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

(March 7, 2006 Session)

CARROLL D. HANEY v. FIVE RIVERS ELECTRONIC INNOVATION, LLC and LUMBERMENS UNDERWRITING ALLIANCE

Direct Appeal from the Chancery Court for Greene County
No. 20030207 Thomas R. Frierson, Chancellor
Filed August 23, 2006

No. E2004-01941-WC-R3-CV - Mailed June 14, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employee contends the trial court erred in finding that he made a meaningful return to work requiring the award to be capped at two and one-half times the medical impairment. We modify the award.

Tenn. Code Ann. § 5-6-225(e) (1999) Appeal as of Right; Judgment of the Greene County Chancery Court is modified.

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, CHIEF JUSTICE, and JON KERRY BLACKWOOD, SR. J. joined.

John T. Milburn Rogers, Rogers, Laughlin, Nunnally, Hood & Crum, Greeneville, Tennessee for the Appellant, Carroll D. Haney.

Jay L. Johnson, Allen, Kopet & Associates, PLLC, Knoxville, Tennessee, for the Appellees, Five Rivers Electronic Innovations, L.L.C., and Lumbermen's Underwriting Alliance.

MEMORANDUM OPINION

Facts

In August 2000, Carroll D. Haney ("Haney") was a mechanical repairman for Five Rivers Electronic Innovations, LLC ("Five Rivers"). His duties consisted of making repairs to faulty television sets or "rejects" from the production line. The repair work involved pushing, pulling and moving the television sets and then placing them back on the production line. Some of the sets weighed 600 pounds or more and took four to six people to move them. On August 24, 2000, Haney was standing on the assembly line "ledge" pushing a reject out of the way when he fell in a twisting motion and injured his low back and hip. He tried to continue working, but his pain grew increasingly worse. He went to see Dr. Marianne E. Filka, a family practice physician, on October 3, 2000. He was treated conservatively and advised not to do any squatting, bending, pulling, sitting, or any other activity that would stretch the sciatic nerve and returned to work. Five Rivers re-assigned him to a job of throwing large cardboard boxes over the television sets to prepare them for shipment. During a November 13, 2000 visit to Dr. Filka, Haney reported that throwing the cardboard boxes made his pain worse.

On November 23, 2000, Haney was laid off by Five Rivers. He returned to Dr. Filka on December 6, 2000 and reported that his pain was less severe after being off work. On January 2, 2001, Haney was called back to work and noted that his pain increased. On February 5, 2001, he was laid off again. He sought and accepted a job at a local hospital that involved some computer work and taking orders to the stockroom. He continued to see Dr. Filka with reports of severe pain. On July 30, 2001, Dr. Filka thought Haney might have a herniated disc. On August 6, 2001, Five Rivers offered Haney a recall to his former job. He declined the offer and continued his work at his new employment with Laughlin Hospital.

In October 2001, Dr. Filka ordered an MRI that revealed advanced degenerative changes and a "paracentral disc herniation at the lumbrosacral area." Haney was referred to Dr. Duncan, who referred him to Dr. McQuain. He was given a series of epidural steroid injections until September 2002 when Five Rivers' worker's compensation insurer, Lumbermen's Underwriting Alliance, declined to pay for further treatment.

Haney was seen by Dr. William Kennedy for evaluation on April 13, 2004. He assessed Haney as having a seven percent physical impairment to the whole body with the following restrictions: no repeated bending, stooping, or squatting; no vigorous pulling or pushing; no walking over rough terrain; no ladder or stair climbing; no work with his hands over his shoulders; and no lifting over twenty pounds. Dr. Filka testified that she does not feel comfortable assigning impairment ratings for back injuries. No other medical testimony was submitted.

Decision Below

The trial judge made thorough and detailed findings of fact. The trial court found that Haney "manifests a permanent anatomical impairment rating of 7% to the body as a whole due

to his lumbar injury." The trial court also found that "before the injury, Mr. Haney enjoyed good health. He now continues to experience pain in his left thigh and numbness in his left foot. He has been forced to reduce activities requiring bending, kneeling, leaning, pulling and squatting. His home yard maintenance now takes longer to complete." The trial court noted that Haney's "return to work for several months until his layoff departure in February of 2001 raises the issue of whether Mr. Haney's award is limited to 2.5 times the anatomical impairment or 6 times said impairment rating." Addressing this issue, the trial court wrote:

> A preponderance of the evidence supports a finding that following the accidental injury on August 24, 2000, Mr. Haney returned to work and continued to work until February 2001 when he was released due to a company layoff. Mr. Haney subsequently secured a new position with Laughlin Hospital. Defendant thereafter recalled the Plaintiff for work in August 2001 but he elected to continue with his employment at Laughlin Hospital. Considering the reasonableness of the employer's return of the employee to work and Mr. Haney's continuation of employment for several months following his injury, this Court concludes that Mr. Haney did have a meaningful return to work following the accidental injury and therefore, his maximum, permanent disability award is limited to two and one-half times the anatomical impairment rating established.

In a footnote, the trial court acknowledged that Haney also experienced a company layoff from November 2000 until January 2001. The trial court then awarded benefits for 17½ percent permanent partial disability to the body as a whole.

Issue

The issue on appeal is whether the trial court erred in finding that the employee made a meaningful return to work after the injury and, thus, is limited to not more than two and one-half times the medical impairment rating. Tenn. Code Ann. § 50-6-241(a)(1).

Standard of Review

The standard of review in a workers' compensation case is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Layman v. Vanguard Contractors, Inc.*, 183 S.W.3d 310, 314 (Tenn. 2006). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases to determine where the preponderance of the evidence lies. *Vinson v. United Parcel Service*, 92 S.W.3d 380, 383-4 (Tenn. 2002). When the trial court has seen the witnesses and heard the testimony, especially when issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's findings of fact. *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 71 (Tenn. 2001). This court, however, is in the same position as the trial judge in evaluating medical proof that is submitted by deposition, and may assess independently the weight and credibility to be afforded to such expert testimony. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002).

Questions of law are reviewed *de novo* without a presumption of correctness. *Perrin v. Gaylord Entertainment Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

Discussion

Jack Lister, Director of Human Resources at Five Rivers testified that the company has seasonal employment based on customer demand for color televisions. Approximately sixty percent of its product is built during the last forty percent of the year. "Every year we go through a seasonal downswing, sometime between Thanksgiving and the first of the new year, and then start increasing again in the April, May, June timeframe." According to Mr. Lister, five to ten percent of the work force would be in a layoff status at any given time. He also stated that the company had a provision in its union contract to permit

> every effort to find suitable work for employees whose jobs need to change due to medical restrictions. That would be work comp or non-work comp related injuries or illness, and basically we look at what the doctor says the restrictions are. We go out on the line and we look at every job within that job classification to see if there is a job that would meet what the doctor says this employee should or should not do.

Haney testified that he had worked for Five Rivers or its predecessor for almost 20 years, and that there were periodic layoffs during certain slower seasons, that he had been laid off in the past and recalled after the layoffs ended. After he was laid off in February 2001, Haney obtained other employment with Laughlin Hospital. Asked why he did not notify Five Rivers that he had taken other employment, he responded: "I had no idea when I'd be called back, Sir,

or if I'd even be called back." Haney testified that he did not return to work at Five Rivers because

> (m)ost of the jobs there, Sir, I wouldn't be able to do. When I took the light duty note from Dr. Filka they sent me home for two days stating they had no work for me. They had tried me on different jobs and finally, they put on that box job where I could set down a while and stand up for a while, so I figured most of the jobs there I wouldn't be able to do, Sir.

Five Rivers claims that it offered Haney a return to work at a wage equal to or greater than the wage the employee was receiving at the time of the injury; that Haney rejected its offer and voluntarily accepted other employment earning a higher wage. It asserts the trial court correctly limited Haney's award to two and one-half times his medical impairment rating. At the time of the injury at issue, the statute provided:

> For injuries arising on or after August 1, 1992, in cases where an injured employee is eligible to receive any permanent partial disability benefits, pursuant to § 50-6-207(3)(A)(i) and (F), 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 injury, the maximum permanent partial disability award that the employee may receive is two and one-half (2½) times the medical impairment rating . . . .

Tenn. Code Ann. § 50-6-241(a)(1). The cap set out in the statute applies when the employer has offered a "meaningful return to work." The determination of whether there has been a meaningful offer to return to work is a question of fact. *Newton v. Scott Health Care Center*, 914 S.W.2d 884, 886 (Tenn. Workers Comp. Panel, 1995). The employer bears the burden of showing by a preponderance of the evidence that the offer is at a wage equal to or greater than the pre-injury employment and that the work is within the medical restrictions appropriate for the employee. *Ogren v. Housecall Health Care, Inc.*, 101 S.W.3d 55, 57 (Tenn. Workers Comp. Panel, 1998).

A determination of whether there has been a reasonable return to work can be made based on circumstances both before and after the employee reaches maximum medical improvement. *Lay v. Scott County Sheriff's Dept.*, 109 S.W.3d 293, 297 (Tenn. 2003). An injured employee who returns to work and then resigns to accept a higher-paying job is subject to the two and one-half times cap. *Lay*, 109 S.W.3d at 298-299. Unlike *Lay*, Haney did not voluntarily resign to accept a better job. He was laid off or terminated by Five Rivers.

In *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 629 (Tenn. 1999), the employer made an offer to return the employee to work, but the employer made no effort to accommodate the employee's physical limitations. The employee quit, litigation ensued, and a year later, the employer offered a position within the limitations resulting from the injury. The Tennessee Supreme Court found both Wal-Mart offers to be unreasonable and held that the trial court erred in finding a meaningful return to work. Tenn. Code Ann. § 50-6-241(a)(2) permits enlargement of an award in an appropriate case where the employee is no longer employed by the pre-injury

employer. That is similar to the facts here. Five Rivers initially offered Haney "light duty" employment that he performed even though he claims that it aggravated his injury and violated the restrictions placed by his physician. Five Rivers, however, twice terminated Haney from even that light duty employment. After the second lay off on February 5, 2001, without any assurance that he would be recalled, Haney found other employment. When Five Rivers offered a return to work six months later on August 6, 2001, Haney declined the offer. According to Mr. Lister's testimony, some ninety to ninety-five percent of the employees would have been retained during this lay off period. Haney was not one of them. An employee who has been released to return to work is not entitled to temporary total disability benefits simply because the employer does not have a suitable available job. *Long v. Mid-Tennessee Ford Truck Sales*, 160 S.W.3d 504 (Tenn. 2005). Where, as here, the employee would not be eligible for temporary total disability benefits, it is reasonable for the employee to seek other employment when terminated from light duty employment.

We find it unreasonable to limit the award under Tenn. Code Ann. § 50-6-241 when the employer returns the employee to work, but then terminates the employee, due to no fault of the employee, with no assurance that he will be re-employed in the future. Under such circumstances, Haney was not unreasonable in seeking other permanent employment. Five Rivers has failed to prove it offered a meaningful return to work.

Having determined that the award of permanent partial disability is not limited, we find from the record and the detailed finding of facts of the trial court that it is not necessary to remand the case for the trial court to determine a proper award. Norman E. Hankins, who was stipulated to be a vocational expert, interviewed Haney, administered I.Q. and reading and arithmetic tests, and reviewed medical records and depositions. Dr. Hankins opined that Haney sustained a 66 percent vocational disability. No other vocational expert testified. While Haney is not able to return to the type of work he did at Five Rivers, we note that he did obtain other permanent employment within his restrictions and at higher pay. We find an award of 28 percent permanent partial disability to the body to be appropriate.

Disposition

The judgment of the trial court is accordingly modified and the case is remanded for any necessary proceedings. Costs of the appeal are taxed to the Appellees.

____

Howell N. Peoples, Special Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE
March 7, 2006 Session

CARROLL D. HANEY v. FIVE RIVERS ELECTRONICS INNOVATIONS, LLC, ET AL.

Chancery Court for Greene County
No. 20030207

Filed August 23, 2006

No. E2004-01941-SC-WCM-CV

JUDGMENT

This case is before the Court upon the motion for review filed by Five Rivers Electronic Innovations, LLC and Lumbermen's Underwriting Alliance pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Five Rivers Electronic Innovations, LLC and Lumbermen's Underwriting Alliance, and their surety, for which execution may issue if necessary.

BARKER, C.J., NOT PARTICIPATING