IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

LAWRENCE E. TAYLOR, Plaintiff-Appellant, v. PYA/MONARCH, INC. d/b/a SPECIALTY DISTRIBUTION, INC., Defendant-Appellee.	)	Rutherford Chancery No. 97WC-962 Hon. Robert E. Corlew, III, Chancellor NO. M1999-01766-SC-WCM-CV Affirmed in part; Reversed in part and Remanded

JUDGMENT ORDER

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is untimely and should be dismissed.

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 are taxed equally to both parties.

It is so ORDERED.

PER CURIAM

Birch, J., Not Participating

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

LAWRENCE E. TAYLOR,	)	**M1999-01766-SC-WCM-CV**
	)	**RUTHERFORD COUNTY**
	)	
Plaintiff/Appellant,	)	**Hon. Robert E. Corlew, III**
	)	
vs.	)	**No. 97WC-962**
	)	
PYA/MONARCH, INC. d/b/a SPECIALTY DISTRIBUTION, INC.,	)	
	)	
Defendant/Appellee.	)	

FILED

February 29, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

FOR THE APPELLANT:

R. STEVEN WALDRON, Esquire
202 West Main Street
Murfreesboro, Tennessee 37130

FOR THE APPELLEE:

JOHN R. LEWIS, Esquire
P.O. Box 198745
Nashville, Tennessee 37219-8745

MEMORANDUM OPINION

MEMBERS OF PANEL:

ADOLPHO A. BIRCH, JR., JUSTICE
LLOYD TATUM, SENIOR JUDGE
CAROL L. MCCOY, SPECIAL JUDGE

OPINION FILED: Affirmed in part
Reversed in part and Remanded.

CAROL L. MCCOY
Special Judge

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers Compensation Appeals Panel of the Supreme Court pursuant to T.C.A. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law.

Appellate review is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e). To satisfy this standard of review, this Court must conduct an independent examination to determine where the preponderance of the evidence lies. Williams v. Tecumseh Products Co., 978 S.W.2d 932, 935 (Tenn. 1998). There is no presumption of correctness accompanying conclusions of law. Union Carbide Corp. v. Huddleston, 854 S.W.2d 87, 91 (Tenn. 1993).

The employee, Lawrence E. Taylor (Taylor), has appealed from the trial court's finding:

1) that he was subject to the cap of 2½ times the impairment rating as provided in T.C.A. § 50-6-241(a)(1),

2) that interest on the judgment entered in favor of Taylor does not begin to accrue with the issuance of the Court's Memorandum Opinion, but rather with the entry of the judgment order, and

3) that certain discretionary expenses were not recoverable from the defendant employer Specialty Distribution (Specialty) due to an offer of settlement made by Specialty.

Taylor worked for appellee Specialty as a truck driver from 1980 to March 13, 1998. He had worked as a truck driver for Kraft Foods for 15½ years before working for Specialty Distribution.

On July 16, 1996, Taylor was unloading his truck when a stack of food cases fell on him causing a left shoulder rotator cuff tear. Over the next year, Taylor's shoulder was operated on twice and he went back to work doing light duty until July of 1997. By April 23, 1997, Taylor had received maximum medical improvement and Dr. Phillips, his physician, gave him an 18% anatomical impairment. Dr. Phillips stated that he could not lift over 10 pounds with his left arm, or use his left arm in an outstretched or overhead position. Dr. Phillips stated that Taylor could not work as a driver of a tractor-trailer truck. On July 9, 1997, Specialty offered Taylor two jobs which it believed were within Taylor's job restrictions. One job was a driver trainer; the other was a hostler. He would have earned more as a driver trainer than he was earning as a truck driver

at the time of his injury. According to Thomas Brannon (Brannon), the Director of Compliance and Employee Development at Specialty, Taylor was uniquely qualified for this job because he had a good rapport with other drivers and customers and would instruct workers as to how to improve customer relations and their delivery skills. The company also felt that Taylor, as a driver trainer, could help with the problem of high turnover in truck drivers. Taylor rejected the offer of trainer because he did not feel he could perform this job, he did not want to fly (a travel requirement of this job) and he did not want to work with the supervisor of this job. He accepted the hostler job which paid less per hour than he had been receiving at the time of his injury.

In March of 1998, Specialty closed the facility where Taylor was working when its only customer elected not to renew its contract with Specialty. Brannon testified that Taylor was given the option to transfer and Taylor denied he was ever offered this option.

Both Brannon and the vocational consultant called on behalf of Specialty, Michael Halloway, testified that the driver trainer job offered to Taylor was within his medical restrictions. Rebecca Williams, the vocational expert called on behalf of Taylor, did not state whether or not the driver trainer job was within Taylor's medical restrictions. Taylor testified that it was not. Although Taylor would have had to use his left arm in a limited way, the primary focus of the job was to pass on his significant knowledge of the delivery business and dealing with customers that he had learned over 30 years in the trucking business. The court found that the employer had offered a job to Taylor within his restrictions and awarded Taylor a vocational disability equal to 2½ times his impairment rating. To secure the limitation of a cap of 2 ½ times the impairment rating, the employer must prove by a preponderance of the evidence that it offered a job to the disabled employee within the medical restrictions of the employee. Ogren v. Housecall Health Care, Inc., 1998 WL 202325 (Tenn. 1998)

First, Taylor seeks a review of the court's determination of the credibility of witnesses and weight of the evidence. Considerable deference must be accorded the trial court's factual findings when issues of credibility and weight of oral testimony is involved. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). Given the substantial evidence supporting the trial court's finding that the job was within Taylor's restrictions and the deference which is to be given to the court's determination of credibility and weight, this Court does not find that

the evidence preponderates against the trial court's determination that Specialty had offered Taylor a meaningful return to work, that he rejected this offer, and that his vocational disability is therefore limited to the statutory cap of 2½ times the impairment rating as provided in T.C.A. § 50-6-241(a)(1).

Taylor's argument that the offer of the driver-trainer job was not valid because it didn't exist is based on speculation. The job did not exist prior to its offer to Taylor, and when he rejected it, it was not filled by anyone else. But this does not prove that the offer was for a phantom job. The employer testified as to the reasons why Taylor was uniquely qualified and the trial court's determination of credibility on this issue is, again, entitled to considerable deference. The record does not preponderate against the court's findings.

The second issue questions the date from which interest begins to accrue on a judgment; is it the date of the trial court's memorandum and opinion or the date of entry of the judgment. While the controlling statute, T.C.A. § 47-14-122 is not a model of clarity, the Tennessee Supreme Court has held that interest does accrue on a non-jury civil case on the date of a trial court's letter setting out the findings of fact and conclusions of law and not the date of entry of the judgment. Davis v. Davis, 924 S.W.2d 351 (Tenn. 1996). Accordingly, the judgment in this matter will be modified to provide that interest began to run on the date of the trial court's memorandum letter of August 26, 1998.

The third issue concerns the trial court's denial of certain discretionary costs. The trial court denied Taylor's application for the trial appearance fee for his vocational expert, Ms. Williams, and the $84 deposition copy fee for two witnesses. These fees were incurred after Specialty's offer of settlement equal to 2½ times the anatomical impairment, the amount of the final judgment. The trial court has discretion in awarding or denying costs not included in the bill of costs prepared by the court clerk. Speciality's settlement offer was not an offer of judgment and therefore T.R.C.P. Rule 68 does not apply. However, the costs in question are discretionary. The fact that they were incurred after a settlement offer was made in the amount of the final judgment precludes this court from finding that the trial court abused its discretion in denying these costs.

The judgment is affirmed in part and reversed in part and remanded to the trial court for proceedings consistent with this order. Costs of the appeal

are taxed equally to both parties.

It is so ORDERED.

_____
Carol L. McCoy, Special Judge

CONCUR:

_____
Adolpho A. Birch, Associate Justice

_____
Lloyd Tatum, Senior Judge