IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT KNOXVILLE
(August 5, 1996 Session)

FILED

October 17, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

JOHNNY JOBE,	)	ANDERSON CIRCUIT
	)	
Plaintiff-Appellee,	)	Hon. James B. Scott, Jr.,
	)	Judge.
v.	)	
	)	No. 03S01-9512-CV-00131
M. K. FERGUSON,	)	
	)	
Defendant-Appellant	)	
	)	
and	)	
	)	
SECOND INJURY FUND,	)	
	)	
Defendant-Appellee.	)	

For Appellant:

Donald B. Oakley
Morristown, Tennessee

For Appellee, Jobe:

J. Anthony Farmer
Knoxville, Tennessee

For Appellee, Second Injury Fund:

Charles W. Burson
Attorney General & Reporter

Dianne Stamey Dycus
Senior Counsel
Nashville, Tennessee

M E M O R A N D U M   O P I N I O N

Members of Panel:

E. Riley Anderson, Associate Justice, Supreme Court
William H. Inman, Senior Judge
Joe C. Loser, Jr., Special Judge

Modified   Loser, Judge

MEMORANDUM OPINION

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. The issue in this appeal is whether the award of permanent disability benefits is excessive. As discussed below, we have concluded the judgment should be modified.

The employee or claimant, Jobe, was 59 years old at the time of the trial. He has a ninth grade education and is a skilled carpenter, capable of reading plans and performing supervisory duties. On May 5, 1993, he fell at work and was slightly injured, but continued to work. On August 24, of the same year, he injured his lower back while lifting a cabinet at work.

He was treated by Dr. David Hauge for a herniated lumbar disc from the second injury and a herniated cervical disc, possibly from the earlier injury. Dr. Hauge assigned a permanent impairment rating of seven percent to the whole body. Dr. Berta Bergia, whom the claimant saw for an examination and evaluation, assigned permanent impairment ratings of five percent for the cervical disc and ten percent for the lumbar disc. Dr. Bergia said the claimant should not do more than sedentary work. The claimant has not returned to work.

The trial judge awarded permanent partial disability benefits based on thirty percent to the body as a whole for the May 5th injury and one hundred percent for the August 24th injury. Because the combined award totaled one hundred thirty percent, the employer was ordered to pay on the basis of one hundred percent and the remaining thirty percent was assessed against the

second injury fund (the fund).

Both the employer and the fund contend the award is excessive. Appellate review of an award of workers' compensation benefits 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. section 50-6-225(e)(2). This tribunal is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1991).

In Tennessee, an employer takes an employee as he is and cannot escape liability when the employee, upon suffering a work-related injury, incurs greater disability because the new injury is superimposed upon a preexisting injury or disability. Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993). In Baxter v. Smith, 211, Tenn. 347, 364 S.W.2d 936 (1962), our Supreme Court found the doctrine of contribution and apportionment to be inconsistent with that rule and rejected as "mere speculation" any effort to apportion the disability of a worker who became disabled as a result of a succession of injuries. And in Bennett v. Howard Johnson's Motor Lodge, 714 S.W.2d 273 (Tenn. 1986), that court recognized what has become known as the "successive injury" or "last injurious injury" rule, when it stated:

> The last successive employer or insurance carrier, taking the employee as he is found at the time of the accident, will be liable for the entire resulting disability, including all medical expenses arising from the disability and regardless of any pre-existing condition....This rule applies whether the subsequent injury aggravates or merely combines with a previous injury or condition of the employee. (emphasis supplied).

For injuries occurring on or after August 1, 1992, where an injured worker is entitled to receive permanent partial disability benefits to the body as a whole, and the pre-injury employer does not return the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is six times the medical impairment rating. Tenn. Code Ann. section 50-6-241(b) (1996 Supp.). If a court awards a multiplier of five or greater, then the court must make specific findings of fact detailing the reasons for its award, considering all relevant factors. Tenn. Code Ann. section 50-6-241 (c) (1996 Supp.). In this case, the trial judge made the requisite findings of fact, but allowed benefits far in excess of six times any of the medical impairment ratings.

In the light of the the above authorities, we conclude the award of benefits on the basis of one hundred thirty percent to the body as a whole to be excessive. Moreover, from our independent examination of the evidence, we find the evidence to preponderate in favor of an award, from the combination of the two injuries, based on sixty percent permanent partial disability to the body as a whole.

The panel is further impelled to address and respectfully reject the contention of the claimant that Dr. Hauge's opinions should receive less weight and be considered less valuable than those of Dr. Bergia because they were admitted into evidence in the form of unsworn written reports and records, rather than by deposition, without objection. It is our opinion that the practice of admitting into evidence, by consent of the parties, the reports and records of experts is to be encouraged as a means of reducing the cost to the parties of preparing and presenting their claims and defenses. In so expressing ourselves, we recognize that an adverse party might not be inclined to forego his right to cross examine the expert and whatever he or she may gain by such cross examination. Our experience has been, though, that experts rarely change their opinions, even in the face of the most skillful cross examination. Thus, we hold,

by consenting to the admission of written reports of an expert, a party waives the oath and opportunity to cross examine and that such evidence is not to be devalued for the absence thereof.

The award is modified in accordance with our above findings and conclusions and, because the claimant's disability does not exceed one hundred percent, the case is dismissed as to the second injury fund. The case is remanded to the trial court for entry of a judgment consistent with this memorandum opinion. The compensation rate shall be the one in effect on August 24, 1993. Costs on appeal are taxed to the plaintiff-appellee.

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Joe C. Loser, Jr., Judge

CONCUR:

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E. Riley Anderson, Justice

____

William H. Inman, Judge

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AT KNOXVILLE

JOHNNY JOBE,) ANDERSON CIRCUIT
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Plaintiff-Appellee,) No. 94LA0079
)
) No. 03S01-9512-CV-00131
vs.)
) Hon. James B. Scott, Jr.
) Judge
M.K. FERGUSON ,)
)
Defendant-Appellant,)
and)
) MODIFIED
SECOND INJURY FUND,)
)
Defendant-Appellee.)

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 it, 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 on appeal are taxed to the plaintiff /appellee, Johnny Jobe, for which execution may issue if necessary.

10/17/96