

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON  
March 23, 2009 Session

**LARRY EUGENE DOUGLAS v. DURA-CRAFT MILLWORK, INC. ET AL.**

**Direct Appeal from the Circuit Court for Benton County  
No. 7CCV-1189 C. Creed McGinley, Judge**

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**No. W2008-02010-SC-WCM-WC - Mailed June 10, 2009; Filed September 29, 2009**

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Employee injured his neck in the course of his employment. While he was receiving treatment for that injury, his doctors discovered that he had a serious spinal condition. The treating doctors testified that this condition was unrelated to his work injury. After receiving treatment, Employee returned to work at his previous job. Several months later, his position was eliminated. He declined an offer of alternate employment. The trial court found that he did not have a meaningful return to work and awarded 65% permanent partial disability ("PPD") to the body as a whole. On appeal, Employer contends that the trial court erred by adopting the impairment rating of an evaluating physician and by finding that Employee did not have a meaningful return to work. We agree and modify the judgment accordingly.<sup>1</sup>

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

WALTER C. KURTZ, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, C. J., and WILLIAM C. COLE, SP. J., joined.

Sean Antone Hunt, Memphis, Tennessee, for the appellants, Dura-Craft Millwork, Inc., and American National Property and Casualty Co.

Charles L. Hicks, Camden, Tennessee, for the appellee, Larry Eugene Douglas.

Robert E. Cooper, Jr., Attorney General & Reporter; Michael E. Moore, Solicitor General; and Joshua Davis Baker, Assistant Attorney General, for the appellee, The Second Injury Fund.

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<sup>1</sup> This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) (2008) for a hearing and a report of findings of fact and conclusions of law.

## **MEMORANDUM OPINION**

### **Factual and Procedural Background**

Larry Douglas (“Employee”) was a forklift operator for Dura-Craft Millwork, Inc. (“Employer”), a manufacturer of doors. He injured himself on February 14, 2006, while pulling a lever to move a “dock plate,” which is a ramp used to allow access to tractor-trailers. He felt immediate pain in his neck and shoulders. Later that day, Billy Hollingsworth, his supervisor and nephew, took him to a local clinic.

Employee was initially treated by Dr. Ken Berry. He told Dr. Berry that he had been experiencing coldness in his hands and pain and stiffness in his neck for three days. Dr. Berry prescribed medication and referred him to a chiropractic clinic for physical therapy, but Employee’s improvement was limited. Dr. Berry ordered an MRI on April 5, 2006, which showed a bulging disk at C5-6.

Dr. Berry referred Employee to Dr. Everette Howell, a neurosurgeon. Dr. Howell first examined Employee on May 11, 2006. Dr. Howell ordered a myelogram and post-myelogram CT scan. These tests showed a thickening of the spinal cord in the cervical spine, a condition known as cervical myelopathy. Dr. Howell placed Employee in St. Thomas hospital for additional tests. From these tests, it was determined that Employee had transverse cervical myelitis, inflammation of the spinal cord. Because this condition is not treated with surgery, Dr. Howell referred Employee to Dr. Robert Fallis, a neurologist. Dr. Fallis agreed with Dr. Howell’s diagnosis and treated Employee with various medications. Employee slowly improved. After Employee was discharged from the hospital, Dr. Fallis continued to follow him until December 11, 2006. At that time, he released Employee to return to work on January 2, 2007, without restrictions.

Employee returned to his previous job. He was laid off on May 10, 2007. The circumstances of the layoff are disputed. Employer had suffered a decline in business, which required a reduction in its workforce. Employee was one of two workers in the shipping department. The other worker was his supervisor, Billy Hollingsworth. Employee testified that he was sent home after being told he was laid off. According to Mr. Hollingsworth’s testimony, Employee could have remained but would have been required to move from the shipping department to another part of the facility. Mr. Hollingsworth testified that he spoke with Employee about moving to another part of the facility three times on May 10, 2007.

Employee eventually decided to take a layoff with his accrued vacation time, during which he would wait to see if business improved. He did not return to work thereafter for Employer or anyone else. Employee denied that he had been offered the opportunity to stay and further testified that he was unable to perform any of the other jobs at the facility due to his injury. Mr. Hollingsworth created a typewritten statement setting out his version of the events on the day they occurred. Employer placed this document into evidence at trial.

Dr. Howell testified by deposition. He testified that Employee's C5-6 disk bulge had been caused by his injury and opined that he retained a 5% permanent anatomical impairment as a result of it. He also stated that Employee had degenerative disk disease at two other levels in his cervical spine, which was unrelated to his work injury. Dr. Howell testified that Employee's transverse cervical myelitis was neither caused nor aggravated by the work injury: "[My] opinion is that [Employee] had a work related injury, and while he was being seen and treated for that, developed his transverse myelitis not related to anything else." He further stated that there were several known causes for the condition, including infection, tumors, and autoimmune disorders, but that these causes had been eliminated by testing in Employee's case. On cross examination, Dr. Howell stated that while the condition can be caused by trauma, the signs associated with such trauma were not present in this case.

Dr. Fallis also testified by deposition. He stated that the transverse myelitis was not related to the work injury. He said that most cases of the condition were idiopathic without a known cause. Dr. Fallis reported that Employee had improved gradually during his course of treatment and had been released to work without restrictions.

Dr. Grafton Thurman, a rheumatologist, performed an examination at the request of Employee's attorney. His report was placed into evidence by agreement of the parties. He appeared to agree with Dr. Fallis and Dr. Howell that the myelitis was not related to the work injury. However, because Employee had minimal degenerative changes at the C3-4 level of the cervical spine, Dr. Thurman used an alternate method to calculate Employee's impairment. Using this method, he concluded that Employee had an impairment of 27% to the body as a whole, due solely to his work injury. Dr. Thurman's report implies that the additional bulging disk was related to the work injury.

Employee was fifty-three years old on the date of the trial. He had attended school through the ninth grade and had no additional education. His prior work experience included operating a machine that assembled shoes and also operating cranes and other heavy equipment in a foundry. Both of those businesses had closed down. Employee had not worked or attempted to find work since being laid off by Employer. He did not believe he was capable of working. He had a lower back injury while working for a previous employer, which had resulted in a settlement for 48% PPD to the body as a whole.

The trial court issued its findings from the bench. It found that all of Employee's symptoms were work-related and adopted the impairment rating of Dr. Thurman. The trial court also determined that Employee had not had a meaningful return to work. It awarded 65% PPD to the body as a whole. Employer was found to be liable for 52%, and the Second Injury Fund was assigned the remaining 13%.

Employer appealed, contending that the trial court erred by finding that Employee developed cervical myelitis as a result of his work injury and by finding that Employee did not have a

meaningful return to work. Employer also contends that the award is excessive. Employer does not contest the trial court's determination that Employee's bulging disk was work-related.

### **Standard of Review**

Our standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). *See also Rhodes v. Capital City Ins. Co.*, 154 S.W.3d 43, 46 (Tenn. 2004); *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 825-26 (Tenn. 2003). When the trial court has seen the witnesses and heard testimony, especially where issues of credibility and the weight of testimony are involved, the court on appeal must extend considerable deference to the trial court's factual findings. *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 71 (Tenn. 2001). "In reviewing documentary evidence such as depositions, however, we extend no deference to the trial court's findings." *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006). Conclusions of law are subject to de novo review without any presumption of correctness. *Rhodes*, 154 S.W.3d at 46; *Perrin*, 120 S.W.3d at 826.

### **Analysis**

#### **1. Causation - Cervical Myelitis**

After a discussion of the medical testimony, the trial court found the following:

In this case, the Court finds from viewing all of this evidence as a whole that the plaintiff's work – condition is related. And you go back to common sense – common sense sometimes. No problem before, but there's certainly a multitude of problems afterwards that his condition is a result of that work-related accident on 2/14/06.

Dr. Thurman has rated him 27 percent. Dr. Howell has rated him 5, but kind of confines it to part of the condition as opposed to the entire condition. The court finds that – a very expensive [sic], persuasive report filed by Dr. Thurman in this case and his rating appears to be intact and persuasive to the Court.

Employer argues that the evidence preponderates against this finding. Specifically, Employer points out that Dr. Howell and Dr. Fallis testified that transverse cervical myelitis was a much more significant condition than the C5-6 disk bulge and was unrelated in any way to the work accident. Employee argues that Dr. Howell testified that cervical myelitis "could be" related to trauma and that testimony, combined with Employee's own, satisfies the usual standard for causation in workers' compensation cases. *See, e.g., GAF Bldg. Materials v. George*, 47 S.W.3d 430, 432-33 (Tenn. Workers' Comp. Panel 2001). However, Dr. Howell also testified that the findings that would be

expected in a case of trauma-induced cervical myelitis, such as a compression fracture, were not present in Employee's case. Both he and Dr. Fallis clearly considered it very unlikely that the work accident had any connection to the inflammation that caused swelling of the Employee's spinal cord.

Dr. Thurman also stated in his report that the cervical myelitis was not related to the work accident. Because he attributed Employee's symptoms of loss of grip strength and coldness in his hands to the cervical myelitis, he did not include any impairment for neurological deficits in his rating. This is of little consequence, however, as his report stated that the results of Employee's neurological examination were normal. The report states that the impairment rating was based upon diagnostic criteria and measurements of Employee's range of motion. Because his opinion was expressed only in a written report, rather than a deposition, it cannot be determined to what extent or by what method Dr. Thurman distinguished the residual effects of the cervical myelitis from the effects of the work injury.

The medical evidence supports the conclusion that Employee's transverse cervical myelitis was unrelated to his work accident. There is virtually no medical evidence to the contrary. We therefore conclude that the trial court erred by finding the consequences of that condition to be compensable under the workers' compensation law. Despite the trial court's error, we must address whether Employee had a meaningful return to work because the trial court's finding that Employee's bulging disk is a compensable injury is uncontested.

## **2. Meaningful Return to Work**

Although Employee denied that he was given the opportunity to work in another area of the facility at the time he was laid off, the trial court apparently accepted the testimony of Mr. Hollingsworth on this subject:

[W]hat is clear to the Court is that [his] job was eliminated. The job that he has done is eliminated . . . [A]pparently, he could have picked up another job there at the plant. It was offered by them.

After discussion – three different discussions and trying to make up his mind, he apparently decided to take the vacation and see if the job would be available after – after the vacation. But the job was eliminated. And the job was not available. It was eliminated. Perhaps he could have taken the other job.

But the Court finds based upon these facts that they – essentially, the job was eliminated. No meaningful return to work, so the caps would not apply.

Employer argues that Employee worked for several months at the same job he held prior to his injury. When that position was eliminated, he was offered a different job at the same rate of pay.

Employer further contends that Employee's decision to accept a layoff amounted to a voluntary resignation, not related to his injury, and that the one and one half times impairment cap therefore applies. In response, Employee points to his own testimony that he was not offered a different job. In the alternative, he contends that he would have been unable to perform any of the other jobs in the facility due to his injury.

“When determining whether a particular employee had a meaningful return to work, the courts must assess the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to either return to or remain at work.” *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 328 (Tenn. 2008). The trial court accepted Employer's version of the events leading to Employee's layoff but then concluded that the elimination of Employee's prior job meant no meaningful return to work. Employer offered to continue Employee's employment at the same rate of pay he had been receiving. Admittedly, it would have been necessary for him to perform a different job. However, Tennessee Code Annotated section 50-6-241(d)(1)(A) does not condition application of the one and one-half times impairment cap upon an employee's successful return to the same job he had prior to his injury. Rather, the cap applies when “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 the injury.” *Id.* Employer's offer to retain Employee at the same rate of pay satisfies the conditions of the statute. For purposes of Tennessee Code Annotated section 50-6-241(d)(1)(A), Employer's offer was reasonable, and Employee's decision to decline that offer was not. We therefore find that the trial court erred by failing to apply the lower cap to this disability award.

### **3. Excessive Award**

Employer argues that the trial court erroneously found that Employee had sustained a 65% permanent partial disability. Employer argues that Dr. Howell and Dr. Fallis were more credible than Dr. Thurman, that Dr. Thurman used the AMA Guides improperly to arrive at his impairment rating, and that the only injury attributable to Employee's employment is a relatively minor disk bulge. Employee argues that he has limited education, that he is no longer employed, and that restrictions placed upon him by Dr. Howell limit his access to the work force.

Regarding the latter, Dr. Howell was careful to state that the restrictions he placed upon Employee were based upon his “best assessment at [the] time [Employee was under his care].” He then said, “I have not seen him since he has either recovered or not recovered from his transverse myelitis. And so I'm not willing to say that they're any more accurate than the extent of my evaluation of him in the time course of my evaluation.” Dr. Howell last saw Employee in July 2006. At that time, Dr. Fallis became the treating physician. When he released Employee in December 2006, Dr. Fallis placed no restrictions upon his activities. Under these circumstances, Dr. Howell's restrictions are of limited value in assessing Employee's vocational disability.

The more significant issue is whether Employee's disability award should be determined using Dr. Howell or Dr. Thurman's impairment rating. Dr. Fallis did not testify directly on the

subject of impairment. He did state that he did not disagree with Dr. Howell's opinion. Both Dr. Howell and Dr. Fallis testified that transverse myelitis was a far more serious problem than a bulging C5-6 disk. Dr. Thurman's report describes both the C5-6 disk bulge and the C3-4 disk bulge as minimal and attributes Employee's symptoms of numbness, tingling and weakness to transverse myelitis. Dr. Howell testified that only the C5-6 disk bulge was related to Employee's work injury. Dr. Thurman did not contradict this but found that the presence of the additional disk bulge should be considered in calculating Employee's impairment. Dr. Fallis, who was the ultimate treating physician, released Employee with no restrictions upon his activities. Considering these facts, we find that the evidence preponderates against the trial court's adoption of Dr. Thurman's impairment rating and supports the use of Dr. Howell's rating. The judgment will be modified accordingly.

### **Conclusion**

The judgment is modified to award 7.5% permanent partial disability to the body as a whole. This case is remanded to the trial court for entry of an order consistent with this opinion. Costs are taxed one-half to Employee, Larry Douglas, and one-half to Employer, Dura-Craft Millwork, Inc., for which execution may issue if necessary.

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WALTER C. KURTZ, SENIOR JUDGE

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**No. W2008-02010-SC-WCM-WC - Filed September 29, 2009**

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**JUDGMENT ORDER**

This case is before the Court upon the motion for review filed by Larry Eugene Douglas, 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 one-half to Larry Eugene Douglas and his surety, and one-half to Dura-Craft Millwork, Inc., for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holder, Janice M., C.J., Not Participating