IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 29, 2012 Session

LANCE ERICKSON v. SDI OF OAK RIDGE TURNPIKE, LLC

Appeal from the Circuit Court for Anderson County
No. BOLA0445 Donald Ray Elledge, Judge

No. E2011-02427-WC-R3-WC-Mailed-Aug. 1, 2012 / Filed-Sept. 4, 2012

In accordance with Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Panel for a hearing and a report of findings of fact and conclusions of law. The employee, who sustained injuries while attempting to repair a piece of food service equipment, filed a claim for workers' compensation benefits. Later, the employer terminated the employee, alleging misconduct in the performance of his duties. The trial court ruled that because the employer had discharged the employee in retaliation for the claim, the employee did not have a meaningful return to work and, furthermore, was entitled to the statutory maximum of six times the medical impairment. The employer appealed. Because the evidence supports the ruling of the trial court, the judgment is affirmed.

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

GARY R. WADE, J., delivered the opinion of the court, in which JERRI S. BRYANT, SP. J., and E. RILEY ANDERSON, SP. J., joined.

S. Nikol Richardson, Knoxville, Tennessee, for the appellant, SDI of Oak Ridge Turnpike, LLC.

Bruce D. Fox and Laura B. Myers, Clinton, Tennessee, for the appellee, Lance A. Erickson.

MEMORANDUM OPINION

Facts and Procedural Background

Lance Erickson ("the Employee") was employed as a co-manager at a Sonic Drive In restaurant in Oak Ridge, which was owned and operated by SDI of Oak Ridge Turnpike,

LLC ("the Employer"). On November 14, 2007, Calvin Wright, the general manager at the restaurant, asked the Employee to repair a heating element used to keep prepared food warm until served. As the Employee attempted to repair the heating element, an unknown individual placed the plug into an electrical outlet. A 220-volt electrical shock caused the Employee to lose consciousness for about five minutes. Although he could not remember what happened immediately following the accident, the Employee learned from other employees that he had fallen, hitting his head on either the floor or a safe. He suffered burns to his hands and, as a result of the accident, chest pains, headaches, and memory loss. "[B]ecause the[other employees were] all needed [at] work," no one was available to take the Employee for medical treatment. In consequence, the Employee called his fiancee, who transported him to the Methodist Medical Center in Oak Ridge for treatment. After his release, the Employee continued to suffer from chest pains and memory loss.

Upon returning to work, the Employee repeatedly asked his supervisors, including district manager Wade Bell and his successor Phillip Wheatley,[1] to pay his medical expenses and to authorize medical care for his symptoms. He informed Wheatley "two and three times a month" that he was still suffering from chest pains, memory loss, and sensitivity to light and specifically mentioned that he "needed to go back" to a physician to determine whether he had heart damage. Although the Employee delivered his unpaid hospital bills to Wheatley and was assured that Wheatley would "take care of it," the bills remained unpaid. Because the Employer had not paid the $5,000 for the hospital treatment and "because . . . [he] didn't want to incur more fines and more fees," the Employee chose not to return to the doctor.

After some online research, the Employee's mother warned the Employee that a claim for workers' compensation benefits had to be filed within one year of the accident. When the Employee notified the Employer that he would have to file a claim if nothing was done, his relationship with his supervisors, particularly Wheatley, became strained. Some two months before his claim was time-barred, the Employee was transferred to a restaurant located in Halls, Tennessee, which required an additional forty-five minutes of travel time both to and from work. Further, a promotion to a general manager position in Oak Ridge, only five miles from his residence, which the Employee had been told he would receive, went to someone else. On November 3, 2008, almost fifty-one weeks after his injury, the Employee filed a claim with the Tennessee Department of Labor. As a result of the claim, the Employer was fined for failing to timely report the November 14th incident. Within days of the claim being filed, Wheatley called the Employee and vulgarly expressed his anger. According to the Employee, Wheatley said, among other things, that he was "pissed" and exclaimed, "What the . . . do you think you're doing? I told you this was taken care of."

[1] Wade Bell was the district manger at the time of the accident, and he was succeeded by Phillip Wheatley at some point shortly after the accident.

Unable to reach a settlement, the Employee filed suit on September 22, 2010. In response, the Employer, among other claims in defense, denied that the injuries were work-related and further alleged that the Employee had been terminated from his employment for misconduct and, in any event, should be limited in any disability award to the minimum cap provided by statute.

The testimony at trial established that at the time the Employee filed the claim, he had worked for the Employer for six years without a reprimand. Within weeks of filing his claim, however, the Employee was reprimanded twice by his supervisors for alleged violations of the "policy matrix," an agreement signed by the Employee shortly after his 2007 employment. On the first occasion, the Employee received a written reprimand for granting a refund to a customer for $2.97 four minutes after closing and for granting a second refund some fifty-one minutes after the employee who had made the sale clocked out for the day.[2] The Employee testified that Allen Ashley, the general manager at the Halls location, maintained that the reprimand was issued because a ticket had been "written before closing time[,] and it wasn't closed out until after the business should have been closed." In response, the Employee explained that the customer had ordered just prior to closing and came back after closing dissatisfied with the food; because the grills had been turned off in the meantime, he had to refund the order rather than replace it. When Ashley did not accept his explanation, the Employee refused to sign the reprimand, asserting that he had done nothing wrong.

On December 20, 2008, the Employee received a second reprimand for having left the store some five days earlier without another manager present. There were two refunds while he was gone: one in the amount of about $20 and the other for about $4. While the Employee agreed that leaving the premises was against company policy, he contended that it was not against Ashley's policy for the Halls location and that it was a common practice for managers at that location to take short breaks at a convenience market located just across the street. He further testified that he had previously asked Wheatley about leaving the premises during breaks and recalled that Wheatley had no objections to the practice. Because the Employee believed that a reprimand was not warranted, he again refused to sign.[3] After

[2] The policy matrix provided that "[c]ancelled and recalled ticket reports should be attached to the [daily sales report], the copy retained in the drive-in. Each ticket [was to] be attached and [to] include an explanation for the charge, including signature of the employee and manager on duty." The policy matrix also required that "[a] minimum of two people . . . be present and clocked in at the drive-in during all customer service hours. At least one person must be the associate manager level or above. . . . Exceptions to this are not permitted even for brief periods of time."

[3] When entered into evidence at trial, the December 20th disciplinary form bore a signature which (continued...)

this incident, the Employee was placed on a temporary suspension for three days and later informed not to return for three more days. On December 26, 2008, two months after filing his workers' compensation claim, Wheatley and Ashley arranged a meeting with the Employee at a Shoney's Restaurant in Oak Ridge to discuss the suspension. After informing the Employee that he was not being held responsible for the refunds on December 20th, they discharged him "for leaving the premises."

On cross-examination, the Employee acknowledged that as to the first reprimand, he did not attach the receipt to the daily sales slip in strict accordance with the policy. He testified that he had signed the receipt, however, and also had a cook sign the receipt because the employee responsible for the transaction had left for the day. He further testified that he explained the basis for the refund on the receipt and then placed it in a blue bag on the desk instead of on the daily sales report because Ashley had instructed him to do so in accordance with the standard practice at that location. The Employee also testified that he had asked Wheatley earlier about the practice of placing the receipt into a bag instead of onto the daily sales receipt, and that Wheatley had "said it wasn't a problem."

Brent Cass, a former general manager for the Employer, worked with the Employee and at one point shared a residence with him. As a witness for the Employee, he testified that it was common practice in at least two of the Sonic stores, one of which was run by Ashley, to place the receipts into a blue bag instead of attaching them to a daily sales report. Cass further confirmed that refunding transactions after closing was a frequent occurrence and that the general practice for managers at Ashley's location was to go to the neighboring convenience store during ten to fifteen minute breaks. Cass claimed that Ashley's absence during his shift had become a joke, as "[h]e was always gone [. . . ,] sometimes during the course of a day driving past . . . on a motorcycle."[4] Cass further testified that he never observed anyone other than the Employee being disciplined for such action. On cross-examination, Cass admitted that he was terminated by the Employer for his participation in a cover-up of missing petty cash funds.

Kimberly Carson, a former co-manager for the Employer and co-worker of the Employee, testified that managers from various stores engaged in "just leaving [refund receipts] on the desk" as well as "just th[rowing] the receipts away." She stated that

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[3](...continued)
appeared to be that of the Employee. When the trial judge asked the Employee if the signature was his, the Employee answered that it was not, and that he was unaware how it got there.

[4] Ashley testified by deposition that while he would occasionally call in food orders and pick them up, he never left the store without another manager on duty.

"oftentimes managers would leave if . . . someone needed food or to get something for themselves." To her knowledge, no one had ever been terminated, admonished, or disciplined for either failing to attach refund receipts to the daily sales report or leaving the premises for breaks during their shift.

Gary Kuhn, the Employer's director of operations, appeared as the only witness for the Employer. He claimed that the Employee was not terminated solely for the ticket cancellations and further contended that his leaving a shift unattended qualified as a serious violation of company policy. On cross-examination, Kuhn conceded that the Employer's report to the Unemployment Compensation Benefit Office cited the cancellation of the sales tickets as the only grounds for termination.

Medical and Vocational Disability

A cardiologist found that the Employee's chest pains were not related to the heart and referred him to a neurologist, Dr. Samir Al-Kabbani. Dr. Al-Kabbani, who testified by deposition, performed an evaluation of the Employee that included an electroencephalogram and a magnetic resonance imaging. He found that the Employee's symptoms—headaches, memory loss, seizures, nausea, and loss of sleep—were the result of a migraine condition and epilepsy. In his opinion, the epilepsy and the migraines were caused by the electrical shock.[5] Dr. Al-Kabbani found that the Employee had reached maximum medical improvement on February 3, 2010, with a 10% impairment to the body as a whole as a result of the accident. He based the impairment rating on the Sixth Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment, but testified that his rating would have been the same if based on the Fifth Edition. Dr. Al-Kabbani restricted the Employee from working around fires, sharp objects, heights, and flashing lights and advised him to avoid emotional or physical stress. He prescribed daily medication to control the headaches and seizures. Pursuant to Tennessee Department of Safety regulations, the Employee was required to abstain from driving unless he remained seizure-free for a period of six months. See Tenn. Comp. R. & Regs. 1340-1-4-.06(2)(I) (2005).

Dr. Rodney Caldwell, a vocational expert, also testified by deposition. In his opinion, the Employee suffered a 65% vocational disability as a result of the accident. Dr. Caldwell observed that the Employee had a high school education, two semesters of college, and had only worked in the food service industry. While concluding that the Employee had tested above high school skill levels in reading and comprehension, he found that the Employee performed at a seventh grade level in mathematics. In forming his opinion of vocational

[5] Dr. Al-Kabbani stated that "the classic migraine is not necessarily trauma induced," but, in accepting the Employee's assertion that he did not have headaches prior to the accident, opined that the "injury triggered[,] worsened[, or] brought [the headaches] to the surface."

disability, Dr. Caldwell considered the Employee's age, work history, vocational testing, medical limitations, and the local labor market, including consideration of the number of jobs available in the area.

At the time of trial, the Employee was thirty-five years of age, married, and had one son. While he had attempted to obtain employment elsewhere, he maintained that "nobody want[ed] to deal with the insurance issues and having someone who could have a seizure and fall in a fryer or fall on the griddle." By disclosing his impairment to prospective employers, he was unable to find gainful employment other than occasional "odd jobs."

Ruling of the Trial Court

At the conclusion of the trial, the trial court first expressly accredited the testimony of the Employee and his witnesses, Brent Cass and Kimberly Carson, and further found that the Employee had been discharged by the Employer "without just cause and in retaliation for filing" the claim for benefits with the Department of Labor.[6] Based upon his inability to go without seizures; his over-sensitivity to light and stress; his lack of sleep; his poor eating habits; and the restrictions placed by the treating physician, the trial court also found that the Employee had a 10% medical impairment rating to the body as a whole. At the time that the Employee was terminated, he earned $673.14 per week, which entitled him to a compensation rate of $448.76 per week. Applying a multiplier of six to the 10% medical impairment rating, the trial court awarded a 60% vocational disability for benefits of $107,702.40, plus discretionary costs and necessary future medical treatment.

Standard of Review

Initially, the trial court's findings of fact are subject to "de novo [review] 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). "This standard of review requires us to examine, in depth, a trial court's factual findings and conclusions." Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991) (citing Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 675 (Tenn. 1991)). 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. Tyron 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

[6] The trial court found that the two reprimands issued by the Employer were not for misconduct, but were an effort "to get rid of this employee" because his claim created problems for the Employer "for not filing a First Report of Injury with the State" as required by statute.

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 Grp., 259 S.W.3d 656, 665 (Tenn. 2008). On questions of law, our standard of review is de novo with no presumption of correctness. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007) (citing Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003)).

Applicable Law

In 2004, the General Assembly overhauled the workers' compensation statutes in an attempt to reduce the cost of coverage to employers. See Lynch v. City of Jellico, 205 S.W.3d 384, 390 (Tenn. 2006) (recognizing that it is in the best interest of the citizens of Tennessee to reduce employers' cost of providing workers' compensation coverage for their employees). The 2004 changes included a reduction in the cap on permanent partial disability benefits to one-and-one-half times the medical impairment rating for an injured employee who is given the opportunity to return to his pre-injury place of employment at the same or a greater wage, otherwise referred to as a meaningful return to work. See Tenn. Code Ann. § 50-6-241(d)(1)(A); see also Tryon, 254 S.W.3d at 328 n.8. The cap for an employee who does not have a meaningful return to work, however, remained six times their medical impairment rating. See Act of May 20, 2004, ch. 962, § 11, 2004 Tenn. Pub. Acts 2346, 2351 (codified at Tenn. Code Ann. § 50-6-241(d)(2)(A) (2004)); Gibson v. Hidden Mountain Resort, Inc., No. E2010-02561-WC-R3-WC, 2011 WL 6181125, at *5 (Tenn. Workers' Comp. Panel Dec. 12, 2011). If an employee is terminated as a result of their injury or in retaliation for a claim for benefits resulting from the injury, there has been no meaningful return to work and the higher cap applies. See Moore v. Best Metal Cabinets, No. W2003-00687-WC-R3-CV, 2004 WL 2270751, at *3 (Tenn. Workers' Comp. Panel Oct. 7, 2004).

When assessing the extent of an employee's vocational disability and selecting the appropriate multiplier within the given range, "the court shall consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition." Tenn. Code Ann. § 50-6-241(d)(2)(A); see also, e.g., Bright v. Shoun Trucking Co., Inc., No. E2011-00542-WC-R3-WC, 2011 WL 6088661, at *7 (Tenn. Workers' Comp. Panel Dec. 7, 2011). Further, the claimant's own assessment of his or her physical condition and resulting disabilities cannot be disregarded. Bright, 2011 WL 6088661, at *7; see also Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975); Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn. 1972). It is within a trial court's discretion to apply a multiplier of six as long as it "include[s] specific findings of fact in the order that detail the reasons for awarding the maximum permanent partial disability." Tenn. Code Ann. § 50-6-241(d)(2)(B); see also Bright, 2011 WL 6088661, at *7; Blankenship v. Masterbend Cabinets, Inc., No. E2008-02582-WC-R3-WC, 2009 WL 3321382, at *1 (Tenn.

Workers' Comp. Panel Oct. 16, 2009).

Analysis

The trial court, as indicated, held that the Employee was terminated not for misconduct, but in retaliation for filing the claim for benefits. In consequence, the Employee was not limited to an award of one-and-one-half times his medical impairment rating. While not challenging the ruling that the Employee was denied a meaningful return to work, the Employer argues in this appeal that the maximum multiplier of six was excessive.

The Employer first contends that the trial court improperly considered factors beyond those pertinent to the determination of the Employee's vocational disability. Because the trial court judge commented that the Employee's supervisors had "egg on [their] face[s]" by purposefully ignoring the claim in hopes that "the statute of limitations would expire," the Employer asserts that an award of the maximum multiplier possible was meant as a punishment for the mishandling of the claim instead of an appropriate assessment of disability based upon the relevant factors. We disagree. In our view, the comment was merely an explanation of the ruling that the termination was in retaliation for the claim rather than for any misconduct and, therefore, a denial of a meaningful return to work. Cf. Gibson, 2011 WL 6181125, at *6 (observing that a trial court must determine if a post-injury termination was a result of an employee's misconduct prior to deciding which multiplier cap applies). The trial court, based upon the testimony at trial, found that the Employee could no longer work in the food industry, for which he had been trained, and that he could "not find a job in the local economy . . . because of the seizures" other than "odd jobs."

The Employer next argues that the trial court relied too heavily on Dr. Al-Kabbani's list of precautions regarding his work for two reasons: (1) this list was a "generic laundry list" given to all patients regardless of the severity of their symptoms; and (2) the Employee himself did not abide by the limitations. To illustrate the second point, the Employer points out that the Employee drove to court on the day of the trial even though he had not been seizure-free for any six month period since the accident. Nevertheless, the trial court, after seeing and hearing the Employee firsthand, accredited the testimony regarding his physical limitations. We are not inclined to substitute our judgment for that of the trial judge based only upon the Employee's driving himself to the trial. See Bright, 2011 WL 6088661, at *7. In short, the findings of the trial court are entitled to significant deference. See Whirlpool, 69 S.W.3d at 167.

The Employer next contends that in order to apply a multiplier of greater than five, the trial court must elaborate on the effects of the Employee's age and education and that there must be something unusual about the nature of the disability. By statute, the trial court need only "include specific findings of fact in the order that detail the reasons for awarding

the maximum permanent partial disability." Tenn. Code Ann. § 50-6-241(d)(2)(B). In our assessment, the trial court met that standard. Here, the trial court made specific references to the age, education, training, and work experience of the Employee before determining that his physical limitations warranted the "six-times multiplier."

Moreover, the deposition testimony supports the findings of the trial court. Dr. Al-Kabbani deemed the Employee's medical impairment rating to be 10%. He also addressed the medications that the Employee was required to take in order to control his symptoms, the fact that the symptoms would continue indefinitely, the limitations he imposed upon the Employee, and the reasons for the limitations. Dr. Caldwell opined that the Employee had a 65% vocational impairment, thus, supporting the trial court's finding of a 60% vocational impairment. This testimony was largely unrefuted.

Finally, a number of panel decisions have upheld awards of the higher multiplier cap under facts similar to these. See, e.g., Mathenia v. Milan Seating Sys., 254 S.W.3d 313, 316, 321 (Tenn. 2007) (upholding an award of six times the medical impairment rating to a fifty-year-old employee with a high school diploma and no additional education); Michaud v. Rehab Care Grp., No. W2009-02152-WC-R3-WC, 2011 WL 322419, at *2, *4 (Tenn. Workers' Comp. Panel Jan. 27, 2011) (holding that the trial court did not err when it considered statutory factors and made sufficient findings to support applying a multiplier of six when the employee was a fifty-eight-year-old woman with an associate's degree and diverse work experience); Blankenship, 2009 WL 3321382, at *4-5 (holding that a multiplier of six was not excessive when the employee was forty-four years old with limited work skills and limited education); Phelps v. Mark IV Auto., No. W2006-00274-WC-R3-CV, 2007 WL 445640, at *3, *5-6 (Tenn. Workers' Comp. Panel Feb. 12, 2007) (holding that a multiplier of six was proper where the employee was thirty-seven years old; a high school graduate; had a year of cosmetology schooling, but never received a certificate or used that training; and returned to work, but resigned as a result of pain from the injury); Oatsvall v. Baptist Mem'l Hosp. - Huntingdon, No. W2003-02474-WC-R3-WC, 2004 WL 1621682, at *5-6 (Tenn. Workers' Comp. Panel July 20, 2004) (holding that a multiplier of five was appropriate when the employee was forty-four years old and had a high school education, extensive work experience, and limitations that would preclude her from returning to full-time work in her previous fields of employment).

Conclusion

The Employee was denied a meaningful return to work and, therefore, was not limited to a cap of one-and-one-half times his medical impairment rating. As required by Tennessee Code Annotated sections 50-6-241(d)(2)(A) and (B), the trial court properly addressed each of the factors pertinent to an award of permanent partial disability benefits of six times the medical impairment rating of 10%. The judgment of the trial court is, therefore, affirmed.

Costs are taxed to the Employer, SDI of Oak Ridge Turnpike, LLC, and its surety, for which execution may issue if necessary.

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GARY R. WADE, JUSTICE

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SPECIAL WORKERS' COMPENSATION APPEALS PANEL
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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 appeals 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 of this appeal are taxed to SDI of Oak Ridge Turnpike, LLC, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM