IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
June 24, 2013 Session

LATARIUS HOUSTON v. MTD CONSUMER GROUP, INC.

Appeal from the Chancery Court for Haywood County
No. 13663 George R. Ellis, Judge

No. W2012-01975-WC-R3-WC - Mailed September 24, 2013; Filed October 25, 2013

The parties stipulated that the employee suffered work-related injuries to both arms and that she was entitled to permanent partial disability benefits based on a 40 percent disability to each arm. The trial court found that the employee's average weekly wage was $463.92 and that her compensation rate was $309.28 per week. The employer has appealed, arguing that the trial court erred in calculating the employee's average weekly wage. We reverse the judgment of the trial court and remand for computation of the average weekly wage and for entry of a revised judgment.

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

DON R. ASH, SR. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J., and TONY A. CHILDRESS, SP. J., joined.

Edward L. Martindale, Jr., Jackson, Tennessee, for the appellee, Latarius Houston.

Michael Carter, Milan, Tennessee, for the appellant, MTD Consumer Group, Inc.

OPINION

Beginning in November 2005, Latarius Houston worked as a laborer for MTD Consumer Group, Inc. ("MTD"), which manufactures lawn and garden equipment. In March 2008, Ms. Houston sustained work-related injuries to both of her arms and never returned to work.

After her injury, Ms. Houston timely filed a workers' compensation claim with the Department of Labor and Workforce Development, and the parties exhausted the benefit

review process on September 20, 2011. Ms. Houston filed the present lawsuit in the Haywood County Chancery Court on October 3, 2011, and the case proceeded to trial on June 12, 2012.

Before presenting testimony, the parties stipulated that Ms. Houston's bilateral carpal tunnel syndrome was work-related and that she had sustained a 40 percent permanent partial disability to each arm. The parties, however, were unable to reach an agreement on Ms. Houston's average weekly wage and compensation rate. These issues formed the sole basis for the trial.

Ms. Houston testified that when she was hired by MTD, no one discussed the possibility of annual layoffs. She conceded, however, that she learned of MTD's annual layoffs during her two years of employment with MTD and that the layoffs were based on seniority. Ms. Houston stated that she was "laid off" from work at MTD in May 2006 until December 2006 and was laid off again in April 2007 and did not return to work until December 2007.

Greg Usery, MTD's General Manager from 2002 to 2009, testified that MTD made lawn mowers and garden products. Mr. Usery stated that the annual layoffs occurred "[b]ecause we're a seasonal company [that] make[s] seasonal products." He added that "[MTD] didn't have demand for lawn and garden equipment in late summer and early fall and into the wintertime." Mr. Usery further testified as follows:

> [D]epending on the year as we ended up with our volume on a certain rider or certain piece of equipment, we would have a layoff. We'd probably average about three layoffs a year. Normally, the first layoff would hit in the April/May time frame. The second layoff would be in May or June. And then usually our final layoff would be in July. And the way we handled it, it was strictly by seniority.

Mr. Usery also stated that it was a "known fact" that MTD was a "seasonal operation" and that MTD's contract with the union mentioned that employees may lose seniority based on layoffs. Mr. Usery acknowledged, however, that he did not know if Ms. Houston was told about the annual layoffs when she was hired. Mr. Usery said that the layoffs, which usually impacted 60 to 70 percent of the employees, were "staggered depending on when the line went out" and based on "what the demand was for the product that we were making." Mr. Although the layoffs generally occurred at the same time each year, Mr. Usery testified that a layoff could be delayed if there was a demand for a product. Mr. Usery could not recall a year in which MTD did not have at least one layoff. Mr. Usery testified that Ms. Houston

had been laid off for 33 of her last 53 weeks of employment and therefore received no wages for those weeks.

After hearing the proof, the trial court determined that the time periods during which Ms. Houston was laid off should not be included in calculating her average weekly wage. Accordingly, the trial court found that Ms. Houston's average weekly wage was $463.92 and that her compensation rate was $309.28 per week. MTD appealed, and this 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.

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 trial court's factual findings. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733 (Tenn. 2002); Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004). Questions of law, however, 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).

Analysis

MTD's sole argument on appeal is that the trial court erred in calculating Ms. Houston's average weekly wage. Specifically, MTD argues that the trial court should have included the 33 weeks during which Ms. Houston was laid off in its calculation of her average weekly wage and that Ms. Houston's actual average weekly wage was $169.51. In contrast, Ms. Houston maintains that the trial court properly excluded these periods when determining that her average weekly wage was $463.92.

Tennessee Code Annotated section 50-6-102(3)(A) defines "average weekly wages" as "the earnings of the injured employee in the employment in which the injured employee was working at the time of the injury during the period of fifty-two (52) weeks immediately preceding the date of the injury divided by fifty-two (52)." The statute further provides, however, that "if the injured employee lost more than seven (7) days during the period when the injured employee did not work, although not in the same week, then the earnings for the

remainder of the fifty-two (52) weeks shall be divided by the number of weeks remaining after the time so lost has been deducted." Id.

Our Supreme Court has consistently held that an injured employee may deduct from his computation of the average weekly wage only those days missed as a result of a "sickness, disability, or other fortuitous circumstance." Russell v. Genesco, Inc., 651 S.W.2d 206, 210 (Tenn. 1983); see also Carter v. Victor Chem. Works, 101 S.W.3d 462, 463 (Tenn. 1937) (recognizing that only "fortuitous, that is, chance happenings and uncontemplated circumstances" entitle an injured employee to an offset of days missed); Cf. Cantrell v. Carrier Corp., 193 S.W.3d (concluding that an employee's eight-week leave of absence due to sickness must be excluded).

Here, Ms. Houston's missed days were clearly not due to sickness or disability. Instead, Ms. Houston's lost time was the result of MTD's annual layoffs. We must therefore determine whether MTD's layoffs constitute a "fortuitous circumstance" such that Ms. Houston is entitled to deduct these layoffs from the calculation of her average weekly wage. Whether a day should be deducted from the computation of an employee's average weekly wage is a fact specific inquiry. Cantrell, 193 S.W.3d at 472.

In Cantrell, the Court cited as examples of fortuitous circumstances "the closing of a plant for repairs, the occasional loss of working time due to bad weather, or a reduction of work due to market-driven reasons, such as an unforeseen shortage of material or a lack of orders." Cantrell, 193 S.W.3d at 472 (citing Hartley v. Liberty Mut. Ins. Co., 276 S.W.2d 1, 4 (Tenn. 1954)). On the other hand, lost time that is a "recognized incident of [the employee's] regular employment" should not be excluded from the computation of the employee's average weekly wage. Carter, 101 S.W.2d at 463. For example, an employee "whose work hours vary from week to week will not be given the benefit of the deduction of days not worked if the employer simply had less work for the employee." Cantrell, 193 S.W.3d at 472 (citing Carter v. Victor Chem. Works, 101 S.W.2d 462, 463 (Tenn. 1937)).

In Carter v. Victor Chem. Works, for example, the employee's widow filed an action to collect benefits under the Workmen's Compensation Act after the employee accidentally died from a work-related injury. Id. at 462.[1] The employee's work schedule varied significantly from week to week during his six years of continuous employment with the employer because "[s]ome weeks there was more work for him to do than others." Id.

[1] Although the Tennessee Workmen's Compensation Act in effect at the time of Carter varies substantially from the current Tennessee Workers' Compensation Act, the principles espoused in Carter survive the statute's evolution and continue to be cited. See, e.g., Cantrell v. Carrier Corp., 193 S.W.3d 467 (Tenn. 2006)(citing Carter with approval).

During the 52 weeks prior to his death, the employee had only worked a total of 37 weeks. Id. The trial court therefore calculated the employee's average weekly wage by taking his earnings from the year preceding his death and dividing by 52 weeks. Id.

On appeal, the employee's widow argued that the trial court should have calculated her husband's average weekly wage using only the days that her husband actually worked. Id. Our Supreme Court, however, affirmed the trial court's calculation of the average weekly wage, holding that "[t]he weekly variableness in [the employee's] earnings was not due to sickness[,] disability, or other fortuitous circumstances, but was a normal and recognized incident of his regular employment." Id. at 464. As the Court explained, "a stonemason, or bricklayer employed regularly by a building contractor, paid by the hour or day, cannot work in rain or snow" but provision for their missed working time is made through an increase in the wage rate paid to such workers. Id.

Applying these principles in the present case, we cannot agree with the trial court's conclusion that MTD's layoffs were "fortuitous." As mentioned above, "fortuitous circumstances" may include ". . . a reduction of work due to market-driven reasons, such as an unforeseen shortage of material or a lack of orders." Cantrell, 193 S.W.3d at 472 (emphasis added). Although Mr. Usery's testimony indicated that MTD's layoffs were the result of a market-driven force–i.e., a decreased demand for MTD's seasonal products–MTD's layoffs were hardly "unforesee[able]." Id. Instead, Mr. Usery testified that in his seven years as plant manager he could not recall a single year when the plant did not have at least one layoff. Additionally, Mr. Usery's testimony revealed that the employees' union contract expressly contemplated annual layoffs and that the annual layoffs could affect seniority.

Ms. Houston testified that she was not informed of MTD's layoff policy when she was hired in November of 2005. She admitted, however, that she learned of MTD's annual layoffs and experienced layoffs during her two years of employment. According to her testimony, Ms. Houston was "laid off" from May 2006 until December 2006 and again from April 2007 until December 2007. Thus, MTD's layoffs were clearly not "fortuitous," but were instead "recognized incident[s] of [Ms. Houston's] regular employment." Carter, 101 S.W.2d at 64. Therefore, we must conclude that the trial court erred in excluding from Ms. Houston's average weekly wage the 33 weeks that she did not work due to MTD's routine layoffs.

Conclusion

For the foregoing reasons, the trial court's judgment is reversed, and this case is remanded to the trial court for a determination of Ms. Houston's proper average weekly wage. Costs are assessed to Ms. Houston, for which execution shall issue if necessary.

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DON R. ASH, SENIOR JUDGE

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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 on appeal are taxed to the Appellee, Latarius Houston, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM