IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
February 24, 2014 Session

MADIA DIA v. IMPORTS COLLISION CENTER, INC.

Appeal from the Circuit Court for Davidson County
No. 12C2105 Hamilton V. Gayden, Jr., Judge

No. M2013-01496-WC-R3-WC - Mailed July 16, 2014
Filed August 20, 2014

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. Employee filed a request for reconsideration pursuant to Tenn. Code Ann. § 50-6-241(d)(1)(B), which Employer opposed on the ground that Employee's loss of employment was due to Employee's voluntary resignation and/or his employment-related misconduct. The trial court ruled that Employer failed to carry its burden of proof as to either of the asserted grounds for denying reconsideration. The trial court therefore granted Employee's request for reconsideration and awarded increased benefits. Based on our review of the entire record, we reverse the trial court's judgment.

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

J.B. COX, SP.J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., J. and DONALD P. HARRIS, SP.J., joined.

Richard C. Mangelsdorf, Jr. and N. Adam Dietrich II, Nashville, Tennessee, for the appellant, Imports Collision Center.

James S. Higgins and Ryan Simmons, Nashville, Tennessee, for the appellee, Madia Dia.

OPINION

Factual and Procedural Background

Mr. Madia Dia ("Employee") was fifty-eight years old at the time of trial. Employee was born in Senegal and had no formal education, although he attended what he described as a Wolof-language school and a religious school.[1] He left school at age fifteen to begin working as a mechanic. Employee immigrated to the United States when he was in his thirties and worked for a short time as a mechanic in New York before moving to Tennessee.

Imports Collision Center is an automotive repair business specializing in work on significantly damaged vehicles. The business is owned by Mr. Mohammad Rahimi. At the times pertinent to this lawsuit, Employee was employed as a mechanic at Imports Collision Center ("Employer"), and he previously had worked for other automotive businesses owned by Mr. Rahimi. In total, Employee had worked for Mr. Rahimi's various businesses, including Imports Collision Center, for approximately eleven years. During that time, Mr. Dia was a productive employee who had never been formally reprimanded with any type of written warning, prior to the incident at issue in this case.

On November 21, 2007, Employee sustained a work-related injury to his shoulder. He received medical treatment, after which he returned to work for Employer. Employee received an impairment rating of 5% to the body as a whole, and, based on that rating, he settled his workers' compensation claim at the rate of 7.5% permanent partial disability to the body as a whole.

On May 18, 2012, Employee filed a "Reconsideration Complaint" alleging that he no longer was employed by Employer and that his loss of employment occurred within 400 weeks of his return to work following his injury. The complaint asserted that "[r]econsideration is appropriate because Plaintiff has a substantial percentage of industrial or vocational disability as a result of Plaintiff's loss of employment exceeding the previous settlement percentage." Employer filed an answer to the complaint in which Employer asserted that Employee is not entitled to reconsideration. In pertinent part, Employer's answer stated:

> Defendant denies that Employee was terminated from his employment without cause. Defendant avers that Employee voluntarily resigned from his employment with Employer, thus

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[1]It is not clear from the record whether it was actually a single school or two different schools.

> Employee is precluded from any reconsideration under the Tennessee Workers' Compensation Act. Moreover, Employee's voluntary resignation from his employment coupled with his workplace insubordination, disobedience, and misconduct further precludes any reconsideration.

Employee's loss of employment resulted from events occurring on February 14, 2012. The witnesses who testified at trial—Employee and two representatives of Employer—gave differing accounts regarding the particulars of those events, but the following facts are essentially undisputed: (1) Employee was instructed to remove an exhaust pipe and muffler from an immobile damaged car located on a lot outside the shop; (2) Employee asked a fellow employee to assist him in moving the vehicle into the shop, so that he could place it on a lift in order to work on the vehicle;[2] (3) other employees also joined in the effort to move the vehicle into the shop; and (4) Mr. Damon Rahimi (the owner's son, who was one of the managers of Employer) halted the movement of the vehicle, immediately ordered Employee to go to Mr. Rahimi's office, and also ordered Mike Johnson (Employer's Operations Manager) to draft a formal disciplinary write-up regarding Employee's actions. It also is undisputed that Mr. Johnson prepared a written Disciplinary Action Form and that Employee refused to sign the disciplinary form, which Employer required before Employee could return to work. Several days later, Employee began working for another employer.

I. Employee's Testimony

Employee testified as follows concerning the particulars of the events summarized above. According to Employee, he was instructed on a previous day to work on the damaged car outside the shop, but he testified "[i]t was freezing cold[,] . . . it snowed that day." The next day, he again was told to go outside and work on the vehicle; however, when he inspected the vehicle, he saw that it was positioned on a slope. Employee thought it would be unsafe to attempt working on the vehicle in that location because the vehicle, by being on a slope, could shift and fall on him as he worked underneath the car. He also testified he was concerned that any movement of the car, while he was working under it, could cause broken glass to fall into his eyes. For those reasons, Employee asked a fellow employee to help him place jacks under the car, put the car on a dolly, and move it "to a safer place." Employee testified that the other worker then asked several additional employees to help move the vehicle. However, as the employees began trying to move the vehicle, Damon Rahimi came outside and instructed everyone to stop what they were doing and return to their work stations. Employee testified that Mr. Rahimi instructed Employee to go to the office, but that

[2] As will be discussed later, there is a dispute as to whether Employee disobeyed a superior's order *not* to move the vehicle into the shop.

when he went to the office he was instructed by a person in the office ("Kasim") to "go home until tomorrow." Employee said he returned the next day and met with Damon Rahimi, Mike Johnson, and "Kasim," and that they handed him "a paper" and asked him to sign it. Employee testified that he refused to sign the document because he did not know the contents of it. He added that he "told them, you know, that I didn't work on the car for fear of being injured after they gave me that paper, because I didn't know what was on the paper." He denied that he only refused to work on the car because it was too cold, explaining that "my judgment told me that it was not in a safe place."

Employee, who has only a limited ability to read in English,[3] testified that he gave the paper to another employee (Paco Dominguez, who was a supervisor in another of Employer's shops), who advised him (as Employee testified), "[d]o not sign it because they're not telling the truth in this paper." According to Employee, he then went to "Kasim" and said he wanted to work but that he could not sign the paper. Employee testified that "Kasim" said, "[w]ell, if you don't sign, you're not going to work here." At that point, Employee left the premises and went home; he testified that he returned later the same day, but "[i]t was the same thing, so I started looking for a job." He found a job as a mechanic for another automotive shop, but he now makes approximately $200 per week less than he made in his position working for Employer.

II. Testimony of Employer's Representatives

As noted above, two representatives testified on behalf of Employer—Damon Rahimi and Mike Johnson.[4] Mr. Rahimi and Mr. Johnson testified as follows to the particulars of the events that culminated on February 14, 2012.

Both Mr. Rahimi and Mr. Johnson testified that Employee had been instructed on two previous occasions to remove the exhaust system from the damaged car outside the shop, but that Employee had said it was too cold to do the work outside. Mr. Rahimi twice agreed to wait on having the work done, but Employee was told for a third time (on the date in question — February 14, 2012) to go and remove the exhaust system from the damaged vehicle. Mr. Rahimi testified that Employee asked to move the vehicle inside the shop, but Mr. Rahimi

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[3]When asked if he could read or write in English, Mr. Dia testified: "I can read just a little bit, and I can write just a little bit in English." Mr. Dia has a better ability to communicate orally in English, but the record reflects he testified through the use of an interpreter.

[4]We note for clarity that references hereinafter to "Mr. Rahimi" refer to Damon Rahimi. His father, Mohammad Rahimi (the owner of Employer), was not directly involved in the events that occurred on February 14, 2012.

denied that request, saying it would be much more efficient to just do the work outside. According to Mr. Rahimi's testimony, Employee "said, okay, he understood." Mr. Rahimi testified that he "went back to work," but he went back out to the shop from the office (for an unrelated reason) and noticed "a lot of employees were missing." Walking outside the shop, Mr. Rahimi saw "everyone pushing this vehicle" and "became infuriated because I had just had this lengthy conversation." Mr. Rahimi told everyone to go back to work and directed Employee to go to Mr. Rahimi's office. According to Rahimi's testimony, "I was too mad to talk to [Employee], so I just told him – you know, he even came and said, 'I'm sorry, man. I'm sorry,' because he knew what he had done was completely wrong." Mr. Rahimi then found Mr. Johnson and told him to "formally write him up[.]" Mr. Rahimi said that Mr. Johnson gave Employee the written disciplinary form, but that Employee did not sign the form, asking for time to look at it. Employee returned the next day and informed Mr. Rahimi that he would not sign the document. Mr. Rahimi told Employee, "[w]ell, we need you to sign this, you know, so that you can continue working here[.]" Mr. Rahimi testified that Employee again went home and returned the following day and asked, "Why don't you just fire me? Why are you making me do this?" Mr. Rahimi told Employee "I don't want to fire you. I just – I want you to work. But this is becoming a problem over and over again. We don't want this problem. We just want you to work here within the . . . chain of command[.]" When asked during his testimony if Employee could return to work without signing the document, Mr. Rahimi answered: "No. We made it clear, you know, this is not something we are going to give up. You have to agree to listen to management before you could continue."

Mr. Rahimi was asked about any earlier instances in which Employee had been given verbal warnings about his actions and, if so, for examples of such incidents. Mr. Rahimi testified that Employee had been given verbal reprimands for allowing fluids to drain onto the shop floor instead of into disposal bins and that he also had previously been admonished for not properly using safety locks on the shop's lifts. Employee also failed to follow instructions as to how repairs should be made and would do the repairs a different way. Mr. Rahimi stated that "[t]here were plenty of times where [Employee] wasn't working for several hours trying to resolve a dispute that should have never existed in the first place."

Mr. Johnson's testimony covered much of the same ground as Mr. Rahimi's testimony. Mr. Johnson testified that Employee "often refused to follow safety standards by refusing to wear personal safety equipment such as eye protection, using safety stands when a car was on a jack, using the safety stops when a car was on a lifter. He often refused to do a job in the manner that we instructed him to do so." According to Mr. Johnson, "I don't remember any time that he ever agreed with anything that I confronted him with. It was always an argument. It took a long time to get to the point."

Regarding the events on February 14, 2012, Mr. Johnson testified that Employee had twice been told to perform the work on the damaged car outside but that he had objected because the weather was too cold on those days. Management therefore allowed Employee to "[w]ait until a better day." When Employee's supervisor told him the third time to perform the work, Employee again refused because it was too cold; Mr. Johnson, however, "supported his supervisor's decision to go ahead and do that job at that time." Employee then went "over [Mr. Johnson's head] to Damon," but Mr. Rahimi instructed Employee to go ahead and do the work. Like Mr. Rahimi, Mr. Johnson testified that Employee clearly was told not to bring the damaged vehicle inside the shop, but that he proceeded to try to do so. Mr. Johnson testified that, following Mr. Rahimi's halting of the attempt to move the vehicle, he (Mr. Johnson) interviewed Employee "to get his side of the story." Mr. Johnson acknowledged that Employee raised his concern about the safety of working on the vehicle where it was located. Mr. Johnson then wrote up Employee for "[i]nsubordination and disrupting the workplace," and he then read Employee the disciplinary form and asked him if he understood it. Mr. Johnson testified that it was not his intention to fire Employee because of what had happened. Instead, the purpose of the written discipline was to "get him back to work as quickly as possible and avoid these type [sic] of disruptions in the future." When Mr. Johnson asked Employee to sign the written discipline, Employee refused, saying he would like to "show it to his lawyer." Mr. Johnson said he responded to Employee by saying, "That's fine, because you're going to be taking the rest of this day off anyway. Go take care of that. Come back in the morning ready to work and sign this document, and we'll move forward." However, when Employee returned the next day, Employee told Mr. Johnson that he (Employee) had not seen a lawyer yet and that he was not ready to sign the document. Mr. Johnson testified that Employee returned on the third day to pick up some of his tools and that Mr. Johnson asked him about his intentions; according to Mr. Johnson, Employee

> told me at that point, he's not going to sign it. Why don't I just go ahead and fire him for not signing it. And, again I told him, 'I have no intention of firing you. I'm just trying to communicate to you what the problem is and not have it again in the future.'

Mr. Johnson then told Employee, "until you're ready to sign it – you're going to not be able to continue to work until you sign it."

III. Trial Court's Ruling

Following a bench trial, the trial court entered a Final Order in which the court stated, in pertinent part:

> This Court found the Defendant failed to prove that Plaintiff had either resigned or was terminated for misconduct. Further, the Court finds that Plaintiff sustained an actual vocational disability of 15% to the body as a whole. In accordance with said findings and conclusions, this Court enters the following Order:
>
> IT IS HEREBY ORDERED, ADJUDGED, AND DECREED the Plaintiff is entitled to have this Court reconsider his prior permanent partial disability benefits in accordance with Tenn. Code Ann. § 50-6-241.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that as a result of the November 21, 2007 workers' compensation injury the Plaintiff sustained a fifteen percent (15%) disability to the body as a whole. Accordingly, Plaintiff shall have and recover from the Defendant the sum of Seventeen Thousand Four Hundred and 00/100 ($17,400.00) Dollars. Said amount represents a fifteen percent (15%) permanent partial impairment to the body as a whole at the compensation rate of Five Hundred Eighty and 00/100 ($580.00) Dollars per week less a credit given for the seven and one-half percent (7.5%) percent disability award which was paid pursuant to the original order of settlement.

Standard of Review

Courts reviewing an award of workers' compensation benefits must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When conducting this examination, Tenn. Code Ann. § 50-6-225(e)(2) requires the reviewing court to "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. *Tryon v. Saturn Corp*., 254 S.W.3d. 321, 327 (Tenn. 2008); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). However, the reviewing courts need not give similar deference to a trial court's findings based upon documentary evidence such as depositions, *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006); *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004), or

to a trial court's conclusions of law, *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Employee's request for reconsideration is governed by Section 50-6-241(d)(1)(B), Tennessee Code Annotated, which provides (in pertinent part):

> (i) If an injured employee receives benefits for body as a whole injuries pursuant to subdivision (d)(1)(A) and the employee is subsequently no longer employed by the pre-injury employer at the wage specified in subdivision (d)(1)(A) within four hundred (400) weeks of the day the employee returned to work for the pre-injury employer, the employee may seek reconsideration of the permanent partial disability benefits. . . .
>
> (ii) . . . .
>
> (iii) Notwithstanding this subdivision (d)(1)(B), under no circumstances shall an employee be entitled to reconsideration when the loss of employment is due to either:
>
>> (a) The employee's voluntary resignation or retirement; provided, however, that the resignation or retirement does not result from the work-related disability that is the subject of such reconsideration; or
>>
>> (b) The employee's misconduct connected with the employee's employment.

Tenn. Code Ann. § 50-6-241(d)(1)(B) (Supp. 2013).

The dispositive issue in this appeal is whether the trial court erred in ruling that Employer failed to carry its burden of proving Employee's loss of employment resulted from Employee's voluntary resignation or his employment-connected misconduct. Employer contends that the trial court erred in its ruling, while Employee asserts that the trial court's ruling is correct.

A. Employer's Arguments

Employer's argument is primarily based on two earlier cases: *Pigg v. Liberty Mutual Insurance Co.*, No. M2007-01940-WC-R3-WC, 2009 WL 585962, (Tenn. Workers' Comp. Panel Mar. 9, 2009), and *Marvin Windows of Tennessee, Inc. v. Gardner*, No. W2011-01479-WC-R3-WC, 2012 WL 2674519 (Tenn. Workers' Comp. Panel June 8, 2012).

In *Pigg*, the employee had settled separate claims for a shoulder injury and a back injury and had returned to work for the employer. Approximately three years later, the employee was unable to satisfy her production quota and was eventually terminated for that reason. Following her termination, she sought reconsideration of both of her prior claims. The trial court held that reconsideration of the back injury was barred by the terms of the settlement, and the court denied reconsideration of the shoulder injury because the employee's termination was for "misconduct." *Pigg*, 2009 WL 585962, at *1. On appeal, the Panel briefly discussed various appellate cases pertaining to reconsideration[5] and then stated:

> The [reconsideration] 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.

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[5]Regarding reconsideration after the employee's termination because of a reduction in the size of the employer's workforce, we note that Section 50-6-241(d)(1)(B)(i) was later amended to address that issue for claims approved or adjudicated on or after July 1, 2010. *See* Act of June 3, 2010, ch. 1034, 2010 Tenn. Pub. Acts 617.

> 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*.

Pigg, 2009 WL 585962, at *4-5 (citations omitted).

In *Marvin Windows*, the employee settled a workers' compensation claim and returned to work for his pre-injury employer. Approximately two years later, the employee was diagnosed with cancer and took a medical leave of absence for over one year. The employer's written policy permitted one year of medical leave; when the employee was unable to return to work after one year of medical leave, the employer terminated his employment. The employee then sought reconsideration of his earlier award, but the trial court ruled that he was not eligible for reconsideration. On appeal, the Panel considered whether the employee's failure to comply with the employer's medical-leave policy constituted "misconduct" for purposes of the reconsideration statute. As the Panel stated,

> This case turns on the interpretation of "misconduct" in Tennessee Code Annotated section 50-6-241(d)(1)(B)(iii)(b). This provision states that an employee is not eligible for reconsideration of a workers' compensation award if the employee's loss of employment is due to misconduct. The employee behavior need not rise to the level of gross or willful misconduct to satisfy this misconduct standard. *Pigg v. Liberty Mutual Ins. Co.*, No. M2007-01940-WC-R3-WC, 2009 WL 585962, at *5

> (Tenn. Workers' Comp. Panel Mar. 9, 2009). Misconduct refers to an employee's inability to perform his or her job due to reasons unrelated to a workplace injury. *Id*. (holding that an employee's failure to satisfy a production quota in compliance with workplace rules amounted to misconduct). The standards for behavior and productivity are governed by reasonable policies established by the employer. *Id*.
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> The court must also consider the employer's need to enforce workplace rules and the reasonableness of the contested rules. Employers should be able to enforce reasonable workplace rules and policies without being penalized in workers' compensation cases. *Carter v. First Source Furniture Grp.*, 92 S.W.3d 367, 371 (Tenn. 2002). Therefore, an employer will not be penalized for enforcement of a policy if the court determines "(1) that the actions allegedly precipitating the employee's dismissal qualified as misconduct under established or ordinary workplace rules and/or expectations; and (2) that those actions were, as a factual matter, the true motivation for the dismissal." *Durham v. Cracker Barrel Old Country Store*, Inc., No. E2008-00708-WC-R3-WC, 2009 WL 29896, at *3 (Tenn. Workers Comp. Panel Jan.5, 2009).

Marvin Windows, 2012 WL 2674519, at *3-4. Based on those principles, the Panel held in that case that the employer's medical-leave policy was reasonable and that the employee's failure to comply with that policy constituted "misconduct" that barred reconsideration of his earlier award. *Id*. at *4.

Employer argues that Employee's refusal to sign the Disciplinary Action Form amounted to a "forfeiture" of his employment, i.e., a voluntary resignation under Section 50-6-241(d)(1)(B)(iii)(a). As Employer stated in its brief: "Employee held the keys of his employment in his pocket. He could have signed the form and remained employed. By not signing the form, however, he forfeited his employment." Based on *Pigg* and *Marvin Windows*, Employer goes on to argue that, even if Employee's refusal to sign the written discipline is not considered a voluntary

resignation, his "gross insubordination" and his disobedience in violating a direct order from management constituted "misconduct" that resulted in his loss of employment.

B. Employee's Arguments

Employee bases his primary arguments on two cases that pre-date *Marvin Windows*: *Douthit v. Griffin Industries., Inc.*, No. M2009-01857-WC-R3-WC, 2010 WL 3490202 (Tenn. Workers Comp. Panel Sept. 8, 2010), and *Devereux v. United Parcel Service, Inc.*, No. M2010-00710-WC-R3-WC, 2011 WL 795539 (Tenn. Workers' Comp. Panel Mar. 8, 2011).

In *Douthit*, the employee sustained a knee injury but returned to work for the same employer. He settled his claim for a 3% permanent partial disability to his leg. The employee later sustained a work-related shoulder injury. A committee of his peers determined that both injuries were preventable, which led to the employee's termination for violation of a company rule. He subsequently filed a petition for reconsideration, and the employer argued that he was not entitled to reconsideration because of misconduct, i.e., violating the employer's "policy that any employee who sustained two 'preventable' accidents within a three-year period was subject to termination." *Douthit*, 2010 WL 3490202, at *2. The trial court found that there was no "intentional misconduct" on the part of the employee, but on appeal the Panel stated that "an 'intentional misconduct' standard is insufficient. . . . It is the reasonableness of an employer's work rule and the reasonableness of the application of that rule to a particular employee which determine whether or not a terminated employee's application for reconsideration is barred by his misconduct." *Id*. at *5. The Panel went on to find that the employer's termination of the employee was not reasonable under the circumstances because the employer did not have an appropriate standard for determining whether a preventable accident had occurred; thus, the employer's *application* of its rule to the employee was not reasonable. *Id*.

Relying on *Douthit*, Employee states that he "does not contest Employer's rule regarding the ability to use a disciplinary form, he does contest the application of the rule specifically to him." He advances several reasons why Employer's application of its rule in requiring Employee to sign the disciplinary form was unreasonable. First, Employee notes that, because he was unable to understand the contents of the form, he "was allowed to seek help reading the document" and "took the document

to another supervisor for review." Because "he relied upon the word of a supervisor who instructed him not to sign the Disciplinary Action Form[,]" Employee asserts that "[b]eing given completely opposite instructions by different superiors is clearly an unreasonable application of the rule." Second, Employee asserts that, because Employer knew Employee was unable to read in English, it was an unreasonable application of "the rule" requiring him to sign the disciplinary form. Third, Employee contends that Employer "did not have a set standard as to its disciplinary procedure" and that "Employer has not established what behavior constitutes written discipline over verbal discipline." *Id*. He also asserts that "Employer has not established whether there is any procedure to appeal the discipline[.]" And lastly, Employee asserts that "there was an unreasonable application of the rule like in *Douthit* because Mr. Dia's safety concerns unreasonably led him to being disciplined." *Id*.

In *Devereux*, the employee who was seeking reconsideration of an earlier award of benefits had been terminated for violating the employer's workplace violence policy by allegedly making threats to a superior. The trial court, however, found the employee to be a credible witness and found that his statements to his superior did not violate the employer's workplace violence policy. The trial court therefore reconsidered the earlier award and granted additional benefits. On appeal, the employer asserted that the employee was guilty of misconduct due to his violation of the employer's attendance policies and his statements that allegedly violated the workplace violence policy. The Panel agreed with the trial court that threatening violence against persons or property would have constituted misconduct barring reconsideration, had the employee made such threats. The Panel, however, went on to affirm the trial court's finding that the employee did not make such threats. Addressing the employer's argument that the employee's termination was also justified for violating the employer's attendance policies, the Panel observed that the employee's

> termination was specifically based upon the workplace violence policy. The termination notice did not list any other reason for termination except the violence policy. . . . For purposes of determining an employee's eligibility for reconsideration of a previous workers' compensation award, judicial inquiry must be limited to the stated ground for termination.

Devereux, 2011 WL 795539 at *4.

Employee asserts that this Panel "should limit its inquiry to the Employer's stated ground for Mr. Dia's termination, which was not signing the Disciplinary Action Form." Employee's argument on this point is based on a "Separation Notice" that Employer sent to the Tennessee Department of Labor and Workforce Development after Employee was no longer working for Employer. The Separation Notice contained a box for the employer to fill in to "explain the circumstances of this separation[.]" The handwritten entry in that box stated: "was disciplined for insubordination. He was told he must agree to follow directions in the future in order to keep working. He refused to agree." Based on the foregoing entry on the Separation Notice, Employee asserts that the only stated ground for his "termination"[6] was that he did not sign the Disciplinary Action Form. He therefore suggests, citing *Devereux*, that this Panel should not consider whether any of his actions on February 14, 2012—other than his refusal to sign the Disciplinary Action Form—constituted misconduct.

In closing, Employee asserts that this case does not involve either voluntary resignation or misconduct. In his words, "[i]t was an unfortunate combination of a limited ability to communicate combined with a company's poor ability to set forth clear work rules. A miscommunication between the parties would not fall under either defense set forth by the statute." Thus, he contends that the trial court's ruling is correct.

C. Analysis

As stated above, Section 50-6-241(d)(1)(B)(iii) sets out two circumstances under which an employee is not entitled to reconsideration: (1) when the loss of employment is due to the employee's voluntary resignation or retirement (not resulting from the work-related disability at issue); and (2) when the loss of employment is due to "[t]he employee's misconduct connected with the employee's employment." In this case, Employer asserts that Employee is not entitled to

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[6]The Separation Notice form contains three options for listing the "Reason for Separation": (1) "Lack of Work"; (2) "Discharge"; and (3) "Quit." We note that the Separation Notice in the record contains an "X" in the box next to the word "Quit."

reconsideration under *both* of those provisions. We first will consider Employer's contention that Employee voluntarily resigned from his position.

At the outset, we note that the trial judge said in his oral ruling that he "totally believe[d] Mr. Rahimi and Mr. Johnson, and I don't totally believe Mr. Dia in some of the things that he testified to." The trial court, however, went on to accept *some* of Employee's testimony and ruled that Employer had failed to carry its burden of proving either voluntary resignation or misconduct. Under the standard of review set out above, we must give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. *Tryon*, 254 S.W.3d. at 327.

Unlike the facts concerning Employee's alleged misconduct—which are disputed by the parties — the basic facts concerning his actual loss of employment are relatively straightforward. Mr. Rahimi and Mr. Johnson both testified that they did not intend to fire Employee on February 14, 2012. Instead, their stated goal was to have him sign the Disciplinary Action Form and then return to work. They did testify, however, that Employee could not return to work without signing the written discipline form. When Employee requested time to seek the advice of counsel regarding the disciplinary action, Employer permitted him an additional day to do so. The action of Employer in allowing Employee time to review the Disciplinary Action Form shows the reasonableness of Employer in dealing with Employee's language issue as well as the reasonableness of the rule requiring his signature.

Although Employee argues that he had one or more valid reasons for not signing the Disciplinary Action Form, his testimony does not contradict Mr. Rahimi's and Mr. Johnson's testimony that he could have returned to work if he had chosen to sign the Form.

Based on our review of the record, we conclude that the evidence preponderates against the trial court's finding that Employer failed to carry its burden of proving a voluntary resignation. Clearly, Employee held the keys of his employment in his pocket. He could have signed the form and remained employed. By not signing the form, however, he forfeited his employment. It obviously was a difficult choice for Employee to make, but the evidence shows that he indeed had a choice to keep his position with Employer.

Because we conclude the evidence was sufficient to prove a voluntary resignation, we could end our analysis at this point. However, because the parties' arguments concerning misconduct and voluntary resignation, as well as the witnesses' testimony regarding the events on February 14, 2012, are so intertwined, we elect to briefly address the misconduct issue.

As stated in *Wheeler v. Hennessy Industries*:

> The Tennessee Supreme Court has held "that an employer should be permitted to enforce workplace rules without being penalized in a workers' compensation case." *Carter v. First Source Furniture Group*, 92 S.W.3d at 368. Thus, as a general matter, the courts are not charged with deciding for employers whether an employee's conduct is sufficiently egregious to warrant discharge. However, in the context of a claim for benefits under the Workers' Compensation Law, the courts may be required to determine whether particular acts constitute misconduct for the purpose of determining which cap on permanent partial disability benefits applies.

Wheeler v. Hennessy Indus., No. M2007-00921-WC-R3-WC, 2008 WL 3342878, *7 (Tenn. Workers' Comp. Panel Aug. 11, 2008). Thus, we turn to consider whether Employee's actions on February 14, 2012, constituted misconduct for purposes of the reconsideration statute.

We reiterate that the trial judge "totally believe[d] Mr. Rahimi and Mr. Johnson," and believed only portions of Employee's testimony. In light of that credibility determination, we accredit Mr. Rahimi's and Mr. Johnson's testimony that Employee was told by a superior *not* to move the damaged vehicle into the shop, but that he proceeded to disobey that order. We also accredit their testimony that Employee had been a productive employee over the years, but that he also had previously caused difficulties in the management of the body shop.

Based on the principles set out in *Pigg* and *Martin Windows*, we conclude that Employee's actions constituted misconduct for purposes of the reconsideration statute and that Employer's decision to impose written discipline on Employee was

reasonable. That returns us full circle to the issue of voluntary resignation — the evidence shows that Employer did not fire Employee, but that he chose not to sign the Disciplinary Action Form, which was a precondition to his continuing his employment.

In reaching our conclusion that the evidence preponderates against the trial court's finding that Employer failed to prove voluntary resignation and/or misconduct, we reject Employee's arguments that *Douthit* or *Devereux* require a different result. First, the evidence does not support Employee's argument (based on *Douthit*) that Employer's actions amounted to an unreasonable application of its policy requiring an employee to sign a written disciplinary action. We do not find persuasive Employee's argument that he did not sign the document because he received conflicting "instructions" from two different supervisors. Mr. Dominguez was not Employee's direct supervisor (Employee's supervisor was "Majid"), but was a supervisor in another of Employer's shops. In any event, both Mr. Rahimi and Mr. Johnson were in positions superior to Mr. Dominguez's position within the company, and both Mr. Rahimi and Mr. Johnson told Employee he must sign the Disciplinary Action Form as a condition to continued employment. We also find that the evidence does not support Employee's claims that Employer's application of its rule was unreasonable due to Employee's inability to read, the Employer's lack of a standard for its disciplinary procedure, and Employee's asserted safety concerns about working on the damaged car. This is simply a case in which Employee deliberately disobeyed Employer's direct order not to move the vehicle inside the shop. He further enlisted the assistance of other employees, which not only was against the instructions of Employer, but it also was disruptive to the workplace. Employer's decision to discipline Employee for that misconduct was reasonable.

Regarding Employee's argument that, under *Devereux*, we should limit our consideration to Employer's "stated ground for termination[,]" our holding on the voluntary-resignation issue is entirely consistent with *Devereux*. Assuming for the sake of argument that we are limited by *Devereux* to considering only the reason stated in the Separation Notice for Employee's loss of employment, the Separation Notice indicates that Employee "Quit" after refusing to agree to remedy the insubordination and misconduct by agreeing to follow directions in the future in order to keep working. This notice indicates the voluntary nature of his loss of employment.

Conclusion

For the reasons stated above, we find that the evidence preponderates against the trial court's finding that Employer failed to carry its burden of proving Employee's loss of employment was due to voluntary resignation or misconduct. Because we conclude that Employer carried its burden of proof as to each of those statutory grounds, we hold that Employee was not entitled to reconsideration pursuant to Section 50-6-241(d)(1)(B)(iii). Accordingly, we reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

The costs are taxed to Mr. Madia Dia and his surety, for which execution may issue if necessary.

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J. B. COX, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
February 24, 2014 Session

MADIA DIA v. IMPORTS COLLISION CENTER, INC.

Circuit Court for Davidson County
No. 12C2105

No. M2013-01496-WC-R3-WC

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 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 will be paid by Mr. Madia Dia and his surety, for which execution may issue if necessary.

PER CURIAM