

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 21, 2003 Session

WADE NANCE v. STATE INDUSTRIES, ET AL.

**Direct Appeal from the Chancery Court for Cheatham County
No. 9653 Leonard W. Martin, Chancellor**

**No. M2002-01762-WC-R3-CV - Mailed - December 23, 2003
Filed - March 12, 2004**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. Section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. This matter was initially tried by the trial court on November 29, 1999, and the trial court found in favor of employer/defendant State Industries due to employee's failure to use a mandated safety procedure. On appeal, the Workers' Compensation Panel articulated a new four-prong standard to be applied when employers assert the affirmative defense of willful failure or refusal to use a safety appliance. This case *Wade Nance v. State Industries, Inc. and ITT Hartford Insurance Co.*, 33 S.W.3d 222 (Tenn. 2000). The four prong test enumerated is as follows: (1) at the time of the injury the employer had in effect a policy requiring the employee's use of a particular safety devise; (2) the employer carried out strict, continuous and bona fide enforcement of the policy; (3) the employee had actual knowledge of the policy, including a knowledge of the danger involved in its violation, through training provided by the employer; and (4) the employee willfully and intentionally failed or refused to follow the established policy requiring use of the safety appliance. The panel concluded that the employer had carried its burden of proof on elements (1), (3) and (4), and remanded the case for a new trial on element (2), all as set out above. On July 15, 2002, the case was tried again before the same judge and the court determined State Industries, employer, had satisfied its burden of proof on this issue, i.e. the employer carried out a strict, continuous and bona fide enforcement policy. As discussed below, the panel has concluded the evidence does not preponderate against the trial court's finding and we affirm.

**Tenn. Code Ann. § 50-6-225(e) (2000 Supp.) Appeal as of Right; Judgment of the
Chancery Court Affirmed**

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J. and Joe C. Loser, Jr., Sp. J., joined.

Donald D. Zuccarello, Nashville, Tennessee and
Marcia D. McShane, Nashville, Tennessee, for appellant, Wade Nance

Cynthia Debula Baines, Nashville, Tennessee,
John Thomas Feeney, Nashville, Tennessee, and
Shannon Elisabeth Poindexter, Nashville, Tennessee, for appellees, ITT Hartford Insurance Co. and
State Industries, Inc.

MEMORANDUM OPINION

FACTS

On June 7, 1998, complainant, employee, while performing his duties for employer as a greaser and oiler, suffered a fractured right ankle. Employee had positioned himself on a ladder approximately four to five feet off the floor and was attempting to grease a turn-roller machine located in the employer's paint shop. Another employee unexpectedly activated the turn-roller, causing the employee to fall, injuring his ankle. Employer required lock-out/tag out safety procedure, and employee failed to use the procedure. The purpose of the lock-out/tag out procedure is to prevent a machine from being activated while being cleaned or otherwise maintained.

Employer had such a safety procedure in their training manual which was disseminated to its employees. They further had training classes, and employee had received training on this procedure. Evidence in this case indicated some employees did not use this safety procedure even though they had a device on their person to initiate the procedure. Employer had in place a procedure for disciplinary violations ranging from a written reprimand to termination.

ANALYSIS

Appellate review is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2002 Supp.). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. *Winegert v. Government of Sumner County*, 908 S.W.2d 921, 922 (Tenn. 1995). The standard governing appellate review of findings of fact by a trial court requires the Special Workers' Compensation Appeals Panel to examine in depth a trial court's factual findings and conclusions. *GAF Bldg. Materials v. George*, 47 S.W.3d 430, 432 (Tenn. 2001). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. *Tobitt v. Bridgestone/Firestone, Inc.*, 59 S.W.3d 57, 61 (Tenn. 2001) Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates

against the trial judge's determination. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

The issue in this case, as well as in the trial court, is, did the employer carry the burden of proof that, "the employer carried out strict, continuous and bona fide enforcement of the policy."

The trial court made a very detailed and well reasoned findings of fact in this case. The panel has examined in depth the trial court's factual findings and, after affording the trial court a presumption of correctness, we find the evidence in this case does not preponderate against the findings of the trial court.

CONCLUSION

The judgment of the trial court is affirmed. The cost of this appeal is taxed to appellant, Wade Nance.

ALLEN W. WALLACE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

**WADE NANCE v. STATE INDUSTRIES, INC. And ITT HARTFORD
INSURANCE CO.**

No. M2002-01762-SC-WCM-CV - Filed - March 12, 2004

ORDER

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well-taken and should be denied 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 on appeal are taxed to the appellant, Wade Nance.

IT IS SO ORDERED.

PER CURIAM

Birch, J. - Not participating.