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

MICHAEL RAY WOLFORD v. ACE TRUCKING, INC., ET AL.
Direct Appeal from the Circuit Court for Decatur County
No. 2827 C. Creed McGinley, Judge

No. W2008-00435-WC-R3-WC - Mailed March 31, 2009; Filed May 7, 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. After review, we conclude that an employee may seek reconsideration under Tennessee Code Annotated section 50-6-231 by either filing a motion in the original proceeding or by filing a new action in the same court and county in which the original was entered. The judgment of the trial court is affirmed.

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.

Michael L. Mansfield and Amanda C. Waddell, Memphis, Tennessee, for the appellant, Ace Trucking, Inc.

Art D. Wells, Jackson, Tennessee, for the appellee, Michael Ray Wolford.

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

MEMORANDUM OPINION

Factual and Procedural Background

The record in this case is large, and the procedural history is convoluted, including two previous appeals. Nevertheless, the relevant facts are essentially undisputed, and the issue presented is one of law only.

Michael Wolford ("Employee") injured his back in the course of his work for Ace Trucking ("Employer") on July 14, 2000. Employee had two previous work injuries to his back, and these injuries had resulted in awards totaling 42% permanent partial disability (PPD) to the body as a whole. Concerning the injury that is the subject of this case, the trial court initially awarded benefits for "100% PPD to the body as a whole." The award resulted in an appeal. The Workers' Compensation Panel concluded that the trial court had erred and remanded the case with directions to the trial court to determine whether Employee was permanently and totally disabled, or permanently partially disabled. Wolford v. Ace Trucking, Inc., No. W2003-02783-WC-R3-CV, 2004 WL 1937164 (Tenn. Workers' Comp. Panel Sept. 1, 2004) (Wolford I).

On remand, the trial court determined that Employee was not permanently and totally disabled. The trial court did determine, however, that Employee was entitled to the maximum award for PPD, which is 400 weeks of benefits. The award was apportioned 58% to Employer and 42% to the Second Injury Fund (Fund), pursuant to Tennessee Code Annotated section 50-6-208(b). A second appeal was taken. The Panel affirmed the decision of the trial court. Wolford v. Ace Trucking, Inc., No. W2004-02905-WC-R3-CV, 2005 WL 3051124 (Tenn. Workers' Comp. Panel Nov. 14, 2005) (Wolford II).

The initial injury, its effects, and the medical treatment rendered for it are fully described in the two previous panel opinions. For the purposes of this appeal, it is not necessary to recount them in any detail. Shortly before Wolford II was decided by the Panel, Employee filed a petition seeking modification of his previous award pursuant to Tennessee Code Annotated section 50-6-231. Employee alleged in his petition that a modification was appropriate because he had sustained an increase in incapacity due solely to his previous injury. Although this petition was filed under a new docket number, the petition was filed in the same court and in the same county in which the original judgment had been entered. In July 2006, the Employee underwent a fifth surgical procedure. The Employee had temporary improvement, but ultimately worsened. At the time of the hearing on his petition, Employee was taking numerous

medications, including narcotics, and had difficulty standing, walking and with other activities of daily living. After finding that Employee had an increase of incapacity, which was due solely to the original work injury, the trial court increased the previous award to benefits for permanent and total disability.

After the petition was filed but before the petition was heard and decided, however, Employer completed making its periodic payments under the previous judgment. Since it had completed making its periodic payments while the petition was pending, Employer argued that the entire amount of the increased award should be apportioned to the Fund. The trial court initially agreed and judgment was entered accordingly. The Fund filed a motion to reconsider. Ultimately, the Fund's motion to reconsider was granted, and Employer was directed to pay 58% of the permanent total disability award. The Fund was directed to pay the remaining 42% of the permanent total disability award. Employer has appealed, and on appeal, Employer contends that the trial court erred in granting the Fund's motion for reconsideration and incorrectly apportioned the award between it and the Fund.

Analysis

Because this appeal presents a question of law only, we review the trial court's conclusions de novo with no presumption of correctness. Gray v. Cullom Machine, Tool & Die, Inc., 152 S.W.3d 439, 443 (Tenn. 2004). Resolution of the issues raised is determined by the interplay between Tennessee Code Annotated section 50-6-231, which permits reconsideration of periodic awards in certain circumstances, and Tennessee Code Annotated section 50-6-208, the Second Injury Fund statute.

Employer argues that its liability should be limited to the amount in the original judgment based upon the following line of reasoning: Employee sought reconsideration by filing a new action, rather than a motion or petition in the original action. While that "new" action was pending, Employer completed its 232 weeks of payments under the "original" judgment. Employer asserts that the jurisdiction of the trial court to apportion a portion of the permanent total disability award to it was "extinguished" once it made the last payment under the original judgment. This assertion is primarily based on Employer's argument that there was no proceeding pending under the docket number of that judgment. Employer argues that all remaining liability for permanent disability benefits must be placed upon the Fund.

The linchpin of Employer's argument is that Employee committed a fatal procedural error by filing a separate action for reconsideration under section 50-6-231, rather than filing a motion under the docket number of the original claim. Implicitly,

under this theory, if Employee had filed a motion bearing the docket number of the original judgment, the trial court's jurisdiction to modify Employer's obligation would have continued past the payment of the 232nd week of benefits. In support of its position, Employer cites Gould, Inc. Century Elec. Div. v. Barnes, 498 S.W.2d 623 (Tenn. 1973). In Gould, the employee received a judgment for 300 weeks of benefits in the Chancery Court sitting in Madison County. While that judgment was being paid, the employee filed an action seeking modification of the award under section 50-6-231.[1] This new action was filed in the law and equity court of Gibson County. The Gibson County court dismissed the action on the basis of improper venue. The Supreme Court affirmed, stating: "[T]he modification suit is not a new suit. It is merely a continuation of the original suit by petition for a reopening and modification of the original judgment." Id. at 624-25. On that basis, venue in Gibson County was not proper. The Court further noted: "Regardless of the foregoing reasoning and conclusions, we are of the opinion authority exists for holding that a modification suit must be filed in the same court which heard the original compensation suit." Id. at 625. The issue of whether a motion, rather than a new action, is required by section 50-6-231 was not raised in Gould. There is nothing in the quoted language, or elsewhere in the decision, however, that can be interpreted as requiring one of those procedures over the other.

In our view, Employer's argument unduly emphasizes form over substance and is at odds with the remedial purpose of the workers' compensation law. There is no specific statutory provision nor appellate decision which supports the contention that an employee who seeks relief under section 50-6-231 by means of a separate civil action must obtain that relief from the trial court before his employer completes making payments under the initial judgment, while an employee who seeks the same relief by means of a motion is under no such deadline. In the absence of such authority, we conclude that an employee may seek relief under section 50-6-231 by either a motion in the original proceeding, or by filing a new action in the same court and county in which the original judgment was entered. As long as the motion or new action is filed prior to the paying of the final payment under the original judgment, it is timely; Nelson v. Cambria Coal Co., 178 Tenn. 389, 158 S.W.2d 717, 721 (1942), accord Am. Snuff Co. v. Helms, 201 Tenn. 622, 301 S.W.2d 348, 351 (1957), and the trial court may proceed to grant the relief warranted by the evidence.

Having found that the trial court had the authority to grant relief under section 50-6-231, we address Employer's contention that its liability should have been limited

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[1]At that time, this section was codified as Tennessee Code Annotated section 50-1025.

to 232 weeks of benefits by operation of section 50-6-208(b). The trial court's initial decision regarding disability, as affirmed by the Panel in Wolford II, was that Employee was not permanently and totally disabled. Therefore, only section 50-6-208(b),[2] which addresses combined PPD awards which exceed 100% to the body as a whole, applied to the award. Section 50-6-208(a) is implicated only when a finding of permanent total disability is made. Under section 208(b), the employer is liable for only that portion of the award between the amount of the previous awards and 400 weeks. The trial court in Wolford II correctly assigned 232 weeks of the original 400 week award to Employer and remainder was assigned to the Fund.

After hearing Employee's subsequent petition to increase his award pursuant to section 50-6-231, however, the trial court found that Employee had become permanently and totally disabled solely as a result of the original work injury. Because of that finding, section 50-6-208(a) came into play. By its terms, section 50-6-208(a) requires that the trial court determine the extent of disability resulting solely from the most recent injury and limit the employer's liability to that percentage of the entire award. Gray, 152 S.W.3d at 444-45. The employer's liability, however, is based upon the entire length of the award rather than 400 weeks. Id. at 445.

In Bomely v. Mid-America Corp., 970 S.W.2d 929, 935 (Tenn. 1998), the Supreme Court directed that when both section (a) and (b) may be applied to an award, that is when an employee is permanently and totally disabled and also has prior workers' compensation awards, the trial court should determine the employer's liability under each method, and then apply the result most favorable to the employer. The employers' liability, however, is still based upon the entire award rather than 400 weeks. Id. at 932.

Employer cites Hill v. Eagle Bend Mfg., 942 S.W.2d 483 (Tenn. 1997), in support of its position. In that case, an employee sustained an injury which rendered him permanently and totally disabled. Employee had two previous workers' compensation awards, and the two previous workers' compensation awards totaled 100%. The Supreme Court found that since a third injury rendered employee permanently and totally disabled, the entire permanent and total disability award should be apportioned to the Fund. Id. at 488-89 Hill, however, is not applicable to the circumstances of this case, because, in this case, Employee was rendered permanently and totally disabled by the very same injury which Employer now seeks to hold up as a limit to its liability.

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[2]Section 50-6-208(b) applies only to injuries occurring on or before June 30, 2006.

The trial court found that the present injury alone caused permanent and total disability. Under section 50-6-208(a), Employer would be liable for the entire award. Under section 50-6-208(b), however, Employer would be liable for only 58% of the total award. Since the latter result is more favorable to Employer, we conclude that the trial court therefore correctly apportioned the award. Bomely, 970 S.W.2d at 935.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Ace Trucking Inc., and its surety, for which execution may issue if necessary.

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TONY A. CHILDRESS, SPECIAL JUDGE

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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 the Appellant, Ace Trucking, Inc., and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM