

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

October 13, 2004 Session

**EARL N. MULLINS v. QUEBECOR WORLD OF KINGSPORT,  
INCORPORATED, ET AL.**

**Direct Appeal from the Circuit Court for Hawkins County  
No. CV-523 John K. Wilson, Judge**

**December 28, 2004**

**No. E2004-01241-WC-R3-CV - Mailed November 24, 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. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court awarded the employee 26 percent permanent partial disability to the body as a whole. The employee has appealed insisting the award is not adequate. The judgment is affirmed.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court is Affirmed.**

ROGER E. THAYER, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J., and HOWELL N. PEOPLES, SP. J., joined.

Angela Vincent, Johnson City, Tennessee, for Appellant, Earl N. Mullins.

Steven H. Trent, Johnson City, Tennessee, for Appellees, Quebecor World Kingsport, Inc. and The Travelers Insurance Company.

**MEMORANDUM OPINION**

The employee, Earl N. Mullins, has appealed from the action of the trial court awarding him 26 percent permanent partial disability to the body as a whole. Plaintiff contends the award of disability is not sufficient.

Facts

Earl Mullins, a sixty-year-old high school graduate with almost forty years experience with defendant Quebecor, sustained a work-related injury on September 30, 2002. At the time of injury,

he was a first class or senior pressman who was a group leader at the company's Hawkins County plant. He testified he and another employee had been moving a heavy bookshelf and he felt a sting in his back and as he was getting on a forklift truck, pain in his hip was excruciating. On October 5, 2002, his complaints when sitting were so numerous his wife took him to the emergency room in Kingsport. He was examined and discharged with pain medication. The hospital record indicated he was complaining of left hip and leg pain and that trauma was denied.

On the date of the incident, he filled out an accident report for his employer indicating the accident had occurred while he was getting on a forklift truck and turning to sit down. He continued to work until October 25, 2002 when he was laid-off because the plant closed. At one point prior to his injury, plaintiff was thinking about applying for a similar position at the company's Kingsport plant but after the accident, he decided to retire.

Plaintiff came under the care of Dr. David A. Wiles on December 30, 2002. Dr. Wiles, a neurosurgeon, testified by deposition and stated the history indicated the employee was lifting shelves onto a pallet that was to be lifted with a forklift when he felt a sudden onset of hip pain; that an MRI examination showed a large herniated disc at L4-5 that had inferiorly migrated down behind the L5 vertebral body and was displacing the L5 nerve root; that he performed surgery on January 21, 2003 which was followed by a period of physical therapy; that most of the complaints were about his hip pain and that he had degenerative disc changes in the lumbar spine; that he found he had a 13 percent medical impairment and imposed restrictions on excessive sitting, standing or walking and he should not lift over 30 pounds; that after surgery his complaints were so numerous another MRI exam was conducted and there was no evidence of recurrent disc herniation.

As to his condition at the time of the trial below, plaintiff testified surgery eliminated 50 percent of his pain but his back still bothered him, his hip still ached and his feet still felt numb.

At the conclusion of the hearing, the trial court found the employee sustained a 26 percent permanent partial disability to the body as a whole.

#### Standard of Review

The review of the case on appeal is *de novo* accompanied by a presumption of the correctness of the findings of the trial court unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(2).

Where the trial court has seen and heard witnesses and issues of credibility and the weight of oral testimony is involved, the trial court is usually in a better position to judge credibility and weigh evidence. However, where evidence is introduced by deposition, the appellate court is in as good a position as the trial court in reviewing and weighing testimony. *Lander v. Fireman's Fund Ins. Co.*, 775 S.W. 2d 355, 356 (Tenn. 1989).

### Analysis

The employee argues the award of 26 percent disability is not adequate under the evidence and that the award should be increased to six times the medical impairment under Tenn. Code Ann. § 50-6-241(b).

It has often been stated in appeals of this nature, the extent of vocational disability is primarily a question of fact for the trial court and it must be determined from all the evidence including lay and expert testimony. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W. 3d 625, 629 (Tenn. 1999). Also, anatomical impairment is a separate and distinct finding from vocational disability and is only one factor to be considered in determining the extent of vocational disability. *George v. Building Materials Corp.*, 44 S.W.3d 481 (Tenn. 2001).

In addition to medical impairment, the trial court should also consider the employee's age, education, training and skills as well as the opportunity for employment in the open labor market. *Orman v. Williams-Sonoma, Inc.*, 803 S.W.2d 672, 678 (Tenn. 1991).

In examining the record, we find that some credibility questions did arise from plaintiff's testimony and we defer to the trial court in handling this issue as the court saw and heard this evidence. We also note that during plaintiff's examination he stated he was able to return to his position at work if he had someone to do the lifting. Thus, he recognized he had the ability to perform some types of work. In all, we are not able to say the evidence preponderates against the 26 percent award of disability. The statutory provisions of Tenn. Code Ann. § 50-6-241(a) and (b) are not formulas for computing or establishing disability but are mere caps or ceilings which under certain circumstances cannot be exceeded.

### Conclusion

The judgment of the trial court is affirmed. Costs of the appeal are taxed to the plaintiff.

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ROGER E. THAYER, SPECIAL JUDGE

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**Hawkins County Circuit Court**  
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**JUDGMENT**

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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the plaintiff, Earl Mullins, for which execution may issue if necessary.