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

November 26, 2012 Session

STANLEY FRANKLIN v. VOUGHT AIRCRAFT INDUSTRIES, INC. ET AL.

Appeal from the Chancery Court for Smith County
No. 7748 Charles K. Smith, Chancellor

No. M2012-00864-WC-R3-WC - Mailed March 8, 2013
Filed April 10, 2013

After the employee sustained a compensable injury to his low back which required surgery, he returned to work. The company for which he worked was sold to another entity after the date of injury but before the employee's return to work. At trial, both parties agreed that the one and one-half times multiplier cap did not apply because the sale of the company was a "loss of employment" for the purposes of Tennessee Code Annotated section 50-6-241(d). At trial, the employee was awarded 78% permanent partial disability, the maximum permitted under law, based on an anatomical rating of 13%. The employer has appealed and is contending that the award is excessive. 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 in accordance with Tennessee Supreme Court Rule 51. We affirm the judgment.

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

DONALD P. HARRIS, SP. J, delivered the opinion of the Court, in which SHARON G. LEE, J., and WALTER E. KURTZ, SR. J., joined.

Stephen W. Elliott and Fetlework Balite-Panelo, Nashville, Tennessee, for the appellants, Triumph Aerostructures, LLC and Specialty Risk Services, LLC.

B. Keith Williams and James R. Stocks, Lebanon, Tennessee, for the appellee, Stanley Franklin.

MEMORANDUM OPINION

Factual and Procedural Background

On June 8, 2010, Stanley Franklin hurt his back while working for Vought Aircraft Industries, Inc. ("Vought"). The accident occurred when a chair Mr. Franklin was sitting in collapsed and he struck his lower back on a wing panel. Mr. Franklin initially sought medical treatment from his primary care physician, Dr. Thomas Kowal, who later referred him to Dr. Tarik Elalayli, an orthopaedic surgeon. Dr. Elalayli diagnosed Mr. Franklin with a left-sided disc extrusion at the L5-S1 level of the spine. He initially recommended epidural steroid injections, but when two such injections provided no significant relief to Mr. Franklin, Dr. Elalayli recommended surgery to remove the herniated disc material. Dr. Elalayli performed that surgery on October 21, 2010. Although Mr. Franklin reported no relief from the surgery initially, he gradually improved over time.

On June 16, 2010, while Mr. Franklin was off from work because of his injury, Vought was acquired by Triumph Aerostructures ("Triumph"). When Mr. Franklin returned to his job, he worked for Triumph in the same capacity as he had before his injury and his hourly wage was slightly higher than it had been before the injury. He described his responsibilities as follows: "I put on little [electrical] brackets about an inch long. . . . And, I wrap them to the wires. I take a little squeeze gun and squeeze them on. . . . I can stand up. I can sit down." He testified that he believed this was the only job at Triumph he was capable of performing. He had attempted other jobs, but was unable to do them for more than one day at a time. He reported difficulty bending over, walking long distances, and crawling in tight spaces. According to Mr. Franklin, if he did not have the exact kind of job he was performing at Triumph, he could not work at all.

Mr. Franklin and Triumph participated in the Benefit Review Process and reached an impasse on May 4, 2011. That same day, Mr. Franklin filed suit seeking workers' compensation benefits in the Chancery Court in Smith County, alleging that he had become partially or permanently disabled as a result of the June 2010 injury. Triumph answered, generally denying both the extent of Mr. Franklin's injury and liability. The case was tried on February 10, 2012.

The proof at trial included the deposition testimony of Dr. Kowal and Dr. Elalayli describing Mr. Franklin's early treatment and surgery. Dr. Elalyli testified that he released Mr. Franklin from his care on January 24, 2011 and assigned a 10% permanent anatomical impairment. He did not assign any permanent restrictions because Mr. Franklin had already been restricted from lifting more than ten pounds and repetitive pushing and pulling because of an earlier injury.

Mr. Franklin testified at trial that he was fifty-one years old and a high school graduate. In addition to aircraft assembly, his work experience included being a "tool setter,"[1] performing aircraft maintenance, farming, and some carpentry. He did not believe he could return to any of these previous jobs because of the effects of his injury. At the time of his injury, he was engaged in a remodeling project installing flooring in his garage. He testified he was not able to get down to install the flooring or lift and hold the floor joists in place due to the severe pain in his back that was radiating into his left leg and foot. He also stated that if he tried to assist his wife with house or outside work, he would be unable to work the next day because of immobilizing pain in his back.

Mr. Franklin's wife, Janet Franklin, testified that they owned a small farm. Before his injury, Mr. Franklin assisted with the gardening and tending to animals; after the injury, he was unable to continue doing so. She verified that he had been unable to complete the remodeling project that he had started before the injury and was no longer able to assist with house and yard work.

Dr. Richard Fishbein testified by deposition that he performed an independent medical examination of Mr. Franklin on March 9, 2011 at the request of Mr. Franklin's attorney. Dr. Fishbein noted that Mr. Franklin had limited range of motion in his back and some loss of sensation and diminished reflexes in the left leg. He considered these findings to be consistent with Mr. Franklin's injury and surgery. Dr. Fishbein testified that Mr. Franklin scored 116 on a "pain questionnaire," which ranked in the moderate to severe range. He assigned an anatomical impairment of 13%, based on the American Medical Association Guides to the Evaluation of Permanent Impairment, (Sixth Editon). Dr. Fishbein recommended that Mr. Franklin avoid excessive bending and stooping, repetitive lifting, and ever lifting more than ten pounds. He also recommended alternating sitting and standing.

Triumph conceded that the one and one-half times multiplier caps contained in Tennessee Code Annotated section 50-6-241(d)(1)(A) (2008 & Supp. 2012) would not apply because of the acquisition of Vought by Triumph after the date of Mr. Franklin's injury.[2] The trial court found that Mr. Franklin was a credible witness and accepted his

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[1] A job involving the maintenance and repair of industrial machinery.

[2] In Barnett v. Milan Seating Sys., 215 S.W.3d 828 (Tenn. 2007) the Tennessee Supreme Court held that where the employer was sold or acquired between the time of the injury and the awarding of workers' compensation benefits, the employee was no longer working for the pre-injury employer and, therefore, was not subject to the caps contained in Tennessee Code Annotated section 50-6-241(d)(1)(A). Tennessee Code Annotated section 50-6-241(d)(1)(B)(i) provides that where an employee does not continue to remain in the employment of the pre-injury employer within 400 weeks after returning to work, the employee may seek (continued...)

testimony concerning his present abilities and limitations. The trial court accredited Dr. Fishbein's testimony concerning impairment and limitations and awarded 78% permanent partial disability, the maximum permitted by Tennessee Code Annotated section 50-6-241(d)(2)(A). Triumph has appealed, arguing that the award of benefits is excessive.

Standard of Review

We are statutorily required to review the trial court's factual findings "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." Tenn. Code Ann. § 50-6-225(e)(2) (2008 & Supp. 2012). Following this standard, we are further required "to examine, in depth, a trial court's factual findings and conclusions." Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)). We accord considerable deference to the trial court's findings of fact based upon its assessment of the testimony of witnesses it heard at trial, although not so with respect to depositions and other documentary evidence. Padilla v. Twin City Fire Ins. Co., 324 S.W.3d 507, 511 (Tenn. 2010); Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). "When the issues involve expert medical testimony that is contained in the record by depositions, determination of the weight and credibility of the evidence 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 Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008).

Analysis

Triumph advances two arguments in support of its position that the trial court's award of benefits was excessive. First, it contends that the trial court placed insufficient weight on the fact that Mr. Franklin returned to his pre-injury job and continued to perform that job at the time of trial. Second, it contends that the size of the award is inconsistent with the results of other cases in which the one and one-half times impairment multiplier did not apply because of a change of ownership of the employing entity.

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[2](...continued)
reconsideration of an award capped by section (d)(1)(A). In 2009, the Tennessee General Assembly enacted Tennessee Code Annotated section 50-6-241(d)(1)(C), which provides that where an employee has received workers' compensation benefits for an injury, occurring on or after July 1, 2009, to the body as a whole or a scheduled member benefit that has been capped by section (d)(1)(A) and the employer has been sold or acquired, the employee is not entitled to a reconsideration pursuant to section (d)(1)(B)(ii) provided the employee remains in the employ of the successor at equal to or greater than the pre-injury wage. Because the 2009 legislation did not specifically modify the application of the caps contained in section (d)(1)(A), Barnett controls and the caps do not apply to a successor employer in the initial award of permanent benefits.

"The extent of an injured worker's permanent disability is a question of fact." Lang v. Nissan N. Am., Inc., 170 S.W.3d 564, 569 (Tenn. 2005) (citing Jaske v. Murray Ohio Mfg. Co., 750 S.W.2d 150, 151 (Tenn. 1988)). The workers' compensation statute instructs courts to "consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in [his] disabled condition." Tenn. Code Ann. § 50-6-241(d)(2)(A). In this case, the trial court noted Mr. Franklin's return to work for Triumph. The trial court also took note of and accredited Mr. Franklin's testimony that his job was the only one in Triumph's facility that he was capable of performing due to the limitations resulting from his injury. The trial court observed that all of Mr. Franklin's previous jobs involved physical exertion and found it was doubtful that Mr. Franklin would be able to return to any of those positions. The trial court also found that Mr. Franklin's age would make any retraining, if such becomes necessary, a significant undertaking, and his physical limitations preclude him from working in all but relatively light or sedentary occupations. For these reasons, we are unable to conclude that the evidence preponderates against the trial court's finding concerning disability.

Second, Triumph's reliance on previously decided cases imposing compensation less than the maximum permitted by law for injured employees who have successfully returned to work, but who are not subject to the one and one-half times impairment cap because of a change in ownership of the employing entity, is misplaced. Triumph relies on a case where the trial court awarded only a four times multiplier where the injured employee returned and worked in the same capacity she had before her injury. See Day v. Zurich Am. Ins., No. W2009-01349-WC-R3-WC, 2010 WL 1241779 (Tenn. Workers' Comp. Panel Mar. 31, 2010). In Day, the employee injured both of her shoulders in two separate workplace injuries. When she returned after surgery, the employing entity had merged with another organization. At trial, the employee testified that she was sixty-four and had planned to retire when she turned sixty-six; however, she was considering an earlier retirement. The trial court awarded a four times multiplier and the Workers' Compensation Panel affirmed the award, holding that the evidence did not preponderate against the trial court's assessment of the employee's disability.

Similarly, a different trial court awarded an employee who had sustained an arm injury a three times multiplier when the entity for which he had been working when he was injured was sold to another corporation before the employee returned to work. See Meeks v. Hartford Ins. Co. of Midwest, No. W2009-01919-WC-R3-WC, 2010 WL 3398835 (Tenn. Workers' Comp. Panel Aug. 30, 2010). In Meeks, the trial court concluded that while the employee's injury had a limited effect on his ability to function, the injury did have an effect on his daily activities. On review, the Workers' Compensation Panel concluded that the evidence did not preponderate against the trial court's findings and affirmed the award.

Triumph asserts that these cases demonstrate that an award of the full six times multiplier is excessive. We find instead that these cases are merely demonstrative of a reviewing court's assessment of a trial court's exercise of its discretion. We find that the trial court in this case assessed the facts and circumstances and concluded that an award of the maximum six times multiplier was appropriate. The evidence does not preponderate against this conclusion. This is a fact-intensive inquiry and, based on the unique circumstances of any given case, an employee may be entitled to compensation in the amount of one and one-half times the impairment, the maximum award of six times the impairment, or some amount between the two. The facts of this case may have permitted a smaller award, but the trial court's decision to award the maximum is a reasonable result in light of the evidence.

Conclusion

The judgment is affirmed. Costs are taxed to Triumph Aerostructures, LLC, Specialty Risk Services, LLC and their surety, for which execution may issue if necessary.

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DONALD P. HARRIS, SPECIAL JUDGE

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**Chancery Court for Smith County
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No. M2012-00864-WC-R3-WC - Filed April 10, 2013

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 Triumph Aerostructures, LLC Specialty Risk Services, LLC and their surety, for which execution may issue if necessary.

PER CURIAM