IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 2004 Session

TIMOTHY L. HARRISON v. PETERBILT MOTORS COMPANY, ET AL.

Direct Appeal from the Circuit Court for Robertson County
No. 9843 John H. Gasaway, III, Judge

No. M2003-01457-WC-R3-CV- Mailed - November 9, 2004
Filed - December 9, 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 of findings of fact and conclusions of law. In this appeal, the employee was on lay-off status at the time of the initial award of 50% vocational disability (2 ½ times the medical impairment rating). The employee filed a complaint for reconsideration shortly after he participated in a walk-through at the plant and after which the employer found that there were no jobs available within the employee's medical restrictions. The employee contends that the trial court erred in dismissing his complaint for reconsideration of an original award which he contends was granted under *Tenn. Code Ann.* § 50-6-241(a)(1) and that, because his employer retains him on lay-off status but has not returned him to work, he is now eligible for reconsideration under *Tenn. Code Ann.* § 50-6-241(a)(2). The trial court dismissed the complaint finding the facts not sufficient to institute a new cause of action under the statute. The panel concluded that the judgment of the trial court should be affirmed.

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

JAMES L. WEATHERFORD, SR.J., delivered the opinion of the court, in which FRANK DROWOTA, C.J., and JOHN A. TURNBULL SP.J., joined.

William L. Underhill and Michael L. Underhill, Madison, Tennessee, for the appellant , Timothy L. Harrison.

Terry L. Hill and Stacey Billingsley Cason, Nashville, Tennessee, for the appellee, Peterbilt Motors Company.

Paul G. Summers, Attorney General, and Dianne Stamey Dycus, Deputy Attorney General,

Nashville, Tennessee, for the appellee, Sue Ann Head, Administrator of the Division of Workers' Compensation, Tennessee Department of Labor, Second Injury Fund.

MEMORANDUM OPINION

Mr. Timothy L. Harrison was 35 years old at the time of trial and has a high school education. On July 12, 1999, he injured his back during the course and scope of his employment while working for Peterbilt Motors. Although Peterbilt denied the workers' compensation claim, Mr. Harrison sought medical treatment for his injury.

Mr. Harrison was diagnosed with degenerative disc disease with bulging discs. On January 6, 2000, his physician instructed him to take leave from work until he reached maximum recovery. On the same day, Peterbilt placed Mr. Harrison on "lay-off" status which allows Mr. Harrison to retain his seniority status although he is not doing any work for or earning any wages from Peterbilt. At the time of his injury Mr. Harrison was earning $22.00 per hour.

On March 21, 2000, Dr. Douglas C. Matthews performed back surgery. Dr. Matthews found that Mr. Harrison reached maximum medical improvement on January 8, 2001 and released him to return to work with the following permanent restrictions: no climbing, crawling, bending stooping or lifting over 50 pounds. Dr. Matthews assigned a 13% permanent impairment rating to the body as a whole. In an independent evaluation, Dr. David Gaw assigned a 20% permanent impairment rating to the body as a whole.

On June 13, 2001, the trial court found that Mr. Harrison had sustained a 20% anatomical impairment and awarded 50% vocational disability (2½ times the anatomical impairment), with lifetime future medical benefits.[1]

In April 2002, Mr. Harrison went to work for a motel and later an auto parts store earning $7.00 to $8.00 an hour.

On May 9, 2002, at Peterbilt's request Mr. Harrison performed a walk-through to determine if he could perform any of the jobs available. Although Mr. Harrison maintained he was able to perform some jobs, Peterbilt determined that his permanent restrictions precluded him from filling any of these vacant positions. He remains on layoff status subject to recall in the future.

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[1]The trial court did not specify whether the award was made under *Tenn. Code Ann.* § 50-6-241(a)(1),which limits awards to 2 ½ times the medical impairment rating for employees who have returned to work for the pre-injury employer at an equal or greater wage than the employee was making at the time of the injury, or under *Tenn. Code Ann.* § 50-6-241(b), which limits awards to 6 times the medical impairment rating for employees who have not returned to work making an equal or greater wage than they were at the time of the injury. The trial court stated in reference to its use of multipliers that: "Given the Court's ruling, I don't really believe the Court has to make a determination as to whether he is – whether the Court could use a multiplier up to six as opposed to two and a half. I don't think his laid off status makes any difference given the Court's ruling."

On June 17, 2002, Mr. Harrison filed a complaint for reconsideration of his previous workers' compensation award pursuant to *Tenn. Code Ann*. § 50-6-241(a)(2).[2]

In its order dismissing the complaint the trial court stated:

> Upon conclusion of the offer of proof at trial, the Court found the additional facts concerning the Plaintiff's subsequent call-back to work by the Defendant employer, as well as the Plaintiff's subsequent return to lay-off status were not sufficient for the Plaintiff to institute a new cause of action under Tennessee Code Annotated section 50-6-241(a)(2), and dismissed the Plaintiff's case on that sole issue. Additionally, the Court found that although the Plaintiff never returned to work for the Defendant employer post-injury, his lay-off status indicates the Plaintiff has not lost his employment in accordance with the aforementioned statute.

ANALYSIS

Review of findings of fact by the trial court is *de novo* upon the record of the trial court and is accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence shows otherwise. *Tenn. Code Ann.* § 50-6-225(e)(2); *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). Conclusions of law are reviewed *de novo* without any presumption of correctness. *Ivey v. Trans Global Gas and Oil*, 3 S.W.3d 441, 446 (Tenn. 1999).

The employee raises the sole issue of whether there was not a meaningful return to work by the employer so as to allow the employee to seek reconsideration of the previous workers' compensation award pursuant to *Tenn. Code Ann.* §50-6-241(a)(2).

Tenn. Code Ann. § 50-6-241 provides in pertinent part:

> (a)(1) ...[I]n cases where an injured employee is eligible to receive any permanent partial disability benefits ... 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 (2 1/2) times the medical impairment rating.
> (2) In accordance with this section, the courts may reconsider, upon the filing of a new cause of action, the issue of industrial disability. ... Such reconsideration may be made in appropriate cases where the employee is no longer employed by the pre-injury employer and makes application to the appropriate court within one (1)

[2] At the time of trial Peterbilt Motors had been in shutdown for over 8 months due to a labor dispute.

year of the employee's loss of employment, if such loss of employment is within four hundred (400) weeks of the day the employee returned to work.

(b) Subject to factors provided in subsection (a) of this section, in cases ... where an injured employee is eligible to receive permanent partial disability benefits ...and the pre-injury employer does not return 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 six (6) times the medical impairment rating.

Mr. Harrison contends that the trial court granted the original award under subsection (a)(1).[3] He argues that the trial court presumed that he would return to work for Peterbilt based on his lay-off status and on testimony from Peterbilt officials expressing an expectation of returning him to work. More than a year after the first trial, Peterbilt has not returned him to work and he remains on lay-off status. Mr. Harrison contends that his award qualifies for reconsideration.

After hearing oral arguments the court stated: "[T]he argument here that the Courts's Ruling was such that you are not entitled to be before the Court without regard to the layoff issue is pretty compelling. ... the Court finds that you are not legally justified to be here and I'm not going to hear your Petition on the basis that the Court's Ruling previously addressed the ability or disability of Mr. Harrison at the time."

Mr. Harrison had not returned to work at the time of the first hearing. Because Mr. Harrison was not earning wages equal to or greater than his pre-injury wages, he was eligible for an award under subsection (b) at the time of the first trial. The first trial court's findings of fact and conclusions of law failed to specify whether the award was granted under subsection (a) or (b). After reviewing the trial court's statements noting Mr. Harrison's employment status and its belief that his status did not affect the award in ruling on the initial award and its dismissal of the complaint for reconsideration, we conclude that the trial court found Mr. Harrison not subject to the 2 ½ times multiplier cap when it calculated the award. We find, therefore, that reconsideration was properly denied.

Because we find that the trial court did not apply the 2 ½ times multiplier as a maximum to cap the award, we do not reach the issue of under what circumstances an employee on lay-off status could be considered "no longer employed" under *Tenn. Code Ann.* § 50-6-241(a)(2) to qualify for reconsideration of a previous award. Although we do not find this to be so in the present case, we can foresee circumstances where an employer could frustrate the purpose of the Workers' Compensation Act[4] by keeping an employee on lay-off status indefinitely to avoid providing the

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[3] Mr. Harrison did not appeal the trial court's ruling.

[4] *Martin v. Lear Corp.* 90 S.W.2d 626, 629 (Tenn. 2002)(*Tennessee Code Annotated* § 50-6-116 declares the Workers' Compensation statute to be remedial in nature, and directs that the statute "shall be given an equitable construction by the courts, to the end that the objects and purposes of this chapter may be realized and attained." *Tenn.*

employee with a higher award under subsection (b). We believe this to be an issue of first impression which can best be resolved with guidance from the Legislature. *See Perrin v. Gaylord Entertainment Co.*, 120 S.W.3d 823, 826-27 (Tenn. 2003)(noting that the terms "no longer employed with the pre-injury employer" and "loss of employment" are not defined in the statutory scheme).

CONCLUSION

After careful review and consideration of the record, the Panel affirms the judgment of the trial court. Costs of appeal are taxed to the appellant, Timothy L. Harrison.

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JAMES L. WEATHERFORD, SR.J.

Code Ann. § 50-6-116 (1999). "Accordingly, 'these laws should be rationally but liberally construed to promote and adhere to the Act's purposes of securing benefits to those workers who fall within its coverage.'" See Watt v. Lumbermens Mut. Cas. Ins. Co., 62 S.W.3d 123, 128 (Tenn. 2001) (quoting Lindsey v. Smith & Johnson, Inc., 601 S.W.2d 923, 926 (Tenn.1980))).

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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 appeals 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 appellant, Timothy L. Harrison, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM