IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE

ERNEST RODNEY FORD, CIRCUIT Plaintiff-Appellee, vs. THE TENNESSEE COAL COMPANY COMPANY, Defendant-Appellant.	)	ANDERSON COUNTY NO. 03S01-9806-CV-00060 THE HONORABLE JAMES B. SCOTT, JR., JUDGE
ODIS E. PHILLIPS, Plaintiff-Appellee, vs. THE TENNESSEE COAL COMPANY, Defendant-Appellant.	)	 NO. 03S01-9806-CV-00061

For the Appellant:

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For the Appellee:

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Mailed May ____, 1999

MEMORANDUM OPINION

Members of Panel:

Justice William M. Barker
Special Judge Howell N. Peoples
Special Judge Joe C. Loser, Jr.

AFFIRMED and REMANDED

PEOPLES, Special Judge

OPINION

These workers' compensation appeals have been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with T.C.A. Section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The appeals present a common issue of law involving the application of Tennessee Code Annotated Section 50-6-241. If an employer initially returns an injured employee to work at the same rate of pay after an injury but then goes out of business, is the employee's award capped at two and one-half times the medical impairment rating? The trial court refused to limit the award. We affirm.

Ernest Rodney Ford

Ernest Rodney Ford, age 24, received a special education diploma from high school. He has trouble reading and writing. He went to school each day for two or three hours then worked at Pallets Plus for five to six hours as a co-op student. His work at Pallets Plus involved catching wood, running a forklift, and operating a nail gun. After high school, he went to work at Beech Grove Processing, a predecessor of Tennessee Coal Company, as a washer and later transferred to the mines. At the mines, he carried straw, seeded landslides and old strip sites, drove a truck and front-end loader, and helped maintain equipment. He did deep mining for about five years until the mine shut down. He worked in a space 18 feet wide and 42 to 46 inches high. His back "popped" when he picked up a template that weighed 30 to 40 pounds. He was off work for 88 days and requested to go back to work. Mr. Ford returned to work with limitations to avoid excessive bending and stooping, and permitting him to lift up to 20 pounds frequently and 40 pounds occasionally. He had physical problems when he returned to work and was thinking of quitting when the company closed the mine. He has been unable to find another job. Dr. Geron Brown, orthopedic surgeon, testified that Mr. Ford has a medical impairment of five percent as a result of the lumbar strain, and two percent for a pre-existing condition, for a total of six percent under the combined table of the AMA Guides. Dr. William Kevin Bailey, a physiatrist, testified that Mr. Ford just aggravated his pre-existing spondylolistheses and that there was two percent impairment specific to this injury. He and Dr. Brown agreed on the limitations placed on Mr. Ford.

Rodney Caldwell, a vocational consultant, testified that Mr. Ford reads at a third grade level, can do arithmetic at a ninth grade level, and has a 45 to 50 percent vocational disability based on the physical limitations.

Odis Earl Phillips

Odis Earl Phillips, age 46, graduated from high school in 1970. During high school, he worked for the Job Corps painting and mowing grass. After high school, he worked in deep mines and strip mines, drove an eighteen-wheeler, operated a front-end loader, and worked part-time as a security guard. He has a "diploma" as a residential electrician. At the time of the injury, he was cleaning around a belt drive at the mine. He picked up rock that had spilled and felt pain his back. He was hurt on Thursday, stayed off on Friday, and went back to work on Saturday with limitations. The doctor found a ruptured disc. Even though Mr. Phillips had pain while working, he went back to the deep mine because "it was his job." He was given restrictions of lifting 20 pounds frequently and 40 pounds occasionally. He could not work underground with those restrictions. He was building a house for himself before the injury that led to this claim. He is not able to work around his house now, and is unable to do anything at home after work but sit in a recliner.

Six months after the mine closed, he got a job driving a truck at $8 per hour. At the mine, he earned $13.25 per hour. He has new restrictions of sitting no more than four to six hours per day for only one to two hours at a time. He testified that his back is getting worse.

Dr. William Kevin Bailey testified that he diagnosed lumbar strain with "one disc that was perhaps more of a large bulge if not a small herniated disc at the L-4, L-5 level, which is the second to the last disc in the lower back." He assessed a permanent medical impairment of five percent to the body and imposed restrictions of lifting 20 pounds with frequency and 40 to 50 pounds maximum, and decreased stooping, standing, twisting and bending. Dr. Geron Brown, Jr. saw Mr. Phillips for an independent medical examination and concurred with Dr. Bailey.

Rodney Caldwell, the vocational consultant, testified that Mr. Phillips had a 45

percent vocational disability.

The Tennessee Coal Company

The Tennessee Coal Company closed the mine where Mr. Ford and Mr. Phillips worked on August 5, 1997. All employees were paid 60 days severance pay through October 5, 1997.

Standard of Review

"Appellate review in a worker's compensation case is *de novo* upon the record with a presumption that the findings of the trial court are correct. Tenn. Code Ann. §50-6-225(e)(2) (1991 and Supp. 1997). Where a question of law is presented, as in this case, appellate review is *de novo* without a presumption of correctness." Parks v. Mun. League Risk Management Pool, 974 S.W. 2d 677, 678 (Tenn. 1998) (citing Presley v. Bennett, 860 S.W.2d 857 (Tenn. 1993).

Analysis

The pertinent provisions of Tennessee Code Annotated Section 50-6-241 provide as follows:

> "(a)(1) . . . (I)n cases where an injured employee is eligible to receive any permanent partial disability benefits . . . and the pre-injury employer returns 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 two and one-half (2 ½) times the medical impairment rating . . .
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> * * * *
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> (b) . . . (W)here an injured employee is eligible to receive permanent partial disability benefits . . . 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 (6) times the medical impairment rating . . ."

These provisions have been considered and addressed by the Supreme Court and by

Special Workers' Compensation Appeals Panels. In Middleton v. Allegheny Elec. Co., Inc., 897 S.W. 2d 695 (Tenn.1995), the panel found Section 50-6-241 to be clear, plain and unambiguous. In Newton v. Scott Health Care Center, 914 S.W. 2d 884 (Tenn. 1995), the panel held (1) the offer of the employer to return the employee to employment must be reasonable in light of the circumstances of the employee's physical ability to perform the offered employment, and (2) an employee's refusal to return to offered work must not be unreasonable. In Brown v. Campbell County Bd. Of Educ., 915 S.W. 2d 407 (Tenn.1995) cert. denied, 517 U.S. 1222, 116 S.Ct. 1852, 134 L.Ed 2d 952 (1996), the Tennessee Supreme Court, considering the constitutionality of the provisions, said: "Re-employment of injured workers is a legitimate state objective which justifies the distinction between those injured employees who are returned to work and those who are not. The distinction has a rational basis." In Davis v. Reagan, 951 S.W. 2d 766 (Tenn. 1997), the Supreme Court found the language of Section 50-6-241 to be unambiguous and to apply only to cases of permanent partial disability to the body. Finally, in Brewer v. Lincoln Brass Works, Inc., ___ S.W. 2d ___ (Tenn. 1999), (opinion filed April 12, 1999 designated for publication), the Supreme Court noted that a worker's award is capped at two and one-half times the medical impairment if he or she is returned to work at a wage equal to or greater than the wage at the time of the injury. "If, however, the employer's attempts to accommodate an injured worker become futile, the worker may file for increased benefits under Tenn. Code Ann. § 241(a)(2). Pursuant to § 241(a)(2), a court may enlarge a workers' compensation award that was previously capped by the 2.5 multiplier in § 241(a)(1)." *Id.*

The employer would have this Court apply the "two and one-half" cap when an employer makes an effort to return the employee to work at the same or greater wage but then eliminates the job for economic reasons. "A basic principle of statutory construction is to ascertain and give effect to legislative intent without unduly restricting or expanding the intended scope of a statute." Parks, 974 S.W. 2d at 679 (citing Owens v. State, 908 S.W. 2d 923 (Tenn. 1995)). Section 50-6-241 imposes the limitation on an employee who actually is returned to work. Neither the statute nor the cases construing the statute reward an employer and penalize the employee based on the employer's good intentions. In the present

cases, the employees were returned to work at the same or greater wages, but their jobs were eliminated before the trial of their claims for workers' compensation benefits. Under these circumstances, the plain language of the statute does not cap the permanent partial disability at two and one-half times the medical impairment rating.

The employer asserts that the trial court failed to find, as required by Section 50-6-242, that clear and convincing evidence established three of the following facts: (a) the employee lacks a high school diploma or equivalent, (b) the employee is 55 or older, (c) the employee lacks reasonably transferable job skills, (d) there are no reasonable local employment opportunities considering the employee's permanent medical condition. The provisions of Section 50-6-242 apply only when the actual disability exceeds the six times cap set out in 50-6-241. Davis v. Reagan, *supra.* In the present cases, the trial court did not award more than six times the medical impairment rating.

Conclusion

We hold the trial court did not err in awarding more than two and one-half times the medical impairment rating when the employer initially returned the injured employees to work but, then, terminated them when it closed the mine where they worked. We further hold that the provisions of Tennessee Code Annotated Section 50-6-242 do not apply to cases of permanent partial disability when the trial court awards less than six times the medical impairment rating. The actions of the trial court are affirmed and these cases are remanded for all appropriate purposes. Costs on appeal are taxed to the Appellant.

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Howell N. Peoples, Special Judge

Concur:

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William M. Barker, Justice

_____

Joe C. Loser, Jr., Special Judge

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AT KNOXVILLE

ERNEST RODNEY FORD,	)	ANDERSON CIRCUIT
	)	No. 97LA0192
Plaintiff-Appellee,	)	
	)	No. 03S01-9806-CV-00060
v.	)	
	)	
RUBBERMAID, et al.	)	James B. Scott, Jr.
	)	Judge
Defendant/Appellant,	)	
	)	
ODIS E. PHILLIPS	)	
	)	No. 03S01-9806-CV-00061
Plaintiff-Appellee,	)	
	)	
THE TENNESSEE COAL COMPANY,	)	
Defendant-Appellant.	)	

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 facts 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 Appellant, The Tennessee Coal Company and Robert Knolton, surety, for which execution may issue if necessary.

06/29/99