IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 26, 2012 Session

MARVIN WINDOWS OF TENNESSEE, INC. v. JAMES GARDNER

Appeal from the Circuit Court for Lauderdale County
No. R. D. 6428 Joseph H. Walker, III, Judge

No. W2011-01479-WC-R3-WC - Mailed May 8, 2012; Filed June 8, 2012

The employee was injured in 2007 and returned to work for his pre-injury employer. The employee's claim was settled in November 2007 and was subject to the one and one-half times impairment cap set out in Tennessee Code Annotated section 50-6-241(d)(1)(A). In July 2009, the employee was diagnosed with cancer, and he took a medical leave of absence. The employee remained on leave for over one year. The employer's policy permitted one year of medical leave. When the employee was unable to return to work in July 2010, he was terminated pursuant to that policy. The employee then sought reconsideration of the November 2007 settlement. The trial court found that the employee was not eligible for reconsideration. The employee has appealed, contending that the trial court's ruling was erroneous. We affirm the judgment of the trial court.

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

TONY A. CHILDRESS, SP. J., delivered the opinion of the Court, in which JANICE HOLDER, J., and DONALD P. HARRIS, SR. J., joined.

Spencer R. Barnes, Jackson, Tennessee, for the appellant, James R. Gardner.

Amber E. Luttrell and Hailey H. David, Jackson, Tennessee, for the appellee, Marvin Windows of Tennessee, Inc.

MEMORANDUM OPINION

Factual and Procedural Background

James Gardner was employed by Marvin Windows of Tennessee, Inc. ("Marvin Windows") as a truck driver. Mr. Gardner was injured on February 1, 2007, when some cargo fell on him. Mr. Gardner sustained a compressed fracture of his spine and a dislocation of his left ankle. Mr. Gardner was treated by Dr. Mark Harriman, an orthopaedic surgeon. Dr. Harriman treated the back injury with a brace, and he performed surgery to repair Mr. Gardner's ankle.

Mr. Gardner returned to his position as a driver for Marvin Windows in May 2007. Dr. Harriman released Mr. Gardner with no permanent restrictions in November 2007. Dr. Harriman assigned a permanent impairment of 26% to the body as a whole for both injuries. Mr. Gardner's workers' compensation claim was settled for 32.99% permanent partial disability to the body as a whole.

Mr. Gardner continued to perform his job duties for Marvin Windows until he had a recurrence of cancer. Mr. Gardner began receiving chemotherapy treatment, and Mr. Gardner's oncologist took him off work beginning July 2009 because of this treatment. Thereafter, Mr. Gardner was placed on various forms of medical leave. Marvin Windows' internal policies permitted an employee to be on medical leave for one year. In July 2010, Marvin Windows contacted Mr. Gardner to determine if he was able to return to work. Representatives of Marvin Windows met with Mr. Gardner on July 27, 2010. Mr. Gardner informed the representatives that his condition prevented him from returning to work. As a result, Mr. Gardner's employment was terminated as of July 27, 2010. Mr. Garner filed a complaint for workers' compensation benefits on September 22, 2010. 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. Tenn. Sup. Ct. R. 51.

On the date of trial, Mr. Gardner was sixty-two years of age. He had a high school education and had attended community college for six months. In addition to truck driving, Mr. Gardner had worked as a welder and had performed work in factory settings. Mr. Gardner testified that due to his work injury, pain in his left foot and ankle left him unable to sleep through the night. Mr. Gardner testified that he walked with a limp and was unable to stand for long periods of time. Mr. Gardner stated that lifting "what a normal person would lift" caused him to have back pain later in the day. Mr. Gardner confirmed, however, that Dr. Harriman had removed all restrictions on his activities and that he was currently under no restrictions due to his work injury. Mr. Gardner testified that he was physically able to perform his job until the recurrence of cancer in July 2009.

Dr. Harriman testified that he had examined Mr. Gardner on several occasions after releasing him in November 2007, and he had most recently examined Mr. Gardner in April 2011. At that time, Mr. Gardner complained of pain in his upper back. Dr. Harriman testified that those symptoms were unrelated to the work injury. Dr. Harriman also testified that Mr. Gardner was still capable of working without restrictions from an orthopaedic standpoint.

Kent Carter, Marvin Windows' director of human resources, testified that Marvin Windows has a written policy permitting up to twelve months of medical leave. Mr. Carter testified that the reason for placing a time limit on employee leave was to ensure predictability in the workplace and prevent hardships in filling employment positions. Mr. Carter identified letters sent from Marvin Windows to Mr. Gardner during his leave in 2009 through 2010 that described its policy. Mr. Carter testified that he and another representative of Marvin Windows met with Mr. Gardner in July 2010 to discuss the exhaustion of his leave. During this meeting, Mr. Gardner gave no indication that he was able to return to work at that time. Mr. Carter testified that the reason for Mr. Gardner's termination was "expiration of leave of absence." During cross-examination, Mr. Carter stated that the same leave policy had been in effect for many years. Mr. Carter also stated that there had been no wrongdoing by Mr. Gardner that led to his termination.

The trial court found that Mr. Gardner was not entitled to reconsideration of the earlier settlement. The court found that the reason for Mr. Gardner's termination was his need for medical leave that exceeded one year, which violated Marvin Windows policy. The trial court found that Mr. Gardner's medical leave was unrelated to his employment at Marvin Windows, and the policy violation was Marvin Windows' true motivation for terminating Mr. Gardner's employment. The trial court also found Marvin Windows' policy to be reasonable, and the termination of Mr. Gardner's employment to be within the policy. In the alternative, the court found that if Mr. Gardner was eligible for reconsideration, he was not entitled to an increased award of permanent disability benefits. Judgment was entered in accordance with those findings, and Mr. Gardner has appealed from the judgment.

Analysis

The material facts in this case are not disputed. Therefore, the issues presented in this appeal are questions of law. Lawrence County Educ. Ass'n v. Lawrence County Bd. of Educ., 244 S.W.3d 302, 309 (Tenn. 2007). Mr. Gardner's employment was terminated because he exceeded the length of medical leave permitted by Marvin Windows' policy. Mr. Gardner contends that this termination was a loss of employment that triggered a right to reconsideration of the prior settlement pursuant to Tennessee Code Annotated section

50-6-241(d)(1)(B).[1] Marvin Windows' contends that the termination was unrelated to Mr. Gardner's workplace injury and, consequently, there is no right to reconsideration. Questions of law are reviewed de novo upon the record with no presumption of correctness. Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 642 (Tenn. 2008).

In order to determine if an employee is eligible for reconsideration of his or her past award for permanent partial disability benefits, courts must examine whether an employee has had a meaningful return to work following a work-related injury. Howell v. Nissian North America, Inc. et al., 346 S.W.3d 467, 472 (Tenn. 2011) (citing Tryon v. Saturn Corp., 254 S.W.3d 321, 328 & n.9 (Tenn. 2008)). Employees who have had a meaningful return to work will have their benefits limited by the one and one-half times multiplier in Tennessee Code Annotated section 50-6-241(d)(1)(A). Id. Employees who have not had a meaningful return to work will have their benefits "capped using the larger multiplier of six in section 50-6-241(d)(2)(A)." Id. Whether or not an employee has had a meaningful return to work is determined by examining the reasonableness of the employer's offer to return the employee to work and the reasonableness of the employee's failure to accept the employer's offer and return to work. Tryon v. Saturn Corp., 254 S.W.3d 321, 328 (Tenn. 2008). This determination is a fact-intensive analysis.

Mr. Gardner concedes that he initially had a meaningful return to work. He had been working at Marvin Windows for two years following his spine and ankle injuries before he had a recurrence of cancer. He was under no work restrictions and was physically able to perform his work duties. Therefore, the sole issue is whether Mr. Gardner's subsequent

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[1] Tennessee Code Annotated section 50-6-241(d)(1)(B) provides, in pertinent part:

> (i) If an injured employee receives benefits for body as a whole injuries pursuant to subdivision (d)(1)(A) and the employee is subsequently no longer employed by the pre-injury employer at the wage specified in subdivision (d)(1)(A) within four hundred (400) weeks of the day the employee returned to work for the pre-injury employer, the employee may seek reconsideration of the permanent partial disability benefits.
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> * * * *
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> (iii) Notwithstanding the provisions of this subdivision (d)(1)(B), under no circumstances shall an employee be entitled to reconsideration when the loss of employment is due to either:
> (a) The employee's voluntary resignation or retirement; provided, however, that the resignation or retirement does not result from the work-related disability that is the subject of such reconsideration; or
> (b) The employee's misconduct connected with the employee's employment.

violation of Marvin Windows' workplace rule will bar Mr. Gardner from reconsideration of his past award.

This case turns on the interpretation of "misconduct" in Tennessee Code Annotated section 50-6-241(d)(1)(B)(iii)(b). This provision states that an employee is not eligible for reconsideration of a workers' compensation award if the employee's loss of employment is due to misconduct. The employee behavior need not rise to the level of gross or willful misconduct to satisfy this misconduct standard. Pigg v. Liberty Mutual Ins. Co., No. M2007-01940-WC-R3-WC, 2009 WL 585962, at *5 (Tenn. Workers' Comp. Panel Mar. 09, 2009). Misconduct refers to an employee's inability to perform his or her job due to reasons unrelated to a workplace injury. Id. (holding that an employee's failure to satisfy a production quota in compliance with workplace rules amounted to misconduct). The standards for behavior and productivity are governed by reasonable policies established by the employer. Id.

The court must also consider the employer's need to enforce workplace rules and the reasonableness of the contested rules. Employers should be able to enforce reasonable workplace rules and policies without being penalized in workers' compensation cases. Carter v. First Source Furniture Grp., 92 S.W.3d 367, 371 (Tenn. 2002). Therefore, an employer will not be penalized for enforcement of a policy if the court determines "(1) that the actions allegedly precipitating the employee's 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. E2008-00708-WC-R3-WC, 2009 WL 29896, at *3 (Tenn. Workers' Comp. Panel Jan. 5, 2009).

Mr. Gardner's leave, through no fault of his own, exceeded the limit established by Marvin Windows' policy. While this was not willful misconduct, Mr. Gardner's leave did prevent him from performing his job at Marvin Windows. Mr. Gardner's recurrence of cancer was also unrelated to his previous workplace injury. These events, however, are sufficient to satisfy the definition of "misconduct" under the established policy and section 50-6-241(d)(1)(B)(iii)(b).

In addition, Marvin Windows' leave policy was reasonable in substance and application. The policy provided a one year time period for Mr. Gardner to be treated and recover from his illness. This is a substantial period of time to hold open Mr. Gardner's position. Marvin Windows also took steps to ensure that Mr. Gardner was aware of the policy and met with him after one year to determine the likelihood of his return to work. It is undisputed that Marvin Windows terminated Mr. Gardner's employment because he exceeded the limit of the leave policy and the policy was not applied to Mr. Gardner in a

discriminatory manner. The trial court found, and we agree, that Marvin Windows' leave policy was reasonable. We conclude that the trial court correctly found that Mr. Gardner's loss of employment did not give rise to a right of reconsideration under Tennessee Code Annotated section 50-6-241(d)(1)(B). In light of that conclusion, it is not necessary for us to address Mr. Gardner's arguments concerning the trial court's alternative ruling.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to James Gardner and his surety, for which execution may issue, if necessary.

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TONY A. CHILDRESS, SPECIAL JUDGE

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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 on appeal are taxed to the Appellant, James Gardner and his surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM