IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
March 15, 2001 Session

DREW DAVIS v. AVRON TRUSS COMPANY, INC.

Direct Appeal from the Circuit Court for Cumberland County
No. CV002996 John A. Turnbull, Judge

No. E2000-00780-WC-R3-CV - Mailed - May 31, 2001
FILED: JULY 5, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court found the fired plaintiff's return to work non-meaningful and awarded eighteen percent vocational disability. The plaintiff's misconduct was found irrelevant because he had not reached maximum medical improvement on the day he was fired. The trial court also awarded discretionary costs to the plaintiff. We find an employer may dismiss an injured employee for egregious misconduct, such as fighting with a fellow employee, regardless of the injured employee's medical status at the time of the misconduct. We therefore affirm the judgment of the trial court, but we modify the award to two and one-half times the impairment rating given by the employee's physician or fifteen percent. We also affirm the trial court's judgment fully with respect to discretionary costs.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court is Affirmed as Modified

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which E. RILEY ANDERSON, C.J., and ROGER E. THAYER, SP. J., joined.

Richard Lane Moore, Cookeville, Tennessee, for the appellant Avron Truss Company, Inc.

James P. Smith, Crossville, Tennessee, for the appellee, Drew Davis.

MEMORANDUM OPINION

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2). *Stone v. City of McMinnville,* 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more

depth the factual findings and conclusions of the trial courts in workers' compensation cases. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

Facts

The plaintiff, age twenty-nine at the time of trial, has no high school diploma. He has certification as a welder, but he testified he could not currently perform that job. The plaintiff's previous work history consists mainly of unskilled labor and work as a hunting guide.

On August 28, 1998, the plaintiff injured his left shoulder in a work-related fall. He was provided with medical care and benefits. The injury required rotator cuff surgery, which was performed on October 18, 1998. The plaintiff returned to work with medical restrictions.

After the plaintiff returned to work, he became involved in a fist fight with a fellow employee. The defendant warned the plaintiff that he would be fired if another such incident occurred. On January 7, 1999, the plaintiff engaged in a second round of fisticuffs with the same employee. During the second incident, a supervisor, who was trying to separate the two combatants, was struck in the face by the plaintiff. The plaintiff and the other employee were fired immediately; neither employee was allowed to return to work for the defendant. The plaintiff had not yet reached maximum medical improvement.

The trial court found the plaintiff had not been afforded a meaningful return to work and awarded eighteen percent vocational disability based on the physical impairment rating given by the plaintiff's physician. The trial court found the plaintiff's bouts of fist fighting were beside the point because the plaintiff had not reached maximum medical improvement when he was fired. The trial court also awarded discretionary costs for court reporting and transcripts pertaining to the plaintiff's unemployment hearing because the plaintiff was forced to obtain the transcript to prepare for cross-examination and impeachment attempts by the defendant.

Medical Evidence

Dr. Susan Pick, M.D., an orthopedic surgeon, testified by deposition. Dr. Pick treated the plaintiff for the injury that resulted from his August 23, 1998, work-related fall. She performed the plaintiff's rotator cuff surgery on October 18, 1998. Dr. Pick imposed medical restrictions of lifting no more than twenty-five pounds before allowing the plaintiff to return to work. She did not place the plaintiff at maximum medical improvement until March 23, 1999. Dr. Pick opined the plaintiff had retained a permanent impairment of ten percent to the left upper extremity or six percent to the whole body.

Discussion

Tennessee Code Annotated § 50-6-241(a)(1) limits a workers' compensation award to two and one-half times the impairment rating if the pre-injury employer returns the injured employee to employment at a wage equal to or greater than the wage earned by the employee at the time of the injury. The employee must, however, have a meaningful return to work.

An assessment of a meaningful return to work includes an analysis of the employer's offer to return the employee to work, the nature of the work to be performed in relation to the employee's medical restrictions and the reasonableness of a refusal to return to work in light of the medical restrictions. In cases involving an employee who returns to work and then leaves, the reason for leaving the job should be analyzed as well. *See Newton v. Scott Health Care Ctr.*, 914 S.W.2d 887 (Tenn. 1995). A meaningful return to work depends upon the facts of each case. *Id.*

In *Niziol v. Lockheed Martin Energy Systems, Inc.*, 8 S.W.3d 622 (Tenn. 1999), the Court held a worker, when terminated for reasons unrelated to the injury, may petition to reopen a case under Tennessee Code Annotated § 50-6-241(a)(2) for an increase in an award that had previously been limited to two and one-half times the medical impairment rating because the worker was returned to work with the pre-injury employer at a salary equal to or greater than the salary earned prior to the injury as defined under Tennessee Code Annotated § 50-6-241(a)(1).

This rule would seem to be applicable in a case where the plaintiff is returned to work after an injury and terminated prior to the conclusion of a compensation claim. However, we conclude that the *Niziol* rule is only applicable in a case where the termination of the employment is brought about by the employer and not by the employee.

We do not conclude that a worker who has been returned to work and is subject to the limit of two and one-half times the medical impairment rating, can by his or her own misconduct, bring about the termination of the employment and then recover at a rate of six times the medical impairment rating as set out in Tennessee Code Annotated § 50-6-241(a)(2)(b).

In this case, the worker was performing his job duties within his medical restrictions at the time of his misconduct and discharge; he did not leave because of an inability to perform his job duties, thus rendering his return to work non-meaningful. Likewise, the plaintiff was not dismissed because of ill job performance due to his injury. The plaintiff was dismissed because he engaged in two fistfights with a fellow employee and hit a supervisor during the second fight. Moreover, after the first fight, the plaintiff was warned that he would be dismissed if a second incident occurred. The fact that the employee had not reached maximum medical improvement is of no import when wilful misconduct of this type is involved.

The evidence shows the plaintiff was afforded a reasonable return to work; therefore, he may recover only two and one-half times his medical impairment rating of six percent, which is fifteen percent.

We affirm the judgment of the trial court, but we modify the judgment and award the plaintiff fifteen percent vocational disability to the body as a whole, which is two and one-half times the six percent whole body medical impairment rating found by the plaintiff's physician. The defendant will, of course, be responsible for the plaintiff's medical care and future treatment required by the August 23, 1998, injury. We also find the evidence does not preponderate against the trial court's award of discretionary costs.

The costs of this appeal are taxed to the plaintiff.

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JOHN K. BYERS, SENIOR 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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

Costs on appeal are taxed to the plaintiff, Drew Davis, for which execution may issue if necessary.

07/05/01