IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, DECEMBER 1996 SESSION

DAVID B. MASE,	)	KNOX COUNTY
	)	
Plaintiff/Appellee	)	
	)	
v.	)	HON. DALE C. WORKMAN,
	)	CIRCUIT JUDGE
COCA-COLA ENTERPRISES, INC.,	)	
	)	
Defendant/Appellant	)	NO. 03S01-9605-CV-00054

For the Appellant

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For the Appellee:

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M E M O R A N D U M O P I N I O N

Members of Panel:

E. Riley Anderson, Justice
Roger E. Thayer, Special Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED **THAYER, Special Judge**

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.

Defendant, Coca-Cola Enterprises, Inc., has appealed from the trial court's action in awarding plaintiff, David B. Mase, 35% permanent partial disability to the body as a whole.

The employer contends the trial court was in error in ruling it liable for the compensable injury as opposed to applying the Last Injury Rule, which would have fixed liability against the employee's last employer. An issue is also raised as to whether the trial court was in error in awarding an amount of disability which was in excess of 2½ times the medical impairment rating.

Plaintiff was 30 years of age at the time of the trial and had completed the 12th grade. He testified he was injured while working on October 15, 1993, when he was stacking twelve-pack cartons of drinks at a customer's business; that he experienced pain in his left hip and leg; he was referred by his employer to Dr. Don King, who treated him with medication and therapy; he was released to return to work on November 12, 1993, and returned to the same job at the same rate of pay; he told the trial court he did not feel able to work but attempted to do so anyway.

Plaintiff was terminated by defendant on December 2, 1993. There is a conflict in the evidence as to the exact reason for his discharge. Plaintiff testified a supervisor requested that he sign a written statement agreeing he could be terminated if he did not meet certain standards of work; that he told the company official that he would not sign the statement because his physical condition would not permit him to comply with the statements and that he was terminated for failing to execute the statement.

The record indicates that during 1992 and 1993 plaintiff had been warned a number of times by his employer that his performance on the job was not satisfactory and that he had been tardy in reporting to work often.

The supervisor testified he met and discussed with plaintiff his poor job performance on December 3rd; he offered him an opportunity to return to work if he would agree to perform up to their standards; plaintiff responded by saying he could not do that but did not say why or mention his physical condition as a reason.

After being discharged, plaintiff was employed during the same month with the Knox County Juvenile Court as a correction or detention officer. The record is silent as to his rate of pay in this position. Also, during the same month of his discharge and reemployment, he returned to see Dr. King still complaining of physical problems. Dr. King ordered MRI studies which then revealed definite disc protrusions at L3-4 and L4-5 levels. He was then referred to an orthopedic surgeon, Dr. John H. Bell, who saw him on January 6, 1994 and later performed surgery. Plaintiff was released to return to work on May 5, 1995.

Dr. Bell continued to see plaintiff on a regular basis after he was released as he was still complaining of pain in his low back, left hip and having some swelling about his back. He gave a ten percent medical impairment rating to the body as a whole.

We must review the record of findings by the trial court *de novo* accompanied by a presumption of the correctness of the findings of fact unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

Where the trial court has seen and heard witnesses and issues of credibility and the weight of oral testimony are involved, the trial court is in a better position to judge credibility and weight of evidence and considerable deference must be accorded to those circumstances. *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989).

The first question deals with the Last Injury Rule. The employer argues plaintiff's employment with the Juvenile Court aggravated his condition, and this last employer should be the legally responsible party.

We do not find the evidence to support this contention. While it is true the employee continued to suffer from his condition during his short period of

reemployment, there is no evidence in the record which indicates he sustained an injury with the last employer or that his condition was aggravated by his new duties. To the contrary, plaintiff's testimony as to how he was injured and Dr. Bell's opinion that this work activity in all probability caused the rupture of the discs is the only evidence concerning how his injury occurred.

The primary issue is whether the award of disability is limited to 2½ times the medical impairment rating provided in T.C.A. § 50-6-241(a)(1) or whether the award may be fixed under subsection (b) of the statute up to a maximum of 6 times the medical impairment.

If the employee sustains a compensable injury and is returned to work by the pre-injury employer at a wage greater or equal to the wage the employee was earning prior to the injury, the award to the employee shall be limited to 2½ times the medical impairment rating under subsection (a)(1). However, if the employee is not returned to work by the pre-injury employer at a wage greater or equal to the wage the employee was earning prior to the injury, the award to the employee shall be limited to 6 times the medical impairment rating under subsection (b).

T.C.A. § 50-6-241 does not and cannot define all the circumstances which might arise in determining whether there has or has not been a "return to work" within the meaning of the statute. Therefore, the courts have been required to assess the peculiar facts of each case and construe the statute to determine its application. In doing this, we must keep in mind that the intent of the legislature in passing this act was to encourage employers to return employees to work upon their recovery from injury.

The trial court found the facts of the case authorized an award in excess of the cap imposed under subsection (a)(1), and we cannot say the evidence preponderates against this conclusion. The return to work period was very short and Dr. Bell was of the opinion plaintiff should not have returned to work with defendant even after his recovery from surgery. Therefore, it appears plaintiff's return to work was not meaningful in the sense of the statute and initially the

capping of the claim would fall under subsection (b), which imposes a cap of 6 times the medical impairment rating. The trial court's award of 35% disability with an impairment rating of 10% is well within the scope of the statue.

We are of the opinion the provisions of subsection (a)(2) have no application to the facts of this case. If the initial question results in a finding that the return to work was meaningful, an employee may apply to the court to reconsider the award capped under subsection (a)(1) provided the employee qualifies with all of the requirements of (a)(2).

The judgment is affirmed. Costs of the appeal are taxed to defendant and sureties.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
E. Riley Anderson, Justice

_____
Joe C. Loser, Jr., Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

DAVID B. MASE,	)	KNOX CIRCUIT
	)	NO. 1-251-95
Plaintiff/Appellee,	)	
	)	
vs.	)	Hon. Dale C. Workman
	)	Judge
	)	
COCA-COLA ENTERPRISES, INC.	)	
	)	
Defendant/ Appellant.	)	03S01-9605-CV-00054

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Worker' Compensation 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 act 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 to the defendant/ appellant, Coco-Cola Enterprises, Inc. and Paul D. Hogan, Jr., Surety, for which execution may issue if necessary.

03/17/97