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

FILED

June 18, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

BOBBY LEE POWERS	)	MORGAN CHANCERY
	)	
Plaintiff/Appellee	)	
	)	
V.	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
	)	Hon. Frank V. Williams, III, Chancellor
Defendant/Appellant	)	
	)	
and	)	
	)	
DINA TOBIN, DIRECTOR OF THE SECOND INJURY FUND	)	
	)	
Defendant/Appellee	)	NO. 03S01-9707-CH-00085

For the Appellant:

J. William Coley
Hodges, Doughty & Carson
617 Main Street
P.O. Box 869
Knoxville, Tn. 37901-0869

For the Appellees:

Roger L. Ridenour
Ridenour, Ridenour & Fox
P.O. Box 530
Clinton, Tn. 37717-0530

Sandra E. Keith
Assistant Atty. General
425 5th Avenue North
2nd Floor, Cordell Hull Bldg.
Nashville, Tn. 37243-0499

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

MODIFIED IN PART;
AFFIRMED IN PART.

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.

The trial court found plaintiff, Bobby Lee Powers, to be 100% disabled and awarded benefits for a period of 400 weeks pursuant to the provisions of T.C.A. § 50-6-242. The judgment recited plaintiff was "found to have a 100 percent permanent, partial disability." Defendant insurance carrier, Aetna Casualty & Surety Company, was held liable for 80% of the award and the remaining 20% was allocated to the Second Injury Fund.

The insurance carrier has appealed insisting plaintiff was found to be totally disabled and that the award of benefits should be paid until plaintiff becomes 65 years of age pursuant to the provisions of T.C.A. § 50-6-207(4)(A)(I). This would result in payments being made for 262 weeks since plaintiff reached his maximum medical improvement on July 9, 1996. Aetna also argues the trial court was in error in making the 80% allocation to it as the court failed to take into account a previous award of workers' compensation benefits paid to plaintiff.

The Second Injury Fund also contends the award should be computed under T.C.A. § 50-6-207 rather than the provisions of T.C.A. § 50-6-242. The state fund insists the allocation of 20% of the award to it was proper since an earlier workers' compensation award paid to the plaintiff was never approved by a court.

Plaintiff was injured while working for Charles Blalock & Sons, Inc. on December 1, 1994. He was 58 years old when injured and 60 years of age at the time of trial. He completed the 4th grade and began working at age 13 years. He testified he could not read or write but could change money. His work experience is mostly in the construction industry. On the day of his last injury, he was operating a bulldozer and was backing up when he suddenly struck a large rock. This caused a whiplash injury to his neck and back and the force was strong enough to break the neck rest on the bulldozer. He continued to work with a lot of pain and medication until November, 1995. He has not worked anywhere since this time.

Plaintiff has suffered a number of health problems prior to this last work-related injury. In 1966 he injured his back with another employer and was

hospitalized and in traction treatment for about a week. He received a workers' compensation settlement for a 20% impairment but there is no evidence in the record the settlement was approved by a court. In about 1974-75 he suffered a heart attack while working. In 1977 he sustained a serious injury while working to one of his knees. This resulted in four different surgical procedures and he received an award of compensation benefits of 50% disability to his leg which related as 20% disability to the whole body.

As a result of the last injury, plaintiff had surgery on December 1, 1995, for ruptured cervical disc. He said this procedure helped his symptoms to some extent for awhile. Then he began having pain which required a second surgery performed on March 15, 1996, which did not seem to help much. This was followed by physical therapy that did not help either.

At the time of the trial during May 1997, he told the trial court he was still in a great deal of pain; that he had numbness in his right arm all the way down to the end of two fingers and he frequently dropped objects; that his low back still hurt and his left leg was numb down to his foot; he still suffered bad headaches and could not sleep well; and that he could not stand longer than ten minutes. He also stated he was not able to work and was receiving social security disability benefits.

Craig Colvin, a vocational rehabilitation witness, was of the opinion plaintiff was 100% disabled from jobs he had performed in the past but noted that a functional capacity evaluation report mentioned in one of doctor's deposition indicated he could sustain light part-time work.

Dr. Eugenio F. Vargas testified by deposition. He performed the last surgical procedures. The first was for a ruptured cervical disc and the second surgery was for a "C8 nerve root impingement". He was of the opinion the conditions he attempted to correct were due to work-related activities and that he had an 11% medical impairment as a result of the last injuries. He also stated he could not return to the same job he had held at the time of the last injury. When questioned about restrictions that might be imposed upon him, he stated he had not considered that as he had not attempted to return to work. When pressed about restrictions, he said he would prefer to have a functional capacity evaluation before giving an opinion. A

second deposition was later taken and introduced into evidence. Dr. Vargas said the report indicated plaintiff could do light part-time work.

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).

The first issue deals with the question of whether the employee should be determined to be totally and permanently disabled or whether his disability should be determined as permanent partial disability. The statutory definition of total disability focuses on the employee's ability to return to gainful employment. *Davis v. Reagan,* 951 S.W.2d 766 (Tenn. 1997). If an employee is totally incapacitated from working at an occupation which brings the employee an income, then the employee is classified as "totally disabled" under the provisions of T.C.A. § 50-6-207(4)(B) and the disability compensation must be paid as provided in subsection (4)(A) of the statute. The last subsection states the compensation shall be paid during the period of such total disability until the employee reaches the age of sixty-five (65).

In rendering a decision on this issue, the trial court stated:

> "And I'll state generally for the record that I looked and watched this man very closely on the witness stand, I read the medical proof and, you know, we hear and see a lot of comp cases, and quite truthfully, I see a lot of people who claim to be a hundred percent disabled, who really are not, and I don't award them a hundred percent disability. This man is the genuine article right here. He's one hundred percent disabled. This man, because of his prior injuries, all of the things that existed on the day that he had that injury while working that bulldozer and his educational background, his work history, everything about him, convinces me that this man most likely will never work again."
>
> "Now I haven't found him to be permanently and totally disabled, but if you really want to know, I would be very doubtful that he'll ever get to point -- where this man will work again. . . ."

We find these remarks by the trial court indicated more credit was given to the employee's testimony concerning his opinion he could not return to work than the conclusion made by the examiner who made the functional capacity evaluation examination and report. Certainly, the trial court was in a better position to judge plaintiff's credibility than we are from the printed record.

After considering all pertinent factors, we find plaintiff is totally and permanently disabled and that his disability compensation is governed by the

provisions of T.C.A. § 50-6-207 and that his benefits under the statute should be paid until he reaches 65 years of age.

The second issue raises a question as to the correctness of the 80%-20% allocation of the award. All parties appear to agree that the allocation must be made under T.C.A. § 50-6-208(b). This subsection requires the court to combine the past award of compensation and the present award and if the total exceeds 100%, then the Second Injury Fund is liable for the percentage of benefits in excess of 100%. In applying this rule, the court declined to consider the award of 20% paid to the employee during 1966 as there was no evidence it was court-approved. The 1997 award of 20% was court-approved and was combined with the 100% award which totaled 120%. The excess of 20% was allocated to the state injury fund.

We find this allocation was proper. Settlements which are not court-approved are not binding on the employee, employer or insurer. A prior judicial determination regarding the extent of permanent disability is central to the application of subsection (b). *Hale v. CNA Insurance Companies, et al,* 799 S.W.2d 659 (Tenn. 1990).

The judgment is modified to find the employee totally and permanently disabled and entitled to benefits pursuant to the provisions of T.C.A. § 50-6-207 (4)(A) and affirmed as to the allocation of responsibility between the parties. Costs of the appeal are taxed to plaintiff/employee.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
Adolpho A. Birch, Jr., Justice

_____
William H. Inman, Seni

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BOBBY LEE POWERS	)	MORGAN CHANCERY
	)	
Plaintiff/Appellee	)	No. 96-128
	)	
vs.	)	
	)	Hon Frank V. Williams,
	)	Chancellor
AETNA CASUALTY & SURETY COMPANY	)	
	)	
	)	No. 03S01-9707-CH-00085
Defendant/Appellant	)	
and	)	
	)	
DINA TOBIN DIRECTOR OF TH SECOND INJURY FUND	)	
	)	
	)	
Defendants/Appellee.	)	

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/appellee, Bobby Lee Powers, for which execution may issue if necessary.

06/18/98

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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