IN THE SUPREME COURT OF TENNESSEE
WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, MARCH 1998 SESSION

LIBERTY MUTUAL INSURANCE COMPANY	)	KNOX CHANCERY
Plaintiff/Appellee	)	
V.	)	Hon. Sharon Bell, Chancellor
LARRY BRINTON, JR., DIRECTOR OF THE WORKERS' COMPENSATION DIV., DEPT. OF LABOR SECOND INJURY FUND	)	
Defendant/Appellant	)	NO. 03S01-9706-CH-00072

For the Appellant:

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Nashville, Tenn. 37243-0499

For the Appellee:

James T. Shea, IV
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P.O. Box 1708
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M E M O R A N D U M O P I N I O N

Members of Panel:

Adolpho A. Birch, Jr., Justice
William H. Inman, Senior Judge
Roger E. Thayer, Special Judge

REVERSED & DISMISSED. THAYER, Special 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.

This appeal presents a novel issue arising from the provisions of T.C.A. § 50-6-238(b), which is one of the 1992 amendments to the Workers' Compensation Act.

The appeal was perfected by the defendant, The Tennessee Department of Labor Second Injury Fund, from a ruling of the trial court awarding plaintiff, Liberty Mutual Insurance Company, a judgment in the sum of $6,526.52.

The complaint alleged plaintiff was the workers' compensation insurance carrier for Macawber Engineering, Inc. and one of their employees, Lonnie D. Roberts, contended he sustained a work-related injury (heart attack) on July 19, 1993, as a result of stress due to overtime work and excessive heat at his workplace; that upon reviewing the claim plaintiff denied the heart attack was work-related and declined to pay benefits and medical expenses; that the claim was reviewed by a workers' compensation specialist who ordered plaintiff to pay temporary total disability benefits of $6,526.52 for a period beginning July 20, 1993 to January 17, 1994, and plaintiff complied with this order; that sometime after February 14, 1994, the Department of Labor determined the claim was not compensable as the heart attack was not work-related; that plaintiff made a demand upon the state Second Injury Fund for a refund which was declined.

The complaint alleges that a copy of the state department's order to pay, drafts issued by plaintiff in satisfaction of the order and a copy of the department's order denying plaintiff's claim were attached to the complaint as exhibits but the certified record does not contain any of these documents.

Defendant answered the complaint by alleging it was without sufficient information or knowledge to form a belief as to the allegations and strict proof of same was demanded. For further answer it was alleged that T.C.A. § 50-6-238 allowed a workers' compensation insurance carrier to receive a refund under circumstances as alleged in the complaint when the Defendant was furnished a copy of a court order finding the claim was not compensable and since no such order had been submitted to it, the claim for a refund was premature.

Defendant later filed a motion to dismiss because (1) the employee had not been made a party to the action, (2) the statute of limitations of one year had expired, and the present claim was barred, and (3) the statute in question did not authorize a suit against the defendant.

Plaintiff filed a response to the answer alleging the employee never filed a complaint seeking compensation for the claim and since any action by the employee was barred, the employee was not a necessary party.

A hearing was conducted concerning the issues developed by the pleadings and the issues were taken under advisement by the trial court. An order was later entered overruling the motion to dismiss. The order also provided the court found the employee's claim was barred by his failure to file suit within one year and the claim was non-compensable for this reason and plaintiff was entitled to the refund under the statute.

The case is to be reviewed on appeal de novo accompanied by a presumption of the correctness of the findings of fact unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2). However, the de novo review does not carry a presumption of correctness to a trial court's conclusion of law but is confined to factual findings. *Union Carbide v. Huddleston,* 854 S.W.2d 87, 91 (Tenn. 1993).

Subsection (b) of T.C.A. § 50-6-238 provides:

> "If a specialist has ordered the payment of benefits pursuant to this section, and a court finds that the injury was noncompensable, then an employer or the employer's workers' compensation insurer is entitled to a refund of all amounts paid from the second injury fund established by § 50-6-208, within thirty (30) days of submission of appropriate evidence of such findings to the department of labor. . . ."

Our review of the record indicates there was not any evidence introduced supporting any of the allegations of the complaint. The record is devoid of any stipulation of facts by the parties. Also, there are not any affidavits in the record and the matter could not be treated as having been disposed of by summary judgment.

We find the trial court was in error in awarding a judgment against the defendant state agency based solely on the pleadings which we view as raising disputed issues of fact. Additionally, we find the complaint did not state a cause of action because it failed to allege the insurer had complied with the statute in furnishing evidence that a court had found the claim noncompensable prior to the alleged demand for a refund.

As an alternative prayer for relief, plaintiff insurer requested that in the event a monetary judgment was not awarded that the court find the claim to be noncompensable and a refund to be appropriate. We find the record is insufficient to establish whether the alleged claim of the employee was compensable or non-compensable.

Lastly, we find that T.C.A. § 50-6-238 does not authorize an action of this nature against the second injury fund. The second injury fund statute, T.C.A. § 50-6-208(b)(2)(B), provides that claims against the fund shall be made in the manner prescribed in T.C.A. § 50-6-206. The latter statute allows joining the second injury fund as a party defendant in proceedings where "the employee would be entitled to receive or is claiming compensation from the 'second injury fund' provided for in § 50-6-208. . . ."

The judgment is reversed and the complaint is dismissed. Costs of the appeal are taxed to plaintiff.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
Adolpho A. Birch, Jr., Justice

_____
William H. Inman, Senior Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

FILED

July 16, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

LIBERTY MUTUAL INSURANCE COMPANY	)	KNOX COUNTY No.127398-3
Plaintiff/Appellee,	)	
vs.	)	Hon. Sharon Bell Chancellor
LARRY BRINTON, JR. DIRECTOR OF THE WORKERS' COMPENSATIO DIV. DEPT. OF LABOR SECOND INJURY FUND.	)	No. 03S01-9706-CH-00072
Defendant/Appellant,	)	

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' 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 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 taxed to the plaintiff, Liberty Mutual Insurance Company for which execution may issue if necessary.

07/16/98

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 plaintiff-appellant and sureties, for which execution may issue if necessary.

IT IS SO ORDERED this ____ day of June, 1997.

PER CURIAM

Anderson, J. - Not Participating

al 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 to the plaintiff-appellant, Vernon Harris and Gilbert and Faulkner. surety, for which execution may issue if necessary.

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