IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

PEDRO GUTIERREZ	}	*DAVIDSON CIRCUIT*
	}	*No. Below 96C-2657*
Plaintiff/Appellee	}	
	}	*Hon. Thomas W. Brothers*
vs.	}	*Judge*
	}	
	}	*No. 01S01-9801-CV-00016*
TRAVELERS INSURANCE	}	
COMPANY and DINA TOBIN,	}	
Director of the Division of Workman's	}	
Compensation, TENNESSEE DEPT.	}	
OF LABOR, SECOND INJURY		}
FUND	}	
	}	*VACATED IN PART*
Defendants/Appellants	}	*AFFIRMED 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 defendant/appellant, Travelers Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED on February 22, 1999.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(December 11, 1998 Session)

PEDRO GUTIERREZ Plaintiff-Appellee, v. TRAVELERS INSURANCE COMPANY and DINA TOBIN, Director of the Division of Workman's Compensation, TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND, Defendants-Appellants.	)	DAVIDSON CIRCUIT Hon. Thomas W. Brothers, Judge. No.01S01-9801-CV-00016

For Appellant, Travelers:

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

Members of Panel:

William M. Barker, Associate Justice
William H. Inman, Senior Judge
Joe C. Loser, Jr., Special Judge

VACATED IN PART
AFFIRMED 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 employer's insurer, Travelers, insists (1) the evidence preponderates against the trial court's finding that the employee or claimant, Gutierrez, is permanently and totally disabled, and (2) the trial court erred by holding Travelers liable for eighty-two percent of the total award, rather than the first four hundred weeks. The Second Injury Fund insists the trial court erred by requiring it to pay eighteen percent of each periodic benefit. As discussed below, the panel has concluded the order requiring the Fund to reimburse Travelers for eighteen percent of disability benefits already paid and to be paid in the future should be reversed, but the judgment otherwise affirmed.

The employee brought this civil action seeking compensation benefits for injuries suffered when he fell from a roof to the ground on March 24, 1996, causing complete T-10 paraplegia, a severe traumatic brain injury and mental and nervous injuries. After a trial, the trial judge found the employee to be permanently and totally disabled, within the meaning of Tenn. Code Ann. section 50-6-207(4)(B) and awarded benefits to age sixty-five, which he apportioned eighty-two percent to Travelers and eighteen percent to the Second Injury Fund. The final judgment was entered on December 22, 1997.

More than thirty days later, and after appealing the above final judgment, Travelers served a motion for an order amending the final judgment by requiring the Second Injury Fund to reimburse it for eighteen percent of the disability payments it had already made and for each future disability payment. The trial judge granted the motion.

The extent of an injured worker's disability is an issue of fact. Jaske v. Murray Ohio Mfg. Co., 750 S.W.2d 150 (Tenn. 1988). Our review of the first issue is therefore de novo upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2).

When an injury, not otherwise specifically provided for in the Act, totally incapacitates a covered employee from working at an occupation which brings him an income, such employee is considered totally disabled. Tenn. Code Ann. section 50-6-207(4)(B); Prost v. City of Clarksville, 688 S.W.2d 425 (Tenn. 1985). The definition focuses on an employee's ability to return to gainful employment. Davis v. Reagan, 951 S.W.2d 766 (Tenn. 1997).

The claimant was born and reared in Mexico and was thirty-one years old at the time of the injury. His ability to communicate in English is somewhat limited, though he did not require an interpreter. He has less than a high school education and has no skills except as a carpenter and laborer. In March of 1996, while working as a carpenter for Angel A. Pastrana, the claimant was blown off a building roof and fell twenty feet to the ground, suffering complete T-10 paraplegia and a severe traumatic brain injury, leaving him with an eighty-one to ninety-one percent permanent whole body impairment. A vocational expert,

whose testimony the trial judge found to be credible and persuasive, testified the claimant is not capable of sustaining competitive employment without substantial rehabilitation.

From a review of the whole record, we cannot say the evidence preponderates against a finding of permanent total disability. The remaining issues are questions of law. Our review is thus de novo without any presumption of correctness. Presley v. Bennett, 860 S.W.2d 857 (Tenn. 1993).

The argument of Travelers in support of its second issue is that Tenn. Code Ann. section 50-6-60-208(b), which is applicable to this case, expressly limits an employer's liability to one hundred percent permanent disability to the body as a whole and thus explicitly limits an employer's liability to 400 weeks of benefits when a prior award has been rendered and the subsequent employer hires the employee. Awards of permanent total disability are payable to age 65 without regard to the monetary cap imposed by the 400 week maximum total benefit provision of Tenn. Code Ann. section 50-6-102(a)(6) and, where the award is apportioned between the employer and the Second Injury Fund, the apportionment is based on the total number of weeks to age 65 rather than limiting the employer's liability to a percentage of 400 weeks. Bomely v. Mid-American Corp., 970 S.W.2d 929 (Tenn. 1998) (Justice Holder dissenting). We thus conclude that the trial judge correctly apportioned the award between Travelers and the Second Injury Fund.

In cases where the Second Injury Fund is liable for a portion of disability benefits, the obligation of the employer is determined first and paid first, and any credit for payment of temporary total disability benefits is deducted from the fund's liability. Cameron v. Kite Painting Co., 860 S.W.2d 41 (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).

Upon those principles, the panel concludes it was error for the trial court to order the Fund to pay a portion of each periodic payment. The panel also concludes the motion to alter or amend was served and filed too late. *See* Tenn. R. Civ. P. 59.02. That order is accordingly vacated, but the judgment of the trial court is otherwise affirmed. Costs on appeal are taxed to Travelers Insurance Company.

Joe C. Loser, Jr., Special Judge

CONCUR:

William M. Barker, Associate Justice

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William H. Inman, Senior Judge