IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 23, 2013 Session

**ALVIN HAYES v. SHARP TRANSPORT CO. and CHEROKEE INSURANCE CO.**

**Appeal from the Chancery Court for Lawrence County**
**No. 11-15528 Stella Hargrove, Chancellor**

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**No. M2013-00932-WC-R3-WC - Mailed January 15, 2014**
**Filed February 20, 2014**

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In accordance with Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. Employee suffered compensable injuries to his lower back and right shoulder. Employer asserted that the permanent disability award for employee's injury should be capped at one and one half times his impairment rating because employee had voluntarily resigned. Following a bench trial the trial court found that the statutory cap of one and one half times did not apply to employee's permanent partial disability benefits because employee's retirement was reasonably related to his workplace injury and therefore he did not have a meaningful return to work. Based on an impairment rating of eleven percent the trial court awarded 35 percent permanent partial disability benefits. We find there was a meaningful return to work and accordingly we reverse the trial court judgment.

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

E. RILEY ANDERSON, SP. J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., J. and DON R. ASH, SR. J., joined.

Richard House, Franklin, Tennessee, for the appellee, Alvin Hayes.

Stephan K. Heard and Adam O. Knight, Nashville, Tennessee, for the appellants, Sharp Transport Co. and Cherokee Insurance Co.

## MEMORANDUM OPINION

Alvin Hayes, Employee, started working as a truck driver for Sharp Transport Co., Employer, in Etheridge, Tennessee in 2001. In addition to driving for Employer, his duties included climbing, bending, stooping, and lifting. His driving routes included long-distance trips split into five-hour segments where possible and other trips up to eleven hours at a time.

In November of 2004, Employee requested and received part-time work, which gave him scheduling flexibility. In making this choice his work benefits were eliminated, but he wanted to work less, spend more time at home and was financially able to do so.

On April 12, 2006, he drove his truck to the Nashville Ford Glass plant to pick up a load of glass. Before leaving Nashville he was sliding tandems to balance the truck load. As he jerked to replace a pin which was in a bind, he injured his lower back and right shoulder. He reported the injury to Employer, was offered a physician but declined. He missed no work and continued to work regularly.

In January of 2007, he asked Employer for a physician. Employer furnished a panel and employee chose Dr. Douglas Wilburn, an orthopedic surgeon, who after examination, began to treat employee conservatively for his back and shoulder injury with medication and exercise. Employee was given no work restrictions and missed no work, continuing to work regularly until his retirement.

Almost five years after his injury Employee chose to retire on January 17, 2011, after he had reached age 62, so that he could receive social security benefits. He stated at trial that he planned to work until age 65 but he worried that he could not drive safely because the pain from his injuries made it difficult to concentrate. He testified that driving a large tractor-trailer requires "100 percent awareness of your surrounding and constant surveillance." At no time during his employment did he advise Employer that he was having any pain or difficulty driving. At the time he announced his retirement he did not advise Employer of any reason.

Dr. Douglas Wilburn testified by deposition that he saw Employee on January 30, 2007, which was nine and one half months after he was injured. Employee complained of pain in his lower back and right shoulder. Dr. Wilburn diagnosed Employee with moderate lumbar spondylosis, which was a lumbar strain superimposed over an existing arthritic condition, and shoulder tendinitis which is an irritation combined with existing arthritis. He treated Employee conservatively with medications and prescribed exercise including walking. The medications provided were an anti-inflammatory, a muscle relaxer and steroids. No medication was prescribed for pain. From 2007 to 2011 four epidermal steroid injections were given for nerve irritation, two in 2007, one in 2009 and one in 2010. Over the almost

five years of his treatment Dr. Wilburn testified "his symptoms would come and go" and when he had flare-ups he would be treated and would improve. Over time his arthritic shoulder improved until he had a full range of motion and his primary complaint was his back. Dr. Wilburn stated from the beginning of his treatment until his retirement there was a mild progression of his pre-existing degenerative arthritis. Dr. Wilburn did observe that Employee was "clearly more symptomatic" when he was working. Dr. Wilburn confirmed that he never issued any work restrictions and that he did not advise Employee to retire. Dr. Wilburn assigned an impairment rating of 11 percent to the body as a whole.

Bonnie Tatum testified that she was Safety Director for Employer and that she worked nine years at the company while Employee was there. She testified she saw him before and after his runs. She stated that Employee was a very good driver who was "dependable" and "punctual." She said that he never complained to her or anyone else about any physical problems affecting his work and that he never missed work. At the time he retired he gave no reason for retiring and specifically he did not say he was retiring because of his injury.

At the time of trial Employee was age 64. He had finished the tenth grade in high school but received his GED. Prior to working for Employer he had been a farmer for several years. Before that he built mobile homes, worked on pipeline construction, maintained school buses and dump trucks and was a long-distance truck driver. He testified he was still having problems with his back. He agreed that he owned his home in Summertown, Tennessee with 64 acres mortgage free and that he shared the mowing of 2 acres with his wife. He conceded that he had taken several long-distance trips where he shared the driving with his wife. He agreed that he still owned and used a motorcycle, pontoon boat and 4 vehicles which included two Cadillacs and two trucks all debt free. He also agreed that his favorable financial position enabled him to choose part-time work in 2004. His wife, age 72 at trial, testified she retired from Maury Regional Hospital in 2008 and their joint retirement income was approximately $3,100 a month when he retired at age 62. She corroborated his complaints of pain.

In determining Employee's vocational disability, the trial court considered Employee's work history, education, medical condition, physical activity, age, and job opportunities. The trial court found that Employee's retirement was reasonably related to his workplace injury and that he did not have a meaningful return to work. Accordingly his benefits were not capped at 1.5 times the impairment rating. Dr. Wilburn's impairment rating was eleven percent and the trial court awarded permanent partial disability benefits of 35 percent disability to the body as a whole.

## Standard of Review

Our standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. See Tenn. Code Ann. § 50-6-225(e)(2) (2005); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). When issues of credibility of witnesses and the weight to be given their in-court testimony are before the reviewing court, considerable deference must be accorded to the factual findings of the trial court. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733 (Tenn. 2002); see Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004) . When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). This Court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). Questions of law are reviewed de novo with no presumption of correctness afforded to the trial court's conclusions. Gray v. Cullom Machine, Tool & Die, 152 S.W.3d 439, 443 (Tenn. 2004).

In assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and her capacity to work at the kinds of employment available in her disabled condition. Tenn. Code Ann. § 50-6-241 (2008); Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990). The claimant's own assessment of his or her physical condition and resulting disabilities cannot be disregarded. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975); Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn. 1972). The trial court is not bound to accept physicians' opinions regarding the extent of the plaintiff's disability, but should consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d at 677.

## Analysis

Employer argues that the trial court erred in finding that Employee did not have a meaningful return to work. Employer asserts that Employee voluntarily resigned from his employment almost five years after his injury and his resignation was not reasonably related to his workplace injury. Accordingly, the trial court should have capped the award at 1.5 times the impairment rating. Employee argues that the trial court correctly found that his resignation was reasonably related to his workplace injury and that he did not have a meaningful return to work.

The concept of "meaningful return to work" developed in response to the multiplier caps because the workers' compensation statutes failed to address "the common circumstance in which an employee who becomes permanently, partially disabled as a 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). Employers ask courts to apply the lesser multiplier if employees had returned to work for *any* period of time, while employees who had returned to work but were unable to continue working argued for application of the greater multiplier. Id. Courts resolved this issue by focusing on whether an injured employee had a meaningful return to work. Id. If so, courts applied the lesser multiplier, if not, the greater multiplier applied. Id.

As the Supreme Court has explained, "When determining whether a particular employee had a meaningful return to work, the courts must assess the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to either return to or remain at work." Tryon v. Saturn Corp., 254 S.W.3d at 328; see also Williamson v. Baptist Hosp. of Cocke Cnty., Inc., 361 S.W.3d 483, 488 (Tenn. 2012); Howell v. Nissan North America, Inc., 346 S.W.3d 467, 472 (Tenn. 2011). "The determination of the reasonableness of the actions of the employer and the employee depends on the facts of each case." As the court noted in Tryon, the circumstances to which the concept of 'meaningful return to work' must be applied are remarkably varied and complex". Tryon, 254 S.W.3d at 328.

An employee "has not had a meaningful return to work if he or she returns to work but later resigns or retires for reasons that are reasonably related to his or her workplace injury." Id. at 328-29. In such cases, the trial court may award benefits of up to six times the impairment rating. Tenn. Code Ann. § 50-6-241(b). "If, however, the employee later retires or resigns for personal reasons or other reasons that are not reasonably related to his or her workplace injury, the employee has had a meaningful return to work." Tryon, 254 S.W.3d at 329. In such cases, for injuries occurring after July 1, 2004, the award is limited to 1.5 times the impairment rating. Tenn. Code Ann. § 50-6-241(a)(1). See Tryon, 254 S.W.3d at 329; Williamson, 361 S.W.3d at 488-89.

In applying these principles, the trial court found that Employee was credible and became increasingly concerned about his pain and his ability to safely drive a freightliner. Employee was planning on driving until age 65; however, he decided that with the continued pain in his back, the safest route was to go ahead and retire at age 62. The Court found that Employee's decision to retire was reasonably related to his work injury and he had not had a meaningful return to work.

On appeal, Employer argues that Employee voluntarily decided to retire and chose his date of retirement after he reached age 62 so that he could receive social security benefits.

He never missed work because of injury, had no work restrictions from his physician and never advised his employer that he had a problem doing the work during the almost five years from the time of his injury to his retirement. When he announced his retirement he gave his employer no reason and he specifically did not tell the employer that it was because of his workplace injury.

As we have previously stated, determining whether an employee had a meaningful return to work requires an assessment of the reasonableness of the employer in returning the employee to work and the reasonableness of the employee in returning to work. In this case Employer generously accommodated Employee when he wanted to work part-time in 2004 to have more time at home. In 2006 when Employee was injured, Employer offered him a physician but he declined and missed no work. Nine and one-half months later he asked Employer for a physician and was provided one, but the physician issued no work restriction and Employee missed no work for almost five years until his retirement. Employer was never advised that Employee was having problems doing the work. Both Employer and Employee were reasonable in their actions of providing work and returning to work. However, since Employee has resigned we are required to go further and determine whether his resignation was reasonably related to his workplace injury.

In the case of Tryon v. Saturn Corp., supra, the Tennessee Supreme Court summarized the cases occurring prior to 2008which involved the concept of a meaningful return to work as follows:

> The first case employing the concept of "meaningful return to work" involved an employee who resigned after returning to work for less than one month. When asked to explain the reasons for his resignation, the employee stated that he resigned because his physician had advised him to resign and because of the intense pain he was experiencing. On these facts the Appeals Panel concluded that the employee had not had a meaningful return to work.

Bailey v. Krueger Ringier, Inc.,1995 WL 572056, at *3-4. Since 1995, this Court and the Appeals Panel have found that an employee who later resigned or retired did not have a meaningful return to work when (1) the employee's workplace injury rendered the employee unable to perform his or her job, (2) the employer refused to accommodate the employee's work restrictions arising from the workplace injury, and (3) the employee's workplace injury caused too much pain to permit the employee to continue working. Tryon v. Saturn Corp., 254 S.W.3d at 329 (footnotes omitted).

In several circumstances, the Appeals Panel has determined that an employee's resignation or retirement was not reasonably related to the workplace injury even though the employee was still experiencing pain or limitations traceable to the workplace injury or had been advised to retire. For example, an Appeals Panel found that an employee's retirement was not reasonably related to his workplace injury even though a physician had advised him, as a "friend," to retire because the physician's recommendations were not for medical reasons and because the employee stated that he retired to take advantage of an early retirement benefit package and to pursue farming. Ralston v. Aerostructures Corp., 2007 WL 439024, at *4 (Tenn. Feb. 12, 2007).

Then, after 2008, in Howell v. Nissan North America, Inc., 346 S.W.3d 467 (Tenn. 2011), the Supreme Court decided the employee did not have a meaningful return to work when after her return to work from injury, the employer assigned her to a new, more difficult production line job that based on her personal physical restrictions, knowledge and experience she knew she could not perform, so she resigned. Howell v. Nissan North America, Inc., 346 S.W.3d at 472-73.

In 2012 in Williamson v. Baptist Hosp. of Cocke Cnty., Inc., 361 S.W.3d 483, (Tenn. 2012), the Supreme Court held that a certified nursing assistant had a meaningful return to work when because of work restrictions after injury, he was transferred to a position as a phlebotomist. He resigned after 2 weeks based upon what the court decided was an unreasonable and unsubstantiated fear that he could not perform the job. Williamson v. Baptist Hosp. of Cocke Cnty., Inc., 361 S.W.3d at 489-90.

In most cases decided previously by the Appeals Panels and the Supreme Court when the employee has returned to work after an injury and then later resigned because of pain from the injury the time frame between return and resignation has been relatively short. Tryon, supra, involved the longest period of time (i.e. 16 months) but the employee's decision to retire was based on his physician's strong medical advice and increasingly intense cervical pain. Accordingly he did not have a meaningful return to work.

In the instant case the employee reduced his work to part-time in 2004, so he could spend more time at home. He worked for the employer for almost five years after his injury in 2006 with no complaint. He made the voluntary choice of a date to retire after age 62 in 2011, so he could draw social security. His wife, age 70 in 2011, had already retired in 2008. He announced his retirement to his employer without any statement that it was associated with his workplace injury. His doctor stated that during his almost five years of treatment he would have flare-ups and undergo treatments and get better. He stated that employee had had a mild progression of his pre-existing arthritic condition of his back. His doctor never restricted him from working throughout his entire period of treatment and did not advise him to retire.

We conclude that his choice to retire was voluntary and not reasonably related to his workplace injury and accordingly he had a meaningful return to work. For the foregoing reasons, the trial court's judgment is reversed and the cause is remanded to the trial court to apply the statutory cap. Costs are assessed to Employee, Alvin Hayes, for which execution shall issue if necessary.

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E. RILEY ANDERSON, SP.J.

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**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 the Employee, Alvin Hayes, for which execution may issue if necessary.

PER CURIAM