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

FILED

April 22, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

BLAINE BRACKINS, Plaintiff/Appellant v. SEVIER COUNTY, TENNESSEE, SEVIER COUNTY BOARD OF EDUCATION and LOCAL GOVERNMENT WORKERS' COMPENSATION FUND, Defendants/Appellees	)	SEVIER CIRCUIT NO. 03S01-9607--CV-00083 HON. BEN HOOPER, II, JUDGE

For the Appellant:

Richard T. Wallace
Ogle & Wallace, P.C.
121 Court Ave.
Sevierville, TN 37862

For the Appellees:

Elizabeth A. Townsend
Gerald L. Gulley, Jr.
Baker, McReynolds, Byrne, O'Kane, Shea & Townsend
P.O. Box 1708
Knoxville, TN 37901-1708

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

Members of Panel:

E. Riley Anderson, Justice
John K. Byers, Senior Judge
Roger E. Thayer, Special Judge

AFFIRMED IN PART,
REVERSED IN PART and
REMANDED

BYERS, Senior 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.

The trial judge found that plaintiff was 50% permanently partially disabled as a result of his work-related injury by accident. He further found that the workers' compensation carrier was entitled to a credit of $104,430.64, plaintiff's net recovery for his third-party tort settlement. He held that he could not exclude recovery for loss of consortium from plaintiff's net recovery because no specific amount of that recovery was apportioned to loss of consortium. He limited the recovery for medical expenses to plaintiff's out-of-pocket expenses. He granted the plaintiff's attorney a 20% fee from the medical expenses awarded and stated that plaintiff's attorney may have to look to plaintiff's attorney in the third-party action for the rest of his fee.

The plaintiff below appeals the trial court's judgment raising the following issues:

1) Whether the evidence preponderates against the trial court's finding that plaintiff retains 50% permanent partial disability to the body as a whole.

2) Whether the trial court erred in allowing the defendant a credit against the portion of the third-party tort recovery which is attributable to plaintiff's spouse's recovery for loss of consortium.

3) Whether the trial court erred by not crediting the full amount of medical expenses against the net recovery because the plaintiff's group hospitalization insurer had not filed a subrogation claim.

4) Whether the trial court should have required the defendant to pay the plaintiff's attorney's fees.

We affirm the judgment of the trial court except as to the issue of medical expenses, for which the defendant is liable in full.

The plaintiff was injured in a car accident on August 1, 1990 while he was traveling in the course of his employment with the Sevier County Board of Education. The plaintiff, who was 53 years of age at the time of trial, continues to work for the

same employer at a higher wage than the wage he was earning at the time of his accident. He has a limited education, having completed the eighth grade and attended part of the ninth grade; however, he testified that can read and write "pretty good." His former work experience includes work as a farm hand, in the military, self-employment performing small-engine repairs, as a laborer, then supervisor at a grocer wholesaler and for Activated Metals & Chemicals, where he worked for 11 years.

Plaintiff testified that he is now limited in his ability to perform heavy lifting, stand or walk for prolonged periods, climb ladders and get into and out of a truck. A former supervisor testified to similar limitations on plaintiff's ability to work, and a co-worker testified that plaintiff was able to do only about 30% of what he could do before his car accident.

Dr. Paul Thomas, an orthopaedic surgeon, treated plaintiff at the hospital and provided follow-up care until he moved to Franklin, Tennessee in late 1991. He described plaintiff's most serious injuries as being his right hip fracture and a fracture of the femoral shaft in his right leg. He performed surgery on plaintiff, inserting a rod to promote healing of the femoral shaft. He further testified that plaintiff received a rather severe laceration on the back of his right foot, which resulted in reflex sympathetic dystrophy in plaintiff's right foot. He testified that this condition involves pain and swelling and could remain the same or improve.

Dr. Thomas assigned the plaintiff impairments based on the then-current third edition of the GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT published by the American Medical Association. These impairment ratings were: 33% to the lower extremity due to the ankle, 18% due to the knee and 29% due to the hip, a total of 61% to the lower extremity or 24% to the body as a whole. He last saw the plaintiff on September 17, 1991 and opined that he would defer to Dr. Smith if Dr. Smith opined that plaintiff's ankle problem had resolved. If plaintiff's ankle problem had resolved, he opined that the plaintiff would retain a 15% to 18% impairment to the body as a whole.

Dr. Smith treated the plaintiff after Dr. Thomas for a hypertrophic non-union of the femur, replacing the rodding in plaintiff's leg with a larger rod. He also performed arthroscopic surgery on plaintiff's knee, during which he discovered a medial meniscus tear and fairly advanced arthritis. He was uncertain whether plaintiff's medial meniscus tear preceded his injury or whether plaintiff's arthritis was exacerbated by his injury. He did not treat plaintiff's ankle problem and seemed to believe that plaintiff's ankle problems had resolved. He assigned the plaintiff medical impairment ratings of four percent to the hip and eight percent to the knee, twelve percent to the body as a whole.

The medical records of Dr. William McPeake, an orthopaedic surgeon, who treated plaintiff for his problems with his ankle reflects Dr. McPeake's opinion that plaintiff would retain a permanent impairment from his injury to his ankle.

Plaintiff testified that he did not have any problems with his hip, knee or ankle prior to his work-related injury. He further testified that his right ankle continues to swell and to cause him pain and showed the trial judge his ankles.

Plaintiff and his wife received a settlement from a third-party action based on the August 1, 1990 accident. The check, in the amount of $210,000.00, was made out to both plaintiff and his wife. There was no allocation made for what, if any, of this was attributable to loss of consortium. At the time of the settlement, the workers' compensation carrier had paid medical expenses of $48,266.72. Since the settlement, plaintiff has incurred a further $35,482.22 in medical expenses related to treatment of his right leg, none of which was paid by the workers' compensation carrier. Of that amount, plaintiff paid $5,079.85 and defendant's group hospitalization insurer paid the remainder, but this insurer has not made a claim against the plaintiff or the workers' compensation carrier for reimbursement.

Our review of this case is *de novo*, accompanied by the presumption that the trial court's findings of fact are correct unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2). Where there is an issue of law and not of fact, our standard of review is *de novo* without a presumption of correctness. *Bradshaw v. Old Republic Ins. Co.*, 922 S.W.2d 503, 503 (Tenn. 1996).

We have reviewed the medical evidence and the lay testimony and find the evidence does not preponderate against the trial court's award of 50% permanent partial disability to the body as a whole.

The trial judge found the settlement of the plaintiff's action against the third party did not allocate a specific amount of the recovery to the wife for loss of consortium. Because of this, the trial judge held he was unable to reduce the off-set to which the defendant was entitled on the basis of a deduction in the amount of net recovery for loss of consortium. We find, under the facts surrounding this case, the trial judge was correct in his ruling on this issue.

However, we reverse the trial court's judgment on the issue of the employer's liability for medical expenses. This Court has previously held that an employer cannot receive a set-off against its legal obligation to pay for an employee's medical expenses related to his work-related injury because of payments made by its group hospitalization insurer for those same expenses. *Koehring-Southern & Am. Mut. Ins. Co. v. Burnette*, 225 Tenn. 147, 464 S.W.2d 820 (1970); *American Bridge Division, U.S. Steel Corp. v. McClung*, 206 Tenn. 317, 333 S.W.2d 557 (1960). We do not see a difference between allowing the workers' compensation carrier credit for such payments in this case and a credit or set-off against the employers' liability in those cases. We are not persuaded by the defendant's argument that the group hospitalization insurer's failure to request reimbursement in this case affects the defendant's liability under the Tennessee Workers' Compensation Law.

Plaintiff's attorney is entitled to a 20% fee on all medical expenses recovered by plaintiff. *Langford v. Liberty Mut. Ins. Co.*, 854 S.W.2d 100 (Tenn. 1993). He is not entitled to attorney's fees to be paid by the defendant.

We, therefore, affirm the judgment of the trial court except as to the issue of medical expenses, on which we reverse the trial court's judgment. Costs are taxed equally to the plaintiff and the defendant. This case is remanded for all appropriate purposes.

John K. Byers, Senior Judge

CONCUR:

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E. Riley Anderson, Justice

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Roger E. Thayer, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

BLAINE BRACKINS	)	SEVIER CIRCUIT
	)	No .92-811
Plaintiff/Appellant,	)	
	)	
vs.	)	Hon. Ben Hooper, II,
	)	Judge
	)	
	)	
SEVIER COUNTY, TENNESSEE,	)	
SEVIER COUNTY BOARD OF	)	
EDUCATION and LOCAL	)	
GOVERNMENT WORKERS'	)	
COMPENSATION FUND,	)	
	)	
Defendants/Appellees.	)	03S01-9607-CV-00083

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 equally to the plantiff and the defendant for which execution may issue if necessary.

04/22/97