

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 15, 2010 Session

MICHAEL DEVEREUX v. UNITED PARCEL SERVICE, INC.

**Appeal from the Chancery Court for Davidson County
No. 07-2087-IV Russell T. Perkins, Chancellor**

**No. M2010-00710-WC-R3-WC - Mailed - February 4, 2011
Filed - March 8, 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. The employee sought reconsideration of his earlier workers' compensation settlement, which had been "capped" pursuant to Tennessee Code Annotated § 50-6-241(d). His employer asserted that he had been terminated for cause, and was therefore not eligible for reconsideration. The trial court found for the employee and awarded additional benefits. We affirm the judgment.

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

JON KERRY BLACKWOOD, SR.J., delivered the opinion of the Court, in which CORNELIA A. CLARK, C.J., and WALTER C. KURTZ, SR.J., joined.

David T. Hooper, Nashville, Tennessee, for the appellant, United Parcel Service, Inc.

Angus Gillis, III, Nashville, Tennessee, for the appellee, Michael Devereux.

MEMORANDUM OPINION

Factual and Procedural Background

Michael Devereux ("Employee") was a "shifter" for United Parcel Service, Inc. ("Employer"). His job involved moving semi-trailers to and from the loading dock of Employer's package-sorting facility in Whites Creek, Tennessee. He began working for Employer on a part-time basis in 1977, while still in high school. He was terminated in 2006.

The circumstances of his termination will be discussed below.

Mr. Devereux sustained a compensable injury to his left knee in March 2005. As a result of that injury, he ultimately required a total knee replacement. That procedure took place in February 2006. Mr. Devereux testified that he developed severe pain in his left hip immediately after surgery. Dr. Steven McLaughlin, Mr. Devereux's treating physician, was unable to determine the cause of his hip symptoms. After a period of recovery and physical therapy, Mr. Devereux's knee functioned well. However, he continued to have symptoms in his hip. Dr. McLaughlin released him in June 2006, assigning 37% permanent anatomical impairment of the left leg due to the knee injury and surgery. He assigned no permanent impairment for the hip injury, and placed no permanent restrictions upon Employee's activities. The parties agreed to settle Mr. Devereux's workers' compensation claim for approximately 44% permanent partial disability to the left leg. The settlement was approved by the trial court on July 18, 2006.

Mr. Devereux returned to work in late June 2006. He worked several days and then took a scheduled vacation, during the week of July 4, 2006. He returned to work after the vacation but his hip problems persisted. On July 15, 2006, after his shift had ended, he testified that he told his supervisor that he would be off work while he sought treatment for his hip. Mr. Devereux then contacted Dr. McLaughlin's office to arrange for a steroid injection in the hip. After July 15, he did not return to work. The steroid injection was administered on July 27, 2006. On July 25, 2006, Mr. Devereux received a call from Mike Borchette, his union steward. Larry Jones, a "feeder manager" for Employer, had inquired about Mr. Devereux's absence from work. Mr. Devereux contacted Mr. Jones by telephone to advise that he was receiving medical treatment for his left hip. Mr. Jones testified he told Mr. Devereux it would be necessary for him to supply a medical excuse in order to continue his absence.

Mr. Devereux did not obtain a doctor's excuse as instructed by Mr. Jones. On July 27, 2006, Mr. Jones informed Mr. Borchette he was planning to issue a notice to Mr. Devereux that he would be terminated if he did not report to work within seventy-two hours. Mr. Borchette called Mr. Devereux, who immediately called Mr. Jones. The substance of that conversation is hotly disputed. Mr. Devereux testified he told Mr. Jones he had documents concerning alleged OSHA violations, and he would report these alleged violations if Mr. Jones did not stop harassing him. Mr. Jones testified Employee stated he had a "box that would level the building," and he would "f***** kill himself," if Mr. Jones did not leave him alone. It is undisputed that, after the phone call, Mr. Jones notified Employer's security department and Metro police. He then immediately processed Employee's termination, based upon a violation of Employer's workplace violence policy.

Mr. Devereux refused delivery of the termination letter sent by Employer. Roughly one year later, in July 2007, he filed a grievance concerning his termination. However, the grievance was denied because it was not filed within five days of the termination, as required by Mr. Devereux's collective bargaining agreement with Mr. Devereux's union.

Mr. Devereux was forty-nine years old when the trial occurred. He was a high school graduate. After his termination by Employer, he had worked only sporadically. He testified his left knee worked well, but he continued to have pain in his left hip which limited his activities.

The trial court issued its decision in the form of a written memorandum. It found Employee to be a credible witness and accepted, for the most part, his version of the July 27 telephone conversation with Mr. Jones. It found that the statements made by Mr. Devereux during that conversation did not violate Employer's workplace violence policy, and his termination therefore did not bar his petition for reconsideration. It awarded 100% permanent partial disability ("PPD") of the left leg. Employer timely filed a motion to alter or amend. The trial court denied the motion, but filed a revised memorandum decision, reaching the same result. Employer has appealed, asserting that the trial court erred by finding that Employee was entitled to seek reconsideration.

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, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315 (Tenn. 1987). A reviewing court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. *Ridings v. Ralph M. Parsons Co.*, 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

Employer contends the trial court erred by granting reconsideration of the settlement. It contends that Mr. Devereux unreasonably refused to return to work and that reconsideration is barred by Mr. Devereux's misconduct, specifically (a) his violation of

attendance policies, and (b) his statements, characterized by Employer as threats, during the July 27 telephone conversation.

In support of its first contention, Employer points out, as of mid-July 2006, Mr. Devereux had been released to full duty work by his physician, and no physician thereafter either took him off of work, or placed any restrictions upon his activities. Although Mr. Devereux received an injection in his hip on approximately July 24, neither Dr. McLaughlin nor the doctor who performed the procedure excused Employee from working, nor did Mr. Devereux present an excuse from any other physician.

Mr. Devereux addresses the reasonableness and attendance issues together. He notes he had informed his supervisors of his intention to have the injection; it was arranged, presumably, with the approval of Employer's insurer; and he told Mr. Jones he would not know the effect of the injection for at least several days during the telephone conversation of July 25. He also states he was not asked to provide a written excuse for his absence, and the collective bargaining agreement required a warning before a termination for poor attendance could take place.

Employer points to Mr. Devereux's statements during the July 27 telephone conversation, as described by Mr. Jones, contending they constitute a violation of the workplace violence policy. In its decision, the trial court agreed the alleged statements about "leveling the building," if made, would be misconduct which barred reconsideration. However, it specifically found that Employee was a credible witness and adopted his description of the conversation in most respects. It found his statements were about alleged OSHA violations, and making such statements did not constitute misconduct. It further found he did not threaten to commit suicide during that conversation and noted, if he had made such a statement, it would not constitute a violation of the company's policy because it did not involve the workplace.

We agree with the trial court that if Employee threatened violence against persons or property during the July 27 telephone conversation, such threats would constitute misconduct which would bar him from seeking reconsideration under Tennessee Code Annotated § 50-6-241(d)(1)(B)(iii)(b) (2008 & Supp. 2010). *See Carter v. First Source Furniture Grp.*, 92 S.W.3d 367, 371 (Tenn. 2002) ("[A]n employer should be permitted to enforce workplace rules without being penalized in a worker's compensation case."). The trial court was presented with two irreconcilable versions of the July 27 conversation through the live testimony of Mr. Devereux and Mr. Jones. Each man presented his account of the conversation through live testimony. The trial court observed the witnesses and chose to accredit Mr. Devereux's testimony regarding the telephone conversations. As Employer points out, Employee admitted he was agitated during the conversation, and Mr. Jones's

actions immediately after the conversation took place are consistent with his version. Nevertheless, the resolution of the issue was necessarily based squarely upon the trial court's assessment of the credibility of the parties. That assessment is entitled to substantial deference. *Humphrey*, 734 S.W.2d at 315. In the absence of compelling evidence to the contrary, we will not disturb the trial court's finding that Mr. Devereux did not threaten to commit an act of violence against persons or property during his July 27 telephone conversation with Mr. Jones. Therefore, his termination was not based upon misconduct, i.e., a violation of Employer's workplace violence policy.

Employer's additional arguments contend that Mr. Devereux unreasonably refused to return to work after his last shift on July 15 or provide medical excuses from the period he was off work awaiting the injection until July 24. Employer contends that these acts of misconduct would have been sufficient to terminate Mr. Devereux even if he had not been terminated for his alleged violation of the workplace violence policy. However, Mr. Devereux was not terminated for these reasons. His termination was specifically based upon the workplace violence policy. The termination notice did not list any other reason for termination except the violence policy. The trial court specifically found that Mr. Devereux did not violate this policy. For purposes of determining an employee's eligibility for reconsideration of a previous workers' compensation award, judicial inquiry must be limited to the stated ground for termination. Consequently, we decline to consider this issue.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to the appellant, United Parcel Service, Inc., and its surety, for which execution shall issue, if necessary.

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 by the Appellant, United Parcel Service, Inc., and its surety, for which execution may issue if necessary.

PER CURIAM