IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
February 26, 2007 Session

STEVEN R. NORMAN v. HBD INDUSTRIES, INC.

Direct Appeal from the Chancery Court for Scott County
No. 9002 Billy Joe White, Chancellor

Filed September 14, 2007

E2006-00381-WC-R3-WC - Mailed June 12, 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 hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The issues on appeal involve whether weeks spent absent from work due to a strike are included when calculating an employee's average weekly wage. We hold that the trial court erred in excluding the weeks spent on strike and modify the award to reflect the proper calculation of the employee's average weekly wage.

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

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the court, in which WILLIAM M. BARKER, C.J., and J. S. (STEVE) DANIEL, SR. J., joined.

Lee Anne Murray, Nashville, Tennessee, attorney for Appellant, HBD Industries, Inc.

David H. Dunaway, Lafollette, Tennessee, attorney for Appellee, Steven R. Norman.

MEMORANDUM OPINION

Factual Background

The plaintiff, Steven R. Norman [hereinafter "Norman"], had worked for HBD Industries, Inc. [hereinafter "the employer"] for twenty-eight years. Between August 2001 and January 7, 2002, he participated in a strike against the employer.

On August 1, 2002, Norman claimed he injured his chest, back and right shoulder while loading a hose on a steel mandrel. He was treated by company physician, Dr. Raymond Lyons.

Norman was off from work from August 1, 2002 until November 26, 2002 during which time he was paid temporary disability benefits at the rate of $473.33.

On January 20, 2003, he reinjured his back while attempting to push a hose and was treated by Dr. Judy Gordon, another company physician. Norman continued to suffer pain and in January 2004, he suffered another injury to his right arm.[1]

Eventually Norman saw his family physician, who referred him to Dr. David Cassada. Dr. Cassada diagnosed thoracic outlet syndrome and placed restrictions on Norman which included lifting no more than nine pounds and avoidance of repetitive use of his arms. Dr. C. M. Salekin, a specialist in neurology and occupational medicine evaluated Norman and assigned an impairment rating of nineteen percent impairment to the body as a whole.

Norman's complaint for workers' compensation benefits was filed on February 26, 2003. HBD filed an answer on March 28, 2003 which included a wage statement. The wage statement covered the week ending November 26, 2000, through August 2, 2002, which included fifty-two weeks that Norman actually worked. It contained no wages for the thirty-four weeks from May 7, 2001 through January 2, 2002, the time period that Norman was on strike. In actuality, it covered a time period of eighty-six weeks prior to the injury.

On October 31, 2005, the employer filed an amended wage statement[2] which began with the week of August 9, 2001 and ended with the week of August 2, 2002 - fifty-two weeks of employment prior to the date of injury. This statement reflected that Norman had zero earnings during the weeks on strike. At trial, counsel for Norman objected to the use of the amended wage statement on the grounds that it was not signed by an official of the employer nor submitted in a timely fashion. The employer tendered a witness to verify the wage statement, to which counsel for Norman objected on the same grounds with the additional objection that the witness had not been made available for deposition. The trial court excluded the amended wage statement and the witness.

Ruling of the Trial Court and Issues on Appeal

The trial court found Norman suffered a work-related injury and awarded 47.5 percent permanent partial disability to the body as a whole. This finding is not appealed. The trial court further ruled that the weeks Norman was on strike should not be included in the calculation of the average weekly wage and calculated the workers' compensation benefit rate to be $473.37. The employer appeals and contends that:

I. The trial court erred by concluding the weeks during which the plaintiff

---

[1] The arm injury is the subject of a separate workers' compensation claim.

[2] After a change in employer's counsel.

participated in a strike should be excluded in calculating his average weekly wage; and,

II. The trial court erred by excluding the amended wage statement.

In the alternative, appellee Norman asserts that the judgment can be "justified through the application of § 50-6-102(3)(B)."

Standard of Review

Our standard of review of factual matters in a workers' compensation case is de novo upon the record, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) 2005; see also Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004); Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 825 (Tenn. 2003). Conclusions of law are subject to de novo review without any presumption of correctness. Rhodes, 154 S.W.3d at 46; Perrin, 120 S.W.3d at 826.

Analysis

This appeal centers on the calculation of Norman's average weekly wage. The employer, relying on Hartley v. Liberty Mut. Ins. Co., 197 Tenn. 504, 276 S.W.2d 1 (Tenn. 1954), asserts that the fifty-two weeks used in computing Norman's average weekly wage should include the weeks he spent on strike and his workers' compensation benefit rate therefore should be $290.27. Norman argues, in part, that the average weekly wage was correctly calculated, resulting in a benefit rate of $473.39; that Norman's participation in the strike be treated as a "fortuitous circumstance"; that the time on strike should be excluded from the calculations; and, that the award can be alternatively "justified through the application of § 50-6-102(3)(B)."

In Goodman v. HBD Industries Inc., 208 S.W.3d 373, 378-380 (Tenn. 2006),[3] the Tennessee Supreme Court, in upholding Hartley, addressed these same issues.

> In Hartley, this Court addressed the exact question we are faced with today: should the time the employee spent on strike against the employer be excluded when calculating an employee's average weekly wage, 276 S.W.2d at 2-3. The employee in Harley had taken part in a sixteen-week strike against his employer. Id. at 2. Of those sixteen weeks, the plant was closed for eight weeks for repairs. Id. After returning to work, the employee was injured within the course and scope of his employment. Id. When calculating the employee's average weekly wage, the trial court deducted eight weeks, representing the eight weeks during which the plant was closed, but included the other eight weeks during which the employee was on strike.

[3] Writ for certiorari denied: Goodman v. HBD Indus., U. S. Lexis 4558, 75 U.S.L.W. 3583 (U.S. Apr. 30, 2007).

> Id. We affirmed, holding that the trial court correctly deducted the eight weeks for the plant closure and that the period for the strike could not be deducted because the employee's "total earnings for the year were reduced by his own voluntary act." Id. at 3.
>
> * * * * *
>
> Because there is no valid reason to overrule Hartley, we apply the rule from that case and hold that the twenty-eight weeks during which Goodman was on strike should be included when calculating his average weekly wage.
>
> * * * * *
>
> The Workers' Compensation laws do not permit an employee to choose the average weekly wage calculation that yields the highest result. The employee must follow the sequence outlined in Tennessee Code Annotated section 50-6-102(3). If the employee is employed for fifty-two weeks prior to the injury, the employee must use subsection (A). If the employee was employed for less than fifty-two weeks prior to the injury, the employee must use subsection (B). Here, [the employee] was employed by HBD for the full fifty-two weeks prior to his injury. Therefore, subsection (A) applies, and his income earned during those fifty-two weeks is divided by fifty-two to arrive at his average weekly wage.

In this case, we find that Norman had been employed by HBD for the required full fifty-two weeks prior to his injury and therefore find that his average weekly wage is appropriately calculated using Tennessee Code Annotated section 50-6-102(3)(A).

Accordingly, we find that the trial court erred by excluding the strike weeks in calculating Norman's average weekly wage and modify the weekly benefit amount, based on the fifty-two weeks prior to the injury as mandated by statute, to $290.27 [4] instead of the $473.37 awarded by the trial court. Issues involving the exclusion of the Amended Wage Statement are pretermitted.

Conclusion

We affirm the trial court's award of benefits, but at a weekly compensation rate of $290.27 instead of $473.37. Cost of this cause is assessed against the appellee, Steven R. Norman, for which execution shall issue.

JON KERRY BLACKWOOD, SENIOR JUDGE

[4] The original wage statement filed with the answer resulted in an average weekly wage of $272.38. In its brief, the employer has stipulated to the rate of $290.27 which is reflected in the amended wage statement that was excluded by the trial court.

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STEVEN R. NORMAN v. HBD INDUSTRIES, INC.

Chancery Court for Scott County
No. 9002
Filed September 14, 2007

No. E2006-00381-SC-WCM-WC

ORDER

This case is before the Court upon the motion for review filed by Steven R. Norman pursuant to Tenn. Code Ann. § 50-6-225(3)(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 Steven R. Norman, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

BARKER, C.J., not participating.