

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

December 9, 2004 Session

**RANDY LEE HAYES vs. FIRST SOURCE FURNITURE GROUP, ET AL.**

**Direct Appeal from the Chancery Court for Lauderdale County  
No. 12,443 Martha B. Brasfield, Chancellor**

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**No. W2004-00742-WC-R3-CV- Mailed March 22, 2005; Filed April 21, 2005**

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First Source Furniture Group and Travelers Insurance Company have appealed the decisions of the trial court in favor of Randy Lee Hayes. First, the trial court awarded Mr. Hayes 25% permanent partial disability to his left arm due to a new injury. Second, the trial court, pursuant to Tennessee Code Annotated section 50-6-241(a)(2), reconsidered Mr. Hayes' prior award and increased it by 7% to the body as a whole. We affirm the decisions of the trial court while correcting an admitted error regarding Mr. Hayes' workers' compensation benefit rate for the arm injury.

**Tenn. Code Ann. § 50-6-225(e)(3) (Supp. 2003) Appeal as of Right; Judgment of the  
Chancery Court Affirmed as Modified; Case Remanded.**

W. FRANK BROWN, III, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and CAROL L. MCCOY, SP. J. joined.

S. Newton Anderson, Memphis, Tennessee, for the Appellants, First Source Furniture Group and Travelers Insurance Company.

Art D. Wells, Jackson, Tennessee, for the Appellee, Randy Lee Hayes.

**MEMORANDUM OPINION**

**I. Factual Procedural Background**

Randy Lee Hayes ("Mr. Hayes") worked for First Source Furniture Group ("First Source") and its predecessor from 1983 until December of 2002. At all times relevant to these proceedings Travelers Insurance Group ("Travelers") was the workers' compensation insurance carrier for First Source. On April 7, 1999, Mr. Hayes suffered an injury to his right shoulder and arm. On August 24, 2001, Mr. Hayes was awarded 35% to the body as a whole. Mr. Hayes had continued to work for First Source without missing work and without suffering any reduction in pay. This award was capped by the 2.5 time medical impairment rating prescribed by Tennessee Code Annotated section 50-6-241(a)(1).

Mr. Hayes began using his left arm more after the injury to his right shoulder and arm. He then began experiencing problems with his left arm. These problems developed, worsened and resulted in surgery to Mr. Hayes' left arm.

First Source closed its plant in December of 2002, and Mr. Hayes' employment was terminated. As a result of his job loss, Mr. Hayes asked the trial court to reconsider his 2001 award. Mr. Hayes also filed a claim to recover for the injury he received to his left arm. The trial court consolidated these two claims for trial. Mr. Hayes was unemployed from December of 2002 until he obtained employment on September 18, 2003.

After receiving and considering all of the evidence, the trial court awarded Mr. Hayes an additional 7% to the body as a whole for the 2001 award. The trial court also awarded Mr. Hayes 25% permanent partial disability to the left arm. The Defendants have appealed and contend that Mr. Hayes should not have received any reconsideration for the 2001 award. Further, they contend that the award of 25% to the left arm is excessive. The Defendants specify four issues on appeal. All parties agreed that the trial judge erred when she mistakenly listed the workers' compensation benefit rate for Mr. Hayes' left arm injury as \$692.00 and that the maximum compensation rate was \$581.00 per week. The other three issues can be resolved during an examination of the two awards.

## **II. Standard of Review**

Findings of fact are *de novo* upon the record of the trial court with a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2003); Tenn. R. App. P. 13(d). In making this determination, we must give considerable deference to the trial judge's findings with regard to weight and credibility of any oral testimony. *Townsend v. State*, 826 S.W.2d 434, 437 (Tenn. 1992). We weigh the evidence to determine where the preponderance lies and make an evaluation of the judgment within the confines of established rules. If medical testimony is given by deposition or report of physician, we may make an independent assessment of the medical proof to see where the preponderance of evidence lies. *Cooper v. Ins. Co. of N. Am.*, 884 S.W.2d 446 (Tenn. 1994). Furthermore, the trial court has the discretion to accept the opinion of one medical expert over that of another medical expert. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333 (Tenn. 1996).

## **III. Analysis**

### **A. Reconsideration of the 2001 Award**

The Defendants contend that the trial court erred in increasing Mr. Hayes' initial, 2001 award from 35% to 42% to the body as a whole. Basically, the Defendants argue that the facts of the case do not warrant an increase in the award. Mr. Hayes did not miss much work as a result of his 1999 injury that resulted in the 2001 award. Mr. Hayes remained at First Source and did not miss any other work until the plant closed. The right shoulder problems are essentially unchanged since the 2001 award. Since 2001, Mr. Hayes has not suffered further medical impairment or been given additional restrictions. Mr. Hayes' new job involves manual

labor. He uses a six to eight-pound bar to open rail cars, dumps gravel on the railroad track, and occasionally uses a ten to twenty-pound sledgehammer in his work.

Mr. Hayes was forty-two years old at the time of the consolidated hearing. He has a high school diploma and has taken various vocational classes. He has completed classes in machine shop, small machine repair, and introduction to computers.

Counsel for Mr. Hayes pointed to Mr. Hayes' nine-month period of unemployment between the closing of the First Source plant and Mr. Hayes' new employment. Mr. Hayes has permanent work restrictions, including no repetitive, heavy lifting and no repetitive, overhead work. He still has pain and problems from his right shoulder.

The trial court took the matter under advisement to review the medical depositions. The trial court issued an order, which included a review of the facts and applicable law. The trial court essentially stated that all of the factors set forth by the General Assembly in Tennessee Code Annotated section 50-6-241(a)(2) must be considered. The trial court then set forth the following reasons for the increased award:

Several factors and the anatomical impairment ratings of the doctors have been set out above. The Court also considers the fact that the Plaintiff did return to Anderson Hickey [First Source], and was able to perform with difficulty the same job after his injury that he performed prior to his injury. He was terminated from his job due to no fault of his own. He was unemployed and received unemployment benefits for approximately 9 months, during which time he sought employment through various methods (through the office of Tennessee Employment Security and job fairs). He was hired by one company for a few weeks and then obtained his present job. He informed his new employer of all of his work-related injuries. He is able to perform the duties of his new job, but must work in awkward positions to accommodate his disabilities. (Other problems are stated above and below.) He is receiving approximately \$1 less per hour at his present employment than he was receiving at Anderson Hickey. The Plaintiff is a young but well-motivated worker. He continues to have trouble with his right shoulder and his right carpal tunnel syndrome, and these injuries continue to cause him pain and difficulty in performing his job duties. The Court finds that the Plaintiff is entitled to an additional 7% vocational impairment to the body as a whole pursuant to Tenn. Code Ann. §50-6-241(a)(2).

The leading Tennessee case regarding a section 241 reconsideration is *Brewer v. Lincoln Brass Works, Inc.*, 991 S.W.2d 226 (Tenn. 1999). *Brewer* holds that additional anatomical impairment is not necessary for reconsideration under section 241. Indeed, such would be an indication of a new injury, which would be handled by a new lawsuit and not a reconsideration. The *Brewer* court distinguished the reconsideration of a prior award from the aggravation of pre-existing or new injury:

An employer's workers' compensation liability is capped at 2.5 times the anatomical impairment rating when the employer returns an injured employee to

work at a wage equal to or greater than the wage at the time of the injury. Tenn. Code Ann. § 50-6-241(a)(1). If, however, the employer's attempts to accommodate an injured worker become futile, the worker may file for increased benefits under Tenn. Code Ann. § 241(a)(2). Pursuant to § 241(a)(2), a court may enlarge a workers' compensation award that was previously capped by the 2.5 multiplier in § 241(a)(1). Among the factors for consideration for enlargement of an award under § 241(a)(2) are the "employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in the claimant's disabled condition." Increased anatomical impairments and subsequent injuries are not factors for consideration under § 241(a)(2). The focus is purely on the issue of industrial disability.

A petition to enlarge a previous award under § 50-6-241(a)(2) is not the appropriate vehicle to use when a worker sustains additional injuries or additional anatomical impairment. A § 241(a)(2) petition is proper when the injured worker attempts to return to work but the original work-related disability later renders the injured worker unemployable with the pre-injury employer. Section 241(a)(2) then allows the injured worker to receive a new industrial disability rating when the employer's attempts to accommodate the worker fail. The new disability rating is not limited by the § 241(a)(1) cap and is based on the worker's previous anatomical impairment rating. We hold that if the worker, however, sustains additional impairment, whether caused by a subsequent work-related injury or work-related aggravation injury or aggravation of the original injury, the worker must file a new claim for workers' compensation rather than attempting to enlarge a previous award under § 241(a)(2).

*Brewer*, 991 S.W.2d at 228-29 (footnote omitted).

Thus, trial courts are to use the same factors in reconsidering a prior award that they would use in determining the initial award absent the caps. In other words, what was the case worth without the caps? Here, the trial court determined that the proper award was 42% to the body as a whole. The prior award of 35% was capped by the 2.5 times medical impairment rating set forth in Tennessee Code Annotated section 50-6-241(a)(1).

The record shows that the trial court properly used the factors set forth in Tennessee Code Annotated section 50-6-24(a)(2). It determined that an additional 7% to the body should be awarded. The Defendants have not carried their burden on appeal. The judgment of the trial court is supported by the record and should be affirmed.

## **B. Left Arm Injury**

Mr. Hayes sustained a new injury to his left arm. The diagnosed problem was carpal tunnel syndrome (“CTS”) of the left arm. A carpal tunnel release was performed. The trial court awarded Mr. Hayes 25% permanent partial disability to the left arm. After considering all of the evidence, the Defendants appealed and contend that the award was excessive and influenced by an improper rating under the AMA Guides.

### **1. The Excessive Award.**

Dr. William Fly was the treating physician and surgeon for Mr. Hayes’ left CTS. Dr. Fly assigned a permanent medical impairment rating of 5% to the left arm. Dr. Joseph C. Boals, III, was an evaluating physician who saw Mr. Hayes one time for the left CTS. Dr. Boals assigned a 10% anatomical rating. In addition, Dr. Boals stated that Mr. Hayes should avoid repetitive work and heavy gripping.

Mr. Hayes and his wife, Janet Hayes, testified as to Mr. Hayes’ problems. Mr. Hayes has problems grasping and holding items with his left hand. He has problems especially with small items and with a lawn mower and weed eater. He has problems sleeping.

In addition to reviewing the medical evidence, referred to above, the trial court stated the following:

The Plaintiff continues to complain of numbness in his fingers, and hurting, cramping, and aching of the muscle at the base of his thumb. The pain in his left arm and hand awakens him at night. He cannot hold small objects, such as small nuts and bolts. The vibration of power tools aggravate the pain. His grip is not strong, and he frequently drops items.

The Court must consider all pertinent factors, including lay and expert testimony, the employee’s age, education, skills, and training, local job opportunities, and capacity to work at types of employment available in the employee’s disabled condition. Many of these factors have been set out above. Based on the factors to be considered, the court finds that the Plaintiff has sustained a 25% impairment to his left arm.

Trial judges are given great latitude with regard to their decisions which are based upon their personal observations and credibility of the witnesses. The trial court found that Mr. Hayes continues to suffer problems with his left hand. The factors set forth above by the trial court are sufficient to justify a 25% vocational award even if Dr. Fly’s 5% medical impairment were the only medical impairment considered in this case.

## **2. The Improper Evidence.**

The Defendants also contend that the trial court erred in relying upon Dr. Boals' testimony. The Defendants claim Dr. Boals failed to follow the American Medical Association Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> edition. They contend Dr. Boals determined the impairment rating before Mr. Hayes was at optimal recovery time and that he did not have positive clinical findings of median nerve dysfunction.

Counsel for Mr. Hayes contends that the Defendants did not raise the objection at the trial level. The Panel agrees. There was no objection to the introduction of Dr. Boals' deposition at trial. Even if the trial court had excluded Dr. Boals' testimony about the impairment rating, the trial court could still have considered the remainder of Dr. Boals' deposition testimony. Regardless of whether Dr. Boals' deposition was considered, there is sufficient evidence to justify the trial court's award of 25% to Mr. Hayes' left arm.

## **IV. Conclusion**

\_\_\_\_\_The decisions of the trial court awarding Mr. Hayes an additional 7% permanent partial disability under Tennessee Code Annotated section 50-6-241(a)(2) for his initial case and 25% for the left arm due to the CTS, pursuant to Tennessee Code Annotated section 50-6-207(3)(ii)(m) (Supp. 2003), are affirmed, and this case is remanded to the trial court for further proceedings consistent with this opinion. The costs of appeal are taxed to the Appellants, for which execution may issue if necessary.

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W. FRANK BROWN, III  
SPECIAL 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 Appellants, First Source Furniture Group, and Travelers Insurance Company, for which execution may issue if necessary.

**IT IS SO ORDERED.**

**PER CURIAM**