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

JEFFREY K. BOYCE V. DAB PLUMBING, INC. and OAK RIVER INSURANCE COMPANY

Direct Appeal from the Chancery Court of Bedford County
No. 24,423, Hon. J.B. Cox, Judge

No. M2003-01903-WC-R3-CV - Mailed - July 28, 2004
Filed - September 27, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employer contends that the trial court erroneously: (1) awarded payment of unauthorized medical expenses, (2) refused to apply the statutory cap allowed by Tenn. Code Ann. § 50-6-241(a)(1) to the permanent partial disability award, and (3) granted excessive permanent partial disability benefits in light of the employee's vocational factors. The issues turn on witness credibility and findings of fact. The Panel defers to the trial court and finds that the trial court opinion should be affirmed in all respects.

Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right; Judgment of the Circuit Court Affirmed.

John A. Turnbull, Sp. J., Delivered the opinion of the court, in which Frank F. Drowota, III, Chief Justice, and James L. Weatherford, Sr, Sp. J., joined.

Clancy F. Covert and Michael W. Jones, Wimberly Lawson Seale Wright & Daves, Nashville, TN, for the appellants, DAB Plumbing, Inc. and Oak River Insurance Co.

Joseph L. Mercer, Nashville, TN, for the appellee, Jeffrey K. Boyce.

MEMORANDUM OPINION

Facts

Jeffrey Boyce ("Jeffrey")[1], the appellee, was employed by DAB Plumbing, Inc. ("DAB"), which is owned by his brother David Boyce ("David") and his sister-in-law Debbie Boyce ("Debbie"). Jeffrey was a "plumbers' helper" who carried materials to and from a job site and performed the physical "grunt work" necessary to enable the plumber to do his job. On May 31, 2002, Jeffrey injured his back when he stooped to walk under a chain as he returned from the truck carrying materials. Debbie took Jeffrey to the emergency room that day. He was told to return to see another doctor if he was still in pain in a few days. Jeffrey never saw the recommended doctor but instead returned to work.

After Jeffrey had returned to work for over three months, he and David had an argument over a personal matter on September 9, 2002. Jeffrey claims that David terminated his employment at that time in a fit of anger. David claims that he never terminated Jeffrey's employment, but assumed Jeffrey had quit because he did not return to work. However, on appeal David claims that he did terminate Jeffrey for misconduct (not reporting to work on September 9). At some time following the day of the argument, David retrieved Jeffrey's company truck, which was Jeffrey's only vehicle.

Jeffrey claims that he repeatedly told David and Debbie of his continued back pain, although David and Debbie deny being aware that Jeffrey needed to see a doctor. Neither party asserts that Jeffrey directly requested to see a doctor. Jeffrey claims he was afraid to see or request to see a doctor because requesting medical attention would jeopardize his employment.

There is no evidence that Jeffrey had any prior medical problems with his back. Debbie testified that a workers' compensation report was filed with the insurance company following Jeffrey's injury. Jeffrey was never contacted by a representative from DAB's insurance company, and DAB did not comply with the Tennessee statute requiring it to furnish Jeffrey with a panel of doctors to consult.

Jeffrey was referred to Dr. Walter W. Wheelhouse by his attorney. Dr.

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[1] The first names of the parties are used throughout this opinion, not out of disrespect for the parties, but to better identify the parties since they all have the same family name.

Wheelhouse, the treating physician, testified in his deposition that Jeffrey had reached maximum medical improvement ("MMI") as of April 30, 2003. Dr. Wheelhouse assigned Jeffrey a 13% anatomic impairment to his body as a whole with permanent restrictions to avoid bending, stooping, lifting, twisting, or turning. Dr. Wheelhouse stated that Jeffrey could not return to the same type of work he had done previously because of these restrictions. Dr. William H. Ledbetter performed an independent medical evaluation of Jeffrey at the request of DAB. He determined that Jeffrey was not at MMI, but that he would have at least a 5% permanent physical impairment rating under the AMA Guide to Evaluation of Permanent Impairment, Fifth Edition. Dr. Ledbetter, like Dr. Wheelhouse, diagnosed a ruptured disc at L4-L5 with nerve root compression, and recommended the avoidance of bending, stooping, lifting, twisting, and turning. Dr. Ledbetter recommended further treatment of epidural steroid injections, and if not successful, surgery.

The trial court found that Jeffrey was justified in seeking medical care from Dr. Wheelhouse, that there had been no meaningful return to work, and that Jeffrey had suffered a 50% disability to the body as a whole.

Analysis

On appeal, we are to review the record anew, with the presumption that the factual findings of the trial court are correct unless the preponderance of the evidence is otherwise. Tenn. Code. Ann. § 50-6-225(e)(2) (2002). Where the trial judge made a determination based on live witness testimony, especially where issues of credibility and weight of oral testimony are involved, great deference must be given to that finding on review. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987).

Unauthorized Treatment Expenses

DAB contends that it should not be required to pay for treatment provided by Dr. Wheelhouse because it was unaware that Jeffrey saw Dr. Wheelhouse and did not approve the expenses. Whether an employee is justified in seeking medical services to be paid for by the employer without consulting the employer depends on the circumstances of each case. Harris v. Kroger Co., 567 S.W.2d 161, 163 (Tenn. 1978). Failure by the employer to furnish an injured employee with a list of physicians, required by Tenn. Code Ann. § 50-6-204 (a)(4)(A), does not automatically render the employer liable for medical expenses. See Dorris v.

INA Ins. Co., 764 S.W.2d 538, 541 (Tenn. 1989). The record in this case does not clearly demonstrate whether Jeffrey was explicitly denied medical care by DAB, and it does not demonstrate that expenses incurred for treatment by Dr. Wheelhouse were unnecessary and unreasonable. The trial judge believed the expenses were reasonable and necessary, and the evidence does not preponderate against that finding.

Application of Statutory Cap

DAB next contends that because Jeffrey was fired for misconduct, the statutory cap should apply to limit Jeffrey's award. The cap established in Tenn. Code Ann. § 50-6-241(a)(1) limits the award in cases where an injured employee is returned to work at a wage equal to or greater than the wage the employee was receiving at the time of the injury. If the employer's offer is not reasonable in light of the circumstances of the employee's physical condition, then the offer of employment is not meaningful and the injured employee may receive disability benefits up to six times the amount of the medical impairment. Newton v. Scott Health Care Ctr., 914 S.W.2d 884, 886 (Tenn. 1995). However, an employee's benefits will be limited to two and one-half times the medical impairment if his refusal to return to the offered position is unreasonable. Id. The determination of what is reasonable depends on the facts of each case. Id. When an employee is fired for misconduct prior to treatment of the injury, the cap may apply even though the employer does not offer re-employment after treatment. Carter v. First Source Furniture Group, 92 S.W.3d 367, 371 (Tenn. 2002).

The record contains conflicting testimony regarding the availability of an appropriate position at DAB that is within Jeffrey's prescribed physical restrictions. The record also contains conflicting testimony regarding the reason for Jeffrey's separation from the company.

It was Jeffrey's position that he was involuntarily terminated following a personal dispute with David. The trial judge accredited Jeffrey's testimony. We have carefully read the record and the evidence does not preponderate against that finding.

Vocational Disability

Finally, DAB asserts that Jeffrey's permanent partial disability award is excessive in light of his vocational factors. Vocational impairment is not

measured by whether the employee can return to his original job but whether his ability to earn a living has decreased. George v. Bldg. Materials Corp. of America, 44 S.W.3d 481, 488 (Tenn. 2001). The extent of vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn. 1999). Many factors, including "job skills, education, training, duration of disability... in addition to the anatomical disability testified to by medical experts" must be considered in making this determination. Clark v. Nat'l Union Fire Ins. Co., 744 S.W.2d 586, 588 (Tenn. 1989). Another relevant factor is re-employment of the injured worker after the injury, whether in the same job or in a different one. Id. at 589. However, despite the employee's return to any employment, he is entitled to compensation if his ability to earn wages in any form of employment that would have been available to him in an uninjured condition is diminished by an injury. Id. The plaintiff's testimony also may be considered in establishing the existence and extent of pain and inability to work. Id.

Jeffrey was thirty-one at the time of trial and has a high school education. He testified at trial that he cannot do everyday tasks such as putting on his shoes without pain. His previous jobs mostly have involved physical labor and have included positions as a press operator and a shipping clerk. Dr. Wheelhouse assigned Jeffrey a permanent physical impairment of 13% and, like Dr. Ledbetter, imposed significant restrictions on Jeffrey's movement. At the time of the trial, Dr. Wheelhouse, the treating physician, recommended that Jeffrey should remain off work, and that he should not continue as a plumbers' helper.

The trial court determined that Jeffrey sustained permanent partial disability of 50% to the body as a whole on the basis of his injury and his limited vocational and transferable skills. We find on the record before us that the evidence does not preponderate against the court's finding.

Frivolous Appeal

Jeffrey argues that he should receive liquidated damages under Tenn. Code Ann. § 50-6-225(h) because the appeal is frivolous. If it appears that a workers' compensation appeal is frivolous or taken solely for delay, the court may award damages in favor of the appellee. Tenn. Code Ann. § 50-6-225(h); Tenn. Code Ann. § 27-1-122. The court must use discretion in granting such damages "so as not to discourage legitimate appeals." Davis v. Gulf Ins. Group, 546 S.W.2d 583, 586 (Tenn. 1977) (discussing the predecessor of Tenn. Code Ann. § 27-1-122).

An appeal is considered frivolous if it lacks merit or has no reasonable chance of success. Bursack v. Wilson, 982 S.W.2d 341, 345 (Tenn. Ct. App. 1998). We find that the evidence on appeal is conflicting. Determination of the issues thus turned on credibility. Since there was significant conflict in the facts and the legal conclusions to be drawn from the facts, the appeal was not frivolous.

Conclusion

We hold that the trial court's judgment should be affirmed in all respects. The costs on appeal are assessed against the appellants, DAB Plumbing, Inc. and Oak River Insurance Company.

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JOHN A. TURNBULL, SPECIAL JUDGE

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by DAB Plumbing, Inc., and Oak River Insurance Company, 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 DAB Plumbing, Inc., and Oak River Insurance Company, and their surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Drowota, C.J., not participating