IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
February 28, 2002 Session

RONALD HAYWOOD v. ORMET ALUMINUM MILL PRODUCTS CORPORATION, ET AL.

Direct Appeal from the Circuit Court for Carroll County
No. 3939 C. Creed McGinley, Judge

No. W2001-01494-WC-R3-CV - Mailed March 19, 2002; Filed May 1, 2002

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/Defendant asks: (1) Whether the limitations in Tenn. Code Ann. § 50-6-241(a)(1) apply?; and (2) whether the evidence supports an award of fifty-six percent (56%) to the body as a whole? As discussed below, the Panel concludes the trial court's judgment is affirmed.

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

L. TERRY LAFFERTY, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JOE C. LOSER, JR., SP. J., joined.

W. Timothy Hayes, Jr. and Christopher H. Crain, Memphis, Tennessee, for the Defendants/Appellants, Ormet Aluminum Mill Products Corporation, et al.

Donald E. Parish, Huntingdon, Tennessee, for the Plaintiff/Appellee, Ronald Haywood.

MEMORANDUM OPINION

At trial, Ronald Haywood, Plaintiff, age 44, a high school graduate and emergency medical technician, testified that he was running an aluminum sheet mill in July 1998. Plaintiff saw a drum, weighing approximately 800 pounds began to fall from a cradle into a pool of oil. The drum struck the pool of oil, splashing the same on the floor. Plaintiff tried to step out of the way, slipped and fell striking his left arm on the floor and his lower back and head struck the steel plated floor. Plaintiff was given emergency room treatment at Occupational Medicine in Jackson, Tennessee. X-rays at Jackson General Hospital, indicated a possible fracture of the elbow. Dr. John Everett of the West

Tennessee Bone and Joint Clinic, applied a soft cast to Plaintiff's arm. Plaintiff underwent an MRI for his back injury and continued receiving treatment for his arm and back injury throughout 1998 and 1999. When Dr. Everett retired, Dr. Stonecipher began treating Plaintiff. For his back, Dr. Stonecipher recommended physical therapy and medication. Eventually, on March 27, 2000, Dr. Stonecipher performed surgery on Plaintiff's left arm. Plaintiff stated why the surgery was so far out, "the company and insurance carrier just kept messing around, refusing to authorize it… they just kept putting it off." Plaintiff stated that he returned to work in April 2000 at Ormet, where he remained working until he was laid off in November 2000.

During cross-examination, Plaintiff stated that he returned to light duty work in July 1998, and gradually the doctors allowed him to return to full duty over a period of time. Plaintiff, a 14-year veteran employee, in the latter part of 1999 bid for an opening in the plant's maintenance department. Plaintiff acquired this job, but was required to join a union, paying a higher wage scale, but lost his seniority of 14 years. It was during this period of time that Plaintiff had surgery to his left arm and was eventually laid off in November 2000.

At trial, Plaintiff stated that he had just been hired by Fast Trans to run short haul loads from Jackson to Memphis, Tennessee. Plaintiff makes one to two trips a day, which permits him to spend nights at home. Plaintiff's wife has renal failure problems, which requires Plaintiff to be at home to assist her and their three children. Due to his injuries, Plaintiff has been unable to perform his EMT work, since Baptist Hospital required that Plaintiff has a 100 percent recovery from his work injuries. After surgery to the left arm and at the present time, Plaintiff stated he still has numbness, pain and tingling in his fingers. Plaintiff has a grating, popping sensation in the elbow, a loss of motion in the elbow and arthritis has set in the elbow. Plaintiff is unable to grip objects with his left hand, therefore requiring the use of both hands. Due to his injuries, Plaintiff has been unable to perform his usual activities at home and participate in his son's baseball activities. Plaintiff is unable to carry his two-year old daughter. As to his back, Plaintiff stated that his back continues to hurt and he cannot sit for long periods of time. His wife described "used to when I'd come home from work my wife would say I looked like an eighty-year old man, the way I'd walk." Prior to the injuries of July 1998, Plaintiff had no prior medical problems. He had injured a finger on the job, but this injury was taken care of by the Defendant.

Lisa Haywood, wife of Plaintiff, testified that she is a licensed practical nurse by trade. She and her husband have three children, and he is the sole support of the home. Mrs. Haywood has been unable to work for the past year, due to renal failure in both kidneys. She presently is considered for dialysis or eventually a kidney transplant. She stated that since her husband's injury to his back and arm, he has been unable to participate in coaching baseball and soccer. Her eleven-year old son, Jason, had to quit baseball since his father has been unable to work with him. Her husband has difficulty in lifting and carrying their two-year old daughter and when he gets up in the morning, he is stiff, "walking like an old man."

Defendant did not offer any proof.

MEDICAL EVIDENCE

Primarily, the medical proof in this record consists of the medical records of Dr. Lowell Stonecipher and the evaluation report of Dr. Robert Barnett. Supplementing these reports are the test results from Occupational Medicine Clinic, Jackson-Madison County General Hospital, Jackson Bone & Joint Clinic, and Methodist LeBonheur Healthcare. All reports are uniform in that Plaintiff fell at work injuring his left elbow and coccyx, on July 1, 1998. Dr. John Everett, Jackson Bone & Joint Clinic, initially saw Plaintiff on July 1, 1998, and administered a soft cast for a fractured left elbow. X-rays indicated Plaintiff has spondylolisthesis at L-5 and Plaintiff was able to return to work on light duty. Dr. Everett retired in August 1998 and Dr. Stonecipher began as Plaintiff's treating physician.

On September 16, 1998, Dr. Stonecipher saw Plaintiff, who complained of pain problems with the upper left extremity and lower left extremity. Dr. Stonecipher requested an EMG and MRI. The MRI indicated mild bulging at L5-S1 without herniation. On September 17, 1998, Plaintiff's left elbow was injured on the job when a piece of metal fell striking the left arm. Dr. Stonecipher noted pain on the extreme range of motion of the elbow, and the blow caused an aggravation of the healing of the crinoid process of the elbow. Plaintiff was put in a sling and given a work excuse. On October 1, 1998, Dr. Stonecipher noted Plaintiff lacked a little motion to the elbow, MRI's were okay, and permitted Plaintiff to remain on light duty for two weeks and then return to regular duty. As of November 9, 1998, Dr. Stonecipher noted an MRI showed little bulging at the last disc. Dr. Stonecipher discharged Plaintiff PRN with no restrictions and no permanent impairment.

On August 18, 1999, Plaintiff returned to see Dr. Stonecipher with complaints of back problems and continuing pain to the left elbow. Dr. Stonecipher's examination was normal, but he concluded that Plaintiff had a probable tardy ulnar nerve in the left elbow. Plaintiff was permitted to work with restrictions. Dr. Stonecipher saw Plaintiff on September 19, 1999, October 14, 1999 and February 8, 2000, for continuing pain in the elbow due to the tardy ulnar nerve. During this time period, Plaintiff was working without restrictions. On February 8, 2000, Dr. Stonecipher recommended surgery to the left elbow and opined this tardy ulnar nerve was work related. On March 27, 2000, Dr. Stonecipher performed surgery on Plaintiff and had him off work for two weeks. As of April 11, 2000, Plaintiff was permitted to retum to work on limited duty. As of June 8, 2000, Plaintiff was doing better, with some limited feeling to the elbow, and Plaintiff was permitted to work without restrictions. On September 7, 2000, Dr. Stonecipher determined that Plaintiff had decreased sensation in the ulnar nerve. Plaintiff had a grip strength of 90 on the right and 91 on the left. Plaintiff had reached maximum medical improvement. Dr. Stonecipher opined that Plaintiff sustained an impairment of three percent (3%) to the left upper extremity, secondary to the ulnar nerve problem.

On May 10, 1999, Dr. Robert J. Barnett, an orthopedic surgeon, saw Plaintiff at request of counsel. Plaintiff complained of pain, weakness and numbness in the left hand. Plaintiff also had constant pain in the lower back. The pain was aggravated by long and heavy lifting, especially at the end of a long day. A physical examination revealed that Plaintiff had limited motion in full

flexion of the left elbow, a loss of 20 degrees extension in the left elbow and crepitation in the elbow. Plaintiff had a twenty-five percent (25%) grip loss in the left hand compared to the right hand. Utilizing the Crepitation Table 19, page 59, Dr. Barnett opined that Plaintiff had seven percent (7%) loss of the left arm, a significant grip loss in the left hand and an additional three percent (3%) impairment due to loss of sensation. Plaintiff sustained a total impairment of fifteen percent (15%) to the left arm from the fracture.

As to Plaintiff's back, Plaintiff has a first degree spondylothesis which has been aggravated by his back injury. Thus, Plaintiff has sustained a five percent (5%) permanent physical impairment to the whole body. Dr. Barnett opined that Plaintiff sustained a fourteen percent (14%) permanent physical impairment to the whole body as a result of his back and left elbow injury.

Based upon the summarized evidence, the trial court awarded permanent partial disability of fifty-six percent (56%) to Plaintiff, finding that Plaintiff did not have a meaningful return to work and therefore the two and one/half times caps would not limit this. Tenn. Code Ann. § 50-6-241(b).

LEGAL ANALYSIS

Appellate review of findings of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence lies otherwise. Tenn. Code Ann. § 50-6-225(e)(2).

This panel is not bound by the trial court's findings but instead conducts an independent examination of the record to determine where the preponderance lies. *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991). Where the trial court has seen and heard witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the trial court that had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. *Long v. Tri-Con Ind. Ltd.*, 996 S.W.2d 173, 178 (Tenn. 1999). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of documentary evidence as the trial court. *See Walker v. Saturn Corp.*, 986 S.W.2d 204 (Tenn. 1998). The extent of an injured employee's vocational disability is a question of fact. *Story v. Legion Ins. Co.*, 3 S.W.3d 450, 456 (Tenn. Sp. Workers' Comp. 1999).

Defendant asserts that Plaintiff returned to work at Ormet for almost two years and five months following his injury and during that period, Plaintiff was working without restrictions for two years. Thus, Plaintiff had a meaningful return to work, and therefore the caps of two and one/half times applies. Tenn. Code Ann. § 50-6-241(a)(1). Plaintiff counters that he had an ongoing medical problem that was finally resolved by surgery in March 2000, approximately 21 months after injury. Plaintiff did not meet maximum medical improvement until September 2000 and was laid off work within two months. Also, Plaintiff steadily found his wages decreasing from $43,252.00, in 1997-98 to $32,562.00 in 2000. Thus, Plaintiff did not have a meaningful return to work.

"A meaningful return to work" is governed by Tennessee Code Annotated § 50-6-241(a)(1) and (b). Subsection (a)(1) applies to awards in cases where there has in fact been a "meaningful return to work." *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 629 (Tenn. 1999); *Newton v. Scott Health Care Ctr.*, 914 S.W.2d 884, 886 (Tenn. Sp. Workers' Comp. 1995). This subsection states in pertinent part:

> [W]here an injured employee is eligible to receive any permanent partial disability benefits,… and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is two and one half (2½) times the medical impairment rating.…

However, subsection 241(b) applies to awards in case in which there has been no "meaningful return to work." This subsection in pertinent part states:

> [W]here an injured employee is eligible to receive permanent partial disability benefits, and the pre-injury employer does not return the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is six (6) times the medical impairment rating.…

To determine whether there has been a meaningful return to work, the court's inquiry must focus on the "reasonableness of the employer in attempting to return the employee to work. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d at 629. A variety of factual situations, wherein trial courts, will be required to construe the meaning of the words in question here. The ultimate resolution of their meaning will be leavened by an assessment of the reasonableness of the employer in attempting to return the employee to work and, if applicable, the reasonableness of the employee in failing to return to work. *Newton v. Scott Health Care Center*, 914 S.W.2d 884, 886 (Tenn. Sp. Workers' Comp. 1995).

The trial court found that Plaintiff is no longer working, he has been laid off, and has significant vocational problems despite the fact that Plaintiff is industrious. Thus, Plaintiff has not been returned at a same or higher wage. Therefore, the two and one half times caps would not apply. Independently, we must review the record to ascertain the correctness of the trial court's findings.

As the trial court was impressed with Plaintiff's work history and industrious nature, his attempts to keep working on both light and regular duty with constant elbow and back pain, we likewise are so impressed. Plaintiff fractured both his left elbow and injured his coccyx in July 1998. With no fault on the part of Plaintiff, Plaintiff did not have surgery to correct this elbow injury until March 2000. Plaintiff was on light duty until June 2000, and then returned to regular duty. In September 2000, Dr. Stonecipher determined that Plaintiff reached maximum medical improvement. However, Plaintiff was laid off from work two months later. Although Defendant contends that Plaintiff earned an income from his EMT work, the record reflects that Plaintiff was restricted in this

work due to his job-related injury. Likewise, we note Plaintiff's ability to earn the same annual salary, due to his injury, affected his ability to fulfill his regular work duties, including overtime. Thus, from our review of the entire record, we find that the evidence does not preponderate against the trial court's finding that Plaintiff did not make a meaningful return to work and trial court's award of fifty-six percent (56%) vocational disability is affirmed.

In conclusion, the trial court's judgment is affirmed and the cost of this appeal is taxed to the Defendant.

_____

L. TERRY LAFFERTY, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
February 28, 2002

RONALD HAYWOOD v. ORMET ALUMINUM MILLPRODUCTS CORPORATION, et al.

Circuit Court for Carroll County
No. 3939

No. W2001-01494-WC-R3-CV - Filed May 1, 2002

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 on appeal are taxed to the Defendant/Appellant, Ormet Aluminum Mill Products Corporation, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM