IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
January 12, 2009 Session

GENERAL MOTORS CORPORATION v. WEISLEY FRAZIER ET AL.

Direct Appeal from the Circuit Court for Cannon County
No. 07-38 Robert E. Corlew, III, Chancellor

No. M2008-00523-WC-R3-WC - April 2, 2009
Filed - June 12, 2009

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) for a hearing and a report of findings of fact and conclusions of law. Employee injured his back and knees at work. While he was receiving medical treatment, Employee offered a special retirement incentive package to decrease its workforce. Employee chose to accept this plan and retired while he was still receiving medical treatment. At trial, he contended that he was permanently and totally disabled. The trial court found that he was not permanently and totally disabled. The trial court also found that Employee's recovery was limited to one and one-half times his anatomical impairment. Employee has appealed, and on appeal, Employee asserts that the trial court erred in finding that he was not permanently and totally disabled. In the alternative, he asserts that the trial court erred in applying the one and one-half times "cap." We affirm the judgment.

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

TONY A. CHILDRESS, SP. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and D. J. ALISSANDRATOS, SP. J., joined.

J. Anthony Arena, Brentwood, Tennessee, for the appellant, Weisley Frazier.

Nathaniel K. Cherry, Nashville, Tennessee, for the appellee, General Motors

Corporation.

Robert E. Cooper, Jr., Attorney General & Reporter; Michael E. Moore, Solicitor General; Diane Dycus, Deputy Attorney General; and Amy T. McConnell, Assistant Attorney General, for the appellee, the Second Injury Fund.

MEMORANDUM OPINION

Factual and Procedural Background

Weisley Frazier ("Employee") was a millwright for General Motors Corporation ("Employer") at its Spring Hill (Saturn) facility. A millwright is a skilled labor position involving the maintenance and repair of heavy equipment. The work is strenuous and involves substantial lifting, climbing, crawling and twisting.

Employee was injured on April 8, 2006, when a large fan that he and other millwrights were working on became unbalanced and fell. The falling fan struck Employee on his knees, and Employee was thrown to the ground. The accident was reported immediately. The accident caused Employee to have pain in his shoulders, knees and back. Employee chose to see Dr. Jeffrey Adams, an orthopaedic surgeon, in Columbia.[1] Dr. Adams first saw Employee on May 10, 2006. At that time Dr. Adams, who ordered MRI scans of Employee's back and knees, placed Employee on light duty. The MRI's revealed an annular tear of the L5-S1 lumbar disk and cartilage damage to both knees. On July 7, 2006, Dr. Adams performed arthroscopic surgical procedures on both of Employee's knees. Thereafter, Dr. Adams ordered physical therapy for the knees and an epidural steroid injection for the back. Employee reached maximum medical improvement on December 8, 2006. At that time Dr. Adams assigned an anatomical impairment of 12% to the body as a whole for the combined knee and back injuries. Dr. Adams placed the following permanent activity restrictions upon Employee: no lifting over twenty pounds; no squatting or kneeling; no repetitive bending or stooping; and no climbing more than occasionally.

Although Employee continued to work until his surgery, the work performed was of a limited nature. In fact, Employee testified that he sat in a "computer room" where he "did nothing." Shortly before Employee's surgery, Employer offered a

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[1]Dr. Adams had previously treated Employee for injuries to his shoulders, which had been the subject of previous claims. Those claims had been settled for a combined total of 67% permanent partial disability to the body as a whole.

special early retirement program to its workers for the purpose of reducing its workforce. Employee accepted one of the retirement options offered by Employer, and Employee executed the documents concerning the early retirement plan on June 6, 2006. Employee's retirement was effective on October 1, 2006. Employee did not return to work after his surgery.

One of the early retirement plan documents executed by Employee contained the following language: "I am satisfied with the terms of this application and acknowledge that I am voluntarily accepting it. This acceptance is not under duress and I am able to work and suffer from no disability that would preclude me from doing my regular assigned job. As such, I acknowledge that I am not entitled to disability pay or benefits." Despite executing this document, Employee testified that on the date the early retirement document was executed, he believed that he was in fact suffering from a disability that prevented him from performing his regular job. Nevertheless, after a discussion with a union representative, Employee decided to sign the document.

Employee testified that he had discussed the early retirement plan with Dr. Adams during an appointment on May 23, 2006. Employee stated that Dr. Adams told him that he "would never be able to do my job again." According to Employee, Dr. Adams recommended that he accept the early retirement plan. Dr. Adams, whose testimony was submitted by way of deposition, neither confirmed nor denied such a discussion took place on May 23, 2006. Dr. Adams did testify, however, that "on the next office visit after September 11, 2006[,]" Employee informed him that he had retired.[2] According to Dr. Adams, Employee told him that he had accepted the early retirement because "[Employee] just didn't think he could hold up to the pounding on the concrete with all of the medical problems he has."

Dr. Adams testified that Employee's injuries would prevent Employee from performing his job as a millwright. Due to the repetitive and physical nature of factory jobs and the amount of walking or standing on concrete involved in such employment, Dr. Adams was also skeptical that Employee would ever be able to work in a factory at all.

Employee, who is a high school graduate, was fifty-one years old at trial. Employee attended a community technical college for two years as part of his training program to become a millwright. Employee then had to complete eight thousand

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[2] The record does not reflect the date on which the "next office visit after September 11, 2006" occurred.

hours of on the job training before being certified as a millwright. In addition to his millwright certification, Employee has, or has held, licenses or certifications in HVAC, electrical installation and repair, robotics and hydraulic repair. Employee has also owned and operated a hardware store and several small markets and restaurants. Except for one of these businesses, Employee has sold these businesses for a profit. Employee and his wife had also bought several houses for investment purposes and had sold all these houses for a profit. Employee's only work since retiring from Employer was to perform some relatively simple electrical work in some houses that his wife, who is a licensed real estate agent, was selling. Employee testified that he did not think he could perform any of his pre-injury jobs.

The trial court found that Employee was not permanently and totally disabled. The trial court also found that Employee's voluntary retirement resulted in the disability award being capped at one and one-half times the anatomical impairment. The trial court thereafter awarded 18% permanent partial disability ("PPD") to the body as a whole. The trial court made an alternative finding that, if the award had not been capped, Employee had sustained 50% PPD. Employee has appealed, and on appeal, Employee asserts that the trial court erred by finding that Employee was not permanently and totally disabled. In the alternative, Employee contends that the trial court erred by finding that the award of disability benefits was "capped" at one and one-half times the anatomical impairment.

Standard of Review

Review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2008), which provides that appellate courts must "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." As has been 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. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). 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. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003).

Analysis

1. Permanent Total Disability

Employee contends that he is permanently and totally disabled and that the trial court erred in finding otherwise. In support of his position, Employee relies primarily upon Dr. Adams testimony that Employee was unable to return to factory work and his own testimony concerning his limitations. "The test as to whether an employee is permanently and totally disabled requires us to determine if the employee is 'totally incapacitate[d] . . . from working at an occupation that brings the employee an income . . . . '"; "Hubble v. Dyer Nursing Home, 188 S.W.3d 525, 535 (Tenn. 2006) (quoting Tenn. Code Ann. § 50-6-207(4)(B) (2005)).".

In its findings the trial court reviewed Employee's various business ventures, including his hardware store, restaurants and real estate transactions. On the basis of those factors, and Employee's appearance and testimony, the trial court concluded that Employee was not totally disabled. This Court has reviewed the record independently, as it is required to do. The effects of Employee's injuries are significant, and Employee cannot return to the skilled profession he had worked in for most of his adult life. Nevertheless, the record reviews that Employee is intelligent and that he possesses business acumen and experience. In light of those residual qualities, we conclude that the evidence does not preponderate against the trial court's finding that Employee is not incapacitated from working in an income-producing occupation.

2. Application of Cap

The trial court found that the lower cap on disability awards, set out at Tennessee Code Annotated section 50-6-241(d)(1)(A), applied in this case. The trial court stated, in pertinent part, that "once you retire, or quit, or leave the employment, then you remove from the pre-injury employer the opportunity to continue your meaningful return to work." The court cited Lay v. Scott County Sheriff's Dep't, 109 S.W.3d 293 (Tenn. 2003), in support of its conclusion.

Employee contends that the trial court's interpretation of Lay was incorrect. Employee argues that Lay, and the Supreme Court's subsequent decision, Tryon v. Saturn Corp., 254 S.W.3d 321 (Tenn. 2008), stand for the proposition that the question for the trial court to determine is whether or not a voluntary resignation or retirement is "reasonably related" to the work injury. See Tryon, 254 S.W.3d at 328-29; Lay, 109 S.W.3d at 298-99. Employee points out that the Supreme Court in Tryon found that the evidence did not preponderate against a trial court's finding that the employee's retirement was reasonably related to the injury. This finding was

based largely upon evidence that the employee's treating physician had advised him to retire. 254 S.W.3d at 334. In that context, Employee argues that his testimony concerning the statement that Dr. Adams allegedly made on May 23, 2006, and Dr. Adams' statement concerning Employee's inability to return to factory work, is similar to the description of the treating physician's statement to the employee in Tryon.

Employer notes two dissimilarities between this case and Tryon. First, the employee in Tryon returned to work and retired after thirty (30) years of service with the employer. Employer also contends that Tryon is distinguishable because Tryon was decided under Tennessee Code Annotated section 50-6-241(a), and Tennessee Code Annotated section 50-6-241(a) is only applicable to injuries occurring prior to July 1, 2004.[3] The injury in this case, however, arose after July 1, 2004, and is therefore governed by Tennessee Code Annotated section 50-6-241(d).

Tennessee Code Annotated section 50-6-241(d) states explicitly: ". . . under no circumstances shall an employee be entitled to reconsideration when the loss of employment is due to . . . (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 . . . . "." Employer asserts that the "does not result from" language in 241(d) sets a more stringent standard than the "reasonably related to" standard that was applied in Tryon. On that basis, Employer contends that, because Employee executed early retirement documents before his surgery, the retirement did not result from the work injury. This contention that Employee's voluntary retirement did not result from his injures is largely based on the argument that the ultimate consequences of Employee's injuries were not known at the time Employee signed the retirement documents.

In addition, Employer notes the language of the early retirement documents signed by Employee stated that he was able to perform his normal job duties. Employer argues that the language in these documents demonstrate that Employee's injury was not the reason for the retirement. Employer also argues that Employee's testimony that he signed the early retirement documents when he knew he was not able to perform his normal job duties undermines the credibility of Employee's testimony concerning why he retired.

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[3] Tennessee Code Annotated section 50-6-241(a) does not explicitly address voluntary separation from employment. The principle that a voluntary resignation did not preclude reconsideration, or application of the higher cap, if the voluntary resignation was reasonably related to a work injury, was developed by case law after the enactment of that section.

The difference between a voluntary resignation or retirement which "results from" a work injury and one which is "reasonably related" to a work injury, if any, is subtle. In Gibbs v. Saturn Corp., No. M2007-02263-WC-R3-WC, 2009 WL 141895 (Tenn. Workers' Comp. Panel Jan. 22, 2008), which was decided under Tennessee Code Annotated section 50-6-241(d), the panel did not draw a distinction between "results from" and "reasonably related." In fact, the panel in Gibbs relied in large part upon cases decided under section 50-6-241(a). Gibbs outlines the analytical framework concerning voluntary retirement or resignation and meaningful return to work as follows:

> Where an employee voluntarily retires, whether the employee had a meaningful return to work depends on the employee's reason for retiring. If the employee retired for reasons that are reasonably related to his or her workplace injury, the employee did not have a meaningful return to work. However, if the employee voluntarily retires for reasons unrelated to an injury, the employee is deemed to have had a meaningful return to work.

Id. at *5 (citations omitted). In light of the Court's decision in Gibbs, we do not interpret Tennessee Code Annotated section 50-6-241(d) as modifying the existing standard for determining whether a voluntary resignation precludes application of the higher statutory cap.

Employee testified that he was motivated to accept the early retirement offer, at least in part, by a May 23, 2006 conversation with Dr. Adams. Employee testified that Dr. Adams advised him at that time that he would "never be able to do factory work again." In his deposition, however, Dr. Adams neither confirmed nor denied that he made such a statement on May 23, 2006.[4] The first reference to retirement in Dr. Adams' testimony concerned "the next office visit after [a] September 11, 2006 appointment.". It was at that appointment when Employee informed Dr. Adams that he had retired.

On May 23, 2006, Employee had been under Dr. Adams' care for this injury for only thirteen days. Employee was undergoing physical therapy for his lower back and anticipating arthroscopic surgery on his knees. Employee executed the paperwork accepting the early retirement package on June 6, 2006. At the time Employee executed these documents, he had been under Dr. Adams' care for slightly

[4] It does not appear that Dr. Adams was ever asked if he made such a statement to Employee during the May 23, 2006 appointment.

less than a month. The arthroscopic surgery on Employee's knees took place one month later on July 7, 2006.

One of the documents Employee signed on June 6 contained the statement, set out verbatim earlier in this opinion, that Employee was able to work and not under a disability that would preclude him from doing his regular assigned job. In the context of the evidence presented in this case, Employee's assent to this statement may be interpreted in one of two ways. The first is that, although he was unable to perform his regularly assigned job at the time he signed the document, Employee anticipated that he would be able to do so in the future. The second is that Employee deliberately made an untrue statement in order to receive a monetary benefit.[5] Either view of the evidence, however, supports the trial court's decision to apply the lower cap. If Employee actually thought he would be able to return to work after a period of recovery, then Employee's retirement did not result from nor was it reasonably related to his injury. If, however, Employee was untruthful at the time he signed the early retirement document, which Employee contends that he was, then Employee's entire testimony concerning why he did in fact accept early retirement is called into question. After due consideration, we conclude that the evidence does not preponderate against the trial court's decision on this issue.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Weisley Frazier, and his surety, for which execution may issue if necessary.

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TONY A. CHILDRESS, SPECIAL JUDGE

[5] Under the early retirement package, Employee is to receive discounts on GM products, healthcare benefits for life and a monthly pension for life.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

GENERAL MOTORS CORPORATION ET AL. v. WEISLEY FRAZIER

No. M2008-00523-SC-WCM-WC - Filed - June 12, 2009

ORDER

This case is before the Court upon the motion for review filed by Weisley Frazier pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(A)(ii), 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 Weisley Frazier, for which execution may issue if necessary.

PER CURIAM

CLARK, J., NOT PARTICIPATING