

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
January 25, 2001 Session

**JOE W. DILLARD v. TEXTRON AEROSTRUCTURES, a division of AVCO
CORPORATION**

**Direct Appeal from the Chancery Court, Part III, for Davidson County
No. 96-2110-III Ellen Hobbs Lyle, Chancellor**

**No. M2000-01558-WC-R3-CV - Mailed - March 14, 2001
Filed - April 16, 2001**

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 found the plaintiff sustained a 75 percent permanent partial vocational disability to the body as a whole. The defendant says the record does not support the finding that the plaintiff experienced a permanent anatomical change or a permanent aggravation of his pre-existing condition as a result of an incident on October 18, 1995, and January 2, 1996. The defendant also says the award, if any, should be limited to two and one-half times the medical impairment rating. We affirm the judgment of the trial court.

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

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, J. and JOSEPH C. LOSER, JR., SP. J., joined.

Frederick W. Hodge and Stephen W. Elliott, Nashville, Tennessee, for the appellant, Textron Aerostructures.

William H. Partin, Jr., Lexington, Kentucky, for the appellee, Joe W. Dillard.

OPINION

The trial court found the plaintiff sustained a 75 percent permanent partial vocational disability to the body as a whole.

The defendant says the record does not support the finding that the plaintiff experienced a permanent anatomical change or a permanent aggravation of his pre-existing condition as a result of an incident on October 18, 1995, and January 2, 1996. The defendant also says the award, if any, should be limited to two and one-half times the medical impairment rating. We affirm the judgment of the trial court.

Facts

The plaintiff filed suit against the defendant seeking compensation for injuries which occurred on October, 18, 1995, and January 2, 1996. The record reveals that the plaintiff had previous injuries to his back as well as a degenerative condition (stenosis) which made him vulnerable to further injury.

The fact of the injury is not significantly controlling on the outcome of this case now because of its judicial history.

This case was first tried on December 17, 1997. The trial judge dismissed the plaintiff's case because the court was of the opinion the plaintiff had failed to show the injuries set out in his petition had caused any aggravation of or exacerbation of his pre-existing condition.

The ruling of the trial court was appealed by the plaintiff and a Special Workers Compensation Panel found the record did show an aggravation and worsening of the plaintiff's pre-existing condition. The judgment of the trial court was reversed and the case was remanded thereto. The Supreme Court approved the findings of the Special Workers' Compensation Panel.

The trial court on rehearing the case on the remand correctly pointed out that the issues to be determined on the remand were the extent of the plaintiff's disability, whether the award should be limited to two and one-half times the medical impairment rating and whether the award should be paid in a lump sum.

The issue of compensability has been settled by the previous finding on appeal. It is not an issue in this proceeding. The defendant does not appeal from the lump sum award or the extent of the medical impairment rating. The only issue on the appeal is whether the award should be limited to two and one-half times the impairment rating.

Discussion

Tennessee Code Annotated § 214(a)(1) provides that when an employee who has sustained a compensable injury is returned to work by the employer at a wage equal to or greater than what the worker earned prior to the injury, the award will be limited to two and one-half times the medical impairment rating. Tennessee Code Annotated § 214(b) provides that if the

worker is not returned to work at a wage equal to or greater than the wage earned prior to the injury, the plaintiff may recover six times the medical impairment rating.

When there is a dispute between the employer and employee concerning whether the employee, who fails or is not returned to work, should receive two and one-half times the medical impairment rating or up to 6 times the medical impairment rating. This issue, like all others, must be determined by the facts of the case.

The answer to determining the 2.5 vis-a-vis the 6 times award where there is no return to work is based upon whether the offer of the employer to return to work is reasonable or unreasonable and whether the refusal of the employee to return is reasonable or unreasonable. *Newton v. Scott Health Care Ctr.*, 914 S.W.2d 884 (Tenn. 1995).

There was considerable evidence heard by the trial court on this issue. The defendant presented the testimony of a witness who was a staff consultant and benefits employee of the defendant. He testified the company could accommodate the limitations placed on the plaintiff by his treating physician, Dr. Rex E. Arendall, an orthopedic surgeon. The witness was, however, not very conversant with the demands of the job nor was he familiar with the restrictions placed upon the plaintiff by his physician.

An employee of the defendant and other witnesses familiar with the demands of the work gave testimony which indicated the plaintiff could not return to work. Dr. Arendall, the only medical witness in the case, testified the plaintiff would have continuing pain and told the plaintiff he should retire if there was no progression toward recovery.

The trial judge gave little credence to the witness called by the defendant to show that the plaintiff could return to work under the restrictions because of his lack of knowledge about the job or medical restrictions. Based on all the evidence touching upon this, the trial judge found the plaintiff was unable to return to work. The evidence supports this finding and we affirm the judgment of the trial court.

The cost of this appeal is taxed to the defendant.

JOHN K. BYERS, SENIOR JUDGE

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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 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 the defendant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM