

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

AT NASHVILLE
(June 9, 1997 Session)

JOHN SCHULTZ,)
) LAWRENCE CIRCUIT
)
) Plaintiff-Appellee,)
) Hon. Jim T. Hamilton,
) Judge.
)
) v.)
) No. 01S01-9701-CV-00017
)
) CITY OF LAWRENCEBURG,)
)
) Defendant-Appellant,)
)
) v.)
)
) TENNESSEE SECOND INJURY FUND,)
)
) Third Party Defendant.)

FILED

November 7, 1997

Cecil W. Crowson
Appellate Court Clerk

For Appellant:

James A. Hopper
Savannah, Tennessee

For Appellee, Schultz:

Ben Boston
Christopher V. Sockwell
Lawrenceburg, Tennessee

For Appellee, Second Injury Fund:

John Knox Walkup
Attorney General & Reporter

Diane Stamey Dycus
Senior Counsel
Nashville, Tennessee

MEMORANDUM OPINION

Members of Panel:

Adolpho A. Birch, Jr., Chief Justice, Supreme Court
Robert S. Brandt, Senior Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED

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 employer, City of Lawrenceburg, contends (1) the evidence preponderates against the trial court's finding of a compensable injury by accident arising out of and in the course of employment, (2) the evidence preponderates against the trial court's finding that the employee's compensation rate is \$308.08, (3) the evidence preponderates against the trial court's award of temporary total disability benefits from August 5, 1994 through October of 1995 and (4) the trial court erred in commuting permanent partial disability benefits to a lump sum. As discussed below, the panel has concluded the judgment should be affirmed.

The employee or claimant, John Schultz, was forty-nine years old at the time of the injury. He has an eighth grade education and a GED. He has worked as a heavy equipment operator since 1968.

On January 21, 1994, while working for the employer, he injured his neck and back while operating a backhoe as a jackhammer on frozen ground. He injured his left shoulder again on August 5, 1994 while working for the employer and running out of a hole filling with water. He attempted to work the next day before going to a doctor's appointment, then was totally disabled until October 18, 1995, when he reached maximum medical improvement.

The claimant was treated or evaluated by a number of physicians and assigned permanent impairment ratings of from six to ten percent from the injuries which the physicians related to the work he was performing. He continues to have neck and shoulder problems.

The record contains conflicting documentary evidence as to the employee's average weekly wage, but the employer had actually paid benefits of \$308.08 from the August injury until the date of maximum medical improvement, for his temporary total disability.

The trial court awarded no additional temporary total disability benefits, but did award the claimant's reasonable and necessary medical expenses and permanent partial disability benefits based on thirty-two percent to the body as a whole, payable in a lump sum. The claim against the Second Injury Fund was dismissed. 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).

(1)

Under the Tennessee Workers' Compensation Law, injuries by accident arising out of and in the course of employment which cause either disablement or death of the employee are compensable. Tenn. Code Ann. section 50-6-102(a)(5).

An accidental injury is one which cannot be reasonably anticipated, is unexpected and is precipitated by unusual combinations of fortuitous circumstances. Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993). An accidental injury arises out of one's employment when there is apparent to the rational mind, upon a consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury, and occurs in the course of employment if it occurs while an employee is performing a duty he was employed to do. Id. The evidence fails to preponderate against the trial court's finding that the employee suffered a compensable injury.

(2)

In most cases, where there is a dispute over the employee's compensation rate, there is consistent evidence upon which that can be mathematically determined. In this case, however, the most persuasive evidence is the rate which the employer has determined to be the proper one by paying it as temporary total disability benefits, accompanied by the presumption of correctness of the trial court's finding. Consequently, the evidence fails to preponderate against the trial court's finding as to the employee's compensation rate.

(3)

Temporary total disability refers to the injured employee's condition while disabled to work because of his injury and until he recovers as far as the nature of his injury permits. Redmond v. McMinn County, 209 Tenn. 463, 354 S.W.2d 435 (1962). Benefits for temporary total disability are payable until the injured employee is able to return to work or until he attains maximum medical recovery, at which time his entitlement to such benefits terminates. Prince v. Sentry Ins. Co., 908 S.W.2d 937 (Tenn. 1995). Consequently, the evidence fails to preponderate against the trial court's finding with respect to temporary total disability benefits.

(4)

Permanent disability benefits that are payable periodically may be commuted to a lump sum. In determining whether to commute an award, the trial court must consider whether the commutation will be in the best interest of the employee and the ability of the employee to wisely manage and control the commuted award. Tenn. Code Ann. section 50-6-229(a). In this case, it is in the employee's best interest to obtain his benefits in a lump sum to satisfy debts that have resulted from problems beyond his control. Moreover, there is evidence that he and his wife have the ability to wisely manage and control a lump sum. Accordingly, the panel finds no error in the trial court's commutation of the award to a lump sum.

The judgment of the trial court is affirmed. Costs are taxed to the defendant-appellant.

Joe C. Loser, Jr., Special Judge

CONCUR:

Adolpho A. Birch, Jr., Chief Justice

Robert S. Brandt, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

JOHN SCHULTZ,)	LAWRENCE CIRCUIT NO. 14093
)	
PLAINTIFF/APPELLEE,)	
)	
V.)	
)	HON. JIM T. HAMILTON, JUDGE
CITY OF LAWRENCEBURG,)	
)	
DEFENDANT/APPELLANT,)	
)	
V.)	S. CT. NO. 01S01-9701-CV-00017
)	
TENNESSEE SECOND INJURY FUND,)	
)	
THIRD-PARTY)	
DEFENDANT/APPELLEE.)	AFFIRMED.

<p>FILED</p> <p>November 7, 1997</p> <p>Cecil W. Crowson Appellate Court Clerk</p>
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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 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 Appellant, City of Lawrenceburg, for which execution may issue if necessary.

It is so ordered this 7th day of November, 1997.

PER CURIAM

Birch, Not Participating