

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

**FILED**  
**May 16, 1997**  
**Cecil W. Crowson**  
**Appellate Court Clerk**

HERBERT EARL CARTER, ) FENTRESS CHANCERY  
Plaintiff/Appellee )  
)  
)  
v. ) HON. BILLY JOE WHITE,  
) CHANCELLOR  
)  
ITT HARTFORD INSURANCE COMPANY, ) NO. 01S01-9606-CH-00111  
Defendant/Appellant ) (NO. 94-91 below)  
)  
and )  
)  
SUE ANN HEAD, etc. (SECOND )  
INJURY FUND), )  
Defendant/Appellee )  
\_\_\_\_\_ )

FOR THE APPELLANTS:

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(FOR ITT HARTFORD)

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(FOR SECOND INJURY FUND)

FOR THE APPELLEE:

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MEMORANDUM OPINION

MEMBERS OF PANEL:

ADOLPHO A. BIRCH, JR., CHIEF JUSTICE, SUPREME COURT  
JOHN K. BYERS, SENIOR JUDGE  
WILLIAM S. RUSSELL, RETIRED JUDGE

MODIFIED AND REMANDED

RUSSELL, SP. J.

This appeal from the judgment of the trial court in a workers' compensation case has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated Section 506-225 (e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

THE CASE

The appellee/employee was working as a truck driver on January 27, 1994, when he was injured in a head-on collision with another truck. What complicates this case is that the injured employee had suffered two serious prior injuries of the same general nature of those suffered in this accident. In a 1990 accident he suffered a ruptured disc and a fractured coccyx. This was a workers' compensation case, but the employer was self-insured and filed for bankruptcy before a settlement was made. Medical records for that injury reflect a 5% anatomical impairment. Another back injury at work in 1991 resulted in a workers' compensation settlement based upon a 20% vocational disability to the whole body.

In the case at bar the trial court found that the injured

employee, Herbert Earl Carter, suffered a 90% vocational disability from the 1994 accident, that he was thereafter totally disabled; and, because of the prior 20% whole body disability that the defendant insurance company should pay him for 90% of 400 weeks and the Second Injury Fund 10% of 400 weeks. Both appealed.

#### THE ISSUES

ITT Hartford Insurance Company (substituted for U.S.F. & G. Insurance Company as carrier for the employer) contends that the finding that the employee was 90% disabled as a result of the 1994 accident is excessive under the proof, that the award should have been confined to the right leg rather than the whole body; and, in the alternative, the award against the insurance carrier should have at most been 80%.

The Second Injury Fund also contends that the proof does not support a judgment of 90% permanent disability arising out of the 1994 accident, or the judgment of 10% of 400 weeks against the Second Injury Fund.

The appellee contends that the trial court erred in not awarding lifetime benefits under Tennessee Code Annotated Section 50-6-207 (4).

#### APPLICABLE LAW

Liability under the Second Injury Fund is defined under Tennessee Code Annotated Section 50-6-208.

Our appellate review is de nova upon the record of the trial court, accompanied by a presumption of the correctness of the

findings of fact, unless the preponderance is otherwise. Tennessee Code Annotated Section 50-6-225 (e)(3). Conclusions of law are subject to de nova review without any presumption of correctness. Presley v. Bennett, 860 S.W. 2d 857 (Tenn. 1993).

An employee is considered totally disabled when a covered injury totally incapacitates him or her from working at an occupation which brings him or her an income. Tennessee Code Annotated Section 50-6-225 (e)(2).

#### ANALYSIS

\_\_\_\_\_The threshold key to an analysis of this case is whether or not the evidence supports the trial judge's holding that Mr. Carter is permanently and totally disabled.

Three experts testified. A chiropractor, Boyd Denton Matthews, saw him eight times. The subject injury occurred on January 27, 1994. Dr. Matthews saw him first on August 23, 1994, and last on September 25, 1994. He studied records of Mr. Carter's prior injuries, and examined his present condition. He opined that Mr. Carter had a 36% permanent partial anatomical impairment to the whole body. However, he was unable to allocate this impairment to a specific prior accident. In effect, he said that Mr. Carter, when he examined him, had these impairments, but he could not say how or when they originated. Specifically, he was asked and answered:

Q. Doctor, finally one more question. We've talked a lot about these prior injuries and I just have one more question in regard to those. Based on the fact that you've never seen this man prior to this most recent auto

accident and he's had all these prior lumbar problems, you can't differentiate how much, if any, anatomical changes are attributable to the most recent accident versus all his prior injuries?

A. Anything that I would say prior to 8/23[94] when I saw him would be pure speculation.

The second expert to testify was Norman E. Hankins, Ed. D., a vocational expert. Based upon his review of the medical records of Mr. Carter's 1990 and 1991 injuries, he opined that Mr. Carter had a fifty percent vocational disability when he was working full time as a truck driver prior to January 27, 1994. Then, primarily based upon the conclusions of the chiropractor. Dr. Matthews, relative to the undifferentiated disabilities existent after all of the accidents, Dr. Hankins opined that Mr. Carter was one hundred percent vocationally disabled. This witness noted that Dr. George H. Lien, M.D., a board certified neurological surgeon who had treated the injured employee after his last accident, opined that Mr. Carter could return to driving a truck; but this witness apparently gave no weight to Dr. Lien's expert opinion.

The third expert is Dr. Lien. He reviewed the prior medical records and treated Mr. Carter for his 1994 injuries. He opined that Mr. Carter could return to truck driving, but would be unable to manually operate a tarp winch.

Dr. Lien diagnosed a peroneal nerve injury with leg atrophy, and set a 15% impairment to the whole person. He testified further that a peroneal nerve palsy was a condition that could improve or even go away over a prolonged recovery. Dr. Lien

testified: "There is no radiologic evidence of any problems that should cause him from being able to do unlimited work."

Dr. Lien was asked and answered:

Q. - - - can you say within a reasonable degree of medical certainty as to whether or not the peroneal nerve palsy was caused by the accident in January of 1994?

          A. I think that there are a lot of unknowns in this case. I do not know the exact site of his nerve injury, whether its at the level of the peroneal nerve or whether it's at the level of his lumbar spine. There is no way for determining the age of the injury based upon objective criteria. All that I have to go by is the patient, the history that he presents of this atrophy occurring since the accident.

#### CONCLUSION AND JUDGMENT

The weight of the evidence is that Mr. Carter had substantially the same injuries prior to 1994, and that he suffered an exacerbation in the subject accident. The most persuasive testimony regarding his fitness to return to work as a truck driver comes from Dr. Lien. We find that the evidence preponderates against the judgment that Mr. Carter is totally and permanently vocationally disabled. We hold that the January 27, 1994 accident resulted in 37 1/2% permanent partial vocational disability to the body as a whole, and amend the judgment of the trial court accordingly. The case is remanded for enforcement of the decree. Costs on appeal are assessed to ITT Hartford Insurance Company, the substitute appellant.

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WILLIAM S. RUSSELL, SPECIAL JUDGE

CONCUR :

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ADOLPHO A. BIRCH, JR.,  
CHIEF JUSTICE

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JOHN K. BYERS, SENIOR JUDGE

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Plaintiff-Appellee,	(
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Defendant-Appellant,	( Hon. Billy Joe White,
	( Chancellor
and	(
	(
SUE ANN HEAD, ETC. (SECOND	(
INJURY FUND),	(
	(
Defendant-Appellee.	( MODIFIED AND REMANDED.

**JUDGMENT**  
**ORDE**  
**R**

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well taken and should be denied; 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 defendant-appellant, ITT Hartford Insurance Company.

IT IS SO ORDERED this 16th day of May, 1997.

PER CURIAM

Birch, C.J. - Not participating.



