IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 21, 2009 Session

KIMBERLY WHEELER v. WHIRLPOOL CORPORATION

Direct Appeal from the Circuit Court for Rutherford County
No. 56698 Mark Rogers, Judge

No. M2009-00206-WC-R3-WC - Mailed - December 30, 2009
Filed - February 3, 2010

In this workers' compensation action, the employee, Kimberly Wheeler, sustained repetitive trauma injuries to both arms. The injuries were accepted by her employer, Whirlpool Corporation, as compensable. After having surgery on both arms, she returned to work, initially in a light-duty status, and later to full duty. The product line on which she worked was then shut down and moved to another location. She was offered the option of accepting a voluntary layoff or moving to another product line. She chose the voluntary layoff. Under the terms of her employment contract, she continued to be an employee although she was not working. Eventually, the entire plant closed and Ms. Wheeler was terminated at that time. The trial court found that she had meaningful return to work and voluntarily left her employment. For that reason, it limited its award of permanent partial disability benefits to one and one-half times the anatomical impairment in accordance with Tennessee Code Annotated section 50-6-241(d)(1)(B). The employee has appealed, contending that the trial court erred by applying the one and one-half times impairment cap. We agree and modify the judgment.[1]

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

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., J., and JON KERRY BLACKWOOD, SR. J., joined.

Monica Mayo-Grinder, Nashville, Tennessee, for the appellant, Kimberly Wheeler.

David T. Hooper, Brentwood, Tennessee, for the appellee, Whirlpool Corporation.

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[1]This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law.

MEMORANDUM OPINION

Factual and Procedural Background

Ms. Wheeler was an assembly line worker for Whirlpool Corporation, a manufacturer of air conditioning and refrigeration products. She began working for Whirlpool in 1988. For the last several years of her employment, she was a group leader. In that job, she was required to provide parts to workers on the assembly line and, periodically, to fill in for absent workers. In 2005, she began having pain in her hands, at the point where the thumb meets the wrist. She is right-handed, and the pain on that side appeared first and was more significant. She reported her injury to Whirlpool and, initially, received treatment from a physician and physical therapist on the premises.

When the treatment provided was not effective, Whirlpool provided her with a panel of orthopaedic surgeons from which she selected Dr. Timothy Steineagle. Dr. Steineagle prescribed conservative treatment, including injections and medication. When these measures did not provide relief, he referred Ms. Wheeler to Dr. Kyle Joiner, an orthopaedic surgeon who specialized in the treatment of hand problems. Dr. Joyner testified by deposition. His diagnosis was bilateral basal thumb arthritis.[2] Because conservative treatment had not provided relief, he recommended surgery. On November 16, 2006, he performed a carpo-metacarpal arthroplasty of her right thumb and wrist. A similar procedure was performed on the left side on April 26, 2007. After each procedure, Ms. Wheeler was taken off work for a period of time, then permitted to return under gradually relaxing restrictions. On September 19, 2007, Dr. Joyner released Ms. Wheeler to return to full duty. At that time, Dr. Joyner assigned a permanent anatomical impairment of 2% of the right arm, and 3% of the left arm. In his deposition, he agreed under cross examination that an additional 11% impairment should be assigned to each arm, based upon the American Medical Association Guides.

Dr. David Gaw, also an orthopaedic surgeon, performed an independent medical examination at the request of Ms. Wheeler's attorney. In his opinion, Ms. Wheeler had sustained a permanent impairment of 12% in the right arm, and 13% in the left arm.

In December 2007, Whirlpool announced that the "air purifier line," to which Ms. Wheeler was assigned, would be shut down. Because she had sufficient seniority, Ms. Wheeler was offered the choice of accepting a voluntary layoff or moving to the built-in refrigeration line. She chose the layoff. She testified that she had occasionally worked on the built-in refrigeration line in the past, and "wasn't sure there was any job I could do over there," because of the amount of pinching and gripping, which would affect her hands. She also testified that some of the jobs on that line required heavy lifting, which she would be unable to do because of pre-existing heart problems.[3] Shortly after accepting the layoff, she returned to Dr. Joyner, who permanently restricted her from activities requiring repetitive pinching.

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[2]Employer did not contest the compensability of this condition.

[3]Ms. Wheeler had suffered heart attacks in 1997 and 2004.

Suzette Baldwin, a human resources representative, testified on behalf of Whirlpool by deposition. She stated that Ms. Wheeler continued to be an employee of Whirlpool after accepting the voluntary layoff. She retained recall rights under its collective bargaining agreement. Ms. Wheeler had been laid off and recalled several times in the past. Because Whirlpool had eliminated several product lines in recent years, however, the built-in refrigeration line was the only production line remaining in the plant at the time Ms. Wheeler chose the voluntarily layoff. On August 15, 2008, that line was also shut down. Thereafter, the only employees remaining at the facility were involved in activities related to plant closure. Ms. Baldwin testified that Ms. Wheeler continued to be employed, in layoff status, until August 15. On that date, she was officially terminated. The letter informing Ms. Wheeler of the plant closure explained the procedures to "obtain her goal share and her other benefits." Ms. Baldwin confirmed that Ms. Wheeler was not terminated for misconduct, and did not voluntarily resign.

Ms. Wheeler was forty-two years old when the trial occurred. She is a high school graduate. She also has an associate's degree in paralegal studies, which she received in 2006. On cross examination, she testified that one of the reasons she entered the paralegal program was to obtain less strenuous employment due to her heart problems. Prior to working for Whirlpool, she had worked in a retail clothing store and at a restaurant. She testified that she had not worked since her termination by Whirlpool, though she had made many applications, mainly for law-related jobs. She stated that she did not believe she was capable to returning to factory work due to problems with her hands. She also reported that she had difficulty using her hands in private life such as when opening jars and carrying heavy items.

The trial court found that Ms. Wheeler had a meaningful return to work and voluntarily left her employment when she accepted the layoff. It awarded 18% permanent partial disability to the right arm, and 19.5% permanent partial disability to the left arm. The trial court appropriately made an alternative finding that, if she did not have a meaningful return to work, she had sustained 50% permanent partial disability of the right arm and 40% permanent partial disability of the left arm.

Ms. Wheeler has appealed, contending that the trial court erred by finding that she had a meaningful return to work. Whirlpool contends that the judgment has been satisfied and the appeal is moot.

Standard of Review

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2)(2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997);

Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

Analysis

Meaningful Return to Work

In its ruling from the bench, the trial court stated:

> What I've got is that she voluntarily removed herself from the workplace. Now, you can say, well, she didn't voluntarily, they gave her a choice, but that's the crux of it. They did give her a choice to continue working in the facility and she voluntarily chose to take a voluntary layoff.
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> Now maybe that's a bad way to call it. Maybe that's not a layoff. Maybe that's a forced layoff. But I'm sitting here with testimony that she could have stayed as an employee; she made the decision to leave the employment; therefore, it would appear she's capped at one and a half times the rating.

Ms. Wheeler makes two arguments in support of her position that she did not have a meaningful return to work. First, she contends that her termination by Whirlpool in August 2008, due to the plant closure, is completely determinative of the return to work issue. Citing Edwards v. Saturn Corp., No. M2007-01955-WC-R3-WC, 2008 WL 4378188 (Tenn. Workers' Comp. Panel Sept. 28, 2008), she argues that her acceptance of a temporary layoff did not, of itself, terminate the employment relationship. In Edwards, the trial court found that an employee's post-injury meaningful return to work was not frustrated by his layoff as part of a plant-wide shutdown of indefinite duration. The panel affirmed noting, among other factors, that both the employer and the employee considered the employment relationship to continue during the layoff period.

Ms. Wheeler also relies upon Wilson v. Consolidated Freightways, No. E2007-01201-WC-R3-WC, 2008 Tenn. Lexis 508 (Tenn. Worker's Comp. Panel, July 11, 2008). In that case, the employee returned to work for several months. She then accepted a voluntary layoff. Id. at *13. She testified that her reason for doing so was that she was having difficulty performing her job correctly due to the consequences of her work injury. Her employer subsequently went bankrupt. The trial court found that she did not have a meaningful return to work. The panel held that the evidence did not preponderate against the trial court's finding on the issue and remarked that, even if she had not been laid off, she would have eventually lost her employment and been eligible for reconsideration. Id. at 14.

Pursuant to Tennessee Code Annotated section 50-6-241, an employee who sustains a permanent partial disability as the result of a work-related injury is entitled to receive permanent partial disability benefits. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). For injuries

occurring on or after July 1, 2004, if "the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury," the employee's permanent partial disability award is capped at one and one-half (1 1/2) times the medical impairment rating. Tenn. Code Ann. § 50-6-241(d)(1)(A). In such a case, if the employer does not return the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is six (6) times the medical impairment rating. Tenn. Code Ann. §§ 50-6-241(d)(2)(A). When an employee returns to work at his or her pre-injury employment, but does not remain employed, the courts must determine whether the employee made a "meaningful return to work." Lay v. Scott County Sheriff's Dept., 109 S.W.3d 293, 297-98 (Tenn. 2003); Hardin v. Royal & Sunalliance Ins., 104 S.W.3d 501, 506 (Tenn. 2003).

The Tennessee Supreme Court has recently addressed the concept of "meaningful return to work" in Tryon v. Saturn Corp.:

> 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. The determination of the reasonableness of the actions of the employer and the employee depends on the facts of each case.. . .[Prior decisions] provide that 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. . . . 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 328-29 (internal citations omitted). Moreover, the Court in Tryon held that an employer's obligation to provide a meaningful return to work continues for so long as an employee's right to reconsideration exists. Id. at 333.

Tenn. Code. Annotated section 50-6-214(d)(1)(B)provides:

> (ii) If an injured employee receives benefits for schedule member injuries pursuant to subdivision (d)(1)(A), and the employee is subsequently no longer employed by the pre-injury employer at the wage specified in subdivision (d)(1)(A), the employee may seek reconsideration of the permanent partial disability benefits. The right to seek the reconsideration shall extend for the number of weeks for which the employee was eligible to receive benefits under § 50-6-207, beginning with the day the employee returned to work for the pre-injury employer.
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> (iii) Notwithstanding the provisions of this subdivision (d)(1)(B), under no circumstances shall an employee be entitled to reconsideration when the loss

of employment is due to either:

> (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; or
>
> (b) The employee's misconduct connected with the employee's employment.

Clearly, the requirements of Tennessee Code Annotated section 50-6-214(d)(1)(B)(ii) have been met. At the time of trial, Ms. Wheeler was clearly no longer employed by Whirlpool at the her pre-injury wage. Since, according to the testimony of Ms. Baldwin, she was not discharged for misconduct, in order for the trial court to have limited Ms. Wheeler's recovery to the lower caps, it must have equated her voluntary layoff to a voluntary resignation or retirement and found that it was not a result of her work-related disability. While the trial court made no express findings with regard to these issues, we conclude that the evidence preponderates against both necessary findings.

A critical factor in determining whether Ms. Wheeler's acceptance of a voluntary layoff amounted to a voluntary retirement or resignation for purposes of section 50-6-241(d)(1)(B)(iii) is that, as in Edwards, both she and Whirlpool considered her to be an employee until August 15, 2008. That is the date upon which the employment relationship was permanently severed. Her acceptance of the voluntary layoff in January 2008 did not end her employment. Moreover, there is proof in the record that she anticipated the availability of being recalled. The evidence showed that Ms. Wheeler had been laid off and recalled several times during her tenure with Whirlpool. She had significant seniority. While she did not accept the opportunity to move to the built-in refrigeration unit, which was at the time the only remaining line at the plant, the closure of the plant had not been announced at the time she made that decision. There is no evidence to suggest she should have presumed that she would not be recalled. Some employees were, in fact, recalled after having been laid off.

There is also evidence to suggest that she was concerned about her ability to perform the work in the built-in refrigeration unit. In her previous job, she had been a team leader which consisted of keeping the assembly line stocked with parts and periodically filling in for a team member when they were on a break. She testified that on the built-in refrigeration line, she would not be a team leader but would be an assembler entailing more repetitive movements for much longer periods of time. She further testified that she recently had experienced problems with her hands and wanted to consult with Dr. Joyner about her ability to do repetitive work.[4]

The record indicates Ms. Wheeler was advised of the closure of the air purifier line and given the opportunity to move to the built-in refrigeration line on December 3, 2007. She made an appointment with her treating physician, Dr. Joyner, for December 5, 2007. According to Dr.

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[4]Ms. Joyner testified Dr. Joyner had previously advised her that she needed to get out of factory work, but his advice was erroneously excluded by the trial court as hearsay.

Joyner, on that day, she reported to him a recent change in job positions at work. "She was sorting cardboard boxes, and this was requiring a lot of repetitive loading and pinching, and she was developing soreness from that." She reported to Dr. Joyner that the soreness had developed during the week prior to her visit. Dr. Joyner "recommended that she continue with job activities that did not require repetitive loading or pinching" and made that a permanent work restriction.

Ms. Wheeler testified that she did not accept a position on the built-in refrigeration line because of the way her hands were feeling and because she was not sure there was any job on that line that did not require repetitive pinching or gripping. She had worked on that line from time to time and was familiar with the type of jobs that were available there. Her testimony in this regard was not contradicted and was supported by the problems she reported to Dr. Joyner on December 5, 2007. Additionally, the trial court expressly found her to be a credible witness, stating, "if any reviewing Court looks at this matter, I'd like for them to note that this trial court would believe whatever Kimberly Wheeler said based upon her presence in the courtroom and her testimony from the stand."

We therefore conclude that Ms. Wheelers' acceptance of the voluntary layoff did not amount to a "voluntary resignation or retirement" and, in any event, was the result of her work-related injury. It follows that the subsequent termination of the employment relationship was based upon Whirlpool's unilateral business decision. For these reasons, we conclude that the trial court erred by limiting the award to one and one-half times the anatomical impairment. The judgment is modified in accordance with the trial court's alternative finding.

Satisfaction of Judgment/Mootness

Whirlpool contends that the appeal is moot, because it paid the judgment and Ms. Wheeler accepted the payment. The factual basis of this argument is presented through exhibits and affidavits attached to Whirlpool's appellate brief. These documents were neither offered nor admitted into the record by the trial court. "Attachments to briefs are not evidence and will not be considered by the appellate courts." Forrest v. Rees, No. 01C01-9411-CC-00387, 1996 WL 571765, *3 (Tenn. Crim. App. Oct. 8,1996). We therefore find Whirlpool's argument to be without merit.

Conclusion

The judgment is modified to award 50% permanent partial disability of the right arm and 40% permanent partial disability of the left arm. It is affirmed in all other respects. Costs are taxed to Whirlpool Corporation, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

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Circuit Court for Rutherford County
No. 56698

No. M2009-00206-WC-R3WC - Filed - February 3, 2010

JUDGMENT

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 will be paid by Whirlpool Corporation, for which execution may issue if necessary.

PER CURIAM