

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
June 24, 2013 Session

BESSIE CAWTHON v. BAPTIST MEMORIAL HOSPITAL-UNION CITY ET AL.

Appeal from the Chancery Court for Obion County
No. 27767 W. Michael Maloan, Chancellor

No. W2012-02138-SC-WCM-WC - Mailed October 14, 2013; Filed January 15, 2014

An employee sustained a work-related injury to her shoulder while working as a licensed practical nurse at her employer's hospital. After returning to work in a modified-duty position for several months after a second shoulder surgery, the employee elected to have knee replacement surgery to remedy pre-existing arthritis that was unrelated to her work. Unfortunately, the knee replacement surgery caused the employee to develop "foot drop." The employee subsequently exhausted her available leave time because of a prolonged recovery, and the employer terminated her employment. The employee filed the present action seeking permanent total disability benefits. The trial court initially found that the employee had a meaningful return to work and capped her award at one and one-half times her anatomical impairment. The court, however, granted the employee's motion to alter or amend and found that she did not have a meaningful return to work and that she was permanently and totally disabled. The trial court apportioned the award between the employer and the Second Injury Fund, and both parties appealed. We conclude that the employee is not permanently and totally disabled and that she made a meaningful return to work after her shoulder surgeries. We therefore reverse the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery Court Reversed

DON R. ASH, SR. J. , delivered the opinion of the Court, in which JANICE M. HOLDER, J., and TONY CHILDRESS, SP. J., joined.

J. Matthew Kirby and Laura S. Martin, Memphis, Tennessee, for the appellant, Baptist Memorial Hospital-Union City.

Robert E. Cooper, Jr., Attorney General & Reporter; Alexander S. Rieger, Assistant Attorney General, for the appellant, Tennessee Department of Labor and Workforce Development, Second Injury Fund.

Jeffrey A. Garrety and Charles Holliday, Jackson, Tennessee, for the appellee, Bessie Cawthon.

OPINION

Factual and Procedural Background

Bessie Cawthon worked as a licensed practical nurse (“LPN”) for Baptist Memorial Hospital-Union City (“the Hospital”) from January 2003 until January 2009.¹ On January 12, 2007, Ms. Cawthon fell from a chair while working at the Hospital and injured her right shoulder. Ms. Cawthon did not seek medical treatment until March 16, 2007, when Dr. Blake Ragsdale, an orthopaedic surgeon, diagnosed her injury as a rotator cuff tear. Dr. Ragsdale performed surgery on May 23, 2007, and Ms. Cawthon briefly returned to work. Because Ms. Cawthon continued to experience pain in her shoulder, Dr. Ragsdale performed a second procedure on November 14, 2007. The Hospital modified her work duties, and Ms. Cawthon returned to work from January until July 17, 2008, when she requested medical leave to undergo a total knee replacement due to preexisting arthritis in both knees.

On November 20, 2008, the parties exhausted the benefit review process with the Tennessee Department of Labor and Workforce Development, and Ms. Cawthon filed the present action in the Chancery Court for Obion County later that same day. Ms. Cawthon had used all of her available leave time due to complications from her knee replacement surgery, and the Hospital therefore terminated her employment in January 2009. The case went to trial on October 6, 2011.

At trial, Ms. Cawthon testified that she briefly returned to work after her first shoulder surgery, but her shoulder did not improve. She again returned to work in January 2008 under a “transitional employment plan” that the Hospital created in April of 2007. Ms. Cawthon testified that her new, modified LPN position accommodated Dr. Ragsdale’s restrictions and did not require any overhead lifting, pushing, or pulling. The modified position required Ms. Cawthon to, among other things, answer call lights, audit patients’ charts, dispense medications, take vital signs, and assist other nurses on the floor. Ms. Cawthon testified that she left her modified position on July 17, 2008, to have a total knee replacement.

¹Although Ms. Cawthon’s employment was terminated in January 2009, her last day worked was July 17, 2008.

Ms. Cawthon acknowledged during cross-examination that she had known of her need for total knee replacement when her orthopaedic surgeon first suggested the procedure in 2000 and that she had notified the Hospital of her arthritic condition when she was interviewed for a position in 2003. She requested and received special scheduling accommodations from the Hospital at that time. Ms. Cawthon admitted that her knee surgeon released her to return to work on the condition that she wear a left-foot brace and that she failed to obtain the brace before her leave time expired in January 2009.

Ms. Cawthon testified that she has weakness and limited range of motion in her shoulder. She experiences continuous pain, which fluctuates between four and eight on a scale of one to ten. Repetitive motion and simple activities such as holding a steering wheel and moving laundry cause her pain to increase, and her shoulder pain interferes with her sleep. Ms. Cawthon further testified that she limps after walking less than one block, that her shoulder pain is increasing, and that activities such as lifting an item from the refrigerator or stirring a pot make her arm feel as if it is “coming out of socket.” Ms. Cawthon takes narcotic pain medication, Lortab, four times per day. It is unclear from the record, however, whether the Lortab was prescribed for Ms. Cawthon’s shoulder, her knees, or both. Ms. Cawthon explained that the Lortab interferes with her concentration and causes her to be short-tempered.

Ms. Cawthon denied that she is able to work, despite testifying in her discovery deposition that she had the ability to work some jobs after her knee surgery. Ms. Cawthon said that increased pain in her hip, groin, and lower back, as well as her diminished range of motion since giving her deposition, have decreased her ability to work. Ms. Cawthon acknowledged that she had received unemployment compensation for nine months after her termination and that she certified her ability to work so that she could receive her unemployment benefits.

Nicky Thomas, the Hospital’s Human Resources Director, testified that the Hospital would have permitted Ms. Cawthon to continue working in her modified position. Similarly, Jill Hopper, Ms. Cawthon’s immediate supervisor, testified that the Hospital was aware of Ms. Cawthon’s knee problems and that Ms. Hopper did her best to assign Ms. Cawthon to patient rooms that were nearest to the nurses’ station. Ms. Hopper also testified that Ms. Cawthon’s work performance in January 2008 was rated satisfactory to exemplary, and she described Ms. Cawthon as a “good employee [who] was good at her job.”

The report of Dr. James Warmbrod was entered into evidence at trial. Dr. Warmbrod was chosen by the parties to examine Ms. Cawthon and to prepare a Medical Impairment Rating report pursuant to Tennessee Code Annotated section 50-6-204 (b)(5). Dr. Warmbrod assigned Ms. Cawthon a 15 percent permanent impairment to the body as a whole based on

the Fifth Edition of the AMA Guides. He opined that Ms. Cawthon could perform “sedentary to light work with no lifting over 25 pounds” but that “[Ms. Cawthon] should not do any work above shoulder height on the right side.”

Ms. Cawthon introduced the deposition of Dr. Apurva Dalal, an orthopaedic surgeon who conducted an independent medical examination of Ms. Cawthon on May 9, 2008. Dr. Dalal’s examination revealed deltoid muscle atrophy and diminished range of motion in the right shoulder. Dr. Dalal assigned Ms. Cawthon an 18 percent permanent impairment to the body as a whole and recommended that she avoid repetitive use of her right arm, perform no overhead activity, and limit lifting to twenty pounds. When asked to estimate Ms. Cawthon’s impairment from the knee replacement surgeries, which occurred after his examination, Dr. Dalal estimated Ms. Cawthon’s impairment to be 36 percent to the body as a whole.

Ms. Cawthon also introduced the deposition of Dr. Robert Kennon, a vocational consultant who evaluated Ms. Cawthon at her attorney’s request. Dr. Kennon testified that he interviewed Ms. Cawthon on December 15, 2008, and January 22, 2009. Dr. Kennon said Ms. Cawthon scored 16 on the Wonderlic intelligence test, which indicated she has a tenth or eleventh-grade knowledge level. Dr. Kennon also administered the Wide Range Achievement Test, which revealed that Ms. Cawthon reads at a tenth-grade level, spells at an eleventh-grade level, and performs mathematics at a seventh-grade level. Dr. Kennon testified that, in forming his opinions, he reviewed Ms. Cawthon’s medical records and a Functional Capacity Evaluation (“FCE”) report from Star Physical Therapy.²

Dr. Kennon opined that, based on Dr. Dalal’s restrictions and the restrictions listed in the FCE report, Ms. Cawthon is 100 percent vocationally disabled. Using Dr. Warmbrod’s proposed restrictions, however, Dr. Kennon estimated Ms. Cawthon’s vocational disability to be 94 percent. Dr. Kennon noted that most nursing positions require moving patients—a task Ms. Cawthon can no longer perform. Dr. Kennon therefore concluded that Ms. Cawthon was “out of nursing,” unless she took additional training. Although he acknowledged that Ms. Cawthon possessed “some” transferrable skills, Dr. Kennon opined that Ms. Cawthon required additional training to use these skills in the job market. Dr. Kennon testified that, at the time of his evaluation, the unemployment rate in northwestern Tennessee was significantly higher than the statewide rate and that Ms. Cawthon’s knee problems affected her ability to find and maintain a job.

On cross-examination, Dr. Kennon acknowledged that Ms. Cawthon had worked approximately 200 shifts after her shoulder surgeries. He also conceded that the tasks of some jobs in the workforce do not strictly match the descriptions contained in the Dictionary

²The date of Star’s FCE is unknown, and the report was not admitted into evidence at trial.

of Occupational Titles. Dr. Kennon agreed that Ms. Cawthon had reported to him a number of problems with her knees and that, in Ms. Cawthon's view, her knees were her primary problem. Dr. Kennon said that he considered Ms. Cawthon's knee problems when making his report. Dr. Kennon acknowledged that Ms. Cawthon could possibly perform a job that was "carved out" for her based on her restrictions. Dr. Kennon concluded that Ms. Cawthon was of average intelligence and was capable of learning.

After hearing the evidence, the trial court announced its findings from the bench. Based on her return to work from January through July 2008, the trial court concluded that Ms. Cawthon made a meaningful return to work. Adopting Dr. Warmbrod's impairment rating of 15 percent to the body as a whole, the trial court awarded 22.5 percent permanent partial disability and entered its written judgment on April 10, 2012.

On May 10, 2012, Ms. Cawthon filed a motion to alter or amend the trial court's judgment, arguing that the trial court had erroneously determined that she made a meaningful return to work and that she was not permanently and totally disabled. By letter dated July 10, 2012, the trial court concluded that its earlier findings were erroneous and entered a second judgment on September 6, 2012, finding that Ms. Cawthon did not have a meaningful return to work and that she was permanently and totally disabled as of July 18, 2008, the day after her date last worked. Specifically, the trial court found that, irrespective of any complications or disabilities that arose from Ms. Cawthon's knee replacement surgery, the combination of Ms. Cawthon's pre-existing knee problems and her work-related shoulder injury rendered her permanently and totally disabled. The trial court apportioned the award 60 percent to the Second Injury Fund ("the Fund") and 40 percent to the Hospital. The Hospital and the Fund filed the present appeal, which has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51.

Standard of Review

The trial court's findings of fact are reviewed de novo on the record and are accompanied by a presumption of correctness, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given in-court testimony is involved, considerable deference is given to the trial court because the trial judge had the opportunity to observe the witness's demeanor. Madden v. Holland Group of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve a medical expert's deposition testimony, however, the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may therefore draw its own conclusions with regard to those issues. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed de

novo on the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Although stated differently in its brief, the Hospital essentially urges the Panel to reverse the lower court's revised judgment for the following three reasons: (1) Ms. Cawthon's motion to alter or amend failed to satisfy Tennessee Rule of Civil Procedure 59; (2) the evidence preponderates against the trial court's finding that Ms. Cawthon was permanently and totally disabled as of her last day worked; and (3) Ms. Cawthon's return to work following her second shoulder surgery limits any permanent partial disability award to one and one-half times her anatomical impairment pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A).³ The Fund joins in the Hospital's argument that Ms. Cawthon is not permanently and totally disabled. The Fund also argues that, even if Ms. Cawthon is permanently and totally disabled, Ms. Cawthon failed to prove any of the bases for Fund liability under Tennessee Code Annotated section 50-6-208.

Tennessee Rule of Civil Procedure 59

A trial court may alter or amend a judgment under Tennessee Rule of Civil Procedure 59.04 only "(1) when the controlling law changes before a judgment becomes final, (2) when previously unavailable evidence becomes available, or (3) when, for sui generis reasons, a judgment should be amended to correct a clear error of law or to prevent injustice." Vaccarella v. Vaccarella, 49 S.W.3d 307, 312 (Tenn. Ct. App. 2001) (quoting Bradley v. McLeod, 984 S.W.2d 929, 933 (Tenn. Ct. App. 1998)). In contrast, if the moving party is "simply seeking to relitigate matters that have already been adjudicated," then she is not entitled to relief under Rule 59. Id. Ms. Cawthon concedes that the first two circumstances

³The Hospital also questions whether Ms. Cawthon, who failed to request a benefit review conference within one (1) year of the date on which she ceased to be employed as required by Tenn. Code Ann. §50-6-241(d) and whose loss of employment, the Hospital contends, was due to her own misconduct, is entitled to "reconsideration benefits." "Reconsideration of a previous award" is a term of art that arises purely from statute. See Tenn. Code Ann. § 50-6-241(a)(1)(B)(I) (setting out the method by which an injured worker may request a reconsideration of a previous workers' compensation award). After a careful review of the record, we find no indication that Ms. Cawthon's complaint sought reconsideration benefits or that the trial court awarded such benefits in its initial or revised judgments. We recognize that the term "reconsider" appears in Ms. Cawthon's motion to alter or amend in which she moved the court to "reconsider its finding of industrial disability under the 6 time cap." Read in the context in which it appears, however, the term simply reflects Ms. Cawthon's request that the trial court reassess its previous ruling. Because we determine that Tennessee Code Annotated section 50-6-241(a)(1)(B)(I) was not the basis for the trial court's ruling, we decline to address this issue.

are inapplicable to her case. She maintains, however, that the trial court implicitly granted her motion to alter or amend under the third circumstance to prevent injustice. Without question, the trial court's remarks from the bench at the conclusion of the trial illustrate that the court remained unsettled on the issues. The trial court opined that Ms. Cawthon is permanently and totally disabled and expressed its belief that the work injury was a substantial contributor to Ms. Cawthon's disability. Based on the trial court's remarks, we conclude that trial court's decision to reverse its previous ruling fell within the circumstances contemplated by Rule 59.04.

Permanent Total Disability

We next consider the Hospital's argument that the evidence preponderates against the trial court's finding that Ms. Cawthon was permanently and totally disabled. An employee is entitled to permanent total disability benefits when she is "totally incapacitate[d] . . . from working at an occupation that brings [her] an income." Tenn. Code Ann. § 50-6-207(4)(B) (2008 & Supp. 2012). In making this determination, the reviewing court must consider a number of factors, including: "the employee's skills, training, education, age, job opportunities in the immediate and surrounding communities, and the availability of work suited for an individual with that particular disability." Hubble v. Dyer Nursing Home, 188 S.W.3d 525, 536 (Tenn. 2006). Ultimately, however, the "focus [of the court's analysis is] on the employee's ability to return to gainful employment." Davis v. Reagan, 951 S.W.2d 766, 767 (Tenn. 1997).

The Hospital primarily argues that Ms. Cawthon's return to work after her second shoulder surgery preponderates against the trial court's finding that she was permanently and totally disabled on July 18, 2008, the first day of her official leave for knee replacement surgery. Notably, the mere fact that an employee returns to work after her injury in the same position and at the same pay rate "does not per se preclude the court from finding [that she] is totally disabled." Skipper v. Great Cent. Ins. Co., 474 S.W.2d 420, 424 (1971); see also Princinsky v. Premier Mfg. Support Servs., Inc., No. M2009-00207-SC-WCM-WC, 2010 WL 3715636, *6-7 (Tenn. Workers' Comp. Panel Sept. 23, 2010). Our Supreme Court has also noted, however, that "[i]t would be an extremely rare situation in which an injured employee could, at the same time both work and be found permanently and totally disabled." Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 48 (Tenn. 2004).

In Rhodes, the employee suffered a heart attack while working as a lumberjack for the defendant's logging company. 154 S.W.3d at 45. After a year-long recovery, he returned to work as a chainsaw operator for the employer but quit three years later due to increased chest pains. Rhodes, 154 S.W.3d at 45. The trial court found that the employee was permanently and totally disabled as of his last day worked, and the employee appealed,

arguing that he was permanently and totally disabled on the date he reached maximum medical improvement. Rhodes, 154 S.W.3d at 46. In support of his position, the employee argued that he was able to return to work only because his employer allowed him to split his workload with fellow employees, making his post-injury position less strenuous. Rhodes, 154 S.W.3d at 46. Our Supreme Court rejected the employee's argument, explaining that an employee may receive permanent total disability benefits for the period of time during which he returned to work only if "the evidence . . . show[s] that the employee was not employable in the open labor market and that the only reason that the employee was currently working was through the magnanimity of his or her employer." Id. at 48.

In this case, Ms. Cawthon maintains that her return to work following her shoulder surgery was purely a result of the Hospital's "magnanimity" in accommodating her physical restrictions and that she is otherwise incapable of performing the expected functions of an LPN. Rhodes, 154 S.W.3d 48. Clearly, an employee's "own assessment of her physical condition and resulting disability is competent testimony that should be considered." Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000) (quoting McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn.1999)). Notwithstanding Ms. Cawthon's own assessment of her limitations, additional evidence adduced at trial also supports a finding that the Hospital essentially created a special position for Ms. Cawthon. Moreover, Ms. Cawthon's inability to perform the ordinary duties of an LPN is undisputed.

The point remains, however, that Ms. Cawthon was capable of performing the duties imposed by her modified position with the Hospital on the date that she left for knee replacement surgery. Our Supreme Court has long held that the permanent total disability statute "contemplates employment in the open labor market and not a return to the employee's previous position." Prost v. City of Clarksville, 688 S.W.2d 425 (Tenn. 1985). Thus, the issue before us is not whether Ms. Cawthon was able to work as an LPN on July 18, 2008, but whether Ms. Cawthon was able to remain gainfully employed on that date.

The Hospital presented undisputed testimony from its Human Resource Director, Nicky Thomas, that the Hospital would have permitted Ms. Cawthon to continue working in her modified position indefinitely. Moreover, Ms. Cawthon's immediate supervisor, Jill Hopper, testified that Ms. Cawthon was a "good employee [who] was good at her job" and that Ms. Cawthon's work performance was rated satisfactory to exemplary in January 2008. Notably, Ms. Cawthon worked in her modified LPN position for nearly seven months after being released from her last shoulder surgery. Although Ms. Cawthon experienced some pain as a result of her knees and shoulder during that time, Ms. Cawthon testified that her sole reason for leaving her position at the Hospital was to undergo a knee replacement surgery that had been recommended as early as 2000. Moreover, Ms. Cawthon testified that none of her required tasks under the transitional employment plan that modified her duties

required her to work outside of her restrictions.

After a thorough review of the record, we find that the evidence preponderates against the trial court's finding that Ms. Cawthon was permanently and totally disabled on July 18, 2008. In our view, the evidence presented at trial clearly shows that Ms. Cawthon was capable of performing her work duties at the time she requested leave for knee surgery. The trial court's judgment in that regard is therefore reversed.

Meaningful Return to Work

Having determined that Ms. Cawthon is not permanently and totally disabled, we must next determine whether Ms. Cawthon's permanent partial disability award is limited to one and one-half times her medical impairment rating. See Tenn. Code Ann. § 50-6-241(d)(1)(A) (limiting an injured worker's recovery to the one and one-half multiplier when the employee returns to work for "the pre-injury employer . . . at a wage equal to or greater than the wage the employee was receiving at the time of the injury"). The Hospital argues that Ms. Cawthon's return to work from January through July 2008 precludes an award of benefits in excess of the one and one-half cap. We agree.

Whether an employee makes a meaningful return to work is fact-specific and requires the reviewing court to "assess the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to either return to or remain at work." Tryon v. Saturn Corp., 254 S.W.3d 321, 328 (Tenn. 2008) (citations omitted). Furthermore, an employee who returns to work after a work-related injury but who later leaves for "reasons that are not reasonably related to his or her workplace injury" are subject to the statutory cap. Tryon, 254 S.W.3d 328. We must therefore look at all of the facts and circumstances surrounding Ms. Cawthon's departure from the Hospital to determine if it was "reasonably related" to her shoulder injury. Tryon, 254 S.W.3d 328.

In its bench ruling, the trial court found that Ms. Cawthon continued to work after her shoulder surgeries and only stopped working when "she decided to go have her knees done." The trial court further found that Ms. Cawthon was terminated "not because of her inability to work due to any of these injuries but [because] her leave time had expired." The trial court therefore determined that Ms. Cawthon's award was capped at one and one-half times her impairment. In its ruling on Ms. Cawthon's motion to alter or amend, however, the trial court reversed its ruling, stating that "although she did return to work, she was on limited or light duty and required assistance. Therefore, her award is not capped at one and one-half (1-1/2) times the MIR rating of fifteen percent."

It is undisputed that Ms. Cawthon returned to work for the hospital in January 2008 in a modified-duty position. It is also undisputed that Ms. Cawthon continued to work in this modified position until she took leave to have knee replacement surgery in July 2008, which was in no way connected to her job. The Hospital's HR director testified that the Hospital would have allowed Ms. Cawthon to continue working in the modified-duty position indefinitely. Ms. Cawthon, despite presenting no contrary evidence, argues that the modified job description title – "transitional employment plan" – implies that the position was temporary. Without actual evidence, however, this assertion is mere speculation. Therefore, the evidence preponderates against any finding or conclusion that the position was temporary.

Furthermore, the Hospital's efforts to accommodate Ms. Cawthon's limitations were clearly reasonable. Similarly, Ms. Cawthon's decision to have knee replacement surgery was also reasonable. Her knee surgery, however, was completely unrelated to her shoulder injury or her employment at the Hospital, and we therefore conclude that, under the circumstances, the trial court erred by finding that Ms. Cawthon did not have a meaningful return to work following her shoulder surgeries.

Conclusion

The trial court's findings that Ms. Cawthon is permanently and totally disabled and that she never made a meaningful return to work are reversed. The judgment is affirmed in all other respects, and this cause reversed and remanded for entry of the trial court's initial judgment of April 10, 2012, in which Ms. Cawthon was found 22.5 percent vocationally disabled and was awarded \$43,372.80 in permanent partial disability benefits. Because Ms. Cawthon is not permanently and totally disabled, all claims against the Fund are dismissed. The costs of this appeal are taxed to Ms. Cawthon, for which execution may issue if necessary.

DON R. ASH, JUDGE

IN THE SUPREME COURT OF TENNESSEE
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ET AL.**

**Chancery Court for Obion County
No. 27767**

No. W2012-02138-SC-WCM-WC - Filed January 15, 2014

ORDER

This case is before the Court upon the motion for review filed on behalf of Bessie Cawthon pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(A)(ii), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are taxed to Bessie Cawthon, for which execution may issue, if necessary.

PER CURIAM

JANICE M. HOLDER, J., not participating.