IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 27, 2010 Session

DAVID WEACHTER v. HARTFORD UNDERWRITERS INSURANCE COMPANY

Appeal from the Circuit Court for Sumner County
No. 31084-C C. L. Rogers, Judge

No. M2010-00108-WC-R3-WC - Mailed - January 26, 2011
Filed - February 28, 2011

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. Employee was injured in a motor vehicle accident. It is undisputed that his injuries were compensable and that he is permanently and totally disabled as a result of the accident. The issues on appeal are the propriety of the trial court's calculation of the average weekly wage, the trial court's denial of a set-off to Employer for a settlement with the third party tortfeasor, and the award of vocational expert witness fees. We find that the trial court correctly calculated the average weekly wage, but erred by denying the set-off and awarding the expert's fees. The judgment is modified accordingly.

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

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the Court, in which SHARON G. LEE, J., and JERRI S. BRYANT, SP. J., joined.

Blakely D. Matthews and Jason K. Currie, Nashville, Tennessee, for the appellant, Hartford Underwriters Insurance Company.

William B. Jakes III, Nashville, Tennessee, for the appellee, David Weachter.

MEMORANDUM OPINION

Factual and Procedural Background

David Weachter ("Employee") was a photographer and trainer for Nationwide Studios, Inc. ("Employer"), which contracts with daycare centers to photograph children and sell packages of photos to parents. Employee's job required substantial travel outside Tennessee. On August 6, 2006, Employee was injured in a motor vehicle accident in Indiana when the driver of an oncoming vehicle crossed the center line of the highway and struck Employee's vehicle head on. As a result of the accident, Employee sustained fractures of the spine, left leg, and right foot, as well as nerve damage in the same areas. He underwent numerous surgical procedures, including several to treat post-surgical infections. Dr. Rick Davis, his treating orthopaedic surgeon for the spinal injuries, assigned a 27% anatomical impairment to the body as a whole for those injuries. Dr. Marc Tressler, his treating orthopaedic surgeon for the foot and leg injuries, assigned a 20% impairment to the body as a whole for those injuries. Employee was referred by Dr. Davis to Dr. Peter Kroll, an anesthesiologist specializing in pain management. Dr. Kroll assigned an additional 6% impairment to the body as a whole due to chronic pain. Drs. Davis and Tressler placed significant activity restrictions on Employee. He was regularly taking several narcotic pain medications that interfered with his ability to work and engage in other activities. Employer does not dispute that Employee is permanently and totally disabled as a result of the accident.

Employee was forty-two years old at the time of the trial, was a high school graduate, and had taken approximately sixty credit hours of community college classes. Before he went to work for Employer, he worked as a janitor and later owned and operated a janitorial service. He began work for Employer as a janitor and then trained to become a photographer and was working as a photographer and trainer when his injury occurred. Employee had not worked or attempted to return to work since his injury. He testified that he believed he was unable to work. He settled a claim against Enterprise Rent-a-Car ("Enterprise"), the owner of the other vehicle involved in his accident, for $25,000, of which he received $15,000 after payment of attorney's fees and expenses.

Employee presented the testimony of Patsy Bramlett, a vocational evaluator. She stated that he was able to read and perform arithmetic at a twelfth-grade level without time limits. However, when Ms. Bramlett administered timed tests, Employee's performance was substantially lower. She opined that he was unable to work as a result of his medical restrictions, assigning him a one hundred percent vocational disability rating. Ms. Bramlett also testified that he would be unable to pass a pre-employment drug screen due to the various medications he took daily.

Employee was paid on a salary and commission basis. After his injury occurred, a wage statement was prepared and used as a basis for calculating his average weekly wage and workers' compensation benefit rate. Subsequently, it was determined that he had received three payments not reflected in the wage statement: a Christmas bonus of $1,000, paid in December 2005; a bonus of $5,000, paid in December 2006; and a payment of $1,278.79 for commissions earned before his injury but not paid until 2008 due to an accounting error.

Employee's father, Richard Weachter, was the Chief Financial Officer of Nationwide Studios, Inc. when his son was injured. He explained that at Nationwide, generally the bonuses were paid at the end of each year and were considered part of an employee's compensation package. The amount of the annual bonus was based upon a subjective appraisal of each employee's job performance during the previous year. Performance appraisals were usually conducted by Richard Weachter and Nationwide's Chief Executive Officer, but Richard Weachter did not participate in determining the amount of his son's bonus.

After trial, the trial court took the case under advisement and directed the parties to file post-trial findings of fact and conclusions of law. The trial court adopted and signed the findings submitted by Employee. The trial court found that Employee was permanently and totally disabled; the December 2006 bonus should be included in the calculation of Employee's average weekly wage and benefit rate; and Employer was not entitled to a set off for any portion of the third-party settlement with Enterprise. The trial court subsequently granted Employee's motion to award Ms. Bramlett's fee. Employer has appealed, contending that the trial court erred by including the $5,000 bonus paid after the injury in its calculation of the average weekly wage, by not ordering a set-off for the settlement with Enterprise, and by ordering the payment of Ms. Bramlett's fee.

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, we afford considerable deference to the trial court's factual findings in this regard because the trial court had the opportunity to directly observe the demeanor of the witnesses and to hear in-court testimony. Madden v. Holland Grp. of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Average Weekly Wage

Employer, relying on Tennessee Code Annotated section 50-6-102(3)(A), contends that the trial court erred by including the December 2006 bonus payment in the calculation of the average weekly wage. Section 50-6-102(3)(A) provides that the average weekly wage is to be calculated based upon "the earnings of the injured employee in the employment in which the injured employee was working at the time of the injury during the fifty-two (52) weeks immediately preceding the date of injury." Employer argues that the December 2006 bonus does not fall within the statutory definition because the payment was made after the injury, was a discretionary payment by Employer, and was not based upon any predetermined formula.

In Bryson v. Benton, the Tennessee Supreme Court stated the general rule regarding what is included in the calculation of "earnings" for determination of the average weekly wage: "[i]n computing actual earnings as the beginning point of wage basis calculations, there should be included not only wages and salary but anything of value received as consideration for the work, such as tips, and bonuses, and room and board constituting real economic gain to the employee." 395 S.W.2d 794, 795 (Tenn. 1965) (quoting Larson, Workmen's Compensation Law, § 60.12); see also P & L Const. Co. v. Lankford, 559 S.W.2d 793, 795 (Tenn. 1978) ("The earnings of an employee include anything received by him under the terms of his employment contract from which he realizes economic gain."). Our Supreme Court has also held that bonuses paid to an employee can be considered "earnings" under the workers' compensation act. Moss v. Aluminum Co. of Amer., 276 S.W. 1052, 1054 (Tenn. 1925); see also Cooksey v. CNA Ins. Co., No. 1998-00103-WC-R3-CV, 1999 WL 1249413, at *5 (Tenn. Workers' Comp. Panel, Dec. 20, 1999) ("Bonuses, overtime and other incentive pay given to the employee as part of his overall compensation for services are also considered part of his wages.").

Employer cites Armstrong v. Spears, 393 S.W.2d 729 (Tenn. 1965) in support of its proposition. Armstrong, however, concerns the use of projected future earnings to determine average weekly wage, and stands for the proposition that "[t]he average weekly wage . . . must be ascertained by past earnings and not by what [an employee] may earn in the future." Id. at 733. Armstrong is not applicable to the issue raised by Employer in this case, which does not involve projected future earnings but, to the contrary, involves an actual payment made by Employer to Employee after the injury at issue.

Employee points to his testimony that the bonus was based upon the work he performed during the year before the accident.[1] He argues therefore that the bonus was earned before, but paid after, the accident. Employee's father, Richard Weachter, testified that the Employer's end-of-year bonuses were based upon a subjective evaluation of a particular employee's job performance during the preceding year. Richard Weachter testified that the December bonuses were included as part of an employee's overall compensation package presented to all employees and that the annual bonuses were paid to "all home office employees." He further testified as follows:

> Q: And then [Employee] was paid $5,000.00 in December, '06, which would have been four months after the accident, after he had stopped working?
> A: That just happens to be when the check was written, but it was for work performed during the first eight months.

As Chief Financial Officer of Employer, Richard Weachter was in a position to have knowledge of the annual bonuses, and no evidence was presented which contradicted his testimony. The bonus was therefore earned by an employee during the 52 weeks immediately preceding the date of the accident and injury. In Employee's case, that period was January 1 through August 6, 2006. We conclude that the trial court correctly held that the December 2006 bonus payment was properly included in Employee's earnings for the purpose of calculating the average weekly wage.

Set-off of Third Party Settlement

Employee recovered a total of $25,000 and received a net of $15,000 from Enterprise, the owner of the vehicle that caused his injury. The Employer requested a credit against its liability for either the gross or net amount pursuant to Tennessee Code Annotated section 50-6-112, which provides in pertinent part:

> (a) When the injury or death for which compensation is payable under this chapter was caused under circumstances creating a legal liability against some person other than the employer to pay damages, the injured worker . . . shall have the right to take

[1] Employee also relies on Lane Enterprises, Inc. v. Workmen's Compensation Appeal Board (Patton), 644 A.2d 726 (Penn. 1994) where the issue presented was whether a bonus payment should be allocated to the particular quarter in which it was paid (the Pennsylvania statute provided that the average weekly wage should be calculated based upon quarters in certain instances) or prorated for the entire year upon which the amount of the bonus was based. The Pennsylvania Supreme Court held that the latter analysis was correct. In light of the structural differences between the Pennsylvania statute and our own, we conclude that Lane Enterprises has, at best, limited value in the analysis of this case.

> compensation under this chapter, and the injured worker . . . may pursue the injured worker's . . . remedy by proper action in a court of competent jurisdiction against the other person.
> . . .
> (c)(2) In the event the net recovery by the worker . . . exceeds the amount paid by the employer, and the employer has not, at the time, paid and discharged the employer's full maximum liability for workers' compensation under this chapter, the employer shall be entitled to a credit on the employer's future liability, as it accrues, to the extent the net recovery collected exceeds the amount paid by the employer.
> (3) In the event the worker . . . effects a recovery, and collection of that recovery, from the other person, by judgment, settlement or otherwise, without intervention by the employer, the employer shall nevertheless be entitled to a credit on the employer's future liability for workers' compensation, . . . to the extent of the net recovery.

The trial court denied Employer's request for two reasons. First, the trial court found that Employer was required to raise its claim for subrogation credit in its answer, pursuant to Tennessee Rule of Civil Procedure 8.03, and had failed to do so. Second, the trial court found that Employer's "subrogation rights apply only to third party settlements with persons and entities who have 'legal liability' in tort, as opposed to contract, for an employee's injuries, and [Employer's] subrogation rights do not apply to the proceeds of the settlement with Enterprise."

Employer contends that Rule 8.03 applies only to affirmative defenses, and that its subrogation right, granted by statute, is not an affirmative defense. Rule 8.03 explicitly requires a party to

> set forth affirmatively facts in short and plain terms relied upon to constitute accord and satisfaction, arbitration and award, express assumption of risk, comparative fault (including the identity or description of any other alleged tortfeasors), discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, statute of repose, waiver, workers' compensation immunity, and any other matter constituting an affirmative defense.

Rule 8.03 does not refer to a claim of offsetting statutory subrogation rights. Employee cites no case authority that supports his contention that the statutory subrogation right must be pleaded as an affirmative defense. In Aetna Cas. & Sur. Co. v. Gilreath, the Supreme Court described the statutory right in very broad terms and held that the statute "clearly obligates the employee to repay the employer all compensation advanced and to credit any future compensation due, up to the full amount of the proceeds of any settlement." 625 S.W.2d 269, 273 (Tenn. 1981). "The purpose of the employer's statutory subrogation lien is '[t]o prevent the employee from receiving a double recovery.'" Correll v. E.I. DuPont de Nemours & Co., 207 S.W.3d 751, 754 (Tenn. 2006) (quoting Hickman v. Cont'l Baking Co., 143 S.W.3d 72, 76-77 (Tenn. 2004)). We conclude that Employer was not required by Rule 8.03 to raise its potential subrogation claim in the answer. See Melton v. Firestone Tire & Rubber Co., 625 S.W.2d 713, 714 (Tenn. 1981) (holding that set-off was not an affirmative defense to be pleaded in a workers' compensation case where the employer sought to prove that it had made payments beyond the statutory period); accord Flowers v. Turner, No. W2001-01429-COA-R3-CV, 2003 WL 135055, at *6 (Tenn. Ct. App. Jan. 14, 2003). It is apparent from the record that Employer raised the issue of its potential subrogation right during discovery, that counsel exchanged correspondence concerning the subject, and that the issue was properly placed before the trial court for resolution.

Employee's argument that his claim and settlement with Enterprise were based in contract, rather than tort, is unconvincing. Employee relies on Hudson v. Hudson Municipal Contractors, 898 S.W.2d 187, 188 (Tenn. 1995), which involved a recovery by the deceased employee's survivor from the employee's own uninsured motorist insurance carrier. In this case, unlike Hudson, Employee received compensation from Enterprise, the owner of the vehicle driven by the tortfeasor who caused Employee's injuries. Employee and Enterprise had no contractual relationship. Any claim by Employee against Enterprise was necessarily based upon Enterprise's relationship with the tortfeasor, and the actions of the tortfeasor, and was therefore a tort claim. Tennessee Code Annotated section 50-6-112(a) and (c) provide that, when a compensable injury "was caused under circumstances creating a legal liability against some person other than the employer to pay damages," the employer is entitled to a credit in the amount of the recovery from the third party, less reasonable attorney's fees and expenses. We therefore conclude that the trial court erroneously denied Employer's request for a set-off of Employee's net recovery of $15,000 against the award of permanent total disability benefits.

Payment of Expert's Fee

The trial court ordered Employer to pay Employee the $1,000 fee charged by the vocational expert for interviewing Employee and generating the expert report. Employer contends this was error because an expert's preparation costs are not recoverable as

discretionary costs under Tennessee Rules of Civil Procedure 54. Miles v. Marshall C. Voss Health Care Ctr., 896 S.W.2d 773, 776 (Tenn. 1995). However, Employee sought recovery of these costs under Tennessee Rule of Civil Procedure 37.03(2), which provides:

> If a party fails to admit . . . the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves . . . the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36.01, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or (4) there was other good reason for the failure to admit.

In June 2009, Employee served a Request for Admission which asked Employer to admit that Employee was permanently and totally disabled. Employer's response stated that "this adjudication is within the sole province of the Court," but conceded that Employee had a "substantial permanent physical disability." Employer points out that Employee had been at Maximum Medical Improvement for only a few days at the time the request was made; that the C-32 forms used as proof in the case were not completed by Employee's treating physicians until months later (October 7 and 20, 2009); that Employee's vocational expert, Ms. Bramlett, did not examine him until October 9, 2009; and that Ms. Bramlett testified that she did not finalize her opinions until about one week before the November 23, 2009, trial. Employer argues that the issue was thus in doubt, at least until the eve of trial. In light of the circumstances outlined by Employer, we conclude that Employer "had reasonable ground to believe that he or she might prevail on the matter" of permanent and total disability at the time it answered Employee's request for admission, and therefore the trial court erred by awarding the examination fee of Employee's vocational expert pursuant to Rule 37.03(2).

Conclusion

The portions of the trial court's judgment denying Employer's request to set off the amount of Employee's net recovery from Enterprise, and awarding Employee the cost of the examination conducted by his vocational evaluator, are reversed. The remainder of the judgment is affirmed. The case is remanded to the trial court for entry of an order consistent

with this opinion. Costs are taxed one-half to Hartford Underwriters Insurance Company and its surety, and one-half to David Weachter, for which execution may issue if necessary.

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JON KERRY BLACKWOOD, SENIOR JUDGE

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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 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 one-half to Hartford Underwriters Insurance company and its surety , and one-half to David Weachter, for which execution may issue if necessary.

PER CURIAM