

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

September 29, 2006 Session

**HOLLY J. YOUNG v. CUMBERLAND COUNTY MEDICAL CENTER,
ET AL.**

**Direct Appeal from the Circuit Court for White County
No. CC1518M John J. Maddux, Jr., Circuit Judge**

**No. M2005-02550-WC-R3-CV - Mailed - January 5, 2007
Filed - February 12, 2007**

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 of findings of fact and conclusions of law. On this appeal, the sole issue presented is whether the trial court erred by failing to cap the recovery of the employee, Holly Young, at 2.5 times the medical impairment as required by Tennessee Code Annotated section 50-6-241(a)(1). In this case, Ms. Young sustained a shoulder injury to her right shoulder resulting in surgery. Following the first surgery, Ms. Young was returned to work performing light duty for her employer, Cumberland County Medical Center (CCMC). She resigned that employment due to progressively intense pain. Thereafter, Ms. Young underwent a second surgery. She was not offered employment by CCMC following her second surgery or after she had reached maximum medical improvement. The trial court determined Ms. Young's anatomical impairment to be fifteen percent to the body as a whole, held the statutory cap of benefits contained in Tennessee Code Annotated section 50-6-241(a)(1) did not apply, and awarded benefits based upon a fifty percent disability to the body as a whole. We affirm.

**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 CORNELIA A. CLARK, J., and MARIETTA SHIPLEY, SP. J., joined.

David C. Nagle, Chattanooga, Tennessee, for the Appellants, Cumberland County Medical Center and Liberty Mutual.

Ronald Thurman, Cookeville, Tennessee, for the Appellee, Holly J. Young.

MEMORANDUM OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

Holly Young was 36 years of age at the time of the trial of this case. She graduated from high school and attended two years of nursing school to get her Registered Nurse's degree. She began working for Cumberland County Medical Center (CCMC) in March 2003, to do home healthcare nursing as a team coordinator. Her employment required that she be able to lift and manipulate 21-50 pounds unassisted.

On September 10, 2003, she was at a patient's home to provide care to a woman who was wheelchair confined. As she was transferring her from her wheelchair to the bed, the woman clasped her hands around her neck and pulled. As she and the woman fell onto the bed, Ms. Young felt her neck pop and her right arm became twisted and trapped beneath the woman. Overnight, her neck and shoulder became extremely sore and stiff. She informed her employer about her injury and was sent to the emergency room at CCMC. Personnel there took x-rays of her neck and shoulder and recommended she see an orthopaedic physician. She was assigned to see Dr. Russell Garland. Dr. Garland treated her conservatively with physical therapy and muscle relaxers but when her pain persisted recommended surgery. The surgery was performed on December 18, 2003.

Following surgery and occupational therapy, Dr. Garland released Ms. Young to restricted or light duty. Ms. Young reported to her supervisor, Cindy Bilbrey, but was told there was not a light duty position available and that she should seek employment elsewhere. Then, near the end of February 2004, she was returned to work by CCMC auditing charts and preparing work schedules in the office. Ms. Young performed those jobs but experienced considerable pain and, on June 2, 2004, quit her job. According to Ms. Young, the reason she terminated her employment was the intense pain that resulted from the employment. On the resignation form that she turned in to Cindy Bilbrey, she assigned as the reason for her resignation the injury to her shoulder. Ms. Bilbrey returned the form to her and insisted she list at least three different reasons. As a result, Ms. Young added pay and family obligations as additional reasons for her resignation.

At the time of her resignation, Ms. Young was still under the care of Dr. Garland and was still experiencing ever-increasing pain and stiffness in her shoulder. A second surgery was performed in November 2004, to correct these problems. Following the second surgery, Ms. Young underwent eleven months of additional occupational therapy and, at the time of trial, was still under the care of Dr. Garland. Ms. Young testified she would not be able to return to her former job because she could not satisfy the lifting requirements. She did not believe she could perform light duty on a full-time basis because working for extended periods of time with her arm in front of her writing or typing caused increased pain, stiffness and weakness.

Ms. Young testified that she continues to have pain and stiffness on a daily basis. The shoulder has been better with rest, heat and over-the-counter medications such as Tylenol. She has

continued taking the arthritis medication, Celebrex, and a muscle relaxer, Soma. She has been unable to do yard work except for riding a lawn mower and has had difficulty with normal household cleaning and cooking. She had a functional capacity evaluation which indicated she could not return to her regular work at CCMC. She is chemotherapy certified but did not feel she was ready to return to any type employment at the time of trial because her shoulder had not healed. Ms. Young indicated she intended to return to work and intended to stay in the nursing field.

Cindy Bilbrey, the R.N. Administrator for the Home Health Department at CCMC Home Care, testified that when Ms. Young quit her job, she said she was going to stay home with her son and take care of the property that she and her husband had inherited from Mr. Young's father. Ms. Bilbrey denied that Ms. Young reported being in constant pain prior to her resignation. She admitted, however, that when Ms. Young resigned and listed her shoulder injury as the reason for her resignation, Ms. Bilbrey asked that she list two additional reasons.

Dr. Russell T. Garland testified by deposition. He is a board-certified orthopaedic surgeon practicing in Crossville, Tennessee. Dr. Garland first saw Holly Young on September 16, 2003. At the time she was an employee of CCMC Home Care. She related that while transferring a heavy patient to a bed, the patient collapsed and her right arm became trapped beneath the patient. Following her injury, she experienced persistent pain and was referred to Dr. Garland's office by the workers' compensation insurance carrier.

After examining her right shoulder, Dr. Garland prescribed medication and physical therapy. Ms. Young made little progress and began showing signs of impingement and bursitis in the shoulder. An MRI was performed, revealing fluid in the shoulder, which is consistent with impingement. Dr. Garland believed she should have the shoulder decompressed to relieve the impingement, and surgery was performed on December 18, 2003.¹

After the first surgery, Dr. Garland allowed Ms. Young to return to work on light duty. She initially was better but then became much worse. She manifested symptoms over the acromion-clavicular joint. Arthritis had developed in the joint that would become increasingly painful and debilitating over time. Dr. Garland recommended surgery to remove a portion of the distal clavicle.

¹Dr. Garland explained that the shoulder itself is seldom painful and seldom develops arthritis. The most common problem that develops in the shoulder is impingement. The ball and socket joint of the shoulder is under a bony ledge called the acromion. The acromion is a stationary, protective structure with the ball of the shoulder moving beneath it. There is a fluid sac called the bursa located between the two structures that allows the movement. When the shoulder is injured, the bursa swells up and gets caught between the front edge of the acromion and the ball of the shoulder. This is called impingement. The tissue in the shoulder reacts to the stress, inflammation increases producing more fluid, and the situation is made worse. The goal of Ms. Young's first surgery was to shave off the undersurface of the acromion in order to create enough space for the bursa to function without being pinched.

A second surgery was performed on November 11, 2004.² Following such a surgery, improvement is very slow and it takes about a year for the patient to reach maximum improvement.

In Dr. Garland's opinion, Ms. Young will retain a sixteen percent impairment to the right shoulder extremity which correlates to a ten percent whole person impairment. Dr. Garland agreed that Ms. Young would be entitled to an additional ten percent impairment of the right upper extremity because of the resection of the distal clavicle. According to Dr. Garland, Ms. Young should avoid heavy lifting at or above waist level and any activity that causes her pain.

The trial court found Ms. Young to be a very credible witness but indicated it was not persuaded by Ms. Bilbrey's testimony. The trial court found that, at the end of February, Ms. Young returned to CCMC and tried to do her work but quit when the pain became so intense that she was no longer able to work. Her resignation due to pain was corroborated by the fact that shortly thereafter Dr. Garland performed a second surgery made necessary by Ms. Young's progressively worsening pain. The trial court found Ms. Young's anatomical impairment to be fifteen percent (15%) to the body as a whole based upon Dr. Garland's testimony. In the opinion of the trial court, CCMC failed to prove it offered to return Ms. Young to work following her second surgery or reaching maximum medical improvement. As a result, the trial court determined the 2.5 cap provided for in Tennessee Code Annotated section 50-6-241(a)(1) did not apply and awarded Ms. Young benefits based upon a fifty percent permanent partial disability to the body as a whole. From this ruling, CCMC has appealed.

II. SCOPE 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) (2005). When 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. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where 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. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

²According to Dr. Garland, when a bone is operated on, it has a tendency to remodel. The acromion abuts the end of the collarbone. After the acromion remodeled, Ms. Young developed arthritis between these two bones, and Dr. Garland had to perform a second surgery to remove the tip of the collarbone so that it would not abut against the acromion. This surgery is described as a resection of the distal clavicle.

III. ANALYSIS

The sole issue presented for review is whether the trial court erred in failing to apply the 2.5 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).

CCMC contends Ms. Young voluntarily resigned her employment on June 2, 2004, giving reasons for her resignation not related to her injury and, thus, is entitled to enforcement of the statutory cap contained in the above Code section. We disagree and affirm the ruling of the trial court that the 2.5 times cap provided for in the Workers' Compensation Law was inapplicable to this case.

Courts in this state have held that in order for the statutory 2.5 cap to apply, the offer of employment or return to work must be "meaningful." Thus 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 Center, 914 S.W.2d 884, 886 (Tenn. Workers' Comp. Panel 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 the 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.

The Tennessee Supreme Court has consistently stated the ability of the injured employee to perform the offered employment is determinative of whether the return to work or offer of return to work is meaningful. In Lay v. Scott County Sheriff's Dep't, 109 S.W.3d 293, 298 (Tenn. 2003), the Court stated, "[c]learly, if an employee returns to work but is unable to perform his or her duties due

to a work-related injury, then the worker's resignation would be reasonably related to the injury, and there would be no meaningful return to work." In Hardin v. Royal & Sunalliance Ins., 104 S.W.3d 501 (Tenn. 2003), the Court stated that a trial court could reconsider a previous award and exceed the 2.5 times cap if the subsequent resignation was reasonably related to the injury as where the resignation is "due to the employee's inability to perform the work." Id. at 506. While Hardin was a reconsideration case brought pursuant to Tennessee Code Annotated section 50-6-241(a)(2), the Tennessee Supreme Court has held the same standard should be applied to an initial assessment. Lay, 109 S.W.3d at 298.

In the case before us, the trial court found Ms. Young was unable to perform the work she was assigned on light duty following her first shoulder surgery due to the progressively intense pain she experienced. We have carefully reviewed the record and are unable to find that the evidence preponderates against this finding, especially in view of the deference we must afford the trial court with regard to the credibility of witnesses who personally testified before it.

The circumstance that differentiates this case from the precedents we have discussed is that the resignation took place during the time Ms. Young was still being treated for her injured condition and prior to her reaching maximum medical improvement. We have held that an employer that wishes to limit the award to the 2.5 times impairment limitation of Tennessee Code Annotated section 50-6-241(a)(1) has the burden of establishing, by a preponderance of the evidence, that a meaningful offer of a return to work was made at a wage equal to or greater than the pre-injury employment. Ogren v. Housecall Health Care, Inc., 101 S.W.3d 55, 57 (Tenn. Workers' Comp. Panel 1998). As previously stated, in order for an offer of return to work to be meaningful, the offered employment must be within the employee's ability to perform. Newton, 914 S.W.2d at 886. After Ms. Young resigned her employment on June 2, 2004, due to her inability to perform the work, there is no evidence CCMC offered her meaningful employment or, for that matter, any employment at all during her recovery or after she had reached maximum medical improvement. In a similar situation, this panel has held that even though an employee may have been unable to perform light duty during the course of his treatment and recovery, if, after the employee has reached maximum medical improvement, the employer again offers meaningful employment and the offer is unreasonably refused, the statutory cap will be applied. Vowell v. Clinton Home Center, E2004-01477-WC-R3-CV, 2005 WL 1474596 at *4 (Tenn. Workers' Comp. Panel June 22, 2005). Because the CCMC made no meaningful offer of employment following Ms. Young's resignation due to her inability to perform the work assigned to her, the trial court correctly determined the statutory cap contained in Tennessee Code Annotated section 50-6-241(a)(1) did not apply.

IV. CONCLUSION

Accordingly, the judgment of the trial court is affirmed in all respects. The costs of this appeal are taxed to the Appellants, Cumberland County Medical Center and Liberty Mutual.

DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
SEPTEMBER 29, 2006 SESSION

HOLLY J. YOUNG v. CUMBERLAND COUNTY MEDICAL CENTER, ET AL

**Circuit Court for White County
No. CC1518M**

No. M2005-02550-WC-R3-CV - Filed - February 12, 2007

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 appeals 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 will be taxed to the Appellants, Cumberland County Medical Center and Liberty Mutual, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM