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

JACOB E. CARTER, Plaintiff/Appellee v. LUMBERMEN'S UNDERWRITING ALLIANCE, Defendant/Appellee and LARRY BRINTON, JR., DIRECTOR OF THE DIVISION OF WORKERS' COMPENSATION, TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND, Defendant/Appellant	)	KNOX CHANCERY NO. 03S01-9610-CH-00095 HON. FREDERICK D. McDONALD, CHANCELLOR

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

Members of Panel:

Chief Justice E. Riley Anderson
Senior Judge John K. Byers
Special Judge Roger E. Thayer

AFFIRMED and MODIFIED

BYERS, Senior Judge

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. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Stone v. City of McMinnville,* 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial court in a workers' compensation case. *See Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452, 456 (Tenn. 1988).

The issues raised on appeal are: whether the evidence preponderates against the finding by the trial judge that the plaintiff is permanently and totally disabled; whether the trial court erred in apportioning the liability of the insurer at 25 percent and of the Second Injury Fund at 75 percent; and whether the trial court erred in limiting the insurer's liability to 25 percent of 400 weeks and imposing liability on the Second Injury Fund for the remainder of the weeks until the plaintiff reaches age 65.

We affirm the findings of the trial court that the plaintiff is permanently and totally disabled and that the apportionment of this liability is on the basis of 25 percent to the insurer and 75 percent to the Second Injury Fund. We modify the apportionment of the liability at 25 percent of 400 weeks to the insurer and the remaining liability to the Second Injury Fund. We apportion the award in accordance with the holding of the Supreme Court in *Bomely v. Mid-American Corp.,* ___ S.W.2d ___ (Tenn. 1998).

The plaintiff has an extensive medical history as demonstrated by the medical evidence in this case, which consists of the depositions of five physicians, the report of physician, and the appearance of two physicians at trial. Additionally, the medical records of one physician were introduced by the Second Injury Fund. The medical evidence consists of physical evaluations and treatment, as well as a psychiatric evaluation. The plaintiff also presented a vocational expert's testimony at trial.

The evidence shows the plaintiff sustained a back injury on August 24, 1994 in the course and scope of his employment with the defendant. Prior to this injury, the plaintiff suffered a back injury in an automobile accident, which was non-compensable. The plaintiff also had a preexisting congenital disease called Marfan's syndrome, as well as cardio vascular disease.

From the medical records, it is evident the plaintiff is severely limited in the amount of physical work he can perform with restrictions such as limited bending, squatting, heavy lifting, working over rough terrain, excessive ladder or stair climbing, and lifting more than seven pounds repetitively.

The degree of medical impairment fixed by the medical testimony ranged from 10 percent to 15 percent. Some of the expert witnesses apportioned the impairment between the current and past back injuries, while others did not. At any rate, one physician found the plaintiff to be 10 percent disabled as a result of his back problems, apportioning 5 percent to the previous injury and 5 percent to the injury at issue in this case. The medical proof shows the plaintiff cannot perform the work he was doing prior to the injury.

The vocational expert found, based upon the medical restrictions, the plaintiff was 75 percent vocationally impaired. A psychiatrist testified the plaintiff suffered from depression disorder which made it impossible for him to be gainfully employed.

The plaintiff was 48 years of age at the time of the trial. We are unclear about the educational level attained by the plaintiff. However, it appears he is trained only for work as a laborer.

The trial judge reviewed the medical depositions and heard the testimony of the plaintiff and other witnesses, including expert witnesses. The judge found the evidence showed the plaintiff was permanently and totally disabled due to his back injury of August 1994 which was superimposed on a former back injury, along with his other health problems including the psychiatric problem which was made worse by the second back injury. The judge found 25 percent of the plaintiff's disability was attributable to the injury of August 1994. In accordance with Tenn. Code Ann. § 50-6-208(a), the trial court apportioned the liability at 25 percent to the insurer and 75 percent to the Second Injury Fund.

We have reviewed the evidence in this case and find it does not preponderate against the findings of the trial judge on the degree of disability and in the manner of apportioning the liability between the insurer and the Second Injury Fund.

The trial judge ordered payment to the plaintiff to continue until he reached age 65 in accordance with Tenn. Code Ann. § 50-6-207(4)(A)(1). The judge then ordered the insurer to pay 25 percent of 400 weeks (100 weeks) and ordered the Second Injury Fund to pay 75 percent of the total number of weeks until the plaintiff reached age 65.

This case has abided a decision by the Panel until the Supreme Court decided the case of *Bomely v. Mid-American Corp.,* ___ S.W.2d ___ (Tenn. 1998), which raised the apportionment of awards until age 65. On May 26, 1998, the Supreme Court held in *Bomely* that the liability of the employer-insurer and the Second Injury Fund should be in accordance with the percentage of their respective liability over the entire time until the petitioner reaches the age of 65.

The decision in *Bomely*, of course, controls the issue in this case. The insurer is liable for 25 percent of the number of weeks until the plaintiff reaches the age of 65 and the Second Injury Fund is liable for 75 percent of those weeks. The insurer will pay their portion of the judgment first, after which, the Second Injury Fund shall commence to pay its proportionate liability.

The cost of this appeal is taxed equally to the insurer and the Second Injury Fund.

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John K. Byers, Senior Judge

CONCUR:

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E. Riley Anderson, Chief Justice

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Roger E. Thayer, Special Judge

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JACOB E. CARTER Plaintiff-Appellants, v. LUMBERMEN'S UNDERWRITING ALLIANCE. Defendant-Appellee. And LARRY BRINTON, JR., DIRECTOR OF THE DIVISION OF WORKERS' COMPENSATION, TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND. Def endant/Appellant	)	KNOX CHANCERY No. 123810-1 No. 03S01-9610-CH-00095 Hon. Frederick D. McDonald Chancellor.

FILED

August 10, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

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 facts 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 equally to the insurer and the Second Injury Fund for which execution may issue if necessary.

08/10/98