

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 26, 2007 Session

CLARENCE WHEELER v. HENNESSY INDUSTRIES

**Appeal from the Circuit Court for Davidson County
No. 05C-3642 Amanda McClendon, Judge**

**No. M2007-00921-WC-R3-WC - Mailed - July 9, 2008
Filed - August 11, 2008**

This 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) (Supp. 2007) for a hearing and a report of findings of fact and conclusions of law. It involves an employee with a pre-existing medical condition who sustained a work-related injury. The employer terminated the employee after he failed to report for work or call in after he had been released to return to work without conditions. Following a bench trial, the Circuit Court for Davidson County found that the employee had sustained a work-related injury that had aggravated a pre-existing condition. The trial court also determined that the employee had not made a meaningful return to work and, therefore, that the cap on benefits in Tenn. Code Ann. § 50-6-241(a)(1) (2005) did not apply. The trial court also determined that the employee was one hundred percent permanently partially disabled. The employer has appealed. While we affirm the trial court's finding that the employee sustained a compensable injury, we vacate the finding that the employee had not had a meaningful return to work and that the employee was one hundred percent permanently partially disabled. Accordingly, we remand the case to the trial court for further proceedings consistent with this opinion.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right; Judgment of the Circuit Court Affirmed in Part; Vacated in Part; and Remanded

WILLIAM C. KOCH, JR., J., delivered the opinion of the court, in which ALLEN W. WALLACE and JERRY SCOTT, SR.JJ., joined.

Michael S. Moschel and Alonda McCutcheon, Nashville, Tennessee, for the appellant, Hennessy Industries.

David B. Lyons, Nashville, Tennessee, for the appellee, Clarence Wheeler.

MEMORANDUM OPINION

I.

In January 2001, Clarence Wheeler was involved in an automobile accident in which he injured his neck. He was seen at Vanderbilt Hospital's emergency room and was later evaluated by Dr. James Anderson, a neurologist practicing in Springfield, Tennessee. One of Dr. Anderson's treatment notes, dated February 22, 2001, stated that Mr. Wheeler's symptoms included "neck pain radiating into his left greater than his right extremity."

In May 2002, Mr. Wheeler began working part-time for Hennessy Industries, Inc. ("Hennessy"). Several months later, in July 2002, Hennessy hired Mr. Wheeler as a full-time probationary employee. Mr. Wheeler worked on an assembly line making wheel balancing machines. This job required him to use at least two pneumatic tools which were attached to hoses mounted on overhead retractable reels.

On August 15, 2002, Mr. Wheeler accidentally struck the back of his head on one of the pneumatic tools as he straightened up from a bending position. He immediately reported the incident to his supervisor and was treated for pain in his neck and shoulder by a nurse on the premises. Though he continued working, Mr. Wheeler's symptoms did not improve. On August 20, 2002, he requested additional medical treatment.

Hennessy referred Mr. Wheeler to Dr. Carol Browdy, an occupational health physician. Dr. Browdy diagnosed a cervical strain and prescribed physical therapy and medication. She also placed work restrictions on Mr. Wheeler that limited him to light-duty assignments. Hennessy, however, did not immediately have any light-duty work available for Mr. Wheeler.¹

Mr. Wheeler had several other appointments with Dr. Browdy over the next several weeks but had no significant improvement. During these office visits in late August to mid-September, Dr. Browdy maintained Mr. Wheeler's light-duty work restrictions. Ultimately, Dr. Browdy ordered an MRI and a functional capacity evaluation ("FCE") and referred Mr. Wheeler to an orthopaedic surgeon. The MRI and the FCE were performed, but Mr. Wheeler was never examined by an orthopaedic surgeon. The MRI revealed degenerative changes and a congenital back condition. The FCE report cited symptom magnification and inconsistent effort.

Mr. Wheeler was last seen by Dr. Browdy on October 1, 2002. His appointment was scheduled for 9:00 a.m., but the record indicates that it started a few minutes early. During this appointment, Dr. Browdy released Mr. Wheeler to resume his regular work duties without any restrictions. Mr. Wheeler's appointment was completed at 9:11 a.m.,² and Dr. Browdy's office faxed a copy of his release to Hennessy at that time.

¹In fact, Mr. Wheeler did not return to work until mid-September 2002.

²Mr. Wheeler asserts that his appointment did not end until 10:00 or 11:00 a.m.

Mr. Wheeler's assigned work shift began at 7:00 a.m. and ended at 3:30 p.m. However, he did not report for work on October 1, 2002, following his appointment with Dr. Browdy even though he had been released without work restrictions and even though the Hennessy plant was approximately one mile from Dr. Browdy's office. Hennessy terminated Mr. Wheeler's employment on October 2, 2002 in a letter stating, in part:

The purpose of this letter is to notify you that effective today, Wednesday, October 2, 2002 your employment with Hennessy Industries, Inc. will be terminated due to your failure to report to work after release from your doctor to full duty. This is considered to be abandonment of your job. . . . [You] were seen by the physician at 9:00 a.m. on . . . October 1, 2002. You were released to return to work at that time. You did not return to work nor call in on the message line.

Mr. Wheeler received the letter on October 2, 2002.³

Mr. Wheeler's next medical appointment related to his August 15, 2002 injury was in February 2003. This appointment was with Dr. Tarek Elalayli, an orthopaedic surgeon practicing in Nashville.⁴ In November 2003, Dr. Ronald T. Zillum, a neurosurgeon, conducted an independent medical examination ("IME") at the trial court's request. Dr. Zillum, testifying by deposition, opined that Mr. Wheeler had degenerative changes in his cervical spine and that it was possible that the August 2002 incident had aggravated that condition. He also testified that, based upon his comparison of X-rays taken prior to the injury with others taken later, there was no discernible anatomical change in Mr. Wheeler's cervical spine.

In November 2004, Mr. Wheeler was referred through TennCare to Dr. Robert Davis, another neurosurgeon. Based upon an MRI study conducted in September 2004, Dr. Davis concluded that Mr. Wheeler had spinal stenosis at the C3-4 level. In January 2005, Dr. Davis performed an anterior cervical fusion to correct this condition. During the procedure, Dr. Davis observed that the stenosis was caused by bone spurs and a bulging disc. He testified that these conditions "originated in the on-the-job injury" of August 2002. On March 7, 2005, Dr. Davis released Mr. Wheeler to return to work with no restrictions. He opined that Mr. Wheeler retained a 26.5% permanent anatomical impairment.

In November 2005, Dr. Walter Wheelhouse conducted another IME of Mr. Wheeler at the request of Mr. Wheeler's lawyer. Dr. Wheelhouse reviewed the records of Mr. Wheeler's previous physicians, performed a clinical examination, and prepared a C-32 form at Mr. Wheeler's request.

³Mr. Wheeler later explained that he did not return to work at Hennessy on October 1, 2002 because he was feeling fatigued and because he had another appointment for an unrelated medical condition scheduled for October 2, 2002.

⁴Dr. Elalayli was not deposed and his records were not placed in evidence. However, the record contains a summary of his report prepared by another physician.

Hennessy conducted a cross-examination deposition in accordance with Tenn. Code Ann. § 50-6-235(c)(1) (2005). During this deposition, Dr. Wheelhouse testified that Mr. Wheeler retained an impairment of 28% to the body as a whole. He also opined that Mr. Wheeler's pre-existing condition had been aggravated by the August 2002 event.

On November 30, 2005, Mr. Wheeler filed his second complaint seeking workers' compensation benefits in the Circuit Court for Davidson County. He had filed a similar complaint three years earlier in the Chancery Court for Davidson County, but he voluntarily dismissed this complaint in November 2005, two weeks before the case was scheduled to be tried. On Hennessy's motion, the record of proceedings in the chancery court was incorporated into the record of the circuit court.

Dr. Paul McCombs, another neurosurgeon, initially examined Mr. Wheeler on March 6, 2006. Mr. Wheeler reported to Dr. McCombs at that time that he continued to have neck and right shoulder pain. Dr. McCombs ordered a myelogram which showed stenosis at the C3-4 level. Ultimately, Dr. McCombs performed a cervical laminectomy at that level. This procedure differed from the procedure performed by Dr. Davis but was for the same general purpose – to remove bony growth in the spine in order to alleviate stenosis. Dr. McCombs also opined that the August 2002 incident had aggravated Mr. Wheeler's pre-existing degenerative condition and that Mr. Wheeler had a permanent impairment of 25% to the body as a whole. He placed no restrictions upon Mr. Wheeler's activities.

At the request of Hennessy's lawyer, Dr. Brett Babat, an orthopaedic surgeon practicing in Nashville, performed an IME on Mr. Wheeler on September 5, 2006. Dr. Babat reviewed medical records and conducted his own clinical examination. He opined that it was "unlikely" that the August 2002 incident had aggravated or advanced Mr. Wheeler's pre-existing condition.

At the time of the January 17, 2007 bench trial, Mr. Wheeler was forty-one years old. He had completed the tenth grade and the General Educational Development (GED) classes, but he had not taken the GED exam. His work history consisted primarily of assembly line work and operating a fork lift. After being terminated by Hennessy, he worked for two years as a fork truck operator at Tri-Star Industries. He lost that job when the plant closed.

The trial court found that Mr. Wheeler's August 2002 injury had aggravated his pre-existing degenerative back condition and that Mr. Wheeler had not had a meaningful return to work. The trial court also concluded that Mr. Wheeler's permanent disability should be determined by multiplying his anatomical impairment by a factor of five. Because this resulted in a disability of greater than one hundred percent, the trial court reduced the award to one hundred percent and awarded Mr. Wheeler four hundred weeks of benefits.

Hennessy has appealed the trial court's award. It asserts that the trial court erred by finding that Mr. Wheeler sustained a compensable aggravation of his pre-existing degenerative condition and by failing to apply a cap at two and one-half times Mr. Wheeler's medical impairment rating pursuant to Tenn. Code Ann. § 50-6-241(a)(1) (2005).

II.

Courts reviewing an award of workers' compensation benefits must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When conducting this examination, Tenn. Code Ann. § 50-6-225(e)(2) requires the reviewing court to "[r]eview . . . the trial court's findings of fact . . . 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." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. *Tryon v. Saturn Corp.*, ___ S.W.3d. ___, ___, 2008 WL 2098104, at *4 (Tenn. 2008); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). However, the reviewing courts need not give similar deference to a trial court's findings based upon documentary evidence such as depositions, *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006); *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004), or to a trial court's conclusions of law, *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

III.

Hennessy first asserts that the trial court erred by finding that Mr. Wheeler's August 2002 injury aggravated his pre-existing degenerative back condition. It argues specifically that Mr. Wheeler's medical experts based their opinions on incomplete or inaccurate information. We have determined that the evidence does not preponderate against the trial court's conclusion that Mr. Wheeler's August 2002 injury aggravated his pre-existing back condition.

A.

In every case seeking benefits under the Workers' Compensation Law, the employee bears the burden of proving each element of his or her cause of action. *Fitzgerald v. BTR Sealing Sys. N. Am.-Tenn. Operations*, 205 S.W.3d 400, 404 (Tenn. 2006). The element of causation is satisfied where the injury has a rational, causal connection to the work. *Wilhelm v. Krogers*, 235 S.W.3d at 127; *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W. 2d 690, 692 (Tenn. 1997). Although the employee has the burden of proving causation, all reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. *Phillips v. A & H Constr. Co.*, 134 S.W.3d 145, 150 (Tenn. 2004); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W. 3d at 168.

B.

Hennessy attacks the trial court's causation finding on four fronts. First, it argues that the weight of Dr. Davis's opinions is undermined by the fact that he was unaware of Mr. Wheeler's 2001 automobile accident and subsequent medical treatment. Second, it asserts that Dr. McCombs was under the impression that Mr. Wheeler's symptoms following his August 2002 injury were different than his symptoms following the 2001 automobile accident. Third, Hennessy points out that none of the physicians noted any significant anatomical change in Mr. Wheeler's back between the X-rays

taken before the August 2002 injury and X-rays taken following the injury. Fourth, Hennessy points out the numerous discrepancies between Mr. Wheeler's trial testimony and his previous statements in his interrogatory responses, his discovery deposition, and a recorded statement taken by the workers' compensation insurer.

In response, Mr. Wheeler notes his own un rebutted testimony that he had completely recovered from the 2001 automobile accident before the August 2002 injury. He also points out that the trial court did not conclude that he lacked credibility and that none of the physicians who testified on his behalf changed their opinions after being informed about the 2001 accident.

The evidence most favorable to Hennessy on this issue is the testimony of Dr. Babat who opined that it was "unlikely" that Mr. Wheeler had sustained a permanent aggravation of his pre-existing degenerative disease. His examination, however, occurred more than four years after the event. An interval of this length is of more consequence when, as here, the issue under consideration is causation as opposed to impairment.

Dr. Zellum's examination occurred closer in time to the event than any of the physicians who testified. Moreover, his examination was conducted at the request of the chancellor in the original action. Dr. Zellum testified that he compared the X-rays taken before and after the injury at issue here and was unable to discern any anatomical change from those studies. However, he also agreed that it was possible that the work injury had caused an aggravation of the underlying condition.

Drs. Davis and McCombs saw Mr. Wheeler after Dr. Zellum did. However, they were treating physicians who had contact with Mr. Wheeler on multiple occasions over extended periods of time. Both expressed their opinion that his pre-existing degenerative condition was worsened by the August 2002 injury. While neither physician had complete records concerning Mr. Wheeler's prior medical history, both stood by their original causation opinion after they were provided with this additional information.

We have independently reviewed the medical depositions. While reasonable minds can differ on the issue of causation, we are unable to conclude that the evidence preponderates against the trial court's finding that Mr. Wheeler sustained a compensable aggravation of his pre-existing degenerative back condition as a result of the August 2002 event. Therefore, we affirm the trial court's finding with regard to causation.

IV.

Hennessy also argues that the trial court erred by concluding that Mr. Wheeler did not have a meaningful return to work and then by multiplying Mr. Wheeler's anatomical impairment by a factor of five. It asserts that the cap in Tenn. Code Ann. § 50-6-241(a)(1) should apply because Mr. Wheeler was prevented from having a meaningful return to work only by his discharge for misconduct. Mr. Wheeler responds that his failure to return to work on October 1, 2002 was justified and that Hennessy's reason for terminating him was simply pretextual. We have determined that the evidence preponderates against the trial court's finding that Mr. Wheeler contacted Hennessy

on October 1, 2002, and that the case should be remanded to enable the trial court to determine the basis for Mr. Wheeler's termination.

A.

The concept of "meaningful return to work" was devised by the courts to assist with the application of the caps on permanent partial disability benefits in Tenn. Code Ann. § 50-6-241. For claims arising before July 1, 2004,⁵ Tenn. Code Ann. § 50-6-241(a) provides that permanent partial disability benefits for employees who have had a meaningful return to work cannot exceed two and one-half times their medical impairment rating. For employees who have not had a meaningful return to work, Tenn. Code Ann. § 50-6-241(b) provides that their permanent partial disability benefits cannot exceed six times their medical impairment rating. *Tryon v. Saturn Corp.*, ___ S.W.3d at ___, 2008 WL 2098104, at *5.

The circumstances in which the concept of "meaningful return to work" must be applied are varied and complex. *Newton v. Scott Health Care Ctr.*, 914 S.W.2d 884, 886 (Tenn. Workers' Comp. Panel 1995). When required to determine whether an employee has had a meaningful return to work, the courts must assess the reasonableness of the employer's actions, as well as the reasonableness of the employee in failing either to return to work or to remain at work. *Lay v. Scott County Sheriff's Dep't*, 109 S.W.3d 293, 297-98 (Tenn. 2003); *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 630 (Tenn. 1999). The determination of the reasonableness of the acts of both the employer and the employee depends on the facts of each case. *Tryon v. Saturn Corp.*, ___ S.W.3d at ___, 2008 WL 2098104, at *5.

For the two and one-half multiplier in Tenn. Code Ann. § 50-6-241(a)(1) to apply, the employer must "return[] the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury." If the employee is not returned to work, then the larger cap in Tenn. Code Ann. § 50-6-241(b) applies. However, the courts have recognized an exception to the larger multiplier that arises when an employer does not return an employee to work. An employer who has discharged an employee because of misconduct is not required to offer the employee re-employment or to retain the employee on its payroll in order to obtain the benefit of the two and one-half cap in Tenn. Code Ann. § 50-6-241(a)(1). *See, e.g., Carter v. First Source Furniture Group*, 92 S.W.3d 367, 371-72 (Tenn. 2002); *Davis v. Avron Truss Co., Inc.*, No. E2000-00780-WC-R3-CV, 2001 WL 767014, at *2-3 (Tenn. Workers' Comp. Panel July 6, 2001).

B.

Hennessy insists that it discharged Mr. Wheeler for misconduct on October 1, 2002. Its October 2, 2002 letter states that Mr. Wheeler was being discharged because he had abandoned his

⁵The Tennessee General Assembly reduced the two and one-half multiplier to one and one-half for injuries occurring on or after July 1, 2004. Because Mr. Wheeler's work-related injury occurred before July 1, 2004, the two and one-half multiplier in Tenn. Code Ann. § 50-6-241(a)(1) rather than the one and one-half multiplier in Tenn. Code Ann. § 50-6-241(d)(1)(A) applies.

job. Accordingly, Hennessy contends that the two and one-half cap in Tenn. Code Ann. § 50-6-241(a)(1) applies because Mr. Wheeler was terminated for misconduct because he failed to return to work or to call in to report that he would not be returning to work on October 1, 2002 after his medical appointment.

The trial court, however, declined to apply the two and one-half cap because it concluded that Mr. Wheeler did not have a meaningful return to work. In reaching this conclusion, the trial court stated:

This Court finds that [Mr. Wheeler] did not have a meaningful return to work and was in fact let go by letter dated October 2, 2002 when Dr. Browdy released him on October 1, 2002 and he called work that day to tell them he was released but that he could not come in on October 2, 2002 because of an appointment with his oncologist for treatment of Hodgkins Lymphoma.

This finding reflects that the trial court's decision that Mr. Wheeler did not have a meaningful return to work was based, in large part, on its finding that Mr. Wheeler had contacted Hennessy on October 1, 2002, thereby implicitly finding Hennessy's explanation for Mr. Wheeler's discharge was pretextual.

The evidence preponderates against the trial court's factual finding that Mr. Wheeler contacted Hennessy on October 1, 2002. During his direct testimony, Mr. Wheeler conceded that he did not call Hennessy until the morning of October 2, 2002. In fact, the parties stipulated that Mr. Wheeler did not call Hennessy until 6:00 a.m. on October 2, 2002. Accordingly, Hennessy's contention that it terminated Mr. Wheeler for his failure to report or to call in on October 1, 2002 after being released to return to work by Dr. Browdy cannot be dismissed on this basis. Thus, the issues presented become more complicated to resolve than under the trial court's analysis.

The present case tests the boundaries of the application of the misconduct exception. Mr. Wheeler argues that Hennessy should not have discharged him because his conduct on October 1, 2002 was reasonable. He also argues that his conduct was not sufficiently egregious to warrant termination and that Hennessy had allowed other employees three absences before terminating them. Accordingly, Mr. Wheeler insists that Hennessy's decision to terminate him was merely a pretext for discharging an injured employee. While his arguments are related, they present two different understandings of the misconduct exception.

We have concluded that Mr. Wheeler's latter argument presents the proper inquiry when a court is addressing whether the misconduct exception to Tenn. Code Ann. § 50-6-241(b) applies. The Tennessee Supreme Court has held "that an employer should be permitted to enforce workplace rules without being penalized in a workers' compensation case." *Carter v. First Source Furniture Group*, 92 S.W.3d at 368. Thus, as a general matter, the courts are not charged with deciding for employers whether an employee's conduct is sufficiently egregious to warrant discharge. However, in the context of a claim for benefits under the Workers' Compensation Law, the courts may be

required to determine whether particular acts constitute misconduct for the purpose of determining which cap on permanent partial disability benefits applies.

When an employer relies on the misconduct exception to Tenn. Code Ann. § 50-6-241(b), it necessarily concedes that it did not return the employee to work or that the employee is no longer working. Ascertaining whether the misconduct exception applies requires the court to address whether the employer has satisfactorily demonstrated that the employee's misconduct was its actual motivation in terminating the employee. *See, e.g., Carter v. First Source Furniture Group*, 92 S.W.3d at 368, 371-72;⁶ *Suits v. M & M Mars*, No. E2004-02368-WC-R3-CV, 2005 WL 2469690, at *2, 4 (Tenn. Workers' Comp. Panel Oct. 5, 2005);⁷ *Davis v. Avron Truss Co.*, 2001 WL 767014, at *2.⁸

If the employee's behavior cannot be reasonably classified as misconduct,⁹ then the employer's misconduct assertion would be merely pretext for discharging the employee,¹⁰ and the larger cap in Tenn. Code Ann. § 50-6-241(b) would apply. *See, e.g., Phelps v. Mark IV Automotive*, No. W2006-00274-WC-R3-CV, 2007 WL 445640, at *2-4 (Tenn. Workers' Comp. Panel Feb. 12, 2007);¹¹ *Todd v. Cont'l Cas. Co.*, No. W2003-01019-WC-R3-CV, 2004 WL 2381368, at *2-5 (Tenn. Workers' Comp. Panel Oct. 15, 2004);¹² *Moore v. Best Metal Cabinets*, No. W2003-00687-WC-R3-CV, 2004 WL 2270751, at *3 (Tenn. Workers' Comp. Panel Oct. 7, 2004);¹³ *Boyce v. DAB*

⁶In *Carter v. First Source Furniture Group*, the court applied the lower statutory cap after finding that the employer had discharged the employee for violence in the workplace after she responded to another employee's profane name-calling by chasing the other employee with a box cutter and kicking him.

⁷In *Suits v. M & M Mars*, the Appeals Panel applied the lower statutory cap to an employee who was discharged for being absent from work for three days without calling.

⁸In *Davis v. Avron Truss Co.*, the Appeals Panel applied the lower cap to an employee who was discharged for engaging in a second fist fight after being warned that additional fighting would result in his termination.

⁹Where the conduct is reasonably classified as minor misconduct, the lack of egregiousness of the conduct tends to cast doubt upon an employer's assertion that it was motivated solely by the misconduct in terminating the employee but does not preclude a finding that misconduct was the actual motivator.

¹⁰The termination of an injured employee by an employer in-and-of-itself inherently creates a certain degree of initial skepticism about the purity of the employer's motivation.

¹¹In *Phelps v. Mark IV Automotive*, the Appeals Panel held that the lower statutory cap did not apply because the employee's violation of the employer's attendance policy was caused by her work-related injury.

¹²In *Todd v. Cont'l Cas. Co.*, the Appeals Panel declined to apply the misconduct exception notwithstanding the employer's assertion that the employee had violated company policy because it found that the employee was actually discharged for filing a claim for workers' compensation benefits.

¹³In *Moore v. Best Metal Cabinets*, the Appeals Panel determined that the lower cap did not apply because it did not accredit the employer's claim that the employee had been discharged for insubordination.

Plumbing, Inc., No. M2003-01903-SC-WCM-CV, 2004 WL 2159008, at *1, 3 (Tenn. Workers' Comp. Panel Sept. 27, 2004);¹⁴ *Davis v. Avron Truss Co.*, 2001 WL 767014, at *2.¹⁵

Hennessy contends that it had work available for Mr. Wheeler and that it discharged him because he failed to report for work on October 1, 2002, after Dr. Browdy released him or to call in to report that he would not be returning to work on that date. Mr. Wheeler responds that that reason is mere pretext. He notes that employees were normally allowed three days of absence before being terminated. Hennessy replies that the three-day absence rule did not apply to Mr. Wheeler because he was a relatively new, probationary employee. Mr. Wheeler, however, states that he was never apprised that employees should return to work on days where they had missed several hours of their shifts due to a doctor's appointment.

The record is unclear regarding the nature and substance of Hennessy's policy with regard to probationary employees being absent or calling-in or how Hennessy applied these policies when it knew the employee would be absent for a medical appointment for part of his or her shift.¹⁶ In order to determine whether the cap in Tenn. Code Ann. § 50-6-241(a)(1) or the cap in Tenn. Code Ann. § 50-6-241(b) applies, this case would benefit from a remand that would allow the parties to present evidence focused more precisely on Hennessy's actual motivation in terminating Mr. Wheeler and for factual findings by the trial court on this issue.

V.

The trial court entered a judgment for four hundred weeks of benefits based upon its finding that Mr. Wheeler had sustained a "disability rating of 100%." On its face, this award is in conflict with *Vinson v. United Parcel Serv.*, 92 S.W.3d 380, 384-85 (Tenn. 2002), in which the Supreme Court stated unequivocally that there is no such classification as a one hundred percent permanent partial disability under Tennessee's workers' compensation law. An employee may be permanently totally disabled, or less than one hundred percent permanently partially disabled. We also remand the case to the trial court to address this issue.

Based upon the record before it, the trial court must first determine if Mr. Wheeler is permanently and totally disabled in accordance with Tenn. Code Ann. § 50-6-207(4)(B) (Supp. 2007): "totally incapacitate[d] . . . from working at an occupation that brings the employee an income" If Mr. Wheeler is not totally disabled, then the trial court must determine the extent

¹⁴In *Boyce v. DAB Plumbing, Inc.*, the Appeals Panel declined to apply the lower statutory cap because it was not persuaded that the employee was discharged for missing one day of work.

¹⁵In *Davis v. Avron Truss Co.*, the Appeals Panel applied the lower statutory cap after finding that the employee had not been discharged for poor job performance related to his injury and that the employer had returned the employee to work within his medical restrictions.

¹⁶Violation of an employer's policies is not a magic talisman that automatically resolves a case in the employer's favor. It is, however, evidence that supports an employer's assertion that the employee was terminated for that reason. See, e.g., *Carter v. First Source Furniture Group*, 92 S.W.3d at 368, 371-72; *Phelps v. Mark IV Automotive*, 2007 WL 445640, at *2-4; *Todd v. Cont'l Cas. Co.*, 2004 WL 2381368, at *2-5.

of his partial disability in accordance with the factors described in Tenn. Code Ann. § 50-6-241(a)(2): “all pertinent factors, including lay and expert testimony, employee’s age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant’s disabled condition.”

The starting point for resolving these issues will be the expert medical testimony. In that regard, we note that Dr. Wheelhouse placed restrictions upon Mr. Wheeler’s activities but that Drs. Davis and McCombs, the treating physicians who testified on Mr. Wheeler’s behalf, placed no restrictions upon his activities.

VI.

Mr. Wheeler asserts that this appeal is frivolous and requests an award of damages pursuant to Tenn. Code Ann. § 50-6-225(h) (Supp. 2007). We decline to make such an award.

VII.

We affirm the trial court’s decision that Mr. Wheeler sustained a compensable injury. However, we vacate the trial court’s decision not to apply the cap in Tenn. Code Ann. § 50-6-241(a)(1) and its award of one hundred percent permanent partial disability. The case is remanded for further proceedings in accordance with this opinion. We tax the costs of this appeal in equal proportions to Hennessy Industries, Inc. and its surety, and to Clarence Wheeler for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., JUSTICE

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

CLARENCE WHEELER v. HENNESSY INDUSTRIES

**Circuit Court for Davidson County
No. 05C-3642**

No. M2007-00921-WC-R3-WC - Decided August 11, 2008

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 in equal proportions by Hennessy Industries, Inc. and its surety and to Clarence Wheeler, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM