IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED

December 3, 1998

Cecil W. Crowson
Appellate Court Clerk

DONNIE G. SMITH	*}*	*PUTNAM CIRCUIT*
	}	*No. Below NJ-6308*
Plaintiff/Appellee	*}*	
vs.	*}*	
	}	
HERITAGE FORD-LINCOLN-	*}*	*Hon. John A. Turnbull*
MERCURY,INC.,HARLEYSVILLE	*}*	*Judge*
MUTUAL INSURANCE COMPANY	*}*	
Defendants/Appellees	*}*	*No. 01S01-9712-CV-00274*
and	*}*	
DINA TOBIN,Director of the Division	*}*	
of Workers' Compensation	*}*	
TENNESSEE DEPARTMENT OF	*}*	
LABOR, SECOND INJURY FUND	*}*	*MODIFIED IN PART;*
Defendant/Appellant	*}*	*VACATED IN PART*

JUDGMENT ORDER

This case is before the Court upon 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 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 will be paid by defendants/appellees, for which execution may issue if necessary.

IT IS SO ORDERED on December 3, 1998.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(June 29, 1998 Session)

DONNIE G. SMITH,	)	PUTNAM CIRCUIT
	)	
Plaintiff-Appellee,	)	Hon. John Turnbull,
	)	Judge.
v.	)	
	)	No.01S01-9712-CV-00274
HERITAGE FORD-LINCOLN-MERCURY, INC., HARLEYSVILLE MUTUAL INSURANCE COMPANY,	)	
	)	
Defendants-Appellees,	)	
and	)	
	)	
DINA TOBIN, Director of the Division of Workers' Compensation, TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND,	)	
	)	
Defendant-Appellant.	)	

For Defendant-Appellant:

John Knox Walkup
Attorney General & Reporter

Kathleen W. Stratton
Sandra E. Keith
Assistant Attorneys General
Nashville, Tennessee

For Defendants-Appellees:

J. Michael Morgan
Ortale, Kelley, Herbert & Crawford
Nashville, Tennessee

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

Members of Panel:

Frank F. Drowota, III, Associate Justice, Supreme Court
William H. Inman, Senior Judge
Joe C. Loser, Jr., Special Judge

MODIFIED IN PART
VACATED IN PART

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. The issues on appeal are (1) whether the trial court erred in its apportionment of permanent total disability benefits and (2) whether the trial court erred in ordering the Second Injury Fund (the Fund) to reimburse the employer in the event the injured employee were to die before reaching age sixty-five. As discussed below, the panel recommends the apportionment of disability benefits be modified and the order that the Fund reimburse the employer be vacated.

In April of 1996, the employee or claimant, Donnie Smith, suffered a compensable back injury, while working as a mechanic for Heritage Ford-Lincoln-Mercury, Inc. The injury was described by the trial judge as "rerupture of a previously herniated disk at the L5-S1 level."

The claimant had suffered three previous disabling injuries. On May 7, 1986, while employed by Russell Stover Candies, the claimant suffered a knee injury, for which he received a lump sum award of $7,500.00, which equates to one based on 11.16 percent to the body as a whole.

In 1987, he hurt his back while working on a car at home. For that injury, he was treated by Dr. G. William Davis, who performed a lumbar laminectomy and disk excision in December of 1987. After recovering from that injury, he worked approximately fifty-five hours per week as a machine grinder for a period of approximately three years, then as a mechanic for Valley Ford in Sparta until April of 1995, when he began working for Heritage. His medical impairment from this prior back injury was 10 percent to the whole body, according to three different experts.

In addition, the claimant suffered a gradually occurring injury to his shoulder in 1988, which resulted in surgery in 1995, and from which he received a five percent medical impairment rating from his doctor. The evidence does not establish that the 1987 back injury or the 1988 shoulder injury was work-related or that there was any award of benefits for either.

Following his most recent injury, which is the subject of this litigation, the claimant again sought the services of Dr. Davis, who diagnosed a disk rupture at the site of the previous surgery and a free fragment that was impinging on the nerve root. The doctor recommended a diskectomy and fusion surgery at the L5-S1 interspace. During surgery, air was entrained into the blood flow, resulting in the claimant being, for all practical purposes, paralyzed from the nipples down.

It is undisputed that the claimant is permanently and totally

disabled, that Heritage had knowledge of his prior disabilities to the shoulder, knee and back and that the most recent injury is compensable under the Workers' Compensation Laws of this state. The trial judge found the employee's pre-existing disability from the back, shoulder and knee injuries to be 55% to the body as a whole and from the most recent injury and necessary surgery to be "100% total permanent disability." He found "that the total amount of plaintiff's disabilities are 155%, 155%."

The trial court ordered the employer and its insurer to pay benefits due the employee at the agreed compensation rate for the first 45% of the total of the weeks through his age 65, the Fund to pay the final 55% of such benefits through his age 65 and that "if death shortens the time of permanent disability payments to be made, then (the Fund) will pay over to the employer its 55% share of permanent disability payments made by the employer."

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 50-6-224(e)(2). Jones v. Sterling Last Corp., 962 S.W.2d 469 (Tenn. 1998). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Spencer v. Towson Moving and Storage, Inc., 922 S.W.2d 508 (Tenn. 1996). Extent of vocational disability is a question of fact. Collins v. Howmet Corp., 970 S.W.2d 941 (Tenn. 1998).

The employer and its insurer contend the claimant was not rendered permanently and totally disabled as a result of the most recent injury, but because of the fusion surgery, and that the fusion surgery was necessitated by the prior back injury. They rely on the testimony of Dr. Davis that the medical impairment from the second injury was only slightly greater than the impairment from the prior injury and on the following excerpts from the deposition of Dr. Manuel Robert Weiss, who examined the claimant:

Q. Okay, Doctor, assume that at the time of the surgery by Dr. Davis where he redid the disk repair, that is, we're talking about the second surgery, if it had not been for the complication that occurred and caused Donnie's paralysis, you would have still given and assigned the same percentage that he had before that surgery; that is, the 10 percent impairment; is that correct?

A. If he had never had the second surgery?

Q. No, sir. If he had had the second surgery and had not had a complication.

A. Oh, then he might have received an additional one or two percent for the second operation. I think the guidelines are pretty clear about that.

Q. And you would not have increased his work restrictions as a result of the second injury, would you?

A. It's possible I would have, but probably not that much. I mean let's just say he did have an 80-pound lifting restriction back in 1987 and he reruptured a disk. I would probably lower that to 40 pounds or something like that.

From a consideration of all the medical evidence and the lay proof, the trial court's finding that the claimant is permanently and totally disabled from the 1996 injury is well supported, particularly by the facts that the employee was able to and did work regularly after the prior injury and surgery, though with considerable pain, and that he "generally did well," as the trial judge noted. That work included repeatedly lifting baskets of tank balls weighing 45-50 pounds while leaning and twisting. Additionally, the record shows he missed no time from work because of his back while working for the ball joint company, Valley Ford or Heritage Ford before the 1996 injury.

Moreover, it is settled in Tennessee law that death or injury resulting from medical treatment for a compensable injury or occupational disease is compensable as part of that accident. See Rogers v. Shaw, 813 S.W.2d 397 (Tenn. 1991) and cases cited therein. Accordingly, the evidence fails to preponderate against such finding.

The Fund contends its liability, if any, is under Tenn. Code Ann. section 50-6-208(b), and that the trial judge erroneously apportioned the award between it and the employer. It insists its maximum liability under that subsection is 11.16% to the body as a whole. We agree.

An employee who has previously become disabled from any cause and who, as a result of a later compensable injury, becomes permanently and totally disabled, may receive disability benefits from his employer or its insurance company only for the disability that would have resulted from the subsequent injury. Tenn. Code Ann. section 50-6-208; Cameron v. Kite Painting Co., 860 S.W.2d 41, 43 (Tenn. 1993). However, such employee may be entitled to recover the remainder of the benefits allowable for permanent total disability from the Second Injury Fund. Id.

The Second Injury Fund is liable under subsection (a) of Tenn. Code Ann. section 50-6-208 if (1) an employee has previously suffered a permanent physical disability from any cause or origin, and (2) the employee becomes permanently and totally disabled as the result of a subsequent compensable injury. Under subsection (a), the prerequisites for imposing liability on the Second Injury Fund are a prior injury, either compensable or non-compensable, which caused permanent disability and a subsequent compensable injury which rendered the employee permanently and totally disabled. Sweeten v. Trade Envelopes, Inc., 938 S.W.2d 383, 385 (Tenn. 1996). Under subsection (a), a permanently and totally disabled employee is entitled to recover from the

Second Injury Fund the amount whereby an award for permanent total disability exceeds the award for the subsequent injury. Minton v. State Industries, Inc., 825 S.W.2d 73, 76-77 (Tenn. 1992).

An employer under subsection (a) is responsible only for that disability that would have resulted from the subsequent injury had the earlier injury or injuries not existed. Bomely v. Mid-America Corp., 970 S.W.2d 929 (Tenn. 1998). Consequently, the extent of disability caused by the last injury is a critical factor in determining the liability, if any, of the Second Injury Fund. Id.

If an injured employee has one or more prior awards under the Workers' Compensation Act, and the combination of all such awards equals or exceeds one hundred percent permanent disability to the body as a whole, then the Second Injury Fund will pay, under subsection (b), the benefits due the employee in excess of one hundred percent. Sitz v. Goodyear Truck Tire Center, 762 S.W.2d 886, 887 (Tenn. 1988). Liability under subsection (b) is conditioned upon awards for permanent disability to the body as a whole, including the award for the last injury, exceeding 100 percent. Sweeten v. Trade Envelopes, Inc., 938 S.W.2d 383, 385 (Tenn. 1996). The Second Injury Fund is liable under subsection (b) if the sum of two or more awards for permanent disability to the body as a whole equal or exceed 100 percent permanent disability. Hill v. Eagle Bend Mfg. Co., 942 S.W.2d 483 (Tenn. 1997).

Subsections (a) and (b) of Tenn. Code Ann. section 50-6-208 are not mutually exclusive, and an employee may meet the criteria for coverage under both sections. Perry v. Sentry Ins. Co., 938 S.W.2d 404, 407 (Tenn. 1996). When the facts satisfy the requirements of both subsections (a) and (b), the courts should apply the one which produces a result more favorable to the employer since the goal of the Second Injury Fund statute is to encourage the hiring of injured workers by limiting employer liability. Bomely v. Mid-America Corp., supra.

The facts of this case do satisfy the requirements of both subsections (a) and (b). However, if subsection (a) is applied, there is no liability on the Fund, because the employer is liable for all of the subsequent injury, it having caused, as the trial judge found, the employee to be 100% permanently and totally disabled. Thus, the rule in Bomely requires the application of subsection (b) in this case. That section provides as follows:

> "(b)(1)(A) In cases where the injured employee has received or will receive a workers' compensation award or awards for permanent disability to the body as a whole, and the **combination of awards** equals or exceeds one hundred percent (100%) permanent disability to the body as a whole, the employee shall not be entitled to receive from the employer or its insurance carrier any compensation for permanent disability to the body as a whole that would be in excess of one hundred percent (100%) permanent disability to the body as a whole, **after combining awards**.

"(B) Benefits which may be due the employee for permanent disability to the body as a whole in excess of one hundred percent (100%) permanent disability to the body as a whole, **after combining awards**, shall be paid by the second injury fund.

"(C) It is the intention of the general assembly that once an employee receives an award or awards for permanent disability to the body as a whole and such awards total one hundred percent (100%) permanent disability, any permanent disability compensation due for subsequent compensable injuries to the body as a whole shall be paid by the second injury fund instead of the employer." (Emphasis supplied).

The trial judge found that the employee's previous award for a knee injury equated to one based on 11.16% permanent partial disability to the body as a whole, which he combined with the employee's pre-existing non-work-related disabilities, and assessed 55% as the Fund's share of the award for the most recent injury. He said, "(T)aking all the previous disability under part (a) and part (b) together, the combined effect resulted in vocational disability to the plaintiff to the extent of 55% to the body as a whole, all of which pre-existed the injury which is the immediate subject of this case." We are aware of no published authority authorizing the combining, under subsection (b), of disabilities for which there was no workers' compensation award; and none has been cited to us.

In summary, the Fund has no liability under subsection (a) because the evidence fails to preponderate against the trial judge's finding that the employee is 100% permanently and totally disabled from the most recent injury. Under subsection (b), the employer's liability is limited to 88.84% because a previous workers' compensation award equates to one based on 11.16% to the body as a whole. Thus, the judgment is modified by apportioning 88.84% to the employer and its insurance carrier and 11.16% to the Fund.

The final issue derives from the trial court's order that the Fund reimburse the employer or its insurer for a portion of payments made to the claimant in the event he dies before reaching age sixty-five. The employer and its insurer contend the order is consistent with the purpose of the Second Injury Fund.

The Fund was created by the legislature to encourage the hiring of the handicapped by relieving an employer who knowingly hires a handicapped person or retains an employee after discovering the employee has a physical disability of part of the liability for workers' compensation benefits by shifting liability for payment of benefits to the Fund. Arnold v. Tyson Foods, Inc., 614 S.W.2d 43, 44 (Tenn. 1981). It provides assurance to employers that they will not be liable for more than one hundred percent disability if a worker is injured again. Caudill v. Consolidation Coal Co., 910 S.W.2d 417, 419-420 (Tenn. 1995).

The obligation of the employer is determined first and paid first.

Cameron v. Kite Painting Co., 860 S.W.2d 41, 44 (Tenn. 1993). Where liability is apportioned to the Second Injury Fund, the payments by the Fund do not begin until after completion of the payments by the employer. Tenn. Code Ann. section 50-6-208(a)(1). The obligation of the Fund is not concurrent with that of the employer. Smith v. Liberty Mut. Ins. Co., 762 S.W.2d 883, 885 (Tenn. 1988). If the injured worker dies from some cause other than the compensable injury, benefits are terminated. Tenn. Code Ann. section 50-6-207(4)(A)(iv).

We find no contrary authority. To the extent that the judgment of the trial court orders reimbursement of the employer and its insurer by the Fund, it is therefore vacated.

Costs on appeal are taxed to the defendants-appellees. The cause is remanded to the Circuit Court of Putnam County.

_____

Joe C. Loser, Jr., Special Judge

CONCUR:

_____

Frank F. Drowota, III, Associate Justice

_____

William H. Inman, Senior Judge