IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 16, 2012 Session

TOMMY W. HOUSE v. NISSAN NORTH AMERICA ET AL

Appeal from the Chancery Court for DeKalb County
No. 2009-056 Ron Thurman, Chancellor

No. M2011-01481-WC-R3-WC - Filed July 26, 2012

The employee alleged that he suffered a compensable injury to his right shoulder in July 2008. His employer contended that the employee's complaints were a continuation of a February 2006 injury to the same shoulder which was the subject of an earlier settlement. In the alternative, the employer contended that any award of benefits should be limited to one-and-one-half times the anatomical impairment in accordance with Tennessee Code Annotated section 50-6-241(d)(1)(A), because the employee resigned in April 2010 pursuant to a voluntary buyout program. The trial court found that the employee had sustained a new injury in July 2008 and that his resignation was reasonably related to the work injury, and therefore, the lower cap did not apply. A judgment awarding benefits was entered, and the employer has appealed. We affirm the trial court's judgment.[1]

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

WALTER C. KURTZ, SR. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, C.J., and E. RILEY ANDERSON, SP. J., joined.

Frederick R. Baker, Cookeville, Tennessee, for the appellants, Nissan North America, Inc., and Ace American Insurance Company.

R. Steven Waldron, Murfreesboro, Tennessee, and Bratten Hale Cook, II, Smithville, Tennessee, for the appellee, Tommy W. House.

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[1] Pursuant to 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.

MEMORANDUM OPINION

Factual and Procedural Background

Tommy House ("Employee") was employed as a production worker by Nissan North America ("Employer") from November 1994 until April 2010. Prior to the July 2008 shoulder injury at issue in this appeal, Employee sustained several compensable injuries including an anterior cruciate ligament tear of his right knee, carpal tunnel syndrome, bilateral elbow injuries, and injuries to both shoulders.[2]

Employee injured his right shoulder in February 2006. In May 2007, Dr. James Rungee performed surgery to repair that injury. Dr. Rungee testified that Employee reached maximum medical improvement from that injury in November 2007.

Employee returned to work in February 2008 after recovering from carpal tunnel syndrome and injuries to his left shoulder and elbows; at the time of his return, his job duties included working on brake lines on the underside of vehicles. About two weeks after returning to work, he felt a popping sensation in his right shoulder. He was placed on a lighter job and received physical therapy from Employer's therapists. While receiving physical therapy on his arm, he experienced acute shoulder pain. Employee resumed overhead work in the summer of 2008 and performed overhead work for about a week before again experiencing a popping sensation in his right shoulder. Employee reported the popping sensation to Employer, who arranged for him to return to Dr. Rungee.

On August 7, 2008, Employee again returned to Dr. Rungee for treatment, who then opined that Employee's complaints were a continuation of his 2006 shoulder injury and that Employee "had just gotten some recurrent stiffness in his shoulder and his mechanics were a little out of whack." Physical therapy was prescribed. At this August 7, 2008 appointment, Employee told Dr. Rungee that "he was expecting to leave [Employer] in April of 2009 and take an early buyout option." Dr. Rungee testified that he thought this was a reasonable course of action for Employee because, in light of his numerous workplace injuries, "it would be better to move on to something that wasn't quite [as] physically challenging as what he was doing."

Employee was referred to Dr. Blake Garside for a second opinion. Dr. Garside performed a second surgical procedure on Employee's right shoulder on December 15, 2008. At that time, Dr. Garside found a "suture anchor" from the earlier surgery which had pulled loose, another labral tear, and bursitis. Dr. Garside ultimately released Employee from his

[2] Employee's alleged July 2008 injury is the only injury at issue in this case. The other injuries were the subject of separate actions or settlements.

care in April 2009 and placed no permanent restrictions on Employee's activities. When asked whether Employee's condition was a distinct, new injury or a continuation of the previous injury, Dr. Garside stated that "with the ability of hindsight, having performed the arthroscopy and seeing the failure of the mechanical device [suture anchor], I agree that it would be a continuation of [the previous] injury."

Dr. David Gaw evaluated Employee at the request of Employee's attorney. Like Dr. Garside, he was asked whether Employee had sustained a new injury in the summer of 2008, or if his problems after that time were merely a continuation of the injury previously treated by Dr. Rungee. Dr. Gaw testified that he "would consider that a new injury . . . based on the fact that he did have a re-tear at the same level that was previously fixed."

Employee returned to work for Employer from April 2009 until April 2010. During that period he worked in production quality assurance, a lighter job than the production line position he had previously held. On April 1, 2010, he left Employer in accordance with the buyout agreement and received an agreed-upon lump sum payment of approximately $83,000. On April 22, 2010, he went to work for Shiroki as a forklift operator earning about forty percent of the amount that he had earned at Nissan. Employee performed his job at Shiroki without special accommodations and worked for Shiroki until May 2011, when he accepted a position at Lochinvar Industries as a forklift operator.

At trial, Employee testified that he continues to have pain in his right shoulder and takes Lortab, prescribed by his primary care physician, "at least once or twice a day." According to Employee, his right arm is weaker than before his injury and turning the steering wheel of a forklift is painful, although he continues to operate a tractor on his farm.

In a June 14, 2011 order memorializing his bench ruling, the trial court found that Employee sustained a distinct, new injury to his right shoulder in July 2008, and that he had an additional two percent impairment as a result of the new injury. The trial court further found that Employee had not made a meaningful return to work, so Employee's benefits were not "capped" at one-and-one-half times the anatomical impairment rating pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A) (2008 & Supp. 2011). The trial court then found that Employee had sustained a disability of ten percent to the body as a whole as a result of the new injury. Judgment was entered accordingly.

Employer has appealed, contending that the trial court erred by finding that a new injury occurred; by finding that Employee did not have a meaningful return to work; and by awarding a ten percent permanent partial disability to Employee's body as a whole.

Standard of Review

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given to the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Madden v. Holland Grp. of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Did a "New" Injury Occur?

Employer contends that the trial court erred in finding that Employee sustained a new injury in 2008. Employer argues that Employee's complaints were not the result of a new injury, and that both Dr. Rungee and Dr. Garside opined that Employee's complaints were the result of a continuation of his previous shoulder injury.

An employee does not suffer an additional compensable injury where the employee merely experiences an increase in pain caused by work activity. However, an employee may suffer an additional compensable injury where a work injury advances a pre-existing condition, or the employee suffers a new, distinct injury other than increased pain. Tropser v. Armstrong Wood Prods., 273 S.W.3d 598, 607 (Tenn. 2008). Dr. Rungee testified that he repaired a tear of Employee's labrum during the 2007 procedure. Dr. Garside, according to his testimony and Dr. Gaw's description of the operative note, also repaired a tear of Employee's labrum in 2008. The inference to be drawn, as Dr. Gaw testified, is that a new tear occurred after the 2007 procedure performed by Dr. Rungee. A new labral tear constitutes an "anatomical change" of Employee's pre-existing shoulder condition and therefore is a new, distinct injury; the 2008 labral tear is therefore a compensable injury. See Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 62 (Tenn. 2001).

The appellant refers us to the oft-cited rule that experts who testify by deposition are to have the reviewing court draw its own inference as to the weight and credibility of that testimony. Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006).

That rule is somewhat more nuanced than is asserted by the appellant. Even where the experts all testify by deposition, the evaluation of the live trial testimony by the trial judge

is not to be disregarded. Regarding the independent evaluation of expert depositions, the Tennessee Supreme Court has explained:

> [Such evaluation] does not mean that the deposition testimony of experts should be read and evaluated in a vacuum. While causation and permanency of an injury must be proved by expert medical testimony, such testimony must be considered in conjunction with the lay testimony of the employee as to how the injury occurred and the employee's subsequent condition . . . . [C]onsiderable deference must be given to the trial court's evaluation of such oral testimony.

Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991) (citations omitted).

Considering the record as a whole, we are unable to conclude that the evidence preponderates against the trial court's finding that Employee sustained a new injury.

Meaningful Return to Work

Employer next argues that any award of benefits should be capped at one-and-one-half times the anatomical impairment because Employee had a meaningful return to work. The concept of "meaningful return to work" is used to determine if an employee's maximum partial permanent disability award is limited by the lower caps under Tennessee Code Annotated sections 50-6-241(a)(1) and (d)(1)(A), or if an employee can seek reconsideration of a settlement that was limited by those caps. Williamson v. Baptist Hosp. of Cocke Cnty., Inc., 361 S.W.3d 483, 488 (Tenn. 2012); Tryon v. Saturn Corp., 254 S.W.3d 321, 328-30, 333 n.25 (Tenn. 2008). Employer argues that Employee accepted the buyout package before receiving medical confirmation that he had sustained a new injury and before learning whether that new injury would have any permanent consequences regarding his ability to work. Employer argues that Employee's acceptance of its buyout package was therefore a voluntary resignation unrelated to his work injury, rendering him ineligible for benefits in excess of the lower cap. See Tenn. Code Ann. § 50-6-241(d)(1)(B)(iii) (2008).

In response, Employee emphasizes his problems at work and refers to his conversation with Dr. Rungee on August 8, 2008, wherein Dr. Rungee effectively encouraged him to accept the buyout package and seek a less strenuous form of employment because of his numerous work injuries. Employee compares his situation to that of the employee in Tryon v. Saturn Corporation, who had sustained several work-related compensable injuries. Tryon, 254 S.W.3d at 325-26. After a neck injury, Mr. Tryon's physician recommended that he consider retirement or disability retirement due to his injuries; Mr. Tryon took his physician's advice and retired sixteen months later, after earning his full thirty-year retirement. Id. at

325. His employer asserted that his award of benefits should be limited to the amount permitted by the statutory cap then in effect, because the sixteen month period between Mr. Tryon's injury and his retirement constituted a meaningful return to work. Id. at 326. His employer asserted that Mr. Tryon retired because he became eligible to receive his full retirement benefits, not because of the pain resulting from his injury. Id. at 332-33. On those facts, the Supreme Court held that the retirement was reasonably related to his work injury, and the lower cap did not apply. Id. at 333-34.

The Tryon Court first observed:

> The circumstances to which the concept "meaningful return to work" must be applied are remarkably varied and complex. 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. The determination of the reasonableness of the actions of the employer and the employee depends on the facts of each case.
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> . . . .
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> 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 which triggers the two and one-half multiplier allowed by Tenn. Code. Ann. § 50-6-241(a)(1).

Id. at 328-29 (citations omitted). The Court in Tryon then explained:

> 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.

Id. at 329 (footnotes omitted); see also Williamson, 361 S.W.3d at 487-90; Howell v. Nissan N. Am., Inc., 346 S.W.3d 467, 471-73 (Tenn. 2011).

Here the evidence established that Employee experienced physical problems and that his physician encouraged him to seek other, less strenuous employment due to his work

injuries.[3] Dr. Rungee's recommendation, although it was made subsequent to Employee's decision to retire, confirmed the relation between Employee's decision to accept the buyout package and Employee's physical problems. We are unable to conclude that the evidence preponderates against the trial court's findings that Employee did not have a meaningful return to work.

Excessive Award

Finally, Employer contends that the evidence preponderates against the trial court's decision to make a disability award five times the amount of the anatomical impairment. Employer notes that Employee has some education beyond high school, was able to return to work for Employer for over a year after his work injury, and has worked steadily since that time. In response, Employee points to his own testimony that operating a forklift causes pain in his right shoulder, that his work history is primarily unskilled, that he is forty-six years old, and that his hourly wage since leaving Employer is less than half of his previous wage.

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)). In determining the extent of permanent disability, a trial court "shall 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 claimant's disabled condition." Tenn. Code Ann. § 50-6-241(d)(2)(A) (2008). Based upon these factors, we are unable to conclude that the evidence preponderates against the trial court's finding on this issue.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Nissan North America, Inc. and Ace American Insurance Company, and their surety, for which execution may issue if necessary.

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WALTER C. KURTZ, SENIOR JUDGE

[3] Describing the ongoing physical problems caused by the Employee's injuries, the trial court compared Employee to "a pencil that's been put through a pencil sharpener. He's been sharpened down to a point several times."

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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 Nissan North America, Inc. and Ace American Insurance Company, and their surety, for which execution may issue if necessary.

PER CURIAM