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

ROBERT KELLOW v. TML RISK MANAGEMENT POOL AND THE CITY OF LEBANON

Direct Appeal from the Criminal Court for Wilson County
No. 05-0589 J.O. Bond, Judge

No. M2006-01573-WC-R3-WC - Mailed - September 26, 2007
Filed - October 29, 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. In this case, the trial court found the Employee's bilateral shoulder injury to be compensable and awarded benefits for 50% permanent partial disability to the body as a whole. Employer asserts that the trial court erred by accepting the evaluating physician's opinion that Employee suffered an 11% impairment and by awarding Employee 50% permanent partial disability to the body as a whole. Employer also contends that the permanent partial disability award should be limited to one and one-half times Employee's medical impairment rating because there was a meaningful return to work. We find the trial court did not err in accrediting Employee's medical proof, but we conclude that the evidence in the record preponderates against the trial court's finding that Employee did not have a meaningful return to work. Thus, the trial court erred in awarding benefits in excess of the one and one-half statutory cap. We modify the trial court's judgment and award one and one-half of the medical impairment rating of 11% or 16.5% to the body as a whole.

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

RICHARD E. LADD, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, C.J., and DONALD P. HARRIS, SR. J., joined.

Jennifer O. Locklin and William M. Bates, Nashville, Tennessee, for the appellants, TML Risk Management Pool and the City of Lebanon.

William J. Butler and Frank. E. Farrar, Lafayette, Tennessee for the appellee, Robert Kellow.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

Robert Kellow, ("Employee"), began working as a maintenance person for the City of Lebanon, ("Employer"), in May 2004. On the date of trial, he was fifty-five years old. He had completed eighth grade and did not have a GED. He had performed manual labor his entire life.

Employee alleged that he injured his shoulders in August 2004 while pulling tin sheets onto the roof of a garage in the course of his employment with Employer. Employee testified that he informed his supervisor the following week that he had hurt his shoulders and might need to see a doctor. Employer offered no evidence to refute Employee's testimony on this issue. His supervisor did not offer him any medical treatment options, so Employee did not see a doctor at this time. Employee continued to work; however, he testified that he was able to do so only because his co-workers helped him with work that required Employee to reach above his head.

In addition to the shoulder injury at issue in this case, Employee has several other injuries. In January 2005, Employee sustained a work-related neck injury, which was accepted as compensable. He was off work for two months after this injury. Employee then returned to work and continued to work until he sustained a back injury on March 30, 2006.

In May 2005, nine months after he sustained the shoulder injury, Employee again reported the shoulder injury to Employer's administrative personnel. The claim was denied. Employee did not seek further medical treatment for the shoulder injury after the claim was denied. Between August 2004 and May 2005, Employee called his family physician, Dr. Tammy Collins, seven times, including the day he reported his shoulder injury to Employer. Employee testified that he thought he reported his shoulder injury to Dr. Collins, but he was not sure he had done so. Employee admitted Dr. Collin's records did not show complaints of shoulder pain before May 2005.

On March 17, 2006, twenty months after the injury occurred, Employee consulted Dr. Walter Wheelhouse for an independent medical evaluation at the request of his attorney. Dr. Wheelhouse is the only physician Employee consulted regarding his shoulder injury. Employer did not request a separate medical evaluation of Employee's injury. Dr. Wheelhouse testified by deposition.

Dr. Wheelhouse did not review any of Employee's medical records in preparation for the independent medical examination. He received Employee's oral medical history, conducted a physical examination, and measured Employee's range of motion. He did not order an x-ray, MRI, or other diagnostic testing. Dr. Wheelhouse found positive impingement signs in both shoulders and testified that there were no indications that Employee was magnifying his symptoms or being untruthful in his description of the shoulder injury and symptoms. Dr. Wheelhouse concluded that Employee had suffered a significant work-related injury to both shoulders and had reached maximum

medical improvement. Dr. Wheelhouse assessed Employee with a 10% impairment of his right upper extremity, which converts to a 6% whole person impairment, and a 8% impairment of his left upper extremity, which converts to a 5% whole person impairment. The combined total is 11% whole person impairment.

Dr. Wheelhouse acknowledged that Employee had sustained a neck injury prior to consulting Dr. Wheelhouse for an examination, and testified that he reviewed the medical records relating to that injury prior to being deposed. He testified that the neck injury would affect only neck range of motion measurements and would not affect Employee's shoulder range of motion measurements. Dr. Wheelhouse asserted repeatedly that the limitations resulting from the neck injury were unrelated to the limitations associated with the shoulder injury and did not affect his opinion on the impairment rating for Employee's shoulder injury. Dr. Wheelhouse specifically testified that nothing in Employee's medical records indicated that his neck injury had exacerbated Employee's shoulder injury.

Following his examination of Employee, Dr. Wheelhouse imposed permanent restrictions requiring Employee to work with his elbows at his side and bent at ninety degrees and precluding Employee both from working with his arms extended away from his body and from reaching, lifting, pulling, or working with his arms above shoulder level. Dr. Wheelhouse opined that these restrictions would prevent Employee from returning to work as a maintenance person. However, Dr. Wheelhouse acknowledged that, except for missing two months of work due to his neck injury, Employee had continued to work after his shoulder injury. Employee has not returned to work since he sustained a back injury in March 2006.

The trial court accepted the opinion of Dr. Wheelhouse and found the Employee's testimony credible. The trial court also found that Employee was able to continue working only because co-workers had helped him and that Employee could not continue working for the City given Dr. Wheelhouse's restrictions. Based on the assessment of 11% impairment, the trial court awarded Employee 50% permanent partial disability to the body as a whole.

II. ISSUES

Employer contends that the trial court erred by accepting the opinion of Dr. Wheelhouse and by granting a permanent partial disability award that exceeded the one and one-half times statutory multiplier.

III. STANDARD OF REVIEW

This court reviews a trial court's findings of fact in a workers' compensation case de novo upon the record of the trial court with a presumption of correctness, "unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2006). Under this standard, a reviewing court is not bound by the factual findings of the trial court and may "review the record on [its] own to determine where the preponderance of the evidence lies." *Cleek v. Wal-Mart Stores,*

Inc., 19 S.W.3d 770, 773 (Tenn. 2000) (citing *Ivey v. Trans Global Gas & Oil*, 3 S.W.3d 441, 446 (Tenn. 1999)). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility are involved, we must extend deference to the trial court's factual findings. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315 (Tenn. 1987). However, we extend no deference to the trial court's findings when reviewing documentary evidence such as depositions. *Ferrell v. Cigna Prop. & Cas. Ins. Co.*, 33 S.W.3d 731, 734 (Tenn. 2000). As to questions of law, the standard of review is de novo with no presumption of correctness. *Perrin v. Gaylord Entm't. Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

IV. ANALYSIS

Employer contends that the trial court erred in finding, based on the deposition testimony of Dr. Wheelhouse, that Employee sustained a work-related injury. "When the medical testimony is presented by deposition, as it was in this case, this [c]ourt [may] make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies." *Cooper v. Ins. Co. of N. Am.*, 884 S.W.2d 446, 451 (Tenn. 1994) (citing *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989)). We find that the evidence does not preponderate against the trial court's finding on this issue.

Employer argues that Dr. Wheelhouse's opinions on causation and medical impairment are unfounded and not credible because the circumstances of the examination and the information available to him during the examination were deficient. Specifically, Employer notes that Dr. Wheelhouse examined Employee twenty months after the alleged injury, did not examine Employee's medical records relating to his neck injury, and did not order diagnostic testing when assessing Employee's impairment for the shoulder injury. Employer also notes that Employee complained of shoulder pain associated with his neck injury, but did not report this to Dr. Wheelhouse. Employer argues that "[i]t defies common sense to state that pain in the same part of the body, albeit from two different instances, could be allotted specifically between those two incidents." Employer, however, did not offer any medical proof to support this contention or to contradict the deposition testimony of Dr. Wheelhouse.

Employee responds that Dr. Wheelhouse reviewed the medical records relating to the neck injury prior to being deposed and testified that Employee's neck injury would not affect range of motion measurements for his shoulders. In addition, Dr. Wheelhouse testified that Employee's neck injury in no way affected his assessment of Employee's shoulder injury. Employee also stresses that Employer offered no expert medical testimony to counter Dr. Wheelhouse's opinion.

In light of the lack of medical proof to contradict Dr. Wheelhouse's assessment, we are unable to find that the trial court erred in holding that Employee sustained an 11% impairment as a result of a work-related injury to his shoulders. Accordingly, we affirm the trial court's holding concerning that issue.

We next consider whether the trial court erred by exceeding the one and one-half times

statutory cap in awarding Employee a 50% permanent partial disability to the body as a whole. Tennessee Code Annotated section 50-6-241(d)(1)(A)(Supp. 2004) provides that if an "Employer returns the Employee to employment at a wage equal to or greater than the wage the Employee was receiving at the time of the injury, the maximum permanent partial disability benefits that the Employee may receive is one and one-half (1 1/2) times the medical impairment rating." However, the cap does not apply if the return to work is not "meaningful." *Newton v. Scott Health Care Ctr.*, 914 S.W.2d 884, 886 (Tenn. Workers' Comp. Panel 1995). If there has been no meaningful return to work, a trial court may award benefits up to six times the medical impairment rating pursuant to Tennessee Code Annotated section 50-6-241(d)(2)(A). Id. The Court has held that a return to work is not meaningful if the employee returns to work and subsequently resigns because he is unable to perform his duties due to a work-related injury. *Lay v. Scott County Sheriff's Dept.*, 109 S.W.3d 293, 298 (Tenn. 2003). Furthermore, an employee who resigns after returning to his pre-injury employment may exceed the statutory cap only if the resignation was reasonably related to the injury. *Hardin v. Royal & Sunalliance Ins.*, 104 S.W.3d 501, 505 (Tenn. 2003).

Employer argues that Employee had a meaningful return to work and, therefore, the statutory cap applies in this case. Employer correctly notes that Employee continued to work after sustaining the shoulder injury, as well as after Dr. Wheelhouse imposed permanent restrictions on Employee. Employee did not miss a single day of work as a result of his shoulder injuries. He stopped working only after he sustained a back injury in March 2006. Employer also notes that while Employee complained of shoulder pain that limited his ability to work, he never sought medical treatment for the shoulder injury and took no pain medication for the injury. Although Employee required the assistance of co-workers to perform his duties, this did not prevent him from returning to work, as evidenced by the fact that he remained employed for almost two years after sustaining the shoulder injury.

Employee argues that he did not have a meaningful return to work because of the combined effect of his shoulder, neck, and back injuries. Employee asks the court to apply the reasoning of *Clark v. Lowe's Home Centers*, 201 S.W.3d 647, 648 (Tenn. 2006) to this case. *Clark* clarified the holding of *Brewer v. Lincoln Brass Works, Inc.*, 991 S.W.2d 226, 229 (Tenn. 1999) as standing "only for the proposition that an Employee may not recover for a new injury by seeking to enlarge a prior award. Instead, a new lawsuit must be filed." *Clark*, 201 S.W.3d at 651. *Clark* holds that reconsideration of a prior award under Tennessee Code Annotated section 50-6-241(a)(2) is not precluded by a subsequent work-related injury for which the Employee seeks compensation. *Id*. As Employer notes, however, the issue before the Panel is an initial determination of benefits for the shoulder injuries and whether Employee had a meaningful return to work. *Clark* does not apply simply because Employee suffered additional injuries after his shoulder injury. *Clark* governs cases of reconsideration; the issue of reconsideration is not before the court. As such, *Clark* is not applicable to this case.

In the alternative, Employee argues that exceeding the statutory cap is warranted because Employee testified that he is unable to work within the permanent restrictions imposed by Dr. Wheelhouse. We are mindful of the deference which we afford the trial court regarding its

determination of credibility of witnesses; however, Employee testified that he did not miss a single day of work due to his shoulder injury and continued to work for 20 months after sustaining the shoulder injury. Furthermore, he neither sought nor received medical treatment for the injury at any time. Accordingly, we find that the preponderance of the evidence establishes that Employee had a meaningful return to work. For injuries occurring on or after July 1, 2004, the Employee may receive up to one and on-half times the medical impairment. TCA Section 50-6-241(d)(1)(A). Consequently, Employee's award must be capped at one and one-half times the medical impairment rating, or 16.5 percent.

V. CONCLUSION

The judgment of the trial court is affirmed in part and reversed in part and modified to award Employee 16.5 percent permanent partial disability benefits to the body as a whole. Costs are taxed to the appellee, Robert Kellow, for which execution may issue if necessary.

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RICHARD E. LADD, SPECIAL JUDGE

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JUNE 26, 2007 SESSION

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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 Appellee, Robert Kellow, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM