IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 29, 2007 Session

KAY HILL v. FRANKLIN COUNTY BOARD OF EDUCATION and TENNESSEE SCHOOL BOARDS RISK MANAGEMENT TRUST

Direct Appeal from the Circuit Court for Franklin County
No. 15236-CV Buddy D. Perry, Judge

No. M2006-02011-WC-R3-WC - Mailed - July 26, 2007
Filed - August 31, 2007

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The trial court awarded permanent partial disability benefits of 65% to the body as a whole. The employer has appealed, contending that the trial court used an incorrect method to calculate the average weekly wage. The employer also argues that the amount of the award is excessive and that it is entitled to a credit for an overpayment of temporary disability benefits. We hold that the method used to calculate the average weekly wage was, in fact, erroneous and modify the judgment accordingly. We also hold that the Employer is entitled to credit for the overpayment of temporary disability benefits. We otherwise affirm the trial court's judgment.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2006) Appeal as of Right; Judgment of the Circuit Court Affirmed as Modified

GARY R. WADE, J., delivered the opinion of the court, in which JERRY SCOTT, SR. J., and JON KERRY BLACKWOOD, SR. J., joined.

Jennifer Webb Arnold, Chattanooga, Tennessee, for the appellants, Franklin County Board of Education and Tennessee School Boards Risk Management Trust.

M. Christopher Coffey, Knoxville, Tennessee for the appellee, Kay Hill.

MEMORANDUM OPINION

Factual and Procedural Background

Kay Hill ("Employee") worked as a teacher, assistant principal, and principal for the Franklin County Board of Education ("Employer") from 1975 until 2002. She retired in May of 2002. In

October of that year, the Employer asked her to return to serve on a part-time basis as an assistant principal of the alternative school, a position she shared with another employee, Coach Stetson. The employment contract provided that the Employee would work no more than one hundred days during the 2002-2003 school year. Coach Stetson worked 65 days during that same period of time. The contract also provided that the Employee would be paid a specified amount for each day worked. In the following school year, the parties entered into a contract for "a full school year" of two hundred days.

On September 26, 2003, the Employee fell after tripping over tar paper on a walkway leading to a portable classroom, breaking her left shoulder and wrist. She immediately sought treatment at a local emergency room. Dr. L. Keith Brown, an orthopaedic surgeon, treated her for a four-part fracture of the left humerus, a left wrist fracture, a left shoulder fracture and dislocation with a detached labrum, and a torn left rotator cuff. She reported numbness in her hand. Dr. Brown administered conservative treatment. Within four months of the accident, the fractures had healed but the Employee had not regained full motion in her shoulder. After Dr. Brown ordered an MRI, which showed the extent of the rotator cuff tear and damage to her labrum, surgery was recommended. In an effort to accommodate the Employer, the Employee elected to finish the school year before having the surgery. After determining that the Employee had regained full range of motion of her left shoulder, Dr. Brown released her to full duty in August of 2004.

In the fall, Dr. Brown treated the Employee on two occasions for low back problems unrelated to her employment injury. In May of 2005, however, the Employee returned to Dr. Brown complaining of neck and arm pain. An MRI revealed a herniated disc at the C5-6 level which Dr. Brown believed to be related to the 2003 fall.

Dr. Brown originally assigned an impairment of 9% to the body as a whole for the Employee's left shoulder injury. Later, he increased the rating to 15% based on instability in her left shoulder, explaining that he had failed to include an impairment assessment for her rotator cuff tear. Dr. Brown assigned an 8% impairment to the body as a whole for the neck injury. Because he did not think the injuries would affect her ability to perform her job as a teacher, Dr. Brown did not restrict her work activities.

At the request of the Employer, Dr. McKinley Lundy conducted an independent medical evaluation. Dr. Lundy, an osteopath who is certified in internal medicine and disability evaluation, testified that the Employee had an impairment of 2% to the body as a whole for her shoulder injury, based upon range of motion measurements. He contended that the methods used by Dr. Brown to calculate the impairments for the shoulder did not comply with *AMA Guides.* He stated that he did not detect instability in his physical examination of the Employee and found no mention of that in Dr. Brown's medical notes. He also contested the additional 6% impairment for the shoulder injury, claiming that Dr. Brown had improperly based this impairment by analogy to tables used to rate arthritis in the lower extremity. Dr. Lundy questioned Dr. Brown's assessment because any degenerative changes would have been detected in the range of motion examination. Because the Employee failed to complain about her neck until eighteen months after the accident, Dr. Lundy

concluded that the herniated cervical disc was not related to the work injury.

The Employee, sixty-seven years old on the date of trial, has both bachelor's and master's degrees. She taught for fifteen years in Illinois before her employment in Franklin County School System. After her surgery, she worked during the 2004-2005 school year under an arrangement similar to the one she had at the time of her injury. She did not work for the Employer during the fall of 2005, but returned the following spring.

During the fifty-two weeks prior to her injury, the Employee had worked during parts of forty weeks and had been paid a total of $29,389.31. The Employer argues that the average weekly wage should be calculated by dividing actual earnings by forty, the number of weeks the Employee had actually worked, resulting in a weekly wage of $734.73 and a workers' compensation benefit rate of $489.82 per week. The Employee insists that by virtue of her unique contract with the school, the average weekly wage should be calculated by taking her daily rate of pay and multiplying it by five, a method resulting in an average weekly wage of $1049.61 and a maximum compensation rate of $618.00. She contends that dividing by forty weeks for a full school year is unfair because she would have worked one hundred consecutive days but for Coach Stetson's preference to spread out the division of work duties.

Shortly after the conclusion of the proceedings, the trial court ruled that the neck injury was caused by the 2003 fall, that the compensation rate was $618.00, and that the permanent partial disability was 65% or 260 weeks, the maximum possible award under the statute. Tenn. Code Ann. § 50-6-207(4)(A)(i). Because the Employee was drawing federal social security benefits, the trial court awarded the Employer a set-off of $118, representing 50% of the weekly social security benefits, thereby reducing the compensation rate to$500 per week. The trial court found that Dr. Lundy had "no experience in orthopaedics, orthopaedic surgery, neurology, or neurosurgery" and specifically accredited the testimony of Dr. Brown as "highly qualified" and, as the treating physician, the best qualified to gauge impairment.

Questions for Review

In this appeal, the Employer presents three questions for review:

1. Did the trial court err in calculating the Employee's average weekly wage?

2. If so, is the Employer entitled to a credit for overpayment of benefits?

3. Is the award of permanent partial disability excessive?

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) (Supp. 2006). 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).

Analysis

1. Average Weekly Wage

During the 2002-2003 school year, the Employee shared her position with Coach Stetson, working four or five days per week in the fall semester and three or four days per week in the spring. For the 2003-2004 school year, she worked two hundred days, a full term pursuant to Tennessee Code Annotated section 49-6-3004(a) (2005 Supp.). She was, therefore, a part-time employee until August of 2003, a month prior to her fall, and full-time thereafter.

Tennessee Code Annotated section 50-6-102(3)(A) (2005) provides as follows:

> [T]he earnings of the injured employee in the employment in which the injured employee was working at the time of the injury during the period of fifty-two (52) weeks immediately preceding the date of the injury divided by fifty-two (52); but if the injured employee lost more than seven (7) days during the period when the injured employee did not work, although not in the same week, then the earnings for the remainder of the fifty-two (52) weeks shall be divided by the number of weeks remaining after the time so lost has been deducted.

Further, Tennessee Code Annotated section 50-6-102(3)(B), provides that when "the employment prior to the injury extended over a period of less than fifty-two (52) weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed . . . ."

As indicated, the trial court calculated the average weekly wage by calculating the daily rate of pay and multiplying it by five. A similar method was rejected in Russell v. Genesco, Inc., 651 S.W.2d 206 (Tenn. 1983). In that case, the employee's actual earnings varied significantly from week to week in the period prior to her injury. The trial court "did not consider the Plaintiff's actual earnings because . . . actual earnings were only relevant in computing the average weekly wages of a part-time employee." Id. at 208. Instead, the average weekly wage was calculated by multiplying the hourly rate of pay by 40. The supreme court reversed, holding that "except in those cases where

the claimant 'earns a given sum for a normal week,' actual wages should be used in computing the claimant's average weekly wages." Id. at 209; see also McKinney v. Feldspar Corp., 612 S.W.2d 157, 160 (Tenn. 1981) (holding that "[t]he average weekly wage of a part time employee is found by dividing the total wages received during the year by the number of weeks during which the employee received wages.").[1]

Here, the Employer paid temporary disability benefits to the Employee at the rate of $613.80. Temporary total disability benefits are, of course, payable until an injured employee is able to return to work or, if not returning to work, until he or she attains maximum recovery from the injury, at which time the entitlement to benefits terminates. Simpson v. Satterfield, 564 S.W.2d 953, 955 (Tenn. 1978). Based upon the holding in Shultz v. City of Lawrenceburg, No. 01S01-9701-CV-00017 (Tenn. Workers' Comp Panel Nov. 7, 1997), the Employee argues that she is entitled to the same average weekly wage calculation she obtained for temporary total disability benefits. In Shultz, however, there was conflicting evidence regarding the amount of the employee's actual earnings. Here, there is no dispute.

In our view, Russell controls. The proper average weekly wage, based upon the Employee's actual earnings during the weeks she worked in the year prior to her injury, was $734.73. In consequence, the workers' compensation benefit rate is only $489.82 per week. The Employee received a gross amount of $1,101.20 month in social security benefits ($254.12 per week), 50% of which would amount to $127.06. The set-off of $127.06 per week results in a weekly compensation rate of $362.76. See McCoy v. T.T.C. Ill., 14 S.W.3d 734, 738 (Tenn. 2000) (authorizing a set-off of 50% "of the total amount of any social security old age insurance benefits received by employees over sixty who suffer injuries to the body as a whole and who are awarded permanent total or permanent partial disability benefits under the workers' compensation law"); Tenn. Code Ann. § 50-6-207(4)(A)(i). The judgment must be modified accordingly.

2. Credit for overpayment of temporary disability benefits

An employee must reimburse the employer for any temporary disability benefits improperly paid. McCall v. Nat'l Health Corp., 100 S.W.3d 209, 213 (Tenn. 2003). Because the rate is $489.82 per week, the Employer will be entitled to a credit of $123.98 for each week the benefits were paid.

3. Extent of Permanent Partial Disability

The trial court awarded 65% permanent partial disability to the body as a whole. Because the Employee was over sixty years old on the date of her injury, that is the maximum award pursuant to Tennessee Code Annotated section 50-6-207(4)(A)(i), a section applicable to awards of permanent total disability. In order to avoid illogical results, the Supreme Court has held that the limitation of 260 weeks of benefits also applies to awards of permanent partial disability. Vogel v. Wells Fargo

[1] In Cantrell v. Carrier Corp., 193 S.W.3d 467 (Tenn. 2006), the Court held that the plaintiff's wages should be divided by the number of weeks, not days, the plaintiff worked during the 52 weeks preceding the injury. Id. at 471.

Guard Serv., 937 S.W.2d 856, 862 (Tenn. 1996).

The Employer contends that the award was excessive because the Employee had a high level of education and the injury did not affect her ability to work in her profession. The Employer also argues that the causal relationship between the Employee's cervical disc problem and her original work injury is questionable based on the length of time which elapsed between the date of the original injury and the first recorded symptoms, and that Dr. Brown used an inappropriate method to determine impairment.

The Employee testified that after her injury and eventual surgery, her colleagues were required to assist her during the 2004-2005 school year. Her contract with the Employer was not renewed during the fall of 2005 and in the 2006 spring semester, she taught only two classes. Because of her physical limitations, the Employee was required to employ a housekeeper to perform work that she previously had done herself. The Employee's daughter confirmed that her mother was subject to fatigue and unable to interact with her grandchildren as she did previously.

In assessing disability, trial courts must consider certain factors, "including the employee's skills and training, education, age, local job opportunities, and [the] capacity to work at the kinds of employment available in [the] disabled condition." Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 453, 459 (Tenn. 1988). See also Walker v. Saturn Corp., 986 S.W.2d 204, 208 (Tenn. 1998). An employee is vocationally disabled for purposes of the workers' compensation act "if the . . . ability to earn wages in any form of employment that would have been available to him in an uninjured condition is diminished by an injury." Id. Anatomical disability and vocational disability are entirely different matters. A "medical expert's rating of anatomical disability is merely one of a number of relevant factors used to make this determination" as to vocational disability. Id. at 458.

The Employer argues that because the Employee only presented evidence regarding her age and anatomical disability rating, the trial court could not have considered all the Corcoran factors in its determination of the Employee's vocational disability. The Employer contends that the Employee is capable of performing as a teacher, has no work restrictions, and has an undiminished ability to earn wages, and, therefore, does not qualify for vocational impairment under workers' compensation law.

It is, of course, the responsibility of the claimant to prove each and every element of her claim for workers' compensation benefits. Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487 (Tenn. 1997). Here, the Employee testified to fatigue, to a lack of stamina, and to a general limitation on her ability to teach. As required by statutory and case law, we have conducted an independent review of all of the relevant evidence in the record. In our assessment, the evidence does not preponderate against the trial court's award of 65% permanent partial disability.

CONCLUSION

We hold that the correct workers' compensation rate is $489.82 per week. The Employer is

entitled to a credit of $123.98 per week for all weeks that temporary total disability was paid at a higher rate. Further, the Employer is entitled to a set-off of $127.06 per week pursuant to Tennessee Code Annotated section 50-6-207(4)(A)(i). The judgment is modified accordingly. Otherwise, the judgment is affirmed.

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GARY R. WADE, JUSTICE

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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 will be paid by the Appellants, Franklin County Board of Education and Tennessee School Boards Risk Management Trust, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM