

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 16, 2012 Session

BRIAN RAINES v. VOUGHT AIRCRAFT INDUSTRIES, INC. ET AL.

**Appeal from the Chancery Court for Davidson County
No. 06-23-III Ellen Hobbs Lyle, Chancellor**

**No. M2011-01171-WC-R3-WC - Mailed June 1, 2012
Filed August 17, 2012**

Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. The employee filed this action for reconsideration of a 2006 workers' compensation settlement pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(B)(i) (2008). The settlement was based on a 2005 injury consisting of lumbar disc herniations that resulted in a 12% anatomical impairment rating to the body as a whole. The employee made a meaningful return to work, and his recovery was therefore capped at 1.5 times the impairment rating—18%. The cited statute allows reconsideration when the employee is no longer employed by his pre-injury employer, as occurred in this case when his employer was acquired by another company in 2010. The trial court found the original settlement adequately compensated the employee for his vocational disability and declined to award additional benefits. We affirm the trial court's judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;
Judgment of the Chancery Court Affirmed**

E. RILEY ANDERSON, SP. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, C.J., and JEFFREY S. BIVINS, SP. J., joined.

B. Keith Williams and James R. Stocks, Lebanon, Tennessee, for the appellant, Brian Raines.

Stephen W. Elliott and Fetlework Balite-Panelo, Nashville, Tennessee, for the appellees, Vought Aircraft Industries, Inc., American Home Assurance Company, and Triumph Aerostructures—Vought Aircraft Division.

MEMORANDUM OPINION

Factual and Procedural Background

Brain Raines (“Employee”) was employed by Vought Aircraft Industries, Inc., (“Employer”) as an aircraft assembler when he injured his back on January 26, 2005, while moving a fifty-five-gallon drum containing acetone, which weighed approximately 357 pounds. Employee was treated by Dr. Manuel Weiss, a neurosurgeon, who diagnosed lumbar disk herniations at the L1-2 and L2-3 levels of the spine. In July 2005, after a period of conservative treatment, Dr. Weiss performed surgery consisting of a lumbar laminectomy and discectomy. After the surgery, he assigned an impairment rating of 12% to the body as a whole and placed permanent restrictions on the Employee to avoid repetitive bending and stooping, as well as lifting more than fifty pounds. On October 24, 2005, Dr. Weiss released Employee from his care.

After his release, Employee was able to return to his pre-injury job, and on January 5, 2006, he settled his workers’ compensation claim for 18% permanent partial disability to the body as a whole. Employee was not represented by counsel. The settlement provided for future medical benefits and preserved Employee’s right to seek reconsideration pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(B), which allows reconsideration if the employee is no longer employed by his pre-injury employer.¹

In June 2010, Triumph Aerostructures, LLC, acquired Employer, and Employee was employed by Triumph thereafter. On August 17, 2010, the Employee filed his petition for reconsideration based upon the change of employers.²

¹ “If an injured employee receives benefits for body as a whole injuries pursuant to subdivision (d)(1)(A) and the employee is subsequently no longer employed by the pre-injury employer at the wage specified in subdivision (d)(1)(A) within four hundred (400) weeks of the day the employee returned to work for the pre-injury employer, the employee may seek reconsideration of the permanent disability benefits.” Tenn. Code Ann. § 50-6-241(d)(1)(B)(i).

² In Perrin v. Gaylord Entm’t Co., 120 S.W.3d 823 (Tenn. 2003), and Barnett v. Milan Seating Sys., 215 S.W.3d 828 (Tenn. 2007), the Tennessee Supreme Court interpreted the meaning of “pre-injury” employer in the context of a reconsideration action when there was a sale or acquisition of the pre-injury employer after the employee’s receipt of benefits. “Perrin holds that an employee is no longer working for his or her employer if that company is purchased by a new entity, and this is so even if the employee is performing the same job duties at the same rate of pay at the same location.” Barnett, 215 S.W.3d at 833. Tennessee Code Annotated section 50-6-241(d)(1)(C)(i) has effectively abrogated Perrin and Barnett as to injuries occurring after July 1, 2009. Jenkins v. Yellow Transp., Inc., No. M2009-02471-WC-R3-WC, 2011 WL 1418546, *5 (Tenn. Workers’ Comp. Panel Apr. 13, 2011).

At the reconsideration trial on April 20, 2011, Employee testified that he was fifty one years old, divorced, and had five children. He stopped attending high school in the ninth grade but later received a GED. He also obtained a technical certificate from an aviation course as an airframe and power plant mechanic. His prior work experience included construction work and automobile repair. Employee testified, however, that he was not physically able to return to either construction or automotive work. Since 1998, Employee has worked as an aircraft assembler for Employer, and since June 2010, for Triumph Aerostructures. Since returning to work after his 2005 injury, Employee has continued to work at the same job, at the same location, and at the same salary. Employee has worked four days a week, ten hours a day, and in 2010 he worked sixty-five additional days. Employee's job consists of building, drilling, moving parts, and assembling aircraft structure and parts. The physical requirements of the job include handling and carrying parts, operating pneumatic tools, and frequently climbing ladders. Employee testified that he has continued to suffer back pain, stiffness, and weakness in one of his legs since his surgery. As a result, he has worked more slowly than prior to the injury, especially on ladders. Employee enjoys outdoor activities and had participated in rock climbing, hiking, and riding dirt bikes prior to the injury. After the injury, he was limited to light hiking. Employee conceded that he has not seen Dr. Weiss, or any other physician, for treatment or medication since being released in 2005.

According to Employee, Triumph's business had declined in recent times because several contracts had been completed without being replaced by new contracts. The size of the plant's workforce had also been reduced, but this had been accomplished through attrition and buyout programs, rather than layoffs. He testified that his level of seniority did not change with the change of employers and that he has maintained the same seniority since his 2005 injury, where he was near the middle of the seniority list for all employees.

While Employee offered no other witnesses, he introduced Dr. Weiss's medical deposition. Dr. Weiss explained that in 2005 he had placed permanent restrictions on Employee to avoid repetitive bending and stooping and to avoid lifting more than fifty pounds. Dr. Weiss declined to offer any opinion about Employee's present condition, explaining that he had not seen Employee since his release in 2005. No vocational expert testified, and the defense offered no witnesses.

The trial court found that Employee had sustained a permanent partial disability of 18% to the body as a whole from the January 2005 injury and awarded no additional disability benefits.² Employee has appealed, contending the trial court erred by failing to

²The parties stipulated at trial that the January 2006 settlement had been based upon an incorrect weekly
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increase his permanent partial disability award.

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) (2008). When the trial court has heard in-court testimony, considerable deference must be afforded to the trial court's findings of credibility and assessment of the weight to be given to in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). 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. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Employee contends that the evidence preponderates against the trial court's decision declining to increase his permanent partial disability award. Specifically, he argues that his age, education, training, skills, and work experience, the absence of other aircraft manufacturers in the local job market, and his testimony concerning the effects of his injury, all weigh against the trial court's decision. He further argues that the trial court placed "excessive weight" on his continued post-injury employment in arriving at its decision. In support of these arguments, Employee points out that permanent partial disability is measured by the loss of *ability* to successfully find and maintain employment, rather than the existence of actual financial loss due to a compensable injury. See Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 217 (Tenn. 2006).

Employer responds that the trial court properly found that Employee sustained no additional vocational disability and correctly considered all the factors set out in Tennessee Code Annotated section 50-6-241(d) (2)(A) and did not unduly rely upon any single factor. The preponderance of the evidence supports the trial court's judgment.

The trial court explained its decision as follows:

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benefit rate. The trial court modified the amount of the original settlement to correct that error. Neither side has appealed from the trial court's ruling on this issue.

Applying the . . . factors [set out in Tennessee Code Annotated section 50-6-241(d)(2)(A)] to this reconsideration matter, the Court finds that Mr. Raines has sustained an 18% permanent partial impairment to the body as a whole - the award provided in the 2006 settlement. This finding is based upon the testimony on cross-examination of Mr. Raines that since the acquisition of Vought Aircraft by Triumph Aerostructures, Mr. Raines has had no interruption in work and has retained the same job, with the same pay, at the same location, with the same seniority, and with virtually the same co-workers. Mr. Raines testified that he is performing the same tasks, requiring the same physical exertion and ability, as he was prior to and at the time of the 2006 settlement. Thus, in terms of an actual effect on his present salary or job for the last five years, the injury has had none.

Where the injury has had an effect is in Mr. Raines' ability to find jobs in the open labor market were he to lose his present job. Mr. Raines is older, and the Court accredits his testimony that his pace is slower. The Court also sees from Mr. Raines' work history, that he has predominantly worked manual and physically intensive jobs. Given his age, his back surgery, and his permanent restrictions, Mr. Raines' prospects for locating work in his fields of experience are less.

Nevertheless, comparing those reduced prospects to the facts of Mr. Raines' present and continuous employment for the last five years, his seniority, and that he has not required medical treatment, the Court finds that the 18% permanent partial impairment to the body as a whole awarded under the 2006 settlement adequately takes into account and compensates Mr. Raines for the vocational impact of the 2005 injury. For these reasons, the Court shall not increase the award of 18% permanent partial impairment to the body as a whole on this petition to reconsider.

The extent of an injured worker's permanent disability is a question of fact. Lang v. Nissan N. Am., Inc., 170 S.W.3d 564, 569 (Tenn. 2005) (citing Jaske v. Murray Ohio Mfg. Co., 750 S.W.2d 150, 151 (Tenn. 1988)). In determining the extent of permanent disability, "the trial court shall 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 claimant's disabled condition." Tenn. Code Ann. § 50-6-241(d)(2)(A).

We are satisfied that the trial court carefully considered all of the factors relevant to the issue of disability. The trial court expressly recognized that, in a case such as this one, disability is to be determined based not only upon the actual economic effects of the injury,

but the future potential economic effects as well. The trial court found that Employee had remained in the same job, with the same pay, and with the same seniority for over five years since his injury and had not required any medical treatment. The trial court found that those factors, considered with his reduced future prospects, did not entitle him to an increase in disability and that the original 18% award adequately compensated him for the vocational impact of the 2005 injury. Having carefully examined the entire record and afforded appropriate deference to the trial court's credibility determinations, we conclude that the evidence does not preponderate against the trial court's decision.

Conclusion

The judgment is affirmed. Costs are taxed to Brian Raines and his surety, for which execution may issue if necessary.

E. RILEY ANDERSON, SPECIAL JUDGE

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JUDGMENT

This case is before the Court upon the motion for review filed by Brian Raines pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Brian Raines, for which execution may issue if necessary.

Clark, C.J., not participating