IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 2003 Session

ERNEST L. ATKINSON v. SIGNAGE, INC., ET AL.

Direct Appeal from the Chancery Court for Hickman County
No. 01-232-C Robert E. Lee Davies, Chancellor

No. M2002-01491-WC-R3-CV - Mailed - July 1, 2003
Filed - August 4, 2003

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. In this appeal, the employer and its insurer insist the trial court erred in awarding permanent total disability benefits where the injured employee has returned to work for the same employer at a wage equal to or greater than his pre-injury wage and is working forty hours per week. The employer and its insurer also insist the trial court erred in commuting a portion of the award to a lump sum. As discussed below, the panel has concluded the trial court committed no reversible error.

Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the Chancery Court Affirmed

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., and ALLEN W. WALLACE, SR. J., joined.

Charles S. Herrell, Davies, Humphreys & Evans, Nashville, Tennessee, for the appellants, Signage, Inc. and Liberty Mutual Insurance Company

Larry R. McElhaney, Arena & McElhaney, Nashville, Tennessee, for the appellee, Ernest L. Atkinson

MEMORANDUM OPINION

The employee or claimant, Mr. Atkinson, initiated this civil action to recover workers' compensation benefits for a work related injury. The employer admitted liability but contended the award should be capped at two and one-half times the claimant's undisputed medical impairment rating and paid periodically. After a trial on the merits, the trial court found the claimant to be permanently and totally disabled and awarded disability benefits payable to age 65, commuting a

portion of the award to a lump sum. The employer, Signage, Inc., and its insurer, Liberty Mutual Insurance Company, have appealed.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2002 Supp.). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. 1995). The standard governing appellate review of findings of fact by a trial court requires the Special Workers' Compensation Appeals Panel to examine in depth a trial court's factual findings and conclusions. GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 61 (Tenn. 2001). Where the medical testimony in a workers' compensation case is presented by deposition, the reviewing court may make an independent assessment of the medical proof to determine where the preponderance of the proof lies. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002).

Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 367 (Tenn. 1998). Issues of statutory construction are solely questions of law. Bryant v. Genco Stamping & Mfg. Co., 33 S.W.3d 761, 765 (Tenn. 2000).

The essential facts are undisputed. The claimant was severely injured at work when a large sign fell on him. After surgeries and physical therapy, the employer created a job for him within his medical limitations. As a result the claimant has returned to work in a forty hour per week job at wage greater than his pre-injury wage. Notwithstanding that, a vocational expert testified without contradiction that the claimant is 100 percent unemployable. The appellant contends that the claimant does not qualify for permanent total disability benefits because he is able to earn an income from the job the employer created for him as an accommodation.

Compensable disabilities are divided into four separate classifications: (1) temporary total disability, (2) temporary partial disability, (3) permanent partial disability and (4) permanent total disability. Tenn. Code Ann. § 50-6-207. Each class of disability is separate and distinct and separately compensated for by different methods. Compensation benefits are allowable for an injured employee, separately, for each class of disability which results from a single compensable injury. Redmond v. McMinn County, 209 Tenn. 463, 467, 354 S.W.2d 435, 437 (1962).

When an injury, not otherwise specifically provided for in the Act, totally incapacitates a covered employee from working at an occupation which produces an income, such employee is considered totally disabled. Tenn. Code Ann. § 50-6-207(4)(B). The definition focuses on an employee's ability to return to gainful employment. Davis v. Reagan, 951 S.W.2d 766, 767 (Tenn. 1997). The fact of employment after injury is a factor to be considered in determining whether an

employee is permanently and totally disabled, but that fact is to be weighed in light of all other considerations, including the employee's skills and training, education, age, local job opportunities, capacity to work at the kinds of employment in his or her disabled condition, rating of anatomic disability by a medical expert and the employee's own assessment of his or her physical condition and resulting disability. Vinson v. United Parcel Service, 92 S.W.3d 380, 384-85 (Tenn. 2002).

On those authorities, considering the relevant factors, the claimant is permanently and totally disabled. He has a job because the employer generously created one for him. As this court stated in Skipper v. Great Central Insurance Co., 474 S.W.2d 420 (Tenn. 1971):

> We hold the fact employee is employed after the injury in the same type of employment and at the same wages does not per se preclude the court from finding he is totally disabled as the words are used in T.C.A. 50–1007(e) [now 50-6-207(4)(B)]. To hold otherwise would have the result of discouraging those few hardy individuals who try to work under great physical handicap, by the threat of denying them compensation which they might otherwise be entitled to if they did not work. We do not think it was the intent of the Legislature that the Workmen's Compensation Statutes be so construed. Skipper at 424.

At the time of the trial, the claimant was 53 years old. He has a tenth grade education with a GED obtained in 1985. He has served in the United States Navy, but has no transferable skills. His working experience consists of jobs involving manual labor. His medical impairment rating is 28 percent to the whole body. Considering only the relevant factors enumerated in Vinson, the evidence fails to preponderate against the trial court's finding of permanent total disability.

The appellants, citing Tenn. Code Ann. § 50-6-241(a)(1)[1], contend the claimant's recovery cannot exceed two and one-half times the claimant's medical impairment rating. However, that section, by its plain language, limits the recovery in cases of permanent partial disability, not permanent total disability. The appellants' reliance on the section is therefore misplaced.

The appellants next contend the trial court erred in commuting a portion of the claimant's disability benefits to a lump sum. The trial court commuted benefits which had accrued at the time

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[1] For injuries arising on or after August 1, 1992, in cases where an injured employee is eligible to receive any permanent partial disability benefits, pursuant to § 50-6-207(3)(A)(i) and (F), and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is two and one-half (21/2) times the medical impairment rating determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment (American Medical Association), the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community. In making determinations, the court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition.

of the trial plus 52 weeks and, for the fee of the claimant's attorney, 20 percent of the first 400 weeks of benefits. Upon application by a party and approval by a proper court, benefits which are payable periodically may be commuted to one or more lump sum payments, if the court finds such commutation to be in the best interest of the employee and the employee has the ability to wisely manage and control the commuted award. Tenn. Code Ann. § 50-6-229(a). Such applications are not granted as a matter of course. Forkum v. Aetna Life & Cas. Ins. Co., 852 S.W.2d 230, 233 (Tenn. 1993). The injured worker has the burden of establishing first that a lump sum is in his best interest and, second, that he is capable of wisely managing and controlling a lump sum, but the decision whether to commute to a lump sum is within the discretion of the trial court. Edmonds v. Wilson County, 9 S.W.3d 106 (Tenn. 1999). The court may commute benefits to a lump sum to pay legal fees. National Pizza Co. v. Young, 879 S.W.2d 817, 818 (Tenn. 1994). From our independent examination of the record we cannot say the evidence preponderates against the trial court's finding that commutation is in the best interest of the employee and that he is capable of wisely managing and controlling a lump sum. The trial court did not abuse its discretion in commuting a portion of the benefits to a lump sum.

For those reasons, the judgment of the trial court is affirmed. Costs are taxed to the appellants.

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JOE C. LOSER, JR.

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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, Signage, Inc. and Liberty Mutual Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM