IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
January 27, 2015 Session

# ARNOLD HARRIS v. MR. BULT'S, INC.

**Appeal from the Chancery Court for Loudon County**
**No. 12028 Frank V. Williams, III, Chancellor**

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**No. E2014-00961-SC-R3-WC-MAILED-MARCH 23, 2015**
**FILED - APRIL 23, 2015**

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Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. Arnold Harris ("Employee") injured his left shoulder in the course and scope of his employment with Mr. Bult's, Inc. ("Employer"). The Chancery Court for Loudon County ("the Trial Court") found that Employee did not have a meaningful return to work and awarded 40% permanent partial disability. Employer has appealed, arguing that the Trial Court erred in finding that Employee did not have a meaningful return to work. We affirm the Trial Court's judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2013) Appeal as of Right; Judgment of the Chancery Court Affirmed**

D. MICHAEL SWINEY, J., delivered the opinion of the Court, in which GARY R. WADE and NORMA MCGEE OGLE, JJ., joined.

David T. Hooper, Brentwood, Tennessee, for the appellant, Mr. Bult's, Inc.

William R. Ray, Knoxville, Tennessee, for the appellee, Arnold Harris.

## OPINION

### I. Factual and Procedural Background

Employee was thirty-four years old at the time of trial. After graduating from high school in 1998, he worked as a front-end loader operator for Imco for approximately three years. After a period working for Mastercraft, Employee worked as a parts inspector for Sea Ray Boats for seven years. He began working for Employer in February of 2008. His duties included operating a backhoe, placing trash in trailers, and climbing a ladder to cover the trailers with a tarp. On January 6, 2011, Employee was thrown down an embankment after his backhoe overturned. After being treated at the hospital, he was referred to Dr. Christopher Shaver, a board-certified orthopedic surgeon. An MRI revealed that Employee had torn the rotator cuff in his left shoulder. On January 21, 2011, Dr. Shaver performed surgery to repair the injury. In May 2012, Employee filed a complaint for workers' compensation benefits in the Trial Court. Employer filed an answer in response. This case was tried in April of 2014.

Employee testified that his supervisor, Logan Deck, contacted him two weeks after the surgery and instructed him either to return to work on light duty or to risk losing his job. Although Employee was still in pain, he agreed to perform light duties and office work. In August of 2011, Employee returned to full duty because he needed the money to support his wife and children. Although Dr. Shaver had not imposed work restrictions, Employee testified that it took much longer for him to climb ladders and complete his other tasks. He estimated that his level of pain was an eight or nine on a scale of zero to ten. Although he took Advil, he did not ask for prescription pain medication because taking prescription pain medication would prevent him from working. Employee also stated that the pain interfered with his ability to sleep, do chores around the house, coach his daughters' softball teams, and go bow-hunting.[1]

In April of 2013, Employee resigned his position with Employer and accepted a position as a dry-end operator at Viskase. Although the new position at Viskase paid more money, Employee testified that he enjoyed working for Employer and did not want to leave Employer. Employee testified that he accepted the position at Viskase, however, because the work was "twice as easy" and did not require any overhead lifting or climbing.

Dr. Shaver testified by deposition that Employee suffered a massive, three-tendon tear to his left rotator cuff. Following surgery on January 21, 2011, Employee underwent

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[1] Employee's wife and father likewise testified that Employee was in severe pain and was unable to engage in his normal activities.

physical therapy three times per week. Although Dr. Shaver testified that the repair was intact by August of 2011, he also explained that after the repair of "a massive, traumatic rotator cuff tear, [an individual] would, likely, still have some weakness [and] some range of motion limitations." He assigned 11% impairment to the body as a whole under the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition.

Dr. James Talmage performed an independent medical examination in March of 2013. According to Dr. Talmage's report, Employee indicated that he had pain while working and that he had to take five or six Advil per day. Dr. Talmage noted that Employee could lift fifty pounds with his right arm but only twenty pounds with his left arm. According to Dr. Talmage, Employee had visible atrophy and a limited range of motion in his left arm. After performing a series of tests, Dr. Talmage assigned 12% impairment to the body as a whole.

Eddie Cook, Employee's brother-in-law, testified that he worked as a manager for Employer. Cook was called as a witness for Employer. Cook described Employee as a dependable worker who rarely missed work. He admitted that Employee told him he was often in pain, had trouble climbing ladders and loading trailers, and had difficulties with pain on the job. Cook, however, could not modify or lighten Employee's workload for that position. When Employee accepted a position with Viskase in April of 2013, Cook filled out an Employee Action Form and checked the box indicating that Employee's separation was a "Voluntary Resignation."

After considering the testimony and the evidence, the Trial Court found that Employee did not have a meaningful return to work following his injury and awarded 40% permanent partial disability. Employer argues that Employee had a meaningful return to work and that his benefits, therefore, should have been limited to 1.5 times his impairment rating. We affirm the Trial Court's judgment.

## II. 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 & Supp. 203); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). When issues of credibility of witnesses and the weight to be given their in-court testimony are before the reviewing court, considerable deference must be accorded to the factual findings of the trial court. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 733 (Tenn. 2002); *see Rhodes v. Capital City Ins. Co.*, 154 S.W.3d 43, 46 (Tenn. 2004). When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another. *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675, 676-

77 (Tenn. 1983). This Court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997). Questions of law are reviewed de novo with no presumption of correctness afforded to the trial court's conclusions. *Gray v. Cullom Machine, Tool & Die*, 152 S.W.3d 439, 443 (Tenn. 2004).

## III. Analysis

Employer argues that the Trial Court erred in finding that Employee did not have a meaningful return to work and that the Trial Court instead should have capped the award at 1.5 times the impairment rating. Employee argues that the Trial Court correctly found that he did not have a meaningful return to work.

"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); *see also Williamson v. Baptist Hosp. of Cocke Cnty.*, 361 S.W.3d 483, 488 (Tenn. 2012); *Howell v. Nissan N. Am., Inc.*, 346 S.W.3d 467, 472 (Tenn. 2011). "The determination of the reasonableness of the actions of the employer and the employee depends on the facts of each case." *Tryon*, 254 S.W.3d at 328.

An employee "has not had a meaningful return to work if he or she returns to work but later resigns or retires for reasons that are reasonably related to his or her workplace injury." *Tryon*, 254 S.W.3d at 328-29. In such cases, for injuries suffered between July 1, 2004 and July 1, 2014, the trial court may award benefits of up to six times the impairment rating. Tenn. Code Ann. § 50-6-241(d)(2)(A). "If, however, the employee later retires or resigns for personal reasons or other reasons that are not reasonably related to his or her workplace injury, the employee has had a meaningful return to work . . . ." *Tryon*, 254 S.W.3d at 329. In such cases, the employee's award is limited to 1.5 times the impairment rating. Tenn. Code Ann. § 50-6-241(d)(1)(A); *see also Tryon*, 254 S.W.3d at 329.

In finding that Employee did not have a meaningful return to work, the Trial Court made detailed oral and written findings. Although Employee was able to return to full-time work in August of 2011, the Trial Court found that "he did so while suffering severe and sometimes chronic pain to his left shoulder, both on and off the job." The Trial Court emphasized that "on a scale of zero to ten [Employee] would often have pain in the range of eight to nine" and that he returned to full-time work because he had to support his family. In accrediting Employee's testimony, the Trial Court found that Employee was in severe pain and that "he held on for as long as any reasonable human being could hold on at 18 months

trying to do a job with pain that would have rendered . . . most people unemployable." In short, the Trial Court found that Employee's "resignation . . . was directly related to the pain and disability caused by the subject job injury."

At this juncture, we address Employer's argument that Eddie Cook's testimony regarding Employee's pain as a basis for his leaving Employer was hearsay and that the Trial Court erred in admitting it. Employer objected to this testimony at trial in cross examination. However, on direct examination by Employer's attorney, Cook already had testified without objection to having discussed Employee's pain with Employee. Specifically Cook testified on direct that Employee had told Cook "that he was always in pain." Further, prior to any objection by Employer, Cook also had testified on cross examination that Employee had told him he was having difficulties with pain on the job, was hurting, and that it was hard for him to climb the ladder. There was no objection made to this testimony.

The specific testimony by Cook that was objected to by Employer pertained to what Employee had told Cook as to why he was going to leave the job. The Trial Court overruled the objection and based its ruling on the fact that Cook already had testified without objection as to what Employee had told him concerning his pain, and that Employer already had questioned Cook with regard to the circumstances regarding Employee's leaving Employer. The Trial Court found that Employer had "opened the door" for this testimony. As stated by the Trial Court, the objected to testimony largely already had been elicited before any objection was raised.

Hearsay is defined 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." Tenn. R. Evid. 801(c). We conclude that Cook's testimony concerning Employee's statements to him constitutes hearsay, which is inadmissible absent an exception. Employee argues that the state of mind hearsay exception at Tenn. R. Evid. 803(3) applies here. Rule 803(3) provides for an exception to hearsay for statements of the declarant's then existing mental, emotional, or physical condition, including statements about pain and bodily health. We hold that Cook's testimony at issue, while hearsay, was properly considered by the Trial Court under the state of mind hearsay exception.

We note in the alternative that, even if we were to conclude that Cook's testimony regarding Employee's expressions of pain as to why he was leaving Employer was inadmissible hearsay, the admission of this evidence would constitute harmless error by the Trial Court in light of the preponderance of the other evidence from trial supporting the Trial Court's finding that Employee left Employer because of his ongoing pain.

We conclude that the evidence does not preponderate against the Trial Court's findings and its resulting judgment. Although Employer emphasizes that Dr. Shaver returned Employee to work in August of 2011 with no restrictions and that Employee was able to work for eighteen months after his surgery, the Trial Court accredited Employee's testimony that he had severe pain, that the pain made his work for Employer harder to complete, and that the pain interfered with his ability to sleep and engage in normal activities. Employee's wife and father offered similar testimony. Employer's manager, Eddie Cook, likewise testified that Employee reported ongoing pain and discomfort while working. Cook could not, however, lighten or reduce Employee's workload. Similarly, both Dr. Shaver and Dr. Talmage indicated that Employee had weakness and a limited range of motion in his left shoulder. Although Employer argues that Employee voluntarily resigned to take a job that paid more money, the Trial Court accredited Employee's testimony that he took the new job not because it paid more money but instead because it did not require overhead lifting or climbing and would not result in as much pain. We conclude that the evidence in the record does not preponderate against the Trial Court's findings.

As a final matter, Employee requests his attorney's fees incurred on appeal. Employee's request for attorney's fees is not listed as a separate issue in his brief and Employee provides no authority in support of his request. While Employee prevails on appeal, Employer's appeal was by no means frivolous. In the exercise of our discretion, we decline to award Employee his attorney's fees incurred on appeal.

## IV. Conclusion

For the foregoing reasons, the Trial Court's judgment is affirmed. Costs are assessed to Employer and its surety, for which execution shall issue if necessary.

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D. MICHAEL SWINEY, JUDGE

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

**ARNOLD HARRIS v. MR. BULT'S, INC.**

**Chancery Court for Loudon County**
**No. 12028**

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**JUDGMENT ORDER**

This case is before the Court upon 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, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed to Employer and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM