

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 27, 2012 Session

TERRY FLATT v. ERMIC

**Appeal from the Chancery Court for Madison County
No. 65325 James F. Butler, Chancellor**

No. W2012-00483-SC-WCM-WC - Mailed October 26, 2012; Filed January 10, 2013

An employee sought reconsideration of his workers' compensation settlement after his position was terminated due to a reduction in workforce. His employer subsequently offered employment to the employee on two occasions after his termination. His employer contended that the employee did not have a loss of employment. The trial court found that the employee was eligible for reconsideration and awarded additional benefits. The employer has appealed, contending that the trial court erred by finding that the employee was eligible for reconsideration. In the alternative, the employer contends that the trial court's award was excessive. We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;
Judgment of the Chancery Court Affirmed**

TONY A. CHILDRESS, SP. J., delivered the opinion of the Court, in which JANICE HOLDER, J. and DONALD E. PARISH, SP. J., joined.

Jeffrey G. Foster and David E. Goudie, Jackson, Tennessee, for the appellant, ERMIC.

Edward L. Martindale, Jr., Jackson, Tennessee, for the appellee, Terry Flatt.

MEMORANDUM OPINION

Factual and Procedural Background

Terry Flatt worked for ERMIC as a security guard at the Old Hickory Mall, located in Jackson, Tennessee, from 2004 until June 2011. In May 2006, Mr. Flatt injured his neck moving a large planter. He was referred to Dr. John Brophy, a neurosurgeon. After a long

period of conservative treatment, Dr. Brophy performed a surgical fusion of the C5, C6, and C7 vertebrae. Dr. Brophy assigned Mr. Flatt an 11% impairment to the body as a whole due to Mr. Flatt's injury and surgery. Dr. Samuel Chung, an evaluating physician, assigned Mr. Flatt a 26% impairment to the body as a whole due to his injury and surgery.

Mr. Flatt filed a complaint for workers' compensation benefits on April 2, 2008, in the Chancery Court for Madison County, Tennessee. Mr. Flatt's workers' compensation claim was settled based on a 33.4% permanent partial disability to the body as a whole. Tennessee Code Annotated section 50-6-241(d)(1)(a) (2008) limits an employee's recovery to one and one-half times the medical impairment rating when the 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 settlement agreement was approved by the trial court on May 26, 2009. He returned to work on a full-time basis with no restrictions for two and one-half years before his position was terminated.

Mr. Flatt continued to work for ERM C until June 29, 2011. On that day, ERM C informed Mr. Flatt that he was being terminated due to a reduction in workforce. Mr. Flatt signed a form indicating that his job had been eliminated and that he would have to reapply for future job openings. Mr. Flatt was required to turn in all of the equipment used in his employment. After his termination, Mr. Flatt requested a reconsideration benefit review conference on July 1, 2011. See Tenn. Code Ann. 50-6-241(d)(1)(B)(iv). On August 18, 2011, the parties reached an impasse and on August 22, 2011, Mr. Flatt filed a petition for reconsideration in the Chancery Court for Madison County. See Id.

Shawn Evans, Mr. Flatt's supervisor at ERM C, testified that Mr. Flatt's termination was due to a reduction in workforce. Mr. Evans testified that he spoke to Mr. Flatt privately sometime after Mr. Flatt's June 29, 2011 termination and informed Mr. Flatt that additional funding to hire an employee might become available in the near future. If this occurred, Mr. Evans would make a request that Mr. Flatt be rehired. Mr. Flatt denied that this conversation took place.

Additional funding did become available, and in late August 2011, Mr. Evans offered Mr. Flatt a part-time position. Mr. Flatt declined that offer. In December 2011, Mr. Flatt was offered a full-time position. Mr. Flatt also declined the offer of a full-time position. Mr. Flatt testified that he declined both employment offers because he felt he had been terminated unfairly and because his mother was ill.

Mr. Flatt agreed that he had no permanent medical restrictions from his neck injury. He did identify, however, two activities while working for ERM C that caused him some difficulty. One of those activities was the "light check." This activity consisted of inspecting

all of the light fixtures in the mall parking lot to locate any lights that needed to be repaired or lightbulbs that needed to be replaced. Mr. Flatt testified that the stiffness in his neck caused by his injury made it difficult for him to look upward to check the lights. The light check task was required once per week and took approximately twenty minutes to complete. The other activity that caused Mr. Flatt difficulty was operating a vehicle referred to as a "T3," which was used to patrol the parking lot. Mr. Flatt testified that the T3 did not have shock absorbers and that he experienced discomfort when operating this vehicle because it jarred him. Mr. Flatt also testified, however, that he was able to ride and care for horses that he owned.

On the date of trial, Mr. Flatt was fifty-seven years old. He had an eighth-grade education, and his work experiences were primarily limited to the areas of broadcasting and security. Mr. Flatt was unemployed at the time of the trial. Mr. Flatt collected unemployment benefits after his June 29, 2011, termination. Those benefits, however, were discontinued after he declined ERMC's offers of employment. Mr. Flatt testified that he had applied "for pretty much everything in radio here in Jackson." He also applied for employment at security companies, convenience stores, and a landscaping company. Mr. Flatt continued to have pain and stiffness in his neck, and that the pain interfered with his ability to sleep. Mr. Flatt's ability to look up and to turn his head to the right or left was limited. Mr. Flatt stated that his symptoms prevented him from performing much of his yard work and that he occasionally took over-the-counter pain medications.

The trial court found that Mr. Flatt had been terminated from his job with ERMC and was therefore eligible to seek reconsideration of his earlier settlement. The trial court took into consideration Mr. Flatt's age and limited education and observed that Mr. Flatt's work history was primarily in the radio industry and as a security guard. Using the method approved in Lazar v. J. W. Aluminum, 346 S.W.3d 348 (Tenn. 2011), the trial court found that the 2009 settlement was based on an anatomical impairment of 22.27% to the body as a whole. The trial court concluded that the 2006 injury had caused Mr. Flatt to sustain a 78% permanent partial disability to the body as whole. The trial court gave ERMC a credit for the amount paid in the 2009 settlement and entered judgment accordingly. ERMC has appealed, contending that the trial court erred by finding that Mr. Flatt was eligible for reconsideration. In the alternative, ERMC argues that the amount of Mr. Flatt's disability award was excessive.

This appeal has been referred to a Special Workers' Compensation Panel for a report on its findings of fact and conclusions of law. Tenn. Sup. Ct. R. 51, § 1. The standard of review of findings of fact in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008).

Questions of law are reviewed de novo with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

I. Reconsideration

The first issue is whether Mr. Flatt's termination on June 29, 2011, made him eligible for reconsideration, and, if so, whether ERMC's offers of employment after Mr. Flatt's termination affected his eligibility for reconsideration.

ERMC contends that the trial court erred by finding that Mr. Flatt was eligible to seek reconsideration of his 2009 settlement. Specifically, ERMC asserts that Mr. Flatt did not have a loss of employment because ERMC offered to rehire him on a part-time basis in August 2011 and on a full-time basis in December 2011. Mr. Flatt contends that his termination was a loss of employment that triggered a right to reconsideration of the prior settlement pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(B).

To be eligible for reconsideration, an employee must experience a work related injury and receive benefits for injuries to the body as a whole pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A). If the employee is no longer employed by the pre-injury employer within 400 weeks of his return to work and his loss of employment is not due to a voluntary resignation, retirement, or misconduct of the employee, the employee is eligible to seek reconsideration of the original award. Tenn. Code. Ann. § 50-6-241(d)(1)(B)(i), (iii).

The form ERMC gave Mr. Flatt on June 29, 2011, indicted that Mr. Flatt's job had been eliminated and that he could reapply for any future job openings. This form stated that Mr. Flatt was no longer employed at ERMC and that if he wished to return to work for ERMC he would have to reapply. Mr. Flatt testified that on June 29, 2011, it was his understanding that his job had been terminated. Mr. Evans told Mr. Flatt that an employment opportunity might arise if funds became available and, if so, Mr. Evans would make a request that Mr. Flatt be rehired. Although Mr. Flatt denied this conversation occurred, the conversation described by Mr. Evans did not occur until Mr. Flatt had been terminated from his position. The evidence in the record does not establish that Mr. Flatt's termination was anything other than a permanent loss of employment. Accordingly, Mr. Flatt's previous award was eligible for reconsideration.

ERMC asserts that Mr. Flatt is not entitled to reconsideration of his award following his loss of employment due to a reduction in workforce because ERMC offered to rehire Mr.

Flatt full-time at his previous position six months later. ERMC has not cited, nor have we been able to locate, any Tennessee case or authority supporting ERMC's position. ERMC argues that public policy demands that Mr. Flatt should not be entitled to reconsideration. ERMC relies on Edwards v. Saturn Corp., No. M2007-01955-WC-R3-WC, 2008 WL 4378188 (Tenn. Worker's Comp. Panel Sept. 25, 2008), and Tennessee Code Annotated section 50-6-241(d)(1)(B)(i) (Supp. 2012) to support its position. ERMC argues that the public policy evident in Tennessee Code Annotated section 50-6-241(d)(1)(B)(i) should apply to "protect employers from the negative consequences of acting out of economic necessity."

Tennessee Code Annotated section 50-6-241(d)(1)(B)(i) is not applicable in this case. The amended portion of Tennessee Code Annotated section 50-6-241(d)(1)(B)(i) refers only to those employees who continue in their employment but experience a reduction in pay or a reduction in hours affecting at least 50% of all hourly employees due to economic reasons. Mr. Flatt did not continue to work for ERMC. Rather, Mr. Flatt's employment was terminated on June 29, 2011.

Finally, Edwards is distinguishable from this case. The employee in Edwards returned to work at a wage equal to or greater than the wage he was receiving prior to his last day of work and received a workers' compensation award that was capped at one and one-half times his medical impairment rating. Edwards, 2008 WL 4378188, at *3. He had no medical restrictions and worked without medical complication. More than one year later, he was subject to a plant-wide lay-off and maintained that status at the time of the trial of his workers' compensation case. Id. at *4. At issue in Edwards was whether an otherwise meaningful return to work "is automatically frustrated" by a subsequent lengthy plant-wide layoff. Id.

More importantly, in Edwards the employee was determined to have been an employee of General Motors during his lay-off period. He received virtually all of his benefits and all but 5% of the pre-lay-off compensation from the employer during the time in which he was subject to the plant-wide lay-off. Id. at *6-8. The employee in Edwards also received "one cost-of-living increase during his lay-off." Id. at *6. This Court concluded that the employee did not experience a loss of employment and that the employee had a meaningful return to work despite having been subjected to a lay-off. Id. at * 7.

In this case, however, ERMC did not provide Mr. Flatt with any benefits or compensation after he was terminated. Moreover, unlike the employee in Edwards, Mr. Flatt's termination was a permanent loss of employment. ERMC did not guarantee Mr. Flatt future employment at the time of his termination. See Haney v. Five Rivers Elec. Innovations, LLC, E2004-01941-WC-R3-CV, 2006 WL 2423430, at *5 (Tenn. Workers'

Comp. Panel Mar. 7, 2006) (concluding that it would be unreasonable to limit an award under Tennessee Code Annotated section 50-6-241 when the employee is returned to work but is then terminated due to no fault of his own and with no assurance that he will be re-employed in the future).

We conclude that Mr. Flatt was eligible to seek reconsideration because he applied for reconsideration after experiencing a loss of employment within 400 weeks of the day he returned to work for ERMC after his injury. See Tenn. Code Ann. § 50-6-241(d)(1)(B)(i). ERMC's subsequent offers of employment after Mr. Flatt's position was terminated have no bearing upon whether Mr. Flatt's case is eligible for reconsideration. Accordingly, after our review of the record, we conclude that the evidence does not preponderate against the trial court's finding that Mr. Flatt's loss of employment gave rise to a right of reconsideration pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(B).

II. Excessive Award

In the alternative, ERMC asserts that the evidence preponderates against the trial court's finding that Mr. Flatt sustained a 78% permanent partial disability to the body as a whole from his injury. In support of its contention, ERMC notes that Mr. Flatt had no permanent medical restrictions and is still capable of working in radio or as a security guard.

The extent of an injured worker's permanent disability is a question of fact. Lang v. Nissan N. Am., Inc., 170 S.W.3d 564, 569 (Tenn. 2005)(citing Jaske v. Murray Ohio Mfg. Co., Inc., 750 S.W.2d 150, 151 (Tenn. 1988)). In making determinations on vocational disability, the trial court considers all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition. Tenn. Code Ann. § 50-6-241 (2008); Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn.1990); Roberson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn.1986). The trial court is not bound to accept physicians' opinions regarding the extent of a claimant's disability. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 677 (Tenn.1983). However, an employee's assessment of his physical condition and resulting disabilities may not be disregarded. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn.1975).

Mr. Flatt had no permanent medical restrictions after returning to work, and he performed his job for nearly two and one-half years after his injury. Mr. Flatt testified, however, that his neck injury made some of his job duties with ERMC more difficult. Mr. Flatt was fifty-seven years old, had only an eighth-grade education, and his work experiences were limited to the areas of broadcasting and security. In spite of numerous applications, Mr.

Flatt remained unemployed at the time the trial occurred, more than five months after his termination.

Although Mr. Flatt could have obtained employment with ERMC after his termination, the trial court declined to consider ERMC's offers of employment in determining the appropriate reconsideration award. The trial court discredited ERMC's offers of employment because they were "fraught with uncertainty." The trial court reasoned that if Mr. Flatt were required to accept ERMC's employment offers, ERMC could again terminate Mr. Flatt's employment "without any consequences and with impunity."

This Court can "reverse or modify a trial court's award of workers' compensation benefits under the appropriate circumstances . . ." Howell, 346 S.W.3d at 474 (Tenn. 2011) (citing Tryon, 254 S.W.3d at 335). It is not the role of this Court to substitute its judgment in place of the trial court in assessing an employee's vocational disability. Id. After our review of the record, we are unable to conclude that the evidence preponderates against the trial court's finding on this issue.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to ERMC and its surety, for which execution may issue if necessary.

TONY A. CHILDRESS, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

TERRY FLATT v. ERM

**Chancery Court for Madison County
No. 65325**

No. W2012-00483-SC-WCM-WC - Filed January 10, 2013

ORDER

This case is before the court upon the motion for review filed on behalf of ERM pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(A)(ii), 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 ERM and its surety for which execution may issue, if necessary.

PER CURIAM

JANICE M. HOLDER, J., not participating