IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 29, 2006 Session

CLETUS LEE HARVEY v. STONE & WEBSTER CONSTRUCTION, INC., ET AL.

Direct Appeal from the Chancery Court for Sequatchie County
No. 2018 Jeffery F. Stewart, Chancellor

No. M2006-00264-WC-R3-CV - Mailed - January 5, 2007
Filed - February 12, 2007

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. On this appeal, the employer, Stone & Webster Construction, Inc. (Stone & Webster), alleges the trial court erred by failing to cap the recovery of the employee, Cletus Lee Harvey, Jr., at 2.5 times the medical impairment as required by Tennessee Code Annotated section 50-6-241(a)(1) and in awarding Mr. Harvey a vocational disability of fifty percent of the body as a whole. Finding the evidence does not preponderate against the findings of the trial court, we affirm.

Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Trial Court Affirmed

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and MARIETTA SHIPLEY, SP. J., joined.

F. R. Evans, Chattanooga, Tennessee, for the Appellant, Stone & Webster Construction, Inc.

Michael S. Prichard, Chattanooga, Tennessee, for the Appellee, Cletus Lee Harvey.

MEMORANDUM OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

Cletus Lee Harvey is a high school graduate and was thirty-one years of age at the time of trial. He has had some formal training in auto-body work, is certified as a diesel mechanic and has learned welding. His work experience prior to working for Stone and Webster was doing mechanic work for automobile dealerships and welding. In March 2003, he obtained a job as a construction laborer with Stone & Webster. His job was hanging lead blankets on pipes at the TVA Sequoyah Nuclear Plant in order to reduce the amount of radiation so that maintenance and repair work could be done. The job required lifting 40-90 pounds and climbing, squatting, stretching, and twisting.

On May 7, 2003, he hurt his back. Eventually, he was treated by Dr. Timothy A. Strait. After attempting conservative treatment, Dr. Strait performed surgery on Mr. Harvey at Erlanger Hospital. Following surgery, Mr. Harvey underwent physical therapy and was released by Dr. Strait on February 12, 2004. Upon obtaining his release, Mr. Harvey went straight to the union hall and signed up to return to work. Mr. Harvey had been laid off in June 2003, and his name was placed on the list for calling when a job became available.

While waiting to be recalled by Stone and Webster, Mr. Harvey obtained employment pumping gas at Thomas Service, a service station in Signal Mountain, Tennessee. This job involved a lot of walking and was difficult for him. Later, he was hired to maintain delivery trucks for Summer Song, an ice cream distributor. After three to four weeks on the Summer Song job, he determined he was unable to do the work because Summer Song did not have advanced equipment and Mr. Harvey was unable to jack up the vehicles manually and crawl underneath them.

Finally, the union called and offered Mr. Harvey a three-day job at Bowater as a construction laborer. After the first day of that job, Mr. Harvey felt “pretty rough.” He was sore, stiff and had sharp pains running down into his leg. After the second day, he knew he was unable to do the work and did not return the third day. After attempting the Bowater job, he had to stay in bed for two days and began moving around again only on the third day.

At the time of the trial, Mr. Harvey was working for Butler Fleet Service, a concern that maintains the truck fleet for BellSouth. There he was doing light work such as oil changes. At Butler Fleet, Mr. Harvey earned $13.40 per hour but only worked twenty to twenty-five hours per week. He was offered more money by Butler to work in Louisiana. Mr. Harvey drove to Louisiana and began a twelve hour shift but after ten hours had to stop because of the inability to continue. Mr. Harvey returned to Tennessee where he continued to work for Butler fleet on a part-time basis. He still has difficulty climbing onto the big trucks and has to have help replacing tires and installing rotors. He is scheduled to work five hour shifts but, at times, cannot complete the shifts.

Eight months after being released by Dr. Strait, Mr. Harvey was called back by Stone & Webster and was offered a job for thirty days doing the same thing he had previously done. Mr.

Harvey testified he knew he could not complete thirty days at Sequoyah if he was unable to work more than two days at Bowater. Consequently, he did not accept the assignment.

Since his medical release, Mr. Harvey has tried to avoid lifting and climbing because those activities trigger sharp pain on his left side. He is unable to sit or stand for long periods of time. He has difficulty sleeping because of the inability to get into a comfortable position. Mr. Harvey testified he did not believe he would be able to return to construction work or work for Butler Fleet on a full-time basis. He plans on returning to school in order to enable himself to become employed in the business field or working with computers.

William Miessau, the coordinator of maintenance at Butler Fleet Services, testified that Mr. Harvey was limited to light work such as changing oil and installing mirrors. If he attempted anything requiring lifting, either he or Mr. Harvey's father, who also works for Butler Fleet Services, would help. Mr. Miessau did not believe that Mr. Harvey would be able to work for Butler Fleet on a full-time basis because, when working part-time, he was unable to work every day and, at times, left early because of pain in his back.

Cletus Lee Harvey, Sr., Mr. Harvey's father, confirmed that his son, who he referred to as Lee, was only able to do light jobs at Butler Fleet and was unable to do heavy work, such as changing rotors, transmissions, large tires or engines. The elder Mr. Harvey also testified that his son was unable to do some jobs such as tune ups on vehicles because a lot of twisting was required. If the younger Mr. Harvey has had the need to lift anything over 15 to 20 pounds, his father has done it for him. Mr. Harvey, Sr., opined that if he left Butler Fleet Services, his son also would have to leave because he could not do the job by himself.

Dr. Timothy A. Strait testified by deposition. He is certified by the American Board of Neurological Surgeons and is a clinical assistant professor of surgery at the University of Tennessee College of Medicine, Chattanooga Unit. Dr. Strait first saw Lee Harvey on July 10, 2003. Mr. Harvey related that he had injured his back on May 7, 2003, while working at the Sequoyah TVA Nuclear Plant. He was pulling an object weighing forty pounds when he felt a pop in his lower back. Dr. Strait reviewed an MRI that had been previously taken. The MRI revealed a large disc herniation at L4-5 on the left. Dr. Strait referred him to Pain Management for an epidural steroid injection. The injection gave him some temporary relief but as the medicine wore off he started having symptoms again. Dr. Strait performed surgery on September 25, 2003. During the surgery, Dr. Strait removed the disc that had ruptured. That disc was pinching the L5 nerve root and, in order to get to the disc, he had to remove a portion of the lamina of the L4 and L5 on the left, a procedure which is referred to as a hemilaminotomy.

Following surgery, Dr. Strait enrolled Mr. Harvey in a physical therapy program and then ordered a functional capacity evaluation. Dr. Strait indicated that Mr. Harvey had recovered from his disc surgery, but anyone who has had this surgery has an increased risk for having additional problems over time.

Mr. Harvey reached maximum medical improvement on February 12, 2004. Dr. Strait related Mr. Harvey's condition to an on-the-job injury. Pursuant to the *AMA Guides to the Evaluation of Permanent Impairment, 5th Edition*, Dr. Strait assigned a fifteen percent impairment to the body as a whole. Dr. Strait adopted the work restrictions recommended by the functional capacity evaluation which indicated he could occasionally lift sixty pounds and frequently lift forty pounds. Dr. Strait indicated he normally gave a five-to-ten percent impairment for someone who underwent the procedure performed on Mr. Harvey and admitted he could not explain why he assigned a greater percentage impairment in this case. When asked whether Mr. Harvey could return to a job which required frequent lifting of ninety pounds and a significant amount of climbing, carrying, squatting, stretching, bending, twisting and standing, he responded "I think that's not a very good situation for him. I think that would be putting him in a situation where there is a good chance, you know, that he can re-injure his back."

A Form C-32, Standard Form Medical Report for Industrial Injuries, completed by Dr. Scott D. Hodges was introduced into evidence. Dr. Hodges is certified by the American Osteopathic Board of Orthopaedic Surgery and the American Board of Independent Medical Examiners. He performed an independent medical evaluation on April 5, 2005. Dr. Hodges assigned a ten percent impairment to the body as a whole based on the AMA Guides and agreed with the functional capacity evaluation work restrictions of no lifting greater than sixty pounds occasionally and forty pounds frequently.

The trial court found Mr. Harvey's medical impairment to be ten percent to the body as a whole. The trial court also found Mr. Harvey was unable to perform his previous job at Stone & Webster, which is the job that he was offered following his injury, and, therefore, the trial court was not limited to the 2.5 cap set forth in Tennessee Code Annotated section 50-6-241(a)(1). The trial court found Mr. Harvey had sustained a vocational disability of fifty percent to the body as a whole based upon the significance of his injury, his youth, his educational level, lack of transferable job skills and the limitations on his ability to work. From this judgment, Stone & Webster has appealed.

II. STANDARD OF REVIEW

The standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2005). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997).

III. ANALYSIS

The first issue raised for review is whether the trial court erred in failing to apply the 2.5 times cap contained in Tennessee Code Annotated section 50-6-241(a)(1). That Code section provides, in part:

> For injuries arising on or after August 1, 1992, and prior to July 1, 2004, 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 (2½) times the medical impairment rating . . . .

Tenn. Code Ann. § 50-6-241(a)(1) (2005).

Stone & Webster contends its offer of a thirty-day assignment in the same position in which Mr. Harvey was working prior to his injury was a reasonable attempt to return Mr. Harvey to his former position and requires the application of the cap set forth in the Code section cited above. We disagree and affirm the ruling of the trial court that the 2.5 times cap provided for in the Workers' Compensation Law was inapplicable to this case.

The courts have held that in order for the statutory 2.5 cap to apply, the offer of employment or return to work must be ?meaningful." Thus a return to work that the employee is unable to perform because of his or her injuries is not a meaningful return to work. See Newton v. Scott Health Center, 914 S.W.2d 884, 886 (Tenn. Workers' Comp. Panel 1995). We have recognized that there will be a variety of factual situations where this court is called upon to determine whether a return to work or offer of a return to work is meaningful within the framework of the statute. Generally,

> "[i]f the offer from the employer is not reasonable in light of the circumstances of the employee's physical ability to perform the offered employment, then the offer of employment is not meaningful and the injured employee may receive disability benefits up to six times the amount of the medical impairment. On the other hand, an employee will be limited to disability of two and one-half times the medical impairment if his refusal to return to offered work is unreasonable. The resolution of what is reasonable must rest upon the facts of each case and be determined thereby."

Id.

The Tennessee Supreme Court has consistently stated that the ability of the injured employee to perform the offered employment is determinative of whether the return to work or offer of return

to work is meaningful. In Lay v. Scott County Sheriff's Dep't, 109 S.W.3d 293, 298 (Tenn. 2003), the Court stated, "[c]learly, if an employee returns to work but is unable to perform his or her duties due to a work-related injury, then the worker's resignation would be reasonably related to the injury, and there would be no meaningful return to work." In Hardin v. Royal & Sunalliance Ins., 104 S.W.3d 501 (Tenn. 2003), the Court stated that a trial court could reconsider a previous award and exceed the 2.5 times cap if the subsequent resignation was reasonably related to the injury as where the resignation is "due to the employee's inability to perform the work." Id. at 506. While Hardin was a reconsideration case brought pursuant to Tennessee Code Annotated section 50-6-241(a)(2), the Tennessee Supreme Court has held the same standard should be applied to an initial assessment. Lay, 109 S.W.3d at 298.

In the case before us, the trial court found Mr. Harvey unable to perform the work offered by Stone & Webster, stating, "it was an offer of something that he could not do. And I've heard from the witnesses, I've heard from him, and I'm satisfied factually that they have testified truthfully and honestly about that." Both William Miessau and Cletus Harvey Sr. testified the younger Mr. Harvey performed only relatively light duty at Butler Fleet Services but was not able to consistently work a five-hour shift. Mr. Harvey's wife, a second grade school teacher at Griffith Elementary School, testified he could not do normal yard chores without pain and frequently missed the next day's work because of soreness. She further testified about Mr. Harvey's inability to assist with the remodeling of their home and that sometimes he is unable to put on his own shoes and socks, needing her to do so for him.

Stone & Webster counters that a functional capacity evaluation of Mr. Harvey revealed he had the capacity to perform "heavy" work and had heavy overall strength. That evaluation, however, indicated Mr. Harvey should be restricted to lifting up to sixty pounds occasionally and forty pounds frequently and noted these restrictions would prevent Mr. Harvey from his previous employment that required him to lift up to 100 pounds. Mr. Harvey testified that the lead blankets he placed for Stone & Webster weighed ninety pounds and, while two people carried them if they were able, they frequently had to be placed in locations only accessible to a single person.

After carefully reviewing the evidence and affording the appropriate deference to the trial court's evaluation of the credibility of the witnesses who testified in person, we agree with the trial court's finding that Mr. Harvey was unable to perform the offered employment. Accordingly, we affirm the trial court's determination that Mr. Harvey was not offered a meaningful return to work and, thus, the statutory cap provided for in Tennessee Code Annotated section 50-6-241(a)(1) does not apply.

The next issue raised on this appeal is whether the trial court erred in awarding fifty percent permanent partial disability to the body as a whole based upon the findings specified by the trial court and the evidence. The existence and extent of a permanent vocational disability are questions of fact for determination by the trial court. Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990). They are reviewed *de novo*, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 170

(Tenn. 2002); Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). In assessing the extent of an employee's vocational disability, the trial "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." Tenn. Code Ann. § 50-6-241(b) (2005); Worthington, 798 S.W.2d at 234; Roberson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986). Further, the claimant's own assessment of his or her physical condition and resulting disabilities cannot be disregarded. See Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975); Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 778 (Tenn. 1972).

In this case, the trial court found that Mr. Harvey and the other witnesses who testified concerning his ability to engage in physical labor or activities to be credible. Mr. Harvey testified that he did not believe he would be able to return to construction work and he, his father and William Miessau testified he could not perform the relatively light work he did for Butler Fleet Services on a full-time basis. Based upon their testimony, the trial court found Mr. Harvey had "significant physical problems which affect him in the type of work he is qualified to do." The court went on to state that "he (Mr. Harvey) has limited job skills that are transferrable based upon these physical limitations" and retraining would be required to bring him back into the workforce.

Tennessee Code Annotated section 50-6-241(c) provides that "[i]f the court awards a multiplier of five (5) or greater, then the court shall make specific findings of fact detailing the reasons for awarding the maximum impairment." In this case, the trial judge specified that his award of five times the impairment rating was based upon a lack of transferrable skills, the significant limitations on his physical activities, his relative youth and the period of time he will have to live with these limitations and the fact he has never been in a supervisory or management position. The trial court noted Mr. Harvey had always earned his living by physical labor and that he would no longer be able to earn a living in that fashion. Based upon the evidence and these findings, the trial court found Mr. Harvey had sustained a vocational disability of fifty percent to the body as a whole. We do not disagree with the trial court. Moreover, it is not our function to replace the trial court's judgment with our own. The legislature has given the trial court's findings of facts the presumption of correctness unless we find the evidence preponderates against the trial judge's findings, which, from a review of the evidence in this case, we cannot do.

IV. CONCLUSION

Accordingly, the judgment of the trial court is affirmed in all respects. The costs of this appeal are taxed to the Appellant, Stone & Webster.

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DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
SEPTEMBER 29, 2006 SESSION

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Chancery Court for Sequatchie County
No. 2018

No. M2006-00264-WC-R3-CV - Filed - February 12, 2007

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, Stone & Webster Construction, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM