

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

December 14, 2000 Session

**TERRY TRAYLOR v. NORTH AMERICAN ROYALTIES, INC., d/b/a  
WHELAND FOUNDRY**

**Direct Appeal from the Circuit Court for Hamilton County  
No. 98C0575 Jacqueline E. Schulten, Judge  
FILED: APRIL 4, 2001**

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**No. E2000-01053-WC-R3-CV - Mailed - February 23, 2001**

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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 trial court granted the defendant's motion for summary judgment and dismissed the plaintiff's petition to reopen his previously settled workers' compensation case under the provisions of Tennessee Code Annotated § 50-6-241(a)(2). We reverse and remand the case to the trial court for further proceedings in accordance with this opinion.

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

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J. and JOSEPH M. TIPTON, J. joined.

James S. Dreaden, Chattanooga, Tennessee, for the appellant, Terry Traylor.

Joseph R. White and Timothy J. Millirons, Chattanooga, Tennessee, for the appellee, North American Royalties, Inc, d/b/a Wheland Foundry.

**OPINION**

Normally, review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2); *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). However, this case was dismissed on motion for summary judgment.

When a grant of summary judgment in a workers' compensation case is appealed, the issue is not reviewable *de novo* pursuant to the Workers' Compensation Act, Tennessee Code Annotated § 50-6-225(e); rather review is controlled by the standard provided for summary judgment disposition pursuant to Rule 56 of the Tennessee Rules of Civil Procedure. *McCann v. Hatchett*, 19 S.W.3d 218, 219 (Tenn. 2000).

### Facts

On February 17, 1997, the plaintiff and the defendant entered into a settlement of a workers' compensation claim filed by the plaintiff. The award was based on two and one-half percent times the medical impairment rating because the plaintiff continued his employment with the defendant. In September of 1997, the plaintiff was terminated from his employment.

The plaintiff filed a petition to reopen his workers' compensation settlement on March 13, 1998.

The plaintiff contended the termination was in retaliation for the filing of the workers' compensation claim, and because the termination came within 400 weeks of the settlement of the claim, he was entitled to have the case reopened. The plaintiff contends the award should be raised to reflect a recovery of six times the medical impairment rating.

The defendant argues the plaintiff was terminated because he had violated the company policy on excessive absences and not because of the worker's compensation case.

Prior to filing the petition in the case before us, the plaintiff filed a separate case against the defendant for retaliatory discharge.

The defense of the case for retaliatory discharge was based upon an agreement with the union, which is known as an "Attendance Control Program;" the program is applicable to all employees. Under the program, an employee is given "points" for being absent, arriving late, or leaving work early without a proper excuse. The defendant contends this policy is not used for termination purposes and is also a defense to the petition to reopen the workers' compensation case.

The following types of absence are excluded from the point system:

- Workers' compensation injury* (emphasis added)
- Approved leaves of absence
- Vacation days
- Paid holidays
- In-patient hospitalization
- Out-patient surgery
- Jury duty
- Court appearances (for employees not found in violation of the law)

Funeral leave (per contract)  
Union business

The agreement requires documentation for the listed absences except for leaves of absence, vacations and holidays.

Attached to the defendant's motion for summary judgment was the following:

1. Judgment was entered in the worker's compensation case of *North American Royalties, Inc. d/b/a Wheland Foundry v. Terry Traylor*, under docket no. 96-CV-1517 in the Circuit Court of Hamilton County on February 19, 1997.
2. The judgment entered in Case No. 96-CV-1517 limited plaintiff's recovery to 2 ½ times his medical impairment rating.
3. Plaintiff has been terminated from his employment since the entry of the judgment in Case No. 96-CV-1517.
4. Additional undisputed material facts are set forth in the attached statement of undisputed material facts filed in Case No. 98-C-0648.

p. 009-TR.

The undisputed fact claimed by the defendant in number four of the list of undisputed facts is based upon and refers to a deposition of the plaintiff taken in Case No. 98-C-0648, which was the case for retaliatory discharge.

The plaintiff responded to the motion for summary judgment and admitted numbers one, two, and three were correct. The plaintiff denied the facts in number four were true.

On November 29, 1999, the trial judge entered an order granting the defendant's motion for summary judgment. The trial judge's order recites that its finding was based upon all the records in the case, including the attachment to the pleadings.

### **Discussion**

Summary judgment is appropriate in any case where it is clear from the pleadings that no dispute exists concerning the material facts, and such facts show the moving party is entitled to judgment as a matter of law against the respondent. *Byrd v. Hall*, 847 S.W.2d 208 (Tenn. 1993). Summary judgment is not favored in workers' compensation cases and is almost never an option in such cases. *Berry v. Consolidated Systems, Inc.*, 804 S.W.2d 445 (Tenn. 1991). *See also McCann v. Hatchett*, 19 S.W.3d at 219; *Downen v. Allstate Inc. Co.*, 811 S.W.2d 523 (Tenn. 1991).

The testimony shows disputes of material facts in this case.

The plaintiff was deposed in the retaliatory discharge case. We find much of the deposition is irrelevant to the case. However, those facts which are relevant on the issue of whether the plaintiff

was discharged by reason of the filing of the worker's compensation case or because of the effects of the attendance control program are in dispute. There are disputes on whether some of the absences of the plaintiff were due to the effect of his injury, even though not documented. Specifically, the plaintiff testified in the deposition that on some occasions he was unable to work some days due to side effects from the pain medication he took for the work injury; he testified that office personnel instructed him not to work on some of those days.

The "Attendance Control Program" contract between the union and the employer may give rise to introduction of evidence to show the employee's discharge was because of lack of compliance with the agreement. The employer may introduce evidence to show the plaintiff's absences were not because of his injury but were in violation of the agreement. However, the agreement cannot take precedence over the Workers' Compensation Act and the rule applicable thereto. TENN. CODE ANN. § 50-6-114. On the other hand, the plaintiff has testified in the deposition that he was absent because of the effects of the injury. This testimony creates a dispute concerning a material fact and summary judgment is, therefore, not appropriate in this case.

The judgment of the trial court is reversed and the case is remanded thereto for further proceedings. The cost of this appeal is taxed to the defendant.

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JOHN K. BYERS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE  
AT KNOXVILLE, TENNESSEE  
**TERRY TRAYLOR VS. NORTH AMERICAN ROYALTIES, INC., d/b/a  
WHELAND FOUNDRY**  
**Hamilton County Circuit Court**  
**No. 98CO575**

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**No. E2000-001053-WC-R3-CV - Filed: April 4, 2001**

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**JUDGMENT**

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 to the defendant, North America Royalties, Inc. d/b/a Wheland Foundry, for which execution may issue if necessary.

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