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

ULYSSES STRAWTER v. MUELLER COMPANY

Chancery Court for Hamilton County
No. 13-0494

No. E2015-02374-SC-R3-WC

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 are assessed to Mueller Company and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

FILED
DEC 16 2016
Clerk of the Court
Rec'd by

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
August 15, 2016 Session

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Appeal from the Chancery Court for Hamilton County
No. 13-0494 Pamela A. Fleenor, Chancellor

No. E2015-02374-SC-R3-WC-MAILED-NOVEMBER 16, 2016

Ulysses Strawter ("Employee") was injured on August 11, 2012, in the course of his employment with Mueller Company ("Employer"). After several months of temporary disability, he returned to work at his pre-injury job. Subsequently, his position was eliminated. He remained with Employer but was assigned to a lower-paying job. He filed an action for workers' compensation benefits in the Chancery Court for Hamilton County. The trial court held that Employee had a meaningful return to work and that his award of permanent disability benefits was limited to one and one-half times the impairment rating. Between the trial and the filing of the court's decision, Employee returned to his previous job at a wage higher than his pre-injury wage. The trial court's decision was not appealed. During the months after entry of judgment, Employee was re-assigned to a lower paying position. He filed a petition for reconsideration. The trial court held that Employee was entitled to reconsideration and awarded additional permanent disability benefits in a stipulated amount. 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. The judgment of the trial court is affirmed.

Tenn. Code Ann. § 50-6-225(e)(1) (2014) (applicable to injuries occurring prior to July 1, 2014) Appeal as of Right; Judgment of the Chancery Court Affirmed

KRISTI M. DAVIS, J., delivered the opinion of the court, in which SHARON G. LEE, J., and THOMAS R. FRIERSON, II, J., joined.

Joseph R. White and Cassie C. Rieder, Chattanooga, Tennessee, for the appellant, Mueller Company.

Jeffrey W. Rufolo, Chattanooga, Tennessee, for the appellee, Ulysses Strawter.

OPINION

Factual and Procedural Background

Employee is forty-eight years old and a high school graduate. He served in the United States Army from 1985 through 1988 and received an honorable discharge. Employee began working for Employer on January 4, 1989, and was employed by Employer at the time of trial.

Employee sustained a work-related injury on August 11, 2012, when he stepped off of a forklift and fell, landing on his buttocks and injuring his lower back. At the time of his injury, Employee was classified as a "No Bake Technician," earning $24.04 per hour plus significant overtime compensation. Employee was kept out of work by his doctor from November 2012 until March 2013. During this period of time, Employer provided medical care and paid temporary total disability benefits. On March 18, 2013, Employee was able to return to work to his pre-injury job and, due to a pay raise, was earning $24.84 per hour. He reached maximum medical improvement on April 8, 2013. Dr. Jay Jolley, the authorized treating physician, assigned an 8% permanent medical impairment to the body as a whole for the work injury. In November 2013, Employee's job as a No Bake Technician was eliminated. He accepted a position in the Shipping Department, earning $17.10 per hour.

Employee's action for workers' compensation benefits was tried on February 24, 2014. After hearing the evidence, the trial court took the matter under advisement. On March 22, 2014, Employee's job as a No Bake Technician was re-established, and he returned to that position. At that time, his wage was more than $25.00 per hour. Two days later, on March 24, 2014, the trial court issued its memorandum decision, addressing issues of causation and impairment. In addition, the trial court considered whether Employee made a meaningful return to work at the same or greater pay, such that Employee was statutorily capped at one and one-half times the impairment rating. The trial court determined that although Employee was making less than his pre-injury wage at the time of trial, he initially returned to work at a greater rate of pay. Thus, the trial court concluded that Employee was limited to a maximum award of one and one-half times the medical impairment assigned by Dr. Jolley. The trial court awarded 12% permanent partial disability. The trial court made the following finding with respect to Employee's return to work:

> The issue presented in this case is whether [Employee's] losing his job as a No Bake Furnace Technician removes this case from the caps imposed by [Tennessee Code Annotated section] 50-6-241(d)(1)(A) (Supp. 2013). ...

....

> The court holds that [Employee's] recovery is presently capped. He returned to the same job he had before his injury. His wage was higher when he returned. He lost the job approximately 7 months later when ... [E]mployer reduced the number of employees doing this job from 4 to 2. [Employee] is still employed by [Employer]. The injury has not caused him to lose his job. Section 241(d) is designed to help the employee, where the injury or the subsequent restrictions prevented the employee from returning to the same job or earning the same wage due to his injury. He returned to the same job but lost it later due to a reduction of the number of employees[] performing that specific job. The court acknowledges that a literal reading of the statute could allow for a re-consideration. This did not occur in this case. However, the court does not consider worker[s'] compensation to be this type of social insurance coverage.

The trial court's decision also explicitly stated that Employee retained his reconsideration rights under Tennessee Code Annotated section 50-6-241.

At the time the written decision was issued, the trial court was not aware that, two days prior, Employee had returned to his pre-injury job at a greater rate of pay. Judgment was entered in accordance with the memorandum decision on April 4, 2014. Neither Employee nor Employer appealed the trial court's decision.

On May 5, 2014, Employee's job was once again eliminated, and he returned to the Shipping Department at $17.10 per hour. In September or October of 2014, Employee moved to a position known as "Pre-Assembly - New General Valve," where he was paid $20.63 per hour—less than what he was earning at the time of his work injury. The parties agreed that Employee's reduction in pay after the injury did not affect 50% of all hourly employees working at Employer's Operating Facility in Chattanooga, Tennessee. *See* Tenn. Code Ann. § 50-6-241(d)(1)(B).

Employee filed a petition for reconsideration of his prior permanent partial disability award. The parties agreed to be bound by the trial court's previous alternative decision regarding the extent of disability. Specifically, if Employee was found to be entitled to reconsideration, the parties agreed that he had sustained 35% permanent partial disability to the body as a whole, and Employer would receive a credit for the earlier 12% permanent partial disability award. If the trial court found that Employee was not entitled to reconsideration of his permanent partial disability award, he would not receive any additional permanent disability benefits. He would, however, retain his right to reconsideration under Tennessee Code Annotated section 50-6-241.

Employee filed a motion for summary judgment on all issues. Employer opposed the motion, asserting that Employee was collaterally estopped from seeking reconsideration of the trial court's previous order of March 24, 2014. In the alternative, Employer contended that the trial court's finding that Employee had a meaningful return to work was the "law of the case." At the time of the reconsideration, a new chancellor had been elected. The trial court reviewed the previous judge's order, considered the parties' arguments on summary judgment, and determined that Employee was entitled to additional permanent disability benefits. With respect to Employer's collateral estoppel argument, the trial court held as follows:

> [Employer] "admits that the Judgment Order allowed [Employee] to retain his right of reconsideration under [Tennessee Code Annotated section] 50-6-241(d)," but it is [Employer's] position that "[Employee's] situation has not changed in a way to warrant reconsideration by this Court, since the issues and the facts are **essentially the same as before** ...." However, the Court finds that it is not sufficient that the facts are "essentially the same as before." The facts must be identical. This Court does not find that the facts are essentially the same as before. The facts relevant to reconsideration did not even exist when [the previous trial judge] ruled on March 24, 2014. For example the Parties stipulated that when [the previous trial judge] rendered his decision on March 24, 2014, [Employee] had returned to work and was earning an hourly wage equal to or greater than [what] he was earning at the time of his injury. However, this fact was never in evidence before [the previous trial judge] either prior to or after his ruling. Further [Employee] accepted a lower paying position in May 2014, again a fact not in evidence when [the previous trial judge] ruled in March. Nor was [Employee's] current employment status before the court at the time of the order. Thus while the facts are similar, they are not identical as required.
>
> Moreover, for collateral estoppel to apply, the issues must be identical. [Employer] states that "the issue set forth in the Petition for Reconsideration was decided by [the previous trial judge]." The Court disagrees. The issue of reconsideration was never before [the previous trial judge]. The Supreme Court held that a petition for reconsideration is a new cause of action, separate and apart from the original cause of action. *Nay v. Resource Consultants, Inc.*, [No.] M1996-00016-WC-R3-CV[,] 2000 WL 4255 (Tenn. Workers['] Comp. Panel Jan[.] 5, 2000). See, also, *Hopper v. Oshkosh B'Gosh*[,] No. M2004-01683-WC-R3-CV, 2005 WL 2300387 (Tenn. Workers['] Comp. Panel Sept[.] 22, 2005) wherein the court stated reconsideration actions are separate and distinct causes of action. This Court finds that the original action and the petition for reconsideration are

> two separate and distinct actions that address different issues. In the previous case, [the previous trial judge] was determining compensability and an award of compensation. [Employer] denied compensability asserting it was not a new injury. [The previous trial judge] found that the injury was compensable, capped the award and noted [Employee] retained his right of reconsideration. This petition seeks that reconsideration. [Employer] contests the reconsideration stating that [Employee's] position has not changed in a way to warrant reconsideration. Thus the issues raised in the prior action and the issue raised in the petition, while similar, are not identical as required by *Mullins* [*v. State*, 294 S.W.3d 529 (Tenn. 2009)]. Therefore, this Court determines that collateral estoppel does not apply.
>
> ....
>
> [Employee] demonstrated, and it is undisputed, that at $20.63 an hour, [Employee] is not making a wage equal to or greater than he was making pre-injury at $24 an hour. Thus [Employee] argues he has established reconsideration.
>
> Whereas [Employer] argues that when [the previous trial judge] ruled on March 24, 2014, [Employee] was only making $17.10 an hour in shipping which was less than he made pre-injury. Yet at that wage, [the previous trial judge] still capped the award and found [Employee] had made a successful return to work. [Employer] makes a compelling argument that since [Employee] is making more at the time of the filing of this petition than he was when [the previous trial judge] found he had made a successful return to work, then [Employee's] position has not changed in a way to warrant reconsideration.
>
> The Court notes the unusual factual posture of this case. However, the Court is cognizant that worker[s'] compensation laws are to be liberally construed in favor of the employee in order to insure that workers are appropriately compensated for their work-related injuries. The Court finds that within 400 weeks of the day he returned to work, [Employee] is making less with the same employer than [Employee] was receiving at the time of injury. Thus based upon a literal reading of [Tennessee Code Annotated section] 50-6-241(d)(1)(B)(i), this Court determines that [Employee] has established as a matter of law that he is entitled to a reconsideration of his permanent partial disability benefits.

(Citations omitted).

After this order was entered, a hearing was held on November 12, 2015. The trial court discussed the issues with counsel and affirmed its previous decision that Employee was entitled to additional permanent partial disability benefits. In accordance with the stipulation of the parties, and the alternative findings contained in the March 2014 order, the trial court awarded 35% permanent partial disability. Judgment was entered in accordance with the court's findings. Employer has timely appealed, and the appeal has been referred to this Panel pursuant to Tennessee Supreme Court Rule 51.

Analysis

This appeal does not involve disputed issues of fact. Rather, Employer challenges the trial court's interpretation and application of Tennessee Code Annotated section 50-6-241(d). "The interpretation of a statute and its application to undisputed facts involve questions of law." *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. *Id.*; *Ridings v. Ralph M. Parsons Co.*, 914 S.W.2d 79, 80 (Tenn. 1996).

Employer raises two arguments on appeal. First, it contends that Employee was barred by the doctrine of collateral estoppel from arguing that the one and one-half times impairment cap imposed by Tennessee Code Annotated section 50-6-241(d)(1)(A) did not apply to his petition for reconsideration. Employer also contends that the April 14, 2014 order became the law of the case when it was not appealed and should have been followed by the trial court in the reconsideration proceeding.

Collateral Estoppel

The Tennessee Supreme Court summarized the law of collateral estoppel in *Mullins v. State*, 294 S.W.3d 529 (Tenn. 2009):

> Collateral estoppel is a judicially created issue preclusion doctrine, *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 480, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982); *Morris v. Esmark Apparel, Inc.*, 832 S.W.2d 563, 565 (Tenn. Ct. App. 1991), that promotes finality, conserves judicial resources, and prevents inconsistent decisions, *Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980); *Gibson v. Trant*, 58 S.W.3d 103, 113 (Tenn. 2001); *State ex rel. Cihlar v. Crawford*, 39 S.W.3d 172, 178 (Tenn. Ct. App. 2000). It bars the same parties or their privies from relitigating in a later proceeding legal or factual issues that were actually raised and necessarily determined in an earlier proceeding. *Barnett v. Milan Seating Sys.*, 215 S.W.3d 828, 835 (Tenn. 2007); *Massengill v. Scott*, 738 S.W.2d 629, 631–32 (Tenn. 1987); *Blue Diamond Coal Co. v. Holland–Am. Ins.*

Co., 671 S.W.2d 829, 832 (Tenn. 1984). Thus, when an issue has been actually and necessarily determined in an earlier proceeding between the parties, that determination is conclusive against the parties in subsequent proceedings. *King v. Brooks*, 562 S.W.2d 422, 424 (Tenn. 1978); *Shelley v. Gipson*, 218 Tenn. 1, 7, 12, 400 S.W.2d 709, 711–12, 714 (1966).

The party invoking collateral estoppel has the burden of proof. *State v. Scarbrough*, 181 S.W.3d 650, 655 (Tenn. 2005); *Dickerson v. Godfrey*, 825 S.W.2d at 695; *Fowlkes v. State*, 82 Tenn. 14, 18–19 (1884). To prevail with a collateral estoppel claim, the party asserting it must demonstrate (1) that the issue to be precluded is identical to an issue decided in an earlier proceeding, (2) that the issue to be precluded was actually raised, litigated, and decided on the merits in the earlier proceeding, (3) that the judgment in the earlier proceeding has become final, (4) that the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier proceeding, and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier proceeding to contest the issue now sought to be precluded. *Gibson v. Trant*, 58 S.W.3d at 118 (Birch, J., concurring and dissenting) (citing *Beaty v. McGraw*, 15 S.W.3d 819, 824–25 (Tenn. Ct. App. 1998)).

Moreover, in order for the doctrine of collateral estoppel to apply, the issue must not only have been actually litigated and decided, it must also have been necessary to the judgment. *State v. Thompson*, 285 S.W.3d 840, 848 (Tenn. 2009); *Dickerson v. Godfrey*, 825 S.W.2d 692, 695 (Tenn. 1992). Determinations of an issue or issues that are not necessary to a judgment have the characteristics of dicta and will not be given preclusive effect. Restatement (Second) of Judgments § 27 cmt. h (1982).

The question of whether collateral estoppel applies is a question of law. *Morris v. Esmark Apparel, Inc.*, 832 S.W.2d at 566. *See Partin v. Scott*, No. E2007-02604-COA-R3-CV, 2008 WL 4922412, at *9 (Tenn. Ct. App. Nov. 13, 2008) (No Tenn. R. App. P. 11 application filed); *Tareco Props., Inc. v. Morriss*, No. M2002-02950-COA-R3-CV, 2004 WL 2636705, at *12 n.20 (Tenn. Ct. App. Nov. 18, 2004) (No Tenn. R. App. P. 11 application filed).

294 S.W.3d at 534–35 (footnotes omitted).

Of the five elements of collateral estoppel set out in *Mullins*, four were indisputably established below. The issue of meaningful return to work was raised, litigated, and decided by the trial court in the February 2014 trial and resulting decision. The judgment entered on the trial court's findings was not appealed within thirty days of entry and, therefore, is final. The parties in the reconsideration action are identical to the parties in the original action. Employee had a full and fair opportunity to contest the issue in the prior proceeding and did so. Likewise, there is no question that the meaningful return to work issue was necessary to the April 2014 judgment. The sole element in dispute is whether the issue to be precluded is identical to the issue decided in the earlier proceeding. We agree with the trial court's conclusion that it is not.

At the time this case was first litigated, the issues were whether Employee's injury was a new injury or an aggravation of a pre-existing condition; the amount of impairment; and whether Employee was subject to the one and one-half times cap set forth in Tennessee Code Annotated section 50-6-241(d)(1)(A). With respect to the cap issue, the facts before the trial court at the time it made its decision were that Employee was earning $24.04 at the time of injury; that Employee returned to work at a wage of $24.84; and that Employee was making $17.10 at the time of trial. The trial court concluded that Employee was subject to the statutory cap based on the fact that Employee returned to work at a greater wage than he was making at the time of the injury. The trial court acknowledged that an argument could be made for treating the case as a reconsideration case in light of the fact that Employee subsequently transferred to a lower-paying job, but the trial court rejected this argument and specifically held that Employee retained the right to reconsideration. Although the trial court did not know it, this was a correct result in light of the fact that Employee had been transferred to a higher-paying job. At the time of the trial court's decision, there is no dispute that Employee was earning in excess of $25.00 per hour—more than he was making at the time of injury. Accordingly, there was no issue for Employee to appeal at that time, as suggested by Employer.

Employer contends that because the trial court found Employee to be capped when Employee's wage at the time of the first trial was less than his wage at the time of injury, the trial court essentially precluded Employee from ever asserting a right to reconsideration unless his wage dropped below $17.10. The trial court found, however, that Employee made a meaningful return to work based upon the initial return to work at $24.84. Furthermore, when the case returned to the trial court in 2015, the facts were different. Employee had been transferred to a job paying $17.10 per hour, and he was subsequently transferred to a job paying $20.63 per hour. There is no dispute that under both amounts, Employee was earning less than the $24.04 per hour he was making on the date of injury. We agree with the trial court's summation on this issue:

> The facts relevant to reconsideration did not even exist when [the previous trial judge] ruled on March 24, 2014. For example the Parties stipulated that when [the previous trial judge] rendered his decision on March 24, 2014, [Employee] had returned to work and was earning an hourly wage equal to or greater than [what] he was earning at the time of his injury. However, this fact was never in evidence before [the previous trial judge] either prior to or after his ruling. Further [Employee] accepted a lower paying position in May 2014, again a fact not in evidence when [the previous trial judge] ruled in March. Nor was [Employee's] current employment status before the court at the time of the order. Thus while the facts are similar, they are not identical as required.

Because the issue to be precluded is not identical to the issue previously decided, collateral estoppel does not apply. Accordingly, the trial court's decision on collateral estoppel is affirmed.

Law of the Case

Employer makes the alternative argument under the "law of the case" doctrine that because the first trial court capped Employee when he was making $17.10, the cap could only be removed if Employee was no longer employed at a wage equal to or greater than $17.10 per hour. "Law of the case" is a "legal doctrine which generally prohibits reconsideration of issues that have already been decided in a prior appeal of the same case." *Memphis Pub. Co. v. Tenn. Petroleum Underground Storage Tank Bd.*, 975 S.W.2d 303, 306 (Tenn. 1998). Under this doctrine, "an appellate court's decision on an issue of law is binding in later trials and appeals of the same case if the facts on the second trial or appeal are substantially the same as the facts in the first trial or appeal." *Id.* The doctrine is not a constitutional mandate or limitation on the power of the court but is, instead, "a longstanding discretionary rule of judicial practice which is based on the common sense recognition that issues previously litigated and decided by a court of competent jurisdiction ordinarily need not be revisited." *Id.*

The Court concludes that Employer's argument is simply a restated version of the collateral estoppel argument and it fails for the same reasons. As set forth above, the facts and issues presented in the second litigation are different from those presented in the first litigation. Furthermore, Employer's argument rests on a constrained interpretation of the first trial court's opinion and is inconsistent with the requirement that we construe workers' compensation law liberally in favor of the injured employee. *See Martin v. Lear Corp.*, 90 S.W.3d 626, 629 (Tenn. 2002).

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Mueller Company and its surety, for which execution may issue if necessary.

KRISTI M. DAVIS, JUDGE