

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
November 2000 Session

**DOUGLAS WILLIAMS v. WALDEN SECURITY**

**Direct Appeal from the Chancery Court for Davidson County  
No. 99-1564-II Irving H. Kilcrease, Chancellor**

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**No. M2000-01273-WC-R3-CV - Mailed - January 12, 2001  
Filed - April 12, 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 Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employer, Walden Security, insists (1) the injured employee was not a covered employee at the time of his accidental injury, (2) the award of permanent partial disability benefits is excessive, (3) the trial court erred in assessing statutory penalties, and (4) the trial court erred in commuting the award of permanent disability benefits to a lump sum. As discussed below, the panel has concluded the judgment should be affirmed.

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

LOSER, SP. J., delivered the opinion of the court, in which BIRCH, J. and PEOPLES, SP. J., joined.

Robert L. Farnette and Kristin Fecteau, Allen, Kopet & Boyd, Nashville, Tennessee, for the appellant, Walden Security.

Blakely D. Matthews, Cornelius & Collins, Nashville, Tennessee, for the appellee, Douglas Williams.

**MEMORANDUM OPINION**

For most of his adult life, the employee or claimant, Douglas Williams, worked as a printer. He retired from the printing business in the mid-1970s and, after a short retirement, resumed active employment as a security guard. He previously worked for Murray Guard and, in late 1998, was hired by Walden. His initial assignment was to patrol the Miller Medical Clinic/Hospital on Gallatin Road, until Walden lost the contract. He did not immediately receive a new assignment and, while not working, underwent cataract surgery, from which he was recovering when the

accident occurred, prompting this civil action to recover workers' compensation benefits.

On March 22, 1999, Mr. Williams was informed by a representative of Walden that a new security post was available. Specifically, he was advised that he would be assigned to patrol a Nashville Electric Service (N.E.S.) facility on first shift, 6:00 a.m. to 2:00 p.m., for two weeks while the regular guard was on vacation, and thereafter would be assigned to a permanent duty station at Opryland. He was also told that a representative of N.E.S. would have to approve him prior to commencing work there.

On Thursday, March 25, 1999, the claimant met with Starlis Keen of N.E.S. and received approval to undertake the assignment. At the conclusion of the visit with Keen, the claimant's supervisor, Captain Charles Perry, instructed him to visit the N.E.S. post and meet with the first shift guard, Kelly Joe Ferrell, so that Ferrell could train him relative to the required security detail. Because Ferrell was scheduled to commence vacation on Monday, the claimant was instructed to go to the post on Friday morning, March 26, 1999.

Prior to the claimant's arrival at the post, Captain Perry instructed Ferrell to take him through the security detail in order to familiarize him with the job requirements before Ferrell's vacation began. The familiarization or orientation process required approximately two hours to complete. When the claimant arrived at the security post, Ferrell proceeded to train him on the video surveillance system and necessary paperwork. Then, in accordance with the instructions of Captain Perry, Ferrell took the claimant on a walking tour to familiarize him with the required route and check-in stations.

As Ferrell was showing the claimant the required stops on the security patrol route, the claimant lost his footing in loose gravel and fell to the ground, suffering a massive contact injury to his right eye, rupturing the eyeball. His injuries included nearly complete loss of the field of vision in his right eye and uncontrollable, trauma induced glaucoma and loss of depth perception in both eyes. His treating physician, Dr. Aileen Webb, estimated his permanent impairment at 89 percent to his visual system, which she converted to 84 percent to the body as a whole.

The employer was promptly notified, but has paid no benefits. Two months after the accident, the employer's insurer denied benefits because, it erroneously reported, the claimant did not have authority from N.E.S. to be present at the post for training. He has undergone multiple surgical procedures and the doctor testified that only a miracle could restore his visual system to usefulness. He has not worked since the accident.

Upon the above summarized evidence, the trial court awarded permanent partial disability benefits based on 100 percent to the "visual system" plus a 6 percent penalty, thirty-eight weeks of temporary total disability benefits plus a penalty of 25 percent, and all reasonable and reasonably necessary medical expenses, past, present and future, for treatment of his injuries. Appellate review of issues (1) and (2) 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. Tenn.

Code Ann. § 50-6-225(e)(2). The reviewing court is not bound by a trial court's factual findings but instead conducts an independent examination to determine where the preponderance of the evidence lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584 (Tenn. 1991).

The appellant first contends the claimant was not a covered employee because it did not pay for his time on the date of the injury. Unless expressly excluded, every employee of a covered employer, under any actual or implied contract of hire or apprenticeship, is entitled to the benefits provided by the Act. Tenn. Code Ann. § 50-6-102(9)(A). We find in the record nothing which would exclude the claimant and it is clear from the record that the claimant was under a contract of hire at the time of his injury, whether he was paid for his time or not. The first issue is accordingly resolved in favor of the claimant.

The appellant next contends the award of permanent partial disability benefits to the visual system is one to the body as a whole and thus excessive because an injury to the eye is a scheduled injury. We interpret the award to be one based on the loss of use of both eyes. The statutory schedule of benefits values the loss of sight in both eyes at 400 weeks. Tenn. Code Ann. § 50-6-207(3)(A)(ff).

The appellant contends that because the claimant is more than 60 years old, the award should be limited to 260 weeks and that the award should be reduced because the claimant is drawing old age retirement benefits from Social Security. In the case of permanent total disability, a covered injured employee shall receive, as disability benefits, sixty-six and two-thirds percent of the wages received at the time of the injury, subject to the maximum weekly benefit and minimum weekly benefit, but not beyond the employee's sixty-fifth birthday, provided, that with respect to disabilities resulting from injuries which occur after age sixty, regardless of the age of the employee, permanent total disability benefits are payable for a period of 260 weeks. Such compensation payments are reduced by the amount of any old age insurance benefit payments attributable to employer contributions which the employee may receive under the Social Security Act, U.S.C., title 42, subchapter II, as amended. Tenn. Code Ann. § 50-6-207(4)(A)(i). The reduction does not apply where, as here, an employee over sixty suffers a work-related injury that results in scheduled member benefits. Smith v. U. S. Pipe & Foundry Co., 14 S.W.3d 739, 742 (Tenn. 2000).

The age-based classification contained in Tenn. Code Ann. § 50-6-207(4)(A)(i) does not apply to a worker over age 60 who suffers injury to a scheduled member. McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 185 (Tenn. 1999). Where a worker's only injury is to a scheduled member, he may receive only the amount of compensation provided by the schedule for his permanent disability. Id. Such injuries are exclusively controlled by the statutory schedule. Id.

Accordingly, the evidence fails to preponderate against the chancellor's finding that the claimant has lost 100 percent of the sight in both eyes as a result of his work related accident and is entitled to permanent disability benefits for 400 weeks.

An employer or its insurer who fails to pay compensation benefits as required by the Act may be required to pay a penalty of six percent on any unpaid installments, Tenn. Code Ann. § 50-6-205(b)(3), but only if such failure to pay results from bad faith on the part of such employer or insurer, Mayes v. Genesco, 510 S.W.2d 882 (Tenn. 1974), in which case the penalty is mandatory. Woodall v. Hamlett, 872 S.W.2d 677 (Tenn. 1994). Additionally, if an employer wrongfully fails to pay an employee's claim for temporary total disability payments, the employer shall be liable, in the discretion of the court, to pay the employee, in addition to the amount due for temporary total disability payments, a sum not exceeding twenty-five percent of such temporary total disability claim; provided, that it is made to appear to the court that the refusal to pay such claim was not in good faith and that such failure to pay inflicted additional expense, loss or injury upon the employee; and provided further, that such additional liability shall be measured by the additional expense thus entailed. Tenn. Code Ann. § 50-6-225(j). As to this issue, our review is thus to determine whether the award of penalties resulted from an abuse of discretion.

We find in the record evidence, found by the chancellor to be credible, that an agent of the appellant instructed Ferrell to make untrue statements concerning whether the claimant was to appear for training on the date of the injury, in order to avoid liability for workers' compensation benefits. The chancellor found such conduct to be reprehensible. Moreover, it appears from this record that the employer, or its insurer, having no defense to the employee's claim, attempted to fabricate one first by falsely claiming that the employee was a trespasser on N.E.S. property, then falsely insisting before the trial court and this tribunal that he was not a covered employee, despite a clear preponderance of evidence to the contrary. Additionally, the employee has incurred liability for expenses for care of his injuries and was required to obtain the services of an attorney to enforce his statutory right to workers' compensation benefits. The trial court did not abuse its discretion in assessing the above penalties.

Finally, the appellant argues that the trial court abused its discretion by commuting the disability award to a lump sum. Permanent disability benefits that are payable periodically may be commuted to one or more lump sum payment(s) on motion of any party subject to the approval of the circuit, chancery or criminal court. Tenn. Code Ann. § 50-6-229(a). Lump sum payments shall, in the aggregate, amount to a sum of all future installments of compensation. Tenn. Code Ann. § 50-6-229(a). In determining whether to commute an award, the courts must consider (1) whether the commutation will be in the best interest of the employee, and (2) the ability of the employee to wisely manage and control the commuted award. Huddleston v. Hartford Accident & Indemnity Company, 858 S.W.2d 315 (Tenn. 1993). Whether to commute a workers' compensation award to a lump sum is discretionary with the trial court, and the trial court's decision will not be disturbed on appeal unless the trial court's decision amounted to an abuse of discretion. Edmonds v. Wilson County, 9 S.W.3d 106, 109 (Tenn. 1999). The appellant did not resist the motion before the trial court and the trial court did not abuse its discretion in commuting the award to a lump sum.

All issues having been resolved in favor of the appellee, the judgment of the trial court is affirmed. The cause is remanded to the trial court for an award of interest on unpaid benefits and

such other proceedings, if any, as may be necessary. Costs on appeal are taxed to the appellant.

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JOE C. LOSER, JR.

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**ORDER**

This case is before the Court upon motion for review filed by Walden Security 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 not well taken and should be denied; 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.

The Court has taken under consideration the motion of plaintiff/appellee, Douglas Williams, for an award of just damages for frivolous appeal and finds the motion to be well taken. Therefore, the Court remands this case to the Davidson County Chancery Court for an assessment of attorneys' fees and expenses incurred by Douglas Williams in the course and scope of the appeals before the Workers' Compensation Panel and the full Court.

Costs will be paid by Walden Security, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

BIRCH, J - NOT PARTICIPATING

