IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE

FILED

December 16, 1997

Cecil W. Crowson
Appellate Court Clerk

WALLACE EARL PALMORE Plaintiff/Appellee	No. 01S01-9610-CV-00204 (No. 13668 below)
v.	LAWRENCE COUNTY CIRCUIT COURT
FRITO-LAY, INC. and SECOND INJURY FUND Defendants/Appellants	HON. JAMES L. WEATHERFORD, Judge

FOR THE APPELLANTS:

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MEMORANDUM OPINION

MEMBERS OF PANEL:

LYLE REID, ASSOCIATE JUSTICE, SUPREME COURT
WILLIAM H. INMAN, SENIOR JUDGE
WILLIAM S. RUSSELL, RETIRED JUDGE

MODIFIED AND REMANDED RUSSELL, SP. J.

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court pursuant to Tennessee Code Annotated Section 50-6-225 (e)(3) for hearing and reporting of findings of fact and conclusions of law.

Wallace Earl Palmore was working for Frito-Lay, Incorporated, on October 2, 1992, at a labor intensive job of shoveling peanut butter and cheese filling into a snack sandwich making machine. He had been working twelve hour shifts at this particularly physically demanding job for more than a year. Mr. Palmore had a congenital back spondylolysis with spondylolisthesis and degenerative disc disease. On said date his back pain became so intense that he could no longer work for Frito-Lay.

Mr. Palmore has a lifelong history of back problems, beginning at the age of 13. In 1979, as a result of aggravation of his condition at work for Frito-Lay he was hospitalized for acute back pain. X-rays showed spondylolysis at L5, and he was off work for two weeks before returning to light duty. In 1981 his back popped while working for Frito-Lay and he was again off work for two weeks or more. In both instances he received workers' compensation, but nothing for permanent impairment. At the time of the episode which disabled him in 1992 his employer knew of his historic back problem.

Not having returned to work after the October 2, 1992, incident, Palmore brought suit against Frito-Lay, Inc. on August 23, 1993. In said suit his complaint specifically asked for, inter alia, "permanent total disability benefits"; but, although the plaintiff obviously knew at that time of his pre-existing impairment, as did his employer, he did not sue the Second Injury Fund. Later, on June 28, 1994, the counsel for the employee and the employer entered an "agreed" order joining the Second Injury Fund as a party defendant. On August 1, 1994, an "Amended Complaint" was filed which included the employee's claim against the Second Injury Fund. Said defendant Second Injury Fund filed an Answer on August 23, 1994, denied that it was liable, and also defended upon the one year statute of limitations.

The trial court found the employee to be permanently and totally disabled, held the employer liable for 75% of this disability and the Second Injury Fund liable for 25%. Without comment, the trial court ruled the statute of limitations defense of the Second Injury Fund "not well taken" and overruled it. The court ruled that Mr. Palmore was temporarily totally disabled from October 2, 1992, until March 1, 1995; that his compensation rate was $318.24 per week; that the total compensation for permanent total disability was 400 weeks; and that Frito-Lay should pay $95,472.00 in a lump sum (75% of 400 weeks) and that the Second Injury Fund should pay $31,824.00 (25% of 400 weeks) less whatever Frito-Lay paid for temporary total benefits. Frito-Lay was to be credited with any payment for temporary total in excess of said $31,824.00. Although not calculated in the judgment, it appears that $40,028.94 was paid in temporary total disability benefits, meaning that the Second Injury Fund would pay nothing.

STANDARD OF REVIEW

_____This court reviews the findings of fact by the trial court de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding unless the preponderance of the evidence is otherwise. Tennessee Code Annotated Section 50-6-225 (e)(2).

ISSUES

_____Frito-Lay, Inc. complains of the 75%-25% allocation of responsibility; says that the award of temporary total disability benefits in a permanent total disability case is contrary to the intent of the Workers' Compensation Act; and complains that temporary total disability benefits, if allowable, should have been terminated as of December 2, 1993, not March 1, 1995.

The Second Injury Fund complains: (1) that the statute of limitations had run as to it; (2) that in this case it had no liability under T.C.A. Sec. 50-6-242; (3) and that the trial court erred in awarding the employee his compensation in a lump sum.

STATUTE OF LIMITATIONS

_____This case is changed drastically by our conclusion that the one year statute of limitations barred the action against the Second Injury Fund.

The facts in this case are remarkably like those in the case of Pearson v. Day International Inc., ______ S.W. 2d _______(Tenn. 1996) [1996, WL 385602]. Ours is also a T.C.A. Sec. 50-6-208 (a) case. Mr. Palmore's right to recover against the Second Injury Fund was not dependent on the outcome of prior litigation

regarding his pre-existing disability. His pre-existing disability was largely congenital. The extent of his prior disability was ascertainable. He was treated by the same physician for his prior flare-ups and the disabling episode. That physician ultimately gave impairment ratings for both time frames. Mr. Palmore alleged in his original complaint that he might be permanently and totally disabled as a result of the October 2, 1992, work related episode. As Justice Holder wrote for the court in Pearson, this case is more squarely aligned with the reasoning in Travelers Insurance Company V. Austin, 521 S.W. 2d 738 (Tenn. 1975), wherein it was held that Tennessee Code Annotated Section 50-6-203 requires suit to be brought within one (1) year after the injury. An exception could arise if the employer has made voluntary payment of compensation benefits within that year. This record shows no such payments prior to an order to pay temporary total benefits entered on December 29, 1994, more than two years after the injury. The dates upon which medical benefits were first paid are not shown.

We hold, therefore, that the statute of limitations defense of the Second Injury Fund is good.

A second reason for the dismissal of the case as to the Second Injury Fund exists. That reason is that the evidence preponderates against the finding that Mr. Palmore is totally and permanently disabled as defined in Tennessee Code Annotated Section 50-6-207 (4)(B):

> When an injury not otherwise specifically provided for in this chapter, as amended, totally incapacitates the employee from working at an occupation which brings such employee an income, such employee shall be considered "totally disabled", and for such disability compensation shall be paid as

provided in subdivision (4) (A); * * *

The trial judge was undoubtedly influenced to hold that this employee was permanently totally disabled because on August 24, 1995, counsel for the employer wrote the attorney for the employee and offered to stipulate that Mr. Palmore should be found to have become permanently and totally disabled as that term is used in the Workers' Compensation Act, but that his award be limited to a total of 400 weeks of compensation benefits. Counsel for the employee responded by letter on August 29, 1995 and agreed to the stipulation. Although the Second Injury Fund was in the case and represented by counsel, that attorney was not privy to the stipulation correspondence. This stipulation is therefore not binding. It is obvious that both the employer and the employee were advantaged by the stipulation, which ipso facto made the Second Injury Fund a payment participant in some amount. It is noteworthy also that the 400 week cap is inappropriate in a permanent total disability case. See Tennessee Code Annotated Section 50-6-207 (4)(A).

We have examined the evidence as to the extent of Mr. Palmore's disability. Two physicians testified by deposition. Dr. Stanley Gilbert Hopp, and orthopaedic surgeon, testified that Mr. Palmore told him that he had a long history of back problems, starting at age 13. As a teenager he was treated by a chiropractor. In 1979 he was hospitalized from a spondylolysis defect at L-5. He was off work for a couple of weeks and returned to light duty. In 1981 he bent over, his back popped, and he was off work two or three weeks. He got some outpatient treatment and did fairly well until October 5, 1992. He had been working long

hours, shoveling. He suffered increased pain in his back and left leg, without specific incident or injury.

Dr. Hopp's examination revealed a little tenderness in the low back, but no muscle spasm. His lumbar motion was mild to moderately restricted. Other than decreased sensation in the top of the left foot his nerves were normal in both legs. X-rays of the lumbar spine revealed spondylolisthesis at L-5. There were degenerative changes at L-3, 4. His CT scan showed facet arthrosis at L-4, 5 and S-1. There was no disc herniation or stenosis.

Dr. Hopp testified that Mr. Palmore's pain was primarily from degenerative problems in the low back, with occasional irritation of the nerve root, with a superimposed sprain or strain injury.

Dr. Hopp testified that he did not think that it would be in Mr. Palmore's best interest to bend over high tubs and scoot down or shovel heavy peanut butter. He thought that would strain his back; and if they didn't have anything else for him to do that he would probably need to change his job or even seek disability. But he testified that he thought it was probably better "for a person to keep working".

Dr. Hopp opined that this employee had sustained a chronic strain of his back, resulting in a five percent permanent partial impairment of the whole person. He set out permanent restrictions of no lifting greater that 30 pounds maximum, 15 pounds frequently. He should avoid trunk twisting, but occasional bending is allowed.

His treating physician was Dr. Norman L. Henderson, M.D. He testified that prior to the incident in issue that Mr. Palmore had a 12 to 13 percent impairment to the whole body. He testified that the incident in question resulted in an additional 7 to 8 percent permanent aggravation of the prior impairment Dr. Henderson testified that in his opinion Mr. Palmore is not "medically employable at all".

Mr. Palmore owns a 76 acre farm. In 1995 his tax return indicated that he made $3443.35 farming. The testimony of Mr. and Mrs. Palmore was that he did only light work in looking after cattle and chickens.

Mr. Palmore has obtained a disability pension from Social Security, but the record does not reflect the basis for the ruling.

Based upon Dr. Hopp's testimony, and the admitted farming activity, this employee does not qualify as totally disabled.

CONCLUSIONS

Because of the Statute of Limitations defense and our judgment that Mr. Palmore is not permanently totally disabled we hold that the suit is dismissed as to the Second Injury Fund; and the employer's complaint directed at temporary total disability compensation being ordered paid in a total disability case is rendered moot. We reverse the trial court in holding that the terminal date for the temporary total disability payments is March 1, 1995, and hold the date to be December 2, 1993. We set the

permanent partial vocational disability to the body as a whole at 75 percent, and affirm the trial judge's order of lump sum payment.

We remand the case to the trial court for the enforcement of this judgment, as modified. Costs on appeal are assessed to Frito-Lay, Incorporated.

WILLIAM S. RUSSELL, SPECIAL JUDGE

CONCUR:

LYLE REID, ASSOCIATE JUSTICE

WILLIAM H. INMAN, SENIOR JUDGE

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	)	NO. 13688
PLAINTIFF/APPELLEE,	)	
	)	HON. JAMES L. WEATHERFORD
v.	)	SENIOR JUDGE
	)	
FRITO-LAY, INC. AND	)	
SECOND INJURY FUND,	)	S.CT.NO. 01S01-9610-CV-00204
	)	
DEFENDANTS/APPELLANTS.	)	MODIFIED AND REMANDED.

JUDGMENT

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 Frito-lay, Incorporated, for which execution may issue if necessary.

It is so ordered this 16th day of December, 1997.

PER CURIAM