IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 24, 2008 Session

MICHAEL HICKMAN v. DANA CORPORATION

Direct Appeal from the Chancery Court for Gibson County
No. H-5234 George R. Ellis, Chancellor

No. W2007-01134-WC-R3-WC - Mailed July 22, 2008; Filed August 26, 2008

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. Employee developed carpal tunnel syndrome. The injury was accepted as compensable. Before he reached maximum medical improvement, he was terminated as a result of an argument with a co-worker. He sustained a 5% impairment to each arm as a result of his work injury. The trial court awarded 30% PPD to both arms. On appeal, Employer contends that the trial court erred by finding that Employee did not have a meaningful return to work. We conclude that the evidence does not preponderate against the trial court's decision, and affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right;
Judgment of the Chancery Court Affirmed

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and DONALD P. HARRIS, SR. J., joined.

William F. Kendall, III, Jackson, Tennessee, for the appellant, Dana Corporation.

Mitchell G. Tollison, Jackson, Tennessee, for the appellee, Michael Hickman.

MEMORANDUM OPINION

Factual and Procedural Background

Michael Hickman ("Hickman") worked for Dana Corporation ("Dana") as a material handler. His job consisted primarily of operating a forklift and loading and unloading trucks. He developed bilateral carpal tunnel syndrome in August 2005. The injury was accepted as compensable. He was referred to Dr. David Yakin, an orthopaedic surgeon. Dr. Yakin performed surgery on Hickman's right arm on December 2, 2005, and upon his left arm on January 20, 2006. He released Hickman

from his care on April 25, 2006. He assigned a 5% permanent impairment to each arm as a result of the condition. He placed no permanent restrictions upon Hickman's activities.

Hickman was terminated on December 29, 2005, as a result of an incident that occurred on December 23. Most of the proof at trial was related to that incident. All of the participants testified; none of their accounts entirely matched any of the others. In general terms, Hickman had been instructed by his supervisor, Jimmy Burnside, to unload no more trucks that day. A truck arrived, and the driver requested to be unloaded. Hickman advised the driver that he could not unload the truck without authorization from Burnside. The driver returned with a note from Shane Hassell, the dispatcher, instructing Hickman to unload the truck. Hickman told the driver that only Burnside could authorize him to unload the truck because Burnside was the one who told him not to unload any more trucks. Burnside, Hassell, and Hickman had an argument. Hickman said that Hassell struck or pushed him. Hassell denied the allegation, and Burnside agreed with him. Hickman told Hassell that he "would kill him if he got in his face again." The actual words used by Hickman were somewhat disputed, although he admitted that he used the word "kill." The evidence also showed that both Hassell and Burnside are large men. They are described as being more than six feet in height and weighing in excess of two-hundred-fifty pounds. Hickman testified that he is five feet, nine inches tall and weighs one hundred sixty-five pounds.

The incident was investigated by Dana's human resources director, Ann Wallsmith. Hickman was fired because he threatened Hassell; Hassell was given a three-day suspension because he was found to have provoked the situation. Thereafter, Hickman worked delivering newspapers. He worked briefly at two factory jobs but quit each of them because the jobs caused his hands to hurt.

Hickman is fifty-two years old. He is a high school graduate. He has had no additional education or specialized training. His work history includes twenty-one years at Rockwell International, a factory that manufactures power tools, where he was a material handler, set-up person, and team leader. He has also worked as a machine operator for a window manufacturer and as a power tool repairman. Hickman testified that, as a result of his injury, he still has difficulty gripping objects. He has numbness and tingling that sometimes awakens him at night. The trial court found that Hickman had not had a meaningful return to work and awarded 30% permanent partial disability to both arms. In its ruling, the trial court specifically discredited the testimony of Wallsmith, Hassell, and a third witness for Dana, Russell Noble. The trial court found the testimony of Hickman, Burnside, and an additional witness, Debbie Crouch, to be credible.

Employer has raised two issues on appeal: whether the trial court erred by not applying the 1.5 times impairment cap contained in Tennessee Code Annotated section 50-6-241(d)(1)(A) and, if not, whether the award of 30% PPD to both arms is excessive?

Standard of Review

Our standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2)

(Supp. 2007); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). When issues of credibility of witnesses and the weight to be given their in-court testimony are before the reviewing court, considerable deference must be accorded to the factual findings of the trial court. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002); *Rhodes v. Capital City Ins. Co.*, 154 S.W.3d 43, 46 (Tenn. 2004). When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another. *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675, 676-77 (Tenn. 1983). This Court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997). Questions of law are reviewed de novo with no presumption of correctness afforded to the trial court's conclusions. *Gray v. Cullom Machine, Tool & Die, Inc.*, 152 S.W.3d 439, 443 (Tenn. 2004).

Analysis

1. Meaningful Return to Work

Dana argues that Hickman was terminated for misconduct and therefore that the one and one-half times impairment cap should apply. Hickman argues that, in light of the trial court's finding that most of Dana's witnesses were not credible, either his termination was not for misconduct or that his misconduct did not warrant termination.

Dana cites *Carter v. First Source Furniture Group*, 92 S.W.3d 367 (Tenn. 2002), in support of its position. In *Carter*, the employee was terminated after she had reported her injury, but before she had surgery. She had been "involved in an altercation at work. Another employee called [her] a 'bitch,' and [she] responded by chasing the other employee with a box cutter and kicking him." *Id*. at 368. The trial court found that she had not had a meaningful return to work and made an award in excess of the two and one-half times the impairment cap that was in effect at that time.[1] The Supreme Court reversed. The Court defined the issue presented in that appeal as "whether the employer, having fired an employee for misconduct prior to treatment of the employee's injury, is required to make an offer of re-employment following treatment in order to take advantage of the two and one-half times cap." *Id.* at 371. To answer that question, the Court stated that it was appropriate for a trial court to investigate the reasons that an offer of re-employment was not made. *Id*. at 371. In that context, the Court further stated that "an employer should be permitted to enforce workplace rules without being penalized in a workers' compensation case." *Id*.

Hickman cites only general case law in support of his position. A similar situation, however, was present in *Moore v. Best Metal Cabinets*, No. W2003-00687-WC-R3-CV, 2004 WL 2270751 (Tenn. Workers' Comp. Panel Oct. 7, 2004). In that case, the employer argued that the lower cap should apply to the injury at issue because the employee had been fired for insubordination. The trial court found that during a meeting the employee's supervisor became angry with her, cursed her, and then fired her, and therefore her termination was not for insubordination. The Panel affirmed. *Id*. at *3. The trial court's findings in this case concerning the credibility of various witnesses

[1] Tenn. Code Ann. § 50-6-241(a) and (b) (1999).

provide some basis for application of the reasoning of *Moore*. This case differs, however, because Hickman admitted saying to Hassell, "Shane, if you ever hit me again, I will kill you." In addition, Hickman's immediate supervisor, Burnside, testified that Hickman told Hassell "If you ever get in my face again, I will kill you." The trial court specifically found Burnside to be credible.

Although not explicit in its ruling, the trial court was clearly influenced by the disparity in Dana's treatment of Hassell and Hickman. Hassell, who provoked the incident and who was much larger than Hickman, received a three-day suspension. Hickman, who responded to Hassell's provocation, was terminated. There was sufficient testimony for the trial court to conclude that whatever physical contact occurred was initiated by Hassell. Therefore, the facts in this case are more analogous to the facts in *Moore* than to the facts in *Carter*.

2. Excessive Award

The award of 30% PPD is the maximum permissible under Tennessee Code Annotated section 50-6-241(d)(2)(A) (2005). Dana argues that the award is excessive. Dana's position is based upon the absence of restrictions by the treating doctor, who was the only doctor to testify in the case. Dana also notes that Hickman's subsequent job delivering newspapers was somewhat hand-intensive. In response, Hickman notes his own testimony concerning his continuing symptoms and limitations and his employment history, which consists primarily of factory work.

In assessing the extent of an employee's vocational disability, the trial court may consider lay and expert testimony, the employee's skill and training, education, age, local job opportunities, his capacity to work at the kinds of employment available in his disabled condition, and other pertinent factors. Tenn. Code Ann. § 50-6-241(d)(2)(A) (2005); *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990); *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986). Further, the claimant's own assessment of his physical condition and resulting disabilities cannot be disregarded. *Uptain Constr. Co. v. McClain*, 526 S.W.2d 458, 459 (Tenn. 1975); *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972). The trial court is not bound to accept physicians' opinions regarding the extent of the plaintiff's disability but should consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability. *Hinson*, 654 S.W.2d at 677.

Hickman's testimony concerning his age, his history of relatively unskilled employment, and his limitations supports the conclusion that he sustained a significant vocational disability as a result of this injury.

In this case the trial court made a detailed finding of facts and carefully weighed the credibility of each witness. Considerable deference must be accorded to the factual findings of the trial court. We therefore find that the evidence in this record does not preponderate against the trial court's findings on both issues.

Conclusion

The judgment is affirmed. Costs are taxed to the appellant, Dana Corporation, and its surety, for which execution may issue if necessary.

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ALLEN W. WALLACE, SENIOR JUDGE

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JUDGMENT ORDER

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 on appeal are taxed to the Appellant, Dana Corporation, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM