IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
August 2000 Session

HAROLD W. FERRELL, JR. v. APAC-TENNESSEE, INC. and CIGNA PROPERTY & CASUALTY INSURANCE CO.

Direct Appeal from the Circuit Court for Warren County
No. 10077 J. Richard McGregor, Special Judge

No. M1999-02260- WC-R3-CV - Mailed - October 30, 2000
Filed - December 1, 2000

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. section 50-6-225 (e)(3) for hearing and reporting findings of fact and conclusions of law. The employer contends the trial court erred in finding that the plaintiff suffered a vocational disability of 12% to the body as a whole from his back injury, and an additional 15% to the left arm from his wrist injury which occurred two months later. As discussed below, the panel concludes that the judgment of the trial court should be affirmed. The panel further concludes that the appeal was frivolous or for the purpose of delay and remands the case to the trial court for imposition of appropriate penalty.

Tenn. Code Ann. § 50-6-225(e) (2000) Appeal as of Right; Judgment of the Circuit Court Affirmed, Remanded

JOHN A. TURNBULL, SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, J. and FRANK G. CLEMENT, Jr., Sp. J, joined.

William Joseph Butler and Frank D. Farrar, LaFayette, TN, for the Appellee Harold W. Ferrell, Jr.

Tyree B. Harris, IV, and Alan D. Johnson, Nashville, TN, for the Appellants APAC-Tennessee, Inc. and Cigna Property and Casualty Insurance Company

MEMORANDUM OPINION

Facts

This case encompasses two separate on-the-job injuries, and two separate awards by the trial judge. Harold W. Ferrell, Jr., ("Ferrell"), the 37 year old employee-appellee, worked approximately 18 years for APAC-Tennessee ("APAC") employer-appellant, doing construction and manual labor.

He has an eleventh grade education, but no G.E.D. On or about March 18, 1997, Ferrell injured his back while lifting a manhole cast-iron casting while working for APAC. Ferrell went to the emergency room, received treatment and was referred by APAC to Dr. Campbell for further treatment. Ferrell retumed to work at a light duty assignment for a short time, but soon resumed his full duties.

On or about April 20 or 30, 1997, Ferrell sustained an injury to his left arm when he slipped and fell while climbing down the tracks of a bulldozer he had been operating. The injury occurred when Ferrell reached his arm out to prevent his fall. Ferrell sought medical treatment for the arm approximately one week later. APAC once again referred Ferrell to Dr. Campbell.

The only medical proof offered by either side at trial was the C-32 Form of Dr. C. Robinson Dyer, a board certified orthopaedic surgeon who examined Ferrell at his attorney's request. Dr. Dyer indicated that it was more probable than not that Ferrell's back and arm injuries arose out of his employment. He assigned Ferrell a permanent partial impairment rating of 5% to the left arm, and 5% to the body as a whole for the back injury.

In addition, Dr. Dyer imposed significant restrictions related to the back injury which included: no lifting or carrying more than 50 pounds; no frequent lifting or carrying over 20 pounds; and only occasional climbing, stooping and kneeling. Restrictions placed by Dr. Dyer relative to the left wrist injury included avoiding overhead motion and repetitive twisting of the wrist. These restrictions were first placed on Ferrell by Dr. Dyer on August 11, 1999. After his injuries, Ferrell continued to work for APAC and performed the full duties and occasional heavy lifting and bending required by his job. Ferrell testified that performance of these tasks was followed by resultant pain and stiffness. Ferrell was permanently laid off by APAC in May of 1998 for "lack of work."

The only other witness at trial was Harold W. Ferrell, Sr., who, in addition to being the employee's father, was Ferrell's foremen at APAC. APAC offered no witnesses and no evidence. The trial judge made as a specific finding: "I find the witnesses to be credible."

The trial court assigned Ferrell a 15% permanent partial disability to the left arm and 12% permanent partial disability to the body as a whole. The trial court was forced to rely heavily on Dr. Dyer's C-32 Form, the only medical proof before the court.

The standard of review for findings of fact by the trial court is "de novo upon the record of trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of evidence is otherwise." Tenn. Code Ann. Section 50-6-225(e)(2)(1999). The trial court is in the best position to evaluate the credibility of witnesses. *Story v. Legion Ins. Co.*, 3 S.W.3d 450, 451 (Tenn. 1999). APAC contends that the employee missed no work as a consequence of his injury and has subsequently obtained employment with another construction company doing a similar job at an increased wage with no seasonal layoff. APAC argues that the test for vocational disability is "whether there has been a decrease in the employee's capacity to earn wages in any line of work

available to the employee." *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 678 (Tenn. 1991).

According to APAC, the employee's earning capacity in the open labor market has not been diminished and, as a result, the employee's recovery should be limited to twenty weeks of permanent partial disability benefits for the back injury and six weeks permanent partial disability for the arm injury.

This reading of *Orman* is not the correct one. On more than one occasion, this court has stated "that a vocational disability results when 'the employee's 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.'" *Walker v. Saturn Corporation*, 986 S.W.2d 204 (Tenn. 1998) (quoting *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 458 (Tenn. 1988)). Simply because Ferrell has procured employment at a better wage does not entail that the avenues of employment that were reasonable and previously available to him are still available now that he is injured. The effect of this injury on Ferrell's earning capacity on the open labor market is that the injury has reduced his options considerably, among those that were available to him in an uninjured condition. See generally *Corcoran*, 746 S.W.2d at 459-460.

To assess the extent of an employee's vocational disability, the trial court may consider the employee's skill, training, age, local job market, anatomical impairment rating, and his capacity to work at the kinds of employment available to one in the disabled condition. Tenn. Code Ann. Section 50-6-241 (b) (Supp. 1998). See *Walker*, 986 S.W.2d at 204. The employee's own assessment of his own physical condition and disabilities may not be disregarded. See Id. The trial court should consider all evidence, both expert and lay testimony, to decide the extent of the employee's disability. See Id.

APAC chose not to put forth any evidence, medical or otherwise, and further chose not to cross-examine the medical evidence presented by Ferrell. The trial court found Ferrell and his father to be credible witnesses. Since APAC chose not to put on a defense, other than to suggest Ferrell still has the capacity to earn a comparable living, the evidence does not preponderate against the correctness of the trial court's findings.

Frivolous Appeal

Tennessee law permits any reviewing court to award damages for a frivolous appeal:

> When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of *its own motion*, award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

Tenn. Code Ann. Section 27-1-122 (1999) (emphasis added).

The legislature supplemented this provision in 1992 when this appellate panel was created. Tenn. Code Ann. 50-6-225 (h) now provides:

> When a reviewing court determines pursuant to a motion or *sua sponte* that an appeal of an employer or insurer is frivolous, or taken for purposes of delay, a penalty may be assessed by such court, without remand, against the appellant for liquidated damages.

Tenn. Code Ann. 50-6-225 (i) is a corresponding frivolous appeal provision applying to the employee.

The intent of the legislature to encourage early resolution of workers' compensation cases is unmistakable. Employers will no longer be permitted to starve an employee into submission by withholding temporary disability benefits or medical benefits. Instead, if such benefits are withheld in bad faith, significant penalties may be imposed by the courts[1]. Parties are encouraged to resolve cases in an early and efficient manner. If cases cannot be resolved by settlement through the mediation process established by the legislature, trial courts are directed to give workers' compensation cases precedence on the docket[2]. Finally, if cases are appealed frivolously or for the purpose of delay, penalties may be imposed[3]. Appellate courts should not stifle the right to appeal by imposing penalties if a case raises a legitimate factual or legal issue. Conversely, the appellate courts should not be timid about imposing penalties for frivolous appeals when there is raised no legitimate factual or legal issue, especially if, on the factual issue raised, the trial court has made a specific credibility finding. Parties in workers' compensation cases are not to play games, but instead parties must consider seriously the rights and duties created by workers' compensation law. Significant rights which affect peoples lives are at stake. Where there is no reasonable basis for appeal, penalties should be vigorously applied by the appellate court if the legislative intent is to be given life.

This panel recognizes that the economics of the practice of law do not always permit otherwise zealous advocates to hire experts, call multiple witnesses and thoroughly prepare every possible avenue of defense where the damages at issue in a given case are relatively minor. However, if a defendant is so uninterested in exerting either the effort or expense of defending itself at trial that it chooses to offer no medical proof, no exhibits and no witnesses to rebut the plaintiff's more than adequate showing, then any appeal pursued with a corresponding level of disinterest must

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[1]Tenn. Code Ann. Section 50-6020 5(6)(3); Tenn. Code Ann. Section. 50-6-225(j)

[2]Tenn. Code Ann. Section 50-6-225 (f)(1)

[3]Tenn. Code Ann. Section 50-6-225 (h)

necessarily be viewed as frivolous and as a waste of this court's time. This court clearly has the authority to award damages for frivolous appeal *sua sponte.* See *Norton Creek Community Ass'n vs. Rodman Corp.*, 560 S.W.2d 914 (Tenn. Ct. App. 1977) ("The complaint filed below was frivolous and this appeal is frivolous. *Sua sponte* we invoke T.C.A. Section 27-124.")' see also

Davis vs. Gulf Ins. Group, 546 S.W.2d 583 (Tenn. 1977) ("[T]his appeal ... presents no justifiable questions - neither debatable questions of law nor findings of fact not clearly supported. It is difficult to believe that such an appeal could serve any purpose other than harassment.")

This appeal had no reasonable chance of success and is devoid of merit. No novel or new questions of law are presented. There is essentially no dispute as to the facts. The trial judge found the employee credible. The awards were modest. Since the appeal had no reasonable chance of success and presented no debatable questions of law or fact, it can be reasonably inferred that the appeal serves only to delay. We accordingly find the appeal to be frivolous and remand the case to the trial court for imposition of appropriate penalty for frivolous appeal which may include, but need not be limited to, costs, interest on the judgment, expenses and attorney fees.

Conclusion

The judgment of the trial court is affirmed in all respects. In addition, the appeal is found to be frivolous and the case is remanded to the trial court for imposition of an appropriate penalty. The costs on appeal are assessed against appellants.

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JOHN A. TURNBULL, SPECIAL JUDGE

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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 appears 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, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM