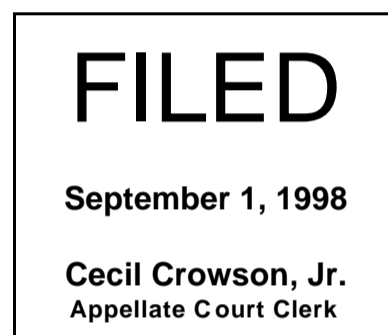


IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT KNOXVILLE
(June 30, 1998 Session)

DAVID F. SUMMERS,) UNION CHANCERY
)
Plaintiff-Appellee,) Hon. Billy Joe White,
) Chancellor.
v.)
) No. 03S01-9703-CH-00029
KNOXVILLE UTILITIES BOARD,)
)
Defendant-Appellant.)
and)
)
LARRY BRINTON, JR., DIRECTOR)
OF THE DIVISION OF WORKERS')
COMPENSATION, TENNESSEE)
DEPARTMENT OF LABOR, THE)
SECOND INJURY FUND,)
)
)
Defendant-Appellee.)



For Appellant:

John W. Wheeler
Hodges, Doughty & Carson
Knoxville, Tennessee

For Appellee, David F. Summers:

J. Anthony Farmer
Knoxville, Tennessee

For Appellee, Second Injury Fund:

John Knox Walkup
Attorney General & Reporter

Kathleen W. Stratton
Sandra E. Keith
Assistant Attorneys General
Nashville, Tennessee

MEMORANDUM OPINION

Members of Panel:

William M. Barker, Associate Justice, Supreme Court
Joe C. Loser, Jr., Special Judge
Roger E. Thayer, Special Judge

AFFIRMED

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. Fairly stated, the issues referred to the panel for findings and conclusions are (1) whether the chancellor erred in computing the employer's liability for permanent total disability benefits based upon a percentage of benefits payable to the employee up to age 65, (2) whether the chancellor erred in holding the employer liable for all benefits payable until the time of the employee's death, from a cause other than the compensable injury, on September 8, 1996, and (3) whether the chancellor abused his discretion by refusing to order the claimant's counsel to remit a portion of his fee because the claimant died before the expiration of 400 weeks. As discussed below, the panel has concluded the judgment should be affirmed as to all three issues.

The employee or claimant, Summers, was fifty-four years old at the time of the trial. He had worked for the employer, Knoxville Utilities District, since 1965. On June 2, 1993, he suffered a compensable neck injury, which injury was superimposed upon three prior disabilities, none of which entitled him to an award of workers' compensation benefits. As a result of the compensable injury, for which the chancellor found him to be thirty percent permanently disabled, combined with the pre-existing physical disabilities, the claimant is permanently and totally disabled.

The trial judge so found and, as required by Tenn. Code Ann. section 50-6-208(a)(1)¹, apportioned the award thirty percent to the employer and seventy percent to the Second Injury Fund, to age 65. The employer contends, by its first issue, that its liability should be limited to thirty percent the first 400 weeks of benefits.

¹ 50-6-208(a)(1) If an employee has previously sustained a permanent physical disability from any cause or origin and becomes permanently and totally disabled through a subsequent injury, such employee shall be entitled to compensation from such employee's employer or the employer's insurance company only for the disability that would have resulted from the subsequent injury, and such previous injury shall not be considered in estimating the compensation to which such employee may be entitled under this chapter from the employer or the employer's insurance company; provided, that in addition to such compensation for a subsequent injury, and after completion of the payments therefor, then such employee shall be paid the remainder of the compensation that would be due for the permanent total disability out of a special fund to be known as the "second injury fund" therein created.

While this appeal was pending, our Supreme Court released its opinions in Bomely v. Mid-America Corp., _____ S.W.2d _____ (Tenn. 1998) and Love v. American Olean Tile Co., _____ S.W.2d _____ (Tenn. 1998), wherein it held, among other things, that the 400 week maximum, applicable to permanent partial disability benefits, has no application in cases of permanent total disability. Thus, the chancellor did not err in his apportionment of benefits between the employer and the Second Injury Fund.

The second issue is also resolved in favor of the Second Injury Fund. The above statute provides no liability upon the fund until "after completion of the payments" for which the employer is liable; and the Workers' Compensation Act provides that if the injured worker dies from some cause other than the compensable injury, benefits are terminated. T.C.A. 50-6-207(4)(A)(iv). 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. T.C.A. 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). Thus, the chancellor did not err in holding the employer liable for all disability benefits which had accrued at the time of the employee's death.

The third issue, questioning the chancellor's refusal to require a remittitur of a portion of previously awarded attorney's fees because of the employee's death, appears to be one of first impression. An attorney's fee for representing an employee for the purpose of recovering workers' compensation benefits may not exceed twenty percent of the amount of recovery or award obtained on behalf of the employee, must be paid by the party who employs the attorney, and is subject to court approval. Tenn. Code Ann. section 50-6-226(a); Honaker v. Kingsport Press, Inc., 659 S.W.2d 22 (Tenn. 1983). An attorney who charges more than twenty percent is subject to disbarment and must forfeit double the amount retained by him to the injured person. Tenn. Code Ann. section 50-6-226(b). The courts may allow fees of less than twenty percent, depending upon what is reasonable under the circumstances. Perdue v. Green Branch Mining Co., Inc., 837 S.W.2d 56 (Tenn. 1992). Attorney fees may be commuted to a lump sum. Tenn. Code Ann. section 50-6-229(a); Modine Mfg. Co. v. Patterson, 876 S.W.2d 293 (Tenn. 1993). Attorneys' fees in contested

cases of permanent total disability are calculated upon the first four hundred weeks of disability only. T.C.A. 50-6-207(4)(A)(iii).

In the present case, the chancellor, at the conclusion of the trial and before the claimant's untimely death, had approved a fee based on twenty percent of the first four hundred weeks of the award, commuted to a lump sum. After the death of the claimant, the employer moved for a reduction, which was denied. The employer contends such denial was an abuse of discretion. Abuse of discretion has been defined as "a conclusion that was clearly against logic (or reason) and not justified." Foster v. Amcon Intern., Inc., 621 S.W.2d 142, 145 (Tenn. 1981).

We have not been cited to any authority which persuades us that the chancellor's decision, under the circumstances of this case, was an abuse of discretion; and we would hold that the attorney's right to a fee became vested when the award was made and that the death of the employee did not impair the right of his attorney to the payment of his fee out of the award rather than the recovery. An attorney's fee should be based on the facts as to his services in the case as of the time the services were rendered, and should not be at the mercy of subsequent or collateral events over which the attorney has no control. Arthur Larson, "Effect of subsequent events on fees award," Workmen's Compensation Law, section 83.13(i), p. 15-1401.

The judgment of the trial court is accordingly affirmed. Costs on appeal are taxed to the defendant-appellant

Joe C. Loser, Jr., Special

CONCUR:

William M. Barker, Associate Justice

Roger E. Thayer, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

DAVID F. SUMMERS,)	UNION CHANCERY
)	No. 2486
Plaintiff-Appellee,)	
)	
)	No. 03S01-9703-CH-00029
v.)	
)	
)	Hon. Billy Joe White
KNOXVILLE UTILITIES BOARD)	Chancellor.
)	
Defendant-Appellant,)	
)	
And)	
)	
LARRY BRINTON, JR., DIRECTOR OF)	
THE DIVISION OF WORKERS')	
COMPENSATION, TENNESSEE)	
DEPARTMENT OF LABOR, SECOND)	
INJURY FUND.)	
Defendant/Appellee.)	

<p>FILED</p> <p>September 1, 1998</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>
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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 defendant/appellant, Knoxville Utilities Board and John W. Wheeler, Surety, for which execution may issue if necessary.

09/01/98