

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON  
July 1, 2004 Session

**MICHAEL RAY WOLFORD v. ACE TRUCKING, INC.**

**Direct Appeal from the Circuit Court for Decatur County  
No. 2568 C. Creed McGinley, Judge**

---

**No. W2003-02783-WC-R3-CV - Mailed July 22, 2004; Filed September 1, 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. In this appeal, the employee insists the trial court erred in awarding disability benefits based on 100 percent permanent partial disability and seeks an award of permanent total disability benefits. As discussed below, the panel has concluded the judgment should be remanded to the trial court for a determination of whether the trial court intended to award permanent total disability benefits or the maximum allowable award for permanent partial disability benefits.

**Tenn. Code Ann. § 50-6-225(e) (Supp. 2002) Appeal as of Right; Case Remanded**

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JAMES F. BUTLER, SP. J., joined.

Art D. Wells, Hill Boren, P.C., Jackson, Tennessee, for the appellant, Michael Ray Wolford

Michael L. Mansfied and John D. Stevens, Rainey, Kizer, Reviere & Bell, P.L.C., Jackson, Tennessee, for the appellee, Ace Trucking, Inc.

Paul G. Summers, Attorney General & Reporter, and Richard M. Murrell, Assistant Attorney General, Nashville, Tennessee, for the appellee, Second Injury Fund

**MEMORANDUM OPINION**

The employee or claimant, Michael Ray Wolford, initiated this civil action against the employer, Ace Trucking, Inc., to recover workers' compensation benefits for a job-related back injury that occurred on July 14, 2000. The Second Injury Fund was added as a defendant by amendment. The only issue submitted to the trial court was the extent of the employee's permanent

disability. After a trial on the merits, the trial court awarded disability benefits based on 100 percent permanent partial disability to the body as a whole. The employee has appealed, seeking permanent total disability benefits.

For injuries occurring on or after July 1, 1985, 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). 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). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Hill v. Wilson Sporting Goods Co., 104 S.W.3d 844 (Tenn. Workers' Comp Panel 2002). Issues of statutory construction are solely questions of law. Id. 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, McCaleb v. Saturn Corp., 910 S.W.2d 412, 414 (Tenn. 1995), 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., 996 S.W.2d 173, 178 (Tenn. 1999). 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 appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). Extent of vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn. 1999). Where the medical testimony in a workers' compensation case is presented by deposition, the reviewing court may make an independent assessment of the medical proof to determine where the preponderance of the proof lies. Bridges v. Liberty Mutual Ins. Co. of Hartford, 101 S.W.3d 67 (Tenn. Workers' Comp. Panel 2000).

As noted above, the trial court awarded benefits based on *100 percent permanent partial* disability. The workers' compensation statutes of this state contain no such classification as 100 percent permanent partial disability to the body as a whole. Vinson v. United Parcel Service, 92 S.W. 3d 380, 384-85 (Tenn. 2002). The facts are essentially undisputed and make it clear that Mr. Wolford is severely disabled from his work-related injury.

Mr. Wolford was injured on July 14, 2000, while working for the employer. To prevent his tractor-trailer rig from being overweight, he was attempting to shift cargo in a trailer when he felt pain in his back radiating down his right leg. He has a history of having had three prior back surgeries, in 1993, 1996 and 1997. He had done well following those surgeries and was working without pain when the injury occurred on July 14, 2000. After that injury, he saw a family physician who referred him to the office of Dr. Rowland, where x-rays were done and a MRI was obtained. He was then referred to Dr. Gulish, who had previously performed surgery on him. Dr. Gulish found another disc rupture and performed another surgical procedure on March 1, 2001. Following the fourth operation, Mr. Wolford was sent to physical therapy but could not participate because of increased pain. He was treated conservatively off and on for over a year and was sent by Dr. Gulish

back to Dr. Rowland for a second opinion. Dr. Rowland referred Mr. Wolford to Dr. Green and a back stimulator was inserted. When this failed to provide relief, Dr. Green inserted a pain pump. When he increased the dosage of morphine, Mr. Wolford would become nauseated. Dr. Green then attempted a different type of pain medication which also made Mr. Wolford sick. Mr. Wolford demanded removal of the pump. He came under the care of Dr. Defluram, who placed him on oral medication and referred him to a psychiatrist, Dr. Bond, and a pain management specialist, Dr. Blair. Dr. Bond found the claimant to be significantly depressed because of his injury and resultant disability. The claimant testified that he continuously suffers from severe disabling pain in his back and right leg and numbness of the three lateral toes of the right foot. He has been on OxyContin for three years and now takes a dose of 80 mg three times a day. He is also on Neurontin, Skelaxin, Wellbutrin, Risperdal, Trazadone, Lexapro and Prilosec. He uses a cane to walk, has pronounced decrease in strength and is unable to work. He has an anatomical impairment of between 13 percent and 39 percent to the body as a whole.

The claimant contends he is permanently and totally disabled. There is no question that his injury is permanent. When an injury, not otherwise specifically provided for in the Act, totally incapacitates a covered employee from working at an occupation which produces an income, such employee is considered totally disabled. Tenn. Code Ann. § 50-6-207(4)(B); Prost v. City of Clarksville Police Dept., 688 S.W.2d 425, 427 (Tenn. 1985). The definition focuses on an employee's ability to return to gainful employment. Davis v. Reagan, 951 S.W.2d 766, 767 (Tenn. 1997). The fact of employment after injury is a factor to be considered in determining whether an employee is permanently and totally disabled, but that fact is to be weighed in light of all other considerations, including the employee's skills and training, education, age, local job opportunities, capacity to work at all kinds of employment in his or her disabled condition, rating of anatomic disability by a medical expert and the employee's own assessment of his or her physical condition and resulting disability. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000).

Where an injured worker is entitled to receive permanent partial disability benefits to the body as a whole, 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 the injury, the maximum permanent partial disability award that the employee may receive is six times the medical impairment rating determined pursuant to the AMA Guides. Tenn. Code Ann. § 50-6-241(b). If a court awards a multiplier of five or greater, then the court must make specific findings of fact detailing the reasons for its award, considering all relevant factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities and capacity to work at types of employment available in claimant's disabled condition. Tenn. Code Ann. § 50-6-241(c).

Notwithstanding the above limitations, a court may award permanent partial disability benefits, not to exceed 400 weeks in appropriate cases where permanent medical impairment is found and the employee is entitled to receive the maximum award of six times the medical impairment. In such cases, the court must make specific documented findings, supported by clear

and convincing evidence, that on the date the employee reached maximum medical improvement, at least three of the following four circumstances existed:

- (1) The employee lacked a high school diploma or general equivalency diploma or could not read or write on a grade eight level;
- (2) The employee was age fifty-five or older;
- (3) The employee had no reasonably transferable job skills from prior vocational background and training; and
- (4) The employee had no reasonable employment opportunities available locally considering the employee's permanent medical condition.

Tenn. Code Ann. § 50-6-242.

The Second Injury Fund contends the trial court's award should be affirmed. The employer contends the award should be modified to provide the maximum award for permanent partial disability.

The claimant, age 37, has a high school education and training as a truck driver. He is not working and testified that he cannot work. Dr. Boals testified that he cannot work because of his injury. His only other experience is in labor-intensive construction work, which he can no longer do. The claimant testified that he can carry nothing heavier than a twelve pack of soft drinks and cannot walk more than 25 to 50 feet without pain. He cannot bend over to wash his feet or put on shoes and socks. He cannot sit for over 30 minutes and cannot stand for more than 15 to 20 minutes without extreme difficulty. He testified, without contradiction, that there is no gainful employment that he can perform because of his problems walking, standing and sitting. He is unable to perform household chores such as mowing, vacuuming, sweeping, mopping and laundering clothes. Dr. Boals testified the claimant is a "back cripple" and unable to work. The operating surgeon, Dr. Eugene Gulish reported, "I'm concerned that with his back that he may never be able to do heavy lifting, bending, twisting or prolonged sitting." And Dr. Elias Bond testified the claimant suffers from depression.

On remand, the trial court will clarify whether it found the claimant to be permanently and totally disabled or permanently and partially disabled and entitled to the maximum allowable award for permanent partial disability, making the required findings, within 45 days. The cause is remanded to the Circuit Court for Decatur County. Costs of this appeal are taxed to the parties equally.

---

JOE C. LOSER, JR.



IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON  
July 1, 2004 Session

**MICHAEL RAY WOLFORD v. ACE TRUCKING, INC.**

**Circuit Court for Decatur County  
No. 2568**

---

**No. W2003-02783-WC-R3-CV - Filed September 1, 2004**

---

**JUDGMENT ORDER**

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 equally to the Appellant, Michael Ray Wolford, to the Appellee, Ace Trucking, Inc., and to the Appellee, Second Injury Fund, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM