IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 22, 2010 Session

LEE MEEKS v. HARTFORD INSURANCE COMPANY OF THE MIDWEST

Direct Appeal from the Chancery Court for Gibson County

No. 19295 George R. Ellis, Chancellor

No. W2009-01919-WC-R3-WC - Mailed July 27, 2010; Filed August 30, 2010

The employee sustained two compensable injuries on the same day. Before he reached maximum medical improvement, all of the stock in his employer was sold to another corporation. The trial court held that this transaction caused a loss of employment for purposes of Tennessee Code Annotated section 50-6-241(d) and awarded 33% permanent partial disability to the left arm, an amount in excess of one and one-half times the anatomical impairment. On appeal,[1] the employer contends that the trial court erred in finding that a loss of employment occurred as a result of the change of ownership and that the award is excessive. We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2008) 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, C. J., and D. J. ALISSANDRATOS, SP. J., joined.

William B. Walk, Memphis, Tennessee, for the appellant, Hartford Insurance Company of the Midwest.

Ricky L. Boren, Jackson, Tennessee, for the appellee, Lee Meeks.

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[1] Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law.

MEMORANDUM OPINION

Factual and Procedural Background

Lee Meeks ("Employee") sustained a compensable injury on February 11, 2008, when he caught his left arm in the door of an injection molding machine. On the same day, he fell and hit his left elbow. Initially, he did not consider his injuries to be serious. However, his symptoms worsened, and he requested medical treatment. He was referred to Dr. Jason Hutchinson, an orthopaedic surgeon. Dr. Hutchinson diagnosed an ulnar nerve entrapment at the elbow. He recommended surgery, which was performed on May 1, 2008. Employee was absent from work for only a few days. He was permitted to work on a full-duty basis beginning on June 4, 2008. The strength and sensation in his left arm improved gradually. He reached maximum medical improvement on February 11, 2009. Dr. Hutchinson testified that Employee retained a mild sensory deficit and mild loss of strength at that time. He assigned a permanent impairment of 2% to the left arm, per the Sixth Edition of the American Medical Association ("AMA") Guides, and released Employee with no restrictions.

Dr. Samuel Chung, a physiatrist, conducted an independent medical examination at the request of Employee's counsel on March 2, 2009. Using a different interpretation of the AMA Guides than Dr. Hutchinson, Dr. Chung assigned a permanent impairment of 11% to the left arm. On cross-examination, he admitted that he had been convicted of medicare fraud in January 2004.

Employee was twenty-eight years old. He was a high school graduate and had attended Dyersburg State Community College for two semesters. He began working for Siegel-Roberts ("Employer") in 2002 as a material handler. Eventually, he became an injection molding machine operator, which was his position at the time his injury occurred. He held the same position at the time of the trial. His previous work experience had been as a material handler for a manufacturer similar to Employer. He testified that the surgery performed by Dr. Hutchinson had significantly improved the condition of his arm. However, he testified that he had some loss of sensation in the ring and small fingers of his left hand and that his grip strength in that hand was diminished. He was able to continue his prior activities of fishing, hunting, and ATV riding, but had made adjustments in each to accommodate the limitations of his left hand.

The parties introduced the deposition of Barry Klinckhardt, in-house counsel for Employer. Mr. Klinckhardt testified concerning the change in ownership of Employer that occurred on May 1, 2008. Prior to that date, Employer was a privately held corporation with an automotive division that operated the plant in Tennessee where Employee worked, and

three non-automotive subsidiaries. Through a series of transactions, the non-automotive subsidiaries were separated from Employer, and all of the stock in Employer was sold to Guardian, Inc. Despite the change in ownership, Employer remained in existence under the same corporate charter and continued to be the immediate employer of Employee.

The trial court held that, as a result of the sale of Employer's stock to Guardian, Employee was no longer employed by his pre-injury employer and that the one and one-half times impairment cap set forth in Tennessee Code Annotated section 50-6-241 (2008 & Supp. 2009) therefore did not apply. It awarded 33% permanent partial disability ("PPD") to the left arm.

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. *Madden v. Holland Group of Tenn.*, 277 S.W.3d 896, 900 (Tenn. 2009). When 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. *Foreman v. Automatic Systems, Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

1. Loss of Employment

The parties agree that the corporate transaction in this case is similar to that considered by the Supreme Court in *Perrin v. Gaylord Entertainment Co.*, 120 S.W.3d 823 (Tenn. 2003), and *Barnett v. Milan Seating Systems*, 215 S.W.3d 828 (Tenn. 2007). In *Perrin*, the Supreme Court held that purchase of a pre-injury employer by another corporate entity was a "loss of employment" for purposes of section 50-6-241(d) and so triggered the one year period to petition for reconsideration of a capped settlement or award. 120 S.W.3d at 827. In *Barnett*, the Court was asked to reconsider and overrule *Perrin*. 215 S.W.3d at 833. In declining to do so, the Court observed that the General Assembly had amended section 50-6-241 after *Perrin* was decided, but had chosen not to change the language relied

upon in that decision. *Id.* In 2009, the legislature amended section 50-6-241 by enacting Public Chapter 364, essentially abrogating *Perrin* and *Barnett* for "injuries occurring on or after July 1, 2009." Employer argues that, under the rationale of *Barnett*, the Panel should overrule *Perrin* and *Barnett* in light of the 2009 amendment to section 50-6-241.

Employer further asserts that two facts distinguish this case from *Perrin* and *Barnett*. In both *Perrin* and *Barnett*, the entity that employed the injured worker was purchased by another corporation, and in both cases, the employee was paid by the purchasing corporation after the sale. In the present case, Employer, not Employer's new owner, continued to pay Employee using the Employer's same federal tax identification number after the change in Employer's ownership.

A similar though not identical fact pattern was before the Panel in *Day v. Zurich Am. Ins.*, No. W2009-01349-WC-R3-WC, 2010 Tenn. LEXIS 171 (Tenn. Workers' Comp. Panel Mar. 31, 2010). *Day* involved an employer whose holding company was sold to another entity and then was merged with a related corporation and re-chartered as an LLC. The trial court held that *Perrin* and *Barnett* controlled and that the change in the employer's ownership amounted to a "loss of employment" pursuant to Tennessee Code Annotated section 50-6-24. On appeal, the employer argued that by enacting Public Chapter 364 the General Assembly expressed a clear preference that the purchase of employer or the holding company that owns employer does not constitute a "loss of employment" under Tennessee Code Annotated section 50-6-241(d). The employer contended that the General Assembly's policy preference should control rather than *Perrin* and *Barnett*. The Panel disagreed stating that the General Assembly's "intent regarding retrospective application of the amendments is explicit and clear. The changes to the workers' compensation statute made by Public Chapter 364 are not applicable" to injuries occurring before July 2009. *Day*, 2010 Tenn. LEXIS 171, at *9. The Panel held that *Perrin* and *Barnett* controlled and affirmed the decision of the trial court. No motion for review was filed, and the Panel's opinion was adopted and affirmed by the Tennessee Supreme Court. *Day v. Zurich Am. Ins.*, No. W2009-01349-WC-R3-WC, 2010 Tenn. LEXIS 172 (Tenn. Mar. 31, 2010).

Although the facts here vary slightly from those in *Day*, we conclude that the differences are not significant enough to distinguish it from that case. We hold that *Day* is binding precedent and that the trial court therefore correctly held that pursuant to *Perrin* and *Barnett* Employee's disability award was not limited to one and one-half times the anatomical impairment.

2. Excessive Award

Employer argues in the alternative that the trial court's award of PPD benefits was excessive. In support of its position, it points out that Employee was released to work without restrictions by Dr. Hutchinson, that Dr. Hutchinson considered the result of the surgery to be very good, and that Employee's own testimony demonstrated that the injury has had only a limited effect on his ability to function. It also contends that Dr. Hutchinson's impairment rating, 2% of the left arm, is more credible than Dr. Chung's 11% impairment. In that regard, it notes that Dr. Chung has been convicted of a felony, that he calculated his rating by combining different types of impairments, and that he conceded that Dr. Hutchinson's method was correct.

In defense of the award, Employee points to those portions of his testimony concerning the effects of the injury upon his activities. In addition, he relies upon Dr. Chung's testimony that the AMA Guides state that, when more than one method of rating an impairment is appropriate, the method which results in the higher impairment is preferable. As is often the case, the evidence in this record could reasonably support a range of findings concerning the extent of the disability caused by Employee's injury. This result is within that range. We conclude, therefore, that the evidence does not preponderate against the trial court's finding on this issue.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Hartford Insurance Company of the Midwest, 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, Hartford Insurance Company of the Midwest, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM