IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
(July 25, 2006 Session)

# HERBERT WAYNE RALSTON v. THE AEROSTRUCTURES CORPORATION and ZURICH AMERICAN INSURANCE COMPANY

**Direct Appeal from the Chancery Court for Rutherford County**
**No. 03-6749, Robert E. Corlew, III Chancellor**

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**No. M2005-01369-WC-R3-CV - Mailed - January 8, 2007**
**Filed - February 12, 2007**

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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. The employee contends that the trial court erred by applying the 2.5 multiplier cap to the employee's vocational disability award pursuant to Tenn. Code. Ann.§ 50-6-241(a)(1). The employer contends that it should not be required to pay post-judgment interest on the award and that the employee's appeal is frivolous. We affirm the trial court's application of the cap. We further find that the employee is entitled to statutory post-judgment interest on the award. Finally, we conclude that the appeal is not frivolous.

**Tenn. Code Ann. § 5-6-225(e) (1999) Appeal as of Right; Judgment of the Rutherford County Chancery Court Affirmed.**

JEFFREY S. BIVINS, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, CHIEF JUSTICE, and HOWELL N. PEOPLES, SP. J., joined.

R. Steven Waldron, Waldron and Fann, Murfreesboro, Tennessee, for the Appellant, Herbert Wayne Ralston.

Stephen W. Elliott, Aaron S. Guinn, Howell and Fisher, Nashville, Tennessee, for the Appellees, The Aerostructures Corporation and Zurich American Insurance Company.

## MEMORANDUM OPINION

### I. Facts

The Plaintiff, Herbert Wayne Ralston ("Ralston"), was 60 years old at the time of the trial in this action. He completed the tenth grade in high school and attended for a portion of the eleventh grade. He later obtained his GED. Ralston began working for Defendant Aerostructures Corporation ("Avco") in May of 1966. He continued with Avco[1] until his retirement on December 19, 2003. On December 12, 2002, Ralston injured his left shoulder at work. He was pulling a piece of material from behind him and his left arm was extended. He felt a pop and the immediate onset of pain in his left shoulder. Ralston continued having intermittent pain over the next few weeks and had difficulty using his arm overhead. On January 31, 2003, he visited Dr. J. Willis Oglesby for treatment of the shoulder injury. Dr. Oglesby ultimately diagnosed Ralston with a full thickness tear of the rotator cuff of his left shoulder. Dr. Oglesby performed surgery on Ralston's left shoulder on February 13, 2003, to repair the torn rotator cuff. Ralston returned to work in March 2003, working within the restrictions set by Dr. Oglesby. Over the next 2 to 3 months, Dr.Oglesby lessened his restrictions, and Ralston eventually returned to full, regular duty work with permanent restrictions against lifting more than five pounds over his head and against doing extensive outstretched work.

Ralston testified that he received the same wage rate when he returned to work as he had earned prior to his injury. He ultimately was able to work longer shifts on occasion than he did before his injury and he occasionally continued to work voluntary overtime. Ralston also testified that Avco accommodated his work restrictions after he returned to work. Dr. Oglesby assigned Ralston a 7 % anatomical impairment rating to the body as a whole as a result of this injury. Ralston also underwent an independent medical examination by Dr. David W. Gaw. Dr. Gaw agreed with Dr. Oglesby's assessment of the 7% impairment to the body as a whole.

By December of 2003, Vought had acquired Avco. Ralston was a member of the International Association of Machinist union which represented employees of Vought. The union requested an early retirement package offer from Vought. In December of 2003, Vought offered an early retirement package. This package increased the monthly pension available to the employees from $36 per month for each year of service to $43 per month for each year of service. This offer translated into an additional amount of approximately $210 per month for Ralston if he chose to accept the early retirement package offer. He would have had to work an additional four years under Vought's then existing retirement plan to qualify for the same amount of increase in the monthly pension. Ralston considered this offer and even discussed his options with Dr. Oglesby. He concluded that it was in his best interest to accept the early retirement package. Since his retirement from Avco, Ralston lives on a 138 acre farm in Bell Buckle, Tennessee. He raises cattle and cuts hay on his farm.

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[1] Although the record is not clear as to the exact date, at some point Vought Aircraft Industries, Inc. ("Vought") acquired Avco. At times in the record and in this opinion, this defendant is referred to as "Avco" and at times as "Vought." The distinction is not material for purposes of the issues before us.

In February 2004, only two months after offering the early retirement package, Vought announced plans to move its Nashville aircraft operation to Texas, and its intention to close the Nashville facility by the end of December 2006. By the date of the trial in this action, the plant closure date had been moved back to sometime between mid-2007 and the year 2008.

The trial court conducted the final hearing in this matter on May 11, 2005. The trial court heard live testimony from Ralston and Ms. Bebe Holland, a human resource generalist for Vought. The trial court also considered deposition testimony from Dr.Oglesby and Dr. Gaw. At the conclusion of the hearing the trial court rendered its decision. The trial court found Ralston to be a very credible witness. The trial court also accepted the 7% anatomical impairment rating to the body as a whole assessed by Dr. Oglesby and Dr. Gaw. After consideration of the relevant factors for determining vocational disability, the trial court concluded that a 30 or 31% vocation disability rating was appropriate in this case. The trial court next considered the application of the 2.5 multiplier cap contained in Tenn. Code Ann. 50-6-241(a)(1).[2] To determine whether the 2.5 cap should apply, the trial court examined evidence to determine whether Ralston had made a meaningful return to work. The trial court concluded that Ralston had made a meaningful return to work, and, therefore, the 2.5 multiplier applied in this case. Accordingly, the trial court entered judgment for Ralston based on a vocational disability award of 17.5%.

## II. Issues

This case presents the following issues on appeal:

1. Whether the trial court erred in finding that the 2.5 multiplier cap in Tenn. Code Ann. § 50-6-241(a)(1) applied in this case?

2. If the panel finds that the 2.5 multiplier cap does not apply, what is the appropriate vocational disability award?

3. If the panel finds that the 2.5 multiplier cap does not apply, should any additional benefit be paid in lump sum?

4. Whether Avco should be required to pay statutory post-judgment interest on the permanent partial disability award from the date of trial through the date of payment?

5. Whether the Plaintiff's appeal is frivolous?

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[2] The injury at issue in this case occurred in December 2002. For injuries after July 1, 2004, a 1.5 multiplier cap applies. Because this injury occurred before July 1, 2004, the 1.5 multiplier cap limitation does not apply in this action.

## III. Standard of Review

The standard of review in a workers' compensation case is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). *See also Layman v. Vanguard Contractors, Inc.*, 183 S.W.2d 310, 314 (Tenn. 2006). 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 to determine whether the preponderance of the evidence lies. *Vinson v. United Parcel Service*, 92 S.W.3d 380, 383-84 (Tenn. 2002). When the trial court has seen the witnesses and heard the testimony, especially when issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's findings of fact. *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 71 (Tenn. 2001). This Court, however, is in the same position as the trial judge in evaluating medical proof that is submitted by deposition, and may assess independently the weight and credibility to be afforded to such expert testimony. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002). Questions of law are reviewed *de novo* without a presumption of correctness. *Perrin v. Gaylord Entertainment Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

## IV. Analysis

Ralston first contends that the trial court erred in applying the 2.5 multiplier cap contained in Tenn. Code Ann. § 50-6-241(a)(1) to his case. The determining question on this issue is whether Ralston made a meaningful return to work following his left shoulder injury. The focus on the inquiry is 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 Healthcare Ctr.* 914 S.W.2d 884, 886 (Tenn.1995). The resolution of what is reasonable must rest upon the facts of each particular case. *Id.* The burden is upon the employer to show, by a preponderance of the evidence, that an offer of returning to work is at a wage equal to or greater than the pre-injury employment and that the work is within the medical restrictions appropriate in the case. *Ogren v. Housecall Health Care, Inc.*, 101 S.W.3d 55, 56 (Tenn. S. Ct. Sp. Worker's Comp. Panel 1998).

In this case, the trial court found that Ralston had made a meaningful return to work. In reaching this conclusion, the trial court carefully considered Ralston's own testimony that he was returned to a wage equal to his pre-injury employment and that Avco accommodated his medical restrictions. The trial court also noted that Ralston was able to perform the duties of his job, if not to his own satisfaction. The trial court fairly concluded that Ralston decision to retire was based upon the economic factors involved rather than as a result to his medical condition. The trial court placed considerable weight on this point upon the testimony of Dr. Oglesby on the retirement issue. Dr. Oglesby testified that Ralston asked his opinion as to whether Ralston should accept the early retirement package. Dr. Oglesby suggested Ralston take the money and retire. Counsel for Ralston asked Dr. Oglesby if that advice was based on his medical treatment of Ralston. Dr. Oglesby testified as follows:

> No. That's more just of being a friend and saying, heck, if you can get out with the same economic benefit today as you could three years from now, go have fun. That really wasn't medical advice. That was economic, personal advice.

Dr. Oglesby provided the following additional comments regarding the early retirement issue:

> . . . the Court should not think that I told him to take early retirement for medical reasons. The Court should understand that after a year of treating him, we got along very well. He was asking my advice about things and I treated him like my big brother and said, you know, from what you are describing about this package and the fact that you would have to work over three years to catch up if you didn't take it, I said, get out and, you know, go raise a garden.

Finally, Dr. Oglesby was asked if he would have recommended Ralston retire had it not been for the offer of early retirement. Dr. Oglesby replied that he would not have recommended that Ralston retire.

Ralston's own testimony also demonstrates that his decision to retire was not a medical decision. Ralston expressly testified that he chose to retire early because of the early retirement benefit package and because he wanted to farm.

The trial court carefully considered all of this evidence and concluded that Ralston made a meaningful return to work. Thus, the trial court found that the 2.5 multiplier cap applied in this case. As a result, the trial court entered a judgment based upon a vocational disability award of 17.5% to the body as a whole. We find that the evidence does not preponderate against the trial court's finding on this issue.[3]

We next consider whether Avco should pay interest on the judgment entered by the trial court. Tenn. Code Ann. § 47-14-121 provides that judgments shall accrue interest at an effective rate of 10% per annum. Tenn. Code Ann. § 47-14-122 provides that this interest shall be computed on a judgment from the day on which the court rendered its decision. Despite these statutory provisions, Avco contends that it should not be required to pay post-judgment interest. Avco cites no authority whatsoever for this proposition. Avco simply contends that "Plaintiff filed the Notice of Appeal in this action and he was solely responsible for the delay in the payment of the judgment . . . and because there is no merit to the issues raised on appeal by Plaintiff." We find this argument totally without merit. Avco has not appealed the trial court's award. If Avco wished to avoid paying post-judgment statutory interest, it clearly had the option to pay Ralston the amount of the unappealed judgment. It chose not to do so. We conclude that Ralston is entitled to the statutory post-judgment interest on the trial court's award.

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[3] Our resolution of this issue renders moot the issues of what amount of additional permanent partial disability benefits should be awarded to Ralston and whether any such award be paid in a lump sum.

Finally, Avco contends that Ralston's appeal is frivolous. In this case, the trial court noted that the issue of whether the 2.5 multiplier cap provision applied was a "close question." Moreover, we have reviewed the entire record in this case, and we find that the appeal is not frivolous.

## V. Conclusion

For the foregoing reasons, the judgment of the trial court on the issue of the award of permanent partial disability benefits in the amount of 17.5% to the body as a whole is affirmed. Additionally, the Defendants are ordered to pay statutory post-judgment interest on the trial court's judgment. Finally, the Plaintiff's appeal is not frivolous. In our discretion, we tax one-half of the costs of this appeal to the appellant, Herbert Lane Ralston, and one half of the costs to the appellees, The Aerostructures Corporation and Zurich American Insurance Company.

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JEFFREY S. BIVINS, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
JULY 25, 2006 SESSION

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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 appeals 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 taxed one-half to the Appellant, Herbert Wayne Ralston, and one-half of the costs to the Appellees, The Aerostructures and Zurich American Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM