

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

September 25, 2003 Session

**JOANNA SWIGER v. NASHVILLE UNION STOCKYARD
RESTAURANT CO., INC.**

**Direct Appeal from the Chancery Court for Davidson County
No. 01-4024-II Irvin H. Kilcrease, Chancellor**

**No. M2002-02971-WC-R3-CV - Mailed - December 19, 2003
Filed - January 27, 2004**

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 to the Supreme Court of findings of fact and conclusions of law. The issues involved in this appeal are whether the plaintiff, Joanna Swiger, had waived her right to seek reconsideration pursuant to TENN. CODE ANN. § 50-6-241(a)(2), and whether Ms. Swiger made a reasonable attempt to return to work.

**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 ADOLPHO A BIRCH, J. and ALLEN W. WALLACE, SR. J., joined.

W. I. Howell Acuff, of Cookeville, Tennessee, for the appellant, Joanna Swiger.

David J. Deming, of Nashville, Tennessee, for the appellee, Nashville Union Stockyard Restaurant.

MEMORANDUM OPINION

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 finding, 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). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1998).

The trial court in this case held that Ms. Swiger had knowingly and voluntarily waived her

right to reconsideration of her vocational disability, and the court further held that Ms. Swiger did not make a reasonable attempt to return to work after the injury, and was therefore not entitled to seek reconsideration. We do not find that the evidence preponderates against these findings, and therefore affirm the ruling of the trial court.

Facts/Medical Evidence

Ms. Swiger injured herself in August 1995 when she slipped in a cooler while working for the Stockyard Restaurant. She settled her workers' compensation claim for 24 percent permanent partial disability to the body as a whole, and in June 1996, Ms. Swiger signed an order approving the settlement that she had reached. Although she was unrepresented at the time, Ms. Swiger had discussed with the judge the issue of waiving her right to reconsideration of her vocational disability, which was a part of the settlement.

After her injury, Ms. Swiger had restrictions that would not allow her to continue working as a server at the restaurant. Paulene Krebs, the nurse case manager, testified that a server's position was the only job ever identified to her that was available to Ms. Swiger, and that she tried repeatedly to work with the restaurant to find Ms. Swiger another position. Andrew Penland, the controller at the restaurant, contends that the restaurant tried to return Ms. Swiger to work a number of times by offering Ms. Swiger a number of positions that would be suitable for her, such as a hostess or answering the telephone, but that Ms. Swiger turned down each offer. Michael Baker, a manager at the restaurant, testified that the restaurant tried to return Ms. Swiger to work several times, and actually still considered Ms. Swiger an employee of the restaurant at the time of the settlement. Mr. Baker also testified that Ms. Swiger had expressed interest in returning to work by picking up a uniform, but that she failed to attend two scheduled orientations. Mr. Baker further testified that he phoned Ms. Swiger after these missed orientations, however Ms. Swiger simply stated that she would not work there.

Dr. Walter Bell was Ms. Swiger's treating physician. Dr. Bell testified that Ms. Swiger had injured her lower rib cage and upper abdominal wall area of her right side when she slipped in the cooler at work. Dr. Bell placed Ms. Swiger on work restrictions of not performing any repetitive activity that produces pain and Ms. Swiger could not lift more than 25 pounds. Dr. Bell also advised Ms. Swiger to use common sense in her restrictions and not do anything that seemed to cause pain. Dr. Bell was of the opinion that Ms. Swiger could not perform the position of a server, but that she could perform nearly any other position at the restaurant.

Discussion

The first issue for consideration in this case is whether Ms. Swiger knowingly and voluntarily waived her right to reconsideration pursuant to TENN. CODE ANN. § 50-6-241(a)(2), which provides that an employee may seek reconsideration of vocational disability if the employee is no longer

employed by the pre-injury employer within a designated period of time.¹ However, this right to reconsideration may be waived through a settlement agreement, which Stockyard Restaurant is arguing is the case here. On June 6, 1996, Ms. Swiger entered into a settlement agreement with Stockyard Restaurant concerning her work-related injury, which reads in pertinent part:

That the employee has returned to work for the pre-injury employer at a wage equal to or greater than the wage she was receiving at the time of her injury of August 10, 1995, and that she is hereby waiving her right to reopen this matter pursuant to T.C.A. Section 50-6-241(a)(2).²

Ms. Swiger argues that this waiver is unenforceable because consideration must flow to each party in order to enter into such an agreement. Although Ms. Swiger is correct in contending that the right to reconsider is a statutory right that belongs to the plaintiff, and that Ms. Swiger was already entitled to be returned to work therefore these things cannot be regarded as consideration, Ms. Swiger is incorrect in contending that no consideration flowed from the Stockyard Restaurant. Stockyard Restaurant was not obligated to enter into the settlement agreement with Ms. Swiger, and therefore could have insisted that the case be taken to trial, in which case Ms. Swiger would have the burden of proving every element of her case. Stockyard Restaurant agreed to settle Ms. Swiger's claim for a lump sum payment of \$21,759.36 in return for Ms. Swiger agreeing to waive her right to reconsideration.

Ms. Swiger's argument that the waiver is unenforceable because it violates public policy is also unpersuasive. On the contrary, there are sound public policy reasons in allowing an employer to settle such future rights of the employee, otherwise the employer "may have less incentive to settle workers' compensation cases." *Nay v. Resource Consultants, Inc.*, 2000 WL 4255 (Tenn.). Therefore, the evidence does not preponderate against the trial court's finding that Ms. Swiger waived her right to reconsideration.

The second issue for consideration is the fact that Ms. Swiger actually never returned to work at the Stockyard Restaurant even though the settlement agreement states differently. The trial court on this issue found that Ms. Swiger was unreasonable in her effort to return to work. The record indicates that Stockyard Restaurant tried a number of times to return Ms. Swiger to work, and it also indicates that Stockyard Restaurant offered Ms. Swiger a position that would more than accommodate the restrictions that Ms. Swiger had to follow. The trial judge in this case had the opportunity to hear the testimony of live witnesses concerning the efforts made to return Ms. Swiger to work. Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. *See Humphrey v. David*

¹Although Ms. Swiger was not represented by counsel at the time of this settlement, she discussed the settlement with the judge beforehand, knew the right she was relinquishing, and understood her actions in agreeing to the terms of the settlement. Therefore, Ms. Swiger entered into this agreement knowingly and voluntarily.

²However, Ms. Swiger did not return to work at the Stockyard Restaurant, which will be discussed later.

Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987). In this case, the evidence does not preponderate against the trial court's finding that Ms. Swiger was unreasonable in her efforts to return to work. Therefore, the ruling of the trial court is affirmed.

Costs are taxed to the appellant.

PER CURIAM

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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 appellant, Joanna Swiger, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM