IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
April 29, 2014 Session

MICHAEL COREY PETERSON v. McMILLAN'S ROOFING AND HVAC

Appeal from the Chancery Court for Knox County
No. 1828071 John F. Weaver, Chancellor

No. E2013-02130-SC-R3-WC-MAILED-JULY 23, 2014-FILED-AUGUST 25, 2014

After recovering from a work-related injury, the employee returned to work for his pre-injury employer but resigned after only a few days. Later, he made a claim for workers' compensation benefits. At the conclusion of the proof, the trial court ruled that the employee was deprived of a meaningful return to work and awarded benefits in excess of one and one-half times his physical medical impairment rating. The employer has appealed, asserting that the trial court erred by so finding and that the one and one-half times cap should apply. 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 & Supp. 2013) Appeal as of Right; Judgment of the Trial Court Affirmed

GARY R. WADE, C.J., delivered the opinion of the Court, in which E. RILEY ANDERSON, SP. J., and JON KERRY BLACKWOOD, SR. J., joined.

Tanya L. Crosse, Knoxville, Tennessee, for the appellant, McMillan's Roofing and HVAC.

Robert M. Asbury, Knoxville, Tennessee, for the appellee, Michael Corey Peterson.

OPINION

I. Facts and Procedural Background

From June 2009 through May 2010, Michael Corey Peterson (the "Employee") worked as a general laborer for McMillan's Roofing and HVAC (the "Employer"). His job duties consisted of carrying materials around job sites, removing old roof surfaces, picking up trash, and moving equipment for other workers. On March 9, 2010, the Employee fell two

stories onto the pavement below while removing the roof and gutter from a commercial building near Central Avenue in Knoxville. He was transported by ambulance to the University of Tennessee Medical Center where he was treated by Dr. Phillip G. McDowell, who diagnosed compression fractures in three places of the spine.

Two months later, the Employee was permitted to return to work with a fifty-pound lifting restriction. Less than a week later, he resigned. On April 30, 2012, the Employee filed suit for workers' compensation benefits, claiming that he was not afforded a meaningful return to work. He contended that his decision to resign was reasonable, given the pain he experienced from his spinal injuries. In response, the Employer maintained that the Employee resigned for personal reasons unrelated to his work injury.

At trial, the Employee testified that he attempted to comply with the fifty-pound lifting restriction but asserted that "there's very few things on a roof that's under [fifty] pounds" and that his physical limitations made him feel like a "slacker." He complained that on his last day at work, his back pain became so severe that he became physically sick and spent the second half of the day in the company truck. He stated that on the following day, he informed Tonya McMillan, the office manager and part owner of the business, that he was not working within the doctor's restrictions and that "there [was] no way [he] was going to be able to continue that type of work . . . and [he] needed to try to find other employment that would better suit [his] needs." The Employee testified that Ms. McMillan explained that there was no roofing job "that's light duty." Following this conversation, the Employee resigned, maintaining that he could not perform the required work because of his injuries.

Following his resignation, the Employee was unemployed for approximately nine months before being hired as a roofer by C.M. Henley Company ("C.M. Henley"). He testified that at the time of his interview, C.M. Henley was aware of his prior injury, and he explained that his new job was less physically demanding because, in part, his co-workers assisted him in moving materials. The Employee admitted, however, that in his employment application with C.M. Henley, he indicated that he resigned from his position with the Employer for "personal reasons." He explained that "[i]t's hard to get hired at a physically demanding job if you[] . . . tell them that . . . you have suffered a back injury . . . [and t]hat wasn't the first thing I wanted [C.M. Henley] to see when [it] looked at my application." During his testimony, the Employee admitted to twelve convictions for shoplifting and theft between December 2010 and April 2012. He continued to work for C.M. Henley for a year and a half until he was incarcerated for the theft of Blu-ray discs from Wal-Mart.

Dr. McDowell, who testified by deposition, confirmed that after his May 11, 2010 appointment, the Employee was authorized to "return to work as he tolerates" with a fifty-pound lifting restriction. According to Dr. McDowell, this meant that the Employee had to

use his "common sense" not to engage in painful activities. Dr. McDowell last treated the Employee on June 23, 2010. The Employee reported occasional pain with heavy lifting but otherwise was making progress. Although Dr. McDowell did not believe that the Employee had reached maximum medical improvement at that time, he released the Employee with instructions to return for treatment only as needed. In October of 2010, in response to an inquiry from the Employer's insurer, Dr. McDowell declared the Employee to be at maximum medical improvement. He initially testified to a permanent impairment rating of 0% because he had not seen the Employee for many months and had assumed that he had no additional problems. After reviewing a report of an independent medical examination conducted by Dr. William Kennedy, however, Dr. McDowell modified his opinion and "agreed with [Dr. Kennedy's] findings," including his assessment that the Employee retained a 19% impairment to the body as a whole due to the compression fractures.

Dr. Kennedy, who also testified by deposition, evaluated the Employee approximately two years after the injury. The Employee complained that he was still experiencing constant pain in his back and, during his examination, Dr. Kennedy detected muscle spasm, which "correlated well and was consistent with [the Employee's] complaint of ongoing constant pain." Dr. Kennedy further observed a decreased range of motion in the Employee's mid-back and concluded that at the time of the examination, the Employee had reached maximum medical improvement. His 19% impairment rating was made pursuant to the Sixth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. He recommended that the Employee's "activities of daily living and employment should permanently not require repeated bending, stooping, or squatting or working over rough terrain or in rough vehicles." Dr. Kennedy also concluded that the Employee "should not attempt to work at heights or under conditions such as on his hands or knees or crawling in which his safety and stability would depend on the normal pain-free mobility and strength of his back." He restricted the Employee from lifting, carrying, pushing, or pulling twenty pounds occasionally or ten pounds frequently. In his opinion, "if [the Employee] works outside of the level of the restriction that [he has] recommended, [the Employee] would be subjecting himself to an excessive risk of making his . . . spine condition worse or of suffering additional injury."

Ms. McMillan testified that the Employee "asked [her] if [she] could lay him off because he wanted to return to school" and he needed to "draw his unemployment" for that purpose. She declined, explaining that "he had been injured and he had just been able to return to work and it would look like [she] was trying to get rid of him." She further testified that the Employee telephoned her a few days later, again asking for a layoff slip so that he could qualify for unemployment. Ms. McMillan denied being aware that the Employee was having difficulty performing his job duties. She admitted, however, that she had never observed him work at a job site.

Joshua Hipsher, the senior project manager for C.M. Henley who had previously worked with the Employee, testified that the Employee failed to disclose the existence of his back injury, the underlying reason for leaving his position with the Employer, or the existence of his medical restrictions. He also stated that no special accommodations were made for the Employee during his term of employment with C.M. Henley.

After taking the matter under advisement, the trial court issued an extensive memorandum opinion, first determining that the Employee had, in fact, sustained a back injury arising out of and in the course of his employment with the Employer. The trial court specifically found that the Employee, upon his return to work, was required to perform the same job duties he had prior to his injury, and that because those duties exceeded his lifting restrictions, the Employee could not continue his work with the Employer. The trial court further found that the Employee had reached maximum medical improvement at the time of trial, had an impairment rating of 19% to the body as a whole, and had permanent work restrictions as indicated by Dr. Kennedy.

Importantly, the trial court found that the Employee's resignation was reasonable under the circumstances and, therefore, the Employee did not have a meaningful return to work. Because he was eligible for an award of permanent partial disability benefits in excess of one and one-half times the anatomical impairment rating, see Tenn. Code Ann. § 50-6-241(d)(1)(A), (2)(A) (2008 & Supp. 2013), the trial court concluded that the Employee was entitled to a 50% permanent partial disability, a multiple of approximately two and one-half times his impairment rating.

The Employer has appealed. The single issue presented for review is whether the evidence preponderates against the trial court's finding that the Employee did not have a meaningful return to work.

II. Standard of Review

A trial court's findings of fact in a workers' compensation case are reviewed de novo accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008 & Supp. 2013); see also Tenn. R. App. P. 13(d). "'This standard of review requires us to examine, in depth, a trial court's factual findings and conclusions.'" Williamson v. Baptist Hosp. of Cocke Cnty., Inc., 361 S.W.3d 483, 487 (Tenn. 2012) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (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. Tryon 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 presented by deposition, we may independently assess the content of that proof in order to determine where the preponderance of the evidence lies. Williamson, 361 S.W.3d at 487 (quoting Trosper v. Armstrong Wood Prods., Inc., 273 S.W.3d 598, 604 (Tenn. 2008)).

III. Analysis

The sole issue before this Panel is whether the trial court correctly ruled that the Employee did not have a meaningful return to work. Tennessee Code Annotated section 50-6-241(d)(1)(A) provides in pertinent part:

> For injuries occurring on or after July 1, 2004, in cases in which an injured employee is eligible to receive any permanent partial disability benefits either for body as a whole or for schedule member injuries, . . . and 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, the maximum permanent partial disability benefits that the employee may receive is one and one half (1½) times the medical impairment rating . . . . In making the determinations, 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 [the employee's] disabled condition.

When an injured employee is not returned to work by the employer at a wage equal to or greater than his or her pre-injury wage, the employee may receive permanent partial disability benefits up to six times the medical impairment rating. Tenn. Code Ann. § 50-6-241(d)(2)(A); Williamson, 361 S.W.3d at 488. It is only "[w]hen the employee has made a 'meaningful return to work,' [that] the lower cap of one-and-one-half times the impairment rating applies." Williamson, 361 S.W.3d at 488 (citing Nichols v. Jack Cooper Transp. Co., 318 S.W.3d 354, 361 (Tenn. 2010)). "[T]he burden is upon the employer to show, by a preponderance of the evidence, that an offer of a return to work is [made] at a wage equal to or greater than the pre-injury employment and that the work is within the medical restrictions . . . for the returning employee." Ogren v. Housecall Health Care, Inc., 101 S.W.3d 55, 57 (Tenn. Workers' Comp. Panel 1998).

The touchstone of the meaningful-return-to-work analysis is "reasonableness." Tryon, 254 S.W.3d at 328. In Tryon, our supreme court made the following observation:

> When 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. The determination of the reasonableness of the actions of the employer and the employee depends on the facts of each case.
>
> . . . [A]n employee has not had a meaningful return to work if he or she returns to work but later resigns or retires for reasons that are reasonably related to his or her workplace injury. Accordingly, the [higher cap] is applicable. If, however, the employee later retires or resigns for personal reasons or other reasons that are not reasonably related to his or her workplace injury, the employee has had a meaningful return to work which triggers the [lower cap].

254 S.W.3d at 328-29 (emphasis added) (citations omitted). The determination of whether or not an employee has had a meaningful return to work is "highly fact-intensive and 'depends on the facts of each case.'" Howell v. Nissan N. Am., Inc., 346 S.W.3d 467, 472 (Tenn. 2011) (quoting Tryon, 254 S.W.3d at 328). Three factors, however, guide the analysis: (1) whether the injury rendered the employee unable to perform the job; (2) whether the employer declined to accommodate work restrictions "arising from" the injury; and (3) whether the injury caused too much pain to permit the continuation of the work. Tryon, 254 S.W.3d at 329.

The resolution of this issue hinges on the testimony of the witnesses and the trial court's assessment of their credibility. It is well established that when the trial judge had the opportunity to observe the witnesses' demeanor and to hear live testimony, considerable deference must be afforded any credibility or factual determinations. Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 642 (Tenn. 2008). We are mindful of our duty not to substitute our judgment for that of the trial court in that regard. Under our limited scope of review, we must only assess whether the evidence preponderates against the trial court's findings. Id.

It is undisputed that when the Employee returned to work, Dr. McDowell had imposed a fifty-pound lifting restriction on the Employee's activities. The Employee's pre-injury position as a general laborer required him to move rolls of rubber weighing five hundred pounds, five-gallon glue buckets weighing seventy pounds, and eighty-pound seam machines. The trial court concluded from the evidence that the Employee was returned to the same job, that his duties exceeded his lifting restrictions, and that he could not perform these duties without pain. Although Ms. McMillan testified that the Employee was supposed to be working on the ground collecting trash at the job site, she did not observe his work. Moreover, the Employer did not offer any testimony from any of its other employees who could describe the work the Employee was expected to perform. The Employer challenged

the credibility of the Employee, establishing that the Employee had numerous convictions for shoplifting. That he later left his job with C.M. Henley because of his incarceration for theft also had an adverse effect upon his credibility as a witness. Nevertheless, the trial court chose to accredit the testimony of the Employee as to the lack of accommodations by the Employer to his work restrictions—there being no evidence to the contrary in that regard.[1]

Further, the trial court found that the Employer was also on notice that the Employee was unable to perform his job duties because, due to the pain he experienced upon his return to work, the Employee became ill and spent half a day sitting in the company truck. The trial court also discounted Ms. McMillan's assertion that the Employer would have offered accommodations to the Employee, finding instead that the Employer had never offered accommodations to anyone else in the past and suggesting that Ms. McMillan lacked the authority to create or offer any such jobs. The trial court inferred from the testimony that the Employer simply failed to honor the restrictions Dr. McDowell placed upon the Employee's return to work.

The proper focus of the inquiry is whether the Employee's decision to leave his employment was reasonably related to his workplace injury. See Tryon, 254 S.W.3d at 329-40 (citing Lay v. Scott Cnty. Sheriff's Dep't, 109 S.W.3d 293, 298 (Tenn. 2003)). Despite our reservations about the character of the Employee and the credibility of his testimony, we are unable to conclude that the evidence preponderates against the trial court's finding that the Employee did not have a meaningful return to work.

IV. Conclusion

The judgment of the trial court is, therefore, affirmed. Costs are taxed to McMillan's Roofing and HVAC and its surety, for which execution may issue if necessary.

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GARY R. WADE, CHIEF JUSTICE

[1] The Employer's files contained two letters dated May 14, 2010, advising the Employee that his position was "awaiting [his] return" and that the Employer was able to accommodate his "work restrictions of no lifting greater than fifty pounds." The Employer, however, acknowledged that the letters were pre-dated in the event the Employee did not return to work, that the Employee had returned to work prior to the date on the letter, and that the letters were not sent to the Employee.

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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 McMillan's Roofing and HVAC and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM