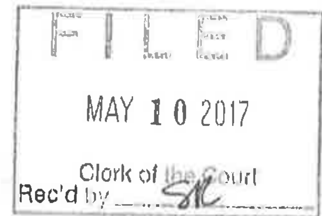
IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE

VICTOR DUNN v. TRADESMEN INTERNATIONAL, INC.

Circuit Court for Johnson County
No. CC-13-CV-121

No. E2015-01930-SC-R3-WC



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 are assessed to Tradesmen International, Inc. and its surety, for which execution may issue if necessary.

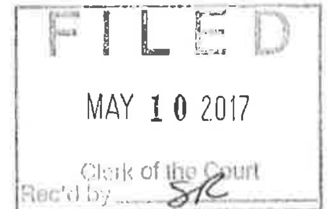
It is so ORDERED.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
February 13, 2017 Session

VICTOR DUNN v. TRADESMEN INTERNATIONAL, INC.

Appeal from the Circuit Court for Johnson County
No. CC-13-CV-121 James E. Lauderback, Judge



No. E2015-01930-SC-R3-WC – MAILED 4/4/2017

Victor Dunn ("Employee"), a Tennessee resident, was injured in Iowa while working for Tradesmen International, Inc. ("Employer"). Employer accepted the injury as compensable but disputed Tennessee's jurisdiction over the claim, contended that any award of permanent disability benefits should be limited to one and one-half times the impairment rating, and disagreed with Employee's calculation of his average weekly wage. The trial court held that it had jurisdiction, that the claim was not "capped," and that Employee's proposed average weekly wage was correct. It awarded permanent partial disability benefits of 25% to the body as a whole. Employer has appealed, arguing that the trial court's ruling on the average weekly wage issue was incorrect.[1] The 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 pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment.

Tenn. Code Ann. § 50-6-225(e)(i) (2014) (applicable to injuries occurring prior to July 1, 2014) Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT E. LEE DAVIES, SR.J., delivered the opinion of the court, in which SHARON G. LEE, J., and JOHN W. MCCLARTY, J., joined.

Richard Lane Moore, Cookeville, Tennessee, for the appellant, Tradesmen International, Inc.

Robert Bates, Johnson City, Tennessee, for the appellee, Victor Dunn.

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[1] Because this is the only issue presented in this appeal, we omit discussion of the evidence pertaining to the remaining issues.

OPINION

Factual and Procedural Background

On September 30, 2013, Employee filed a complaint for workers' compensation benefits in the Circuit Court for Johnson County, Tennessee. Employer filed two different wage statements. The first statement filed December 1, 2014, showed a compensation rate of $532.12. The amended wage statement, filed September 3, 2015, showed a reduced compensation rate of $241.87. The case was tried on September 9, 2015. The trial court took the case under advisement and issued a written memorandum and order on September 18, 2015. The trial court concluded that the proper average weekly wage should be determined by dividing Employee's gross wages by five, the number of weeks Employee worked, which yielded an average weekly wage of $798.18 and a resulting compensation rate of $532.15. Employer then properly perfected its appeal of the trial court's order.

Employee lives in Mountain City, Tennessee, and worked as a millwright replacing bearings, setting up robotic arms for conveyer systems, or otherwise maintaining heavy machinery in factories and plants across the country. In May 2011, Employee submitted an application and was hired by Employer as a millwright. It was undisputed that Employee's employment as a millwright was not and never intended to be a steady, forty-hour-a-week job.

Employee's first assignment for Employer was a job in Virginia where he worked one week for 15.5 hours. Although Employee testified he was available to work, no work was offered by Employer for the next two weeks. Employee's next assignment was in Tennessee where he worked two weeks for a total of 60.5 hours. When this assignment ended, Employee was not offered any work by Employer for the next four weeks. In the second week of July 2011, Employee was assigned a job in Iowa where he worked 78.5 hours over a two-week period before he fell from a ladder and injured his back. Eleven weeks elapsed from the commencement of his employment with Employer until his injury on July 24, 2011. The wage statement reflects the following:

Week	Week Ending	Hours	Gross Wages
1	5/13/2011	15.5	$217
2	5/20/2011	0	$0
3	5/27/2011	0	$0
4	6/3/2011	14	$371
5	6/10/2011	46.5	$1,318.38
6	6/17/2011	0	$0

7	6/24/2011	0	$0
8	7/1/2011	0	$0
9	7/8/2011	0	$0
10	7/15/2011	6	$132
11	7/22/2011	72.5	$1,952.50

Thomas Quail, Employer's corporate counsel, was hired to run the litigation program for the workers' compensation department. Although he agreed Employee's work schedule was intermittent and irregular, he testified it was foreseeable that millwrights would have periods where no work would be available. He went on to state it would be rare to have an employee who worked a full fifty-two weeks.

Jeffrey Popek, employed as a project coordinator by Employer, offered the following:

> QUESTION: Was [Employee's] work schedule irregular?
>
> ANSWER: Yeah. I mean, it's hard to say because they're not full weeks. I don't know if it was due to weather on the job site or if he left the job site or didn't work the full hours available. I don't know. I mean, as far as what I have records of, it looks like different jobs in different locations for short periods of time, but I don't know the answers on why.
>
> QUESTION: And that's pretty typical in this line of work, isn't it?
>
> ANSWER: Yeah.
>
> QUESTION: Most of these guys travel around and work different jobs, and once that job's over, then they move on to the next one, right?
>
> ANSWER: Correct.
>
> QUESTION: And they're not guaranteed 40-hour weeks, are they?
>
> ANSWER: I mean, different jobs are different hours. I mean, sometimes—the majority of the time it's at least 40 hours a week.
>
> QUESTION: But they're not—they don't have that strict or set work schedule, right?

ANSWER: I mean, for the most part, it's—the hours can vary every day.

Employee reached maximum medical improvement on October 18, 2011. He did not work for Employer after that date and obtained employment as a millwright with different labor contractors. The trial court found Employee sustained a 10% partial permanent impairment to the body as a whole, resulting in a 25% vocational disability to the body as a whole. The trial court then computed the average weekly wage at $532.15 by dividing the total gross wages by five, the number of weeks Employee worked.

Analysis

Standard of Review

This appeal does not involve any disputed issues of fact. Rather, Employer challenges the trial court's interpretation and application of Tennessee Code Annotated section 50-6-102(3) (2008 & Supp. 2011). "The interpretation of a statute and its application to undisputed facts involve questions of law." Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009) (citing U.S. Bank, N.A. v. Tenn. Farmers Mut. Ins. Co., 277 S.W.3d 381, 386 (Tenn. 2009); Waldschmidt v. Reassure Am. Life Ins. Co., 271 S.W.3d 173, 175 (Tenn. 2008)). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Id. (citing Goodman v. HBD Indus., Inc., 208 S.W.3d 373, 376 (Tenn. 2006); Layman v. Vanguard Contractors, Inc., 183 S.W.3d 310, 314 (Tenn. 2006)); Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79, 80 (Tenn. 1996) (citing Tenn. R. App. P. 13(d); Union Carbide Corp. v. Huddleston, 854 S.W.2d 87, 91 (Tenn. 1993)).

Calculation of Average Weekly Wage

Tennessee Code Annotated section 50-6-102(3) states, in pertinent part, as follows:

> (3)(A) "Average weekly wages" means the earnings of the injured employee in the employment in which the injured employee was working at the time of the injury during the period of fifty-two (52) weeks immediately preceding the date of the injury divided by fifty-two (52); but if the injured employee lost more than seven (7) days during the period when the injured employee did not work, although not in the same week, then the earnings for the remainder of the fifty-two (52) weeks shall be divided by the number of weeks remaining after the time so lost has been deducted;

(B) Where the employment prior to the injury extended over a period of less than fifty-two (52) weeks, the method of dividing the earnings during that period by the number of weeks and parts of weeks during which the employee earned wages shall be followed; provided, that results just and fair to both parties will be obtained.

Tenn. Code Ann. § 50-6-102(3) (2008 & Supp. 2011).

On appeal, Employer raises a single issue: whether the total earnings should be divided by the full eleven weeks of employment rather than the five weeks Employee performed work and received wages.

As the Tennessee Supreme Court stated in Russell v. Genesco, Inc., 651 S.W.2d 206 (Tenn. 1983): "[W]hile the statute clearly addresses the instance of a regular worker of a forty-hour week, it offers little guidance in computing the average weekly wages for part-time employees and irregular or intermittent employees. Nor does it address the case of the regular employee, whose weekly wages vary because of the nature of the employment." Id. at 207.

With regard to the intermittent or irregular employee, the Court in Russell concluded that there shall be no deductions for lost days caused by circumstances incident to one's employment. Id. at 210.

Employer cites Russell and Carter v. Victor Chem. Works, 101 S.W.2d 462 (Tenn. 1937), in support of its position that periods of Employee's unemployment were foreseeable and a "recognized incident" of employment and therefore should be included in the computation of his average weekly wage. In Russell, the employee had worked for her employer for six years; however, she worked irregularly during the fifty-two weeks prior to her injury. 651 S.W.2d at 207. The Supreme Court held the employee was a regular employee, not a part-time employee, and the proper method to compute her average weekly wage was to use her wages for the relevant fifty-two-week period divided by fifty-two. Id. at 210. In Carter, the employee worked the fifty-two weeks preceding his injury; however, he did not work every day, nor did he work the same number of hours every day. 101 S.W.2d at 462. The Supreme Court affirmed the trial court's decision to compute the employee's average weekly wage by dividing his earnings for the previous year by fifty-two. Id. at 464.

Employee contends he was an "intermittent employee," and therefore the weeks he did not work should be excluded from the computation of his average weekly wage. Although the workers' compensation statute does not use the term "intermittent employee," this term has been used in various decisions, including those cited by both

parties. Employee relies on Gaw v. Raymer, 553 S.W.2d 576 (Tenn. 1977), and Toler v. Nashville C. & St. L. Ry., 117 S.W.2d 751 (Tenn. 1938), in support of his position that his total earnings should be computed by using the number of weeks Employee worked. In Gaw, the employee "moonlighted" part-time for the employer, in addition to his full-time, regular job. 553 S.W.2d at 577. He worked primarily on weekends and occasionally during the week in the hours before reporting to his regular job. Wage records for the fifty-two-week period were incomplete, and paychecks were issued only when the employee had accumulated a "fairly substantial" number of hours, rather than on a regular, periodic basis. Id. at 578. The Supreme Court did not accept the trial court's computation of the average weekly wages and directed the trial court to recalculate the average weekly wage by dividing the total earnings by the number of weeks the employee worked. Id. at 580. In Toler, the employee worked "intermittently" for the employer for ten years. 117 S.W.2d at 751. The evidence showed he worked a total of fourteen out of the fifty-two weeks prior to his injury. However, the employee became a regular employee nine weeks before he was injured. The Supreme Court held that the correct method in that situation was to divide the total earnings by the number of weeks the employee worked during the previous fifty-two weeks. Id. at 752.

The cases cited by the parties have factual situations significantly different from the facts in the case before us. In Russell and Carter, the employees were employed for several years before their injuries occurred. The employee in Gaw was a part-time worker, and the employee in Toler had worked irregularly for his employer but had changed from irregular to regular employment a short time before his injury. Here, Employee was a full-time worker who worked five of the eleven weeks between the time he was hired and the time of his injury.

The Tennessee Supreme Court observed in Cantrell v. Carrier Corp., 193 S.W.3d 467 (Tenn. 2006), that: "The determination of whether a day an employee does not work should be deducted from the computation of the average weekly wage is dependent upon the facts and circumstances of each case." Id. at 472. In this case, while it was foreseeable that there would be gaps in Employee's work schedule due to the unavailability of work, there is a limited amount of data from which his average weekly wage can be computed. Employee worked forty-five percent of the period of time from his date of hire to the date of his injury. A forty-five percent work history is inconsistent with the term "full-time employment."

Tennessee Code Annotated section 50-6-102(3)(B) provides that where employment prior to injury is less than fifty-two weeks, the average weekly wage is to be computed by dividing earnings by the number of weeks the employee worked and that the goal is to achieve a fair result to the employee and the employer. This computation method was used by the trial court in this case, and we find no fault with the trial court's

method with the limited data provided. We affirm the trial court's decision. In light of this conclusion, Employee's contention that Employer waived the issue with the filing of its first wage statement is rendered moot.

Conclusion

The judgment is affirmed. Costs are taxed to Tradesmen International, Inc. and its surety, for which execution may issue if necessary.

ROBERT E. LEE DAVIES, SR. JUDGE