IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
February 18, 2004 Session

RONALD EUGENE JONES v. CRACKER BARREL OLD COUNTRY STORE, INC., ET AL.

Direct Appeal from the Circuit Court for Anderson County
No. 99LA0054 James B. Scott, Jr., Judge

No. E2002-01681-WC-R3-CV -Mailed May 28, 2004
Filed June 30, 2004

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 its findings of fact and conclusions of law. The employer, Cracker Barrel Old Country Store, Inc., argues that the trial court erred by: (1) evaluating the permanent total disability claim of the employee, Ronald Eugene Jones, pursuant to Tenn. Code Ann. § 50-6-242 instead of Tenn. Code Ann § 50-6-207(4)(B); (2) finding the employee entitled to permanent total disability benefits when the preponderance of the evidence indicated he could return to "an occupation which would produce an income"; (3) holding the employee's claim was not limited to the multipliers established by Tenn. Code Ann. § 50-6-241; and (4) entering the order of judgment without a reapportionment clause compelling the second injury fund to reimburse the employer in the event the employee dies before reaching age sixty-five.[1, 2, 3] We agree with the employer that a permanent total disability claim should be evaluated on the basis of Tenn. Code Ann. § 50-6-207(4)(B); the preponderance of the evidence indicates he could return to "an occupation which would produce an income"; and his claim is governed by the Tenn. Code Ann. § 50-6-241 multipliers. While the last issue concerning a reapportionment clause is pretermitted, we nevertheless disagree with the employer.

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

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[1] The employer complains about the dismissal of the appeal when the notice of appeal and transcript of the evidence were filed prior to the entry of the final judgment, since Rule 4(d) of the Tenn. R. App. P. permits a prematurely filed notice of appeal to be treated as filed after the entry of judgment and on the day of its entry. The per curiam order of the Supreme Court dismissed the appeal on February 13, 2003, not because the transcript had not been timely filed as thought by the employer, but because the final judgment had not been entered. However, the final judgment had been entered in the trial court on February 6, 2003.

[2] The employee states the issues in a slightly different manner. They will be inherently discussed as we discuss the employee's complaints.

[3] The second injury fund takes the same position as the employer except on the reapportionment clause issue.

Reversed in Part, Modified in Part and Remanded

H. DAVID CATE, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J., and ROGER E. THAYER, SP. J., joined.

James T. Shea IV, Knoxville, Tennessee, attorney for Appellant, Cracker Barrel Old Country Store, Inc.

Roger L. Ridenour, Clinton, Tennessee, attorney for Appellee, Ronald Eugene Jones.

Paul G. Summers, Attorney General and Reporter, E. Blaine Sprouse and Richard M. Murrell, Assistant Attorney Generals, for Appellee, Sue Ann Head.

MEMORANDUM OPINION

I. Factual Background

Ronald E. Jones, the employee, was forty-six years old when this cause was tried. He left high school in the eleventh grade, has no general equivalency diploma and has no other formal training or education. After he dropped out of school he took care of his grandfather, who had a heart condition. Years later he took a job as a laborer for a construction company. Next, he worked as a night watchman for approximately five years. Then he took a job with Cracker Barrel Old Country Store, Inc., the employer. He worked for the employer for fifteen years, washing dishes, bussing tables and unloading trucks.

On December 27, 1992, while in the employ of the employer, the employee sustained a knee injury. He returned to work with restrictions against stooping, bending and squatting. He settled this workers' compensation claim for 15 percent to the body as a whole.

On April 23, 1998, the employee, while working for the employer, sustained an injury to his neck, which was diagnosed as a cervical radiculopathy at C7. This workers' compensation claim was settled on January 22, 2002, for 19 percent to the body as a whole.

He returned to work after the neck injury, but on September 18, 1998, while lifting a case of green beans at work, the employee sustained an injury to his low back. He was treated by Dr. Cletus J. McMahon, Jr., an orthopedic surgeon, who diagnosed the employee's injury as a low back strain, an injury to the soft tissue, the ligaments, muscles and tendons. Dr. McMahon discharged the employee from his care on March 29, 1999, assigning him a 5 percent impairment to the body as a whole.

The employee returned to work for the employer with the primary restriction of no lifting over twenty-five pounds. He worked a modified schedule of 18 to 20 hours until he quit because of pain in June, 1999.

He was hospitalized at Ridgeview Psychiatric Hospital for suicidal tendencies, and on occasion was taken to other medical facilities for nerves.

At the request of the employer the employee was seen once by Dr. David H. Hauge, a neurological surgeon, on October 19, 1999, for evaluation of his neck injury. Dr. Hauge estimated the employee's permanent impairment relative to his neck injury and restricted the employee to a maximum lifting of twenty-five to twenty-eight pounds and squat-lifting occasionally. He also adopted the restrictions contained in the functional capacity evaluation, which was performed February 7, 2000.

The result of the functional capacity evaluation was the following recommended work capacity:

	Actual Tested	Recommended Work Capacity		
Lifting Position	**Capacity**	**Occasional**	**Frequent**	**Constant**
Level Lift	28#	28#	14#	7#
Weight Carry-25 ft.	25#	25#	12#	6#
Squat Lift	25#	25#	12#	6#
Knuckle to Shld. Lift	18#	18#	9#	4#
Shld. To Overhead Lift	13#	13#	6#	- -
Pushing	25#	25#	12#	6#
Pulling	23#	23#	11#	5#

Relative to the employee's back injury, Dr. McMahon ultimately adopted the functional capacity evaluation's work capacity as permanent restrictions. Dr. McMahon felt the employee could go back to work.

On October 19, 2000, the employee was seen at the referral of his attorney by Dr. Donald G. Catron, a psychiatrist. Dr. Catron diagnosed the employee's mental problems, which he opined were precipitated by the job injury, as an anxiety disorder with a minor or mild depression. He gave the employee a 15 percent permanent impairment to the body as a whole for his mental condition. Dr. Catron thought the employee from a psychiatric perspective could hold and perform most jobs, but that he needed to be careful about swing shifts, harsh production quotas and it would be helpful to have supportive supervisors and co-workers.

The employee was evaluated by Dr. Paul Kelley, a forensic psychiatrist selected by the employer, on July 9, 2001. Dr. Kelley was of the opinion that the employee was malingering and had no functional restrictions on a day-to-day basis as the result of his psychological condition.

The employee was evaluated on May 1, 2001, by Dr. Rodney Caldwell, a vocational consultant, at the request of the employee's attorney. Dr. Caldwell considered the employee 65 percent vocationally impaired as a result of the neck injury, 75 to 80 percent as a result of the back injury and 90 to 95 percent as a result of both injuries. Dr. Caldwell indicated the employee would

have available 4900 jobs in the local job market after the neck injury; and if the restriction did not change after the back injury, the available jobs would be the same. However, since he attributed the bending and stooping restriction to the back injury, there were only 2800 jobs available in the local job market after the back injury.

Dr. Craig Colvin, a vocational consultant, was asked to review this case by the employer. He saw the employee on January 16, 2002. It was his opinion that the employee was 65 to 75 percent vocationally disabled after the neck injury. And since the restrictions did not change after the back injury there was no increase in the occupational disability. Dr. Colvin felt that employee was capable of working 25 to 30 percent of the jobs such as a night watchman, hand checker, inspector and assembler of small parts.

The trial court held that the employee was permanently totally disabled and assessed 70 percent of the benefits to the employer and 30 percent to the second injury fund.

II. Standard of Review

The standard of review of questions of fact in a workers' compensation appeal is *de novo* upon the record, with a presumption that the trial court's findings are correct unless the preponderance of the evidence is otherwise**.** ***Richards v. Liberty Mut. Ins. Co.***, 70 S.W.3d 729, 732 (Tenn. 2002); *see also* Tenn. Code Ann. § 50-6-225(e)(2)(Supp. 2003). The standard of review of questions of law is *de novo* without a presumption of correctness. ***Richards***, 70 S.W.3d at 732.

When issues regarding credibility of witnesses and the weight to be given their testimony are before a reviewing court, considerable deference must be accorded the trial court's factual findings. *See*, ***Houser v. Bi-Lo, Inc.***, 36 S.W.3d 68, 71 (Tenn. 2001). However, the reviewing court may draw its own conclusions about the weight and credibility of expert testimony presented by deposition since the reviewing court is in the same position as the trial court to evaluate such testimony. ***Houser***, 36 S.W.3d at 71, ***Richards***, 70 S.W.3d at 732.

III. Discussion

Disability Issues

The trial court analyzed its permanent total disability decision on the basis of Tenn. Code Ann. § 50-6-242, which deals with permanent partial disability claims, instead of Tenn. Code Ann. § 50-6-207(4)(B), which deals with permanent total disability claims. The parties agree and we conclude that permanent total disability claims are controlled by Tenn. Code Ann. § 50-6-207(4)(A) and (B).

The employer asserts the employee is not permanently totally disabled pursuant to Tenn. Code Ann.§ 50-6-207(4)(B), which provides:

> (B) When an injury not otherwise specifically provided for in this chapter, as amended, totally incapacitates the employee from working at an occupation which brings the employee an income, such employee shall be considered "totally disabled," and for such disability compensation shall be paid as provided in subdivision (4)(A); provided, that the total amount of compensation payable hereunder shall not exceed the maximum total benefit, exclusive of medical and hospital benefits.

We agree.

Dr. McMahon, Dr. Catron and Dr. Kelley felt the employee could go back to work. Even when the vocational experts considered all the employee's problems, neck, back and mental, they determined the employee could work. Dr. Caldwell, the employee's vocational expert and the most negative witness relating to the employee's ability to work, concluded that the employee currently has 2800 jobs available in the local job market which he could perform.

In the case of ***Nelson v. Wal-Mart Stores, Inc.***, 8 S.W.3d 625, 629 (Tenn. 1999) the court said: "The test of whether an employee is permanently totally disabled requires an inquiry into whether the employee is '*totally incapacitate[d]* . . . from working at an occupation which brings the employee an income . . .' Tenn. Code Ann. § 50-6-207(4)(B)(1999) (emphasis added)."

The evidence preponderates against the employee being permanently totally disabled.

The employer contends the multipliers of Tenn. Code Ann. § 50-6-241 should apply and we agree. Tennessee Code Annotated § 50-6-242 does not apply since the employee was under age fifty-five and he does have reasonable employment opportunities.

The employee would not be legally limited to the 2.5 multiplier because the employer has not carried the burden of proving the employee had a meaningful offer of a return to work. *See* ***Ogren v. Housecall Health Care, Inc.***, 101 S.W.3d 55, 57 (Tenn. 1998).

However, the evidence, considering the physical and mental impairment, leads us to conclude that the employee is entitled to permanent partial disability based on a disability of 60 percent to the body as a whole.

Reapportionment Clause

The employer seeks to have a clause, which would require the second injury fund to reimburse the employer for its pro rata share should the employee die before becoming eligible for the full benefits of the Old Age Insurance Benefits Program under the Social Security Act. We disagree, even though the issue is moot because of our determination that this is not a permanent total disability case.

When liability is apportioned to the second injury fund, the payments by the fund do not begin until after the completion of the payments by the employer. Tenn. Code Ann.§ 50-6-208(a)(1); ***Perry v. Sentry Ins. Co.***, 938 S.W.2d 404, 408 (Tenn. 1996). The obligation of the fund is not concurrent with that of the employer. ***Smith v. Liberty Mut. Ins. Co.***, 762 S.W.2d 883, 885 (Tenn. 1988).

IV. Conclusion

We conclude the trial court erred in determining the employee's award should be based on permanent total disability. We modify the workers' compensation award to 60 percent permanent partial disability to the body as a whole, and remand the case to the trial court for such further action as may be necessary consistent with this opinion. Costs of the appeal are taxed to the employee, Ronald Eugene Jones, for which execution may issue if necessary.

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H. DAVID CATE, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

RONALD EUGENE JONES V. CRACKER BARREL OLD COUNTRY STORE, INC., ET AL.
Anderson County Circuit Court
No. 99LA0054

June 30, 2004

No. E2002- 01681-WC-R3-CV

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 appellee, Ronald Eugene Jones, for which execution may issue if necessary.