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

JAMES WALKER HURST, Plaintiff/Appellee v. SCRUGGS, INC. and CIGNA PROPERTY & CASUALTY COMPANY, Defendants/Appellees and LARRY BRINTON, JR., DIRECTOR OF THE DIVISION OF WORKERS' COMPENSATION, TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND, Defendant/Appellant	)	KNOX CHANCERY NO. 03S01-9703-CH-00032 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

MODIFIED and AFFIRMED

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).

We find the record supports the finding that the plaintiff is permanently and totally disabled. We modify the apportionment of liability between the employer and the Second Injury Fund.[1]

The trial court found the plaintiff was injured within the scope of his employment with the defendant on June 17, 1994. The plaintiff had two previous compensable injuries. On June 6, 1983, he was found to have a 60 percent disability to the body as a whole, and on October 8, 1993, he was found to have a 7.5 percent disability as a result of an injury.

The trial judge found the plaintiff was totally and permanently disabled from work following the injury of June 17, 1994 (this case). Further, the trial court found, and the record shows, the plaintiff met three out of four requirements for Tenn. Code Ann. § 50-6-242, which would permit the trial court to exceed the multiplier caps of the statute and award recovery for 400 weeks. In this case, however, the trial court found the plaintiff was entitled to receive benefits until age 65 under the provisions of Tenn. Code Ann. § 50-6-207(4).

In fixing the disability between the employer and the Second Injury Fund, the trial court found that the employer was liable for 32.5 percent of the injury to the plaintiff and the Second Injury Fund was liable for 67.5 percent. At the time the

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[1] This case was filed March 13, 1997 and has awaited the Supreme Court's decision in *Bomely v. Mid-America Corp.,* ___ S.W.2d ___ (Tenn. 1998), which was filed May 26, 1998.

judgment was entered, the number of weeks until the plaintiff reached age 65 was 1,344 weeks. The trial court held the employer's liability would be limited to 32.5 percent of 400 weeks and the Second Injury Fund would be liable for the remaining 67.5 percent of the total number of weeks.

There is little dispute about the medical evidence in this case. The significant testimony is by a treating orthopedic surgeon who found the plaintiff suffered a 10 percent permanent medical impairment as a result of the injury at issue in this case and by an examining orthopedic surgeon who found the plaintiff suffered a 20 percent impairment as a result of this injury. Both of the physicians placed limitations on stooping, bending, and lifting of certain weights.

The record shows the plaintiff had at most six years in school, has no GED certificate, cannot write, and can read, if at all, only a little bit. To put it kindly, the plaintiff is severely mentally challenged. He had to be driven to and from work by his wife. Clearly, as found by the trial court, the plaintiff can only do heavy manual labor and the medical restrictions placed upon him disqualify him from this type of work. This, coupled with the lack of any reasonable transferrable job skills or the lack of mental ability for retraining, without question, renders the plaintiff totally disabled.[2]

As set out above, the trial judge limited the employer's liability to 32.5 percent of 400 weeks and imposed liability upon the Second Injury Fund for the remaining weeks. The Second Injury Fund argues this is error. In *Bomely v. Mid-America Corp.,* ___ S.W.2d ___ (Tenn. 1998), the Supreme Court held the division of liability shall be based upon the percentage of liability as apportioned between the employer and the Second Injury Fund over the entire amount or length of the award.

Thus, in this case, the employer is liable for 32.5 percent of the 1,344 weeks and the Second Injury Fund shall be liable for 67.5 percent of the remainder of the award. The employer shall pay the liability first and the Second Injury Fund will commence payment thereafter.

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

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[2] In its brief, the Second Injury Fund argued that to be totally and permanently disabled the medical impairment rating must be 16.7 percent or more. At the time the brief was filed, this was a viable argument. Subsequently, however, the Supreme Court rejected this concept and held the multiplier caps did not apply to total disability cases. *Davis v. Reagan,* 951 S.W.2d 766 (Tenn. 1997).

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John K. Byers, Senior Judge

CONCUR:

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E. Riley Anderson, Chief Justice

_____
Roger E. Thayer, Special Judge

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AT KNOXVILLE

JAMES WALKER HURST Plaintiff-Appellee, v. SCRUGGS, INC., and CIGNA PROPERTY & CASUALTY COMPANY Defendant-Appellee. And LARRY BRINTON, JR., DIRECTOR O THE DIVISION OF WORKERS' COMPENSATION, TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND. Def endant/Appellant	)	KNOX CHANCERY No. 126172-1 No. 03S01-9703-CH-00032 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