

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

December 8, 2005 Session

ARTHUR PERRY v. NPS ENERGY SERVICES, INC., ET AL.

**Direct Appeal from the Circuit Court for Shelby County
No. CT-004477-03 D'Army Bailey, Judge**

No. W2005-00134-WC-R3-CV - Mailed May 10, 2006; Filed June 12, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Tennessee Supreme Court of findings of facts and conclusions of law. In this appeal the Appellant/Defendant ("Employer") asserts the trial judge erred in finding the statutory cap of two and one-half multiplier set forth in Tennessee Code Annotated section 50-6-241(a)(1) did not apply, and applying the six times multiplier set forth in Tennessee Code Annotated section 50-6-241(6). Further, Employer alleges that the trial judge erred in finding that Appellee/Plaintiff ("Employee") was unable to make a meaningful return to work as set forth in Tennessee Code Annotated 50-6-241. Employer further avers that the trial judge erred in allowing a co-employee to testify as a rebuttal witness when his testimony did not rebut any testimony given by Employer's proof. We conclude the evidence fails to preponderate against the findings of the trial court, and we affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Circuit Court
Affirmed**

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which JANICE HOLDER, J., and ROBERT EWING CORLEW, SP. J., joined.

William C. Sessions, Memphis, Tennessee, for the appellants, NPS Energy Services, Inc. and Zurich American Insurance Company.

William H. Brode and Robert M. Brode, Memphis, Tennessee, for appellee, Arthur Perry.

MEMORANDUM OPINION

Factual Background

Employee was born on January 11, 1952, is a high school graduate, and has been a carpenter for thirty-two years. He has been a union carpenter for eighteen years. While he is classified as a carpenter with various skills, his usual job duties are building scaffolding with pipe and other material on industrial projects such as steam plants. The scaffolding are built approximately 200 feet from the ground up. The work requires heavy lifting.

In this case, when Employer needed carpenters, Employer would call Employee's union and request a certain number of carpenters for a specific job. Employee generally knew when the job would begin and when the job would be completed. After the job was completed, Employee would then notify his union that he was available for another job.

On November 18, 2002, Employee was sorting material and lifting pipes used in scaffolding when he injured his back. He reported the injury. Employer's agent, nurse, and foreman completed an accident report and assigned Employee to light duty. His condition deteriorated, but he continued to work until the job was completed.

Employee was initially treated for kidney problems, but as his condition persisted, he was referred to Dr. James C. Varner, who performed an MRI on March 10, 2003, and found a right paracentral disc protrusion adjacent to the S-1 nerve root. He was then referred to a Dr. Gary L. Kellett, a surgeon, who recommended surgery. Dr. Kellett was killed in a plane crash, and Employee was then referred to Dr. Laverne R. Lovell, who performed surgery on May 8, 2003. He performed a hemilaminectomy and dissection for a ruptured lumbar disc at the fifth level that impinged upon the nerve root at S-1 level. Following surgery, Employee underwent physical therapy and showed some improvement. The physical therapist had difficulty returning Employee to his prior condition.

Employee continued to complain of pain. Dr. Lovell, however, was of the opinion Employee could return to work and assigned an impairment rating of 8% to his body as a whole. Employee then consulted Dr. W. Lee Moffatt, an orthopedic surgeon, due to continued pain and post surgery difficulties in his low back and buttock. Dr. Moffatt recommended he return for further physical therapy for work hardening. Dr. Moffatt eventually concluded that Employee could not return to his previous employment, relying upon his physical exam and the treating physical therapy report, and assigned a 16% permanent impairment rating to the body as a whole.

Employee testified he knew his condition and his job requirements, and for him to return to his previous employment would create a safety hazard for fellow workers. Dr. Moffatt further testified Employee was physically unable to perform the work.

Testimony from witnesses for Employer and Employee differ as to the lifting requirements for union carpenters work. The trial court found that the amount of weight Employee was expected

to lift as a carpenter exceeded his capabilities as set out in the proof and that he is incapable of a meaningful return to work.

Analysis

The trial court's opinion in this case was a through evaluation of the evidence and his opinion was well reasoned. An assessment of a meaningful return to work includes an analysis of the employer's offer to return to work, the nature of the work to be performed in relation to the employee's medical restrictions and the reasonableness of a refusal to return to work in light of the medical restrictions. A meaningful return to work depends upon the facts of each case. *Newton v. Scott Health Care Ctr.*, 914 S.W.2d 884 (Tenn. 1995).

In this case, the trial court was faced with a unique situation. Employee worked as a union member, and the job with Employer had ended. As a result, Employee must now place his name on a list at his union hall, to be sent to work with this or some other employer. The trial judge found that even though he was a union carpenter, his main work was preparing scaffolding. This was heavy and strenuous work requiring heavy lifting. Employee, along with a co-worker, Mr. Peques, both testified to the lifting and strenuous work of the job. The physiotherapy report, along with the testimony of Dr. Moffatt, as well as the Employee and co-worker, caused the trial court to conclude, "I, therefore, would find that he is incapable of a meaningful return to work under the standard of the statute for the reasons that I have indicated; therefore the caps would not apply." We cannot conclude such findings are contrary to the preponderance of the evidence.

A review of the findings of fact and conclusions of law made by the trial court is *de novo* upon the record, accompanied by a presumption of correctness of the findings unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to independently weigh more in-depth the factual findings and conclusions of the trial court in a workers' compensation case. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1998). However, considerable deference must be given the trial court who has seen and heard the witnesses, especially where issues of credibility and weight on oral testimony are involved. *Jones v. Hartford Accident & Indem. Co.*, 811 S.W.2d 516, 521 (Tenn. 1991).

In this case, Employer avers that the trial court erred in allowing a witness to be called by Employee as a rebuttal witness, alleging said witness did not rebut Employer's testimony. A careful reading of the record reveals this issue is without merit and, further, the admissibility of evidence is in the sound discretion of the trial court unless there is a showing that the trial court abused that discretion. No abuse of discretion is shown.

Conclusion

From a careful review of the record and considering the very detailed findings and conclusions of the trial court, we cannot say the evidence preponderates against the findings of the

trial court, and the judgment of the trial court is affirmed. The cost is taxed to Employer, NPS Energy Services, and its sureties for which execution may issue if necessary.

ALLEN W. WALLACE, SENIOR JUDGE

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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 on appeal are taxed to the Appellant, NPS Energy Services, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM