IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 16, 2015 Session

DONNA SWANER v. G4S YOUTH SERVICES, LLC, AND NEW HAMPSHIRE INSURANCE COMPANY

Appeal from the Circuit Court for Davidson County
No. 13C3255 Thomas W. Brothers, Judge

No. M2014-01726-SC-R3-WC – Mailed August 6, 2015
Filed September 14, 2015

The primary issue in this appeal is whether a teacher who was hurt on the job after being terminated but while she was still working under a temporary extension of her contract, can claim that she did not get a meaningful return to work after she reached maximum medical improvement. The trial court held that the statutory cap of one and one-half her medical impairment rating did apply because the employee had a meaningful return to work. This appeal has been referred to the Special Worker's Compensation Panel for a hearing and a report of findings of fact and conclusions of law. We reverse the trial court's determination that the one and one-half times the medical impairment rating applies and adopt the court's alternative finding that the employee sustained a fifty percent permanent partial disability. We affirm the lower court's judgment in all other respects.

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

BEN H. CANTRELL, SR.J., delivered the opinion of the Court, in which JEFFREY S. BIVINS, J., and DON R. ASH, SR.J., joined.

Jonathan Williams, Nashville, Tennessee, for the appellant, Donna Swaner.

W. Troy Hart and David J. Otten, Knoxville, Tennessee, for the appellees, G4S Youth Services , LLC and New Hampshire Insurance Company.

OPINION

Procedural Background

On August 22, 2012, Defendant, employer G4S, terminated the Plaintiff, employee Donna Swaner, but G4S and Ms. Swaner contractually agreed that she would continue working for G4S through September 28, 2012. On August 27, 2012, Ms. Swaner injured her back while working for G4S. She continued working for G4S following her injury and through September 28, 2012, at which time her employment ended. Following the end of her employment with G4S, and her release from treatment on March 20, 2013, Ms. Swaner did not return to work for G4S.

The parties were unable to reach a resolution of her workers' compensation claim at a Benefit Review Conference. On August 13, 2013, Ms. Swaner filed a complaint for workers' compensation benefits in the Circuit Court for Davidson County. The case was tried on July 9, 2014. At the beginning of the trial, the parties stipulated to compensability, the date of injury, notice, Ms. Swaner's weekly compensation rate, and the date of maximum medical improvement.

Factual Background and Testimony

Ms. Swaner testified in person at trial. She was 63 years old and held a BS and Masters degree in English. She worked as a paralegal from approximately 1992-1996. From approximately 1996-2003, she worked for and then owned and operated a family appliance sales and service business. From approximately 2003-2005, Ms. Swaner worked as an assistant teacher and residential counselor at a juvenile facility. She then worked as an educational assistant and an in-house substitute teacher at a high school for three years while obtaining her Masters degree. After receiving her degree, Ms. Swaner worked in 2011 and 2012 as a substitute teacher for the Murfreesboro City Schools System. In May 2012, she went to work as an English and Social Studies teacher for G4S at its new Tennessee juvenile facility for girls ages 12 to 18.

At the time she applied for the position at G4S, Ms. Swaner did not have her Tennessee teaching certificate, but she was eligible for a transitional license, which she received. Ms. Swaner also did not have a special education endorsement. According to Ms. Swaner, G4S was aware of this but did not require the endorsement. Ms. Swaner, however, was aware that G4S wanted her to obtain the endorsement. She had begun to study for the endorsement, but she did not have time during the four months she was employed by G4S to complete the process for obtaining the endorsement. Further, according to Ms. Swaner, she was never informed by G4S that obtaining a special

education endorsement was required in order to keep her job or that she would be terminated if she failed to obtain the endorsement.

G4S's Aimee Lashlee testified in person at trial. Ms. Lashlee was employed as the principal at G4S's new Tennessee juvenile facility from the time the facility opened in May 2012. Ms. Lashlee acknowledged that the job description for the position for which Ms. Swaner applied and was hired did not require her to have a special education endorsement. The other teacher hired for this facility also lacked the special education endorsement. Ms. Lashlee also conceded that she was not aware of anyone at G4S informing Ms. Swaner that she would be terminated for failing to obtain the endorsement. At the time Ms. Swaner was hired, Ms. Lashlee was unaware that a special education endorsement was a requirement to teach at this Tennessee facility. Apparently, the G4S official in Florida responsible for hiring Ms. Swaner and the other teacher at this facility also was unaware of this requirement or was mistaken about it. G4S did try to assist Ms. Swaner in obtaining the special education endorsement and, at least initially, permitted her to continue working without it. G4S never gave Ms. Swaner a time frame within which she had to complete the special education endorsement process.

Ms. Swaner testified that she never received a warning or reprimand from G4S regarding the special education endorsement. Instead, she first learned that she was being terminated in approximately July 2012, when her job was listed in the classified section of a local newspaper. She then gleaned from discussions with Ms. Lashlee and with another G4S official that she was being terminated due to the fact that she did not possess a special education endorsement. According to Ms. Lashlee, that was the reason for her termination. Ms. Lashlee conceded, however, that Ms. Swaner was not terminated for misconduct, for violating a company policy, or for violating an enforced company rule.

On August 22, 2012, Ms. Swaner and G4S entered into a written agreement to continue her employment at G4S through September 28, 2012, in exchange for a gross payment of $500 in addition to her regular wages. Five days later, on August 27, 2012, Ms. Swaner suffered an injury to her back at work, while restraining a student. Ms. Swaner reported the injury and sought treatment at a walk-in clinic on four or five occasions. She returned to work following this injury and continued working at G4S during this time, through the agreed upon end date of her employment, September 28, 2012.

Ms. Swaner subsequently sought treatment from an orthopedic surgeon, Dr. Tarek G. Elalayli, who testified by deposition. In his first deposition on December 6, 2013, Dr. Elalayli testified that he first saw Ms. Swaner on November 14, 2012. A review of her history, the x-rays of her back, and a CT scan revealed an acute compression fracture of

the thoracic spine at T11. He ordered an MRI. Dr. Elalayli saw Ms. Swaner again on December 10, 2012, at which time he reviewed the MRI, which confirmed the acute T11 fracture and indicated that the fracture was healing but not completely healed. At that time, Ms. Swaner was still in pain, and Dr. Elalayli placed her in a brace and prescribed pain medication. He saw Ms. Swaner again on January 9, 2013, and she was still in pain. He scheduled her for physical therapy. He saw Ms. Swaner again on February 6, 2013, and on March 20, 2013, he placed her at maximum medical improvement ("MMI") and assigned her an anatomical impairment rating of 3% to the body as a whole. According to Dr. Elalayli, Ms. Swaner's T11 compression fracture was mild at less than 25%, she had normal neurological functioning in her extremities, and she suffered no nerve damage or compression. He testified that from November 2012, to March 20, 2013, Ms. Swaner would have been subject to restrictions of no repetitive bending and no lifting over fifteen pounds, but that as of March 20, 2013, she could return to full duty. Dr. Elalayli also testified that he had ordered a second MRI on March 20, 2013, but it had not been performed. According to Dr. Elalayli, the results of that MRI might change his opinion with respect to Ms. Swaner's anatomical impairment.

Dr. Elalayli was deposed again on May 16, 2014. He testified that he had seen Ms. Swaner on December 18, 2013, and that she was still in pain. He ordered a second MRI, which was performed on January 14, 2014. This MRI revealed that Ms. Swaner had suffered anatomical change since her prior MRI and that her T11 compression fracture had collapsed, resulting in an increased level of compression to 50% to 75%. This, in turn, resulted in an increase in her anatomical impairment rating to 12% to the body as a whole.

Ms. Swaner testified that she had last seen Dr. Elalayli on June 25, 2014, that she was still on pain medication, and that she was still suffering from chronic pain. She further testified that she had difficulty standing or walking for more than ten to fifteen minutes, but that she could sit for up to one hour. She testified that she had difficulty lifting and doing housework and cooking, yard work, and exercising. She also had difficulty with lifting and grocery shopping. According to Ms. Swaner, she did not have these problems prior to her injury.

After her termination from G4S on September 28, 2012, Ms. Swaner attempted substitute teaching approximately five times in 2012, but she could not perform the required tasks because she could not stand. As a result, she had accepted no substitute teaching assignments since that time. She testified that she did not believe she could go back to teaching at G4S because she cannot stand to teach. She testified that between September 2012 and July 2014, she applied for five or six jobs; she did not apply for other work because she did not believe she could work. Ms. Swaner testified that she could not return to paralegal work due to changes in the field, and could not return to

retail sales due to the physical requirements. As of the July 9, 2014 trial, Ms. Swaner had completed course work and applied for a teaching position at the community college level as an adjunct instructor and was awaiting an interview. This position would not require standing and would be part-time. The salary would be fifty to seventy-five percent less than she was earning at G4S.

Delilah Speed, a friend of Ms. Swaner's, also testified live at trial. Ms. Speed testified that prior to her injury, Ms. Swaner had no difficulty lifting, standing, or walking. Since her injury, however, Ms. Swaner had difficulty in engaging in these activities and tired easily.

Trial Court Findings

The trial court issued its ruling from the bench, which was reduced to a written judgment filed July 23, 2014. The trial court found the testifying witnesses to be credible. With respect to those issues not stipulated to by the parties, the trial court found that Ms. Swaner was entitled to temporary total disability benefits from November 14, 2012, through March 20, 2013, in the amount of $8,372.70. The trial court found that Ms. Swaner had sustained a 12% anatomical impairment to the body as a whole. The court determined that the one and one-half times cap established in Tennessee Code Annotated § 50-6-241(d)(1)(A) applied and awarded her benefits based on an 18% impairment to the body as a whole. In this regard, the court found that Ms. Swaner was terminated from her employment with G4S on August 22, 2012, five days before her injury; that she had entered a contract with G4S on that date to continue to work through September 28, 2012; that she continued to work for G4S through that date; and that she had a meaningful return to work. The trial court further found that Ms. Swaner was not terminated for violating any recognized or well-known rule or policy of G4S, and that her termination was not caused by her work injury.

The trial court rendered an alternative finding with respect to Ms. Swaner's vocational impairment, "[i]n the event an appellate court were to find that the one and one-half 'cap' does not apply in this case." In that event, the trial court found that Ms. Swaner had sustained a 50% permanent partial disability.

The trial court determined that Ms. Swaner also was entitled to a medical mileage reimbursement of $229.83, and ordered that this amount and the amount of her permanent total and permanent partial disability benefits be paid in lump sum.

Ms. Swaner appealed the trial court's decision, contending that the trial court erred in finding the one and one-half times cap applicable. G4S and its insurer contend that the trial court did not err but that, if it did, the case should be remanded "to further

develop the record as to [Ms. Swaner's] vocational disability." The appeal has been referred to the Special Workers' Compensation Appeals Panel. *See* Tenn. Sup. Ct. R. 51, § 1.

Standard of Review

In Tennessee workers' compensation cases, this Court reviews the trial court's findings of fact de novo, accompanied by a presumption of correctness of the findings, unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008 & Supp. 2013); *see also Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). "This standard of review requires us to examine, in depth, a trial court's factual findings and conclusions." *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991) (citing *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 675 (Tenn. 1991)). We give considerable deference in reviewing the trial court's findings of credibility and assessment of the weight to be given to that testimony, when the trial court has heard in-court testimony. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). No similar deference need be afforded the trial court's findings based upon documentary evidence such as depositions. *Glisson v. Mohon Int'l, Inc./Campbell Ray*, 185 S.W.3d 348, 353 (Tenn. 2006). On questions of law, our standard of review is de novo with no presumption of correctness. *Wilhelm*, 235 S.W.3d at 126. The extent of vocational disability is a question of fact to be decided by the trial judge. *Johnson v. Lojac Materials*, 100 S.W.3d 201, 202 (Tenn. Workers' Comp. Panel 2001).

Analysis

1. Application of Statutory Cap/Vocational Disability

The primary issue in this appeal is the application of the one and one-half times statutory cap. The relevant statutory caps are set forth in Tennessee Code Annotated section 50-6-241, which provides in pertinent part:

> (d)(1)(A) For injuries occurring on or after July 1, 2004, in cases in which an injured employee is eligible to receive any permanent partial disability benefits either for body as a whole or for schedule member injuries, . . . and 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 the injury, the maximum permanent partial disability benefits that the employee may receive is one and one half (1½) times the medical impairment rating determined pursuant to the provisions of § 50-6-204(d)(3).

. . .

> (2)(A) For injuries arising on or after July 1, 2004, in cases in which the pre-injury employer did not return the injured employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability benefits that the employee may receive for body as a whole and schedule member injuries subject to subdivision (d)(1)(A) may not exceed six (6) times the medical impairment rating determined pursuant to the provisions of § 50-6-204(d)(3).

As our Supreme Court has stated,

> "These statutes 'protect the interests of several categories of employees, including (1) those who are unable to return to work for their employer because of the effects of their work injuries, (2) those who are able to return, but at a lesser wage because of the effects of their work injuries, and (3) *those who, for reasons outside their control, are placed into the job market to compete against unimpaired applicants.*
>
> . . .
>
> "These statutes encourage the retention of injured employees by reducing the liability of employers who return injured employees to work at the same or a greater wage. In turn, encouraging the retention of injured workers advances the general purpose of the workers' compensation statutes, which 'is to relieve society of the burden of providing compensation to injured workers and to put that burden on the industry employing the worker.'"

Britt v. Dyer's Employment Agency, Inc., 396 S.W.3d 519, 524 (Tenn. 2013) (emphasis added) (citation omitted).

Our Supreme Court also recently explained:

> Under the plain language of this statute, the relevant inquiry in determining which multiplier applies—either one and one-half times the impairment rating or up to six times the impairment rating—"is whether the pre-injury employer returned the injured employee to work at a wage equal to or greater than the pre-injury wage." *Britt v. Dyer's Emp't*

> *Agency, Inc.*, 396 S.W.3d 519, 524 (Tenn.2013). In order for the lower statutory cap to apply, "the burden is upon the employer to show, by a preponderance of the evidence, that an offer of a return to work is [made] at a wage equal to or greater than the pre-injury employment and that the work is within the medical restrictions . . . for the returning employee." *Ogren v. Housecall Health Care, Inc.*, 101 S.W.3d 55, 57 (Tenn. Workers Comp. Panel 1998).

Yang v. Nissan North America, Inc., 440 S.W.3d 593, 598 (Tenn. 2014). "[I]n order to guide the application of the appropriate statutory cap when 'an employee who becomes permanently, partially disabled as the result of a work-place injury returns to work for the pre-injury employer but does not remain employed[,]'" the Court has "recognized the concept of 'meaningful return to work.'" *Id.* at 598-99. As the Court has further explained this concept and the rationale for it:

> [I]f applied woodenly, the bright-line test of section 50–6–241(d)(1)(A)—"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 the injury"—would frustrate the purpose of the statute in "the common circumstance in which an employee who becomes permanently, partially disabled as the result of a workplace injury returns to work for the pre-injury employer but does not remain employed." *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 328 (Tenn.2008). To remedy this problem, Tennessee courts developed the "meaningful return to work" concept.

Furlough v. Spherion Atlantic Workforce, LLC, 397 S.W.3d 114, 130-31 (Tenn. 2013).

"The circumstances to which the concept of 'meaningful return to work' must be applied are remarkably varied and complex." *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 328 (Tenn. 2008); *Furlough*, 397 S.W.3d at 131. This Panel recently noted:

> The cases [concerning meaningful return to work] 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.

Hobbs v. Auto Owners Mutual Insurance Co., 2015 WL 305619 at *5 (Tenn. Workers Comp. Panel 2015).

In this case, Ms. Swaner's employment was terminated, and she and G4S entered into a contract whereby she would continue working for a set period of time, all prior to her injury. Following her injury, Ms. Swaner returned to work for G4S, and she continued working until the expiration of the previously agreed upon time period. The trial court found that Ms. Swaner had not been terminated for violating any recognized or well-known rule or policy of G4S. The trial court further found, however, that her termination was not caused by her work injury. The trial court concluded that Ms. Swaner had a meaningful return to work and that the one and one-half times cap, therefore applied. We disagree.

While we recognize that the facts of this case are distinguishable from the *Britt* case[3], and that the meaningful return to work concept was held not to apply in *Britt*[4], we find that the principles enunciated by the Tennessee Supreme Court in *Britt* are equally applicable to this case.

In *Britt,* the employer (Dyer's) was a temporary staffing agency which had assigned the employee (Britt) to work temporarily at a manufacturing facility. 396 S.W.3d at 521. The employee sustained a compensable work-related injury a few weeks into the assignment and reported it to the employer. At about that same time, the manufacturing facility notified the employer that the employee's assignment had ended. Consistent with its customary business practice, the employer then terminated the employee, and he did not return to work for the employer after his injury. *Id.* In holding that the one and one-half times statutory cap did not apply, the Supreme Court rejected any reliance upon the fact that the employer could not be faulted for the decision of the manufacturing facility to end the employee's assignment and rejected any reliance upon the fact that the employee's employment was temporary:

[3]In *Britt*, the employee never returned to work.

[4]*See Britt*, 396 S.W.3d at 525.

> While it is true, as the trial court concluded, that Dyer's cannot be "faulted" for Mark IV's decision to end Mr. Britt's temporary assignment, this is not a relevant consideration under the plain language of the multiplier statutes. The relevant inquiry is whether the pre-injury employer returned the injured employee to work at a wage equal to or greater than the pre-injury wage.
>
> In applying the lesser multiplier, the trial court also cited the inherently temporary nature of Mr. Britt's employment with Dyer's and Mr. Britt's knowledge of the nature of his employment with Mark IV. These facts, although supported by the record, are not relevant to the determination of which multiplier applies. This is true because the statutory language neither draws a distinction between permanent and temporary employees nor permits or requires consideration of the employer's business practices. We may not alter or amend the statutory language, which focuses only on whether the employer returned the employee to work at a wage equal to or greater than the pre-injury wage, or create a judicial exception to the clear statutory language for temporary employers and employees.

Britt, 396 S.W.3d at 524.

We find that these same principles counsel against the application of the one and one-half times statutory cap in this case. First, even if G4S cannot be faulted for its termination of Ms. Swaner, that is not the relevant inquiry for purposes of the application of the meaningful return to work concept. Even a layoff of an employee for purely economic reasons following the employee's post-injury return to work may be deemed a termination of the employment relationship which results in the absence of a meaningful return to work and the inapplicability of the one and one-half times cap. *See Nichols v. Jack Cooper Transport Co., Inc.*, 318 S.W.3d 354, 364-65 (Tenn. 2010). Second, the temporary nature of Ms. Swaner's employment with G4S following her termination and contractual extension is not relevant to the application of the meaningful return to work concept. Finally, the trial court appears to have based its finding that Ms. Swaner had a meaningful return to work upon Ms. Swaner's return to work immediately after the accident occurred and her continuing to work until the expiration of her contract. However, at that point in time, Ms. Swaner had not reached MMI and had not received any restrictions. Therefore, it was premature for the trial court to make its meaningful return to work determination based on that point in time. *See Haney v. Five Rivers Elec.*

Innovation LLC, No. E2004-01941-WC-R3-CV, 2006 WL 2423430, at *4-5 (Tenn. Workers Comp Panel Aug. 23, 2006).

We reject the reliance of G4S on cases addressing an employee's termination following his or her return to work as a consequence of the employee's violation of or inability to satisfy the rules or policies of the employer. *See, e.g., Carter v. First Source Furniture Group*, 92 S.W.3d 367 (Tenn. 2002). The trial court found that Ms. Swaner was not terminated for violating any recognized or well-known rule or policy of G4S. The evidence does not preponderate against this finding.

The same analysis distinguishes this case from our recent case of *Hobbs v. Auto Owners Mutual Insurance Co.*, No. M2014-00532-SC-R3-WC, 2015 WL 305619, (Tenn. Workers Comp. Panel Jan. 23, 2015), where we found that the worker's choice not to obtain a degree amounted to a violation of the employer's work-place rule.

Accordingly, we conclude that Ms. Swaner did not have a meaningful return to work and that the statutory one and one-half times cap does not apply.

2. Remand

G4S contends that, in the event that the one and one-half times statutory cap is determined not to apply, remand to the trial court is necessary to afford the trial court an opportunity to develop the record regarding Ms. Swaner's vocational disability. We disagree. The trial court carefully considered the testimony and evidence and rendered an alternative finding to specifically address this eventuality. The trial court determined that, in the event that the cap did not apply, Ms. Swaner had sustained a 50% permanent partial disability. The evidence does not preponderate against this finding, and remand is neither necessary nor appropriate.

Conclusion

For the foregoing reasons, the judgment of the trial court is reversed with respect to the application of the one and one-half times cap. The alternative determination of the trial court with respect to Ms. Swaner's vocational impairment is affirmed, as are the remaining determinations of the trial court. The costs of this appeal are taxed to G4S Youth Services, LLC and New Hampshire Insurance Company, and their surety, for which execution may issue if necessary.

_____

BEN H. CANTRELL, SENIOR JUDGE

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

DONNA SWANER v. G4S YOUTH SERVICES, LLC, AND NEW HAMPSHIRE INSURANCE COMPANY

Circuit Court for Davidson County
No. 13C3255

No. M2014-01726-SC-R3-WC – Filed September 14, 2015

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 G4S Youth Services, LLC and New Hampshire Insurance Company, and their surety, for which execution may issue if necessary.

PER CURIAM