

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

November 24, 2014 Session

**ARIANA SAMADI v. HILTON HOTELS CORP. D/B/A EMBASSY SUITES
NASHVILLE AIRPORT**

**Appeal from the Circuit Court for Davidson County
No. 12C858 Joe P. Binkley, Jr., Judge**

**No. M2014-00958-SC-R3-WC - Mailed February 26, 2015
Filed March 31, 2015**

The employee filed a worker's compensation action seeking reconsideration of a prior worker's compensation settlement. The employer argued the employee was fired for misconduct which consisted of failing to complete reasonable work related tasks, and therefore, the employee was ineligible for reconsideration under Tennessee Code Annotated section 50-6-241(d)(2)(B) (2008). The trial court held the employee's refusal did not constitute misconduct because it was based upon a reasonable belief she could not complete the tasks assigned to her because of her prior work-related injury. The employer has appealed from this decision. 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. 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**

DON R. ASH, SR. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, J., and PAUL G. SUMMERS, SR. J., joined

D. Randall Mantooth and Joey Johnsen, Nashville, Tennessee, for the appellant, Hilton Hotels Corp. d/b/a Embassy Suites Nashville Airport.

Jeffrey Levine, Nashville, Tennessee, for the appellee, Ariana Hamid.

OPINION
Factual and Procedural Background

The employee, Ariana Hamid¹ (“Ms. Hamid”) was 64 years of age at the time of trial and is a native of Kabul, Afghanistan. She completed high school in Afghanistan and worked there as a teacher. The only job she has held since immigrating to the United States has been working for the employer, Hilton Hotels Corporation d/b/a Embassy Suites Nashville Airport (“Hilton”), as a housekeeper, which she began in 1995. Ms. Hamid became a United States citizen in 2011.

Her original job duties as a housekeeper included mopping floors, cleaning bathrooms, cleaning mirrors, and vacuuming. She was required to push a 50-pound cart and utilize a 15-pound vacuum. On June 15, 2005, Ms. Hamid suffered a work-related injury to her right shoulder. She filed a worker’s compensation claim in the Circuit Court for Davidson County in 2005. In 2006, she presented to Dr. Sean Kaminsky, her panel physician, and ultimately underwent two arthroscopic right shoulder surgeries. Dr. Kaminsky determined Ms. Hamid reached maximum medical improvement on December 26, 2006, and was released back to full duty work with no work restrictions as of this date. Despite being released back to work with no restrictions, Hilton voluntarily allowed Ms. Hamid to return to work in a position which was less strenuous than her prior position as a housekeeper. She was given the job title of inspector, and her new job duties consisted of making sure the housekeepers had cleaned their assigned rooms according to company standards. Ms. Hamid continued in this position for approximately four years. To perform these duties, she was required to push a 15-pound cart and inform other housekeepers if she found a room not satisfactorily cleaned. She did not clean any rooms herself.

On May 11, 2009, she settled her original worker’s compensation claim², while maintaining her right of reconsideration. In August of 2011, Hilton hired a new supervisor, Wanda Matos. Ms. Matos determined Hilton was short-staffed and asked Ms. Hamid to resume her prior housekeeping duties. She refused, explaining she was physically unable to clean rooms due to the pain and inability to lift her arms because of her prior shoulder injury. Ms. Hamid testified she experienced extreme pain while

¹At the time of the initial workers’ compensation settlement, the employee’s legal name was Ariana Samadi. It has since been changed to Ariana Hamid, and the employee will be referred to as “Ms. Hamid” throughout this opinion.

²The May 11, 2009 trial court order was not submitted to this Panel as part of the appellate record. However, from the trial transcript and the trial court’s April 24, 2014 order, it appears the original settlement included a total impairment rating of eight percent to the body as a whole with a multiplier of 1.5 times Ms. Hamid’s medical impairment rating, resulting in a 12 percent total industrial disability rating.

mopping and vacuuming, and stated due to the earlier injury, she was unable to perform her original employment as a housekeeper. On August 29, 2011, Hilton terminated Ms. Hamid's employment based upon her refusal to assist in the housekeeping tasks assigned to her by her new supervisor.

On February 28, 2012, Ms. Hamid filed a complaint in the Circuit Court for Davidson County asserting her right to reconsideration of the May 11, 2009 worker's compensation settlement. Hilton asserted Ms. Hamid was terminated for willful misconduct under Tennessee Code Annotated section 50-6-241(d) (1) (B) (iii), and therefore, not entitled to reconsideration. A bench trial was held before the Honorable Joe P. Binkley, Jr. on March 26, 2014.

At trial, Ms. Hamid testified with the assistance of a translator. She acknowledged Dr. Kaminsky released her back to full duty work with no restrictions following her second arthroscopic shoulder surgery in 2006. Despite Dr. Kaminsky's release, Ms. Hamid believed she was unable to complete her pre-injury housekeeping duties. She explained, in her experience, these tasks were too painful. However, she provided conflicting testimony on whether she had actually tried to perform any cleaning tasks after her release back to work with no restrictions in 2006—at one point stating she had never tried to clean a room, and at a later time recounting an attempt to use a mop, which caused extreme pain to her right shoulder.

Ms. Hamid testified other inspectors would personally clean rooms which had not been satisfactorily cleaned, and agreed Hamid's job was simply to inspect and notify others of any deficiency in the work. She also testified her right shoulder pain affected her personal life as well and she had trouble cooking, cleaning, doing laundry, going to the grocery store, and playing with her grandchildren.

On cross-examination, Ms. Hamid admitted she could not recall any other inspectors who did not also clean when needed. She agreed the inspector position she held was likely created just for her. She acknowledged Dr. Kaminsky believed she could perform housekeeping tasks such as mopping and vacuuming. Finally, she testified the housekeeping duties she was asked to resume in 2011 were the same as those she performed before her shoulder injury.

The next witness to testify was Joseph Gant, Human Resources Director for Hilton. Mr. Gant testified the inspector position did not simply involve making sure the housekeepers cleaned all rooms to company standards. Rather, the inspector position also involved personally cleaning some rooms, as well as taking on full housekeeper duties when Hilton was short-staffed. Furthermore, inspectors were expected to act in a supervisory capacity and assist in assigning blocks of rooms to housekeepers, as well as entering data into a computer system. Mr. Gant admitted, however, the full job duties of

the inspector position were never required of Ms. Hamid. He further testified the reason for Ms. Hamid's light duty job was not because Hilton believed her statements about shoulder pain but rather simply because she was performing a needed task at the time.

Mr. Gant recalled an August 29, 2011 meeting between Ms. Hamid, Wanda Matos, and himself. At this meeting, Mr. Gant asked Ms. Hamid if she would be willing to assist in performing any of the individual tasks associated with the housekeeper position. Ms. Hamid refused to assist in any of the individual tasks and informed Mr. Gant she could do nothing to assist in cleaning rooms because of right shoulder pain. Mr. Gant stated Ms. Hamid would be required to clean fifteen or sixteen rooms per day if she returned to her housekeeping duties. After Ms. Hamid's refusal to assist in any cleaning activities, Mr. Gant determined Ms. Hamid was no longer able to help her department and she was terminated on August 29, 2011.

Ms. Hamid's daughter, Aziza Nawabi, testified about the close relationship she has with her mother and their daily interactions. She stated Ms. Hamid has difficulty with many household tasks and she requires daily help with many of these activities.

Testifying by deposition, Dr. Kaminsky stated after performing the second arthroscopic shoulder surgery in 2006, he released Ms. Hamid back to work with no restrictions. He further testified she came to see him in 2007 and again in 2011 but those visits were unrelated to the original 2005 right shoulder injury. He admitted while he released Ms. Hamid with no restrictions, some patients still have subjective symptoms, which generally resolve over time. Dr. Kaminsky explained just because a patient has no restrictions does not mean the patient can do any task assigned to them and he advises his patients to be cautious and refrain from doing tasks which cause them pain. Dr. Kaminsky agreed generally he advises his patients to let pain be their guide in determining what tasks they can and cannot do.

At the conclusion of the proof, the trial court ruled from the bench. It found Ms. Hamid's testimony to be credible and concluded she could not help clean fifteen or sixteen rooms per day if the hotel was short-staffed. The trial court gave weight to Dr. Kaminsky's testimony he would instruct his patients to let pain be their guide in determining what activities they can and cannot perform. Consequently, the court found Ms. Hamid's refusal to perform housekeeping duties because she simply could not perform them did not amount to misconduct. The trial court found Ms. Hamid retained a total impairment rating of 8% to the body as a whole and she had a permanent partial disability of 36%. The trial court awarded workers' compensation benefits in accordance with its findings. Hilton appealed the trial court's decision, contending the trial court erred in finding Ms. Hamid's refusal to perform housekeeping tasks did not constitute misconduct. Hilton's appeal has been referred to the Special Workers' Compensation Appeals Panel. See Tenn. Sup. Ct. R. 51, § 1.

Standard of Review

Appellate review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2008), which provides appellate courts must "[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." As the Supreme Court has observed many times, reviewing courts 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 the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court's findings based upon documentary evidence such as depositions. *Glisson v. Mohon Int'l, Inc. /Campbell Ray*, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Hilton asserts the trial court erred by finding Ms. Hamid had not committed willful misconduct under Tennessee Code Annotated section 50-6-241(d) (1) (B) (iii) and by finding she was entitled to reconsideration of her prior worker's compensation settlement. Hilton argues by requiring Ms. Hamid to resume her prior housekeeping duties, it was simply enforcing a reasonable workplace rule, and Ms. Hamid's lack of compliance with this rule constituted misconduct. *See Marvin Windows of Tenn., Inc. v. Gardner*, No. W2011-01479-WC-R3-WC, 2012 WL 2674519 (Tenn. Workers Comp. Panel June 8, 2012); *Pigg v. Liberty Mut. Ins. Co.*, No. M2007-01940-WC-R3-WC, 2009 WL 585962 (Tenn. Workers Comp. Panel Mar. 9, 2009). We disagree.

The Tennessee Workers' Compensation Law limits the amount of permanent partial disability benefits an injured employee may receive when "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 the injury." Tenn. Code Ann. § 50-6-241(d) (1) (A). For injuries occurring on or after July 1, 2004, an employee who returns to work at a wage equal to or greater than the employee's pre-injury wage may receive a maximum permanent partial disability benefit of 1.5 times the employee's medical impairment rating. *Id.* An employee may seek reconsideration of an award of permanent partial disability benefits for the body as a whole if the employee is subsequently no longer employed by the pre-injury employer at the specified wage: "If an injured employee receives benefits for body as a whole injuries pursuant to subdivision (d) (1) (A) and the employee is subsequently no longer employed by the pre-injury employer, the employee

may seek reconsideration of the permanent partial disability benefits.” Tenn. Code Ann. § 50-6-241(d) (1) (B) (i). The trial court may award an employee who qualifies for such reconsideration additional permanent partial disability benefits up to a statutory maximum of six times the employee’s medical impairment rating. Tenn. Code Ann. § 50-6-241(d) (2) (A). However, Tennessee Code Annotated section 50-6-241(d)(1)(B)(iii) provides “under no circumstances shall [the] employee be entitled to reconsideration when the loss of employment is due to either (a) [t]he employee’s voluntary resignation or retirement; provided . . . that the resignation or retirement does not result from the work-related disability that is the subject of such reconsideration; or (b) [t]he employee’s misconduct connected with the employee’s employment.”

In determining whether an employee is eligible for reconsideration of his or her award of permanent partial disability benefits, courts inquire as to whether the employee has had a meaningful return to work following a work-related disability. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 328 & n. 9 (Tenn. 2008); *Lay v. Scott Cnty. Sheriff’s Dep’t*, 109 S.W.3d 293, 297 (Tenn. 2003); *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 629 (Tenn. 1999). If the employee is found to have had a meaningful return to work, his or her benefits are capped using the smaller multiplier of one and one-half in Tennessee Code Annotated section 50-6-241(d)(1)(A). If the employee is found not to have had a meaningful return to work, his or her benefits are capped using the larger multiplier of six in section 50-6-241(d) (2) (A). *See Nichols v. Jack Cooper Transp. Co.*, 318 S.W.3d 354, 361 (Tenn. 2010); *Tryon*, 254 S.W.3d at 328. As the Tennessee Supreme Court stated in *Tryon*, “[w]hen 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.” 254 S.W.3d at 328. The assessment of the reasonableness of the actions of the employee and employer is highly fact-intensive and “depends on the facts of each case.” *Id.*

The Supreme Court addressed a factual situation similar to the instant case in *Howell v. Nissan N. Am., Inc.*, 346 S.W.3d 467 (Tenn. 2011). Since we find there to be no legally significant factual distinctions between *Howell* and the case at bar, the Court’s reasoning in *Howell* is controlling. In *Howell*, the employee worked on an assembly line and used a power tool to bolt parts onto car motors. *Id.* at 469. The employee mainly worked on a certain assembly line which produced V-8 motors, but shortly before her injury, she worked three shifts on a different assembly line which produced four-cylinder motors. *Id.* Employee suffered a work-related injury to both hands and underwent carpal tunnel release surgery. *Id.* She filed a workers’ compensation claim for these injuries, which was subsequently settled, leaving open the right to seek reconsideration. *Id.* The employee was then released back to work with no restrictions. Upon her return to work, she was told she would have to work on the four-cylinder assembly line instead of in her prior position on the V-8 assembly line. *Id.* Despite having no medical restrictions, the

employee refused to accept this position and testified the four-cylinder assembly line worked at a faster pace than the V-8 assembly line and she knew working on the four-cylinder line would cause her too much pain. *Id.* at 470. The employee subsequently resigned and then filed a complaint seeking reconsideration of her prior worker's compensation settlement. *Id.* at 471. The trial court ruled the employee's actions in refusing to accept a position on the four-cylinder line were reasonable and the employee did not have a meaningful return to work. *Id.* In affirming the decision of the trial court, the Tennessee Supreme Court gave deference to the trial court, which "having viewed the witnesses live and observed their demeanor while testifying, found [the employee] to be 'entirely credible.'" *Id.* at 473. Moreover, the Tennessee Supreme Court pointed out the employee had worked three shifts on the four cylinder line, was familiar with the demands of the position, and refused the position based upon pain caused by the underlying work-related injury. *Id.*

Here, Ms. Hamid worked as a housekeeper with Hilton prior to her injury and prior to accepting the inspector position. She testified she was well aware of the job duties of a housekeeper. Despite having no medical restrictions, Ms. Hamid repeatedly told Hilton and Dr. Kaminsky she did not believe she could perform her prior housekeeping duties because of the excessive pain it would cause in her right shoulder due to her prior injury. The trial court, after viewing the witnesses live, found Ms. Hamid to be credible and held she could not have performed the housekeeping duties asked of her. The evidence does not preponderate against this conclusion. Ms. Hamid's refusal to undertake these housekeeping duties were reasonable, directly related to her prior work-related injury, and did not constitute misconduct.

Finally, we note the *Gardner*³ and *Pigg*⁴ cases relied upon by Hilton are factually distinguishable from the instant case. Both *Gardner* and *Pigg* involve situations where an employee suffered a work related injury, returned to work, and was subsequently terminated for violating a reasonable company policy unrelated to the prior work-related injury. The employee in *Gardner* suffered a work-related injury to his back and ankle. *Gardner*, 2012 WL 2674519, at *1. Two years after his return to work, he was diagnosed with cancer and required to miss work to undergo treatment. *Id.* He was subsequently terminated for absences exceeding the company's medical leave policy. *Id.*

In *Pigg*, the employee suffered work-related shoulder and back injuries. *Pigg*, 2009 WL 585962, at *2. After returning to work, the employee repeatedly failed to meet company production quotas but attributed these failures to psychological problems rather than any physical ailments or work-related injuries. *Id.* She was eventually terminated

³2012 WL 2674519.

⁴2009 WL 585962.

for repeatedly failing to meet production quotas. *Id.* The actions of the employees in *Gardner* and *Pigg* were found to constitute misconduct. Conversely, Ms. Hamid failed to follow her supervisor's instructions because she was ordered to perform duties which the trial court found she reasonably believed she was unable to perform because of pain caused by her prior work-related injury. The evidence does not preponderate against the trial court's finding the employee's refusal to perform housekeeping duties does not constitute misconduct.

Conclusion

The trial court's judgment is affirmed. Costs of this appeal are taxed against Hilton Hotels Corporations and its surety, for which execution shall issue if necessary.

DON R. ASH, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

**ARIANA SAMADI v. HILTON HOTELS CORP. D/B/A EMBASSY SUITES
NASHVILLE AIRPORT**

**Circuit Court for Davidson County
No. 12C858**

**No. M2014-00958-SC-R3-WC
Filed March 31, 2015**

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 Hilton Hotels Corporations, and its surety, for which execution may issue if necessary.

PER CURIAM