

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

(December 17, 2003 Session)

VULCAN MATERIALS COMPANY v. CHRISTOPHER DALE WATSON

**Direct Appeal from the Chancery Court for Davidson County
No. 99-3152-II Carol McCoy, Chancellor**

**No. M2003-00975-WC-R3-CV - Mailed - March 30, 2004
Filed - May 19, 2004**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employer claims that the trial court erred (1) in finding work-related disability from aggravation of a back problem, (2) in denying reimbursement of overpayment of temporary total disability benefits by the Second Injury Fund, and (3) in ordering the employer to pay the employee's attorney's fees. We affirm in part and reverse in part.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Davidson County Chancery Court is affirmed in part and reversed in part.

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, CHIEF JUSTICE., and JOHN A. TURNBULL, SP. J. joined.

D. Brett Burrow, Gordon C. Aulgur, Brewer, Krause & Brooks, Nashville, Tennessee, for the Appellant Vulcan Materials Company.

Jay R. Slobey, Blackburn & McCune, Nashville, Tennessee, for Christopher Dale Watson.

MEMORANDUM OPINION

Facts

On October 29, 1999, Vulcan Materials Company (“Vulcan”) filed a complaint seeking a determination that Christopher Dale Watson was not entitled to workers’ compensation benefits for an alleged injury on January 27, 1999. Mr. Watson counter-claimed, alleging a disabling injury to his back in the course and scope of his employment.

On December 10, 1999, a Workers’ Compensation Specialist in the Tennessee Department of Labor issued an order directing Vulcan to provide medical treatment to Mr. Watson and to pay:

Temporary Total Disability benefits for periods of time for which there is medical documentation of TTD disability. The continuation of payment of temporary total disability and medical benefits shall not be terminated by the Employer/Carrier unless an Order Terminating Benefits is issued by a Workers’ Compensation Specialist or such benefits are terminated by a court of proper jurisdiction.

Vulcan paid temporary total disability benefits to Mr. Watson as ordered until January 4, 2002, when, pursuant to a Motion to Discontinue Temporary Total Disability Benefits filed December 21, 2001, the trial court ordered that such payments be immediately discontinued.

Following a trial on December 2, 2002, the trial court issued a bench opinion in which it found that (1) Mr. Watson was only entitled to temporary total disability benefits for the time periods of February 9, 1999 through April 15, 1999 and February 2, 2000 through March 21, 2000, (2) since the employer had paid temporary total disability benefits from October 10, 1999 through January 4, 2002, Vulcan should recover the overpayment from the Second Injury Fund pursuant to Tenn. Code Ann. § 50-6-238(b), (3) Mr. Watson was entitled to 22 percent permanent partial disability to the body as a whole, and (4) Mr. Watson’s attorney should be awarded a fee of 20 percent. A judgment reflecting the findings of the trial court was entered.

Vulcan filed a motion to alter or amend the final judgment to allow an offset because the permanent partial disability award of \$29,415.40 was less than the overpayment of temporary total disability in the amount of \$43,736.73. The trial court granted the offset and then ordered the Second Injury Fund to reimburse Vulcan for the overpayment. The Second Injury Fund filed a motion stating that it was not a party to the suit and asked to be heard on the matter of the reimbursement.

On February 21, 2003, the trial court found that its order granting Vulcan’s request for reimbursement of the overpayment of temporary total disability benefits by the Second Injury Fund was not permitted under the statutes because the employee’s injury was found to be “compensable.” The trial court found that Vulcan was entitled to credit for the overpayment of temporary total benefits and that Mr. Watson was entitled to no additional payment for permanent partial disability. The trial court ordered Vulcan to pay \$5,883.00 (20 percent of the

permanent partial disability award) to Mr. Watson's attorney under the equitable powers of the Court. Vulcan has appealed the actions of the trial court. The Second Injury Fund has failed to participate in the appeal.

Standard of Review

The standard of review in a worker's compensation case is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Houser v. BiLo, Inc.*, 36 S.W.3d 68, 70-71 (Tenn. 2001). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases to determine where the preponderance of the evidence lies. *Vinson v. United Parcel Service*, 92 S.W.3d 380, 383-4 (2002). When the trial court has seen the witnesses and heard the testimony, especially when issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's findings of fact. *Houser*, 36 S.W.3d at 71. Questions of law are reviewed *de novo* without a presumption of correctness. *Tucker v. Foamex, LP*, 31 S.W.3d 241, 242 (Tenn. 2000).

Issues

Did the trial court err in finding that the employee sustained an aggravation of an underlying back problem that resulted in permanent impairment and vocational disability as a result of his work at Vulcan Materials Company?

Did the trial court err in finding Vulcan Materials Company was not entitled to reimbursement for overpayment of temporary total disability benefits from the Second Injury Fund pursuant to T.C.A. § 50-6-238(b)?

Did the trial court err in awarding the attorney for the employee fees of \$5,883.00 to be paid by Vulcan Materials Company?

Discussion

I

The employer contends that the evidence does not sustain a finding that Mr. Watson sustained an aggravation of a pre-existing condition on January 26, 1999, which caused an asymptomatic disc degenerative disease to become symptomatic and disabling. This is an issue of fact. The appellant has the duty of preparing a record that conveys a fair, accurate and complete account of the proceedings in the trial court with respect to the issues on appeal. Tenn. R. App. P. 24(b). We are provided with only the trial court's findings of facts and conclusions of law rendered from the bench and the exhibits introduced at the trial of this cause, which include

three doctor's depositions. We do not have a record of the lay testimony presented to the trial court. In the absence of an adequate record on appeal, this Court must presume the trial court's rulings were supported by sufficient evidence. *Manufacturers Consol. Service v. Rodell*, 42 S.W.3d 846, 865 (Tenn. App. 2000). Because we cannot conduct a *de novo* review without a complete record, the determination of the trial court on this issue is sustained.

II

The right of an employee to temporary total disability benefits is terminated by the ability to return to work or the attainment of maximum medical improvement. *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 776 (Tenn. 2000). An overpayment occurs when temporary total disability benefits are paid after an employee has returned to work or reached maximum medical improvement. The trial court found that Vulcan had overpaid temporary total disability benefits to Mr. Watson. Vulcan asserts that it paid the benefits pursuant to an order from a workers' compensation specialist and should have been entitled to re-imbursement of its overpayment by the Second Injury Fund. We are asked to construe Tenn. Code Ann. § 50-6-238(b) which states:

If a specialist has ordered the payment of benefits pursuant to this section, and a court finds that the injury was noncompensable, then an employer or the employer's workers' compensation insurer is entitled to a refund of all amounts paid pursuant to a specialist's order from the second injury fund established by § 50-6-208, within thirty (30) days of submission of appropriate evidence of such finding to the division of workers' compensation. If the refund is not made within thirty (30) days, then the employer is entitled to interest at the rate of ten percent (10%) per annum from the date the refund became overdue.

As used in the statute, the term "noncompensable" is an adjective describing the word "injury." The terms "noncompensable" and "noncompensable injury" are not defined in the Tennessee Workers' Compensation Act. However, the Act defines a compensable injury as ". . . an injury by accident arising out of and in the course of employment which causes either disablement or death of the employee. . ." Tenn. Code Ann. § 50-6-102(12). When all three elements are present, the injury is compensable. *Story v. Legion Ins. Co.*, 3 S.W.3d 450, 454 (Tenn. 1999); *Fink v. Caudle*, 856 S.W.2d 952, 958 (Tenn. 1993). In the present case, the trial court found the injury to be compensable. In such cases, the trial court can order the employee to reimburse the employer for any temporary benefits improperly paid. *McCall v. National Heath Corp.*, 100 S.W.3d 209, 213 (2003). Vulcan's remedy is to pursue Mr. Watson, not the Second Injury Fund, for the overpayment of temporary total disability benefits. We affirm the action of the trial court on this issue.

III.

Finally, Vulcan complains that the trial court erred in ordering Vulcan to pay the employee's attorney fees in addition to the temporary and permanent disability benefits already paid. The trial court stated that it was ordering payment of the fees under its equitable powers. The Workers' Compensation Act provides that fees of attorneys for services to employees shall be subject to approval of the Commissioner of Labor or the court before which the matter is pending, and that "no attorney's fees to be charged employees shall be in excess of twenty percent (20%) of the amount of the recovery or award to be paid by the party employing the attorney." Tenn. Code Ann. § 50-6-226(a)(1). Where the benefits due to the employee have been paid by the employer, any fee that may be due the employee's attorney is to be paid by the employee. *Honaker v. Kingsport Press, Inc.*, 659 S.W.2d 22, 23 (Tenn. 1983).

An exception is made and the employer pays the employee's attorney only when the employee's attorney secures a recovery in a third-party tort action and there is reimbursement to the employer of all or part of the workers' compensation benefits paid. Tenn. Code Ann. § 50-6-112. However, nothing in that statute relieves the employee of the obligation to pay the employee's attorney in the workers' compensation case. *West v C. M. Ragland Co.*, 842 S.W.2d 251, 253 (Tenn. 1992). We find the trial court erred in ordering Vulcan to pay Mr. Watson's attorney fees.

Disposition

The judgment of the trial court is affirmed in part and reversed in part. Costs of the appeal are taxed one-half against Vulcan Materials Company and one-half against Christopher Dale Watson and their sureties.

Howell N. Peoples, Special Judge

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Vulcan Materials Company 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.

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 assessed one-half against Vulcan Materials Company and one-half against Christopher Dale Watson and their sureties, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Drowota, C.J., not participating