IN THE SUPREME OF TENNESSEE

AT NASHVILLE

JAMES NAY	}	*DAVIDSON CHANCERY*
	}	*No. Below 96-269-I*
Plaintiff/Appellant	}	
	}	*Hon. Irvin H. Kilcrease*
vs.	}	
	}	
	}	*No. M1996-00016-WC-R3-CV*
RESOURCE CONSULTANTS, INC. and THE HARTFORD ACCIDENT INDEMNITY COMPANY	}	
	}	
Defendant/Appellee	}	*REMANDED*

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 by appellee, Resource Consultants, Inc. and The Hartford Accident Indemnity Company, for which execution may issue if necessary.

IT IS SO ORDERED on January 5, 2000.

PER CURIAM

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

JAMES NAY,	)	
	)	
Plaintiff/Appellant	)	DAVIDSON CHANCERY,
	)	DIVISION I
	)	
v.	)	M1996-00016-WC-R3-CV
	)	
RESOURCE CONSULTANTS, INC.	)	HON. IRVIN H. KILCREASE,
and THE HARTFORD ACCIDENT	)	CHANCELLOR
INDEMNITY COMPANY,	)	
	)	
Defendant/Appellee		

For the Appellant:

George M. Allen
Wischhof & Allen
207 Glancy Square
110 Glancy Street
Goodlettsville, TN 37072

For the Appellee:

Blakeley D. Matthews
Cornelius & Collins
Suite 2700, Nashville City Center
511 Union Street
P.O. Box 190695
Nashville, TN 37219-0695

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

Members of Panel:

Justice William M. Barker
Senior Judge John K. Byers
Special Judge Robert E. Corlew, III

REMANDED

CORLEW, Special Judge

OPINION

This worker's compensation appeal has been referred to the Special Worker's Compensation Appeals Panel of the Supreme Court in accordance with the provisions of *Tennessee Code Annotated §*50-6-225 (e) (3) (1998 Supp.) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. Because this case was decided by the Trial Court upon motion for summary judgment pursuant to Rule 56, *Tennessee Rules of Civil Procedure,* our review in this case is *de novo* without a presumption of correctness, as the determinations are only upon questions of law. *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995); *Cowden v. Sovran Bank/Central South,* 816 S.W.2d 741, 744 (Tenn. 1991). On appeal, we are required, as is the Trial Court initially, to take the strongest legitimate view of the evidence in favor of the non-moving party. *Clifton v. Bass*, 908 S.W.2d 205, 208 (Tenn. Ct. App. 1995) *perm. app. denied*; *Foley v. St. Thomas Hospital*, 906 S.W.2d 448, 452 (Tenn. Ct. App. 1995) *perm. app. denied*; and *Fann v. City of Fairview*, 905 S.W.2d 167, 172 (Tenn. Ct. App. 1994) *perm. app. denied* (1995).

The facts in this case are concisely stated. The Plaintiff sustained a work-related injury in April of 1993, sustaining five percent anatomical impairment apportioned to the body as a whole. Subsequently in 1993, while the Plaintiff continued to work for the same employer at the same rate of pay, he entered into a settlement with his employer, agreeing to accept compensation based upon ten percent vocational disability, again apportioned to the body as a whole. The order entered by the Trial Judge settling the claims before the Court on December 28, 1993 provides in part that:

> [T]he Defendants be, and are hereby, forever released and discharged from any further liability of any sort whatsoever to Plaintiff on account of this accident, injury, disability, medical expense past or future, aggravations of pre-existing condition, changes in his condition, or otherwise.

Final Settlement Order and Release, Chancery Court for Davidson County, December 28, 1993. The Plaintiff subsequently lost his job with his employer in October, 1995, less than four hundred weeks after the settlement was approved,[1] and subsequently brought suit

---

[1] The provisions of *Tennessee Code Annotated §*50-6-241 (a) (2) (1998 Supp.) provide that the four hundred (400) week period begins to run at the point the employee returns to work. The file from the 1993 case does not reflect specifically the time at which the employee was

pursuant to the provisions of *Tennessee Code Annotated §*50-6-241 (a) (2) (1998 Supp.), which provide in part:

> [T]he courts may reconsider upon the filing of a new cause of action the issue of industrial disability. Such reconsideration shall examine all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition. Such reconsideration may be made in appropriate cases where the employee is no longer employed by the pre-injury employer and makes application to the appropriate court within one (1) year of the employee's loss of employment, if such loss of employment is within four hundred (400) weeks of the day the employee returned to work. In enlarging a previous award, the court must give the employer credit for prior benefits paid to the employee in permanent partial disability benefits, and any new award remains subject to the maximum [of six (6) times the medical impairment rating].

Id. The Trial Court granted summary judgment in favor of the employer, holding that the original settlement barred any further recovery, and this appeal followed.

The Plaintiff asserts that we should reverse the lower Court, remanding the case for further proceedings because the order below does not expressly preclude the Plaintiff's right to file a new cause of action, and because the record does not support a finding that the Plaintiff intelligently waived his rights to file a new cause of action.

The Defendant urges this Court to affirm the lower Court and to consider that the provisions of the 1993 order effectively preclude any further recovery by the Plaintiff, finding that within the settlement previously reached, the Plaintiff waived his right for further compensation pursuant to the statute. At the time of the injury and the settlement, the provisions of the current law limiting benefits for workers who were returned to the same or a higher wage by the pre-injury employer were in effect. This law provides that the employee may receive a vocational disability rating of no more than two and one-half (2 1/2) times the anatomical impairment rating where he continues to work for the same employer at the same or a higher wage. *Tennessee Code Annotated §*50-6-241 (a) (1) (1998 Supp.)

> [I]n cases where an injured employee is eligible to receive any permanent partial

---

returned to work. In this case, there is no issue, however, because the time from the period of the initial injury until the subsequent time when the employee lost his job was far less than the four hundred (400) week time frame. Nonetheless, in other cases, issues certainly may arise as to whether an employee loses his job within four hundred (400) weeks of the date of his return to work, and where the initial order does not state with specificity that date, subsequent issues certainly may arise as to that date. Thus, it would appear advisable for counsel and courts to establish, at the date of the initial hearing of a worker's compensation action in which recovery is limited because the employee has been returned to his pre-injury employer earning the same or a higher wage, the date on which the employee returned to work in his disabled condition.

> disability benefits, ... and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum partial disability award that the employee may receive is two and one-half (2 ½) times the medical impairment rating....

Id. For the reasons stated below, we vacate the decision of the Trial Court, and remand this case to that Court for further proceedings.

Central to the decision of this appeal is whether a worker who continues to work for his pre-injury employer can waive his right to file a new cause of action after settling his case in accordance with *Tennessee Code Annotated §*50-6-241 (a) (2) (1998 Supp.), which limits the maximum vocational disability rating to two and one-half times (2 ½) his anatomical rating, thus precluding the recovery of additional benefits should he be terminated from that employment within four hundred (400) weeks after returning to work. We find that an employee can so waive his rights, but we further find that he must do so expressly, knowingly, and intelligently. We are not the first worker's compensation panel to look at this issue, although the question is relatively novel. We would respectfully suggest, however, that it is imperative in deciding this question that the Court recognize the language adopted by the legislature in passing this legislation. The legislature expressly used the terminology "new cause of action." We find this wording to be significant. It is important that the courts recognize that the legislature considers the right of the worker to file an action for additional benefits, after having been terminated from his employment within four hundred (400) weeks of his return to work, to be a cause of action totally separate from that initially filed by the injured worker for benefits limited to two and one-half (2 ½) times his anatomical impairment rating while he is employed by his pre-injury employer. Thus, this is not a re-opening of his former case, but a new cause of action, separate and apart from his original cause of action, which may be filed either in the same court which heard the Plaintiff's initial cause of action, or in such other court as may be appropriate under the statutes establishing jurisdiction and venue in worker's compensation cases. Nonetheless, the new cause of action is for further recovery for the initial work-related injury. Where a new or subsequent injury is involved, a new suit should be filed, not to increase the award of vocational disability pursuant to the initial injury, but rather for compensation for the subsequent injury, though the same part of the body may be affected by this new injury.

The aspect of waiving the right to bring a cause of action before the facts giving rise to that cause of action even occur is not a novel one, but is an idea which should be seriously considered. In some areas of the law, we allow such a waiver. Releases of liability, for example, in tort actions are approved by the courts where the release is knowingly and intelligently entered, even before any facts arise which would give to the party signing the release the right to file such a cause of action. The waiver of other causes of action appears, however, to be universally rejected upon public policy grounds. For example, in domestic relations cases, it would perhaps defy reason for a court to uphold an agreement of parties upon marriage never to file an action for divorce, despite the public policy interest of the state in preserving marriages. With respect to worker's compensation cases, we acknowledge that there is a public interest in preserving the right of an injured worker to file his new cause of action. While settlement of litigation should always be fostered, the provisions of *Tennessee Code Annotated §*50-6-241 (a) (2) (1998 Supp.) were intended to provide to the injured worker, who is limited to a reduced rate of allowable recovery by virtue of his return to work by his pre-injury employer, an opportunity to file a new cause of action if subsequently terminated after either settling his initial suit, or having it tried by the Court.

There certainly remain other substantial reasons for workers and employers to settle worker's compensation litigation. When an injured worker has been returned to work by his pre-injury employer, the opportunity remains for the parties to settle claims at or under the two and one-half (2 ½) times limitation provided by statute, to settle issues involving future medical care (although the public interest is certainly strong in causing a worker to retain those rights), and, we also hold, to negotiate a waiver of the employer's right to file a subsequent cause of action in the event he is subsequently terminated, provided he does so knowingly and intelligently and provided this waiver is clearly demonstrated within the order settling the initial worker's compensation suit.

We hasten to point out that a worker's compensation case in which the worker preserves his right to file a new cause of action does not remain open. Instead, that case is terminated and forever concluded after entry of the final order, except, of course, to the extent that the file may remain open during the lifetime of the injured worker for purposes

of enforcing the worker's right to retain his future medical benefits. Preserving the worker's right to file a new cause of action is separate and apart from the initial worker's compensation case.

In the case at bar, the provisions of the 1993 order of the Trial Court are extremely comprehensive in general terms, and if enforced as worded, preclude any further consideration by any court of any issue whatsoever relating to the Plaintiff's April, 1993 injury. The order does not, however, specifically cite the provisions of the statute in question, nor does it specifically state that the Plaintiff has given up his right to file his new cause of action. We find that although a Plaintiff may waive his right to file his new cause of action which has not yet accrued, the order must specifically provide that the new cause of action is waived.

In this case, we therefore must vacate the decision of the Trial Court which granted summary judgment for the employer. For us to affirm the Trial Court, we necessarily must find that any employee who settles his case and receives a lump sum and who agrees to language within an order generally waiving his right to receive any further compensation also waives his right to file a new cause of action were he to be subsequently terminated by his employer. We are reminded that the worker's compensation law must be liberally construed in favor of the worker, in order to insure that workers are appropriately compensated for their work-related injuries. *E.g., Langford v. Liberty Mutual Insurance Company*, 854 S.W.2d 100, 102 (Tenn. 1993); *McClain v. Henry I. Siegel Company*, 834 S.W.2d 295, 296 (Tenn. 1992); *Galloway v. Memphis Drum Service*, 822 S.W.2d 584, 586 (Tenn. 1991).

The better rule may suggest that the Trial Judge, upon approving a settlement of an injured worker's original cause of action, should cause the worker to understand all of his rights in order to insure that he is intelligently waiving his rights in reaching a settlement. It is not required, however, that the Trial Judge explain the provisions of *Tennessee Code Annotated §*50-6-241 (a) (2) (1998 Supp.) to the worker when the judge approves that initial settlement. *Danny E. Ray v. Yasuda Fire and Marine Insurance Company*, 1998 W.L. 707775 (Tenn. Worker's Compensation Panel, 1998). The order must show, however, that the right was waived knowingly and intelligently. The primary role of the Trial Court in initially considering a settlement of a worker's compensation claim is insuring that the

settlement provides to the injured worker substantially the benefits provided to him by the worker's compensation law. *Tennessee Code Annotated §*50-6-206 (1998 Supp.).

It may be argued that a cause of action which has not yet accrued cannot be waived, and that a knowing and intelligent waiver of a cause of action can only occur after that cause of action has accrued, and when one knows of his right to recover, and has at least a general knowledge of the value of that right of recovery. A cause of action which has not yet accrued is nothing more than a prospective right or a possibility of an opportunity for recovery. Any person may have the possibility of being vested at some point in the future with any number of potential causes of action, and the probability of any person becoming possessed of a cause of action is subject to the theories of probability. We hold, however, that a knowing and intelligent waiver of a cause of action which has not vested may be made in worker's compensation cases, and that where it can be shown that the waiver was considered initially by the parties and the Court, a judge can approve a settlement of rights although they have not yet vested.

The wording in the provisions of *Tennessee Code Annotated §*50-6-241 (a) (2) (1998 Supp.), then, is crucial. The statute essentially limits recovery under the worker's compensation law to two and one-half (2 1/2) times the anatomical impairment awarded to an individual, so long as that individual is working for the pre-injury employer and earning the same or a higher wage. A new and separate cause of action, then, under the statute, arises when such a person subsequently is terminated within less than four hundred (400) weeks of his return to work, provided that person files suit within one (1) year after the cause of action accrues. We hold that an injured worker may settle his rights pursuant to this new cause of action at any time after the initial cause of action accrues, but only when it can be shown that he has done so knowingly and intelligently.

There are sound public policy reasons for the decision which we reach. Just as the provisions of *Tennessee Code Annotated §*50-6-241 (a) (1) (1998 Supp.) provide a maximum vocational disability which can be awarded where the pre-injury employer has returned the employee to the job in an effort to encourage pre-injury employers to accommodate disabled workers, a decision by this Court that an employee may in fact waive his right to file a new cause of action without doing so knowingly and intelligently. This would then create a

disincentive on the part of the pre-injury employer to retain an employee after the date of the approval of the worker's compensation settlement. In waiving his right to file a new cause of action, the worker should recognize that where the employer has no possibility of any greater liability whether the employee continues to work for him or not, any incentive imposed by the legislature upon the pre-injury employer to continue to employ the worker after approval of a settlement may be lost unless it continues otherwise to be in the interest of the employer further to retain the worker. All the same, public policy supports the right of the employer to settle such future rights. Unless the employer has the opportunity to settle all future rights which the employee may have, he may have less incentive to settle worker's compensation cases. Certainly parties to lawsuits always have an incentive to settle the issues before the Court, and it appears that the employer continues to have a great incentive to settle issues including compensability itself, and such further issues as temporary total disability, temporary partial disability, and the percentage of permanent vocational disability. Additionally, inasmuch as future medical benefits remain a part of the initial cause of action, employers may continue to negotiate an order which forecloses the payment of any and all further future medical benefits which otherwise are guaranteed to an employee under the provisions of the statute. We also now approve the settlement of the right to file new claims under the provisions of *Tennessee Code Annotated §*50-6-241 (a) (2) (1998 Supp.).

Thus, we hold categorically that an injured worker can waive his right to file a new cause of action against his employer at the time of the settlement of the original cause of action, but only where it can be shown affirmatively subsequently that the employee originally contemplated the loss of that right and knowingly and intelligently waived it. This is a substantial right and should not be considered by the Courts lightly. Where it cannot be shown that a prior settlement specifically considered this right and further that the worker knowingly and intelligently waived this right, the employee shall be deemed to have retained his right to file a new cause of action.

We hasten to address a distinction between the filing of the new cause of action addressed by the provisions of *Tennessee Code Annotated §*50-6-241 (a) (2) (1998 Supp.), and the provisions of *Tennessee Code Annotated §*50-6-231 (1991). The provisions of §50-6-241 address the new cause of action granted by the legislature pursuant to the 1992 statute,

which arises only where circumstances not originally contemplated at the time of the original suit have arisen, those circumstances being that the worker is no longer employed by the pre-injury employer. This is a different situation from that contemplated under the provisions of *Tennessee Code Annotated §*50-6-231 (1991), in which the law addresses the fact that any worker's compensation award, whether judicially ordered in a contested proceeding or judicially approved when a settlement occurs, remains within the authority of the Court for purposes of modification in the event of a change of circumstances, unless it is paid in a lump sum or paid within a six (6) month period. The provisions of *Tennessee Code Annotated §*50-6-231 (1991), however, address only the initial award. The provisions of *Tennessee Code Annotated §*50-6-241 (a) (2) (1998 Supp.) address a new cause of action, or in other words, a new case, separate and apart from the original proceeding.

Clearly the provisions of *Tennessee Code Annotated §*50-6-241 and *Tennessee Code Annotated §*50-6-231 are in conflict. Where two statutes are in conflict and it is impossible to reconcile those statutes, the law provides that the earlier of the two acts is repealed to the extent that it is inconsistent with the more recent enactment. *Brewer v. Lincoln Brass Works, Inc.*, 991 S.W.2d 226, 229 (Tenn. 1999) and *Steinhouse v. Neal*, 723 S.W.2d 625, 627 (Tenn. 1987). Further, it has been held that the provisions of *Tennessee Code Annotated §*50-6-241 (a) (2) (1998 Supp.) are specific, while the provisions of *Tennessee Code Annotated §*50-6-231 (1991) are more general. *See, Id.* at 229-230. Because specific statutes govern over more general ones, the provisions of *Tennessee Code Annotated §*50-6-241 (a) (2) must control over the provisions of *Tennessee Code Annotated §*50-6-231 (1991) to the extent that there is a conflict between the two statutes. *Id.* at 230. Thus the present suit is not barred by the provisions of *Tennessee Code Annotated §*50-6-231 (1991).

The judgment of the Trial Court is therefore vacated, and this cause is remanded for further proceedings in accordance with the terms of this opinion.

The costs of this appeal is taxed to the Appellee.

Robert E. Corlew, III, Special Judge

CONCUR:

_____

William M. Barker, Justice

_____

John K. Byers, Senior Judge