

IN THE SUPREME OF TENNESSEE

AT NASHVILLE

<p>FILED</p> <p>October 11, 1999</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

<p>TIMOTHY GENE GREEN</p> <p style="padding-left: 40px;"><i>Plaintiff/Appellee</i></p> <p>vs.</p> <p>LUMBERMEN'S UNDERWRITING ALLIANCE and FLEETWOOD HOMES OF TENNESSEE, INC.</p> <p style="padding-left: 40px;"><i>Defendant/Appellants</i></p>	<p>} } } } } } } } } }</p>	<p>MACON CIRCUIT No. Below 4091</p> <p>Hon. Bobby Capers</p> <p>No. 01S01-9806-CV-00113</p> <p>AFFIRMED</p>
--	--	--

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 defendants/appellants, for which execution may issue if necessary.

IT IS SO ORDERED on October 11, 1999.

PER CURIAM

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

TIMOTHY GENE GREEN,)
)
)
 Plaintiff/Appellee,)
)
 vs.)
)
 LUMBERMEN'S UNDERWRITING)
 ALLIANCE and FLEETWOOD HOMES)
 OF TENNESSEE, INC.,)
)
 Defendants/Appellants.)

01S01-9806-CV-00113
MACON COUNTY

Hon. Bobby Capers, Judge

No. 4091

FILED

October 11, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

FOR THE APPELLANT:

REID D. LEITNER, Esquire
2300 First American Center
Nashville, TN 37238

FOR THE APPELLEE:

E. GUY HOLLIMAN, Esquire
WILLIAM JOSEPH BUTLER,
Esquire
P.O. Box 280
Lafayette, TN 37083

MEMORANDUM OPINION

MEMBERS OF PANEL:

ADOLPHO A. BIRCH, JR., JUSTICE
HENRY DENMARK BELL., RETIRED JUDGE
HAMILTON V. GAYDEN, JR., SPECIAL JUDGE

AFFIRMED

HENRY DENMARK BELL

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 of findings of fact and conclusions of law.

The trial court found *inter alia* that plaintiff sustained compensable injuries "on or about December 19, 1995 with regard to his right shoulder and a gradual injury to his left shoulder continuing thereafter until plaintiff was no longer able to work . . . on or about June 19, 1997", that both injuries are permanent and that plaintiff "retains a permanent partial disability to his left shoulder and right shoulder in the amount of 60% to the body as a whole and, thus he is entitled to a total of 240 weeks of permanent partial disability benefits" to be paid in a lump sum together with discretionary costs (including \$716.00 related to deposition of independent medical expert Dr. Landsberg).

Defendants contend that the award of permanent partial disability benefits must be limited to the right shoulder injury and limited to an amount no greater than 2 ½ times the medical impairment rating of 6% to the body as a whole assigned by Dr. Pagnani. As discussed below, the Panel has concluded that defendants contention is not well taken and that the judgment of the trial court should be affirmed.

According to plaintiff's testimony at trial he was 38 years old, married and had one child living at home. He only completed 10th grade in school with grades he described as "poor". He had difficulty reading, only wrote his name, and allowed his wife to handle the family finances. He had never passed the G.E.D. test, had never been in the military, had never had any vocational training or specialized training, had never had any management training, had never done any supervisory work anywhere, had never had any training as a supervisor or lead person, and had never had any training in quality control or inspection type work. Plaintiff initially went to work at Fleetwood in 1978 and

worked there until May or June of 1997 when he quit due to continuing problems

in both shoulders. He had a good attendance record at Fleetwood before injuring his right shoulder at work. When he first went to Fleetwood the plaintiff was assigned to work in the cabinet shop. He worked there through his right shoulder injury in December 1995 until October 1996 when he took a voluntary lay-off prior to his right shoulder surgery.

The right shoulder injury occurred in December 1995 when plaintiff tripped and fell at work. He first sought treatment from a general practitioner but later was referred to Dr. Robert Snyder an orthopaedic surgeon in practice with Dr. Michael J. Pagnani, who also saw plaintiff and performed surgery on plaintiff's right shoulder. In his testimony plaintiff described in detail the job that he did in the cabinet shop and the particular parts that caused him problems after injuring his right shoulder. His job required him to push the entire cabinet assembly 30-50 feet to the next station. He testified that pushing the assembled cabinets caused him the most problems. He had trouble running a radial saw with his right arm and installing sinks and fixtures. After injuring his right shoulder he had to be moved off of running the radial arm saw. He had difficulty reaching up under sinks and using a screw gun. Plaintiff further testified that, prior to his fall at work in December 1995 he had never had any significant problems with either shoulder and that he did not do anything outside of work to cause either the right or left shoulder injuries.

Plaintiff's testimony was to the effect that after the 1995 injury and continuing after the right shoulder surgery he used his left arm to compensate for the right shoulder impairment:

"After the surgery on my right and I was - you naturally try to use your left as much as you can and it got worse. They both hurt me so bad, I couldn't do it no more."

Dr. Pagnani testified that on plaintiff's first visit he reported "continued pain in both shoulders". Dr. Pagnani diagnosed rotator cuff tendonitis and his

right shoulder findings at surgery were consistent with his diagnosis. Following surgery Dr. Pagnani had plaintiff off work from February 5 through April 28, 1997. He testified that he assumed that plaintiff's problem with his left shoulder "was

the same problem that had been affecting his right shoulder.” Dr. Pagnani did not treat plaintiff for the left shoulder injury. The sole reason for his failure to do so was his belief that plaintiff had told him that plaintiff did not believe he injured his left shoulder at work. However, Dr. Pagnani conceded that the alleged statement of plaintiff did not appear anywhere in his office notes and he did not remember anything that the plaintiff had told him about how the left shoulder injury happened or what he was doing other than work that would have caused it. Dr. Pagnani verified that Dr. Snyder had previously treated the plaintiff for his left shoulder problems with physical therapy, and that “overuse was diagnosed” by Dr. Snyder. Dr. Pagnani agreed that overuse could cause shoulder problems.

Q. At that particular time, Dr. Snyder, in his first office note, indicated that since Mr. Green’s fall at work in December of 1995, he had switched to his left arm in using it at work . . . ?

A. That’s what it says in his note, that’s correct.

Q. That’s certainly normal for someone who’s experiencing pain in one upper extremity to begin increased use of the other extremity to compensate, correct?

A. That’s true.

Plaintiff unequivocally denied that he ever told Dr. Pagnani that his left shoulder condition had been caused by anything other than work.

Dr. Pagnani assigned plaintiff 10% permanent partial impairment to the right upper extremity for the right shoulder injury which converts to 6% permanent partial impairment to the body as a whole.

Dr. Landsberg saw plaintiff for an independent medical examination and evaluation on September 30, 1997. Included within the history taken by Dr.

Landsberg was the indication that Mr. Green “returned to work after surgery and could not do it. He started using his left arm for everything and then started having increasing pain in the left shoulder” Dr. Landsberg noted that at the time he saw plaintiff the left shoulder was worse than the right with any lifting although he had minimal use of either shoulder. Dr. Landsberg testified that his findings were consistent with plaintiff’s claims of trying to overcompensate with

the left arm for the right arm injury and with Dr. Snyder's last office note of January 6, 1997 wherein Dr. Snyder indicated that "when Mr. Green works with his shoulders they get painful again." Dr. Landsberg's permanent partial impairment ratings are as follows: 5% for the right upper extremity and 8% for the left upper extremity which converts to 3% and 5% respectively whole body impairment, i.e. for both right and left upper extremities a combined permanent partial impairment rating of 8% to the body as a whole.

Following his right shoulder surgery, plaintiff returned to work at the same rate of pay cutting metal bands on a machine even though the band cutting job was light duty, it was extremely painful to his shoulders and the repetitive nature of the band cutting job was a problem for him due to his shoulder injuries. Although the job was "close to a full time job" when the factory was assembling single wide mobile homes, there were no metal bands to cut when the factory was producing double wide mobile homes. One of those other jobs was rolling around under trailers on a creeper, patching the board on the trailer bottoms. The overhead work required by the job caused him difficulty with both shoulders. Another job he was asked to perform after his operation was to sweep the insides of mobile homes. Plaintiff testified "my shoulders got so bad then, it hurt me to do anything." Another job plaintiff was required to perform after returning from the surgery was to put back splash tiles around the back of cabinets. He was unable to perform this job because it required him to carry five gallon buckets of glue. In June 1997 plaintiff

5

determined that he simply was unable to perform his work at Fleetwood any longer and he resigned. He notified Fleetwood he was going to have to "quit because my shoulders was getting so bad." Before resigning plaintiff asked the production manager at Fleetwood if he could attempt to do an inspection or quality control job, but was told that there were no openings in either of those jobs. Plaintiff was never offered a job in quality control or inspection. Plaintiff testified that he did not know whether or not he could do such jobs, but stated he would have tried if such jobs had been offered to him. Plaintiff testified that he

was planning to seek some work he could do, but said “everything I know how to do, I can’t do.” He testified that he liked to work, wished he could continue working at Fleetwood and did not want to have to resign.

Before working at Fleetwood, plaintiff at some time did farm work with his father and had built his own house. He had worked sweeping the floor, putting up stock, and unloading trucks at a department store, and had installed new tires on vehicles at a tire center. However, he testified he would be unable to perform the requirements of these jobs due to the problems with his shoulders. At home plaintiff’s shoulder injuries had caused him to stop using a weedeater and a push mower and he no longer serviced his own car.

Plaintiff offered at trial a number of witnesses including three of his supervisors at Fleetwood, the production manager and a number of co-workers, all of whom testified that plaintiff was honest and a good worker and some of whom corroborated plaintiff’s testimony as to having trouble with both shoulders when he returned to work after the right shoulder surgery.

Defendants insisted at trial and here that there is an irreconcilable conflict between the testimony of plaintiff and that of Dr. Pangani as to the left shoulder causation issue. Defendants’ argument is that plaintiff’s denial of making to Dr. Pagnani the honest confession as to lack of causation of the left shoulder injury reveals that since that confession plaintiff has become a malingerer and pursuer of a fraudulent claim for workers’ compensation

6

benefits. We have carefully reviewed all of the evidence relating to Dr. Pagnani’s paraphrase of plaintiff’s asserted statement. We conclude that this asserted credibility issue, as well as the denial by defendants of plaintiff’s left shoulder claim was probably the result of a bizarre breakdown in communications among Dr. Pagnani, his associate Dr. Snyder and the claims department of defendant Lumbermens Alliance.

The trial judge, at the conclusion of the trial, ruled from the bench that the 2 ½ times medical impairment limitation under Tenn. Code Ann. §50-6-241(a)(1) does not apply and further ruled that both the left and right shoulder

injuries were compensable. He then found plaintiff's vocational disability to be 60% to the body as a whole.

On the Tenn. Code Ann. §50-6-241(a)(1) limitation issue we note that the facts here are closely analogous to those in Joe Bailey v. Krueger Ringier, Inc., d/b/a Ringier American (Weakly County, No. 02S01-CH-00061) cited with approval by our Supreme Court in Newton v. Scott Health Care, 914 S.W. 2d 884 (Tenn. 1995).

After a *de novo* review we do not find that the evidence preponderates against any of the trial court's holdings.

The judgment of the trial court is affirmed and the cause remanded to the Circuit Court of Macon County for enforcement of the judgment and such further proceedings, if any, as may be necessary. Costs on appeal are taxed to the defendants/appellants.

HENRY DENMARK BELL
RETIRED JUDGE

CONCUR:

ADOLPHO A. BIRCH, JR.
JUSTICE

HAMILTON V. GAYDEN, JR.
SPECIAL JUDGE