

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE

January 10, 2002 Session

BIRDIE I. TREECE v. LEAR CORPORATION

**Direct Appeal from the Circuit Court for Hamblen County
No. 99-CCV-259 Kindall Lawson, Circuit Judge**

Filed April 24, 2002

No. E2001-02160-WC-R3-CV

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 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 employee was totally and permanently disabled. The court also found the employer was entitled to a set off for payment of long-term disability benefits and made other rulings as to the employee's rights under the employer's disability retirement plan. Judgment of the trial court is affirmed as to the award of total disability and set off rulings, and vacated as to issues relating to the employee's vested rights to future disability retirement benefits.

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

THAYER, SP. J., delivered the opinion of the court, in which ANDERSON, J., and BYERS, SR. J., joined.

Robert S. Hahn, of Morristown, Tennessee, for Appellant, Lear Corporation.

James M. Davis, of Morristown, Tennessee, for Appellee, Birdie I. Treece.

MEMORANDUM OPINION

In this case the trial court found the employee was totally and permanently disabled and ordered benefits paid until the employee became 65 years of age. The court further found the employee had been declared totally disabled under an employer funded disability retirement plan and made certain rulings as to a set off pursuant to the provisions of Tenn. Code Ann. § 50-6-114(b). The employer has appealed insisting the employee is not totally disabled and also that the court was in error in applying the set off and ruling on the payment of future retirement disability benefits.

Factual Background

The employee, Birdie I. Treece, a high school graduate, was 58 years of age at the time her gradual injuries forced her to stop working for Lear Corporation during January 1999. She had worked for Lear for 29 years and held different positions during her long-term employment. She testified most all of her jobs required repetitive use of her arms and some heavy lifting.

On January 28, 1999, her last day of work, she stated she ran parts for a robot and that she “had to take two side members and grind the burrs off, put two brackets into a welder and side members into a welder and we then put them through another machine.” In the history given to her surgeon, she described her position as a machine welder. She testified the pain in her shoulders and hip became so bad that she had to stop working and seek medical treatment. After surgery on her shoulder, she told the trial court she was not able to perform any of the jobs she had performed at Lear Corporation and that she was unable to work anywhere. The record indicates she is receiving Social Security disability benefits.

Medical Evidence

All of the expert medical evidence was presented by deposition.

Ms. Treece was first examined by Dr. Evelyn Cintron, an internal medicine physician, who testified that the employee had severe bursitis in both shoulders and her right hip; that her right shoulder was worse than the left; and she was “absolutely” of the opinion that her long-term employment activities had aggravated her condition; that therapy both before and after her surgery had helped to some extent but she would never be back to normal; and that her medical impairment was in the range of moderate to severe but no percentage was given. She agreed that restriction on any activities would be as her surgeon had recommended.

Dr. William J. Gutch, a retired orthopedic surgeon, performed an independent medical examination during June 2000 and reviewed reports of her family physician and surgeon. He was of the opinion her medical impairment would be 16 percent to her upper right extremity or 10 percent to the whole body. He testified her work activities had caused her condition and that “over the years, she gradually wore out that shoulder.”

Dr. George Baddour, Jr., an orthopedic surgeon, performed surgery on her right shoulder for a rotator cuff tear during November 1999. He stated she reached maximum improvement on May 10, 2000; that she had a 13 percent impairment to her right extremity or 8 percent to her whole body. He indicated her recovery was reasonably well but that the surgical procedure was a tightening operation and most patients would have some decreased range of motion. He imposed restrictions of no overhead lifting; no carrying more than 20 pounds at waist level and no pushing or pulling more than 20 pounds with the affected arm.

Other Pertinent Facts

The evidence established that Ms. Treece was a member of the United Auto Workers Union and that the union and employer had created regular retirement and disability retirement plans as a result of a collective bargaining agreement which had been in effect since 1971. The disability retirement plan was totally funded by the employer and the employer was self-insured with respect to payment of workers' compensation benefits, group health insurance and disability retirement benefits.

It also appears the employee's claim for workers' compensation benefits was originally declined and her medical bills were processed under the company's general health insurance plan which Ms. Treece testified only paid 80 percent and that she paid the remaining 20 percent.

As to the payment of any benefits to the employee before the trial below, it appears she was never paid any workers' compensation benefits but she did receive \$257 per week in short-term disability benefits for a total period of 52 weeks. Also she officially retired from Lear in August 2000 and qualified for long-term disability retirement benefits in the sum of \$719 per month which she said she begin to receive during November 2000 when she received three payments. In order to qualify for this benefit, she had to establish she was between the ages of 40 and 65 years, had at least 10 years of credited service and was totally and permanently disabled from performing any type of gainful employment. The employer funded plan provided for a set off stating the disability retirement benefit "will be reduced by any workers' compensation benefits you may receive."

Findings of Trial Court

The trial court ruled the claim was compensable and the employee was totally and permanently disabled; that she was entitled to temporary total disability benefits from January 28, 1999 to her maximum recovery date of May 10, 2000; that she recover all medical expenses; be reimbursed for certain mileage expenses; be awarded a lump sum for attorney's fees; and recover certain discretionary costs.

With respect to the issue regarding any set off, the court only allowed a set off against the workers' compensation award for disability retirement payments of \$719 per month which had been paid from November 2000 to June 2001 (trial month). The judgment further provided that (1) the employee would not be entitled to any disability retirement benefits from June 2001 until her 65th birthday, (2) the employer would not be entitled to a set off after her 65th birthday, and (3) the employee's disability retirement benefits would recommence on the date of her 65th birthday.

Issues on Appeal

_____ Lear Corporation contends (1) the trial court was in error in finding the employee was totally disabled, (2) the court was in error in applying the statute, Tenn. Code Ann. § 50-6-114(b), which allows a set off and (3) the set off issue has been preempted by federal legislation, ERISA 29 U.S.C. 1144(a), as applied by the United States Supreme Court in the case of *Alessi v. Ray Bestos*

Manhattan, Inc., 451 U.S. 504 (1981).

Standard of Review

_____ The issues are to be reviewed *de novo* accompanied by a presumption of the correctness of the findings of the trial court unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). However, *de novo* review does not carry a presumption of correctness to a trial court's conclusions of law. *Union Carbide v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993).

Analysis - Total Disability Award

_____ In order to award total disability benefits, the evidence must establish the disability totally incapacitates the employee from working at an occupation which brings the employee an income. Tenn. Code Ann. § 50-6-207(4)(B).

Many factors must be taken into consideration in determining whether an employee is totally disabled such as the employee's age, education, work experience, local job opportunities, etc. and this is to be examined in relation to the open labor market. *Orman v. Williams-Sonoma, Inc.*, 803 S.W.2d 672, 678 (Tenn. 1991); *Clark v. National Union Fire Ins. Co.*, 774 S.W.2d 586, 588 (Tenn. 1989). The statutory definition of total disability focuses on an employee's ability to return to gainful employment. *Davis v. Reagan*, 951 S.W.2d 766 (Tenn. 1997).

The question of the extent of disability is primarily a question of fact for the trial court to determine. The decision will not be overturned on appeal unless the evidence preponderates against the conclusion.

In reviewing the medical evidence, we find that Drs. Baddour and Gutch limited their observations and opinions of impairment to the employee's right extremity or shoulder. Dr. Cintron on the other hand appeared to base her opinion of moderate to severe impairment as a result of the problems with both shoulders and hip. Most of the employee's work experience was over a period of 29 years with defendant corporation and the only other employment involved house cleaning activities which occurred prior to her last employment. At the time of the trial, Ms. Treece was 60 years of age and we are of the opinion the evidence does not preponderate against the conclusion that she is totally and permanently disabled.

Analysis - Set off Issue

The employer did not treat the employee's claim as a workers' compensation claim until the parties were approaching the trial below. The only benefit paid to the employee was some short-term or sickness benefits in the sum of \$257 per week for two 26 week periods of time. Later the employee received long-term disability benefits of \$719 per month which began in November 2000 (three payments) and was paid through June 2001. The trial court declined to allow any set off for payment of short-term or sickness benefits but did allow a set off for payment of the long-term

disability benefits.

Tenn. Code Ann. § 50-6-114 provides as follows:

- (a) No contract or agreement, written or implied, or rule, regulation or other devise, shall in any manner operate to relieve any employer, in whole or in part, of any obligation created by this chapter except as herein provided.
- (b) However, any employer may set off from temporary total, temporary partial, and permanent partial and permanent total disability benefits any payment made to an employee under an employer funded disability plan for the same injury; provided, that the disability plan permits such an offset. Such an offset from a disability plan may not result in an employee receiving less than the employee would otherwise receive under the Workers' Compensation Law. In the event that a collective bargaining agreement is in effect, this provision shall be subject to the agreement of both parties.

Although subsection (b) of the statute allows a set off against temporary total and permanent total disability benefits, there was evidence the employer's disability plan did not provide for a set off for payment of short-term or sickness benefits. Witness Jim Bledsoe, an employee and president of the union, testified he was familiar with the provisions of the collective bargaining agreement and that there was no set off for payment of short-term or sickness benefits. The employer did not offer any evidence to the contrary. We concur with the trial court in not allowing a set off for payment of this benefit since the plan did not recognize a set off for payment of same.

The trial court did allow a set off for payment of long-term disability benefits in the sum of \$719 per month for a certain period of time and there is no issue regarding this ruling.

The remaining part of the judgment attempts to adjudicate the rights and liabilities of the parties under the employer's disability plan. The court held the employee was not entitled to any disability retirement benefits after trial until her 65th birthday; her disability benefits would resume on her 65th birthday; and the employer would not be entitled to any set off after disability benefits resumed. We believe these rulings are beyond the scope of this proceeding and we vacate same. The only issues before the court are the rights and liabilities of the parties under the Workers' Compensation Act. The set off issue only has the effect of reducing the award if disability payments are made. If disability payments are not made, then the full amount of the workers' compensation award would accrue.

Therefore, we find the employee is entitled to an award of workers' compensation benefits at a compensation rate of \$417.83 per week and any disability payments made after trial would be

set off against the workers' compensation award thereby reducing the workers' compensation award. If disability benefit payments are not made, then no set off or credit would exist and the full award of workers' compensation benefits would accrue.

The parties are in obvious dispute as to their rights under the employer's disability plan after workers' compensation benefits cease at age 65. This dispute would have to be resolved at that time. Based on statements made during oral argument, any attempt to require the employee to repay any workers' compensation benefits in order to become eligible for disability retirement benefits would clearly violate the provisions of subsection (a) of the statute.

Analysis - Federal Preemption

The employer argues the set-off issue has been preempted by reason of the provisions of the federal Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1144(a), as applied by the United States Supreme Court in the case of *Alessi v. Ray Bestos Manhattan, Inc.*, 451 U.S. 504 (1981).

In this case retired employees, who had received workers' compensation awards subsequent to retirement, instituted suit in New Jersey state court challenging the validity of certain provisions in their employer's pension plans which reduced a retiree's pension benefit by an amount equal to a workers' compensation award for which the retiree was eligible. The actions were removed to the federal district court where it was ruled the set-off provision was invalid under the New Jersey Workers' Compensation Act. This statute stated: "[t]he right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments." The federal Court of Appeals reversed the ruling and on appeal to the United States Supreme Court, it was held that the New Jersey statute had been preempted by federal law (ERISA) to the extent the statute eliminated a method for calculating regular pension or retirement benefits under plans governed by ERISA.

The plaintiffs in the *Alissi* action were receiving regular retirement or pension benefits and the issue was whether the receipt of workers' compensation benefits would reduce their regular retirement benefits. The decision does not indicate any disability retirement benefits were involved in the issue before the federal courts. Therefore, with all due respect to the United States Supreme Court and its ruling, we find the case is not directly in point with the issue in the action before us.

We find the Tennessee statute intends to guarantee that employees receive the full benefit of the Workers' Compensation Act and to relieve employers from the burden of twice compensating its employees by paying both disability retirement benefits and workers' compensation benefits for the same injury and at the same time. Our statute does not attempt to reduce or affect any regular retirement benefit which the employee may be eligible to receive and there is no evidence Ms. Treece was receiving regular retirement or pension benefits.

For these reasons, we find there has been no federal preemption of the issue of whether

disability retirement benefits may be set off against workers' compensation benefits.

Conclusion

The judgment of the trial court is affirmed as to the award of total disability and allowing a set off against the award for payment of long-term disability benefits. The rulings with respect to the employee's vested rights under the disability retirement plan are vacated. Costs of the appeal are taxed to the employer.

ROGER E. THAYER, 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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the employer for which execution may issue if necessary.