IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STEVE MADDOX	}	*ROBERTSON CHANCERY*
	}	*No. Below 12847*
Plaintiff/Appellee	}	
	}	*Hon. Carol Catalano*
vs.	}	*Chancellor*
	}	
INSURANCE COMPANY OF PENNSYLVANIA AND SECOND INJURY FUND	}	*01S01-9709-CH-00198*
	}	*AFFIRMED IN PART AS*
	}	*MODIFIED, AND REVERSED*
Defendant/Appellant	}	*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/appellants, for which execution may issue if necessary.

IT IS SO ORDERED on December 14, 1998.

PER CURIAM

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

STEVE MADDOX,	)	
	)	
Plaintiff/Appellee	)	ROBERTSON CHANCERY
	)	
v.	)	NO. 01S01-9709-CH-00198
	)	
INSURANCE COMPANY OF PENNSYLVANIA and SECOND INJURY FUND,	)	HON. CAROL CATALANO, CHANCELLOR
	)	
Defendants/Appellants	)	

For the Appellant:

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

Members of Panel:

Justice William M. Barker
Senior Judge John K. Byers
Special Judge Robert E. Corlew, III

AFFIRMED IN PART AS MODIFIED,
AND REVERSED IN PART CORLEW, Special Judge

OPINION

This worker's compensation appeal has been referred to the Special Worker's Compensation Appeals Panel of the Supreme Court in accordance with the provisions of *Tennessee Code Annotated §*50-6-225 (e) (3) (1997 Supp.) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. Our review is *de novo* upon the record accompanied by the presumption of correctness unless the preponderance of the evidence is otherwise. *Tennessee Code Annotated §*50-6-225 (e) (2) (1997 Supp.).

The proof is uncontroverted that the Plaintiff, while within the course and scope of his responsibilities as an employee of the Defendant, sustained an injury to his left knee on May 1, 1993. The Plaintiff was treated by a number of orthopedic surgeons, and a number of surgeries were performed upon his knee. One of the treating surgeons testified that the Plaintiff sustained twelve percent anatomical impairment apportioned to his left leg. The other treating doctors did not testify. A doctor who testified on behalf of the Plaintiff performed an independent medical examination, and opined that the Plaintiff sustained twenty-five percent anatomical impairment apportioned to his leg. Following his initial injury, the Plaintiff received temporary total disability benefits for a period of time. He remained away from the work place until November 15, 1994, except for very brief intervals when he returned to work for short periods of time either under restrictions, or while awaiting treatment by another doctor. On November 15, the Plaintiff was returned

to limited duty for work which involved sitting only. The Plaintiff was to retain this position for so long as he remained on crutches. The employer had a policy of accommodating virtually all temporary restrictions resulting from work-related injuries, and returned the Plaintiff to duty sitting at a table in an area near his regular work station enclosed by "chicken wire." Without reporting any psychological injury, the Plaintiff began seeing a psychologist some time during the summer of 1994, and was referred to a psychiatrist in October of that year. In January 1995, the psychiatrist sent a letter to the employer stating that the Plaintiff was unable to work "due to work-related stressors." His psychological problems prevented the Plaintiff from returning to the work place until February 7, 1997. Because the employer considered the psychological injury not to be work-related, the Plaintiff had been allowed to collect benefits for fifty-two (52) weeks under an insurance policy of accident and sickness coverage during this period.

The Trial Court heard the testimony of the Plaintiff and his witnesses, including live testimony of one psychiatrist, and the deposition testimony of that same psychiatrist and a second psychiatrist, both presented by the Plaintiff. The Plaintiff also presented deposition testimony of an orthopedic surgeon who had conducted an independent medical examination and two lay witnesses. The Defendant presented the lay testimony of the employer's safety manager, and the testimony of one of the authorized treating orthopedic surgeons. No psychological evidence was presented by the Defendant. The Trial Court determined that the Plaintiff sustained one hundred percent vocational disability to his left leg, and further established that although the Plaintiff had no permanent impairment due to his psychological injury, he was entitled to twenty-five (25) months temporary total disability due to his psychological problems, finding those psychological problems

to have been related to the initial knee injury. The Trial Court ruled that the employer was not entitled to reimbursement for the money paid to the Plaintiff under the sickness and accident insurance policy. Finally the Trial Court determined that the Plaintiff was entitled to receive all of his benefits in a lump sum, commutation of the award being appropriate.

After our review of the evidence, it is our finding that the Plaintiff did in fact sustain a permanent injury apportioned to his left leg, but that his benefits under the worker's compensation law should be limited to sixty (60) percent vocational disability apportioned to the leg. We affirm the finding of the Trial Court that the Plaintiff is entitled to twenty-five (25) months temporary total disability benefits for his psychological injury, but we reverse the finding that the employer is not entitled to reimbursement of the sums paid under the sickness and accident insurance policy. Finally, we find that the evidence does not justify commutation of the award, although the Plaintiff is entitled to receive his accrued benefits in a lump sum, and a sum sufficient to compensate his attorney similarly should be commuted.

In performing our *de novo* review of the decision of the Trial Court with regard to the Plaintiff's vocational disability, we have considered the evidence presented to the Trial Court with regard to all pertinent factors, including the anatomical impairment, medical restrictions, and lay evidence concerning the Plaintiff's disabled condition, the Plaintiff's age, education, transferrable job skills, and evidence to the degree that it was presented concerning local job opportunities available to the Plaintiff in his disabled condition. With regard to evidence presented to the Trial Court in the form of testimony, we have reviewed the record accompanied by a presumption of correctness, as stated above, but with regard to evidence presented by deposition, we have reviewed that testimony *de novo*, without

a presumption of correctness. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997). We have considered permanent restrictions imposed upon the Plaintiff, including restrictions providing that he avoid repetitive pounding, repetitive squatting, repetitive stooping, quantities of heavy lifting, and that he avoid occasional squatting.

We have considered the anatomical impairment ratings of Dr. Burton E. Elrod, one of the treating physicians, who opined that the Plaintiff sustained twelve percent anatomical impairment, and the opinion of Dr. Richard Fishbein, who performed an independent medical evaluation, who opined that the Plaintiff sustained twenty-five percent anatomical impairment. We have recognized the Plaintiff's age as presented by the evidence, being forty-two (42) years, and his education, which includes graduation from high school. His prior employment has involved primarily menial labor, having worked as a tire builder and warehouse worker and other production type jobs for his employer, and having previously worked as a welder, mechanic, freight loader, and in similar jobs. Evidence was presented from the safety director for the employer at the time of trial that jobs were available in limited numbers within the restrictions of the Plaintiff, but no other evidence was presented for either party with regard to the availability of jobs within the open market in the Plaintiff's current condition. We find that sixty percent vocational disability, apportioned to the left leg, adequately compensates the Plaintiff for his injury. Therefore, we affirm the decision of the Trial Court in its finding of permanent disability, yet we modify the decision after a full consideration of the evidence. It is our finding that the Plaintiff's vocational disability should be limited to sixty percent.

Next we consider the far more complex question of temporary total disability

for psychological injury. The Trial Court related the Plaintiff's psychological problems to his knee injury, and awarded compensation. We have recognized the evidence which shows that the Plaintiff began seeking treatment from a psychologist during the summer of 1994, after his knee injury on May 1, 1993. Further, in October 1994, the Plaintiff initially saw a psychiatrist. It was not until January 6, 1995, some twenty months after his initial knee injury that his psychological injury became sufficiently disabling to cause his absence from the work place. The record is filled with events which occurred in the Plaintiff's life after his knee injury and before his disability. Some of those events were in fact in some manner related to his knee injury, including the Plaintiff's frustration over his inability to recover from his injury to his knee. Other events were totally unrelated to the work place, however, including evidence of an automobile accident which occurred shortly before his disability due to psychological problems. After considering all of the facts, we find that the psychological injury was in fact a new and separate injury from the initial knee injury. Had the psychological injury been occasioned by the Plaintiff's frustration over his inability to recover physically, and his dissatisfaction with requirements of his employer that he drive to the work place to receive various compensation checks while he was not working, it would be our finding that the Plaintiff would not be entitled to recover under Tennessee law, *Jose v. Equi-Fax*, 556 S.W.2d 82 (Tenn. 1977); *Cigna v. Sneed*, 772 S.W.2d 422 (Tenn. 1989). We find, however, that the evidence preponderates in favor of a finding that the Plaintiff suffered a psychological injury after he returned to work for the employer after November 15, 1994, which aggravated the Plaintiff's pre-existing mental condition to the extent that it became temporarily disabling, necessitating his absence from employment. We thus find the date of this injury to be January 6, 1995, which

finding appears to be supported by the testimony of both psychiatrists who testified. There is no evidence that the Plaintiff sustained any permanent impairment or permanent vocational disability due to these problems, but the evidence preponderates in favor of a finding that the Plaintiff did suffer from a condition which resulted in temporary total disability, as determined by the Trial Court, for a period of twenty-five (25) months. The requirement under the law for notice to the employer of an injury is satisfied by a letter from the Plaintiff's psychiatrist on the date that the injury became temporarily disabling. Although we find that the cause of the injury was different from that determined by the Trial Court, we affirm the finding of the Trial Court that the injury was in fact compensable temporarily for twenty-five (25) months, and we thus affirm the decision of the Trial Court in this respect.

Next, we turn our attention to the question of reimbursement of sickness and accident benefits previously paid by the employer. The Trial Court found that the employer was not entitled to reimbursement of those sums, apparently under the theory that the contract of insurance was not adequately proven by the employer. We agree with the Trial Court that the proof on this issue certainly was not presented in detail. The policy of insurance was never introduced. In fact, the only evidence presented by any party as to this issue was the testimony of the employer's safety director that a reimbursement provision was contained within the policy of insurance.

Reimbursement provisions of insurance contracts are treated under the law just as provisions of other contracts. While stipulations are often reached concerning such reimbursements provisions, we agree with the Plaintiff that the better rule when such issues are contested is to present the insurance contract for consideration by the

Court. In this cause, however, because the only evidence on the issue is that the contract does provide for reimbursement, we find that the evidence so preponderates, and we therefore reverse the decision of the Trial Court as to this issue, and order the reimbursement.

Finally, we find that the evidence does not justify commutation of the worker's award. The Plaintiff is, of course, entitled to receive those benefits which have accrued since his date of maximum medical improvement, being February 7, 1997. *See, Henson v. City of Lawrenceburg,* 851 S.W.2d 809, 814 (Tenn. 1993); *Lock v. National Union Fire Insurance Co. of Pittsburgh,* 809 S.W.2d 483, 488 (Tenn. 1991); *Davenport v. Taylor Feed Mill,* 784 S.W.2d 923, 926 (Tenn. 1990). Further, it appears appropriate to award payment of attorney's fees similarly in a lump sum. *Tennessee Code Annotated §*50-6-229 (a) (1998 Supp.). While we recognize that there is a very limited amount of compensation which has not accrued, the principle remains the same, and we find that the proof when examined in comparison with recent case law does not justify commutation. *See, Spencer v. Towson Moving & Storage, Inc.*, 922 S.W.2d 508, 511 (Tenn. 1996); *Henson v. City of Lawrenceburg,* 851 S.W.2d 809, 814 (Tenn. 1993); *North American Royalties v.* Thrasher, 817 S.W.2d 308, 310-311 (Tenn. 1991).

Little evidence was presented with regard to the ability of the Plaintiff wisely to manage his funds. Proof was presented, however, showing that the Plaintiff is generally delinquent in his payment of bills and further that he was some eight months or more in arrears in his payment of his house note. Where the proof does not demonstrate that a party can wisely manage his funds and that it is in the worker's best interest to receive an award in a lump sum, the award shall not be commuted.

In summary, then, we affirm the decision of the Trial Court in its finding that the Plaintiff has sustained permanent disability apportioned to his leg, and we modify that award to provide for sixty (60) percent vocational disability. We further affirm the Trial Court's decision that the Plaintiff is entitled to twenty-five (25) months temporary total disability due to his psychological problems, but is not entitled to an award of permanent disability for his psychological injury. We reverse the decision of the Trial Court with regard to the issue of reimbursement of the sickness and accident insurance payment, and we further reverse with regard to commutation.

Costs are assessed against the Appellant.

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Robert E. Corlew, III, Special Judge

CONCUR:

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William M. Barker, Justice

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John K. Byers, Senior Judge