

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
May 18, 2015 Session

**CHRISTOPHER SHONDALE STACEY**  
**v. NISSAN NORTH AMERICA, INC. ET AL.**

**Appeal from the Circuit Court for Rutherford County**  
**No. 54759 J. Mark Rogers, Judge**

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**No. M2014-00796-SC-R3-WC – Mailed August 21, 2015**  
**Filed October 15, 2015**

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Employee was terminated as a result of a verbal altercation with an employee of a contractor at his employer's wellness center. He thereafter sought reconsideration of his three previous workers' compensation claims. Employer asserted that Employee was not eligible for reconsideration because he was terminated for misconduct connected with his work. See Tenn. Code. Ann. § 50-6-241(d)(1)(B)(iii)(b) (2014). The trial court found that Employer had not sustained its burden of proof that Employee's misconduct was connected with his employment, determined that Employee was entitled to reconsideration, and awarded additional permanent disability benefits. Employer has appealed, contending that the trial court erred in its ruling concerning the termination, incorrectly excluded evidence of statements given by the contractor's employee and erred by finding that Employee established that he was entitled to disability benefits above those he had already received. The 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 pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(a) (2014) Appeal as of Right;**  
**Judgment of the Circuit Court Affirmed**

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, J. and PAUL G. SUMMERS, SR. J., joined.

Randolph A. Veazey and Thomas W. Tucker, III, Nashville, Tennessee, for the appellants, Nissan North America, Inc. and Ace American Insurance Company.

R. Steven Waldron, Murfreesboro, Tennessee, for the appellee, Christopher Shondale Stacey.

## OPINION

### Factual and Procedural Background

Christopher Stacey (“Employee”) was employed by Nissan North America (“Employer”) as a production worker from July 10, 2000, until December 7, 2011. During the term of his employment, he sustained three compensable injuries that resulted in verdicts or settlements. He injured his left shoulder in August 2006. A trial was held in June 2007 and a judgment was entered in Employee’s favor. The trial court determined that Employee’s left shoulder injury resulted in an anatomical impairment of 6% to the body as a whole and assigned workers’ compensation benefits based on a 9% permanent partial disability rating, resulting in a lump sum recovery of \$24,552.

In August 2007, Employee injured his neck. An order of settlement was entered in March 2009 finding a 25% anatomical impairment rating, assigning workers’ compensation benefits based on a 31.875% permanent partial disability rating, and awarding Employee a judgment for \$90,783.05. Finally, in November 2010, Employee developed carpal tunnel syndrome in his left hand. An order of settlement was entered in May 2011 finding a 2% anatomical impairment rating, assigning workers’ compensation benefits based on a 2.55% permanent partial disability rating, and affording Employee a lump sum recovery of \$3,901.50.

On November 28, 2011, Employee was involved in an altercation with a contract employee working at the Nissan Activity Center (“NAC”), that ultimately led to Employee’s termination. The NAC is a facility that offers various wellness activities to Nissan employees and their families including cardiovascular exercise, weightlifting, group exercise classes, basketball, tennis, and racquetball. The facility is located on Employer’s campus, approximately one-fourth of a mile from Employer’s production area and Employer has a contract with MediFit Corporate Services (“MediFit”) to staff and operate the NAC. While Employer owns the NAC building, Employer has no employees assigned to the facility. Matthew Mitchell, the other party to the November 28, 2011 altercation, was a part-time employee of MediFit whose duties included monitoring exercise participants, picking up weights, cleaning equipment, working the front desk, greeting members as they entered, saying good-bye when they left and

miscellaneous computer duties. It is undisputed that he was the sole MediFit employee at the NAC on the evening of the November 28, 2011 incident.

On November 28, the NAC closed at 9:30 p.m. Employee had worked a full shift, from 7:30 a.m. to 5:30 p.m., and after finishing his shift, he had returned home to fix dinner for and otherwise care for his children. His wife arrived home from work later in the evening, and Employee then went to the NAC to work out. He arrived at approximately 8:45 p.m. and went to the weight room to begin his workout routine. Employee testified that, at about 9:23 or 9:25 p.m., Mr. Mitchell flipped the lights in the weight room off and on and told Employee it was time to go. Employee checked his cell phone and the wall clock, told Mr. Mitchell he had five minutes left in his workout, and further stated that he would finish his routine and leave before 9:30 p.m. According to Employee, Mr. Mitchell became angry and began arguing with him. Employee stated that, during this portion of their argument, Mr. Mitchell came within a few inches of him. Eventually, both men left the weight room and proceeded to the lobby, arguing as they went.

Employee testified that Mr. Mitchell “ran [him] out early” on two earlier occasions. He said that Mr. Mitchell called him a “silverback gorilla” as they walked toward the exit. Employee told Mr. Mitchell that he was going to report the incident to Employer’s Human Resources department and that Mr. Mitchell’s job might be in jeopardy. Employee stated that he twice slammed his hand on the desk in the lobby area and agreed that the argument between himself and Mr. Mitchell was “heated.” He agreed that he told Mr. Mitchell that he must hate his job, called Mr. Mitchell an idiot, told him that he “was making a huge mistake by messing with” him, and mentioned that he was twice Mr. Mitchell’s size. Employee stated that he did not curse or threaten Mr. Mitchell nor did he touch him during the course of the argument. As Employee was leaving, Mr. Mitchell made a telephone call. Employee thought Mr. Mitchell was calling his supervisor and heard him say that someone was being belligerent. Employee then left the NAC.

A video camera was located in the lobby area of the NAC and a video recording of the latter stage of the argument was introduced into evidence. The recording is about four minutes long, contains no audio, and it shows Employee and Mr. Mitchell walking toward the exit. Both men have their backs to the camera. Mr. Mitchell goes behind the desk and continues to face away from the camera. Employee turns toward Mr. Mitchell, speaking and gesticulating. It is apparent that Employee is agitated. At various times, he points his finger at Mr. Mitchell and pounds his hand on the desk. He appears to look at a wall near the desk. He partially exits but returns to the lobby, continuing to speak in Mr. Mitchell’s direction. Eventually, he leaves. Because of the camera angle, it cannot be determined if Mr. Mitchell was speaking to Employee. Mr. Mitchell does not flinch, retreat, or otherwise appear to be threatened. At the end of the recording, Mr. Mitchell is holding a telephone in his hand.

At the time of trial, Mr. Mitchell was no longer employed by MediFit and did not testify. MediFit's Program Manager for the NAC, Jason Anderson, testified that he received the call shown on the video recording between 9:30 and 10:30 p.m. on June 28, 2011. He stated that Mr. Mitchell told him that a situation with a member had become "volatile." Mr. Mitchell then proceeded to tell him that he had been threatened and that the member had left the facility. Mr. Anderson directed him to lock the door and call Employer's security department, then to prepare a written report of what had taken place. In response, he received an email message from Mr. Mitchell at 11:07 p.m. containing Mr. Mitchell's written report of the incident. Mr. Anderson further testified that he takes reports of threats against his employees seriously, routinely requests that employees who have been threatened create a written report of the incident, and that he maintains these records in his office as a part of the regularly conducted activity of the business. Employer offered the email report into evidence but Employee's objection on hearsay grounds was sustained.

Employee reported the incident to his supervisor, Chad Rowland, when he arrived at work the next morning. An investigation was commenced by Employer's Human Resources department. Employee was interviewed by Gavin Higgins, an Employee Relations Specialist. Mr. Mitchell was interviewed by Thomas Storey, a Human Resources Representative and a memorandum of this interview was created at the request of Gayle Robinson, Employee Relations Manager for Employer. Ms. Robinson further testified that the memorandum Mr. Storey created was made at or near the time of the occurrence, transmitted by a person with knowledge of and a duty to transmit the record, kept in the ordinary and regularly conducted activity of Employer, that it was the regular practice of Employer to make or have these memorandums, and that she was the custodian of those records. Employer sought to introduce Mr. Storey's memorandum concerning the interview and to have him testify concerning the statements made to him by Mr. Mitchell. The trial court sustained Employee's hearsay objection to this evidence. Employer made an appropriate offer of proof as to both the document and proposed testimony.

The statements of Employee and Mr. Mitchell, along with the video recording, were gathered by Human Resources personnel and presented to several supervisory personnel from Employee's work area. These included Chad Rowland (Employee's immediate supervisor), David Stokes (Department Manager), and Jeff Younginer (Plant Manager for Employee's area). The decision was made to terminate Employee based on the determination that Employee's "conduct towards a contract employee cannot be condoned. Contract employees are entitled to a work environment that is free from harassment and threats from Nissan employees." Gale Robinson, Gavin Higgins, and Thomas Storey all testified that normal procedures were followed in the decision-making process leading to the termination.

However, Employee presented testimony from three Nissan employees who had received lesser discipline for arguments on the job. Seng Chan Merritt and Toby Merritt both testified regarding an argument they had while on the clock where Mr. Merritt grabbed Ms. Merritt's arm to prevent her from walking away. Both Merritts received written warnings as a result of the incident but were not terminated. Donald Maroney testified that he was disciplined for pushing another employee with the back of his hand after that employee made disparaging remarks towards him. Mr. Maroney testified that he was given a verbal warning and was not terminated. Both incidents took place several years before Employee's termination.

Employee was thirty-nine years old when the trial occurred. He is a high school graduate, with no additional education. Prior to being hired by Employer, he had worked as a contract production employee of Fluor Daniels at Employer's facility. His job for Employer at the time of his termination was "absentee head." This job required him to be able to perform every production job in his work area and also to make certain repairs. He described the position as being similar to a "line leader." He applied for the position and considered it to be a reward. He testified that though his job was physically demanding, he was able to perform it without difficulty. The only activity restriction placed upon him as a result of his three compensable injuries was that he was to perform overhead work for no more than one-third of his work day. Prior to his termination, he regularly lifted weights and played softball for two teams. He continued these activities after his termination.

After his termination, Employee had carpal tunnel surgery on his right hand in January 2013. He was released by his surgeon, Dr. Douglas Weikert, in June 2013. He worked for his brother's lawn care business during the summer of 2013 and also worked as a temporary warehouse supervisor for Essex Distributing from October 2013 through February 2014. He was laid off by Essex due to budget cuts and was unemployed at the time of trial.

While no additional expert medical proof was offered at trial concerning the effects of Employee's injuries, Employee testified that his left shoulder was not as strong as it had been before August 2006, that his range of motion was diminished, and that he had aches and pains in that area. He testified that he continues to have pain in his neck, as well as having low mobility and frequent headaches resulting from his prior neck injury. He testified that his neck had become worse since the 2009 settlement and that he had received trigger point injections and other treatments since the settlement which he paid for out of pocket. He testified that at the time of trial he was seeking approval for additional medical treatment for his neck pursuant to his right to lifetime medical benefits. With respect to Employee's left hand carpal tunnel injury, he testified that his hand "tingles and goes numb every once in a while, and [his] strength isn't the same as it was."

The trial court issued its decision from the bench. After a thorough review of the evidence and arguments presented by both sides, it found that Employee's "alleged misconduct in this case is not connected with [his] employment." On that basis, it concluded that he was entitled to reconsideration of his prior awards. It found that he had sustained an 18% permanent partial disability to the body as a whole due to the shoulder injury, an increase of 9% permanent disability over the previous award, and awarded Employee an additional \$24,522 for that injury. It found that Employee had sustained a 50% permanent partial disability to the body as a whole as a result of the neck injury, an increase of 18.125% permanent disability over the previous award, and awarded Employee an additional \$51,692.50. Finally, it found that Employee had sustained a 6% permanent partial disability to the body as a whole as a result of the left hand carpal tunnel injury, an increase of 3.45% over the previous award, and awarded Employee an additional \$5,278.50. All together, the trial court found that Employee suffered an additional 30.575% permanent partial disability and awarded Employee an additional \$81,523 for his three injuries. Judgment was entered in accordance with the trial court's findings. Employer has appealed, contending that the trial court erred by finding that Employee's misconduct was not connected with his employment, by excluding statements given by Mr. Mitchell from evidence, and by finding that Employee's permanent disability was greater than that recovered in his previous awards and settlements.

## II. Standard of Review

Appellate review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(a)(2) (2014),<sup>1</sup> which provides that appellate courts must "[r]eview . . . the workers' compensation court's findings of fact. . . de novo upon the record of the workers' compensation court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." See also Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). As the Supreme Court has observed many times, reviewing courts must conduct an in-depth examination of the trial court's factual findings and conclusions. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court's findings based upon documentary evidence such as depositions. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

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<sup>1</sup> The text of the statutes currently in effect contains no meaningful differences from that of the statutes in effect at the time of the proceedings in the trial court. Thus, quotations and citations in this opinion are to the current statutes.

### III. Analysis

#### *A. Employee's Claim for Reconsideration Under Tennessee Code Annotated Section 50-6-241(d)(1)(B)(iii)(b)*

Employee's request for reconsideration is governed by Tennessee Code Annotated Section 50-6-241(d)(1)(B), which provides (in pertinent part):

(i) 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 partial disability benefits. . . . (ii) . . . (iii) Notwithstanding this subdivision (d)(1)(B), under no circumstances shall an employee be entitled to reconsideration when the loss of employment is due to either:

(a) The employee's voluntary resignation or retirement; provided, however, that the resignation or retirement does not result from the work-related disability that is the subject of such reconsideration; or (b) The employee's misconduct connected with the employee's employment.

The dispositive issue in this appeal is whether the trial court erred in ruling that Employer failed to carry its burden of proving Employee's loss of employment resulted from Employee's employment-connected misconduct.

Tennessee Code Annotated section 50-6-241(d)(1)(B)(iii)(b) was added to the workers' compensation law by the General Assembly in 2004. See Act of May 20, 2004, ch. 962, 2004 Tenn. Pub. Acts 2346. Prior to the 2004 amendment, our Supreme Court had already recognized a termination for misconduct exception to the right to reconsideration in Carter v. First Source Furniture Group, 92 S.W.3d 367, 371 (Tenn. 2002). There, the Court stated, "In our view, the General Assembly, by passage of section 50-6-241(a), did not intend to require an employer to make an offer of re-employment to an employee previously fired for violating workplace rules." Id. Later cases applying Carter and section 50-6-241(d)(1)(B)(iii)(b) have generally focused on the nature of the employee's alleged misconduct. See Clay v. AT & T Mobility Servs., LLC, No. M2013-01557-WC-R3-WC, 2014 WL 3888188, at \*4 (Tenn. Workers Comp. Panel Aug. 8, 2014); Durham v. Cracker Barrel Old Country Store, Inc., No. E2008-00708-WC-R3-WC, 2009 WL 29896, at \*3 (Tenn. Workers Comp. Panel Jan. 5, 2009); Marvin Windows of Tenn., Inc. v. Gardner, No. W2011-01479-WC-R3-WC, 2012 WL 2674519 (Tenn. Workers Comp. Panel June 8, 2012); Pigg v. Liberty Mut. Ins. Co., No. M2007-01940-WC-R3-WC, 2009 WL 585962 (Tenn. Workers Comp. Panel Mar. 9, 2009).

The trial court stated its finding on this issue as follows:

Now, counsel, I have wrestled with trying to consider and review this statutory provision and how to interpret this. But in this case, what I have concluded is that the employee's misconduct connected with the employee's employment has not been established under the proof.

In this situation, Mr. Stacey was not on the clock. He was not working. In fact, he had left his workday. Had gone home and gone to a facility to work out. No different than if it had been the YMCA in Murfreesboro, but the difference was it was on the premises of his employer, the campus of his employer. And after arriving at the facility, he worked out.

\* \* \* \*

Under this case, the incident did not involve [Employee] and a coworker. In this case, the incident did not involve [Employee] and a supervisor. In this case, the incident that is alleged involving [Employee] and Matt Mitchell did not interfere with work production in any way whatsoever. In this case involving [Employee] and Matt Mitchell, it did not involve the work environment. [Employee] wasn't at work. He was at an activity center, engaged in a recreational activity.

I find -- and I again state to both of you, I think this is a case of first impression. Notwithstanding the law you provided to me, I think that's not the case. I think this case falls under misconduct connected with the employee's employment. And I find the alleged misconduct is not, was not connected with [Employee's] employment.

The trial court discussed and relied upon Armstrong v. Neel, 725 S.W.2d 953 (Tenn. Ct. App. 1986), a case that arose under the unemployment compensation law. In that case, the employee was discharged after a brief verbal argument with another employee. Id. at 954. The incident occurred on the employer's premises, during a break period. Id. The employee's claim for unemployment compensation benefits was denied by the Department of Employment Security because he had been discharged for misconduct connected with his work. Id. at 953. The denial was affirmed by the Chancery Court for Maury County. Id. The Court of Appeals reversed, noting: "[W]e do not believe that Mr. Armstrong's conduct materially interfered with his employer's business. While it may have provided the company with an adequate basis to discharge him, we have concluded that this was an isolated incident that does not warrant denying Mr. Armstrong unemployment compensation." Id. at 956. Like the workers' compensation law, "The unemployment compensation statutes were enacted for the benefit of unemployed workmen and are to receive a liberal interpretation by the courts."



Weaver v. Wallace, 565 S.W.2d 867, 869 (Tenn. 1978) (citing Milne Chair Co. v. Hake, 230 S.W.2d 393 (Tenn. 1950)).

In Krantz v. Nissan North America, Inc., No. M2007-01812-WC-WCM-WC, 2008 WL 4645192 (Tenn. Workers Comp. Panel Oct. 6, 2008), we addressed a termination related to an employee's conduct away from the job. In that case, the employee violated medical restrictions related to his work injury by engaging in competitive western riding and shooting events and was subsequently terminated for violating a company rule that required observance of medical restrictions at all times. Id. at \*2,\*4. The trial court held that, because the misconduct occurred away from the workplace, subsection (d)(1)(B)(iii)(b) did not apply, and the employee therefore did not have a meaningful return to work. Id. at \*5. We reversed, holding that the employer's policy requiring full-time adherence to medical restrictions was reasonable because it decreased the employer's potential exposure to additional liability from potential aggravations of the work injury. Id. at \*6. Thus, the misconduct was sufficiently connected to the work to permit application of subsection (d)(1)(B)(iii)(b). Id. Unfortunately, Krantz provides only limited guidance in this case because there is no evidence in this record that suggests that Employee's conduct exposed Employer to any potential liability at all. In that regard, we find it worthy of note that Tennessee Code Annotated section 50-6-110(a)(6) (2014) provides that injuries arising from recreational activities at employer-provided facilities, such as the NAC, are not compensable.

As the trial court observed, Employee had completed his workday and left Employer's premises before returning to work out. Employee returned on his own time and for the benefit of his own personal health. At the time of the incident he was not in any way attempting to further Employer's business of manufacturing automobiles. The NAC is located on Employer's property but is housed in a building separate from its production facility. It is open to both employees and members of their families. It is staffed completely by MediFit, and Employer has no employees assigned to work in the facility. Mr. Mitchell, the other participant in the argument at the center of this case, was employed by MediFit and was not subject to discipline or supervision by Employer. The argument pertained to the NAC's schedule and Employee's use of the facility. Furthermore, none of Employer's witnesses were able to identify a single individual who had been disciplined for activity occurring at the NAC. With these undisputed facts in mind, we conclude that the trial court correctly held that Employee's termination was not sufficiently connected with his employment to require application of subsection (d)(1)(B)(iii)(b) and that Employee was therefore entitled to reconsideration of his previous award and settlements.

*B. Exclusion of Statements of Matthew Mitchell*

Employer next contends that the trial court erred by sustaining Employee's hearsay objections to the admission of two documents: the first an email sent by Mr. Mitchell to Mr. Anderson on November 28, 2011, which details Mr. Mitchell's account of the altercation between himself and Employee; and the second, a memorandum sent by Michael Storey to Gayle Robinson, which summarizes a conversation that Mr. Storey had with Mr. Mitchell in the course of his investigation of the November 28 incident. Both documents contain Mr. Mitchell's out-of-court statements describing the incident at the NAC. Employer contends these documents were admissible under the business records exception to the hearsay rule.

Tennessee Rule of Evidence 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 802 further provides that "[h]earsay is not admissible except as provided by these rules or otherwise by law." Tennessee Rule of Evidence 803(6) outlines the requirements for a business record to be admissible as an exception to the hearsay rule:

The following are not excluded by the hearsay rule:

....

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses made at or near the time by or from information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness or by certification that complies with Rule 902(11) or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, profession, occupation, and calling of every kind, whether or not conducted for profit.

Turning first to the email sent by Mr. Mitchell to Mr. Anderson, the trial court concluded that the business records exception does not authorize admission of this document because Mr. Mitchell's statement was not part of a regularly conducted business activity:

Now what we're dealing with is where Mr. Anderson, during the course of talking to [Mr. Mitchell] said to him, Hey—or words to the effect, put this in writing and send it to me. If this had been part of the regularly conducted business activity, there would have been no need for the request. He would just – every time he does something as part of the regular business activity, he would send it to him. [Mr. Anderson] requested this. He asked [Mr. Mitchell] to put down his version of events. I don't think this falls under regularly conducted business activity.

We disagree. Simply because Mr. Mitchell did not automatically prepare a written report of the November 28, 2011 incident without any direction from his supervisor does not mean that preparation of the report was not a “regularly conducted business activity.” Mr. Anderson, Mr. Mitchell's supervisor, testified that he instructed Mr. Mitchell to prepare the written account shortly after the incident occurred. Thus, Mr. Mitchell had a business duty to transmit the report. Mr. Anderson further testified that he takes reports of threats against his employees seriously, routinely requests that employees who have been threatened prepare written reports of such incidents, and maintains these reports in his office as a part of the regularly conducted activity of the business. Whether or not Mr. Mitchell, a part-time and low-level employee, was aware of MediFit's policies requiring written reports of altercations between its employees and customers is not determinative on whether such a policy existed or was part of a regularly conducted business activity. See Tenn. R. Evid. 803(6) (requiring evidence of regularly conducted business activities to be “shown by the testimony of the custodian or other qualified witness or by certification that complies with Rule 902(11) or a statute permitting certification”). Mr. Mitchell correctly sought advice from his supervisor who then instructed him on the appropriate course of action. Thus, the trial court erred by excluding Mr. Mitchell's email to Mr. Anderson.

Turning next to the memorandum Mr. Storey sent to Ms. Robinson, which detailed Mr. Storey's conversation with Mr. Mitchell about the incident at the NAC, the trial court concluded that the business record exception did not authorize its admission because, Mr. Mitchell, whose statements were recited in the document, was not a Nissan employee. Thus, the trial court concluded that Mr. Mitchell had no business duty to provide any information to Employer's human resources representatives. Although we do not necessarily disagree with the trial court's determination that Mr. Mitchell had no business duty to transmit information to Employer, we disagree with the trial court that this fact precludes admission of Mr. Storey's memorandum. Admittedly, the memorandum recited Mr. Mitchell's statements, but it was prepared and transmitted by Mr. Storey who had a business duty to Employer. Ms. Robinson, the custodian of H.R. records for Employer, testified that she instructed Mr. Storey to interview Mr. Mitchell as a part of Employer's investigation into the incident. Additionally, she stated that the memorandum he created was made at or near the time of the occurrence, transmitted by a person with knowledge of and a duty to transmit the record, kept as an ordinary and

regularly conducted activity of Employer, and prepared as part of Employer's regular business practice. Thus, Mr. Storey's memorandum should have been admitted under the business record hearsay exception.

Nevertheless, the portion of the memo reciting Mr. Mitchell's statement amounts to hearsay within hearsay. Tennessee Rule of Evidence 805 provides that "[h]earsay within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules or otherwise by law." The advisory comments for Rule 805 provide further examples of when hearsay within hearsay may be admissible:

The rule provides that an out-of-court statement containing several levels of hearsay and multiple declarants is nonetheless admissible if a hearsay exception applies to each declarant's statement. Also, while not covered here, *a particular declarant's statement in the chain may be admissible as nonhearsay.*

Often hospital records contain a nurse's notation that a patient said something to the nurse. In that instance a court must deal with two hearsay declarations. The nurse's notation is admissible as a business record to the extent of showing what words were spoken. The patient's statement may then be admissible under the admissions exception or the declarations of physical condition exception.

(Emphasis added). Under Rule 805, Mr. Storey's memorandum is not admissible for the truth of the matter asserted unless Mr. Mitchell's statement itself falls under a separate hearsay exception. Here, there is no such exception. Therefore, the memorandum is admissible under the business records exception only to show what words Mr. Mitchell had spoken to Mr. Storey. Mr. Mitchell's statements were admissible as nonhearsay to show their effect on Employer, not for their truth. Thus, the trial court erred in excluding the Storey memorandum and should have allowed it to be introduced with the instruction that Mr. Mitchell's statements were only to be considered to show that statements were made by Mr. Mitchell to Employer's representatives and not for the truth of the matter asserted.

The trial court's erroneous rulings on these evidentiary issues do not require reversal, however, because Mr. Mitchell's statements regarding the incident at the NAC are not relevant to the issues presented in this case. These statements are only relevant, whether or not they are admitted for their truth, to validate Employer's decision to terminate Employee. The propriety of Employer's decision to terminate Employee based upon the November 28, 2011 incident is not disputed in this consolidated action for reconsideration of three prior workers' compensation awards and settlements. In fact, the

trial court explicitly declined to address whether Employer had grounds for terminating Employee:

I'm not defending in any way or commenting in any way or making any finding on the appropriateness of [Employer's] termination of this employee. That's not the purpose of this trial or this Court's ruling. I'm not finding that. In fact, I adopt what Judge Koch said [in Armstrong]: We do not condone the conduct of either.

Rather, the trial court held that Employee was not barred from seeking reconsideration because the conduct that resulted in his termination *was not connected with his employment*. We have affirmed that holding, and thus, the trial court's erroneous evidentiary rulings constitute harmless error.<sup>2</sup>

### *C. Award of Additional Disability Benefits*

Employer's final contention is that the evidence preponderates against the trial court's finding that Employee was entitled to additional permanent disability benefits. No additional expert medical testimony was provided, so the trial court was left to determine the amount of additional disability from the lay witness testimony provided at trial. Employer asserts that the trial court should have afforded greater weight to the testimony of Employee and his supervisors that he was still able to perform his job well after the injuries. Although Employee described his work as strenuous, he received excellent performance evaluations and had been assigned to a position of responsibility. He also engaged in strenuous physical activity away from the job, including weight training and playing softball for two teams. He continued those activities even after he was terminated. Based on those facts, Employer submits that the previous award and settlement adequately compensated him for his injuries.

However, Employee also testified his left shoulder was not as strong as it had been before August 2006, that his range of motion was diminished and that he had aches and pains in that area. He testified that he continues to have pain in his neck, as well as having low mobility and frequent headaches resulting from his prior neck injury. In addition, he sought and received treatment for his neck after the 2009 settlement. Finally, he testified that his hand tingles, goes numb, and has decreased strength.

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<sup>2</sup> We also note that Mr. Anderson was permitted, over Employee's objections, to testify about his conversation with Mr. Mitchell that occurred on November 28, 2011, where Mr. Mitchell described to him the incident with Employee.

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 considering that question, the employee's own assessment of his 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, 777 (Tenn. 1972). Furthermore, reviewing courts afford considerable deference to the trial court's findings of fact when the trial court has seen and heard the witnesses. Tryon, 254 S.W.3d at 327. Here, the trial court found Employee to be a credible live witness and found that the extent of Employee's permanent disability amounted to an increase of 30.575% permanent partial disability or \$81,523 over the previous award and settlements. Having carefully reviewed the record, we are unable to conclude that the evidence preponderates against the trial court's findings.

### **Conclusion**

The judgment is affirmed. Costs are taxed to Nissan North America, Inc. and Ace American Insurance Company, for which execution may issue if necessary.

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JON KERRY BLACKWOOD, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

**CHRISTOPHER SHONDALE STACEY v. NISSAN NORTH AMERICA,  
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**Circuit Court for Rutherford County  
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**No. M2014-00796-SC-WCM-WC**

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**Judgment Order**

This case is before the Court upon the motion for review filed by Nissan North America, Inc. and Ace American Insurance Company pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii) (2014), 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 Nissan North America, Inc. and Ace American Insurance Company, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM  
Cornelia A. Clark, J., not participating