IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 23, 2018 Session

VICKI GANDEE v. ZURICH NORTH AMERICA INSURANCE COMPANY

Appeal from the Chancery Court for Shelby County
No. CH-11-0731 Walter L. Evans, Judge

No. W2017-01523-SC-WCM-WC – Mailed July 3, 2018; Filed September 19, 2018

Vicki Gandee ("Employee") sustained a knee injury in 2004 during the course of her employment with Christ United Methodist Church ("Employer"). Employee returned to work after her injury; however, she left her job in April 2006 before reaching maximum medical improvement. Employee filed this claim against Employer's worker's compensation carrier ("Insurer") maintaining she failed to make a meaningful return to work. Employee was seeking permanent partial disability benefits at six times the impairment rating. The parties disputed whether Employee was terminated for misconduct or resigned due to her injury. The trial court found the claim compensable but capped the award at two and one-half times the impairment rating having concluded Employee was terminated for misconduct. Employee appeals claiming the trial court erred in finding she was terminated for misconduct; in applying the lower cap; and in adopting Insurer's expert's impairment rating. 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 trial court's decision to adopt the impairment rating assigned by Insurer's expert; however, we reverse the trial court's decision to cap the award based on misconduct and remand for modification of the award.

Tenn. Code Ann. § 50-6-225(e) (2014) (applicable to injuries occurring prior to July 1, 2014) Appeal as of Right;
Judgment of the Chancery Court Reversed in Part; Affirmed in Part as Modified; and Remanded

DON R. ASH, SR. J., delivered the opinion of the court, in which ROGER A. PAGE, J. and WILLIAM B. ACREE, JR., J., joined.

William C. Sessions, III, Memphis, Tennessee, for the appellant, Vicki Gandee

M. Dean Norris, Memphis, Tennessee, for the appellee, Zurich North America Insurance Company

OPINION

Factual and Procedural Background

Employee, age 59 at the time of trial, began working for Employer in 1990 as the child care director after having served as a church volunteer in the children's ministries for a number of years. As the church grew to 7,000 members, Employer promoted Employee to assistant children's director and then to children's program director. Employee was a salaried employee working over 50 hours per week, and she accumulated personal time and sick time on an informal honor system.

On April 25, 2004, Employee sustained an injury when she fell down a flight of stairs shortly after finishing the children's sermon. Dr. Laura Lendermon, an orthopedic physician and church member, briefly examined Employee and subsequently treated Employee in her office. Dr. Lendermon diagnosed Employee with regional pain syndrome (RPS) related to her knee injury. Employee returned to work approximately two weeks later, describing her recovery as a "slow process."

On August 1, 2004, Employee slipped and fell on a snow cone during a children's event at church. She suffered further injury to her "bad knee" and broke a finger. Employee described the pain as the "most excruciating pain" she had experienced in her life. She returned to work in September 2004 after "learning to walk again." After physical therapy proved unsuccessful, Dr. Lendermon ordered a series of nerve blocks to address Employee's pain. She returned to work in September 2004, and attempted to perform her job tasks. However, Employee found it extremely difficult to meet the physical demands of her position.

Employer did not have a human resources department. Larry Pennington, the chief financial officer, spoke with Employee about her injuries. Employee believed Mr. Pennington was "handling" her injury claim. No one from Employer explained temporary total disability ("TTD") payments or how Employee would be paid for missed time resulting from the injuries. Employee used her personal and sick time for any

absences related to the April and August incidents.

In October 2004, Employee received some checks from Insurer, including a check for over $1,000. The checks, apparently TTD payments, were made out to Employee and were mailed to her home address. Because she did not understand why she had received the checks and was unnerved by the amounts, Employee turned the unendorsed checks over to Mr. Pennington. In February 2006, some seventeen months after returning to work, Employee received her first telephone call from an adjuster with Insurer. The adjuster told Employee she was entitled to reimbursement for the personal and sick time she used during her time off and for her doctor's appointments. Employee compiled a list of days for which she had used her personal time and asked her supervisor at the church, Toni Watson, and Dr. Lendermon to confirm the dates. Insurer subsequently issued checks for $250 and $500, and Employee cashed the checks under the belief the checks were reimbursement for her personal time.

In early 2006, Mr. Pennington was terminated from his employment with the church. Employee never learned what became of the unendorsed checks and never spoke with Insurer about the checks. In April 2006, Drew Sippel, a church administrator, approached Employee about a check from Insurer that Employee had allegedly cashed. Mr. Sippel, who described himself as the "go between" between Employee and Insurer, was unaware of Employee's conversations with Mr. Pennington, and he had no knowledge of the TTD checks Mr. Pennington had accepted from Employee. Mr. Sippel accused Employee of stealing from the church by cashing a check from Insurer while also being paid her full salary by the church in contravention of church policy. Mr. Sippel also claimed Employee had been warned about past performance and integrity issues unrelated to her injury. Soon thereafter, Employee left her position with the church. It was disputed whether she had resigned or was terminated. She later became a real estate agent.

At the request of Insurer, Dr. Arsen Haig Manugian, an orthopedic surgeon, conducted an independent medical examination ("IME") of Employee on December 6, 2007.[1] According to his deposition, Dr. Manugian noted Employee was hypersensitive to touch and walked with a limp. He said Employee would have permanent work restrictions that would likely prevent her from serving as a children's program director. He assigned an impairment rating of five percent to the body as a whole.

Employee sought an IME on March 5, 2014 from Dr. Apurva R. Dalal, also an

[1]The doctors appear to agree Employee reached maximum medical improvement on December 6, 2007.

orthopedic surgeon. In his deposition, Dr. Dalal noted, among other things, Employee had severe pain in her left knee; had increased sensitivity to touch; and walked with a limp. Dr. Dalal opined the injuries were work-related and were permanent. He assigned an impairment rating of eighteen percent to the body as a whole.

At the February 14, 2017 trial, Employee and Mr. Sippel testified to the events described above, and the trial court considered the deposition testimony of Dr. Manugian and Dr. Dalal. Employee insisted she resigned from her position due to the lasting effects of her injuries. She suggested Employer did little to accommodate her injury. Claiming she did not make a meaningful return to work, Employee asked the trial court to adopt the impairment rating assigned by Dr. Dalal and apply the higher cap found in Tenn. Code Ann. § 50-6-241(b). Insurer (on behalf of Employer) asked the trial court to adopt Dr. Manugian's impairment rating and apply the lower cap found in Tenn. Code Ann. § 50-6-241(a)(1) because Employee was terminated for misconduct. After taking the matter under advisement, the court entered an order on June 28, 2017, adopting the five percent (5%) impairment rating assigned by Dr. Manugian. Finding Plaintiff was terminated for misconduct, the court limited Plaintiff's permanent partial disability recovery to two and one half (2 ½) times the impairment rating assigned by Dr. Manugian. The court assigned 12.5% vocational disability to the body as a whole and awarded Plaintiff $28,429.50, which is equal to fifty (50) weeks of permanent partial disability benefits at Plaintiff's compensation rate of $568.59. Employee appeals.

Analysis

Standard of Review

Appellate review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2008), which provides appellate courts must "[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." As the Supreme Court has observed many times, reviewing courts 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 the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. *Tryon v. Saturn Corp*., 254 S.W.3d 321, 327 (Tenn. 2008). 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). Similarly, reviewing courts afford no presumption of

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

I.

We first consider whether the trial court erred in concluding Employee had been terminated for misconduct and by applying the statutory cap found in Tenn. Code Ann. § 50-6-241(a)(1). Lying at the heart of our inquiry is the concept of "meaningful return to work," which was devised by the courts to assist with the application of the statutory caps placed on permanent partial disability benefits. *Tryon*, 254 S.W.3d at 328; *Wheeler v. Hennessy Industries*, No. M2007-00921-WC-R3-WC, 2008 WL 3342878 (Tenn. Workers Comp. Panel Aug. 11, 2008).

Generally, if the employer returns the employee to employment at a wage equal to or greater than the wage she was receiving at the time of injury (i.e. the employee makes a meaningful return to work), permanent partial disability benefits cannot exceed two and one-half times the assigned medical impairment rating. Tenn. Code Ann. § 50-6-241(a) (applicable to claims arising before July 1, 2004); *Wheeler*, 2008 WL 3342878 at *6. On the other hand, if the employee is no longer employed, or is employed at a lower wage (i.e., the employee does not make a meaningful return to work), permanent partial disability benefits cannot exceed six times the medical impairment rating. Tenn. Code Ann. § 50-6-241(b). *See Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327-28 (Tenn. 2008).[2]

Our courts, however, have recognized an exception to Tennessee Code Annotated section 50-6-241(b) for an employer who discharges an employee because of misconduct. The "misconduct exception" as coined by the *Wheeler* panel, can be traced back to the limitations on recovery discussed in *Carter v. First Source Furniture Group*, 92 S.W.3d 367 (Tenn. 2002). In *Carter*, the Court concluded an employer, having fired an employee for misconduct prior to treatment for an injury, was not required to make an offer of re-employment following treatment in order to take advantage of the lower cap contained in

[2]The Insured correctly noted in its brief, as to the second knee injury occurring on August 4, 2004, the statute in effect provided an employee making a meaningful return to work is limited to an award of one and one-half times the medical impairment rating. *See* Tenn. Code Ann. § 50-6-241(d)(1)(A). The trial court did not make the distinction when it generally applied the two and one-half times multiplier found in the earlier statute. *See* Tenn. Code Ann. § 50-6-241(a)(1). Neither party raised the issue as error. In light of our ruling, it is unnecessary to remand the case for reconsideration under the appropriate statute for the respective injury.

section 50-6-241(a)(1). *Id.* at 371. (reasoning an employer should be permitted to enforce workplace rules without being penalized in a workers' compensation case). In the following years, *Carter* and its progeny established the boundaries of the current misconduct exception. *See, e.g.*, *Durham v. Cracker Barrel Old Country Store, Inc.*, No. E2009-00708-WC-R3-WC, 2009 WL 29896 at *3 (Tenn. Workers Comp. Panel Jan. 5, 2009) (affirming the trial court's finding employee was not terminated for misconduct and that the higher cap applied); *Hickman v. Dana Corp.*, No. W2007-01134-WC-R3-WC (Tenn. Workers Comp. Panel Aug. 26, 2008) (concluding the evidence supported the finding employee was not fired for misconduct and did not have a meaningful return to work); *Wheeler v. Hennessy Industries*, No. M2007-00921-WC-R3-WC, 2008 WL 3342878 (Tenn. Workers Comp. Panel Aug. 11, 2008) (utilizing the term "misconduct exception" and remanding the case to allow the parties to present evidence as to whether employer's termination of employee was a pretext); and *Moore v. Best Metal Cabinets*, No. W2003-00687-WC-R3-CV, 2004 WL 2270751 (Tenn. Workers Comp. Panel Oct. 7, 2004) (concluding the evidence preponderated against the trial court's finding employee was fired for insubordination and was therefore subject to the lower cap).

These cases demonstrate when an employer relies on the "misconduct exception," the court "must determine (1) that the actions allegedly precipitating 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. E2009-00708-WC-R3-WC, 2009 WL 29896 at *3 (Tenn. Workers Comp. Panel Jan. 5, 2009) (citing *Carter's* rule regarding limitations on recovery). If the actions qualify as misconduct, the employer must satisfactorily demonstrate the misconduct was its actual motivation in terminating the employee. *Wheeler*, 2008 WL 3342878 at *8 (citing *Carter*, 92 S.W.3d at 368, 371-72 (Tenn. 2002)).

If the misconduct exception applies, an employer is not required to offer re-employment or to retain the employee on the payroll in order to benefit from the lower cap contained in section 50-6-241(a)(1). *Wheeler*, 2008 WL 3342878 at *6 (citations omitted); *Dyson-Kissner-Moran Corp. v. Shavers*, No. E2015-0200-5SC-R3-WC, 2015 WL 12850553 at *4 (Tenn. Workers Comp. Appeal Panel Nov. 16, 2016) (indicating an award for an employee terminated due to misconduct prior to resolution of the workers' compensation claim is subject to the lower cap). On the contrary, if the employee's conduct cannot be reasonably classified as misconduct, the employer's assertion of misconduct would be pretextual and the larger cap contained in section 50-6-241(b) would apply. *Wheeler*, 2008 WL 3342878 at *8.

Thus, within our examination of whether Employee made a meaningful return to work, we also consider whether the misconduct exception applies to limit Employee's recovery. In assessing whether an employee has made a meaningful return to work, courts must consider 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. *Newton v. Scott Health Care Ctr.*, 914 S.W.2d 884 (Tenn. Workers Comp. Panel 1995); *Tryon*, 254 S.W.3d at 328-29; *Dyson-Kissner-Moran*, 2015 WL 12850553 at *4. "The determination of the reasonableness of the actions of the employer and the employee depends on the facts of each case." *Tryon*, 254 S.W.3d at 328-29.

In the instant case, Employee worked for Employer for approximately twelve years. By all accounts the job was physically demanding as Employee worked with children of all ages leading praise and worship, vacation Bible schools, and other youth retreats. Employee said before the knee injuries, she was in the best physical shape of her life. After the injuries, however, Employee had difficulty performing her required tasks due to decreased mobility and pain. Although she routinely walked across the sprawling church campus prior to her injuries, Employee found it necessary to drive from one side of campus to the other after her injury. Employee stated the series of nerve blocks she received were the only way she could fulfill many of her responsibilities. Despite the difficulties, Employee continued to receive periodic raises after her injury. Employee considered leaving her "dream job," indicating her husband had repeatedly encouraged her to do so. She maintained Mr. Sippel's accusation was the "last straw" that led to her resignation. Employee insists she did not make a meaningful return to work.

As noted, however, Employer raised the misconduct exception supported by the testimony of Mr. Sippel. At the conclusion of the proof, the trial court agreed Employee was terminated for misconduct and limited Employee's recovery by applying the lower cap. Accordingly, we examine the elements of the misconduct exception in light of the proof presented at trial.

Misconduct

First, we examine whether the actions resulting in Employee's dismissal or resignation qualified as misconduct under established or ordinary workplace rules and/or expectations.[3] In its findings of fact, the court based its misconduct determination on the

[3]In *Wheeler*, the panel explained, "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

testimony of Mr. Sippel. The court specifically noted the following conduct: (1) Employee's purported agreement to sign over any TTD checks to the church; (2) performance and integrity issues in early 2006, including Employee's past discipline for tardiness and failure to submit lesson plans; and (3) concerns about Employee's truthfulness regarding her whereabouts when she claimed she was running a church errand. In its conclusions of law, the court determined Employer acted reasonably in terminating Employee for cashing a check for TTD benefits while also receiving her full salary. It further determined Employer established it had previously disciplined Employee with regard to ongoing performance issues. The court acknowledged the absence of written procedures prohibiting these actions, but concluded these were ordinary workplace expectations.

Although we must extend considerable deference to the trial court's factual findings where it has seen and heard witnesses and the credibility/weight of oral testimony is involved, in workers' compensation cases we ultimately conduct an independent review to determine where the preponderance of the evidence lies. *Lang v. Nissan North America, Inc.*, 170 S.W.3d 564, 569 (Tenn. 2005) (citations omitted).

The testimony established Employer was largely unfamiliar with workers' compensation claims. Mr. Pennington spoke with Employee about her injuries and accepted what appeared to be TTD checks from Employee. However, he apparently never explained to Employee how she would be compensated for her lost time. Although Mr. Sippel described himself as the "go between" between Employer and Insured, he was unaware of either Employee's previous conversations with Mr. Pennington or the checks surrendered to him. Mr. Sippel had no working knowledge of workers' compensation terminology other than the term "light duty," and his role seemed limited to completing necessary forms. Mr. Sippel was admittedly unfamiliar with the term TTD or the formula used to calculate pay for someone who missed work due to a work-related injury. He did not know if Employee had ever received a TTD payment following her injury. We find no support for the trial court's finding Employer and Employee had an agreement whereby Employee agreed to sign over any TTD checks to Employee in exchange for Employer paying Employee her full salary. In fact, Mr. Sippel could not verify such an agreement, merely indicating unconvincingly such an arrangement was "church policy."

---

context of a claim for benefits under the Workers' Compensation Law, the courts may be required to determine whether particular acts constitute misconduct for purposes of determining which cap on [PPD] benefits applies." *Wheeler*, 2008 WL 3342878 at *7.

Despite this testimony, Mr. Sippel insisted Employee's primary misconduct was her act of cashing a check from Insurer while also receiving her full salary. The trial court characterized the check as TTD benefits and concluded Employee lied about cashing the check. The cashed check, however, remains a mystery. Mr. Sippel claimed he saw the single check endorsed by Employee. However, he could not produce the check, and he could not recall the amount of the check or how he obtained a copy of the check. Mr. Sippel did not know how the check would be classified and his testimony clearly indicates he was unfamiliar with TTD benefits. Again, we find no evidence to support the trial court's conclusions the check was for TTD benefits and was cashed by Employee.

The final example of misconduct cited by the trial court related to "performance" and "integrity" issues. As noted, the court concluded Employer established Employee had been previously disciplined for ongoing performance issues. Mr. Sippel claimed he had been in meetings with Employee and her supervisor, Ms. Watson, to discuss Employee's tardiness as well as her performance issues. However, much of this questioning was excluded as hearsay. As to Employee's "lying about her whereabouts," Mr. Sippel claimed Employee was at home on one occasion when she was supposedly running an errand for Employer. Mr. Sippel said he had a conversation with Employee during which he explained such conduct was unacceptable. No disciplinary records were produced.

Employee testified regarding her interactions with Mr. Pennington. She was unaware of an "agreement" with the church to turn over any checks she received from Insured. Nonetheless, when the checks arrived at her home address, she surrendered them to Mr. Pennington. Although these checks appear to have been for TTD benefits, the record is unclear. Employee admittedly cashed a check or checks from Insured she viewed as reimbursement for her annual and sick time. She denied cashing any checks for TTD benefits.

Employee denied being disciplined for performance or integrity issues. She said she often ran errands for the church and would occasionally leave early in order to return to an evening church function. Employee introduced four letters as trial exhibits. In the first letter, dated March 11, 2002, Employee was informed she had received "the highest job evaluation rating possible at [the church]." The letter added Employee was "in that top tier of staff members who enthusiastically and consistently go beyond what is expected" and the committee wished to "express its appreciation for [Employee's] exceptionally high performance." A second letter, dated March 6, 2003, and a third letter addressing the 2005 budget were more general but both letters expressed appreciation for

the work performed and indicated Employee's compensation was increased each year. The fourth letter, dated July 25, 2005, was from Employee's supervisor, Ms. Watson, to Employee. Ms. Watson complimented Employee's leadership in worship as well as Employee's willingness to design sets, coach children, "run around to purchase supplies," and drive vans full of praise team members. Ms. Watson explained how Employee's enthusiasm "restored the flagging energy of other team members." Ms. Watson acknowledged Employee's difficulties following her injury stating, "The year between VBS 2004 and VBS 2005 has not been an easy one for you by virtue of your health concerns and multiple programs, yet you have disciplined yourself to work when others would have thrown in the towel." Ms. Watson closed her letter by thanking Employee for her dedication to the families and the church. Mr. Sippel attempted to minimize the value of the letters, describing them as "pretty standard form letters."

Reason for Termination

Next, we must consider whether these actions were the true motivation for the dismissal. The trial court, without citation to any authority, placed the burden on Employee when it concluded "[Employee] has not presented any proof that the above listed reasons were not the true motivation for her termination." Indeed, the employee bears the burden of proving each element of his worker's compensation claim. *See Fitzgerald v. BTR Sealing Systems North America*, 205 S.W.3d 400, 404 (Tenn. 2006). However, when raising the misconduct exception, W*heeler* indicates the *employer* must satisfactorily demonstrate the employee's misconduct was its actual motivation in terminating the employee. *Wheeler*, 2008 WL 3342878 at *8. Thus, we consider whether Employer has met its burden.

Mr. Sippel indicated the primary reason he terminated Employee was her act of cashing a check from Insured and her initial dishonesty about whether she had cashed a check. Indeed, the trial court found Employer acted reasonably in terminating Employee for cashing a TTD check. Mr. Sippel said the other performance and integrity issues also factored into his decision. The trial court also accredited this reason. Mr. Sippel denied his decision was related to Employee's work-related injury or her light-duty restrictions.

During his testimony, Mr. Sippel identified an unsigned document bearing the heading "Separation Agreement." The opening recitals of the agreement alludes to Employer's claim Employee was overpaid because she received workers' compensation benefits in addition to her salary but notes Employee's denial of any overpayment. The recitals further indicate the parties had reached an agreement to terminate the

employer/employee relationship through Employee's resignation. Mr. Sippel was unfamiliar with the document, merely stating it was church practice to have a separation agreement with some of its employees. He was unsure whether Employee had ever signed the agreement.

Employee introduced what appears to be a church bulletin from April 16, 2006. In a section entitled "Children's Ministry Announcement," the bulletin informs the church members Employee resigned after twelve years based in part on health-related issues. In the bulletin, the senior pastor commented Employee had "made a marvelous contribution" to the church.

Viewing the trial court's findings in light of the entire record, we must conclude the evidence preponderates against the trial court's finding Employer acted reasonably in terminating Employee for misconduct. The evidence did not establish Employee entered an agreement to surrender checks from Insured in exchange for her regular pay or that she cashed a TTD benefit check. If Employee indeed cashed a check she understood was reimbursement for her personal time, her act of doing so could not reasonably be characterized as misconduct due to the lack of guidance from the church administration. Likewise, although the misconduct exception allows Employer to enforce workplace rules, the evidence does not indicate Employee had faced disciplinary actions to such a degree termination was likely to result. *See Wheeler*, 2008 WL 3342878, at *8, n.9 ("Where the conduct is reasonably classified as minor misconduct, the lack of egregiousness of the conduct tends to cast doubt upon an employer's assertion that it was motivated solely by the misconduct in terminating the employee but does not preclude a finding that misconduct was the actual motivator."). In the absence of misconduct, as the term is construed by the misconduct exception, we conclude Employer has not satisfactorily demonstrated Employee's conduct was its actual motivation in terminating Employee.

We find the misconduct exception does not apply and Employee failed to make a meaningful return to work for the purposes of applying the statutory caps to her permanent partial disability award. Accordingly, she is entitled to an award up to six times the assigned medical impairment rating.

II.

Next, we consider whether the trial court erred in adopting the impairment rating assigned by Insured's expert, Dr. Manugian. The trial court reviewed the depositions of

both Dr. Manugian and Dr. Dalal. Dr. Manugian conducted an independent medical examination of Employee on December 6, 2007. As the trial court noted, Dr. Manugian accounted for Employee's sensory deficits, noting a peripheral nerve disorder which placed Employee in Class 3 of Table 13-23 of the American Medical Association (AMA) Guidelines. The trial court also noted Dr. Manugian's opinion Employee had muscle atrophy in her left thigh and left calf. Dr. Manugian assigned an impairment rating of five percent (5%) to the body as a whole.

At Employee's request, Dr. Dalal conducted an independent medical examination on March 5, 2014. The trial court noted Dr. Dalal could not isolate a single peripheral nerve that had been injured. Because, according to her subjective complaints, Employee experienced pain in her entire lower extremity, Dr. Dalal rated Employee in Class 2 noting "she can walk without assistance with some difficulty." Dr. Dalal conceded his determination was based on the history provided to him rather than on personal observations. He assigned an impairment rating of eighteen percent (18%) to the body as a whole. The trial court found the rating assigned by Dr. Manugian more credible.

Employee acknowledges the trial court has discretion to accept or reject the opinion of one medical expert over another. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 335 (Tenn. 1990); *Johnson v. Midwestco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990); *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675 (Tenn. 1983). However, Employee disagrees with Dr. Manugian's diagnosis, citing the consistent diagnoses made by treating physician, Dr. Linderman, and Dr. Dalal. Employee complains Dr. Manugian only met with her for approximately ten minutes and did not conduct testing or a physical examination while Dr. Dalal spent over two hours interviewing, examining, and obtaining x-rays. Employee alleges Dr. Manugian admittedly did not classify her correctly. Ultimately, Employee asks us to find Dr. Dalal more credible because his findings were objective in nature.

Again, a trial court's findings based upon documentary evidence such as depositions are not entitled to the same deference as a trial court's factual findings based on live testimony. *Glisson v. Mohon Int'l, Inc./Campbell Ray*, 185 S.W.3d 348, 353 (Tenn. 2006). However, having conducted our own review of the depositions, we are not persuaded the trial court erred in adopting the five percent (5%) impairment rating assigned by Dr. Manugian.

III.

Finally, we modify the award in light of our ruling. Having considered the extent of Employee's vocational disability, including our recognition Employee has gone on to work as a real estate agent, we conclude Employee's vocational disability is thirty percent (30%) to the body as a whole—six times the impairment rating of five percent (5%) assigned by Dr. Manugian. *See* Tenn. Code Ann. § 50-6-241(b). The case is remanded to the trial court with instructions to modify the award as set forth in this opinion.

Conclusion

Based on the foregoing, we affirm the judgment of the trial court as to its adoption of the impairment rating assigned by Insured's expert, Dr. Manugian. However, we reverse the trial court's judgment concluding Employee's award was subject to the lower cap of Tenn. Code Ann. § 50-6-241(a)(1) because Employee was discharged for misconduct. Accordingly, remand the matter for modification of the award and for further proceedings consistent with this opinion. The costs on appeal are taxed equally to Employer and Employee, and their respective sureties, for which execution may issue if necessary.

_____

DON R. ASH, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

VICKI GANDEE v. ZURICH NORTH AMERICA INSURANCE COMPANY

Chancery Court for Shelby County
No. CH-11-0731

No. W2017-01523-SC-WCM-WC – Filed September 19, 2018

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Zurich North America Insurance Company pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well taken and is, therefore, denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed equally to the parties, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

ROGER A. PAGE, J., not participating