IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 29, 2006 Session

SHERWOOD F. DOWD v. CASSENS TRANSPORT COMPANY, ET AL.

Direct Appeal from the Chancery Court for Rutherford County
No. 03-7648WC Robert E. Corlew, III, Chancellor

No. M2005-2632-WC-R3-CV - Mailed - January 5, 2007
Filed - March 8, 2007

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. On this appeal, the sole issue presented is whether the trial court erred by failing to cap the recovery of the employee, Sherwood Dowd, at 2.5 times the medical impairment as required by Tennessee Code Annotated section 50-6-241(a)(1). The trial court found Mr. Dowd's retirement, based, in part, upon his fear of re-injury, was reasonably related to his injury and awarded compensation amounting to four times his medical impairment rating. Finding the employer offered employment that Mr. Dowd had the ability to perform and demonstrated a willingness to accommodate his medical restrictions, we find Mr. Dowd's decision to retire on the basis of an apprehension of re-injury was, within the framework of the statute, unreasonable. We reverse.

Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Trial Court Reversed

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and MARIETTA SHIPLEY, SP. J., joined.

Dale A. Tipps, Nashville, Tennessee, for Appellants, Cassens Transport Company and Insurance Company of the State of Pennsylvania.

Donald Capparella, Nashville, Tennessee, for Appellee, Sherwood F. Dowd.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

Sherwood F. Dowd was 60 years of age at the time of trial. From 1990 until December 31, 2004, he was employed by Cassens Transport Company. He worked for Cassens at the Smyrna, Tennessee, location where he serviced and maintained vehicles as a mechanic. As part of his work he did a lot of overhead welding, heavy lifting, pushing, pulling, and prying.

On August 13, 2003, Mr. Dowd went to see his family doctor, Dr. Matt Perkins, because he was experiencing a sharp pain in his right shoulder when he extended his arm. Dr. Perkins ordered an MRI that revealed a partially torn rotator cuff. Mr. Dowd was referred to the Tennessee Orthopaedic Center Alliance and eventually saw Dr. Roderick Vaughan. Dr. Vaughan confirmed that Mr. Dowd had a rotator cuff tear and recommended surgery. The surgery was performed on October 30, 2003.

When Mr. Dowd returned to work on February 2, 2004, he was given restrictions of lifting no more than twenty-five pounds over his head and no more than forty pounds with both arms to his waist. Mr. Dowd was able to comply with those restrictions. He had to modify his work habits by dragging objects rather than lifting them, using a forklift for lifting, putting vehicles on jack stands and working underneath on a creeper rather than standing underneath the vehicle in a pit. However, he managed to perform his job without violating his restrictions.

Mr. Dowd worked forty hours per week plus overtime both before and after his injury and earned the same amount of money. Nonetheless, he left the company on December 31, 2004. Mr. Dowd indicated that the injury was one reason he quit work. Cassens was working a lot of overtime and he did not want to hurt his shoulder again. Additionally, his brother-in-law had retired the previous year at age 65 and died shortly after his retirement. Another man that he had worked with recently had died suddenly. While he had planned on working until he was sixty-two years of age, Mr. Dowd decided to retire earlier. In his words, "I guess I was just ready. I had just had it in my mind I was just going to make up my mind." Following his retirement, he received a pension of $2,653 per month through the Teamsters' Union.

Dr. Roderick A. Vaughan testified by deposition. He is an orthopaedic surgeon certified by the American Board of Orthopaedic Surgery. He first saw Mr. Dowd on August 27, 2003, and reviewed the MRI taken earlier that had revealed a rotator cuff tear and impingement in the acromioclavicular (AC) joint. According to Dr. Vaughan, impingement syndrome implies that the spurs from the AC joint are rubbing on the supra spinatus tendon (rotator cuff), wearing away the tendon, causing degenerative change and, subsequently, a tear. According to Dr. Vaughan, most rotator cuff tears are gradual and can be caused by work activities. After discussing Mr. Dowd's work activities with him, Dr. Vaughan determined that it was more probable than not that his rotator cuff tear was work-related.

Surgery was performed on October 30, 2003. Mr. Dowd had a full thickness tear on the rotator cuff. At the AC joint, the degeneration and spurs were removed. The surgery was successful, and Mr. Dowd was referred for physical therapy. In January 2004, Dr. Vaughan advised him not to lift over twenty-five pounds and to limit his overhead work to occasional. Mr. Dowd felt, with those restrictions, he would be able to modify his work activities and return to his regular duties. After having worked for over two months, Mr. Dowd returned to Dr. Vaughan on April 13, 2004. He stated he was having no pain and no symptoms such as popping in his shoulder. Mr. Dowd did note occasional soreness. Dr. Vaughan placed him at maximum medical improvement and imposed restrictions of not lifting over twenty-five pounds overhead or forty pounds to the waist using both hands.

On February 9, 2005, Mr. Dowd returned to Dr. Vaughan for an impairment evaluation. Dr. Vaughan took an x-ray which demonstrated no evidence of soft tissue calcification or recurrent spurs. In accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition, Dr. Vaughan determined Mr. Dowd retained a ten percent upper extremity impairment in reference to the operative procedure and an additional five percent impairment for loss of range of motion for a total right upper extremity impairment of fifteen percent equating to nine percent permanent partial impairment of the whole person.

The trial court found Mr. Dowd had sustained a nine percent anatomical impairment pursuant to the determination of Dr. Vaughan. The trial court found Mr. Dowd's vocational disability to be thirty-six percent and held Tennessee Code Annotated section 50-6-241(a)(1), limiting an employee's recovery to 2.5 times the anatomical impairment, did not apply because Mr. Dowd's retirement was reasonably related to his work injury. From this ruling, Cassens has appealed. The sole issue presented for review is whether the trial court erred in ruling Mr. Dowd's permanent partial disability rating was not subject to the 2.5 times cap imposed by Tennessee Code Annotated section 50-6-241(a)(1) because Mr. Dowd's retirement was reasonably related to his work injury.

II. SCOPE 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) (2005). 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. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997). Where the only dispute

between the parties is the conclusion to be reached from the undisputed facts and evidence, the question on appeal is one of law and our review of the trial court's conclusions is *de novo* with no presumption of correctness. Id.

III. ANALYSIS

The sole issue presented for review is whether the trial court erred in failing to apply the 2.5 times cap contained in Tennessee Code Annotated section 50-6-241(a)(1). That Code section provides, in part:

> For injuries arising on or after August 1, 1992, and prior to July 1, 2004, 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) (2005).

Cassens contends this statutory cap is applicable because Mr. Dowd returned to work, performed his regular duties for eleven months, and then retired for a variety of reasons including his fear of re-injuring himself. We agree and reverse the ruling of the trial court.

In reaching its decision that Mr. Dowd's retirement was reasonably related to his injury, the trial court stated:

> We recognize that each of these cases are fact-driven, and that the degree of involvement of the injury with the cessation of employment is a matter of degree. The proof in the case before us shows that the worker was able to return to work under restrictions which we consider significant for a diesel truck mechanic. While the employer was accommodating, the evidence shows, the extent to which the Plaintiff was required to modify the way in which he performed his duties was significant. Most significant, perhaps, is the testimony of the physician that, although the plaintiff was able to return to work provided he complied with his restrictions, the possibility of further injury remained. The physician further testified that the worker's retirement was reasonable in light of his injury. The fact that the Plaintiff felt he was required to be constantly vigilant in order to protect himself from further injury further justifies his early termination from work. Although the worker was somewhat advanced in years, there was no evidence that the Plaintiff had otherwise contemplated retirement at age 60, rather than proceeding to work until age 62, despite his concerns that some of his friends had died early either immediately after retiring, or prior to retirement.

> We recognize that the issue, even under the facts of this case, is one upon which reasonable minds may differ. Under the standard, however, which we are required by statute and case law to follow, we believe this is a case where the two and one-half times cap should not apply.

Under our standard of review, we accept the trial court's findings that Mr. Dowd was able to return to work under significant restrictions, that he felt he had to be constantly vigilant in order to avoid re-injury, that he had to modify the way he performed his duties and that a primary reason he retired was apprehension of being re-injured. The evidence does not preponderate against these findings.

With regard to the statements made by Mr. Dowd's physician, we have a different standard of review. They are contained in a deposition and, accordingly, we may draw our own conclusions with regard to them. The trial court found that Mr. Dowd's physician testified that "although the plaintiff was able to return to work provided he complied with his restrictions, the possibility of further injury remained." The testimony of the physician, Dr. Roderick A. Vaughan, with regard to this subject was, however, as follows:

> Q. If he had continued to work, was he at risk for further injury to his right shoulder?
>
> A. If he would not have truly been able to comply with those restrictions that I gave him, yes.

Thus, the physician's assessment of the risk of re-injury was limited to Mr. Dowd's failure to follow his restrictions.

The trial court also noted, the "physician further testified that the worker's retirement was reasonable in light of his injury." That testimony is found in the following portion of Dr. Vaughan's deposition testimony:

> Q: If Mr. Dowd testifies he retired from his employment effective December 31, 2004, and he may have mentioned that to you when he came in to see you the last time. I don't know if he did or not.
>
> A. I don't recall that.
>
> Q: Do you find anything inappropriate about him electing to make the decision to retire?
>
> A: No.

In our view, this testimony does not necessarily relate to Mr. Dowd's injury and does not carry the import given it by the trial court. We find in Dr. Vaughan's testimony no medical evidence that Mr.

Dowd was at an increased risk of injury provided he followed the restrictions given him.

Taking the facts found by the trial court relating to the reasons for Mr. Dowd's retiring as undisputed, the question becomes one of law and is reviewed by us *de novo* without a presumption of correctness. That question is whether fear of re-injury, without more, is a sufficient basis upon which a trial court may rely to find a resignation or retirement from employment reasonably related to a workplace injury so as to avoid application of the 2.5 statutory cap set forth in Tennessee Code Annotated section 50-6-241(a)(1).

At the outset, we would surmise that the vast majority of all injured employees fear re-injury. The very purpose of a physician imposing work restrictions is to define for the employee the scope of activities in which he or she can engage without significantly increasing the risk of re-injury. Thus, all employees assigned work restrictions must follow those restrictions or face the increased risk. Mr. Dowd is probably no different than any other injured employee relative to fearing re-injury and following the work restrictions assigned him.

The Tennessee Supreme Court has held that in order for the statutory 2.5 cap to apply, the offer of employment or return to work must be ?meaningful." Thus a return to work that the employee is unable to perform because of his or her injuries is not a meaningful return to work. See Newton v. Scott Health Center, 914 S.W.2d 884, 886 (Tenn. Workers' Comp. Panel 1995). The Court has recognized that there will be a variety of factual situations where our courts will be called upon to determine whether a return to work or offer of a return to work is meaningful within the framework of the statute. Generally,

> [i]f the offer from the employer is not reasonable in light of the circumstances of the employee's physical ability to perform the offered employment, then the offer of employment is not meaningful and the injured employee may receive disability benefits up to six times the amount of the medical impairment. On the other hand, an employee will be limited to disability of two and one-half times the medical impairment if his refusal to return to offered work is unreasonable."

Id.

Where the employee returns to work after being injured and after a period of time is forced to stop working because of inability to perform due to the work-related injury, such circumstances are generally considered as not making a meaningful return to work. However, if the employee returns to work and sometime thereafter stops working due to personal reasons or other reasons not related to the work injury, then such circumstances are considered as making a meaningful return to work in the sense of our statute. See, e.g., Lay v. Scott County Sheriff's Dep't, 109 S.W.3d 293, 298 (Tenn. 2003); Hardin v. Royal & Sunalliance Ins., 104 S.W.3d 501, 506 (Tenn. 2003).

The Tennessee Supreme Court has emphasized two factors in determining the reasonableness of an employer's offer of re-employment. First is the ability of the employee to perform the offered

employment. Second is the willingness of the employer to accommodate the work restrictions imposed by the employee's attending physician. Hardin, 104 S.W.3d at 505-06; Nelson v. Wal-Mart Stores, Inc., 8 S.W.3d 625, 630 (Tenn. 1999). Where, however, the employee has refused to return to work because the employer has denied accommodations beyond the work restrictions medically recommended, the employee's refusal has been determined to be unreasonable and the Tennessee Code Annotated section 50-6-241(a)(1) caps have been applied. Newton, 914 S.W.2d at 886.

In the case before us, the employee, Mr. Dowd was obviously able to perform the work offered him by Cassens. He performed the work for eleven months following his injury prior to his retirement. Cassens clearly demonstrated a willingness to accommodate his work restrictions. According to Mr. Dowd, during this eleven months, Cassens never required him to exceed his work restrictions, never criticized his job performance or pressured him to work harder or faster. There was no medical evidence before the trial court that Mr. Dowd was at an increased risk of re-injury from his employment so long as he complied with his work restrictions. Based upon these facts, in our view, Mr. Dowd's retiring because he feared re-injury was unreasonable within the framework of Tennessee Code Annotated section 50-6-241(a)(1). To hold otherwise would essentially nullify the statute by allowing any employee to avoid application of the 2.5 cap by refusing employment based upon an unfounded fear of re-injury. The purpose of the statute is to encourage employers to retain injured employees by continuing their employment at their pre-injury rate of pay in exchange for limiting the amount of workers' compensation benefits the employee may recover. In order for the employer to be entitled to the benefit of the statute, it must, according to our case law, offer employment the employee is able to perform and accommodate any work restrictions medically imposed. Cassens has fulfilled these requirements and is entitled to the benefit the statute.

IV. CONCLUSION

Accordingly, the ruling of the trial court holding Tennessee Code Annotated section 50-6-241(a)(1) inapplicable is reversed and permanent partial disability award is reduced to twenty-two and one-half percent reflecting the 2.5 statutory cap. Costs of this appeal are taxed to the Appellee, Sherwood F. Dowd.

_____

DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

SHERWOOD F. DOWD v. CASSENS TRANSPORT COMPANY, ET AL.

Chancery Court for Rutherford County
No. 03-7648WC

No. M2005-02632-SC-WCM-WC - Filed - March 8, 2007

ORDER

This case is before the Court upon the motion for review filed by Sherwood F. Dowd 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 Sherwood F. Dowd, for which execution may issue if necessary.

PER CURIAM

Clark, J. - Not Participating