IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
January 27, 2015 Session

JIMMY HENSLEY v. COCKE FARMERS COOPERATIVE

Appeal from the Circuit Court for Cocke County
No. 32505III Rex Henry Ogle, Judge

No. E2014-00264-SC-R3-WC-MAILED-MARCH 25, 2015
FILED APRIL 27, 2015

This is a workers' compensation settlement reconsideration case. Jimmy Hensley ("Employee") was injured in April 2005. He was able to return to his pre-injury job and settled his claim for permanent disability benefits in November 2007. In May 2010, he was terminated by his employer, Cocke Farmers Cooperative ("Employer"). The minutes of Employer's board of directors state that Employee was terminated without cause. Employee then sought reconsideration of the workers' compensation settlement. Employer argued that Employee had been terminated for misconduct and, therefore, was not entitled to reconsideration. The Circuit Court for Cocke County ("the Trial Court") granted Employee's motion for partial summary judgment and then awarded additional permanent disability benefits after a hearing. Employer has appealed. The appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment of the Trial Court.

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

D. MICHAEL SWINEY, J., delivered the opinion of the Court, in which GARY R. WADE and D. KELLY THOMAS, JR., JJ., joined.

Beecher A. Bartlett, Jr. and Adam G. Russell, Knoxville, Tennessee, for the appellant, Cocke Farmers Cooperative.

F. Braxton Terry, Morristown, Tennessee and W. Lewis Jenkins, Jr., Dyersburg, Tennessee, for the appellee, Jimmy Hensley.

OPINION

I. Factual and Procedural Background

Employee was employed by Employer in various capacities from 1973 until his termination in May 2010. He served as General Manager of the business from 1996 until his termination. He was injured on the job on April 10, 2005 when he fell and broke his leg. He had surgery to repair the injury and a second operation to remove hardware placed during the first procedure. He was able to return to his previous duties in September or October of 2005. His claim for workers' compensation disability benefits was settled based on 23.5% permanent partial disability to the body as a whole. The settlement agreement was approved by the Department of Labor and Workforce Development on November 8, 2007.

Employee was terminated by Employer's Board of Directors on May 20, 2010. The circumstances of the termination will be examined later in this opinion. Employee made some efforts to locate another job. After about two years, he was hired as a lab technician by ConAgra. His base salary at ConAgra was less than one-half of his salary from Employer.

Employee filed this petition for reconsideration of his previous settlement in the Trial Court on July 18, 2011. In August 2012, he filed a motion for partial summary judgment, asserting that "his termination was not due to his misconduct under Tenn. Code Ann. § 50-6-241(d)(1)(B)(iii)." The motion was supported by, *inter alia*, the minutes of the May 20, 2010 meeting of the Employer's Board of Directors. The relevant passage stated:

> A motion was made by Phillip Morgan and seconded by Burl Roberts to Dismiss Jimmy Hensley, without cause. Motion carried. Roll Call: Yes Votes: Phillip Morgan, Burl Roberts, Roger Templin, and Johnny Burnett. No Votes: Dan Williford and Tommy Lillard.

Employer's response in opposition to Employee's motion was supported by excerpts of the depositions of Phillip Morgan, Tommy Lillard, Roger Templin and Burl Roberts. Mr. Morgan testified that Employee had attempted to intimidate members of the Board and had not informed the Board about one hundred tons of missing fertilizer. Mr. Lillard testified that there had been an allegation made that Employee had an affair with a female employee. Mr. Templin testified that Employee had failed to timely inform the Board that its Morristown branch had lost $118,000. He also mentioned the missing fertilizer incident, stating that it had occurred in 2002. Mr. Roberts testified that Employee had been terminated for cause, but the Board had "give[n] him a break so he could move on down somewhere else."

The Trial Court granted Employee's motion. The Trial Court's order stated, "As a matter of law, the official action of the Cocke Farmers Co-op is contained in the monthly Minutes dated May 20, 2010. Consequently, as a matter of law, the Plaintiff, Jimmy Hensley, was discharged without cause." On June 10, 2013, the case proceeded to trial as to what, if any, additional permanent partial disability benefits were to be awarded to Employee.

Employee was fifty-five years old when the trial occurred. He was a high school graduate and had attended the University of Tennessee for a brief period. He testified that he did not believe he could perform a job that required walking on uneven surfaces or ladder climbing. He reported that he had walked a distance of one mile for exercise three to five times per week from 2005 until 2010. He, however, did not do this as often after taking the job at ConAgra. His work for ConAgra consisted of testing samples of ketchup. To perform the job, he took bottles from the assembly line, which was located approximately 250 feet from his work station. He then tested the samples. He estimated that he stood forty minutes or more per hour at work. He worked forty to seventy hours per week. He had requested no special accommodations from Employer from his return to work in 2005 until his termination in 2010.

The parties introduced by stipulation a letter written by Employee's treating physician, Dr. William Oros, on May 22, 2013. In that letter, Dr. Oros stated:

> I do believe that [Employee] likely does have significant pain upon extended standing. His ankle may occasionally give way depending on his level of activity. He will definitely likely have difficulty on rough and uneven surfaces. His lifting will be better identified through a functional capacity evaluation and I will definitely think that he needs to sit down and rest every so often and every couple of hours to give his foot and ankle a break as well as elevate it when possible. These are all things that I think are without question related to his accident that he sustained a number of years ago.

Dr. Rodney Caldwell, a vocational consultant, testified on behalf of Employee. He administered educational tests which determined that Employee was able to read at a twelfth grade level and perform arithmetic above that level. He interpreted the statements in Dr. Oros's letter as restrictions. He agreed that Dr. Oros did not place any lifting restrictions on Employee's activities, but noted a statement made by Employee "that he could lift 25 pounds once in a while, but he can't really carry it." Dr. Caldwell opined that, based solely on Dr. Oros's letter, Employee retained a 50% disability. Taking Employee's statements into account, he estimated the vocational disability to be 60%. On cross-examination, Dr.

Caldwell stated that he was aware that Employee had returned to his previous job for five years before termination without accommodations but offered that Employee was able to make his own accommodations because he was the highest-ranking employee in the business. He also was aware that Employee was working as many as seventy hours per week in his job at ConAgra.

Michael Galloway, also a vocational consultant, testified on behalf of Employer. He opined that Employee had no increased vocational disability. His opinion was based on the absence of "hard, fast[,] specific" restrictions in the medical record. He testified concerning Dr. Oros's letter:

> [The letter of] May 22nd of 2013 from Dr. Oros -- it talks about that there's -- there's -- for example, there's pain with the extent to standing or there's difficulty and there's terminology used of every so often, when possible. So from what I'm getting at from a standpoint of a vocational analysis, we have certain guidelines which we have to look at based upon the dexterity of occupational titles. Either activity is never performed in the job setting; it's occasional; it's frequent; or it's constant.
>
> The terminology being used is very nonspecific, and the only thing very specific that I see is we need to sit down every couple of hours. Based upon that, that is accommodated with individual breaks, lunch that's provided throughout a shift, and then even when Dr. Oros indicates we need to sit down every couple of hours, there is no specific time frame of how long that should take to sit down. So unlike in some cases where we have a hard, fast sit, stand option, if you will, where the doctor says you can only stand for X amount of time or sit for X amount of time, very specifically in terms of occasional and frequent, we don't have any of that in this case. So based upon the letter, obviously, I take from this, Mr. Hensley has still continued to have complaints of symptoms, and certainly his testimony has indicated that, but there's no hard, fast specific restrictions that I'm seeing that in my opinion would keep him from performing certain types of job activities throughout the day.

Mr. Galloway also testified that Employee's successful return to his pre-injury job for five years and his work for ConAgra were "demonstrative work performance" of his ability to work. During cross-examination, Mr. Galloway agreed that it was unlikely that Employee would be able to find another job that paid as well as his work for Employer, because he

lacked the education usually required for a sedentary management position. He also testified that, if it was assumed that Employee was required to sit down for ten to fifteen minutes per working hour and elevate his leg every two hours, his vocational disability would be 40%.

The Trial Court issued its findings from the bench. The Trial Court restated its finding that Employee was terminated without cause, based upon the minutes of the Board of Directors. It further found that Employee had sustained 45% permanent partial disability to the body as a whole as a result of the 2005 injury, effectively awarding an additional 21.5%. Judgment was entered in accordance with those findings. Employer has appealed, asserting that the Trial Court erred by granting Employee's motion for partial summary judgment. In the alternative, Employer urges that the award of additional permanent disability benefits is excessive.

II. Analysis

In Tennessee workers' compensation cases, this Court reviews the trial court's findings of fact de novo, accompanied by a presumption of correctness of the finding, unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008 & Supp. 2013); *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). "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)). We give considerable deference in reviewing the trial court's findings of credibility and assessment of the weight to be given to that testimony, when the trial court has heard in-court testimony. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). On questions of law, our standard of review is de novo with no presumption of correctness. *Wilhelm*, 235 S.W.3d at 126. The extent of vocational disability is a question of fact to be decided by the trial judge. *Johnson v. Lojac Materials*, 100 S.W.3d 201, 202 (Tenn. Workers' Comp. Panel 2001).

Partial Summary Judgment

Employer first asserts that the Trial Court erred by granting Employee's motion for partial summary judgment concerning the reason for Employee's termination, consequently finding that reconsideration of the 2007 settlement was appropriate pursuant to Tennessee Code Annotated section 50-6-241 in effect at the relevant time. Employer points out that an employee who is terminated for misconduct is not eligible for reconsideration, section 50-6-241(d)(1)(B)(iii)(b), and argues that the affidavits submitted in opposition to Employee's motion created a genuine issue of material fact as to whether Employee was terminated for misconduct which precluded summary judgment. Tenn. R. Civ. P. 56.04. In response, Employee contends that the minutes of the Board of Directors are conclusive evidence on the

subject, and the motion, therefore, properly was granted.

It is undisputed that Employer is a nonprofit corporation, chartered under the laws of this State. Tennessee Code Annotated section 48-58-101(b) (2012) provides that "all corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, its board." In Tennessee, a corporation speaks through the minutes of its board, and the "unofficial declarations" of members of the board cannot disprove the contents of the minutes. *Jones v. Planters Bank of Tennessee*, 56 Tenn. 455, 460 (1872). *See also, First Tennessee Bank Nat. Ass'n v. Athletic Indus. Int'l, Inc.*, 1989 WL 37261, at *4 (Tenn. Ct. App. Apr. 20, 1989)(stating the rule and observing that corporate acts may be proven by other evidence when no minutes exist). This rule is consistent with the law in other states. *See*, *e.g., Am. Tel. & Tel. Co. v. Purcell* Co., 606 So. 2d 93, 97 (Miss. 1990); *Jones v. State ex rel. Indiana Livestock Sanitary Bd.*, 163 N.E.2d 605, 608 (Ind. 1960). Applying the rule to the facts of this case, we conclude that the Trial Court properly held that the minutes of Employer's board meeting of May 20, 2010 were conclusive evidence of the reason for Employee's termination, and the parol testimony of some members of the board did not create a genuine issue of fact on the subject.

Excessive Award

Employer also asserts that the Trial Court erred by awarding additional permanent disability to Employee. In support of this assertion, it points to the absence of any formal medical restrictions on Employee's activities. In addition, it relies on Employee's demonstrated ability to perform his job as General Manager from 2005 until 2010 and later as a lab technician for ConAgra without special accommodations as evidence that Employee sustained little or no actual disability due to the 2005 injury.

The extent of an injured worker's permanent disability is a question of fact. *Lang v. Nissan North America, Inc.*, 170 S.W.3d 564, 569 (Tenn. 2005)(citing *Jaske v. Murray Ohio Mfg. Co., Inc.*, 750 S.W.2d 150, 151 (Tenn. 1988). The Trial Court's decision, therefore, is clothed with a presumption of correctness, and we may overturn it only if the evidence preponderates against it. Tenn. Code. Ann. § 50-6-225(e)(2). In conducting that review, we are aware that the employee's own assessment of his or her physical condition and resulting disabilities cannot be disregarded. *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).

Employee testified that he did not believe he could perform a job that required walking on uneven surfaces or ladder climbing because of pain in his leg. He added that he had to elevate his leg after standing for extended periods of time. This testimony is consistent with the opinion expressed by Dr. Oros in his May 2013 letter. Employer's

vocational consultant, Mr. Galloway, essentially agreed that, if Dr. Oros's statements were accepted as medical limitations, Employee had a 40% vocational disability. He also agreed that Employee was unlikely to find employment at a similar salary as his job for Employer due to his educational limitations. Employee's vocational consultant, Dr. Caldwell, opined that Employee's vocational disability could be as much as 60%. All three of these witnesses testified live at trial. To the extent that the Trial Court's finding was based upon the credibility of those witnesses, we are required to defer to its judgment. Against that background, we have examined the record closely and are unable to conclude that the evidence preponderates against the Trial Court's finding on the issue of disability.

III. Conclusion

The judgment of the Trial Court is affirmed. Costs are taxed to Cocke Farmers Cooperative and its surety, for which execution may issue if necessary.

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D. MICHAEL SWINEY, 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 **Cocke Farmers Cooperative and its surety**, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM