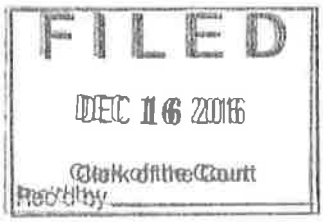
IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE

DYSON-KISSNER-MORAN CORPORATION v. GERRY SHAVERS

Circuit Court for Hamilton County
No. 12C665



No. E2015-02005-SC-R3-WC

JUDGMENT ORDER

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 are assessed to Gerry Shavers and his surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

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SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
August 15, 2016 Session

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Appeal from the Circuit Court for Hamilton County
No. 12C665 Jeffrey Hollingsworth, Judge

No. E2015-02005-SC-R3-WC-MAILED-NOVEMBER 16, 2016

Gerry Shavers ("Employee") worked for Dyson-Kissner-Moran Corporation d/b/a Burner Systems International, Inc. ("Employer"), as a senior manufacturing engineer. In 2008, he developed symptoms of carpal tunnel syndrome. His claim was accepted as compensable. He continued to work at the same job until August 2009, when he was terminated for violation of company policy. The primary issue at trial was whether his award of permanent disability benefits was subject to the one and one-half times impairment cap set out in Tennessee Code Annotated section 50-6-241(d)(1)(A) (2008). Finding that the cap applied because Employee was terminated for misconduct, the trial court awarded permanent partial disability benefits of 46.5% to the body as a whole. Judgment was entered in accordance with the trial court's findings, and Employee has appealed. 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 judgment.

Tenn. Code Ann. § 50-6-225(e)(1) (2014) (applicable to injuries occurring prior to July 1, 2014) Appeal as of Right; Judgment of the Circuit Court Affirmed

KRISTI M. DAVIS, J., delivered the opinion of the court, in which SHARON G. LEE, J., and THOMAS R. FRIERSON, II, J., joined.

Ronald J. Berke, Chattanooga, Tennessee, for the appellant, Gerry Shavers.

Benjamin T. Reese, Chattanooga, Tennessee, for the appellee, Dyson-Kissner-Moran Corporation d/b/a Burner Systems International, Inc.

OPINION

Factual and Procedural Background

Employee worked for Employer from 1989 until 2009 and was a senior manufacturing engineer. In October 2008, his supervisor noticed Employee having difficulty gripping tools and parts and reported this problem to the appropriate company official. Employee was initially referred to a Dr. Schultz and then to Dr. Woody Kennedy. Dr. Kennedy, a hand surgeon, began treating Employee beginning in June 2009. On October 9, 2009, Dr. Kennedy performed a right carpal tunnel release and right long and ring finger releases. He performed a second procedure on the same hand on May 12, 2010. He released Employee from his care on September 21, 2010. At that time, he referred Employee to Dr. Steven Dreskin, a pain management specialist.

Dr. Dreskin's treatment of Employee began in November 2010. He declared Employee to be at maximum medical improvement on January 31, 2012. He assigned 31% permanent impairment to the body as a whole.[1] He continued to treat Employee into 2015.

On July 8, 2009, Employer issued a "letter of intent" to Employee, setting out several "serious problems" with Employee's conduct. The letter was drafted by Employee's immediate supervisor, Chuck Keltner, at the request of Tony Hicks, Employer's operations manager. The letter described several issues of concern that required improvement, including the following behavior: being absent from Employer's plant during normal working hours without informing Mr. Keltner or Mr. Hicks; lack of tact during meetings with other employees or customers; use of coarse or vulgar language during meetings with customers; and getting angry if others disagreed with Employee. Mr. Keltner testified that he began having problems with Employee's conduct in the middle part of 2009. He stated that Employee was difficult to find while in the plant. On one occasion, Employee told Mr. Keltner that he would be working in a specific area of the plant. After making unsuccessful attempts to contact Employee, Mr. Keltner went to the area but was unable to find him.

Employee often had reason to visit Lookout Valley Tool & Machine ("Lookout Valley"), one of Employer's suppliers. On one or more occasions, Mr. Keltner called Lookout Valley but was unable to find Employee.

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[1] The trial court adopted Dr. Dreskin's impairment rating as the basis of its award of benefits. Neither party has raised an issue concerning medical care or impairment. For that reason, we do not address those matters in additional detail.

Mr. Keltner also testified that Employee used unacceptable language during meetings. He said Employee's language did not offend him, but he had received calls from customers complaining about it. He described Employee's conduct at meetings with customers and other employees as an "ongoing problem." He stated that the purpose of the letter of intent was to inform Employee of the need to correct the identified problems or face possible dismissal. Mr. Keltner presented the letter and discussed its contents with Employee. He did not recall if Employee signed the letter.

Mr. Keltner had prepared performance reviews of Employee for several years. He rated Employee's performance in the "excellent" range on each. He stated that he considered the evaluations to reflect Employee's ability to perform his work, rather than his conduct. He testified that Employee was good at his job.

After the letter of intent was issued to Employee, the Human Resources Manager, Brenda Lucas, received a telephone call from Kevin Eastman, Executive Vice President of Lookout Valley. Mr. Eastman requested to meet with Ms. Lucas. When the meeting took place on August 13, 2009, Mr. Eastman brought with him a pack of electrodes. Mr. Eastman told Ms. Lucas that his company had received the electrodes from Employee. He said that Employee had brought the electrodes from Employer's scrap bin and had offered to resell them to Lookout Valley for half-price. After hearing this information, Ms. Lucas brought Mr. Hicks into the meeting. At that time, they discussed several concerns about Employee's conduct. Mr. Eastman was asked a series of questions about his company's dealings with Employee. His responses were typed by Ms. Lucas, and Mr. Eastman initialed and signed the document. During his trial testimony, Mr. Eastman stated that the electrodes were brought to him by an employee of Lookout Valley. He acknowledged that he had no first-hand knowledge concerning the alleged offer to sell the electrodes back to his company but rather was reporting what he had been told by his own employee.

Employee did not dispute that he had taken the electrodes from the scrap bin to Lookout Valley. He stated it had been his practice for years to remove items from the scrap bin and take them to Lookout Valley and other companies with whom Employer did business. He said that he had done this with the permission of Sherman Peed, a prior Vice President of Employer. He denied reselling any of the items. Employee further testified that his supervisors over the years were aware of and approved items from the scrap bin being taken to Lookout Valley. He was not aware of any change in the policy while he was employed.

Mr. Hicks testified that removing items from the scrap bin had been permitted in the past but that the policy changed in 2002 when employees began to have disputes over the materials. He said the policy was never written, and the change of policy was

likewise unwritten. Linda Trivett, who had worked for Employer in various management positions until 2008, testified that removal of items from the scrap bin was a common practice. She was not aware of any formal policy either permitting or prohibiting the practice.

Employee testified at trial and admitted that he made statements disrespecting Employer to vendors. He further admitted that he had asked vendors to cover for him by stating that he was at or near their premises when he was actually golfing. He acknowledged that he did not take requisitions in a timely manner and that he had received verbal warnings, had been disciplined, and had been placed on probation in the past. Regarding the golf outings, he explained that those incidents occurred when he went golfing with "his bosses" and were done at their direction. He identified Mr. Keltner, Ian Rogers, and Mike Frost as the persons who instructed him to request that suppliers lie about his whereabouts.

Mr. Hicks testified that he began working for Employer in 2000 and was the operations manager when Employee was terminated. Mr. Hicks stated that Employee had long-standing disciplinary problems. He described Employee as "very vocal" in meetings, disruptive, and opinionated. Mr. Hicks further testified that around 2009, he attempted to keep Employee away from meetings with customers. Mr. Hicks stated that he had difficulty contacting Employee by telephone or text message and drove to Lookout Valley's premises on one occasion to attempt to find Employee but was unsuccessful. Mr. Hicks testified that he asked Mr. Keltner to draft a letter outlining concerns about Employee's conduct. After that, Mr. Eastman came to Ms. Lucas's office regarding the electrodes and other concerns about Employee's conduct. At that meeting, Mr. Hicks and Ms. Lucas prepared a written set of questions to Mr. Eastman, along with his answers. In that document, Mr. Eastman acknowledged that Employee "tends to just hang out" when he visits Lookout Valley and disrupts the workforce. In addition, he acknowledged that Employee had asked Lookout Valley's employees to tell Employer that Employee was at Lookout Valley when he was not.

Subsequent to the meeting with Mr. Eastman, Mr. Hicks and Ms. Lucas jointly decided to terminate Employee. Mr. Hicks testified that he had no knowledge of Employee's workers' compensation claim at that time. During cross-examination, Mr. Hicks stated that he had no conversations with Employee regarding the alleged change in policy concerning the scrap bin. He explained that his concerns about Employee's conduct increased as he had more contact with him during 2009. He agreed that Employee was very good at his job.

Ms. Lucas's description of the meeting with Mr. Eastman was consistent with Mr. Hicks's account. She testified regarding several rules of conduct set out in Employer's

handbook, including inappropriate removal of property, boisterous or disruptive activity, and insubordination or disrespect. Ms. Lucas testified that she had received emails from several other employees complaining about Employee's behavior. She stated that after the meeting with Mr. Eastman, she and Mr. Hicks discussed Employee's situation. They agreed that he was a valuable employee but concluded that he had a pattern of improving his behavior for a while after receiving a warning and then falling back into his previous ways. They determined that "enough was enough," and they prepared a separation notice for Employee. The notice stated that the termination was for "violation of company policy." Employee was presented with the notice on August 17, 2009.

The trial court delivered its decision from the bench, noting that the primary issue was whether Employee had been fired for misconduct, thereby limiting his award of permanent disability benefits to one and one-half times the medical impairment rating. With respect to Employee's purported attempt to resell scrapped electrodes to Lookout Valley, the trial court found that Employer had failed to sustain its burden of proof. However, the trial court determined that Employer had carried its burden by showing Employee's violation of company policies in other ways. The trial court relied on the testimony of Employee's supervisor regarding his inability to locate Employee and Employee's inappropriate language:

> [It] was difficult to find [Employee] when he needed him. He relates at least one instance in which he was looking for [Employee] where [Employee] told him he would be and he couldn't find him. He was not there. Mr. Keltner also testified that [Employee] was disruptive in meetings, loud, opinionated, prone to use somewhat vulgar language. Mr. Keltner testified that if it was just he and [Employee], he would let it slide, that even if the room was full of engineers, he thought the engineers could take it. However, according to Mr. Keltner, it was also done around customers and others from outside the company. There were complaints about [Employee's] behavior and his language from customers, reports that customers did not want to be part of meetings in which [Employee] was participating.

The trial court noted that Mr. Hicks gave similar testimony about Employee's behavior in meetings and that Mr. Hicks had also attempted, without success, to locate Employee by driving to Lookout Valley's premises. The trial court was also persuaded by Employee's admissions of wrong-doing:

> [Employee] himself admitted that at times he would say things that suppliers – at suppliers' businesses which were critical and disrespectful of [Employer]. He admitted that he asked vendors to lie for him when

> [Employer] called looking for him. He claimed that he did so at the request of his bosses so that they could all go out and play golf. There's no explanation of why the boss would need to lie about his absence from the company.

On the basis of the foregoing evidence, the trial court found that Employer had sustained its burden of proving that Employee was fired for misconduct. The trial court found that the firing was not related to Employee's workers' compensation claim. The trial court adopted Dr. Dreskin's impairment rating of 31% to the body as a whole, and, after considering the factors applicable to determining vocational disability, awarded 46.5% permanent partial disability. Thereafter, Employee made a motion for an award of discretionary costs. The trial court awarded those costs related to the disability issue but denied the motion as to costs incurred in relation to the meaningful return-to-work issue.

Employee has appealed from the trial court's judgment and the order disposing of the discretionary costs motion. In summary, he asserts that the evidence preponderates against the trial court's decision on the misconduct issue and also that the trial court erred by failing to award all the requested costs.

Analysis

The standard of review of issues of fact in a workers' compensation case 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) (2014). When the issues involve credibility and weight to be given testimony, considerable deference is given to the trial court when it had the opportunity to observe the witnesses' demeanor and to hear in-court testimony. *Madden v. Holland Group of Tenn.*, 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008). 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).

Pursuant to Tennessee Code Annotated section 50-6-241(d)(1), an injured employee's award of permanent partial disability benefits is limited to one and one-half times the medical impairment resulting from the injury if he has returned to work for his employer at a wage at least equal to his pre-injury wage. *See Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327–28 & n.8 (Tenn. 2008). If the employee is no longer employed, or is employed at a lower wage, he may receive an award of up to six times the medical

impairment. Tenn. Code Ann. § 50-6-241(d)(2). When an employee is terminated prior to resolution of the employee's workers' compensation claim, and the termination is due to misconduct, the employee is capped at one and one-half times the impairment rating. *See generally, Carter v. First Source Furniture Grp.*, 92 S.W.3d 367 (Tenn. 2002). The determination of whether an employee has committed misconduct "requires the court to address whether the employer has satisfactorily demonstrated that the employee's misconduct was its actual motivation in terminating the employee." *Wheeler v. Hennessy Indus.*, No. M2007-00921-WC-R3-WC, 2008 WL 3342878, at *8 (Tenn. Workers' Comp. Panel Aug. 11, 2008). The guiding principle to be applied in determining whether an employee has made a meaningful return to work is "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*, 254 S.W.3d at 328. "The determination of the reasonableness of the actions of the employer and the employee depends on the facts of each case." *Id.* Furthermore, an employer "should be permitted to enforce workplace rules without being penalized in a workers' compensation case." *Carter*, 92 S.W.3d at 371.

Employee contends that the trial court's decision regarding misconduct was erroneous. First, Employee notes that Ms. Lucas and Mr. Hicks did not provide any explanation for his termination when they presented him with his separation notice. In addition, he argues that his performance evaluations from Mr. Keltner, all in the "excellent" range overall, discredit Employer's explanation of the reasons for the termination. Employee further argues that the decision to terminate him was based upon unreliable hearsay, particularly with respect to several of the complaints contained in Mr. Eastman's signed statement, and that there were no documented instances of violation of company rules in the period between the July 8, 2009 letter of intent and Employee's termination on August 17, 2009.

Having carefully reviewed the record, we conclude that the evidence does not preponderate against the trial court's determination that Employee was terminated for misconduct. The testimony at trial established an on-going problem with Employee in several areas. Specifically, Employee often could not be located and was not where he said he would be. Furthermore, Employee acknowledged that he disparaged Employer in front of suppliers and even admitted that he had asked suppliers to lie about his whereabouts to Employer so that he could play golf. Finally, Employer had significant concerns regarding Employee's language, particularly in front of customers, and customers had lodged complaints. The July 8, 2009 letter of intent provided Employee with a lengthy list of issues concerning his conduct. Mr. Keltner testified that he informed Employee that he would be dismissed if his conduct did not improve. Mr. Keltner also provided first-hand descriptions of Employee's behavior at meetings with co-workers and customers. Employee correctly contends that he received positive

performance evaluations, but his supervisor explained that he was evaluating Employee's job performance, not his attitude, attendance, or conduct. With respect to Employee's complaint that his termination was based on hearsay, Employee overlooks the testimony from Mr. Eastman that he had personal knowledge of areas of deficiency on the part of Employee, specifically, that he had personally asked Employee to leave Lookout Valley's facility; that Employee came to Lookout Valley to request an estimate on a tool for which he did not have specifications; that Employee often presented incomplete and untimely information; and that Employee loitered around Lookout Valley and was disruptive to the workplace. It is not disputed that Mr. Eastman's complaints, whether based on personal knowledge or not, came to the attention of Ms. Lucas and Mr. Hicks *after* the July 8, 2009 letter of intent had been issued.

The basis for Employee's dismissal was the primary factual issue before the trial court. Both sides presented testimonial and documentary evidence on the subject. The trial court was in the best position to make credibility determinations, and "appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary." *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999). The findings of the trial court reflect that it carefully weighed the credibility of each witness's testimony, accrediting some statements and discrediting others. We find no reason to disturb those findings. Thus, we affirm the decision that Employee had a meaningful return to work and was therefore limited to a maximum award of one and one-half times the medical impairment rating.

Employee also asserts that the trial court erred by denying recovery of discretionary costs generated in connection with the meaningful return-to-work claim. In its order, the trial court awarded Employee discretionary costs with respect to the evidence generated regarding Employee's impairment rating but denied the request for discretionary costs on the issue of meaningful return to work because "[Employer] was the prevailing party on the issue" for which those costs were incurred. Tennessee Rule of Civil Procedure 54.04(1) provides for the award of certain discretionary costs "to the prevailing party unless the court otherwise directs." The Tennessee Supreme Court has held that "a prevailing party is one who has succeeded on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Fannon v. City of LaFollette*, 329 S.W.3d 418, 431 (Tenn. 2010) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)) (internal quotation marks omitted).

In this case, the primary issue before the trial court was whether Employee had a meaningful return to work despite his termination. At the start of trial, counsel for Employer acknowledged that there was no dispute regarding the compensability of the injury and stated, without objection from Employee's counsel, that the main issue was "whether or not he's entitled to anything above the statutory cap of one and a half times."

The trial court correctly concluded that Employer was the prevailing party on that issue and that Employee was not entitled to recovery of costs arising from that issue. Accordingly, the trial court's decision on discretionary costs is affirmed.

Conclusion

The judgment is affirmed. Costs are taxed to Gerry Shavers and his surety, for which execution may issue if necessary.

KRISTI M. DAVIS, JUDGE