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

FILED

July 30, 1998

Cecil W. Crowson
Appellate Court Clerk

DARRELL SWEARENGIN, JR.,	)	
	)	
Plaintiff/Appellee	)	WILLIAMSON CHANCERY
	)	
v.	)	NO. 01S01-9704-CH-00090
	)	
PACIFIC EMPLOYERS INSURANCE COMPANY,	)	HON. HENRY DENMARK BELL, CHANCELLOR
	)	
Defendant/Third Party Plaintiff/ Appellee	)	
	)	
v.	)	
	)	
DINA TOBIN, DIRECTOR, DIVISION OF WORKERS' COMPENSATION, TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND,	)	
	)	
Third Party Defendant/Appellant	)	

For the Appellant:

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

Members of Panel:

Justice Adolpho A. Birch, Jr.
Senior Judge John K. Byers
Special Judge Hamilton V. Gayden, Jr.

REMANDED

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.

There are no issues of fact in dispute in this case. All sides agree that the plaintiff is totally and permanently disabled and that he qualifies for payment until age 65. Because the injury in this case was subsequent to previous injuries, the Second Injury Fund incurred liability under Tenn. Code Ann. § 50-6-208(a). The employer and the Second Injury Fund agree that their liability is properly apportioned at 25 percent to the employer and 75 percent to the Second Injury Fund.

The trial judge ordered the employer and the Second Injury Fund to make payment concurrently and a mathematical formula was reached which would fulfill each of the payor's liability for their portion of the award when the plaintiff reached age 65.

The employer asserts its liability should be limited to 400 weeks and insists the trial court properly ordered concurrent payment by it and the Second Injury Fund. The employer concedes these issues would be resolved by the decision of the Supreme Court in *Bomely v. Mid-America Corp.,* ___ S.W.2d ___ (Tenn. 1998).[1]

The Supreme Court has decided *Bomely* and the issues raised herein by the employer have been decided adversely to it. The Supreme Court held the percentage of liability of an employer in cases such as this shall not be limited to the relationship of its percentage of liability to 400 weeks. Rather, the Court held the liability would be apportioned over the total amount of the award in accordance with the percentage of liability affixed to the employer and the Second Injury Fund. Further, the Court held that the employer shall pay its portion of the award first and the Second Injury Fund shall commence payment when the employer has satisfied its liability.

The trial court's judgment requiring concurrent payment by the employer and the Second Injury Fund and limiting the employer's liability to 25 percent of 400

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[1] This appeal was filed April 18, 1997 and the opinion in *Bomely* was filed by the Supreme Court on May 26, 1998. We have abided the decision in that case to decide this case.

weeks is error. We hold the employer shall pay 25 percent of the total number of weeks of the award and the Second Injury Fund shall pay 75 percent. The employer shall pay first and after that amount is paid the Second Injury Fund shall begin to make payments to the plaintiff.

The employer argues that it should not have to pay any interest on the portion of its liability to the plaintiff because it has been paying the full compensation rate from the time of the end of his temporary disability so that the employee would not be left without income. We agree with the employer that it should not pay interest on the judgment during the period of the payments it has made. If there has been an interruption of those payments while this case has awaited decision, the trial court shall, on remand, determine the amount of any accrued and unpaid liability by the employer and assess interest on that amount.

The trial court ordered counsel feels of 20 percent to be paid to the plaintiff's attorney in lump sum. These fees are limited by statute to 400 weeks or 20 percent of the sum represented by 400 weeks. The employer/insurance carrier did not make lump sum payments of the award; the Second Injury Fund did as to its percentage of liability.

The employer argues it should not be required to pay interest on the award for attorney fees because it has been making weekly payments to the plaintiff and the attorney could have received 20 percent of this per week as fees. The employer says the failure of counsel to do so was at counsel's option and it should not be penalized because counsel failed to do this.

We do not find the action of the employer in not paying the lump sum attorneys fees particularly laudable in this case because its liability was fixed at 25 percent of 400 weeks and not disputed. We conclude therefore that the employer shall be liable for interest on the attorneys fees of 20 percent in accordance with the percentage of interest fixed by statute on the amount of the employer's total liability in this case. The trial judge on remand shall enter whatever orders that are fair and equitable to the parties to carry out this holding on counsel fees.

This case is remanded to the trial court for entry of such orders as are necessary to carry out the judgment of this Panel.

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

_____
John K. Byers, Senior Judge

CONCUR:

_____
Adolpho A. Birch, Jr., Justice

_____
Hamilton V. Gayden, Jr., Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

DARRELL SWEARENGIN, JR.,	}	*WILLIAMSON CHANCERY*
	}	*No. 23600 Below*
Plaintiff/Appellee	}	
	}	*Hon. Henry D. Bell,*
vs.	}	*Judge*
	}	
PACIFIC EMPLOYERS INSURANCE COMPANY,	}	*No. 01S01-9704-CH-00090*
	}	
Defendant/Third Party Plaintiff/ Appellee	}	
	}	
vs.	}	
	}	
DINA TOBIN, DIRECTOR, DIVISION OF WORKERS' COMPENSATION, TENNESSEE DEPT. OF LABOR, SECOND INJURY FUND,	}	*REMANDED.*
	}	
Third Party Defendant/Appellant	}	

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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 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 one-half by the Employer; and one-half by the Second Injury Fund, for which execution may issue if necessary.

IT IS SO ORDERED on July 30, 1998.

PER CURIAM