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

June 28, 2005 Session

MICHAEL RAY WOLFORD v. ACE TRUCKING, INC., ET AL.

Direct Appeal from the Circuit Court for Decatur County
No. 2568 C. Creed McGinley, Judge

No. W2004-02905-WC-R3-CV - Mailed October 7, 2005; Filed November 14, 2005

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 Supreme Court of findings of fact and conclusions of law. The appellant, employee, argues that the trial court erred as a matter of law in finding that the employee was 100% permanently partially disabled and seeks an award of permanent total disability benefits. The appellees, the employer and the Second Injury Fund, argue that the trial court was correct in finding that the employee was not permanently and totally disabled. For the reasons stated below, the panel has concluded that the judgment of the trial court should be affirmed as modified.

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

ARNOLD B. GOLDIN, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and ROBERT CORLEW, III, SP. J., joined.

Paul G. Summers, Attorney General and Reporter and Juan G. Villasenor, Asst. Attorney General, Nashville, Tennessee for the appellee, Second Injury Fund.

Art D. Wells, Jackson , Tennessee, for the appellant, Michael Ray Wolford.

Michael Mansfield, and John D. Stevens, Rainey, Kizer, Reviere & Bell, Jackson, Tennessee, for the appellee, Ace Trucking, Inc.

MEMORANDUM OPINION

STANDARD OF REVIEW

The review of the findings of the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, 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). This court is not bound by the trial court's findings, but instead conducts its own independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn.1991).

HISTORY OF THE CASE

The employee, Michael Ray Wolford, filed his complaint for workers' compensation benefits alleging that he sustained an injury to his back on July 14, 2000, while in the course and scope of his employment with his employer, Ace Trucking, Inc. He later amended his complaint to add the Second Injury Fund. The issue presented at trial was the extent of the employee's permanent disability.

Following a trial on October 20, 2003, the court found the employee to be 100% permanently partially disabled. The court found that the employee had prior court approved workers' compensation awards totaling 42% to the body as a whole and assigned 58% of the award to the employer, and the remaining 42% to the Second Injury Fund. The order awarding 100% permanent partial disability to Wolford was entered on November 6, 2003. On November 20, 2004, the employee filed a notice of appeal.

On the initial appeal of this case, the Appeals Panel noted in its opinion that the trial court awarded benefits based on 100% permanent partial disability but that the workers' compensation statutes of this state contain no such classification. Vinson v. United Parcel Serv., 92 S.W.3d 380, 384–85 (Tenn. 2002). The Appeals Panel then remanded the case back to the trial court, mandating that the trial court clarify "whether it found the claimant to be permanently and totally disabled or permanently and partially disabled and entitled to receive the *maximum allowable award* for permanent partial disability."[1]

In the Order on Remand entered on September 23, 2004, the trial court found that the employee was entitled to an award of the maximum permanent partial disability allowable under the Tennessee Workers' Compensation Act, which the trial court found was 400 weeks of benefits at the employee's statutory workers' compensation benefit rate. On October 8, 2004, the employee filed his notice of appeal. It is the second appeal of this case which we now consider.

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[1] The opinion of the initial Appeals Panel, delivered by Joe C. Loser, Sp. J. and joined in by Janice M. Holder, J. and James F. Butler, Sp. J., was filed on September 1, 2004.

PERMANENT AND TOTAL DISABILITY

The employee was thirty-eight years old at the time of trial. He is a high school graduate with additional vocational training received while serving in the military and through a truck drivers training course. He spent the majority of his work history driving trucks of various types but has some other general experience as a laborer and welder. The employee had two prior workers' compensation claims for injuries which required three back surgeries. As a result of the two prior claims, the employee received previous court approved workers' compensation awards totaling 42% permanent partial disability to the body as a whole.

When the employee went to work for Ace, he informed his supervisor about his previous back injuries. The employee worked for the employer for about one and a half years, beginning in February of 1999, before he injured his back for the fourth time on July 14, 2000. He testified that he was pulling on a pin to slide tandems onto a trailer when he felt pain in his back radiating down his right leg. As a result of this injury his doctor, Dr. Eugene Gulish, an orthopaedic surgeon associated with Henry County Orthopaedic Surgery and Sports Medicine, Inc., performed another back surgery on March 1, 2001.

On November 7, 2002, Mr. Wolford was seen at the Semmes-Murphy Clinic by Dr. Maurice Smith for a neurosurgical evaluation. Dr. Smith did not recommend further surgery. In a transcribed note of December 13, 2002, Dr. Smith stated that Mr. Wolford was at maximum medical improvement and assigned him an anatomical impairment of 13% to the whole person.[2]

Dr. Gulish concurred in Dr. Smith's anatomical impairment rating of 13% to the body as a whole and released Mr. Wolford from his care on February 4, 2003.

Mr. Wolford was seen by numerous other physicians during the course of his treatment. On February 18, 2003, on referral by his attorney, he was seen by Dr. Joseph C. Boals, III, for an independent impairment evaluation. Dr. Boals found that Mr. Wolford had an overall anatomical impairment of 39% to the body as a whole.

As in his earlier appeal, the employee contends that he is permanently and totally disabled.

At the trial of this case, the trial court found the employee to be 100% permanently partially disabled and awarded him 400 weeks of benefits. The court specifically found that he was not permanently and totally disabled.[3]

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[2] The parties have stipulated in their "Pre-Trial Memorandum for Workers' Compensation Cases" that the date of maximum medical improvement is December 13, 2002.

[3] In the transcript of the trial proceedings of October 20, 2003, the court stated: ". . . I think the record is deficient as far as someone stating he's absolutely not capable of any type of gainful employment. . . . I feel it's a four-hundred-week award, rather than the permanent."

Because the employee had previous workers' compensation awards totaling 42% to the body as a whole, the trial court found the employer responsible for 58% of the award and the Second Injury Fund for the balance. The employee appealed from the trial court's award.

On appeal, the employee argued that the trial court erred in not finding the employee to be permanently and totally disabled. In reviewing the case on appeal, the Appeals Panel cited Vinson v. United Parcel Service, 92 S.W.3d 380, 384–85 (Tenn. 2002) and noted that

> the trial court awarded benefits based on *100 percent* permanent *partial* disablity. The workers' compensation statutes of this state contain no such classification as 100 percent permanent partial disability to the body as a whole. The facts are essentially undisputed and make it clear that Mr. Wolford is severely disabled from his work-related injury.

Apparently, because of some confusion about the trial court's intentions in light of the current statutory scheme, the Appeals Panel remanded the case for the trial court to "clarify whether it found the claimant to be permanently and totally disabled or permanently and partially disabled and entitled to the maximum allowable award for permanent partial disability."

On remand the trial court again found that the employee was "entitled to an award of the maximum permanent partial disability allowable under the Tennessee Workers' Compensation Act, which the Court finds is 400 weeks of benefits at his statutory workers' compensation benefit rate," rather than an award of permanent and total disability.[4]

Based upon our independent examination of the record, we concur with the trial court's findings that the evidence in this case does not support a finding of permanent and total disability.

To what permanent benefit then is the employee entitled?

MAXIMUM TOTAL BENEFIT

Under current workers' compensation law in Tennessee, there are four categories of compensable disability: (1) temporary total disability; (2) temporary partial disability; (3) permanent partial disability; and (4) permanent total disability. Tenn. Code Ann. § 50-6-207; Cleek v. Wal-Mart Stores, 19 S.W.3d 770, 776 (Tenn. 2000).

The employee argues that because there is no classification in our workers' compensation statutes of 100% permanent partial disability we are bound by the Supreme Court's decision in

[4] In the transcript of the hearing on remand, the trial court stated as follows: "I find that the record in this case did not support that particular statute saying 'permanent and totally disabled from any gainful employment whatsoever'. So that is what I said then, that is what I am saying now."

Vinson. In Vinson the Court stated

> [I]t appears impossible to find that an injured employee is 100% permanently partially disabled without simultaneously finding that the employee is 100% permanently and totally disabled. . . . Thus, an award of 400 weeks appears to be a statutory impossibility because such a finding would necessarily entail a finding of 100% permanent and total disability.

92 S.W.3d at 385, n.2.

The court's logic in Vinson is indisputable on its facts. In this case, however, the trial court on remand did not award 100% permanent partial disability. Rather it found that the employee was entitled to an award of the *maximum permanent partial disability* allowable under the Tennessee Workers' Compensation Act. At the hearing on remand from the initial appeal to the Appeals Panel, the trial court stated as follows:

> The Court makes this finding in this case that it was not the Court's intention, nor presently would it be the Court's intention, to find the plaintiff permanently and totally disabled but it was the Court's intent that he receive the maximum allowable award which would be four hundred weeks.

In Wausau Insurance Co. v. Dorsett, ___ S.W.3d ___ (Tenn. 2005), the Supreme Court, in a case involving the limits on temporary total disability benefits, did an analysis of the statutory term "maximum total benefit". The Court stated as follows:

> Employees are entitled to compensation for each class of disability resulting from a single compensable injury for which they qualify. Redmond [v. McMinn County], 354 S.W.2d at 437. However, unless an employee *is adjudged to be entitled* to permanent total disability benefits, the disability benefits that an employee may receive for a single injury may not exceed the "maximum total benefit." See Tenn. Code Ann. § 50-6-205(b)(1) (1999 & 2004 Supp.) ("The total amount of compensation payable under this part shall not exceed the maximum total benefit . . . .); Vinson v. United Parcel Serv., 92 S.W.3d 380, 384 (Tenn. 2002) (Emphasis added) . . . .
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> . . . The statutory definition of maximum total benefit is clear. The only category of disability benefits exempted from this 400-week limitation is permanent total disability benefits.

Wausau Ins. Co., ___ S.W.3d at ___ (Tenn. 2005) (footnote omitted).

In the present case the trial judge found in two separate hearings that the employee is *not*

entitled to an award of permanent and total disability. Rather, he found the employee to be entitled "to an award of the maximum permanent partial disability allowable under the Tennessee Workers' Compensation Act, which the Court finds is 400 weeks of benefits at his statutory workers' compensation benefit rate." Unlike the factual situation in Vinson, the statutory scheme does provide for a *maximum total benefit* of 400 weeks.

The employee in this case received temporary total disability benefits from the date of his injury on July 14, 2000, until he reached maximum medical improvement on December 13, 2002. Based on the trial court's ruling, the employee is entitled to permanent partial disability benefits for the balance of the *maximum total benefit* of 400 weeks that he has not already received in either temporary total or permanent partial disability benefits. The only exception would be if we were to find that the trial court erred in not finding the employee to be permanently and totally disabled. This we decline to do.

The Second Injury Fund will be responsible for any permanent partial disability benefits that exceed 232 weeks or 58% of 400 weeks.

CONCLUSION

For the reasons stated above, the judgment of the trial court is modified in accordance with this opinion. The cost of this appeal is taxed to the appellant and its sureties, for which execution may issue if necessary.

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ARNOLD B. GOLDIN, 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 Appellant, Michael Ray Wolford, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM