

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

September 15, 2006 Session

**JANETTE PHELPS v. MARK IV AUTOMOTIVE**

**Direct Appeal from the Circuit Court for Decatur County  
No. 2781 C. Creed McGinley, Circuit Judge**

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**No. W2006-00274-WC-R3-CV - Mailed January 11, 2007; Filed February 12, 2007**

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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 our findings of fact and conclusions of law. In this appeal, the employer asserts that the trial court erred in failing to apply the two-and-one-half times impairment cap set forth in Tennessee Code Annotated section 50-6-241(a)(1) and that the forty-two percent permanent, partial disability to the body as a whole, awarded by the trial court, was excessive. We conclude that the evidence presented does not preponderate against the findings of the trial judge and affirm the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Trial Court  
Affirmed**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and ROBERT E. CORLEW, III, SP. J., joined.

Lisa A. Houston, Jackson, Tennessee, for the Appellant, Mark IV Automotive.

Scott G. Kirk, Jackson, Tennessee, for the Appellee, Janette Phelps.

**MEMORANDUM OPINION**

**I. BACKGROUND**

Janette Phelps ("Ms. Phelps") was thirty-seven years of age at the time of trial. She graduated from high school and had one year of cosmetology schooling, but never received a certificate or used that training. She had no other educational or vocational training. Ms. Phelps began working at Mark IV Automotive ("Mark IV"), a manufacturer of automotive hoses, in 1997.

On June 23, 2004, Ms. Phelps was struck in the right shoulder by a tow motor driver. The impact caused her right arm to be pulled back, resulting in acute pain in her shoulder. Ms. Phelps had a similar injury in 1995, but this injury had resolved itself. She was referred to Dr. Charles W. White, Jr., who prescribed physical therapy and restricted her from using the arm at work. When the pain persisted, Ms. Phelps was referred to Dr. Harold M. Antwine, III, an orthopedic surgeon. After attempting further conservative treatment without success, Dr. Antwine performed arthroscopic surgery on November 15, 2004, during which he determined Ms. Phelps had an anterior labral tear and bursitis in the right shoulder. Dr. Antwine performed a partial debridement of the anterior labral tear and a subacromial decompression with complete bursectomy of the right shoulder.

After surgery, Ms. Phelps underwent physical therapy, as prescribed by Dr. Antwine, for approximately two months. She testified she obtained no relief from the problems she was having before the surgery. Dr. Antwine released her to return to work on March 7, 2005, with the only restrictions being no lifting more than twenty pounds with the right upper extremity from the waist to above shoulder height and no repetitive over-the-shoulder work with her right arm. Ms. Phelps returned to Dr. Antwine on March 11, 2005, stating she was unable to tolerate her employment. Dr. Antwine ordered nerve conduction studies and instructed her to avoid heavy gripping. An electrodiagnostic study of the right upper limb was conducted that revealed no evidence of any focal nerve entrapment, radiculopathy, plexopathy, or generalized peripheral neuropathy in the right arm. Dr. Antwine determined he could not find the source of Ms. Phelps' reported discomfort and discharged her from his care. He assigned her an impairment rating of eleven percent of the right upper extremity which equated to a seven percent impairment of the body as a whole using the *AMA Guide to Evaluation of Permanent Impairment*.<sup>1</sup>

Following her return to work, Ms. Phelps was assigned a job trimming radiator hoses. According to Ms. Phelps, this job was harder than the one she had been performing prior to her injury because she had to repetitively pull down a saw with her right arm. She told her employer that she could not do the job, and Mark IV moved her to another department. They assigned her to a glueing job that, according to Ms. Phelps, had more steps to it than the sawing. The job required that Ms. Phelps repetitively use her right hand which, in turn, caused pain in her right shoulder. Moreover, according to Ms. Phelps, the job required she lift totes containing hoses in order to get that product to her work station for processing. The totes weighed more than twenty-five pounds. Ms. Phelps testified she reported to Penny Ross, the Mark IV human resources manager, that she was having trouble doing that job. Mark IV assigned her to another job which Ms. Phelps described as similar to the previous ones and involved repetitive motion, use of her right arm, and lifting the totes containing hose. Ms. Phelps testified she was not physically able to do any of the jobs assigned to her.

From April 14 through May 6, 2005, Ms. Phelps was excused from work because of problems she was experiencing with her knee that she had injured in a fall. Ms. Phelps testified that

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<sup>1</sup>There was also a report from Dr. Joseph C. Boals, III, indicating that she had impairment of eighteen percent of the right upper extremity equated to an eleven percent (11%) impairment to the body as a whole.

while she was having problems with her knee, the real reason she was unable to work was because of her shoulder. Ms. Phelps testified she asked that her short-term disability be started because of the pain she was experiencing in her shoulder. The human resources manager, Ms. Ross, testified Ms. Phelps told her it was for an injury she had sustained that was not job related. When Ms. Phelps did not return to work following May 6, she was terminated by Mark IV on May 9, 2005, pursuant to a company policy that provided any employee who did not report to work for two days without calling in was considered to have voluntarily quit his or her job. Ms. Phelps has not worked since.

Ms. Phelps testified her shoulder is not improved to the point where she believed that she could return to work. When she lifts her shoulder, it steadily pops and locks. Ms. Phelps described her right shoulder as being weaker than her left. She testified she was unable to drive any distance, could not cook as often because cooking requires the use of her right hand, and was unable to do laundry because of the lifting. She testified she was unable to do any activity requiring the repetitive use of her right hand or lifting. She frequently used heating pads and cold packs to relieve the pain and swelling.

Penny Ross, the human resource manager for Mark IV Automotive, testified that Mark IV attempted to accommodate the restrictions provided by Dr. Antwine. They first placed Ms. Phelps on a job that required her to use a saw which she had to reach up to obtain and cut the hose. Ms. Phelps tried that job for a short time and came to Ms. Ross and reported that it caused her discomfort. They placed her on a different job station where she did not have to reach above her shoulder to assemble things. Ms. Phelps came to her and stated it was still causing discomfort and asked to go back to see her doctor. The doctor restricted her until Ms. Phelps underwent the nerve conduction study. She returned on April 11 with a note from Dr. Antwine providing for restrictions. Again, Mark IV attempted to accommodate her restrictions. They placed her at a work station requiring even less movement. The job, according to Ms. Ross, was within the restrictions imposed by Dr. Antwine. While the basket of hose that must be obtained by the operator weighs up to thirty-five pounds, the operator can, according to Ms. Ross, either take some of the hose out so that it doesn't weigh that much or have a supervisor bring it to the work station. Ms. Phelps was instructed to obtain the hose by one of those methods.

Ms. Ross offered a video showing the job that Ms. Phelps was asked to perform. This court has reviewed that video and, while the job does not appear strenuous, it requires continuously repetitive use of both left and right hands. Ms. Ross testified Mark IV had seven other work stations in the area where they could try to accommodate Ms. Phelps, all within the restrictions provided by Dr. Antwine.

The trial court found that Ms. Phelps had sustained a work related injury. The trial judge further found:

Ms. Phelps is a thirty-seven year old female with a high school education, went to cosmetology school but essentially did not or has not used that as far as advancing herself vocationally. History of basically assembly line type work. The

proof would support, she's been an excellent employee for Mark IV Automotive up until the time of her injury.

Based upon the evidence in this case, the Court finds that there is in fact not a meaningful return to work, that this turns, by in large, on the testimony of Ms. Phelps, who, as I said, has impressed the court with her sincerity, her honesty, her candor. And there is absolutely nothing in her testimony to indicate that she's trying to overstate the extent of her disability. As a matter of fact, she impresses me as just being very, very honest and straightforward.

In that same vein, it is obvious to the Court that she made an honest effort to return to her work, and as soon as she was back experienced difficulties which she advised them, placed on yet another job. And I do commend defendant for numerous attempts to accommodate this plaintiff . . . . [T]he Court finds that she, quite simply, was unable to continue her employment there despite the fact that the employer tried to accommodate her.

The trial court agreed with the treating physician that her anatomical impairment was seven percent. The trial court found that she had significant restrictions and that her disability should be six times the impairment or forty-two percent. The trial judge stated, "[T]he Court must assign specific reasons when you do five or six times. But the Court finds that they are there due to the lack of transferable skills, the significant restrictions, and the other factors that are under the Workers' Comp Law." From this ruling, Mark IV has appealed.

## II. STANDARD OF REVIEW

The standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); Lollar v. Wal-Mart Stores, Inc., 767 S.W.2d 143, 149 (Tenn. 1989). Where credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Long v. Tri-Con Indus. Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991).

## III. ANALYSIS

The first issue raised for review is whether the trial court erred in failing to apply the two-and-one-half times cap contained in Tennessee Code Annotated section 50-6-241(a)(1). That Code section provides, in part:

For injuries arising on or after August 1, 1992, and prior to July 1, 2004, in cases where an injured employee is eligible to receive any permanent partial disability benefits, pursuant to § 50-6-207(3)(A)(i) and (F), and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is two and one-half (2½) times the medical impairment rating . . .

Tenn. Code Ann. § 50-6-241(a)(1) (2005).

The Appellant contends this statutory cap is applicable because the plaintiff was offered a position within her restrictions at a wage equal to the wage she was receiving at the time of her injury, actually returned to work for a few days, and, thereafter, was terminated for being absent from work without notifying her employer for more than two days.

As the Appellant notes in its brief, an employee's return to work must not only be literal but also "meaningful." A return to work that the employee is unable to perform because of his or her injuries is not a meaningful return to work. See Newton v. Scott Health Ctr., 914 S.W.2d 884, 886 (Tenn. 1995). We have recognized that there will be a variety of factual situations where this court is called upon to determine whether a return to work or offer of a return to work is meaningful within the framework of the statute. Generally,

[i]f the offer from the employer is not reasonable in light of the circumstances of the employee's physical ability to perform the offered employment, then the offer of employment is not meaningful and the injured employee may receive disability benefits up to six times the amount of the medical impairment. On the other hand, an employee will be limited to disability of two and one-half times the medical impairment if his refusal to return to offered work is unreasonable. The resolution of what is reasonable must rest upon the facts of each case and be determined thereby.

Id. at 886.

The Tennessee Supreme Court has emphasized two factors in determining the reasonableness of an employer's offer of re-employment. First is the ability of the employee to perform the offered employment. Hardin v. Royal & Sunalliance Ins., 104 S.W.3d 501, 505-06 (Tenn. 2003); Nelson v. Wal-Mart Stores, Inc., 8 S.W.3d 625, 630 (Tenn. 1999). Second is the willingness of the employer to accommodate the work restrictions imposed by the employee's attending physician. Hardin, 104 S.W.3d at 505-06; Nelson, 8 S.W.3d at 630.

In the case before us, the trial court found Ms. Phelps made an honest effort to return to work at Mark IV but, due to the difficulties she experienced, was unable to continue working there. The trial court apparently also found the reason Ms. Phelps did not return to work and was subsequently terminated was also due to the difficulties she experienced when trying to work rather than

misfeasance in failing to report for work. These findings were necessarily based upon the testimony of Ms. Phelps who the trial court found to be a credible witness. In view of the deference we must afford the trial court with regard to credibility issues where the witness actually testified and was observed by the trial judge, we are unable to find the evidence preponderates against the trial court's findings with regard to this issue. We also note, however, that it was not entirely reasonable for the Appellant to have assigned an employee, who had sustained a shoulder injury and been out of work for approximately ten months, to positions requiring the repetitive reaching up and pulling down a saw to perform trimming operations or requiring continuously repetitive arm and hand movements. The ruling of the trial court is affirmed with regard to this issue.

The next issue raised on this appeal is whether the trial court's award of forty-two percent permanent partial disability to the body as a whole was excessive. The existence and extent of a permanent vocational disability are questions of fact for determination by the trial court and, as stated above, are reviewed de novo, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 170 (Tenn. 2002); Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). In assessing the extent of an employee's vocational disability, the trial "court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition." Tenn. Code Ann. § 50-6-241(b) (2005); Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990); Roberson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986). Further, the claimant's own assessment of his or her physical condition and resulting disabilities cannot be disregarded. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975); Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 778 (Tenn. 1972).

In this case, the trial court found the plaintiff to be a credible witness worthy of belief. According to the plaintiff's testimony, she did not believe her shoulder had improved sufficiently for her to return to work. She further testified that she was unable to do anything requiring the repetitive use of her right arm or lifting. Because of the deference that must be given the trial court who observed the witness and her demeanor while testifying, this Panel must agree with the trial court's finding that Ms. Phelps was unable to continue the type of employment she had performed prior to her injury.

Tennessee Code Annotated section 50-6-241(c) provides that "[i]f the court awards a multiplier of five (5) or greater, then the court shall make specific findings of fact detailing the reasons for awarding the maximum impairment." While the trial court's ruling is somewhat lacking in this regard, the trial judge did specify that his award of six times the impairment rating was based upon a lack of transferrable skills and the significant restrictions in her activities.<sup>2</sup> There is no evidence in the record that Ms. Phelps had any usable training or skills other than factory assembly

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<sup>2</sup>While the trial court also referred to "the other factors that are under the workers' comp law," we cannot consider those factors in view of Tennessee Code Annotated section 50-6-241(c) requiring "specific findings of fact detailing the reasons for awarding the maximum impairment."

work. According to the testimony of Ms. Phelps, she is unable to perform any work requiring the repetitive use of her right arm or lifting. An employee's own assessment of her physical condition and resulting disability is competent evidence for the court to consider in assessing the extent of vocational disability. Collins v. Howmet Corp. 970 S.W.2d 941, 943 (Tenn. 1998). Based upon this evidence, the trial court found Ms. Phelps had sustained a vocational disability of forty-two percent to the body as a whole. While this panel may have reached a somewhat different result with regard to the extent of Ms. Phelps' permanent disability, it is not our function to replace the trial court's judgment with our own. The legislature has given the trial court's findings of fact the presumption of correctness unless we find the evidence preponderates against the trial judge's findings, which, from a review of the evidence in this case, we cannot do.

#### IV. CONCLUSION

Accordingly, the judgment of the trial court is affirmed in all respects. The costs of the cause are taxed to the Appellant, Mark IV Automotive, and its surety, for which execution may issue if necessary.

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DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE  
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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, Mark IV Automotive, and its surety, for which execution may issue if necessary.

**IT IS SO ORDERED.**

**PER CURIAM**



