determination can be made as to whether the work-related injury has resulted in a permanent disability. *Id.* If the employee remains disabled, permanent disability benefits begin accruing.

The record before us shows the date of maximum medical improvement to be the 5<sup>th</sup> day of September, 1999. It also reveals that 184.48 weeks of temporary total disability benefits were paid and that Mr. Boles received an 8 week advance of permanent total disability for which Union Bank and Trust is entitled to a credit.

On the issue of whether the Second Injury Fund is entitled to an offset for the amount of social security contributions made by Mr. Boles’ employer we find their argument well taken. Tennessee Code Ann. § 50-6-207(4)(A)(i); *Smith v. U. S. Pipe Foundry Co.* 14 S.W.3d 739 (Tenn. 2000) *McCoy v. T.T.C. Illinois, Inc.*, 14 S.W.3d 734 (Tenn. 2000).

The trial court found that Mr. Boles was currently receiving social security disability benefits and ordered that Mr. Boles report to the Fund within 30 days of receiving any social security old age insurance benefits. The Fund points out that the order did not state whether the fund is entitled to a fifty (50%) percent offset.

We are of the opinion the matter should be remanded to the trial court for entry of an order granting the fifty (50%) percent offset and for the purpose of consideration of a finding of fact by the trial court as allowed under Tenn. Code Ann. §50-6-207(6). This statutory provision provides:

(6) For social security purposes only, as permitted by federal law or

regulation, in an award of compensation as a lump sum or a partial lump sum under this chapter for permanent partial or permanent total disability, the court may make a finding of fact that the payment represents a payment to the individual to be distributed over the individual's lifetime based upon life expectancy as determined from mortality tables from Tennessee Code Annotated.

By order entered based upon agreement of the parties Mr. Boles received commutation of 100 weeks of benefits as a lump sum pursuant to Tenn. Code Ann. §50-6-207(4)(A)(ii). The attorney representing Mr. Boles received a fee, and it is not reflected whether the attorney's fee was commuted to a lump sum. The trial court may make a finding of fact that the lump sum payment represents a payment distributed over Mr. Boles' lifetime based upon life expectancy as determined from the mortality table.

## **CONCLUSION**

After careful consideration of the relevant authorities, we conclude that the trial court correctly found that Boles is entitled to 260 weeks of permanent total disability benefits in addition to all temporary disability benefits previously paid. We also conclude that the trial court correctly apportioned the permanent total disability benefits at forty-seven (47%) percent to the employer and fifty-three (53%) percent to the Second Injury Fund.

For clarification of entitlement by the Second Injury Fund to an offset of fifty (50%) percent of the social security old age insurance benefit recorded by the employee and for consideration of application of Tenn. Code Ann. 50-6-207(6) this matter is remanded to the trial court.

Costs are assessed to the appellant, Second Injury Fund.

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TOM E. GRAY, SPECIAL JUDGE

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

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**Chancery Court for Overton County  
No. 37-596**

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**JUDGMENT**

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 the appellant, Second Injury Fund, for which execution may issue if necessary.

**IT IS SO ORDERED.**

**PER CURIAM**