

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 2003 Session

JOHN THOMAS STILL v. COMMISSARY OPERATIONS, INC.

**Direct Appeal from the Circuit Court for Robertson County
No. 9915 Ross H. Hicks, Circuit Judge**

**No. M2003-00528-WC-R3-CV - Mailed - December 15, 2003
Filed - January 20, 2004**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated Section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court determined that I(1) Employee was entitled to the current cause of action pursuant to Tennessee Code Annotated Section 50-6-241(a)(2). The employee sustained no additional vocational disability over and above the previously awarded twenty-five percent. As discussed below, the panel has concluded the judgment of the trial court should be affirmed.

Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the Circuit Court Affirmed

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J. and JOHN K. BYERS, SR. J., joined.

Aubrey T. Givens, Madison, Tennessee, for appellant, John Thomas Still

Mark A. Baugh, Nashville, Tennessee, for appellee, Commissary Operations, Inc.

MEMORANDUM OPINION

FACTS

On March 13, 1998, the plaintiff injured his back at work. At trial, the parties stipulated that the plaintiff's injury was work-related, that it occurred during the course and scope of his employment, and that proper notice was given. The incident was compensable at a rate of \$492. Thus, the only issue at trial was the extent of permanent vocational disability and whether the award should be paid in a lump sum. At the conclusion of proof, the trial court found that the plaintiff had sustained a twenty-five percent vocational disability to the body which equated to two and a half

times the bodily impairment. The trial court further ruled that the plaintiff's rights pursuant to Tennessee Code Annotated Section 50-6-241(2)(b) were not impaired.

Subsequent to the original case, the plaintiff returned to his employment with Commissary Operations, Inc. However, in July 2002, he was terminated. The plaintiff then filed a new cause of action pursuant to Tennessee Code Annotated Section 50-6-(a)(2) in an attempt to increase his previously adjudicated award of twenty-five percent vocational disability. In the second case, the trial court determined that reconsideration of the previous award was required under the facts and circumstances of the plaintiff's loss of employment with Commissary Operations, Inc. However, it did not award the plaintiff any additional vocational disability.

The following facts were adduced at the second trial. After his March 1998 injury, the plaintiff was ultimately released to return to work at Commissary Operations, Inc. Dr. Cushman, the plaintiff's treating physician, assigned the plaintiff a ten percent permanent impairment to the body as a whole. Dr. Cushman told the plaintiff that he should use "common sense" and temporarily refrain from lifting heavy objects. Dr. Cushman did not give the plaintiff any permanent restrictions. He testified that he instructed the plaintiff that if he had any problems to return to see him. Dr. Cushman stated that he did not treat the plaintiff again. The plaintiff returned to work in October 1998, and he continued there until July 2002.

The plaintiff testified regarding problems that he suffered when he returned to work after his back injury. He stated that many of his tasks caused him pain. He also stated that he could not sit for more than three hours in the same position. The plaintiff acknowledged that he did not complain to his supervisors about the alleged pain he suffered. He maintained that it was because he was afraid he might lose his job. The plaintiff's wife also testified regarding the plaintiff's pain and decreased activity.

On September 6, 2001, the plaintiff underwent a physical for the Department of Transportation. The physical was performed at Concentra Medical Center. As part of the examination, the plaintiff filled out a form indicating that he had had a prior back and spinal injury. However, he also stated in the forms that he was not having any problems from his 1998 injury and that he did not have any restrictions with job activities. The plaintiff tried to explain that he filled out the forms as he did because on "that date it wasn't hurting." Following the physical, the plaintiff was re-certified to continue driving.

In October 2001, while planting flowers, the plaintiff injured himself at his home. Three to four weeks after the accident, the plaintiff went to see his own physician, Dr. Peach. On February 19, 2002, Dr. McCarty, an orthopedic specialist to whom Dr. Peach had referred the plaintiff, performed surgery on the plaintiff's shoulder. On March 7, 2002, the plaintiff filled out a form requesting Family or Medical Leave. The form stated that the plaintiff was entitled to twelve weeks of unpaid leave. However, the plaintiff contends that he was approved for six months leave. The plaintiff was already on leave when he completed the form.

On June 19, 2002, Commissary Operations, Inc. sent the plaintiff a form stating that his leave would end on July 29, 2002. According to the plaintiff, the letter stated the following:

Without written verification of your leave extensions, your leave and employment will be terminated. According to the note from Dr. McCarty, he has you off work until July 29, 2002. After this date, [Commissary Operations] will need written documentation from Dr. McCarty supporting another extension.

However, on that day, the plaintiff informed Commissary Operations, Inc. that he would not be coming into work and that he had an appointment with Dr. McCarty. The plaintiff had scheduled the appointment six weeks prior. He testified that he learned that his shoulder would be operated on at this appointment. He maintained that Commissary Operations, Inc. knew about the appointment through Melissa Patterson.

John W. McKinney, III, testified as a vocational expert on behalf of the plaintiff. He reported that he considered the limitations placed on the plaintiff by Dr. Cushman and Dr. Gaw. Mr. McKinney stated that based upon the plaintiff's restrictions, he lost thirty-one percent of the jobs previously available to him in the local Nashville Metropolitan area and surrounding counties. He also stated that the plaintiff was expected to suffer a forty-three percent loss of earning capacity in that he was making \$17.50 per hour at the time he was terminated. Finally, Mr. McKinney opined that the plaintiff's overall vocational disability as a result of his work-related back injury was thirty-seven percent and that other factors could increase the disability up to an additional subjective ten percent.

Melissa Patterson, the Human resources manager for Commissary Operations, Inc., testified that the plaintiff was expected to return to work on July 29, 2002. Ms. Patterson reported that the plaintiff was terminated because he was unable to return from a medical leave of absence, and Commissary Operations, Inc. could no longer hold the position for him. She stated that she filled out the Personnel Change Notice and listed the plaintiff as not eligible for rehire. She could not remember who directed her to list the plaintiff as not for rehire and she did not investigate why he was not eligible for rehire.

John Whitaker, an expert in vocational rehabilitation, testified on behalf of Commissary Operations, Inc. He reported that he assessed the plaintiff but that he did not physically see the plaintiff for the assessment. He opined that the plaintiff suffered a zero vocational disability from the back injury. Mr. Whitaker conceded that there would be a potential loss of income that could equate into a fifty percent diminution of value from the plaintiff's previous position. However, he testified that diminution in income is not a valid factor in considering vocational disability.

ANALYSIS

In this appeal the plaintiff argues that the trial court properly reconsidered the original award

of workers' compensation benefits pursuant to Tennessee Code Annotated 50-6-241(a)(2), and his loss of employment met the statutory requirements for reconsideration. He further maintains that he was unable to fulfill his duties and was terminated, therefore his disability should be increased from 25 percent (2 ½ times impairment) to up to 6 times his impairment. The defendant insists that the court should not have reconsidered the employee's vocational disability because there is no relationship between the plaintiff's injury and his termination.

The trial court in this cause filed a well reasoned findings of fact and conclusions of law.

Appellate review 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) (2002 Supp.). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. *Wingert v. Government of Sumner County*, 908 S.W.2d 921, 922 (Tenn. 1995). The standard governing appellate review of findings of fact by a trial court requires the Special Workers' Compensation Appeals Panel to examine in depth a trial court's factual findings and conclusions. *GAF Bldg. Materials v. George*, 47 S.W.3d 430, 432 (Tenn. 2001). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. *Tobitt v. Bridgestone/Firestone, Inc.*, 59 S.W.3d 57, 61 (Tenn. 2001). The extent of an injured worker's vocational disability is a questions of fact. *Seals v. England/Corsair Upholstery Mfg.*, 984 S.W.2d 912, 915 (Tenn. 1999).

The plaintiff argues that his present disability entitles him to an increase in his disability from his previous award of twenty five percent. It is clear that the plaintiff returned to work after his March 1998 injury in October 1998 and continued to work until July 2002, and while he claims he was in pain he did not complain to any supervisor of the defendant. On September 6, 2001, the plaintiff underwent a physical for the Department of Transportation, and filled out a form indicating his previous back problem and stated on that form that he had no problems from his March 1998 injury. In October 2001 the plaintiff injured himself at his home while planting flowers.

The trial court properly concluded that this was a proper case for reconsideration pursuant to Tennessee Code Annotated Section 50-6-241(a)(2), *Young v. Cardon Better-Bilt, Inc.*, 30 S.W.3d 285 (Tenn. 2000). After considering all of the evidence the court concluded that plaintiff had no increase in his disability from his injury on 1998.

In determining the extent of an injured worker's permanent vocational disability, the trial courts are to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities for the disabled, and capacity to work at types of employment available in the claimant's disabled condition. Tenn. Code Ann. § 50-6-241(a)(1).

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 of the evidence lies. *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991.). However, where the trial judge has seen

and heard the 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 which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony, *Long v. Tri-Con Ind, LTD.*, S.W.2d 173, 178 (Tenn. 1999.).

From a consideration of the pertinent factors, to the extent they were established by the evidence, and giving due deference to the finding of the trial court, we do not find the evidence preponderates against the finding of the trial court.

CONCLUSION

The judgment of the trial court is therefore affirmed. Costs are taxed to the appellant, John Thomas Still.

ALLEN W. WALLACE, 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 appellant, John Thomas Still, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM