

IN THE SUPREME OF TENNESSEE

AT NASHVILLE

<p>FILED</p> <p>December 20, 1999</p> <p>SUMNER CHANCERY Cecil Crowson, Jr. Appellate Court Clerk</p>
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<p>RANDY GENE HAUSKINS</p> <p style="padding-left: 40px;"><i>Plaintiff/Appellee</i></p> <p>vs.</p> <p>COATES CONSTRUCTION COMPANY and LUMBERMENS MUTUAL CASUALTY COMPANY</p> <p style="padding-left: 40px;"><i>Defendant/Appellants</i></p>	<p>} } } } } } } } } } }</p>	<p>SUMNER CHANCERY No. Below 98C-90</p> <p>Hon. Tom E. Gray</p> <p>No. M1998-00196-WC-R3-CV</p> <p>AFFIRMED IN PART/ MODIFIED IN PART</p>
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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 will be paid by appellants, Coates and Lumbermens Mutual Casualty Company, for which execution may issue if necessary.

IT IS SO ORDERED on December 20, 1999.

PER CURIAM

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

AT NASHVILLE
(July 15, 1999 Session)

RANDY GENE HAUSKINS)	
)	
Plaintiff/Appellee)	
)	SUMNER CHANCERY
v.)	
)	M1998-00196-WC-R3-CV
COATES CONSTRUCTION)	
COMPANY and LUMBERMENS)	TOM E. GRAY
MUTUAL CASUALTY COMPANY)	CHANCELLOR
)	
Defendants/Appellants)	

FILED

December 20, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

For Appellants:

Bryan Essary
Edward Hadley
Gideon & Wiseman
Nashville, Tennessee

For Appellee:

C. Tracey Parks
Harsh, Parks & Harsh
Gallatin, Tennessee

MEMORANDUM OPINION

MAILED:

Members of Panel:

Frank F. Drowota, III, Associate Justice
Frank G. Clement, Jr., Special Judge
Samuel L. Lewis, Special Judge

AFFIRMED IN PART/MODIFIED IN PART
Judge

Clement,

MEMORANDUM OPINION

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.

In this appeal, the employer/appellant, Coates Construction Company ("Coates"), presents two basic arguments: (1) that the trial court's awarding of permanent total disability is contrary to the preponderance of the proof presented at trial, insisting the appropriate award be based upon permanent partial disability instead; and (2) that the trial court erred in awarding attorney's fees based on 400 weeks of disability. For his issue on appeal, the employee Randy Gene Hauskins ("Hauskins") seeks temporary total disability benefits from January 6, 1998, until April 22, 1998, the date of maximum medical improvement, suggesting it was inadvertently overlooked by the trial court.

The panel affirms both the trial court's findings that Hauskins is entitled to permanent total disability benefits and the awarding of attorney's fees based on 400 weeks of disability benefits. The panel modifies the trial court's decision by awarding temporary total disability benefits to Hauskins from January 6, 1998, until April 22, 1998.

On May 14, 1996, Hauskins was injured in the scope of his employment with Coates when he came into contact with a 7,200-volt power line while working on the roof of a house and was knocked unconscious. He fell 30 feet to the ground sustaining fractured vertebrae and a brain injury. As a result, Hauskins is a paraplegic and suffers permanent memory damage and diminished reasoning skills. Coates voluntarily paid disability benefits of \$266.66 per week to Hauskins from the time of the accident until January 6, 1998.

In February 1998, Dr. Thomas Groomes, a specialist in physical medicine and rehabilitation who treated Hauskins, stated in a deposition for a separate civil action that Hauskins was unemployable due to constant burning pain in his back and lower extremities. Following an examination on April 22, 1998, Dr. Groomes determined that Hauskins had reached maximum medical improvement and that Hauskins had sustained a 79% whole body impairment including a 5% impairment due to the brain injury. Dr. Groomes also noted that Hauskins' pain had improved since he began taking Neurontin in August of 1997. Dr. Groomes testified that Hauskins was employable within limits specified in the C-32 form completed by Dr. Groomes.

In a workers' compensation case, appellate review on factual issues is de novo with a presumption that the trial court's findings are correct, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. §50-6-225(e)(2)(Supp. 1998). e.g., Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487 (Tenn. 1997). When a trial court has seen and heard witnesses and issues of credibility and weight of testimony are involved, considerable deference is afforded the trial court's findings of fact. Id.

When is "work" not work?

Hauskins owned a video store and tanning salon. The store and salon were operated as a family business. After the injury but before Dr. Groomes examined Hauskins in April 1998, Hauskins would "work" two to three hours per week at the video store and tanning salon he owned. His duties were minimal, he ordered movies, paid invoices, and greeted customers; however, he was unable to perform tasks required of the employees, such as pulling video tapes from the higher shelves or cleaning tanning beds. Due to his impaired memory and other impairments resulting from his brain injury, other personnel were required to double-check his work for he often made mistakes. Hauskins' wife testified that she encouraged him to do as much as possible around the store for his self esteem, even though the tasks he performed could be done more quickly and more reliably by someone else.

Coates relies on Tenn. Code Ann. §50-6-207(4)(B) in asserting that Hauskins is not entitled to permanent total disability benefits, arguing that an employee will be considered “totally disabled” only if the injury “totally incapacitates the employee from working at an occupation which brings such employee an income. Although Hauskins does not receive a wage for the tasks he performs at his store, Coates contends that Hauskins is performing tasks that he would otherwise pay someone to do. Coates further contends that Hauskins does earn income as contemplated in the code because, as owner of the video store, Hauskins is entitled to any profits the business produces. The record reflects that Hauskins’ video store made a profit of \$9,444 in 1997, but Hauskins did not receive a wage from the video store for the time he spent there.

We interpret Tenn. Code Ann. §50-6-207(B) to contemplate employment in an income-producing occupation in the open labor market. See Prost v. City of Clarksville, Police Dept., 688 S.W.2d 425, 427 (Tenn. 1985). We seriously doubt, and the record fails to establish, that another merchant would “employ” and pay “wages” to Hauskins for the “work” he performs at the store. His efforts at the video store do not rise to the level of the job description contemplated in the statute. The record clearly established that Hauskins’ services are principally for his self-esteem. Though Hauskins does “work” at his store, the “work” he performs would not justify a standard “wage” from a disinterested employer in the open labor market. Moreover, the tasks he performs must be double-checked for errors due to his diminished mental capacity and these tasks could be done more quickly and more reliably by someone else. Accordingly, we find and agree with the trial court that the time Hauskins spends at the video store does not constitute “working at an occupation which brings [him] an income” as defined by the statute.

Likewise, the fact that Hauskins owned a business at the time of his injury which has generated a profit does not affect his eligibility for permanent total disability benefits where his injuries prevent him from working at the business. Similarly, an employee who is otherwise eligible for benefits would not have those benefits reduced merely because the employee receives

dividends from investments, interest on a savings account, or winnings from a lottery. These types of earnings are not generated by “working at an occupation which brings such employee an income”. They have no bearing on whether or not the employee is totally disabled as defined by Tenn. Code Ann. §50-6-207(4)(B). Accordingly, the trial court correctly found that Hauskins was permanently totally disabled within the meaning Tenn. Code Ann. §50-6-207(4)(B).

The “First” 400 Weeks

Coates next argues that the trial court erred in awarding Hauskins attorneys’ fees based on 400 weeks of disability payments. The trial court awarded Hauskins attorneys’ fees of \$21,332.80 based on 20% of the first 400 weeks of disability payments ($\$266.66/\text{week} \times 400 \text{ weeks} \times 20\% = \$21,332.80$). See Tenn. Code Ann. §§50-6-207(4)(A)(iii), 50-6-226(a)(1)(Supp. 1998). Tenn. Code Ann. §50-6-207(4)(A)(iii) states, “Attorneys’ fees in contested cases of permanent total disability shall be calculated upon the first four hundred (400) weeks of disability only.” Coates contends that the use of the word “first” means the first 400 weeks of benefits beginning at the time of the injury. Coates argues that Hauskins’ attorney should be entitled to fees based on only 314 of those weeks since Coates had voluntarily paid 86 weeks of disability benefits from the date of the injury until January 6, 1998. According to Coates, Hauskins’ attorney assisted him in obtaining only 314 of the first 400 weeks of benefits. Coates contends the attorney’s fees should have been set at \$16,746.31 ($\$266.66/\text{week} \times 314 \text{ weeks} \times 20\%$).

The use of the phrase “first four hundred (400) weeks of disability only” in Tenn. Code Ann. §50-6-207(4)(A)(iii) establishes a maximum fee an attorney can collect from a permanent total disability case. Prior to 1992, permanent total disability benefits were limited to a maximum of 550 weeks. Tenn. Code Ann. §50-6-207(4)(A)(1991). In 1992, the legislature amended Tenn. Code Ann. §50-6-207(4)(A) to extend permanent total disability benefits until the injured employee reaches age 65. Tenn. Code Ann. §50-6-207(4)(A)(I)(1992 & Supp. 1998). This amendment significantly increases the

potential total award. At the same time, the legislature added §50-6-207(4)(A)(iii) to prevent a similar increase in attorneys' fees awarded in such cases. By adding this provision, the legislature clearly intended to limit the attorneys' fees to 400 weeks of permanent total disability benefits, even though those benefits may now extend for years or even decades. *Cf. Bomely v. Mid-America Corp.*, 970 S.W.2d 929, 933 (Tenn.1998)(holding that calculating attorney's fees based only on the first 400 weeks of compensation supports finding that permanent total disability is not limited to 400 weeks). We view the appellant's interpretation of "first" as overly restrictive and not what the legislature intended. Accordingly, we find that the trial court was correct in awarding Hauskins' attorney's fees based on 20% of 400 weeks of permanent total disability benefits.

Benefits from January to April, 1998

Finally, Hauskins seeks temporary total disability benefits for the period from January 6, 1998, when Coates stopped making voluntary disability payments, until April 22, 1998, the date of maximum medical improvement and the point at which the court ordered permanent total disability benefits to begin. Hauskins did not receive benefits during that 15-week period. The purpose of temporary total disability benefits is to allow for "the healing period during which the employee is totally prevented from working. Under the rule...the temporary total disability period is cut off when the workman has reached its [sic] maximum recovery, at which point either permanent total or permanent partial disability commences...." *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 383 (Tenn. 1986)(quoting *Gluck Bros., Inc. V. Coffey*, 431 S.W.2d 756, 759 (Tenn. 1968)).

Temporary total disability benefits continue from the date of the accident until the employee either has the ability to return to work or reaches maximum medical improvement. *Id.* See *Wilkes v. Resource Auth. of Sumner County*, 932 S.W.2d 458, 462 (Tenn. 1996). Since the panel has already determined

that Hauskins did not return to work, he should have received temporary total disability benefits until he reached maximum medical improvement on April 22, 1998. He is entitled to benefits for that 15-week period. We hold that Coates must pay benefits of \$266.66 per week for that period for a total of \$3,999.90.

In Conclusion

After considering the record of the trial court, the parties' arguments, and the appropriate law, we conclude that the trial court was correct in awarding Hauskins permanent total disability benefits. We further conclude that the trial court correctly determined Hauskins' attorneys' fees based on 400 weeks of permanent disability benefits. We also find that Hauskins is entitled to additional temporary total disability benefits totaling \$3,990.90 for the period from January 6, 1998, until April 22, 1998, and judgment for the additional award is so Ordered.

The judgment of the trial court is accordingly affirmed in part and modified in part. Costs on appeal are taxed to the appellants, Coates and Lumbermens Mutual Casualty Company.

Judge

Frank G. Clement, Jr., Special

CONCUR:

Frank F. Drowota, III, Associate Justice

Samuel L. Lewis, Special Judge