

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT KNOXVILLE  
APRIL 2000 Session

**PETER A. SMITH v. ASPLUNDH TREE EXPERT CO.**

**Direct Appeal from the Chancery Court for Hamilton County, Part II  
No. 74912 Howell N. Peoples, Chancellor**

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**No. E1999-01376-WC-R3-CV - Mailed - August 3, 2000**

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This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The defendant appeals from the judgment of the trial court which awarded the plaintiff temporary total benefits from May of 1992 until November 20, 1995, and found the plaintiff had sustained a forty percent permanent partial disability to the body as a whole. The plaintiff suffered a compensable injury, returned to work for the pre-injury employer, then left that position and obtained employment with another employer. We affirm the award of permanent partial disability, reverse the award of temporary total disability and remand the case to the trial court for a determination of the amount owed consistent with our findings.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court  
Affirmed in Part; Reversed in Part; and Remanded**

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which E. RILEY ANDERSON, C.J. and ROGER E. THAYER, S.J., joined.

J. Bartlett Quinn, Chattanooga, Tennessee, for the appellant, Asplundh Tree Expert Co.

R. Dee Hobbs, Chattanooga, Tennessee, for the appellee, Peter A. Smith.

**OPINION**

**Facts**

The plaintiff, forty-two years of age at the time of trial, was employed by the defendant who had a contract to maintain utility poles throughout the Chattanooga area. The work required digging

around the poles and applying chemicals to inhibit decay and invasion by termites, etc. In May of 1992, the plaintiff began to experience difficulty with his left wrist and arm. Additionally, he developed an allergic reaction to the chemicals used on the poles. The allergic reaction was characterized by discoloration, blistering and swelling of his feet. In August of 1992, the plaintiff voluntarily resigned from his position with the defendant, but he testified he did so because the defendant could provide no work that did not aggravate the condition affecting his arm.

In September of 1992, the plaintiff was hired by Olson Temporary Services and began working at Kimberly-Clark. In January of 1993, the plaintiff left Kimberly-Clark and returned to Maine—his place of residence prior to Chattanooga—where he started a cleaning business that lasted for about one month, at which time he obtained employment at a lumber mill in Maine. He worked the lumber mill job from July to September of 1993.

In January 1994, the plaintiff obtained a license to sell real estate. He was notably unsuccessful in this work. In the fall of 1994, the plaintiff was employed by the Maine school district to teach computer courses.

Currently the plaintiff is working on a Microsoft certification, which could earn him an income of between 40 and 120 dollars per hour. The plaintiff testified he has not made as much in any year since his injury as he had before the injury. He also testified about his inability to use his left arm, which is his dominant arm, because of pain he experiences in the arm and shoulder.

The evidence shows the plaintiff is unable to come in contact with a variety of ordinary products used in living because the exposure to chemicals has caused him to develop a permanent allergy to them.

#### **Medical Evidence**

Charles Sullivan, a doctor of osteopathy, found the plaintiff to have epicondylitis (tennis elbow), alteration of muscle strength in the left side especially in the left upper extremity, loss of a significant degree in the range of motion in the neck, and allergies as a result of exposure to the chemicals at work. Dr. Sullivan found all of this was caused by the plaintiff's work with the defendant. He found the plaintiff sustained a twenty-five percent medical impairment to the body as a whole.

Dr. William F. Boucher Jr., an occupational medicine physician, saw the plaintiff on November 5, 1996, for evaluation. He testified the plaintiff had developed a "chemical burn due to sodium methyl dihydrocarbonate exposure, with recurrent allergic contact reaction." Dr. Boucher testified the condition was permanent and resulted in a seven percent impairment to the body as a whole.

Dr. Martin Redish, orthopedic surgeon, treated the plaintiff from June 17, 1992, through March 10, 1993, for a sore left wrist. On July 22, 1992, he injected the plaintiff's left elbow for soreness after which the plaintiff made no further complaint of elbow pain. Dr. Redish testified the plaintiff reached maximum improvement sometime after March 10, 1993. He found a one to two percent permanent impairment to the plaintiff's left arm. Dr. Redish released the plaintiff to return to work without restrictions on August 5, 1992.

Dr. Christopher R. Brigham, an occupational medicine physician, found the plaintiff's neck complaints unrelated to the plaintiff's work with the defendant. However, Dr. Brigham testified the plaintiff's left wrist and left elbow problem did result from an injury while working for the defendant. Dr. Brigham found the plaintiff reached maximum improvement by March of 1995, and perhaps had

done so sometime in late 1993. Dr. Brigham found the plaintiff to have a five percent upper extremity (arm) impairment, which amounted to a three percent whole body impairment. He found the injury would interfere with any repetitive use of the arm.

### **Discussion of Temporary Total Benefits**

The trial judge found the plaintiff had reached maximum medical improvement as of November 22, 1995, and held the defendant liable for temporary total benefits from the date of injury (May 1992) until the date of maximum medical improvement. During this time the defendant had, either by order of the trial court or voluntarily, paid temporary total benefits to the plaintiff with the exception being the time when the plaintiff was employed for most of the period between May of 1992 and November of 1995, except for the time from May 1, 1993, until July 24, 1993, and from August 30, 1993, to February 12, 1994. The trial court also held the plaintiff entitled to benefits during that time either because he was unemployed by reason of his injury or that he was underemployed because of the injury, i.e., he did not make as much money working for other employers as he made while employed by the defendant.

The correctness of the ruling by the trial court on the issue must be determined upon two grounds: (1) when the temporary total benefits terminate as a matter of law; and (2) if the benefits are once terminated may they be again reinstated.

The general rule is that the period of entitlement to temporary total benefits consists of the period of time the employee is unable to work. *Cluck Brothers Inc. v. Coffey*, 431 S.W.2d 756 (Tenn. 1968). Such benefits are terminated either by the ability to return to work or the attainment of maximum medical recovery. *Simpson v. Satterfield*, 564 S.W.2d 953 (Tenn. 1978).

If the worker is able to work at any employment permitted by the nature of the injuries, temporary total benefits end. *Anderson v. Dean Truck Line Inc.*, 682 S.W.2d 900 (Tenn. 1984).

The application of these precedents to the facts of this case seems to lead to the conclusion that the period for which the defendant was entitled to receive temporary total benefits ended when he became employed by Kimberly-Clark in September of 1993.

The plaintiff on the other hand asserts that temporary total benefits may be resumed after the termination as a matter of law if the worker subsequently becomes temporarily and totally disabled as a result of the injury

The plaintiff relies upon Tennessee Code Annotated § 50-6-234 as well as the cases of *Yount v. Henrite Products Inc.*, 754 S.W.2d 47 (Tenn. 1988) and *Wilkes v. Resource Authority of Sumner County*, 932 S.W.2d 458 (Tenn. 1996) in support of his claim.

Tennessee Code Annotated § 50-6-234 does deal with the discontinuation and resumption of temporary total payments. However, this statute, by its structure, deals with the rights and duties of a worker and employer when the employee resumes work with the same employer. We do not conclude that it permits an employee to accept employment with a successive employer, leave that employment for a cause not associated with the injury suffered during tenure with the previous employer, and then require the previous employer to recommence payment of temporary total disability benefits.

In the cases of *Yount* and *Wilkes*, the workers returned to employment with the employers for whom they worked when their compensable injuries occurred. In each case, the employee required surgery to correct or alleviate the injury sustained. The supreme court in those cases held the workers

were entitled to resumption of temporary total disability benefits during the time they were unable to work because they were recuperating from the surgery that resulted from their compensable work-related injuries.

In this case, the plaintiff testified he was released to return to work on August 5, 1992, with the defendant and stated he was able to do the work required by the defendant. He quit work with the defendant—according to him because he could not do the work with his left arm injury.

If we were to determine the time at which the temporary total benefits ended based upon the testimony of Dr. Brigham, we would affirm the judgment of the trial court on this issue. However, we are of the view the right to receive temporary total benefits is controlled by the return to work of the plaintiff.

The plaintiff returned to work with the defendant, as shown in the record, on July 22, 1992, and left because he could not do the work. The plaintiff then began to work for Kimberly-Clark in September of 1992. We conclude that the right to temporary total benefits terminated on that date.

### **Discussion of Permanent Disability**

The medical evidence in this case is highly divergent on the issue. The trial judge found a causal connection between the work performed by the plaintiff and the wrist injury; from the medical and lay testimony, the trial judge found a causal connection between the contact dermatitis and the exposure to the chemicals used in the employment. The record supports this finding.

The trial court was disconcerted by the wide divergence of the medical testimony on the matter of disability by Dr. Sullivan and Dr. Brigham. Dr. Sullivan found the plaintiff had a twenty-five percent medical impairment to the body as a whole. Dr. Brigham found the plaintiff had a five percent medical impairment to the arm but did not evaluate the impairment as a result of the foot problem.

The trial judge considered the medical testimony of Drs. Sullivan and Brigham in conjunction with the lay testimony of the plaintiff and concluded the plaintiff had sustained a forty percent permanent partial disability to the body as a whole. We find no reason to disagree with that finding.

We affirm the judgment of the trial court on the issue of the disability of the plaintiff.

We reverse that portion of the judgment that addresses the issue of temporary total disability benefits and remand the case to the trial court for a determination of the amount owed consistent with this opinion.

The costs are taxed equally between the plaintiff and the defendant.

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JOHN K. BYERS, SENIOR JUDGE