IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(June 9, 1997 Session)

RICHARD HITCHCOCK,	)	DAVIDSON CHANCERY
	)	
Plaintiff-Appellee,	)	Hon. Robert S. Brandt,
	)	Chancellor.
v.	)	
	)	No. 01S01-9612-CH-00250
WAUSAU INSURANCE COMPANIES and SERVICE AMERICA CORPORATION,	)	
	)	
Defendants-Appellees.	)	
	)	
and	)	
	)	
LARRY BRINTON, JR., DIRECTOR, DIVISION OF WORKERS' COMPENSATION, SECOND INJURY FUND,	)	
	)	
Defendant-Appellant.	)	

For Appellant:

Charles W. Burson
Attorney General & Reporter

Dianne Stamey Dycus
Senior Counsel
Nashville, Tennessee

For Appellee, Hitchcock:

Kenneth M. Switzer
Williams/Nebel & Associates
Nashville, Tennessee

For Appellee, Wausau:

Angus Gillis, III
Schulman, LeRoy & Bennett
Nashville, Tennessee

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

Members of Panel:

Adolpho A. Birch, Jr., Chief Justice, Supreme Court
Thomas W. Brothers, Special Judge
Joe C. Loser, Jr., Special Judge

VACATED AND REMANDED — 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. In this appeal, the Second Injury Fund (the fund) contends (1) the evidence preponderates against the trial court's finding that the claimant is permanently and totally disabled, and (2) that it was error to approve a settlement between the employee and employer under the circumstances. The claimant contends the objection to the settlement comes too late. As discussed below, the panel has concluded both judgments should be vacated and the case remanded for further consideration.

The employee or claimant, Hitchcock, is forty-two and a high school graduate. On October 14, 1993, he suffered a compensable back injury while employed as a warehouseman for the employer, Service America. He has since had three back operations. The operating surgeon has released him to return to work with lifting, twisting and bending restrictions and assigned a permanent impairment rating of twelve percent to the whole body.

On September 5, 1995, the trial court approved a settlement between the claimant and his employer, whereby the claimant received permanent partial disability benefits based on forty-five percent to the body as a whole, paid in a lump sum. The fund did not participate in the settlement.

The claimant's return to work has been complicated by two pre-existing conditions, blindness in one eye and limited side vision in the other, and a prior carpal tunnel release. A vocational expert testified the claimant is capable, in his disabled condition, of performing medium or light sedentary work. At the time of the trial, the claimant was in fact employed by Opryland as a cashier.

After a trial in which the Second Injury Fund was the only defendant, the trial court found the claimant to be permanently and totally disabled and found the fund liable, pursuant to Tenn. Code Ann. section 50-6-208(a), for benefits at the claimant's compensation rate from the date the claimant reached maximum medical improvement from the injury until the claimant reaches age sixty-five. 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. section 50-6-225(e)(2). This tribunal is required to conduct an independent examination of the evidence to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921 (Tenn. 1995).

When an injury, not otherwise specifically provided for in the Act, totally incapacitates a covered employee from working at an occupation which brings him an income, such employee is considered totally disabled. From our independent examination of the record, we find the evidence preponderates

against the trial court's finding of permanent total disability. The claimant is not incapacitated from working at an occupation which brings him an income. Accordingly the award of benefits under Tenn. Code Ann. section 50-6-208(a) is vacated.

After this case was litigated in the trial court, our Supreme Court released its opinion in Sweeten v. Trade Envelopes, 1996 Tenn. Lexis 809 (S. Ct. 1996), in which it held that an employee's claim against the fund must be litigated at the same time as the employee's claim against his employer, unless the fund agrees otherwise, citing Farr v. Head, 811 S.W.2d 894, 896-97 (Tenn. 1991) and Dailey v. Southern Heel Co., 785 S.W.2d 344, 346 (Tenn. 1990). Such was not the case here. The trial court did approve a settlement between the claimant and his employer and that settlement contained a handwritten notation, "It is further ORDERED that the claim against the Second Injury Fund has been announced as settled subject to approval of the State of Tennessee," but the consent order was not signed by counsel for the fund or the state. Moreover, our reading of the statutes is that the fund and the state are one and the same. Accordingly the order approving the settlement is vacated.

The cause is remanded to the Chancery Court for Davidson for such further proceedings as may be appropriate. Costs on appeal are taxed to the plaintiff-appellee.

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Joe C. Loser, Jr., Special Judge

CONCUR:

_____

Adolpho A. Birch, Jr., Chief Justice

_____

Thomas W. Brothers, Special Judge

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

RICHARD HITCHCOCK,	)	DAVIDSON CHANCERY
	)	No. 94-536-III Below
Appellee,	)	
	)	Hon. Robert S. Brandt,
v.	)	Chancellor
	)	
WAUSAU INSURANCE	)	No. 01S01-9612-CH-00250
COMPANIES & SERVICE	)	
AMERICA CORP.,	)	
	)	
Appellees,	)	
	)	
and	)	
	)	
LARRY BRINTON, JR., DIRECTOR,)		
DIV. OF WORKERS' COMP.,	)	VACATED AND REMANDED.
SECOND INJURY FUND,	)	
	)	
Appellants.	)	

JUDGMENT ORDER

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 motions for review are 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 on appeal are assessed to the appellee.

IT IS SO ORDERED this 9th day of October, 1997.

PER CURIAM

Birch, C.J. - Not participating.