

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
January 23, 2012 Session

SCOTT HOUSE v. YRC, INC. ET AL.

**Appeal from the Circuit Court for Davidson County
No. 09C-4402 Amanda McClendon, Judge**

**No. M2011-01535-WC-R3-WC - Mailed April 9, 2012
FILED JUNE 22, 2012**

Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation 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. This is a reconsideration case. The employee settled his claim for one and one-half times the anatomical impairment in 2007. In 2008, his employer merged with a second company to form a new corporate entity. The employee continued to be employed by the new entity in the same location, working under the same collective bargaining agreement that he had been under prior to his injury. The trial court found that he had lost his employment for purposes of Tenn. Code Ann. § 50-6-241(d)(1)(B) and awarded additional permanent disability benefits. The employer has appealed, contending that the trial court erred by finding that a loss of employment occurred. In the alternative, Employer argues that the evidence preponderates against an award of additional benefits. We affirm the judgment.

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

J. S. "STEVE" DANIEL, SP.J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., J. and WALTER C. KURTZ, SR.J., joined.

Stephen K. Heard and Adam O. Knight, Nashville, Tennessee, for the appellant, YRC, Inc., d/b/a Yellow Transportation, Inc.

Russell E. Freeman, Goodlettsville, Tennessee, for the appellee, Scott House.

MEMORANDUM OPINION

Factual and Procedural Background

Scott House (“Employee”) injured his right shoulder on September 26, 2006 while working as a dock worker and hostler operator¹ for Yellow Transportation, Inc. The injury was accepted as compensable. Dr. Michael LaDouceur, an orthopedic surgeon, performed a surgical repair of the injury, and Mr. House was able to return to work at the same job on February 12, 2007 with no permanent restrictions. Dr. LaDouceur assigned 7% permanent impairment to the body as a whole due to the injury. Mr. House settled his workers’ compensation claim for a 10.5% permanent partial disability rating to the body as a whole and the right to return to work. The settlement agreement was approved by the trial court on June 4, 2007.

In October 2008, Yellow Transportation, Mr. House’s employer, merged with Roadway Express, Inc., to form a new entity known as YRC, Inc. This new entity, YRC, Inc., then became the employer of Mr. House. Mr. House continued to perform the same job at the same location as before under the provisions of a collective bargaining agreement that applied to both of the merging companies. His employment had been governed by an agreement between the Teamsters and Yellow Transportation prior to October. The same collective bargaining agreement continued in effect between the Teamsters and YRC, Inc. after the merger. However, because of the merger and consolidation of the two companies’ employees under the provisions of the collective bargaining agreement, Mr. House’s seniority was altered. Mr. House filed a request for a Benefit Review Conference seeking reconsideration of his prior settlement after the merger, contending that he was no longer employed by his pre-injury employer. The parties were unable to resolve the matter at the benefit review conference and Mr. House filed a petition for reconsideration in the trial court on December 10, 2009.

At trial, Mr. House testified that he was fifty years old and he had attended school through the eleventh grade. Thereafter he obtained a general equivalency degree. Mr. House testified that he had primarily been employed as a laborer during his career. His work experiences included being a cashier at a service station, installing privacy fencing, and working in the shipping department of a paper goods manufacturer. He also served three years in the Army Reserve, and three years in the Navy Reserve, where he performed maintenance on vehicles and generators. He began working for Yellow Freight, a predecessor of Yellow Transportation, in 1988 as a dock worker and city driver. He became

¹Mr. House testified that a hostler is a “special-looking tractor that moves and shifts the trailers around” his employer’s facility.

a hostler operator approximately thirteen or fourteen years later. Mr. House described his job as “[b]acking trailers in and out of the dock, hooking, unhooking trailers off the pad, hooking and unhooking trailers for relay for the driver . . . make sure everything’s ready so all the driver has to do is his check and then go.”

Mr. House confirmed that Dr. LaDouceur had placed no permanent restrictions on his activities when he returned to work after the initial injury. However, he testified that his shoulder injury had required him to make adjustments in the way he performed certain tasks:

You have to figure out different ways to turn the steering wheel. I can’t take a quick cut because everything’s angles when you’re backing stuff up. . . . The only way to do it a lot of times is once [my] arm starts hurting, [I’ve] got to lean forwards and lean into the steering wheel to cut down rotation . . . in the shoulder part.

Tearing stuff apart, [I’ve] got to walk around the trailers and grab the one hose and take it off, no longer can just reach across it and pull it.

Mr. House also stated that he had some difficulty pulling pins and chains used to secure trailers to tractors, and operating certain types of trailer doors. On cross-examination, Mr. House agreed that he had sufficient seniority to successfully bid for any job at YRC, Inc.’s facility although he might not get his preferred shifts or days because of the change in his position in the seniority list. He also indicated that he was able to perform all aspects of his job and that his job was the same as it had been before his injury. At the time of the trial he indicated that he was working four to six hours of overtime per week.

Marcus Stanley Lucas, YMC, Inc.’s human resources representative testified that Mr. House’s job performance since returning to work from his injury was satisfactory. He also testified that the collective bargaining agreement in effect after the merger that created YRC, Inc. was the same collective bargaining agreement that had been in effect before the merger. The contract in question between Yellow Transportation and the Teamsters Union contained a section that specifically addressed procedures to be followed when a merger occurred.

The collective bargaining agreement was introduced into evidence by stipulation of the parties. Article 5, Section 2 of the agreement sets out a detailed procedure to be followed concerning seniority rights of employees and other matters, when a merger occurs.

The trial court issued its findings from the bench. It found that Employee did not have a loss of employment as a result of the merger of Yellow Transportation and Roadway Express and therefore was not entitled to reconsideration of his settlement. Subsequent to

the trial, the court was provided with the decision of *Jenkins v. Yellow Transp., Inc.*, No. M2009-02471-WC-R3-WC, 2011 WL 1418546 (Tenn. Workers' Comp. Panel Apr. 13, 2011). After considering *Jenkins v. Yellow Transportation, Inc.*, the trial court altered its decision and found that a loss of employment had occurred as a result of the merger. After making this finding the trial court awarded Mr. House an additional 10.5% permanent partial disability. Judgment was entered accordingly. YRC, Inc. has appealed, contending that the trial court erred by finding that the merger caused a loss of employment that entitled Mr. House to reconsideration of his previous settlement. In the alternative, YRC, Inc., argues that the trial court erred by awarding additional permanent disability benefits.²

Standard of Review

Courts reviewing an award of workers' compensation benefits must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When conducting this examination, Tenn. Code Ann. § 50-6-225(e)(2) requires the reviewing court to "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). However, the reviewing courts need not give similar deference to a trial court's findings based upon documentary evidence such as depositions, *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006); *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004), or to a trial court's conclusions of law, *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Jenkins v. Yellow Transp., Inc., No. M2009-02471-WC-R3-WC, 2011 WL 1418546, at * 1-2 (Tenn. Workers' Comp. Panel Apr. 13, 2011), concerns the exact same merger at issue in this case. Like Mr. House, Mr. Jenkins contended that, as a result the merger of Yellow Transportation with Roadway Express to form YRC, Inc. he was no longer employed by his pre-injury employer and was therefore eligible to seek reconsideration of his previous settlement pursuant to Tenn. Code Ann. § 50-6-241(d)(1)(B). *Jenkins v. Yellow Transp., Inc.*,

²Employer raises an additional argument concerning preemption by the National Labor Relations Act, 29 U.S.C. § 101 *et seq.* Employer does not contend, nor do we find, that a conflict exists between that act and Tenn. Code Ann. § 50-6-114 (2008). The argument is, therefore, not addressed in this opinion.

2011 WL 1418546, at *1-2. However, unlike Mr. House, Mr. Jenkins had been laid off, and asserted that as an additional basis for reconsideration. *Id.* at *1. The Panel found the merger issue to be dispositive of the case. *Id.* at *3. Relying on *Perrin v. Gaylord Entertainment Co.*, 120 S.W.3d 823 (Tenn. 2003) and *Barnett v. Milan Seating Sys.*, 215 S.W.3d 828 (Tenn. 2007), the Panel affirmed the trial court's finding that Mr. Jenkins was no longer employed by his pre-injury employer. *Jenkins v. Yellow Transp., Inc.*, 2011 WL 1418546, at *3-4. The *Jenkins* panel recognized that Tenn. Code Ann. § 50-6-241(d)(1)(C)(i) effectively abrogated *Perrin* and *Barnett* as to injuries occurring after July 1, 2009. *Jenkins v. Yellow Transp., Inc.*, 2011 WL 1418546, at *5. The express terms of this statute are clear as to the way the amendment is to be applied in factual situations as are presented in this case when the legislature states,

Notwithstanding any other of law to the contrary, for injuries occurring on or after July 1, 2009, if an injured employee receives permanent partial disability benefits for body as a whole injuries or if the injured employee receives permanent partial disability benefits for schedule member injuries pursuant to subdivision (d)(1)(A) and the pre-injury employer is sold or acquired subsequent to the receipt of the permanent partial disability benefits, then the injured employee shall not be entitled to seek reconsideration

Tenn. Code Ann. § 50-6-241(d)(1)(C)(i).

Since the injury in the present case predates July 1, 2009 we are precluded for giving the amendment retroactive application and are obligated to follow the legislative policy. The decisions in *Perrin* and *Barnett*, are the underpinning of *Jenkins*. These decisions are the result of the broad language of Tenn. Code Ann. §50-6-241(a)(2) and the requirement in Tenn. Code Ann. §50-6-116 (2008) that the courts construe the workers' compensation statutes in favor of the workers. In each case our job is to construe statutes as they are written, *Waldschmidt v. Rasure Am. Life Ins. Co.*, 271 S.W.3d 173,176 (Tenn. 2008); *Jackson v. Jackson*, 186 Tenn. 337, 342, 210 S.W.2d 332, 334 (1948) and that is what the courts did in *Perrin* and *Jenkins*. We also must do the same in this case because of the date of injury and the effective date of the express legislation.

YRC, Inc. argues that *Jenkins* is distinguishable from the present case because the Panel in that case specifically noted that Mr. Jenkins had been laid off by YRC, Inc. and remained in that status at the time his reconsideration claim was tried. We respectfully disagree with that reading of *Jenkins*. The Panel clearly stated at the beginning of its analysis that "the issue of whether Employee is entitled to a reconsideration under Tennessee Code Annotated section 50-6-241 based on the October 1, 2008, merger of Yellow Transportation

and Roadway Express that resulted in Yellow Transportation ceasing to exist is dispositive of this appeal.” *Jenkins v. Yellow Transp., Inc.*, 2011 WL 1418546, at *3. The Panel addressed arguments made by Employer concerning Mr. Jenkins’s layoff status, but found the issue to be irrelevant under the particular facts of the case. *Id.* at *5.

In *Jenkins*, YRC, Inc. also argued that there had been no loss of employment because of the merger provision of the collective bargaining agreement. The Panel rejected that argument, stating:

We are not persuaded by Yellow Transportation’s argument that, because the collective bargaining agreement anticipated the merger, Employee continued to work for his pre-injury employer after the merger *where it is undisputed that Yellow Transportation no longer existed after the merger*. Nor are we persuaded by the argument that after the merger Employee was still employed by his pre-injury employer because he was similarly employed within the meaning of the collective bargaining agreement as he was prior to the merger.

Jenkins v. Yellow Transp., Inc., 2011 WL 1418546, at *4 (emphasis added).

We conclude that *Jenkins* dictates the result in this case. Therefore, the trial court correctly found that Employee was no longer employed by his pre-injury employer, and was, therefore, eligible for reconsideration.

Award of Additional Permanent Disability

In the alternative, YRC, Inc. contends that the trial court erred by awarding additional benefits because Mr. House has no permanent medical restrictions, and continues to perform the same job duties that he previously performed. Once the trial court determined that Mr. House was entitled to reconsideration, the court was called upon to determine the extent of vocational disability. This determination 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). The trial court’s finding comes to us with a presumption of correctness, and we can reverse it only if we conclude that the evidence preponderates against it. Tenn. Code Ann. § 50-6-225(e)(2). Here the trial court considered that Mr. House is fifty years old. He completed the eleventh grade and later obtained a GED. His work experience is entirely in various forms of manual labor. Although he has no medical restrictions, he testified that he has had to adjust the manner in which he performs some of his job tasks to prevent re-injuring his shoulder and that a number of activities at work and at home cause his shoulder to become painful. It is appropriate for a trial court to consider

an injured employee's own assessment of his physical condition. *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). Having independently reviewed the entire record, we conclude that the evidence does not preponderate against the trial court's decision to award additional permanent disability benefits.

Conclusion

The judgment is affirmed. Costs are taxed to YRC, Inc. and its surety, for which execution may issue if necessary.

J. S. "STEVE" DANIEL, SP.J.

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No. M2011-01535-SC-WCM-WC - Filed June 22, 2012

ORDER

This case is before the Court upon the motion for review filed by YRC, Inc. pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to YRC, Inc., for which execution may issue if necessary.

PER CURIAM

Koch, J., Not Participating