IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 23, 2008 Session

LUTHER ROPER, SR. v. FIRST PRESBYTERIAN CHURCH ET AL.

Direct Appeal from the Chancery Court for Rutherford County
No. 52793 Robert E. Corlew, Chancellor

No. M2007-02287-WC-R3-WC - Mailed - October 3, 2008
Filed - December 4, 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 § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. In this case, the trial court found that the employee suffered a 70% vocational disability to the body as a whole as the result of an injury arising out of and in the course of employment. Since the employee was over sixty at the time of the injury, the trial court limited his award to 260 weeks pursuant to Tenn. Code Ann. § 50-6-207(4)(A)(I). The trial court concluded that the employer's liability was likewise capped at 260 weeks, and, since the employer had already paid 152 weeks of compensation to the employee for previous injuries, the court allocated 108 weeks of the 260-week award to the employer, and the remaining 152 weeks to the Second Injury Fund. The Second Injury Fund appeals, arguing that the employer's liability is not capped at 260 weeks, but rather remains 400 weeks. We hold that the trial court erred in capping the employer's liability at 260 weeks, rather than 400 weeks. Accordingly, we reverse the judgment of the trial court and remand this issue for entry of an order consistent with this opinion.

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

WALTER C. KURTZ, SR. J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., J., and JON KERRY BLACKWOOD, SR. J., joined.

Robert E. Cooper, Jr., Attorney General and Reporter, and Juan G. Villaseñor, Assistant Attorney General, for the appellant, Jim Farmer, Administrator of the Division of Workers' Compensation of the Tennessee Department of Labor and Workforce Development.

Emil L. "Chip" Storey, Jr., Franklin, Tennessee, for the appellees, First Presbyterian Church and St. Paul Travelers.

Sonya W. Henderson, Murfreesboro, Tennessee, for the appellee, Luther Roper, Sr.

MEMORANDUM OPINION

I. Factual and Procedural Background

Luther Roper, Sr., was employed by First Presbyterian Church as a custodian and sexton. On April 2, 2004, he injured his back while moving a desk at the church. The parties have stipulated that the injury arose out of and in the course of employment. At the time of the injury, Roper was sixty-two (62) years old.

Roper's authorized treating physician, Dr. George Lien, assigned a 23% permanent partial impairment to the body as a whole resulting from this injury. Dr. Lien also placed restrictions on Roper, preventing him from lifting or carrying objects heavier than twenty pounds, from standing for more than three hours, and from climbing, stooping, crouching, and crawling. First Presbyterian was unable to accommodate these restrictions, so Roper could not return to work.

Prior to the injury at issue in this case, Roper had sustained other work-related injuries during his employment with the church. He received compensation for these injuries through court-approved settlements totaling 152 weeks, or 38% permanent partial disability to the body as a whole.

The trial court determined that Roper's back injury caused a 70% vocational disability to the body as a whole, which entitled him to 280 weeks of compensation. However, since he was over sixty years old at the time of the injury, the trial court limited his award to 260 weeks pursuant to Tenn. Code Ann. § 50-6-207(4)(A)(I). The trial court's finding of 70% disability to the body as a whole, when combined with his earlier awards totaling 38% to the body as a whole, resulted in total awards in excess of 100%. Because the trial court determined that Roper was not totally and permanently disabled, it concluded that Tenn. Code Ann. § 50-6-208(b) applied for the purpose of allocating the award of benefits between First Presbyterian and the Second Injury Fund ("Fund"). Relying on the decision of the Workers' Compensation Appeals Panel in *Boling v. Sak's, Inc.*, No. M2003-00195-WC-R3-CV, 2004 WL 32384 (Tenn. Workers' Comp. Panel Jan. 6, 2004), the trial court concluded that, with respect to injuries occurring after the age of sixty, 100% permanent disability to the body as a whole equals 260 weeks, rather than the normal 400 weeks. Therefore, taking notice that First Presbyterian had already paid 152 weeks of compensation to Roper for prior injuries, the trial court apportioned 108 weeks of compensation to First Presbyterian (260-152=108), with the remaining 152 weeks apportioned to the Fund.

The trial court also held that the Social Security Offset outlined in Tenn. Code Ann. § 50-6-207(4)(A)(I) applied to First Presbyterian, but could not be claimed by the Fund.

The Second Injury Fund appeals, contending that the trial court erred in the apportionment of liability. The Fund acknowledges that awards for employees injured over the age of sixty is set at 260 weeks. However, the Fund takes the position that an employer's liability pursuant to section 50-6-208(b) is not capped, but remains 400 weeks. Thus, the Fund asserts that it should only be

liable for the amount by which the award exceeds 400 weeks – in this case, 12 weeks (260+152=412)[1].

In his brief on appeal, Mr. Roper raises three additional issues: (1) the amount of his permanent disability, (2) the applicability of the 260-week cap on benefits to permanently partially disabled employees, and (3) how the Social Security Offset is calculated.

II. Standard of Review

This Court reviews a trial court's findings of fact in a workers' compensation case de novo with a presumption of correctness, "unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2007). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, we must extend considerable deference to the trial court's factual findings. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). However, we extend no deference to the trial court's findings when reviewing documentary evidence such as depositions. *Id.* As to questions of law, our standard of review is de novo with no presumption of correctness. *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

III. Analysis

A. Apportionment of Liability

Typically, when an employee receives an award for permanent partial disability to the body as a whole, that award is calculated as a percentage of 400 weeks, which is the statutorily assigned value for the body as a whole. Tenn. Code Ann. § 50-6-207(3)(F). If the employee is over the age of sixty, however, then his compensation is 260 weeks. *Id.* § 50-6-207(4)(A)(I); *Peace v. Easy Trucking Co.*, 38 S.W.3d 526, 529 (Tenn. 2001). Under Tenn. Code Ann. § 50-6-208(b), if an "employee has received or will receive a workers' compensation award or awards for permanent disability to the body as a whole, and the combination of such awards equals or exceeds one hundred percent (100%) permanent disability to the body as a whole," the employer is only liable for the first 100% permanent disability to the body as a whole, with the Second Injury Fund assuming liability for any amount in excess of 100%. Thus, the issue in this case is what constitutes 100% permanent disability to the body as a whole for an injured employee over the age of sixty: 400 weeks or 260 weeks?

The Fund argues that 100% permanent disability to the body as a whole equates to 400 weeks, as defined in Tenn. Code Ann. § 50-6-207(3)(F). The Fund acknowledges that an injured employee over the age of sixty may not recover more than 260 weeks, but insists that does not alter the employer's liability. The Fund contends that under Tenn. Code Ann. § 50-6-208(b) an employer

[1] Tenn. Code Ann. § 50-6-208(b) was subsequently modified for all injuries occurring after July 1, 2006. Tenn. Code Ann. § 50-6-208(d) (2007 Supp.). The decision in this case therefore only relates to pre-July 1, 2006 injuries.

is liable for 100% permanent disability to the body as a whole, which remains 400 weeks even if the employee's recovery is capped at 260 weeks. First Presbyterian, on the other hand, argues that 100% permanent disability to the body as a whole for an injured employee over the age of sixty equates to 260 weeks, since that is the maximum amount such an employee can recover. Additionally, First Presbyterian points out that the purpose of the Second Injury Fund is to encourage employers to hire previously injured employees by limiting the liability of employers to the first 100% of workers' compensation disability. *See Scales v. City of Oak Ridge*, 53 S.W.3d 649, 655 (Tenn. 2001). Thus, First Presbyterian argues, the Panel should hold that 100% disability equates to 260 weeks. The arguments of First Presbyterian are not without substance, but the principal at issue has been resolved previously in *Peace v. Easy Trucking Co.,* 38 S.W.3d 526, 529-531 (Tenn. 2001), where the Supreme Court, while acknowledging the conflicts and difficulties, resolved this calculation issue in favor of the Second Injury Fund. Therefore, we must agree with the Second Injury Fund that 100% permanent disability to the body as a whole equates to 400 weeks.

The Fund will serve its purpose by limiting the liability of employers regardless of this Panel's decision. Our decision only affects the extent to which the Fund limits the liability of employers. In making our decision, we are bound by the relevant statutory language. In Tenn. Code Ann. § 50-6-208(b), the Legislature established the point at which the Fund becomes liable in an employer's stead; that point is 100% permanent disability to the body as a whole. In Tenn. Code Ann. § 50-6-207(3)(F), the Legislature declared 400 weeks to be the value of the body as a whole. Therefore, 100% permanent disability to the body as a whole should equal 400 weeks. The 260-week provision contained in Tenn. Code Ann. § 50-6-207(4)(A)(I) does not change this analysis.

As the Tennessee Supreme Court noted in *Peace v. Easy Trucking Co.*, the original purpose of the 260-week provision was to extend, not limit, benefits for injured employees over sixty years of age.[2] 38 S.W.3d at 529 n.3. Absent the 260-week provision, an injured employee could not receive compensation beyond retirement age. Tenn. Code Ann. § 50-6-207(4)(A)(I). Thus, if an employee were over retirement age he would receive no compensation, and if he were close to retirement age he would receive only a few years of compensation. The 260-week "provision abrogates the [retirement age] 'cutoff' for employees over the age of 60" and ensures they will receive five years (260 weeks) of benefits. *Peace*, 38 S.W.3d at 529 n.3. Thus, the purpose of the provision is not to redefine 100% disability for employees over age sixty; rather it is to ensure that their compensation is not cut off too early.

In *Peace*, the Tennessee Supreme Court held that awards for employees over age sixty are to be calculated as a percentage of 400 weeks "capped" at 260 weeks, rather than as a percentage of 260 weeks. 38 S.W.3d at 532. And in *Scales v. City of Oak Ridge*, the Court used the "number of weeks" conversion method to convert a scheduled member disability rating into a disability rating to the body as a whole. 53 S.W.3d 649, 656-57 (Tenn. 2001). The employee received 300 weeks of compensation for scheduled member injuries that occurred after the employee turned sixty. *Id.*

[2]Due to the complexity of the statutory scheme, the Panel listened to the legislative debates over the 1992 reforms to the workers' compensation law, which included the addition of the 260-week provision. We found nothing in the legislative record helpful in resolving the issue before the Court.

at 657. Noting that "[t]he body as a whole is valued at 400 weeks," the Court determined that the scheduled member injuries equated to 75% disability to the body as a whole (300 is 75% of 400). *Id.* These cases are consistent with the conclusion that the workers' compensation law values the body as a whole at 400 weeks, even for employees injured over the age of sixty.

First Presbyterian contends that applying section 50-6-208(b) in this manner conflicts with the decision of a previous Panel in *Boling v. Sak's, Inc.*, *supra*. Our examination of the facts in *Boling* leads us to conclude otherwise. *Boling* concerned successive injuries, both of which were found by the trial court to result in 100% permanent total disability. *Id.* at * 1. In the present case, neither the previous injuries nor the injury at issue resulted in permanent total disability. Under the circumstances, the reasoning used in *Boling* is not applicable.

We recognize that, because the Social Security Offset applies to First Presbyterian and does not apply to the Fund, our decision has the unfortunate effect of reducing employee's compensation. "The [Workers' Compensation] Act should be liberally construed in favor of compensation and any doubts should be resolved in the employee's favor. However, this liberal construction requirement does not authorize courts to amend, alter, or extend its provisions beyond its obvious meaning." *Wait v. Travelers Indem. Co. of Ill.*, 240 S.W.3d 220, 224-25 (Tenn. 2007) (citations omitted). The Legislature established 100% permanent disability to the body as a whole as the dividing line between the employer's liability and the Second Injury Fund's liability and declared the value of the body as a whole to be 400 weeks. We are bound by that legislative declaration.

For the foregoing reasons, we hold that 100% permanent total disability, as contemplated in Tenn. Code Ann. § 50-6-208(b), equates to 400 weeks, even when an injured employee is over the age of sixty. An employer's liability for injured workers over sixty is not capped at 260 weeks; rather, the employer remains liable for up to 400 weeks. Therefore, we find that the trial court erred in apportioning 152 weeks of the 260-week award to the Second Injury Fund. Having previously paid 152 weeks of compensation to Roper, First Presbyterian is liable for 248 weeks of the current 260-week award, with the Second Injury Fund liable for the remaining twelve (12) weeks.

While we reverse the decision of the trial judge, we acknowledge the difficulty inherent in the resolution of this issue. This Court has struggled with the statutory language and legislative intent no less than the trial judge, but the case is controlled by the prior determination in *Peace, supra*, as set out above.

B. Roper's Claims

With the exception of a single sentence stating a proposition of law that is not in dispute in this case, Roper provides no argument and cites to no authority concerning the amount of his permanent disability or the calculation of the Social Security Offset. "The failure of a party to cite any authority or to construct an argument regarding his position on appeal constitutes waiver of that issue." *Newcomb v. Kohler Co.*, 222 S.W.3d 368, 401 (Tenn. Ct. App. 2006). Therefore, Roper has waived those issues.

Roper also asserts that the 260-week cap found in Tenn. Code. Ann. § 50-6-207(4)(A)(I) does not apply to awards for permanent partial disability. In *Vogel v. Wells Fargo*, 937 S.W.2d 856, 862 (Tenn. 1996), the Tennessee Supreme Court acknowledged that the language of the statute only refers to permanent total disability but nonetheless held that the statute applies to awards for permanent partial disability. The Court did this to avoid the irrational result that a permanently partially disabled employee over the age of sixty could receive more compensation than could a permanently and totally disabled employee over the age of sixty. *Id.* We are bound by decisions of the Tennessee Supreme Court. *State v. Irick*, 906 S.W.2d 440, 443 (Tenn. 1995).

IV. Conclusion

The judgment of the trial court concerning apportionment is reversed; it is affirmed in all other respects. Accordingly, we remand this case to the trial court for entry of an order consistent with this opinion. Costs are taxed one-half to Luther Roper, Sr., and one-half to First Presbyterian Church and St. Paul Travelers and their surety, for which execution may issue if necessary.

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WALTER C. KURTZ, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
JUNE 23, 2008 SESSION

LUTHER ROPER, SR. v. FIRST PRESBYTERIAN CHURCH, ET AL

Chancery Court for Rutherford County
No. 52793

No. M2007-02287-WC-R3-WC - Filed - December 4, 2008

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 are taxed one-half to Luther Roper, Sr., and one-half to First Presbyterian Church and St. Paul Travelers and their surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM