IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 26, 2009

Frankie Blankenship v. Masterbrand Cabinets, Inc., et al.

Direct Appeal from the Circuit Court for Cumberland County
No. CV004679 John A. Turnbull, Judge
Filed October 16, 2009

E2008-02582-WC-R3-WC Mailed July 15, 2009

Frankie Blankenship sought reconsideration of her workers' compensation award after her employer, Masterbrand Cabinets, Inc., discontinued its operations. The trial court granted a multiplier of 6 times her permanent partial disability rating of 3 percent. In accordance with Tennessee Code Annotated section 50-6-225(e)(3) (2008), the appeal by the Employer has been referred to the Special Workers' Compensation Panel for findings of fact and conclusions of law. Because the trial court specifically accredited the testimony of the Employer and properly addressed each of the factors pertinent to an award upon reconsideration, our scope of review is limited. The judgment is, therefore, affirmed.

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

GARY R. WADE, J., delivered the opinion of the court, in which DONALD P. HARRIS, SR. J., and E. RILEY ANDERSON, Sp. J., joined.

Mark J. Romaniuk and Jeffrey S. Beck, Indianapolis, Indiana and Mary Dee Allen, Cookeville, TN for the appellants, Masterbrand Cabinets, Inc. and Ace American Insurance Co.

James P. Smith, Jr., Crossville, Tennessee for the appellee, Frankie Blankenship.

MEMORANDUM OPINION

Facts and Procedural Background

Frankie Blankenship ("the Employee"), who was forty-four years old at the time of trial, was employed by MasterBrand Cabinets, Inc. ("the Employer") as a marker at a manufacturing plant in Cumberland County. On February 1, 2005, the Employee sustained work-related injuries to her wrists, later diagnosed as bilateral carpal tunnel syndrome. Dr. Rick E. Parsons, a physician offered by the Employer, performed a carpal tunnel release on the Employee's left wrist on November 11,

2005 and, based on the success of the first surgery, performed the same procedure for the right wrist on December 15, 2005. After the surgeries, the Employee returned to work at the same or greater wage than she earned prior to her injuries. Dr. Parsons restricted the Employee to light duty.

During a follow-up appointment in January of 2006,[1] the Employee reported improvement and asked to be returned to regular duties. She later explained that the responsibilities of her light duty position placed more stress on her hands than her regular job as a marker. Dr. Parsons granted her request. In subsequent visits, Dr. Parsons observed that the Employee had progressed "exceptionally well," and, by March 9, 2006, her last appointment, had reached maximum medical improvement. Because of occasional tingling and numbness in her fingers, Dr. Parsons assigned the Employee a 3% permanent partial disability to each extremity.

Based on Dr. Parson's medical assessment, the Employer and the Employee reached a settlement on her worker's compensation claim. In addition to a 3% permanent partial disability award, the Employer agreed to compensate the Employee for all future medical expenses related to the injuries.

From January of 2006 until the plant closed in March of 2008, a total of 26 months, the Employee performed her duties, routinely working between eight and twelve hour days. During this time, the Employee did not notify the Employer of any pain, but did testify at trial that she had reported pain and tingling in her hands to Dr. Parsons at her appointment in March of 2006. She did not seek further medical attention from Dr. Parsons after that date. Further, the Employee did not avail herself of the services of the staff nurse provided on site by the Employer during the two year period until the plant closed. At the hearing, she explained that she had not sought further treatment because Dr. Parsons had already performed two surgeries and asked, "What else could he do?" She also explained that she feared being placed back on "light duty," as an off-bearer, which she described as "harder" than her work as a marker.

Prior to the plant closing, the Employer helped other employees find new jobs, offered paid leave to attend job fairs, and extended invitations for local businesses to conduct interviews. The Employee submitted an application to a flooring manufacturer positioned to take over the facility, but was apparently unsuccessful and did not pursue other job opportunities. Unemployed at the time of trial, the Employee testified that her mother's declining health since the Employer closed the business required so much of her time that she had not actively searched for a new job.

At trial, the Employee served as her only witness. She testified to numerous activities she could no longer perform or could perform only with considerable pain, such as four-wheeling, laundry, bowling, bow hunting, bass fishing, mowing, driving, and picking up heavy household items. Moreover, she stated that holding even a small amount of weight, such as a television remote,

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[1] Dr. Richard B. Cunningham, Jr., an associate of Dr. Parsons, saw the Employee once during the course of treatment as a result of Dr. Parsons' absence. This visit occurred on December 28, 2005, at which time Dr. Cunningham released her to perform light duty work with the left hand, but directed her not to use her right hand.

caused shooting pains in her hand. When questioned about her ability to perform future jobs, the Employee, who described the disability in her right hand as "wors[e]" than her left, stated that there were jobs she could do, such as her marker job, but she maintained that any employment would cause pain in her hands and involve restrictions. The Employee testified that she looked into taking classes in order to become a mechanic, and considered working for a cannery, or pursuing other types of employment, but decided that her injuries precluded those options. Despite having received her GED, the Employee did not believe she had the basic education necessary to successfully train to become a secretary or work with computers.

Dr. Parsons, who testified by deposition on behalf of the Employer, reported that the Employee reported only minimal pain two months after the first surgery and one month after the second. Despite some reluctance, he allowed her to return to her regular job because she had found "light duty" to be more difficult. Dr. Parsons did confirm that the Employee reported "shooting pains" in her right hand on February 9, 2006. Having last seen her in March of 2006, when she still reported "tingling," he stated it would be "unusual" for the Employee to experience pain while attempting to engage in physical activities based on his assessment during the term of her treatment. Dr. Parsons stated that nothing had led him to believe "she would not be able to work from the time we released her." He conceded however, that although he had met with the Employee several times between her surgery and release, he would not be able to identify her in a public setting, and that he was "relying on [his] notes" in regards to her state of health at the time of the deposition. He also acknowledged that Debra West, the case manager for the Employer, had prepared a case history on the Employee prior to her first visit, as she did with other Masterbrand employees, and was typically present during his course of treatment.

A video tape, also presented by the Employer, showed the Employee performing her duties with no visible manifestations of pain only a few months prior to the plant's closing. Gina Dykes, a human resources manager for Masterbrand, testified that she had never observed the Employee display any signs of pain after the surgeries. Nancy Wright, a benefit associate, also testified on behalf of the Employer.

At the conclusion of the trial, the trial judge granted an award of eighteen percent (18%) to both the left and right arms based on the permanent partial disability rating of 3% and a multiplier of 6. The net sum to the Employee, less credit for sums previously paid, equaled $20,866.80. Further, the Employer was required to pay for all future medical expenses of the Employee arising out of her work injuries.

The Employer asserts that the trial court erred by failing to take into proper consideration the testimony of Dr. Parsons, and instead relied primarily on the Employee's subjective complaints. Further, the Employer argues that the use of a six times multiplier in calculating the Employee's reconsideration benefits was excessive based on the evidence presented.

Standard of Review

In Tennessee workers' compensation cases, the standard of review is "de novo upon the

record . . . accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2)(2008). When the trial court has seen and heard the witnesses, considerable deference must be afforded to the trial court's findings of credibility and the weight that it assessed to those witnesses' testimony. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008) (citing Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002)). The same deference need not be extended to findings based on documentary evidence such as depositions. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). Indeed, where medical expert testimony is presented by deposition, we may independently assess the content of that proof in order to determine where the preponderance of the evidence lies. Crew v. First Source Furniture Group, 259 S.W.3d 656, 665 (Tenn. 2008) (internal citations omitted). The standard of review for questions of law is de novo without a presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003) (citing Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 732 (Tenn. 2002)).

Applicable Law

When no longer employed by a pre-injury employer, an employee may petition the court for reconsideration of their award. Niziol v. Lockheed Martin Energy Sys., Inc., 8 S.W.3d 622, 624 (Tenn. 1999). Reconsideration may be sought when "the employee is no longer employed by the pre-injury employer and makes application to the appropriate court within one (1) year of the employee's loss of employment, if the loss of employment is within four hundred (400) weeks of the day the employee returned to work." Tenn. Code Ann. § 50-6-241(a)(2). Reconsideration can be granted even if the termination of employment was not the result of the injury, and lack of employment may be taken into account when determining whether an increase in benefits is warranted. Niziol, 8 S.W.3d at 624. Although the reconsideration of workers' compensation benefits is a statutory right, "there is no entitlement to an enlargement of the previous award." Pigg v. Liberty Mut. Ins. Co., 2009 WL 585962, at *4 (Tenn. Workers' Comp. Panel 2009). An employee, whether terminated due to outsourcing or when the business is bought by a new owner, is an appropriate candidate for reconsideration. Id.

In 2004, the Tennessee Legislature amended section 50-6-241 for injuries occurring after July 1 of that year. The language of section 50-6-241(d)(2)(A) establishes that the employee's disability award in reconsideration cases is limited to six times the employee's medical impairment rating. Buckingham v. Fidelity & Guar. Ins. Co., 2007 WL 3120710, at *4 (Tenn. Workers' Comp. Panel 2007) (citing Tenn. Code Ann. § 50-6-241(d)(2)(A)). "[T]he trial court has the authority to grant any award less than or equal to 6 times the medical impairment rating based on all the evidence of vocational disability." Sissom v. State Dep't of Labor Workers' Comp. Div., 2004 WL 1949435, at *2 (Tenn. Workers' Comp. Panel 2004). In determining whether an enlargement of an award is warranted under section 241(a)(2), several factors are to be considered by the court, including an "employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in the claimant's disabled condition." Brewer v. Lincoln Brass Works, Inc., 991 S.W.2d 226, 229 (Tenn. 1999) (citing Tenn. Code Ann. § 50-6-241(a)(2)). "The focus is purely on the issue of industrial disability." Id. When a multiplier of 5 or higher is applied, the court must "make specific findings of fact detailing the reasons for awarding the maximum impairment," thus

requiring all pertinent factors to be considered. Tenn. Code Ann. § 50-6-241(c).

Analysis

In this instance, because the Employee, through no fault of her injuries, lost her employment with the Employer, and filed a timely motion, she is entitled to a reconsideration of the original award. The Employer does not take issue with that, but, as stated, does argue that the trial court afforded too much weight to the testimony of the Employee, disregarded contradictory evidence, and applied an excessive multiplier. The Employer contends that the more "objective" testimony by Dr. Parsons should have prevailed over the "subjective" testimony of the Employee, particularly as to the pain which, she claimed, had persisted since the surgeries. The Employer argues that the trial court failed to make specific findings as to the factors pertinent to the reconsideration. The issue, therefore, is whether the multiplier used to determine the Employee's reconsideration award was justified based on the evidence presented at trial, the findings of the trial court, and the conclusions of law.

At the close of the proof, the trial court specifically accredited the testimony of the Employee, "not [finding] a single discrepancy" and further commented that "and had I heard the proof at that time [of the initial settlement] and how her subsequent treatment has been, the Court would have fixed a disability to the one arm of twenty-five per cent and to the other arm of forty per cent." After addressing the factors outlined in Brewer, the trial judge observed that the Employee, forty-four years of age at the time, had only a formal education through the sixth grade, and limited work skills:

> All of the jobs that she's had during her life have required repetitive manual labor and they include working at the canning company, working for about six or eight months at the Lantana Shirt Factory, where she marked collars, which is a highly repetitive job, and her work for . . . eighteen years for Masterbrand. . . . She has no training to do anything other than highly repetitive type work [and s]he has no computer skills . . . .[2]

The trial judge also made reference to limited job opportunities in Cumberland County and concluded that while working through considerable pain, the Employee had "wor[n] out her hands," precluding her from performing those jobs that would have presumably been within her capabilities.

Because the trial court, having had the benefit of seeing the Employee and hearing her testimony, accredited her as a witness, and because the trial court also addressed each of the factors pertinent to the enlargement of an award on reconsideration under Tennessee Code Annotated section 50-6-241(a)(2), our scope of review is limited. Significant deference must be given to the findings of the trial judge when the credibility of a witness or the weight afforded his or her in-court testimony are important considerations. Whirlpool, 69 S.W.3d at 167. When determining disability,

[2] The record does indicate the Employee acquired a graduate equivalent diploma.

trial judges must consider "all the evidence and [are] not restricted to the precise estimate of disability made by a medical witness." Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 458 (Tenn. 1988) (quoting Forest Prods. v. Collins, 534 S.W.2d 306, 309 (Tenn. 1976)). In contrast, trial courts are not afforded deference as to medical testimony by deposition, Crew, 259 S.W.3d at 665, and, on appeal, we are entitled to draw our own conclusions as to weight or credibility based upon the content of the deposition. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004).

While the Employee testified that she experienced a great deal of pain after returning to work, Dr. Parsons expressed concern that her complaints of continuing pain in the hands were not typical of his patients who had undergone similar surgeries. He did, however, acknowledge that he had not conducted any follow up treatment of Employee. A video tape of the Employee performing her job duties does not demonstrate any outward expression of pain, but but we do recognize that the manifestation and tolerance of pain vary from individual to individual. Dr. Parsons conceded that the Employee did complain of some pain on the next to last of her visits, and on her last visit in March of 2006 had reported tingling associated with any activity by her hands. In light of the conflicting evidence, the crucial factor, in our view, is the trial court's assessment of the Employee's credibility. The content of the deposition of the medical expert, in our view, does not trump the specific findings of the trial judge as to the value and truthfulness of the Employee's testimony. Further, because the trial court specifically addressed each of the factors pertinent to reconsideration and made a plausible assessment of the appropriate multiplier, we find no error.

Conclusion

The judgment of the trial court is affirmed. Cost of appeal shall be assessed to the Employer, Masterbrand Cabinets, Inc., and its surety, for which execution may issue if necessary.

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GARY R. WADE, JUSTICE