IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
February 2003 Session

JAMES DONALD LATTIMORE v. CNA INSURANCE COMPANY, ET AL.

Direct Appeal from the Criminal Court for Wilson County
No. 00-0208A Clara Byrd, Judge

No. M2002-01718-WC-R3-CV - Mailed - May 23, 2003
Filed - June 26, 2003

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. In this appeal, the Second Injury Fund insists the trial court erred in awarding disability benefits in excess of the limitation provided by law where the injured worker was more than sixty years old at the time of the injury. As discussed below, the panel has concluded the Second Injury Fund is not entitled to credit for overpayment made by the employer.

Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the Criminal Court Affirmed

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, C. J., and JAMES L. WEATHERFORD, SR. J., joined.

Paul G. Summers, Attorney General and Reporter, and E. Blaine Sprouse, Assistant Attorney General, Nashville, Tennessee, for the appellant, Second Injury Fund

William Joseph Butler and E. Guy Holliman, Farrar, Holliman & Butler, Lafayette, Tennessee, for the appellee, James Donald Lattimore

Daniel H. Rader, III and Lane Moore, Moore, Rader, Clift & Fitzpatrick, Cookeville, Tennessee, for the appellees, CNA Insurance Company and TRW Steering Systems, Inc.

MEMORANDUM OPINION

The employee or claimant, Mr. Lattimore, initiated this civil action to recover workers' compensation benefits for alleged injuries to his back, left leg and right leg resulting from an accident arising out of and in the course of his employment with the employer, TRW Steering

Systems, in December 1999. He demanded, among other things, permanent partial disability benefits. The claim was settled on October 6, 2002. The settlement order recites that the accident occurred on December 15, 1999 and provided for an award based on 109 weeks of benefits at the employee's agreed compensation rate.

On March 8, 2001, the claimant applied for reconsideration of the above award pursuant to Tenn. Code Ann. § 50-6-241(a)(2), averring that he was no longer working for the employer. Because the claimant was seeking permanent total disability benefits and had disability pre-existing the December 1999 accident, the Second Injury Fund was added as an additional defendant. Both defendants denied liability. After a trial on the merits, the trial court found the employee to be permanently and totally disabled as a result of the combined effects of his pre-existing disabilities and those resulting from his work related accident of December 1999. The trial court found his disability from the work related accident to be 27 percent to the body as a whole and apportioned the award 27 percent to the employer and 73 percent to the Second Injury Fund. Because the employee was more than sixty years old at the time of his work related accident, the percentages were applied to 260 weeks, as required by Tenn. Code Ann. § 50-6-207(4)(A)(I).[1] The employer was given credit for benefits already paid as a result of the earlier settlement, but the Fund was not given credit for payments made by the employer in excess of its ultimate liability.

As a result of the award, the employee will actually receive, when combined with the benefits already paid by the employer, 298.8 weeks of benefits or benefits for 38.8 weeks more than the maximum allowed by the above statute for workers more than sixty years old at the time of their compensable injuries. The Second Injury Fund contends its liability should be reduced, therefore, by 38.8 weeks. Put another way, the Fund seeks credit against its liability for benefits paid by the employer in excess of the employer's ultimate liability. The fund does not take issue with the factual findings of the trial court, including the apportionment of liability between it and the employer.

---

1. (4)(A)(i) PERMANENT TOTAL DISABILITY. For permanent total disability as defined in subdivision (4)(B), sixty-six and two-thirds percent (66 2/3 %) of the wages received at the time of the injury, subject to the maximum weekly benefit and minimum weekly benefit; provided, that if the employee's average weekly wages are equal to or greater than the minimum weekly benefit, the employee shall receive not less than the minimum weekly benefit; provided further, that if the employee's average weekly wages are less than the minimum weekly benefit, the employee shall receive the full amount of the employee's average weekly wages, but in no event shall the compensation paid be less than the minimum weekly benefit. This compensation shall be paid during the period of the permanent total disability until the employee is, by age, eligible for full benefits in the Old Age Insurance Benefit Program under the Social Security Act; provided, that with respect to disabilities resulting from injuries which occur after 60 years of age, regardless of the age of the employee, permanent total disability benefits are payable for a period of two hundred sixty (260) weeks. Such compensation payments shall be reduced by the amount of any old age insurance benefit payments attributable to employer contributions which the employee may receive under the Social Security Act, U.S.C., title 42, chapter 7, subchapter II, as amended.

Ordinarily, appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2002 Supp.). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. 1995). The standard governing appellate review of findings of fact by a trial court requires the Special Workers' Compensation Appeals Panel to examine in depth a trial court's factual findings and conclusions. GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 61 (Tenn. 2001). The extent of an injured worker's vocational disability is a question of fact. Seals v. England/Corsair Upholstery Mfg., 984 S.W.2d 912, 915 (Tenn. 1999). Where the medical testimony in a workers' compensation case is presented by deposition, the reviewing court may make an independent assessment of the medical proof to determine where the preponderance of the proof lies. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Conclusions of law, however, are reviewed de novo without a presumption of correctness. Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 367 (Tenn. 1998). The issue, as stated by the appellant, raises a question of law.

An employee who has previously become physically disabled from any cause and who, as a result of a later compensable injury, becomes permanently and totally disabled, may receive disability benefits from his employer or its insurance company only for the disability that would have resulted from the subsequent injury. Tenn. Code Ann. § 50-6-208. However, such employee may be entitled to recover the remainder of the benefits allowable for permanent total disability from the Second Injury Fund. Id. The Fund was created by the legislature to encourage the hiring of the disabled by relieving an employer who knowingly hires a disabled person or retains an employee after discovering the employee has a physical disability of part of the liability for workers' compensation benefits, by shifting such liability to the Fund. Arnold v. Tyson Foods, Inc., 614 S.W.2d 43, 44 (Tenn. 1981).

Pursuant to Tenn. Code Ann. § 50-6-208)(a), the employer is responsible only for the disability that would have resulted from the subsequent injury, had the earlier injury not existed, and the Fund is liable for the remainder of the award. Allen v. City of Gatlinburg, 36 S.W.3d 73, 77 (Tenn. 2001). A permanently and totally disabled employee is entitled to recover from the Second Injury Fund the amount whereby an award for permanent total disability exceeds the award for the subsequent injury. Perry v. Sentry Ins. Co., 938 S.W.2d 404, 408 (Tenn. 1996).

The Workers' Compensation Act expressly requires that it be given "equitable construction" and declares itself to be a remedial Act. Tenn. Code Ann. § 50-6-116. It must be construed so as to ensure that injured employees are justly and appropriately reimbursed for debilitating injuries suffered in the course of service to the employer. Story v. Legion Ins. Co., 3 S.W.3d 450, 455 (Tenn. 1999). Following that mandate, we conclude the trial court correctly determined the Second Injury Fund's liability to be 73 percent of 260 weeks and hold that the windfall resulting from the

employer's overpayment of benefits goes to the employee, not the Second Injury Fund.

For the above reasons, the judgment of the trial court is affirmed. Costs are taxed to the Second Injury Fund.

_____

JOE C. LOSER, JR.

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

JAMES DONALD LATTIMORE v. CNA INSURANCE COMPANY, ET AL.

Criminal Court for Wilson County
No. 00-0208A

No. M2002-01718-WC-R3-CV - Filed - June 26, 2003

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

IT IS SO ORDERED.

PER CURIAM