IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, DECEMBER 1996 SESSION

DAVID K. BURNETTE, Plaintiff/Appellee v. THE TRAVELERS INSURANCE COMPANY, Defendant and LARRY BRINTON, JR., DIRECTOR SECOND INJURY FUND Defendant/Appellant	)	KNOX COUNTY HON. FREDERICK D. McDONALD Chancellor NO. 03S01-9607-CH-00074

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MEMORANDUM OPINION

Members of Panel:

E. Riley Anderson, Justice
Roger E. Thayer, Special Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED AS MODIFIED IN PART;
REVERSED IN PART AND
REMANDED

THAYER, Special 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.

This appeal has resulted from a finding by the trial court that plaintiff, David K. Burnette, was entitled to 100 percent permanent disability benefits as a result of his injury on December 18, 1994. Since he had a prior award of disability, the court apportioned the award by directing his employer, Target Stores, to pay 15 percent and the State's Second Injury Fund to pay the remaining 85 percent.

The State has appealed insisting the evidence is not sufficient to support a 100 percent disability award and that the apportionment was not proper under TENN. CODE ANN. § 50-6-208.

We agree with this contention and the trial court's judgment as to the extent of permanent disability is modified as hereinafter indicated.

Employee Burnette was 37 years of age and dropped out of school in the 11th grade. He later obtained a G.E.D. certificate and worked as a carpenter in the construction industry for about thirteen years. In 1988, while working in California, he sustained work-related injuries which resulted in an award of workers' compensation benefits of 30 percent to the body as a whole. These injuries were two herniated disks in his neck and two herniated disks in his low back. After recovering from surgical procedures, he moved to Tennessee and worked for some period of time with two different fast food businesses. He was employed as an assistant manager at each company.

In September, 1992, he began working at Target Stores testifying he was still having pain from his injuries and that he was still taking pain medication. While working at Target, he attempted to further his education by attending classes at Pellissippi State. He did this for several years, but had transferred to the University of Tennessee by the time the case was heard in the trial court. His goal was to obtain a degree in special education and become a special education teacher. The record is not clear as to his status in this endeavor but he said he was still taking basic courses and had not been accepted in the College of Education.

On the day in question, he was pulling a large box of merchandise off a shelf which was over his head. As he pulled and turned, he felt a pain in his back. He told the trial court that his condition from the prior injuries had improved to such an extent, he had stopped taking medication several months before the incident at Target. He said he now had pain again in his neck and back as a result of last injury.

The medical testimony consisted of the deposition from Dr. Gilbert L. Hyde and a medical report of Dr. Robert E. Finelli.

Dr. Hyde, an orthopaedic surgeon, testified the event of December 18, 1994, aggravated his prior injuries and condition; he found plaintiff had a 24 percent impairment to his neck of which 19 percent was due to the prior injury and 5 percent was due to the last injury; that plaintiff had a 21 percent impairment to his low back of which 16 percent was due to the prior injury and 5 percent was due to the last injury. Thus, Dr. Hyde was of the opinion his total medical impairment was 45 percent to the body as a whole but only ten percent of the impairment was related to the accident in question. He also testified that plaintiff could return to work subject to certain restrictions on lifting and he should avoid repetitive bending, twisting and stooping activities.

Dr. Finelli did not testify but some of his conclusions are contained in a medical report filed in evidence. This report was not a detailed report from his medical records as is normally observed in cases of this nature but was a copy of a form report for reporting industrial injuries to the Tennessee Department of Labor. It indicated he evaluated plaintiff on August 23, 1995, at the request of the defendant insurance company; that he found an eight percent impairment to his neck and back as a result of a CT scan and other tests and that plaintiff should be subject to restrictions in lifting, pushing, standing and sitting.

Dr. Norman E. Hankins, a vocational assessment consultant, testified by deposition. He felt plaintiff could do simple clerical work from his educational background but found the restrictions imposed by the two physicians eliminated him from most jobs. He said he could probably do part-time work but he was not aware of many jobs in the labor market of this nature. He gave a vocational assessment of

100 percent vocational disability.

Our review of the case is *de novo* on the record of the trial court accompanied by a presumption of the correctness of the findings of fact unless we find the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2).

We are required under this review to examine in depth a trial court's factual findings and conclusions and we are not bound by such findings but must conduct an independent examination to determine where the preponderance of the evidence lies. *Galloway v. Memphis Drum Service.,* 822 S.W.2d 584 (Tenn. 1991).

An employee has the burden of proving every element of the case, including causation and permanency by a preponderance of the evidence. *Tindall v. Waring Park Ass'n.* 725 S.W.2d 935, 937 (Tenn. 1987).

In order to qualify for total disability under our Workers' Compensation Law, the injury must totally incapacitate the employee from working at an occupation which brings him an income. TENN. CODE ANN. § 50-6-207(4)(B).

In deciding whether an employee is totally disabled under this definition, the courts must consider many factors such as the employee's age, education, work experience, local job opportunities, etc., and this is to be examined in relation to the open labor market and not whether the employee is able to return and perform the job held at the time of the injury. *Orman v. Williams-Sonoma, Inc.,* 803 S.W.2d 672, 678 (Tenn. 1991); *Clark v. National Union Fire Ins. Co.,* 774 S.W.2d 586, 588 (Tenn. 1989).

In the present case, we are of the opinion the medical testimony must be construed as recommending the employee may return to the labor market subject to restrictions on certain activities. In applying the statutory definition of what constitutes total disability in the open labor market, we cannot conclude that plaintiff is totally disabled. Based on his educational abilities and his work experience, we believe there are jobs he could perform. Therefore, we find the evidence in the case preponderates against the trial court's conclusion that 100 percent permanent disability should be awarded.

As to the extent of his permanent disability, we note the injury in question

occurred after the adoption of numerous amendments to our Workers' Compensation Law in 1992. Thus, TENN. CODE ANN. § 50-6-241 (which limits a recovery to either two and one-half times the medical impairment or six times the medical impairment) has application.

The record indicates plaintiff returned to work at an hourly rate of pay equal to or greater than that received prior to his last injury. However, he worked less hours and was not really compensated on a weekly or monthly basis as prior to his injury. After several months, his work hours dropped significantly and eventually he had to stop work apparently because of his condition. Therefore, under case law construction of the statute, his return to work was not meaningful and subsection (a)(1) of the statute should not be imposed. We do determine the recovery should be controlled by subsection (b) which imposes a cap of six times the medical impairment rating. In fixing the award, we accept the ten percent total medical impairment rating and fix the permanent partial disability of 60 percent to the body as a whole. We also note that TENN. CODE ANN. § 50-6-242, which creates greater benefits under special circumstances, would not apply as the employee in this case could not qualify under any of the factors set out therein.

The last question is whether the Second Injury Fund is liable for any portion of the award of 60 percent disability.

Since plaintiff received an award of workers' compensation benefits for prior injuries, we must apply TENN. CODE ANN. § 50-6-208(b) rather than subsection (a), which was apparently applied in the trial court's order. The language of subsection (b) requires the court to combine the two awards and if the total exceeds 100 percent, then the Second Injury Fund is liable for benefits in excess of 100 percent. In this case, the combination of the 30 percent award and the 60 percent award results in a total of 90 percent. Thus, the Second Injury Fund is not liable for any portion of the award and the action as to it should be dismissed. See *Burris v. Cross Mountain Coal Co.,* 798 S.W.2d 746 (Tenn. 1990).

The judgment entered in the trial court is modified to award plaintiff 60 percent permanent disability to the body as a whole for which the defendant insurance carrier

is liable; the action apportioning liability is reversed and the case against the Second Injury Fund is dismissed. Costs of the appeal are taxed to plaintiff and defendant insurance company, jointly and sureties.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
E. Riley Anderson, Justice

_____
Joe C. Loser, Jr., Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

DAVID K. BURNETTE,	)	KNOX CHANCERY
	)	NO .124692-1
Plaintiff/Appellee,	)	
	)	
vs.	)	Hon. Frederick D. McDonald
	)	Chancellor
THE TRAVELERS INSURANCE COMPANY,	)	
	)	
	)	
Defendant	)	03S01-9607-CH-00074
and	)	
	)	
LARRY BRINTON, JR., DIRECTOR SECOND INJURY FUND.	)	
	)	
	)	
Defendant/Appellant.	)	

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Worker' Compensation 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 act 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, David K. Burnette and The Travelers Insurance Company for which execution may issue if necessary.

03/14/97