

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

<b>FREDERICK J. LANG</b>	)	<b>Appeal No. M2003-01266-SC-CV</b>
	)	<b>WCM-CV</b>
<b>Plaintiff/Appellee,</b>	)	
	)	
	)	<b>From the Rutherford</b>
	)	<b>County Circuit Court</b>
<b>v.</b>	)	<b>Case No. 02-4756-WC</b>
	)	
	)	
<b>NISSAN NORTH AMERICA, INC. ,</b>	)	
	)	
<b>Defendant/Appellant.</b>	)	

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***BRIEF AMICUS CURIAE OF THE NATIONAL FEDERATION  
OF INDEPENDENT BUSINESS LEGAL FOUNDATION IN SUPPORT  
OF THE DEFENDANT’S APPEAL***

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**Respectfully submitted,**

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## I. INTRODUCTION

This brief is filed by the National Federation of Independent Business ("NFIB") Legal Foundation on behalf of small-business owners who are profoundly concerned by the Special Workers' Compensation Appeals Panel's decision in this case. The Panel's decision expanded the factors to be evaluated by courts in this state when rendering decisions in workers' compensation cases to include damages historically available only through common law tort. This decision threatens the very foundation of the workers' compensation system in Tennessee: the tradeoff of sure and certain relief to injured workers in exchange for immunity from tort damages for employers. The Panel's decision threatens to increase the cost of workers' compensation, which has been identified by small-business owners as a critical problem.

## II. INTEREST OF *AMICUS CURIAE*

The NFIB Legal Foundation, a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all 50 states. The approximately 600,000 members of NFIB, including 10,000 in Tennessee, own a wide variety of America's independent businesses from restaurants to manufacturing firms to bowling alleys. The NFIB Legal Foundation frequently files *amicus curiae* briefs in cases of importance to small business. A June 2004 survey of small-business owners, the results of which were compiled and published in *Small*

*Business Problems & Priorities*,<sup>1</sup> revealed that among small business owners in Tennessee and throughout the United States, the cost of workers' compensation is considered the third most severe business problem, behind only the cost of health insurance and the cost and availability of liability insurance. Survey responses indicated that this problem is significantly more severe than it was a mere three years ago. In the 2000 *Problems & Priorities* survey, respondents ranked workers' compensation as the seventh most severe business problem. Because the Panel's decision threatens to further exacerbate this problem, the issue involved in this review directly and significantly affects small-business owners throughout the state.

### **III. ISSUE OF CONCERN TO *AMICUS CURIAE***

Whether the Special Workers' Compensation Appeals Panel's decision, awarding 45% vocational disability for this hearing loss injury based on the Plaintiff's "loss of ability to enjoy normal, everyday activities taken for granted," should be vacated in favor of reinstating the judgment of the trial court, which found that the appropriate disability award was 9% based on the Plaintiff's demonstrated loss of earning power?

### **IV. STATEMENT OF THE FACTS**

The Plaintiff was 43 years old when this case was tried in March of 2003. [Tr., p. 35]. He is a high school graduate. [Tr., p. 36]. The Plaintiff's work history includes

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<sup>1</sup> Bruce D. Phillips, *Small Business Problems and Priorities, Sixth Edition*, NFIB Research Foundation (2004). A complete copy of this 132-page publication can be downloaded at [www.nfib.com/object/IO\\_16191.html](http://www.nfib.com/object/IO_16191.html)

seven years during which he was employed by the Nolan Company performing various shipping and receiving and inventory functions. [Tr., p. 38].

Prior to becoming employed at Nissan in 1985, the Plaintiff received training at Nissan for which he was awarded a vocational training certificate from the State of Tennessee. [Tr., pp. 36-37]. Since he has been employed at Nissan he has worked as an assembly technician; however, in 2001, the Plaintiff became a line leader. This promotion means that that the Plaintiff spends less time on the line and more time performing administrative duties. [Tr., pp. 42, 57-58, 104].

This lawsuit arose out of the Plaintiff's claim that he sustained work-related hearing loss as a result of his exposure to noise in the work environment. However, twice prior to the time the Plaintiff was hired by Nissan, his hearing was tested. The first test, on February 28, 1985, demonstrated that the Plaintiff had already sustained some hearing loss. He was tested a second time in October of 1985, again prior to being hired at Nissan. The results of the second test demonstrated that in the eight months between the two tests, the Plaintiff's hearing had further degenerated. According to the trial testimony of Dr. Wesley Moore, these two tests demonstrated that there was already some process at work with his hearing even before he went to work at Nissan. [Tr., pp. 79-80]. In Dr. Moore's opinion, the pattern of gradual hearing loss observed in the Plaintiff was merely a progression of a process that was well begun before the Plaintiff ever accepted a job at Nissan. [Tr., p. 80].

The Plaintiff first complained of hearing problems in 1999. [Tr., pp. 48-49]. In 2001 the Plaintiff had additional hearing tests at work and was ultimately referred by Nissan to Dr. Downey for treatment. [Tr., pp. 52-53].

According to the Special Workers' Compensation Appeals Panel's findings of fact, Dr. Downey prescribed hearing aids for the Plaintiff but did not place any permanent restrictions on him. The Panel also found that the employer referred Plaintiff to Dr. Mitchell Schwaber for an independent medical evaluation. Dr. Schwaber opined that the Plaintiff sustained 20.6% hearing loss in the right ear, 31.9% hearing loss in the left ear, and a binaural hearing loss of 22.5%, which equates to 8% impairment to the body as a whole.

The Plaintiff continues in his job a line leader for Nissan. His supervisor, Joe Shelton, testified at trial that he has never had any problems communicating with the Plaintiff. He further testified that he has never had any problems with the Plaintiff being able to respond to a problem on the line; that the Plaintiff has never complained about having trouble hearing anything other than the telephone; and that the Plaintiff is able to successfully perform his work duties as line leader and is regarded as a "very good" employee. [Tr., pp. 104-108]. The Plaintiff testified that his evaluations have been excellent and that he has never been written up for poor work performance. [Tr., pp 62-63].

The Tennessee Department of Labor Statistical Data Form, which is in the Record at Volume I, pp. 30-33, reflects that the Plaintiff has never missed any time from work as a result of his hearing loss and that he continues in his employment at Nissan earning the same wage or greater than he earned at the time his hearing loss was reported.

## V. ORDER APPEALED FROM AND RELIEF REQUESTED

The trial court considered the Plaintiff's age, education, transferable job skills, and the jobs available to him along with the medical and lay testimony as required by the law. Upon giving due consideration to each of these factors, the trial court found that the most significant factor in determining vocational disability is the Plaintiff's ability to work despite his injury. The trial court held that the Plaintiff sustained a 9% vocational impairment and that "because the evidence shows that the Plaintiff depends more heavily on his other strengths, and that his ability to hear, while significant, is not paramount in his work performance, a large disability rating would be inappropriate."

The Plaintiff appealed to the Special Workers' Compensation Appeals Panel. The Panel acknowledged that in determining vocational disability, all of the factors as outlined by the trial court should be evaluated. Nevertheless, the Panel increased the trial court's award from 9% to 45%, apparently based upon an entirely different factor, the Plaintiff's loss of enjoyment of life.

As *Amicus Curiae*, the NFIB Legal Foundation requests that this Court reverse the decision of the Panel because it awarded common-law hedonic damages that are not recoverable under Tennessee's Workers' Compensation Law..

## VII. LAW and ARGUMENT

- A. **“Loss of ability to enjoy normal, everyday activities” is not a factor upon which an award for workers’ compensation can be rendered under Tennessee law.**
1. **The Workers’ Compensation Law is intended compensate employees only for “vocational disability” and to insulate employers from the common law tort damages awarded by Panel.**

In this case, the Special Workers’ Compensation Appeals Panel explained its decision to increase the vocational disability benefit from 9%, as awarded by the trial court, to 45% as follows:

Even though the employee lost no time off work due to the injury and continues to work in the same or similar position, there has been a loss of his ability to enjoy normal, everyday activities generally taken for granted because hearing is required for virtually every human function.

Damages for loss of enjoyment of life are the type of damages that, if proven, are compensable in common law tort. However, one of the purposes for which the workers’ compensation law was created is to insulate the employer from such tort damages. Our Workers’ Compensation Law generally is the sole remedy available to a worker who is injured in a fashion that falls within the broad scope of the Workers’ Compensation statute. Tenn. Code Ann. § 50-6-108 states in part "The rights and remedies herein granted to an employee subject to Workers' Compensation Law on account of personal injury or death by accident ... shall exclude all other rights and remedies of such employee...." This statute clearly expresses a legislative intent that any potential tort liability of the employer arising from "injury or death" is abolished in favor of the remedy provided by workers’ compensation. When a work-related injury arises out of

and in the course of employment, an employee's only option is to proceed under the provisions of the Tennessee Workers' Compensation Law. Frayser v. Denstply International, Inc., 78 S.W.3d 242 (Tenn. 2002). These provisions do not include any mechanism for compensating injured workers for "loss of ability to enjoy normal, everyday activities."

In fact, Tennessee's Workers' Compensation Law defines the specific analysis that must be undertaken in assessing the extent of an employee's vocational disability. As observed by both the trial court and the Panel in this case, the relevant factors include: the employee's age; his skills and training; his education; the local job opportunities available to him; and his capacity to work at the kinds of employment available in his disabled condition. Tenn. Code Ann. § 50-6-241(b). Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990). In addition, the court should consider the lay and expert testimony; however, the trial court is not bound to accept physicians' opinions regarding the extent of the employee's disability, but should consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability. Walker v. Saturn Corporation, 986 S.W.2d 204, 208 (Tenn. 1998).

These factors to which the law gives consideration are specifically tailored to the question of **vocational** disability as opposed to any other type of loss or damage. Under Tennessee law, vocational disability results when an employee's ability to earn wages in any form of employment available to him or her in an uninjured condition is diminished by injury. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 458 (Tenn. 1988); Walker, 986 S.W.2d at 208. The purpose of our Workers' Compensation Law has been well defined by our courts -- to provide compensation only for loss of earning power or

capacity (vocational disability) sustained by workers through injuries in industry. [Mathis v. J.L. Forrest & Sons](#), 188 Tenn. 128, 216 S.W.2d 967 (Tenn.1949).

**2. Based on the factors defined by the law as relevant to the question of vocational disability, the Panel's award is excessive and the trial court's award should be reinstated.**

The facts of this case can be directly contrasted with the facts of [Hickman v. Continental Baking Company](#), 143 S.W.3d 72 (Tenn. 2004). In [Hickman](#), this Court appropriately increased the trial court's disability award from 11% to the whole body to 70% disability to the whole body. The court made explicit findings to support its holding as follows:

Hickman, who was fifty years old at the time of trial, testified that all of his prior work experience had involved maintenance engineering, a field that requires frequent and often strenuous physical exertion, and that he is no longer able to work in this field. It is undisputed that Hickman never returned to work at Continental at a wage equal to or greater than the wage he was receiving at the time of his injury. Hickman receives Social Security disability benefits and has not worked since he sustained his injury. He takes over-the-counter pain relievers and uses a portable TENS unit to obtain relief from his constant pain, despite having undergone surgery on his back. Hickman obtained his high school diploma but only attended one and one-half years of college. Three doctors gave medical impairment ratings: Dr. Riley Jones, an orthopedic surgeon, gave Hickman an 11% medical impairment rating to the body; Dr. Alfred Bonati, a neurosurgeon, gave an impairment rating of 10% to the whole body; and Dr. Robert Christopher, a specialist in rehabilitative medicine, opined that Hickman has a 26% impairment to the whole body. Phillip Minyard, a vocational expert, opined that Hickman is permanently and totally disabled, but he admits that Hickman would be able to work in some capacity.

[Id.](#) at 75-76. In [Hickman](#), the Supreme Court methodically addressed each of the factors to which the law requires consideration be given and explained why, based upon the proof at trial, the vocational disability award should be increased.

Unlike in Hickman, the relevant factors in the case at bar preponderate in favor of the trial court's award of 9% vocational disability as opposed to an increased award of 45%. The Plaintiff, was only 43 years old at the time of trial. [Tr., p. 42]. He has a high school education. [Tr., p. 36]. At trial, both the Plaintiff and his wife testified about his work history over the past twenty years. He worked seven years at Nolan Company, doing counter sales, shipping and receiving, and a front office inventory job. [Tr., pp. 31, 38]. The Plaintiff testified that he received a certificate from the State of Tennessee for vocational training he completed prior to going to work at Nissan. At Nissan, the Plaintiff obtained work experience as an assembly technician using a variety of tools. [Tr., pp. 39-44]. The proof at trial was that since he was recently promoted to his new position as line leader, the Plaintiff has an even greater variety of production and administrative duties. He was described by witness Terry Ewing as "legs for the supervisor," maintaining the stock of working supplies, filling in for absent employees and doing most of the paperwork. [Tr., p. 24]. The Plaintiff has not missed any time from work as a result of his hearing loss.

At trial, the Plaintiff had the burden of proving every element of his case by a preponderance of the evidence. Elmore v. Travelers Insurance Company, 824 S.W.2d 541, 543 (Tenn. 1992). He failed to present any proof that would preponderate in favor of a greater award for vocational disability than the trial court's 9% award. For example, there was no proof that Nissan had difficulty finding a suitable position for him or that he had unsuccessfully applied for jobs outside of Nissan. Nor did the Plaintiff present any proof from a vocational expert that he sustained any loss of access to jobs in the local labor market. To the contrary, all of the evidence tends to prove that the Plaintiff sustained

minimal, if any, vocational disability. The trial court's award was fully supported by its findings of fact. There has clearly been no diminishment of his ability to earn wages in any form of employment available to him in an uninjured condition.

In the case at bar, the Panel did not cite any legal authority to support the 500% increase of the award. The Panel's decision to increase the award appears to be based entirely on the Plaintiff's "loss of his ability to enjoy normal, everyday activities generally taken for granted." This consideration is not compensable under the Tennessee Workers' Compensation Law. Furthermore, there was no proof at trial to support the finding or the significant increase in the award. Therefore, the NFIB Legal Foundation respectfully requests that the Panel decision be reversed.

**B. The Panel's award, which is based on tort damages, is contrary to the policy upon which the Workers' Compensation Law was drafted.**

**1. The quid pro quo, which is the "grand compromise" of the workers' compensation system, is threatened by the Panel's decision.**

The purpose of the Tennessee Workers' Compensation Law is to provide compensation for loss of earning power or capacity. Mathis, 216 S.W.2d at 967. If upheld, the Panel's decision would serve to expand the Tennessee workers' compensation law beyond this purpose. The Panel's decision would compensate the Plaintiff for damages that are traditionally available only in tort. The Tennessee Supreme Court has already recognized the limits intended by the legislature in drafting the law. In the case of Mackie v. Young Sales Corp., 51 S.W.3d 554 (Tenn. 2001), this Court recognized the equitable tradeoff at the heart of the workers' compensation system "--that the employee has a remedy for injuries arising out of and in the course of his or her employment and the employer has a

limit on the amount of its liability **and complete protection from tort liability.**" Id. at 558-559. (emphasis added.)

Similarly, in the case of Harman v. Moore's Quality Snack Foods, Inc., 815 S.W.2d 519, (Tenn. Ct. App. 1991), the Court of Appeals recognized that through the explicit language of Tenn. Code Ann. § 50-6-108, the legislature clearly expressed its intent that any potential liability of the employer arising from work related injuries is "abolished in favor of the remedy provided by worker's compensation." Id. at 524. The Act is based on a mutual renunciation of common law rights and defenses. Tenn. Code Ann. § 50-6-108 See Liberty Mutual Insurance Co. v. Stevenson, 368 S.W.2d 760 (Tenn. 1963). This has been described by the Washington Supreme Court as "the quid pro quo which is the 'grand compromise' of the workers' compensation system." Birklid v. Boeing, 904 P.2d 278 (Wash. 1995).

The award rendered in this case by the Special Workers' Compensation Appeals Panel does not fit into the carefully drafted framework of exclusive remedies provided by the Tennessee Workers' Compensation Law. Tenn. Code Ann. § 50-6-101 *et seq.* It provides compensation for damages the statute was not intended to redress. It is entirely contrary to the legislative mandate that the workers' compensation law not compensate employees for tort-based damages. If permitted to stand, the Panel's decision will effectively deprive employers of the primary benefit of their participation in the workers' compensation system, thus undoing the "grand compromise." They will no longer enjoy the complete immunity from tort that is one of the bedrocks of the system. The mutual renunciation of common law rights and remedies between employer and employee will be destroyed, potentially devastating the entire system.

**2. The policy of construing the law liberally for the employee's benefit does not authorize the extension of its provisions beyond its obvious meaning.**

While the Workers' Compensation Act is to be liberally construed for the employee's benefit, that policy does not authorize the amendment, alteration or extension of its provisions [beyond its obvious meaning].... Pollard v. Knox County, 886 S.W.2d 759 (Tenn.1994). In the case of Middleton v. Allegheny Electric Company, Inc., 897 S.W.2d 695 (Tenn. 1995), the Supreme Court articulated its reluctance to construe the workers' compensation statute beyond the meaning of its language. If a statute is clear, plain and unambiguous and if the enactment of the statute is within the legislative domain, the Courts must recognize the law on the subject is written as intended and the statute must be upheld. *Id.* at 698, citing Carson Creek Vacations Resorts, Inc. v. Tennessee Department of Revenue, 865 S.W.2d 1 (Tenn.1993). In Middleton, the plaintiff requested that the Court construe the provisions of Tenn. Code Ann § 50-6-242 liberally so as to carry out what he asserted was the legislative intent to protect injured workers. The Supreme Court rejected this request, finding that the statute reflects a clear intent on the part of the legislature to restrict disability awards in workers' compensation cases as indicated in Tenn. Code Ann. § 50-6-241. As demonstrated here, this Court has recognized that the legislature has restricted disability awards in workers' compensation cases as indicated in Tenn. Code Ann. § 50-6-241. Therefore, the Panel should not be permitted in this case to extend disability awards to include factors that were not contemplated by legislature or were contemplated and intentionally omitted. Arguments

for the liberal construction of this statute should not influence this court to construe the statute beyond its obvious intent.

**3. The Panel's decision, if upheld, will lead to widespread inconsistency and unpredictability in the application of the law in trial courts and significantly increase workers' compensation costs.**

The decision of the Special Workers' Compensation Appeals Panel in this case represents an unwarranted judicial expansion of factors that courts could consider when rendering workers' compensation awards. This court has previously rejected judicial expansion of the statutorily-mandated factors. In the case of Harlow v. Reliance National, et al., 91 S.W.3d 243 (Tenn. Workers Comp. Panel, Nov. 26, 2002), the Plaintiff, who was not legally married to the deceased employee, urged the Court to stretch the definition of "surviving spouse" under § 50-6-210 such that her relationship was included. The Court held that such an interpretation would exceed the parameters set by the legislature in defining eligible parties for death benefits. The Court observed that "If Ms. Harlow were allowed to recover death benefits, uncertainty would ensue in the determination of who is lawfully married, causing problems to arise in many areas, including workers' compensation." Id. at 246-247. The statutorily-mandated factors provide important certainty in the amount of workers' compensation awards. The Panel's decision importing common-law damages into workers' compensation awards undercuts this certainty and will lead to widespread inconsistency and unpredictability in the application of the law. If this Court were to accept the Panel's finding, the decision would have significant negative consequences for employers in Tennessee and beyond when future state courts are asked to permit hedonic damages in workers' compensation claims against employers in their own jurisdiction. Such a decision

would significantly exacerbate the workers' compensation costs, which are already a significant problem for small business.

### **VIII. CONCLUSION**

For the reasons set forth herein the NFIB Legal Foundation respectfully requests this Court to reverse the decision of the Special Workers' Compensation Appeals Panel and affirmatively hold that damages for "loss of ability to enjoy normal, everyday activities generally taken for granted" and similar tort damages are not compensable under the Tennessee Workers' Compensation Law.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of April, 2005, a true and complete copy of the foregoing Brief Amicus Curiae of the National Federation of Independent Business Legal Foundation in Support of the Defendant's Appeal, was mailed First Class U.S. Mail, postage prepaid, to:

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