IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 22, 2008 Session

YVONNE PIGG v. LIBERTY MUTUAL INSURANCE CO., ET AL.

Direct Appeal from the Circuit Court for Davidson County
No. 06C-937 Barbara Haynes, Judge

No. M2007-01940-WC-R3-WC - Mailed - February 4, 2009
Filed - March 9, 2009

In this workers' compensation case, the employee sustained a compensable shoulder injury. She alleged that she sustained an additional injury to her back as a result of medical treatment for the shoulder injury. Her employer denied that claim. A settlement of both claims was approved by the Department of Labor. The settlement agreement stated that the back injury was being settled on a disputed claim basis, pursuant to Tennessee Code Annotated section 50-6-206(b). The employee returned to work for her employer for approximately three years. She was unable to satisfy her production quota and was eventually terminated for that reason. She sought reconsideration of both claims in the trial court. The trial court held that reconsideration of the back injury claim was barred by the terms of the settlement. It denied reconsideration of the shoulder injury claim because her termination was for "misconduct." Employee has appealed, contending that the trial court erred.[1] We affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court Affirmed

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which GARY R. WADE, J., and WALTER C. KURTZ, SR. J., joined.

Jerry D. Mayo, Nashville, Tennessee, for the appellant, Yvonne Pigg.

Lee Anne Murray and Jennifer R. Mueller, Nashville, Tennessee, for the appellee, Liberty Mutual Insurance Company.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael Moore, Solicitor General; Lauren S. Lamberth, Assistant Attorney General, for the appellee, The Second Injury Fund.

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[1] 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.

MEMORANDUM OPINION

Factual and Procedural Background

On June 14, 1999, the employee, Yvonne Pigg, began working at Dell Products, L.P. Prior to working at Dell, Ms. Pigg had undergone carpal tunnel surgery, which was the basis for a workers' compensation claim, and back surgery which was not work related. She was also diagnosed as having arthritis in her knees. None of these conditions prevented her from working.

On January 26, 2000, Ms. Pigg sustained an injury to her left shoulder in the scope and course of her employment with Dell. Liberty Mutual, Dell's workers' compensation insurer, deemed the shoulder injury compensable and provided medical treatment. On September 5, 2000, Ms. Pigg returned to work without restrictions or impairments. Ms. Pigg returned to the position she previously held at the same or greater wage she had earned prior to this injury.

Ms. Pigg alleged that while in physical therapy for her shoulder, she sustained injuries to her low back and right leg. Liberty Mutual and Dell disputed this claim on the basis Ms. Pigg had a pre-existing history of medical treatment for back pain. The parties settled both claims for $35,000.00. This amount represents 22.84% permanent partial disability to the body as a whole. The settlement allocated 7.5% permanent partial disability to the shoulder injury and the remainder to the alleged back injury. The settlement agreement explicitly stated that Ms. Pigg's alleged back injury was being settled as a disputed claim, pursuant to Tennessee Code Annotated section 50-6-206(b).

Ms. Pigg continued working for Dell through February 24, 2001. She took a leave of absence from February 25, 2001 to July 2001 for back surgery and to cope with depression related to the murder of her eldest son. The back surgery was performed on April 27, 2001, by Dr. Carl Hampf, Ms. Pigg's personal physician. Dr. Hampf approved Ms. Pigg's returning to work on July 16, 2001. After working ten days, Ms. Pigg complained of increased pain in her low back and right leg. Rather than undergoing additional surgery, the problem was treated with a series of three steroid injections. Dr. Hampf restricted Ms. Pigg from working during this period and did not release her to return to work until January 21, 2002. Following her return to work, Ms. Pigg requested nine leaves of absence for various medical conditions unrelated to her shoulder and back injury. This included a leave of absence from February 3, 2005 through May 10, 2005 due to depression associated with the murder of her second son.

At the request of her attorney, Dr. David Gaw examined Ms. Pigg's shoulder and back on April 4, 2002. Dr. Gaw found the shoulder injury to be permanent and testified that it would probably cause pain in proportion to the amount of stretching, overhead lifting, pushing or pulling Ms. Pigg does with her left arm. Dr. Gaw assigned a three percent (3%) anatomical impairment to the body as a whole due to the shoulder injury.

Dell has a company policy that every employee be required to meet production quotas which are referred to as the "metric." Employees who return from a leave of absence with medical restrictions that can be accommodated are not held to the metric. Employees who return from a

leave of absence without medical restrictions are not immediately held to the metric, but are given thirty to forty-five days to "ramp up." If, after this period of time, an employee is still not meeting the metric, he or she may be put on a performance improvement program for thirty days.

In this case, since each doctor released Ms. Pigg to work without restrictions, she was held to the metric in those months when she did not take a leave of absence. After her surgeries, from mid-2002 to mid-2005, there were months in which Ms. Pigg did not meet her metric but she was not put on a performance improvement program. Upon her return to work on May 10, 2005, Ms. Lambert was told that she would have 60 days to "ramp up" her production to 100% of her prescribed "metric." When the 60 days expired, her supervisor delayed placing Ms. Lambert on a performance improvement plan for almost three additional months. Because she still was not meeting her production quotas, Ms. Pigg was placed on a performance improvement program on October 3, 2005. Traditionally, an employee on a performance improvement program is given a trainer to teach and assist the employee. Ms. Pigg testified that she was not given a trainer. On December 1, 2005, Ms. Pigg was terminated for failing to improve her production. Cassandra Sims, who became Ms. Pigg's supervisor in May 2005, testified that Ms. Pigg never related her failure to meet the production quotas to physical ailments, but rather attributed it to psychological problems that resulted from the death of her son in February 2005.

Liberty Mutual filed a motion to dismiss Ms. Pigg's claim for reconsideration of benefits for her lower back injury on the ground that the "disputed claim" settlement barred reconsideration. The trial court granted the motion. The claim for reconsideration of the left shoulder injury proceeded to trial. The court denied that claim. In its decision, the court deemed the testimony of Cassandra Sims to be credible, and found that Dell terminated Ms. Pigg because of her own misconduct in failing to comply with company policy regarding attainment of production quotas. The court also found that this violation was unrelated to any work-related accident.

Ms. Pigg has appealed from those decisions, contending that the trial court erred 1) in denying her claim for reconsideration of the shoulder injury by determining that her termination was due to misconduct, and 2) in finding that Ms. Pigg did not have the right to a reconsideration of the alleged back injury because the claim was settled on a disputed basis.

Standard of Review

In a workers' compensation case, issues of fact are reviewed de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). 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); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

Analysis

It is essentially undisputed that Ms. Pigg was terminated for job performance reasons, i.e., her continuing inability to satisfy the metric. First, as she did at trial and now on appeal, Ms. Pigg contends that her termination constituted a loss of employment which triggered the right to reconsideration of her prior settlement pursuant to Tennessee Code Annotated section 50-6-241(a)(2) (2008). In support of her position, Ms. Pigg contends that her inability to meet her production quota was caused by the effects of her work-related injury, and thus are "reasonably related" to that injury. See Tryon v. Saturn Corp., 254 S.W.3d 321, 328-29 (Tenn. 2008); Lay v. Scott County Sheriff's Dep't, 109 S.W.3d 293, 298 (Tenn. 2003) ("Clearly, 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 the alternative, Ms. Pigg contends that her inability to meet production standards was not willful misconduct, and should not extinguish her right to seek reconsideration. Cf. Davis v. Avron Truss Co., No. E2000-00780-WC-R3-CV, 2001 WL 767014, at *2 (Tenn. Workers' Comp. Panel July 5, 2001). Second, regarding her back injury, Ms. Pigg argues that the settlement of that claim on a "disputed" basis does not preclude reconsideration of the extent of her permanent partial disability. Our resolution of the first issue renders it unnecessary to address the second.

The trial court found that Ms. Pigg's inability to meet the requirements of the metric was unrelated to her work injuries. In making that finding, the trial judge specifically accredited the testimony of Ms. Pigg's supervisor, Cassandra Sims. As previously stated, this finding is entitled to deference by this Panel since the trial judge saw and heard the witnesses and is in a better position to evaluate their credibility. We also have considered admissions of Ms. Pigg during her testimony that detract from her credibility. For example, she indicated on her application with Dell that she had graduated from high school when, in fact, she had not. On the same application, she indicated she had never been involuntarily discharged from any prior employment when she had been fired from two previous positions. She made the same misrepresentation in her responses to interrogatories propounded in this case. During her deposition in November 2006, she denied having been involved in an automobile accident since July 2002, but admitted during trial that she was taken to the emergency room following an automobile accident in April 2004. We have also weighed the substantial evidence in the record of Ms. Pigg's multiple physical and mental problems during this period that were unrelated to her work injuries. We further note that Ms. Pigg did not receive any treatment for the shoulder injury in 2003, 2004 or 2005, and that she was released back to work by her physicians with no restrictions on several occasions. We conclude that the evidence does not preponderate against the trial court's finding. That determination leads us to the question of whether Ms. Pigg's failure to satisfy production quotas, for reasons unrelated to her work injury, is a proper basis for the trial court's denial of her request for a reconsideration of her previous permanent partial disability award.

Initially, an employee is not required to prove that the loss of employment is related to the prior work injury in order to qualify for reconsideration under Tennessee Code Annotated section 50-6-241(a)(2). Niziol v. Lockheed Martin Energy Sys., Inc., 8 S.W.3d 622, 624 (Tenn. 1999); Young v. Caradon Better-Bilt, Inc., 30 S.W.3d 285, 288 (Tenn. 2000). However, even though an employee might have a statutory right to reconsideration, there is no entitlement to an enlargement of the previous award. In considering this issue, cases involving the statutory cap on benefits under Tennessee Code Annotated section 50-6-241(b) are particularly helpful, because our Supreme Court has employed a similar analysis in those cases and in those involving a reconsideration and increase of benefits under section 50-6-241(a)(2). See Lay, 109 S.W.3d at 298.

In Tryon, the Supreme Court reviewed many of the cases which have addressed the related issues of "loss of employment" and "meaningful return to work." Tryon, 254 S.W.3d at 328-30. In cases where an injured employee was unable to return to work, or continue to work, due to pain or restrictions caused by the work injury, it has generally been found that the employee should receive an enlargement of an earlier benefit award under Tennessee Code Annotated section 50-6-241(a)(2) (2008) or to application of the higher "cap" upon permanent disability awards under Tennessee Code Annotated section 50-6-241(b) (2008). See, e.g., Nelson v. Wal-Mart Stores, Inc., 8 S.W.3d 625, 630 (Tenn. 1999); Young v. Cumberland County Med. Ctr., No. M2005-02550-WC-R3-CV, 2007 WL 439015 (Tenn. Workers' Comp. Panel Feb. 12, 2007). On the other hand, employees who do not return to work, or who voluntarily resign for reasons unrelated to the work injury are bound by the lower "cap," and should not receive a greater benefit. See, e.g., Lay, 109 S.W.3d at 299; Hardin v. Royal & Sunalliance Ins., 104 S.W.3d 501, 506 (Tenn. 2003).

In a slightly different context, an employee who is terminated as a result of his or her own misconduct should not receive a reconsideration or application of the higher "cap." Carter v. First Source Furniture Group, 92 S.W.3d 367 (Tenn. 2002); Davis, No. E2000-00780-WC-R3-CV, at *2. However, an employee who is terminated due to outsourcing of his work is appropriate for reconsideration, Niziol, 8 S.W.3d at 624, as is an employee whose employer is purchased by another business entity. Barnett v. Milan Seating Sys., 215 S.W.3d 828 (Tenn. 2007).

The cases do not provide a bright line test, but illustrate a continuum. At one end, an employee who voluntarily leaves his employment for reasons of his own choosing, or who is terminated for disruptive or violent behavior is subject to the lower cap on his disability award initially, and is not an appropriate candidate for reconsideration. At the other, an employee who leaves his or her employment because the effects of an injury do not permit the employee to perform his or her job, or is terminated because of a reduction in the size of the employer's workforce, is not subject to the lower cap initially, or, if he or she has previously had a meaningful return to work, may properly seek reconsideration. The facts of this case fall somewhere toward the center of that continuum.

The guiding principle to be applied in addressing this issue is "the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to either return to or remain at work," Tryon, 254 S.W.3d at 328. "The determination of the reasonableness of the actions of the employer and the employee depends on the facts of each case."

Id. "[A]n employer should be permitted to enforce workplace rules without being penalized in a workers' compensation case." Carter, 92 S.W.3d at 371. However, an employer's decision to terminate an employee for non-compliance with workplace rules is subject to examination by the courts in that employee's workers' compensation lawsuit. Id.; Krantz v. Nissan N. Am., Inc., No. M2007-01812-WC-R3-WC, 2008 WL 4645192, *5-6 (Tenn. Workers' Comp. Panel Oct. 6, 2008); Moore v. Best Metal Cabinets, No. W2003-00687-WC-R3-CV, 2004 WL 2270751 (Tenn. Workers' Comp. Panel Oct. 7, 2004).

Continuing satisfaction of production quotas was a condition of employment at Dell and is, therefore, justifiably viewed as a work rule. The establishment of a production quota, as a general proposition, is reasonably related to the business necessity of producing and selling goods or services in sufficient quantities to make a profit. In the absence of specific evidence that a particular quota is simply unrealistic or is being applied to an individual employee in a discriminatory manner, an employer should be able to enforce such a rule without penalty. There is no substantial evidence in this case that the production quotas imposed by Dell were unrealistic or that they were being applied to Ms. Pigg in a discriminatory manner. To the contrary, it appears that, in recognition of Ms. Pigg's many medical and other problems, Dell was quite lenient in its application of the metric to her. In short, the rule was reasonable and appears to have been reasonably applied by the employer. Consistent with Carter, we find that Dell should not be "penalized" for its reasonable conduct.

Ms. Pigg contends that her inability to satisfy the metric is not properly characterized as misconduct and should not, therefore, result in the trial court's rejection of her request for a reconsideration. Her deficiency was not the result of any fault or intent on her part, but of factors apart from the workplace that were beyond her control. She contrasts this with the conduct engaged in by the employees in Carter (assaulting a co-employee), and Davis (fighting with co-employee). On the basis of that contrast, she argues that only a termination for gross or willful misconduct acts may serve as the basis for denial of a request for reconsideration of a workers' compensation award.[2] Her conduct was certainly not comparable to that of either Ms. Carter or Mr. Davis. Use of the term "misconduct" permits negative inferences which are not necessarily applicable in this case. Ms. Pigg simply was unable to perform her job for reasons unrelated to her work injuries. Whatever terminology is used to describe the facts giving rise to her termination, we hold that Dell's enforcement of its reasonable work rule does not subject it to additional liability under section 50-6-241(a)(2).

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Yvonne Pigg and her surety, for which execution may issue if necessary.

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[2]We note that Tennessee Code Annotated section 50-6-241(d)(1)(B)(iii)(b) (2008), which applies to injuries occurring after July 1, 2004, bars reconsideration when the loss of employment is due to "the employee's misconduct connected with the employee's employment." There is no willfulness requirement. Cf. Tenn. Code Ann. §50-6-110(a) (2008).

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DONALD P. HARRIS, SENIOR JUDGE

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OCTOBER 22, 2008 SESSION

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No. M2007-01940-WC-R3-WC - Filed - March 9, 2009

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 Yvonne Pigg and her surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM