

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
June 11, 2004 Session

ROBERT HUNLEY v. MOORE'S LUMBER & BUILDING SUPPLIES, INC.

**Direct Appeal from the Chancery Court for Knox County
No. 155703-2 Daryl R. Fansler, Chancellor**

Filed September 30, 2004

No. E2003-02193-WC-R3-CV - Mailed July 15, 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 trial court awarded the employee twelve and one-half (12 1/2) percent permanent disability as a result of a back injury and ruled the award was capped by the two and one-half times the five (5) percent medical impairment because the employee rejected a reasonable offer to return to work. The judgment is affirmed.

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

ROGER E. THAYER, SP. J., delivered the opinion of the court, in which E. RILEY ANDERSON, J., and WILLIAM H. INMAN, SR. J., joined.

Henry T. Ogle, Knoxville, Tennessee, for Appellant, Robert Hunley.

Victoria J. Pike, Knoxville, Tennessee, for Appellee, Moore's Lumber & Building Supplies, Inc.

MEMORANDUM OPINION

The employee, Robert L. Hunley, has appealed from the trial court's action in awarding him twelve and one-half (12 1/2) percent permanent partial disability as a result of a work-related back injury.

Factual Background

The employee is fifty-six years of age and reached the ninth grade in school. He had been employed by defendant, Moore's Lumber & Building Supplies, Inc., for sixteen years prior to

sustaining a back injury on December 10, 2001, when he was engaged in lifting a 95-pound bag of concrete. At the time of his injury, he was employed as a delivery truck driver which required him to load and unload the building supplies being delivered. After being off for some period of time, he was released to return to work under restrictions of not lifting more than twenty-five pounds and limiting his activity on bending, etc.

Employee Hunley testified that he returned to some type of light duty and then begin working his old job of delivering building supplies and that he finally reached a point where he could not physically do the work and quit working for this reason during the first week of April 2002. When he was questioned by counsel about being offered another position within his restrictions, he replied that he did not remember that.

Janice Williams, defendant's administrative manager, told the trial court that the company attempted to accommodate all of his restrictions and his supervisor was notified of the restrictions and was directed to provide any help that he might need. She also said his truck had a lift on it for the purpose of loading and unloading supplies. She said Mr. Hunley never reported any further problems to the company.

Calvert L. Saunders, vice-president of Administration, testified Mr. Hunley was an excellent and dependable employee and that it was company policy to accommodate any injured employee returning to work with restrictions. He stated he attempted to contact Hunley during July 2002 in an effort to get him back to work but he never returned his call to Mrs. Hunley. He said on about August 1, 2002, he finally reached him and attempted to have a discussion about his returning to work in a job that he could do under his medical restrictions. He said the employee seemed to have no interest in it and just said he could not do the work. Saunders said he tried to explain the company was going to create a job that would be light duty and Hunley responded by saying there was no light duty work. The witness said he was never able to explain the specific type job as the employee was upset and did not want to discuss the matter further. The new position would have been at the same salary and the same work hours. He said he was very disappointed as Mr. Hunley was a valued employee.

Dr. Paul H. Johnson, an orthopedic surgeon, testified by deposition and stated that the MRI report indicated degenerative changes resulting in spinal stenosis with disc protrusions or bulges; that his impression was the employee "had a probable right upper lumbar radiculopathy"; that surgery would probably not help the situation; and that he had a five (5) percent impairment under the AMA Guidelines. He released him to return to work under restrictions on lifting and bending. The doctor said he requested and received a Functional Capacity Evaluation report which indicated the employee could return to work in the light to medium physical demand category as defined by the United States Department of Labor.

Two vocational rehabilitation witnesses testified. They interviewed the employee, administered certain tests and examined the medical evidence. Julian NaDolsky was of the opinion the employee had no opportunity for employment at all and was 100 percent vocationally disabled.

However, he did admit that if a job could be found that fit his restrictions, he could probably do the work. Craig Colvin was of the opinion the employee was still eligible for sedentary type work which was a light level of physical exertion and that he had a fifty (50) percent vocational disability.

The trial judge found that the employee's refusal to return to work was unreasonable and the employee's disability would have to be capped under the provisions of Tenn. Code Ann. § 50-6-241(a)(1) at two and one-half times the medical impairment. Accordingly, judgment was entered for twelve and one-half (12 1/2) percent permanent partial disability to the body as a whole. The court specifically found that the testimony of witness Saunders was more credible on the return to work issue and that the two and one-half times cap applied although otherwise the disability would be fifty (50) percent.

Standard of Review

The review of the issue on appeal is *de novo* accompanied by a presumption of correctness of the findings of the trial court unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(2). Where the trial court has seen and heard witnesses and issues of credibility and the weight of oral testimony is involved, the trial court is usually in a better position to judge credibility and weight evidence but where evidence is introduced by deposition, the appellate court is in as good a position as the trial court in reviewing an opinion and weighing testimony. *Landers v. Fireman's Fund Ins. Co.*, 775 SW.2d 355, 356 (Tenn. 1989).

Analysis

The award of twelve and one-half (12 1/2) percent permanent disability was computed by the trial court pursuant to the provisions of Tenn. Code Ann. § 50-6-241(A)(1) which caps a recovery at two and one-half times the medical impairment. The employee contends his leaving employment was due to his injury and his inability to perform his work duties and that he should recover an award of at least six times his impairment under subsection (a)(2) and that he also qualifies for relief under Tenn. Code Ann. § 50-6-242.

Generally, where the employee has returned to work, the recovery of benefits cannot exceed two and one-half times the medical impairment. Subsection (a)(1). However if the employee does not return to work, then the recovery cannot exceed six times the medical impairment. Subsection (a)(2). In cases where the employee has not returned to work but was offered a position by the employer, the court's inquiry must focus on the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to return to work. *Newton v. Scott Health Care Ctn.*, 914 S.W.2d 884, 886 (Tenn. Sp. Worker's Comp. 1995). Where the employer attempts to limit the award under subsection (a)(1), the burden is upon the employer to show by a preponderance of the evidence that an offer of a return to work is at a wage equal to or greater than the pre-injury employment and that the work is within the medical restrictions which the medical evidence shows are appropriate for the returning employee *Ogren v. Housecall Health Care, Inc.*, (Tenn. Sp. Workers' Comp. 1998).

In applying these rules, we find the employer's offer of a return to work was reasonable under the circumstances as a new position was to be created with work duties within imposed medical restrictions and at the same rate of pay as before the injury. The employee did not seem interested in hearing any of the details of the offer and was convinced there was no light duty work available. The medical evidence and both expert vocational witnesses indicated the employee could perform light duty work if such was available. While this type of a work position may not have been as readily available in the open labor market, it was available with the employer. We hold the refusal of the offer to return to work was unreasonable on the part of the employee and the trial court was correct in fixing the award of disability pursuant to Tenn. Code Ann. § 50-6-241(a)(1).

Conclusion

The evidence does not preponderate against the award of twelve and one-half (12 1/2) percent permanent partial disability. The judgment is affirmed. Costs of the appeal are taxed to the employee.

ROGER E. THAYER, SPECIAL JUDGE

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JUDGEMENT

This case is before the Court upon the motion for review filed by Robert Hunley 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Robert Hunley, for which execution may issue if necessary.

PER CURIAM

Anderson, J - Not Participating