IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 26, 2009

LORI ANN PATTON v. HARTCO FLOORING COMPANY, A DIVISION OF ARMSTRONG PRODUCTS, INC., et al.

Direct Appeal from the Chancery Court for Scott County
No. 9418 Billy J. White, Judge

No. E2008-01829-WC-R3-WC - Filed October 1, 2009

This 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. The issue raised on appeal is whether the Employee, who suffered a neck, arm and shoulder injury in the course and scope of her employment, made a meaningful return to work after her injury. The trial court ruled that the Employee did not make a meaningful return to work, and that, therefore, the cap on benefits of one and one-half times the impairment rating provided for in Tennessee Code Annotated section 50-6-241(a)(1) did not apply. The trial court applied a multiplier of four times the impairment rating. The Employer appealed. We agree with the trial court that the Employee did not have a meaningful return to work, and thus the benefits cap does not apply. Moreover, the multiplier of four times the impairment rating was not excessive. We affirm the judgment.

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

E. RILEY ANDERSON, SP. J., delivered the opinion of the court, in which GARY R. WADE, J., and DONALD P. HARRIS, SR. J., joined.

Linda J. Hamilton Mowles, Knoxville, Tennessee for the appellant, Hartco Flooring Company, Inc.

David H. Dunaway, LaFollette, Tennessee for the appellee, Lori Ann Patton.

MEMORANDUM OPINION

Facts and Procedural Background

Lori Ann Patton (the Employee) began working in 1998 at the Employer, Hartco Flooring Company, Inc., a manufacturer of wood flooring products. It is undisputed that the Employee first

worked at the Employer as a finished line grader. However, the Employee switched jobs within the company to become an unfinished line grader and worked at that position for approximately four years before her workplace injury.

On or about April 19, 2005, while performing her duties as an unfinished line grader, the Employee suffered an injury to her right arm and shoulder. The employee reported a gradual increase in pain to the Employer who referred her to Dr. Paul Naylor, an orthopedic surgeon. As a result of her injury the Employee filed a workers compensation action against her Employer in the Scott County Chancery Court on May 18, 2005. The case was finally tried on July 1, 2008. The following summarizes the proof at trial.

The Employee's job as an unfinished grader required that she stand in front of the conveyor belt while the wood strips moved down the assembly line toward her. She examined each piece of wood as it moved in front of her, then picked it up and flipped it over to examine the other side. If a piece of wood contained a defect, then she marked it to indicate to the nester that it needed to be repaired. She then placed it in one of five nearby slots at waist level, depending on its length. If the wood seemed irreparable she picked it up and threw it onto the waste conveyor that was just above shoulder level, right at her eye level. The size of the wood the Employee handled on the unfinished line varied from nine inches to seven feet long and between two and one-quarter (2 1/4) inches to three and one-quarter (3 1/4) inches wide.

1. Medical Treatment

On June 8, 2005, Dr. Naylor first examined the employee. He treated her with an injection in her right shoulder and diagnosed her with shoulder impingement and possibly a partial tear in her rotator cuff attributable to the repetitive motion required of her at work. Dr. Naylor ordered an MRI on her shoulder, which revealed bursal side fibrillation, fraying of the outer edge of the tendons in the rotator cuff consistent with impingement, a cyst around the labrum, and mild AC joint arthritis. Because the Employee did not respond to conservative treatment, Dr. Naylor suggested arthroscopic surgery on her right shoulder. On July 8, 2005, Dr. Naylor performed surgery and uncovered bone spurs that were irritating the rotator cuff, but he did not see any actual tears. He removed the bone spurs and repaired the fraying rotator cuff.

After surgery, Dr. Naylor sent the Employee to aggressive therapy, withheld her from work for two months, and released her to light duty again on September 6, 2005, with a recommendation of no overhead work. In the middle of November of 2005, Dr. Naylor released her to four hours a day of regular duty and four hours of lighter duty.

On December 12, 2005, Dr. Naylor determined that she had reached maximum medical improvement. He assigned a 3% permanent partial impairment to the body as a whole for the right shoulder. He released her to work without restrictions, and she returned to work at full duty at her original unfinished grader position.

The Employee returned to see Dr. Naylor several months later regarding recurring pain in the back of her right shoulder and also in her neck. Conservative measures were not effective, and she

underwent an MRI of her cervical spine on June 19, 2006. The MRI revealed bulging disks at C2 and C5-6. An electromyography (EMG) conducted at Dr. Naylor's request on February 23, 2007, showed evidence of mild subacute C6 radiculopathy on the left side. Dr. Naylor treated her with injections and medication but her symptoms did not improve. When Dr. Naylor last saw the Employee on March 15, 2007, she still complained of the C6 radiculopathy with persistent pain.

Dr. Naylor referred the Employee to Dr. Peter E. Vonderau, a specialist in physical rehabilitation, who first examined the Employee on September 25, 2006. He found weakness of the rotator cuff muscles, decreased sensation and tenderness to palpation in the neck and shoulder. She was seen again in October, November and December of 2006, with continuing complaints of pain in the neck and shoulder. She was treated with therapy, medication and a shoulder injection. When she was seen on November 27, 2006, Dr. Vonderau explained to her that given her right shoulder surgery she would be best served to find a job that required less lifting, pushing and pulling. On that very date she changed jobs from the unfinished line grader position to a nester position for which she had previously applied in September 2006. During his treatment Dr. Vonderau had placed the Employee on restrictions from time to time which varied from no overhead work, no constant repetitive use of the upper extremities, a five-pound lifting restriction and limited hours per day. Nevertheless, she was released to return to work at her new job as a nester with no restrictions. Throughout 2007 and until March 2008 she was seen by Dr. Vonderau with continuing complaints of pain in the neck and shoulder. In February 2008, she was placed on a 20-pound lifting restriction with no throwing of wood. At her last visit in March of 2008, she still had persistent symptoms of pain but was able to work.

Because the Employee's problems with her right arm persisted even after she was released by Dr. Naylor to return to work in December of 2005, her attorney scheduled an evaluation with Dr. Choudhury Salekin. Dr. Salekin examined the Employee at her attorney's office on March 11, 2006. He completed a Form C-32, which assigned her a permanent impairment rating of 13% to the body as a whole. Dr. Salekin determined that the Employee suffered a torn rotator cuff in her right shoulder. He also diagnosed ulna nueropathy in the Employee's right forearm and medial epicondylitis in her right elbow.

On June 7, 2007, the Employee saw Dr. Paul Johnson, an orthopaedic spine surgeon, at the Employer's request. Dr. Johnson, who only saw the Employee one time, attributed the pain in her neck to the disk herniation at C5-6. He assigned an anatomical impairment of 5% to the body as a whole and returned her to work without restrictions.

2. Return to Work

When Dr. Naylor released the Employee to return to work without restrictions in December of 2005, she was performing the same job at the same wage that she had performed before her injury. The Employee testified that "in order to be able to stay there and work, it's what I felt I had to do." However, she also stated that "[i]t got to where the pain of doing [the unfinished grading] job was really more than I could handle. Yes, I was there everyday, but it just got to be unbearable. And then they started running the wide wood, which made it even worse."

As a result she applied for a change in her job from an unfinished line grader to a nester, which paid 70 cents an hour less but was less strenuous. The process of a transfer at the Employer's facility required an employee to apply for the new position, then wait for an opening in that position to become available, and then to be awarded the position with no certainty in the process. In the present case, the Employee worked at her old job as an unfinished line grader without restrictions until September 2006, when she applied for the nester job. She was awarded the nester position in November 2006.

In April of 2005, when she was injured, the Employee was earning $11.61 per hour as an unfinished line grader. In March of 2006, after she returned to work as a unfinished grader, her rate of pay was $12.07 per hour. Her pay was reduced by 70 cents an hour when she transferred to the nester position in November of 2006. The Employee, however, received three raises as a nester, and was making $12.21 per hour at the time of trial, which was more than she was making prior to her injury. She testified that she would have received those same raises had she remained in the unfinished line grader position or transferred to the finished line grader position. The Employer's Environmental Health and Safety Manager, Kelly Daugherty, agreed that, had the Employee stayed in the position of grader, she would have been making substantially more money on the hour in the grading position rather than the nester position. The Employee testified at trial that her overall pay had been reduced by approximately $100 a week from what she was making prior to her injury.

3. Trial Court's Findings

The trial was held July 1, 2008 in the Scott County Chancery Court before Chancellor Billy Joe White. At the close of the evidence, the trial court awarded the Employee a 5% permanent partial impairment rating to the body as a whole for the neck and awarded 3% to the body as a whole for the right shoulder, for a total of an 8% permanent partial impairment to the body as a whole. The court denied the second claim, citing no medical evidence showing epicondylitis.

The trial court found that the Employee was unable to maintain her employment and transferred to a job paying 70 cents less on the hour to alleviate her pain. Moreover, she was told by the supervisor that she should quit working so much overtime because that might be making her injury worse. The court therefore held that there was no meaningful return to work and, accordingly, that the one and one-half times cap on benefits of Tennessee Code Annotated section 50-6-241(a)(1) did not apply. The court set a multiplier of four for total of 32% permanent partial disability benefits to the body as a whole.

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) (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. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987). 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. Landers v. Fireman's Fund Ins. Co., 775 S.W.2d 355, 356 (Tenn. 1989). A

trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

The only two issues the Employer raises on appeal are whether the Employee made a meaningful return to work and, if not, whether the award is excessive.

1. Meaningful Return to Work

In order to determine whether there was a meaningful return to work by the employee, we first examine the applicable Tennessee statutes and the cases that followed interpreting the statutes. The statute provides that if 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 award is capped at one and one-half times the medical impairment rating, assuming the injury occurred after July 1, 2004. Tenn. Code Ann. § 50-6-241(d)(1)(A) (2008). On the other hand, if the employer does not return the employee to work at a wage equal to or greater than the wage the employee was receiving at the time of injury, the employee may recover a permanent partial disability award up to six times the medical impairment rating. Tenn. Code Ann. § 50-6-241(d)(2)(A).

In interpreting the foregoing statutes, a recent panel opinion observed:

> If the employee made a meaningful return to work, employee's permanent partial disability award is capped using the smaller multiplier as provided in either Tennessee code Annotated section 50-6-241(a)(1) or -241(d)(1)(A). If the employee did not make a meaningful return to work, however, the employee's permanent partial disability award is calculated using the larger multiplier found in Tennessee Code Annotated sections 50-6-241(b) and -241(d)(2)(A).

Edwards v. Saturn Corp., No. M2007-01955-WC-R3-WC, 2008 WL 4378188, at *4 (Tenn. Workers' Comp. Panel Sept. 25, 2008).

The Supreme Court explained the concept of a meaningful return to work as follows: When determining whether a particular employee had a meaningful return to work, the courts must assess 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. See Lay v. Scott County Sheriff's Dept., 109 S.W.3d 293, 297 (Tenn. 2003); Nelson v. Wal-Mart Stores Inc., 8 S.W. 3d 625, 630 (Tenn. 1999). The determination of the reasonableness of the actions of the Employer and the Employee depends upon the facts of each case. See Newton v. Scott Health Care Ctr., 914 S.W. 2d 884, 886 (Tenn. Workers' Comp. Panel 1995).

The employer has the burden, by a preponderance of the evidence, to establish that an offer of a return to work is at a wage equal to or greater than the pre-injury employment and that the work is within the medical restrictions which the medical evidence shows are appropriate for the returning employee. Ogren v. Housecall Health Care, Inc., 101 S.W.3d 55, 57 (Tenn. Workers' Comp. Panel

1998). Moreover, the work must be reasonable in light of the circumstances of the employee's physical ability to perform the offered employment. Newton, 914 S.W.2d at 886.

The Employer contends that the Employee had a meaningful return to work because (1) the Employee returned to work for fourteen months at the same wage she was receiving at the time of her injury and (2) the later reduction in her wage was the result of a voluntary decision on her part to transfer from the unfinished line grader position to the nester position. The Employer compares the present case to cases involving voluntary resignations. See, e.g., Lay, 109 S.W.3d at 299 (applying the benefits cap where the employee worked for five months after the workplace injury, voluntarily resigned for reasons unrelated to the injury, then returned to a lower-paying position); Knollwood Manor v. Cox, No. M2008-00151-WC-R3-WC, 2008 WL 4936762, at *4 (Tenn. Workers' Comp. Panel Nov. 20, 2008) (finding that the employee had a meaningful return to work because the preponderance of the evidence showed that her resignation was due to a scheduling dispute and not based on retaliatory behavior from the company due to her injury).

The Employee, on the other hand, contends that her change of job from an unfinished grader to a nester, which resulted in a 70-cent-per-hour reduction in pay, is not a meaningful return to work. She asserts that the wage is not equal to or greater than the wage she was receiving at the time of the injury. Moreover, the Employer denied her the right to work voluntary overtime. The Employee argues that while she attempted to work as an unfinished grader, it was not physically possible for her to continue to do so. As a result she bid on and accepted the nester job because of her limitations, which her employer recognized in refusing her voluntary overtime.

The Employee argues that existing case law supports the proposition that a return to a pre-injury job that the employee ultimately cannot perform, followed by a transfer to a less-strenuous, lower-paying position, does not consist of a meaningful return to work. The Employee cites Dowd v. Cassens Transport Co., No. M2005-2632-WC-R3-CV, 2007 WL 715518 (Tenn. Workers' Comp. Panel Mar. 8, 2007), which provides that "[w]here the employee returns to work after being injured and after a period of time is forced to stop working because of inability to perform due to the work-related injury, such circumstances are generally considered as not making a meaningful return to work." Id. at *6 (citing Lay v. Scott County Sheriff's Dept., 109 S.W.3d 293 (Tenn. 2003)). An earlier panel reached a similar conclusion. See Haywood v. Ormet Aluminum Mill Prods. Corp., 2002 WL 927440 (Tenn. Workers' Comp. Panel May 1, 2002).

In our view, the Employee in this case returned to work, performing the same job as an unfinished line grader that she performed before her injury. She testified, however, "[i]t got to where the pain of doing [the] job was really more than I can handle . . . it just got to be unbearable." Thereafter she transferred to a less-strenuous, lower-paying job.

We think this case is comparable to Tryon v. Saturn Corp., 254 S.W. 3d 321 (Tenn. 2008), where the employee sustained a series of workplace injuries while working at Saturn's Spring Hill Plant. Despite the pain he experienced due to his workplace injuries, the employee continued to work for sixteen months following a second neck surgery. The employee's doctor advised him to consider retirement or disability retirement options, and he retired. The trial court found that Tryon

did not have a meaningful return to work. Upon a full court review, the Supreme Court affirmed the trial court's conclusion that the employee did not have a meaningful return to work.

The Tryon Court stated that regardless of whether Tryon retired sixteen days or sixteen months after returning to work, the fundamental question was whether Tryon's decision to retire was reasonably related to his workplace injury. Id. at 333. The Court agreed with the trial court that the risk to Mr. Tryon's health posed by continuing to work, along with the significant pain that he was experiencing, formed a reasonable basis for not continuing to work. Id. at 334.

In the much earlier case King v. Goodyear Tire & Rubber Co., No. 02S01-9611-CH-00100, 1997 WL 468958 (Tenn. Workers' Comp. Panel Aug. 18, 1997), a panel held that the employee, who had initially returned to work in the same position earning the same wage but transferred after seven months to a lower-paying, less-strenuous job to alleviate the pain, did not have a meaningful return to work. The King court found significant the fact that the medical testimony proffered by the employee did not include a statement that the employee could not or should not have been able to perform the job he was performing before and after the injury. Id. at *3. We think this case is comparable to Tryon and is distinguishable from King because the employee's physician Dr. Vonderau recommended that she take a less-strenuous job and she did so, just as Mr. Tryon's physician recommended that he consider retiring and he did so.

Although the Employee here worked for a period of time after her return to her pre-injury job, this does not preclude a finding that she did not have a meaningful return to work as long as her transfer was reasonably related to the workplace injury. See Tryon, 254 S.W.3d at 333. The Employer did not refute the Employee's testimony that her transfer was a direct result of her workplace injury and the severe pain she experienced in the unfinished line grader position. Moreover, Dr. Vonderau did recommend to the employee a change to a less-strenuous job. Just as the employee in Tryon was reasonable in resigning due to the pain he experienced, the Employee here was reasonable in voluntarily transferring to a lower-paying position that was within her capabilities.

The Employer also claims that the benefit cap should apply even if the Employee transferred to the less-paying position due to the pain from her workplace injury because she was making more money ($12.21 per hour) at the time of trial than she did prior to her injury ($11.61 per hour). The undisputed testimony at trial, however, indicated that the Employee was making more money at the time of trial than she did at the time of her injury because she had received three longevity raises in the interim. Moreover, both the Employee and the Employer's Safety Manager testified that the Employee would have received the same raises at the unfinished line grader position had she been capable of continuing in it, but that she also would have been making 70 cents per hour more. Because the Employee earned less than her pre-injury wage when she transferred to the nester position and remained at a lower salary relative to the unfinished line grader position up until the time of trial, the evidence does not preponderate against the trial court's finding that she did not have a meaningful return to work.

2. Excessive Award

The Employer argues that even if the Employee did not have a meaningful return to work, the multiplier of four applied by the trial court is excessive. Where an employee does not have a meaningful return to work, "the maximum permanent partial disability benefits that the employee may receive for the body as a whole and schedule member injuries subject to subdivision (d)(1)(A) may not exceed six (6) times the medical impairment rating." Tenn. Code Ann. § 50-6-241(d)(2)(A). In determining the amount of the multiplier, the 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(c).

In this case the Employee is forty-six years old and has a high school education. She has no additional education or training. She worked for 10 years as a sewing machine operator prior to the assembly line job she now has with the Employer. Because of the continuing pain caused by her work injury, many factory jobs are foreclosed to her. The evidence shows that the Employee leads an active life. However, the Employee also testified that she still experiences pain, requiring her to take a pain pill every morning and, at times, work with a heating pad on her shoulder.

We find that the facts do not preponderate against the trial court's award of 32% permanent partial disability and that the award is not excessive.

Conclusion

The judgment of the trial court is affirmed. Costs of this appeal shall be assessed to the Employer, Hartco Flooring Company, and its surety, for which execution may issue if necessary.

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E. RILEY ANDERSON, SPECIAL JUSTICE