IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 17, 2014 Session

MARVIN WINDOWS OF TENNESSEE v. BOBBY L. WILLIAMS

Appeal from the Circuit Court for Lauderdale County
No. 6478 Joseph H. Walker III, Judge

No. W2013-02193-SC-R3-WC - Mailed April 30, 2014; Filed June 5, 2014

An employee suffered a work-related injury to his back. The employer acknowledged that the injury was compensable but disputed the extent of permanent partial impairment and the reasonableness of the employee's decision to take early retirement. The trial court awarded the employee 28% permanent partial disability to the body as a whole, and the employer appealed, contending that the trial court erred in failing to cap the award at one-and-one-half times the anatomical impairment pursuant to Tennessee Code Annotated section 50-6-241(d). The employee also appeals, arguing that the trial court erroneously concluded that he was not permanently and totally disabled. After a careful review of the record, we affirm the trial court's determination that the employee is permanently and partially disabled. We reverse, however, the trial court's determination that the statutory cap of one-and-one-half times the anatomical impairment rating does not apply and remand to the trial court for a determination of the employee's vocational disability consistent with this opinion.

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

J. S. "STEVE" DANIEL, Sp. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J., and DONALD P. HARRIS, Sp. J., joined.

Amber E. Luttrell, Jackson, Tennessee, for the appellant, Marvin Windows of Tennessee.

Jeffrey P. Boyd, Jackson, Tennessee, for the appellee, Bobby L. Williams.

OPINION

Factual and Procedural Background

On August 4, 2009, Bobby L. Williams was employed as a service technician for Marvin Windows of Tennessee ("Marvin Windows"). On that date, Mr. Williams was replacing nine-foot stationary door panels at a site in Mississippi when he felt a "twinge" in his back. Mr. Williams reported his injury and was initially treated by the company nurse and the company doctor. Marvin Windows subsequently accepted Mr. Williams' injury as compensable and provided him with additional medical treatment.

During the course of his treatment, Mr. Williams continued to work on light duty for Marvin Windows. He reached maximum medical improvement ("MMI") on January 18, 2010, and continued to work in a modified-duty position for Marvin Windows until he left for a planned vacation on March 1, 2010. While on vacation, he was injured in a serious automobile accident. After the accident, he was granted medical leave and received approximately five weeks of short-term disability benefits. While on leave, he applied for Marvin Windows' voluntary retirement plan, which the company offered in 2010 to all employees 55 years of age and older. After Marvin Windows granted his request for early retirement, Mr. Williams took the remainder of his vacation time and worked six hours on a single day, April 27, 2010, cleaning out his service truck. Mr. Williams retired effective April 30, 2010.

A Benefit Review Conference was held on April 12, 2011, but the parties were unable to resolve their differences. That same day, Marvin Windows filed a complaint in the Circuit Court for Lauderdale County. On May 9, 2011, Mr. Williams filed an answer and counter-complaint to which Marvin Windows filed an answer on June 10, 2011.

The case went to trial on June 3, 2013. The parties stipulated that Mr. Williams' injury was compensable, that notice was given, that Marvin Windows had paid temporary total disability benefits, that the workers' compensation rate was $459.35, that Mr. Williams was 62 at the time of his injury, and that his maximum period of compensation was therefore 260 weeks. The only issues at trial were the nature and extent of Mr. Williams' disability and the application of the statutory cap of one-and-one-half times the impairment rating. Tenn. Code Ann. § 50-6-241(d) (2008 & Supp. 2013).

Mr. Williams testified at trial that he was 66 years old at the time of trial and was 62 years old on August 4, 2009, the date of the accident. Mr. Williams did not complete the 10th grade. However, he obtained his GED, attended vocational school, and obtained heavy equipment and welding training. His prior work experience included employment at a cardboard box plant, material handling at an electric manufacturing plant, machine operation

for a file cabinet manufacturer, and set operation for a magazine binder, as well as welding and house framing. Mr. Williams began working for Marvin Windows in 1989 in a position on the loading dock and subsequently advanced to the position of molder. He was working as a service technician at the time of his injury.

Mr. Williams explained that as a service technician, his work primarily involved the replacement and repair of doors and windows at job sites. Mr. Williams testified that on the date of his injury, he and another employee were in Mississippi installing nine-foot stationary door panels when he felt a twinge in his back. He informed his supervisor, James Sylvester, of his injury and was instructed to see the company nurse, who prescribed medication. Mr. Williams was off work for the remainder of the week and was then instructed to see the company doctor. After a brief period of treatment by the company doctor, Marvin Windows provided Mr. Williams with a panel of physicians, from which he selected Dr. Jason Hutchison, an orthopedic surgeon in Jackson, Tennessee.[1]

According to Mr. Williams' testimony, he saw Dr. Hutchison "a couple of times." Mr. Williams stated that Dr. Hutchison administered shots in his back, which temporarily relieved his pain. After Mr. Williams continued to complain of pain in his back and leg, however, Dr. Hutchison referred him to Dr. Glenn Crosby, a neurosurgeon in Memphis, Tennessee. Mr. Williams testified that Dr. Crosby ordered physical therapy including work conditioning, prescribed medication, reviewed his MRI, informed him that surgery was not needed, and placed him on light-duty restrictions to give his back time to heal.

Mr. Williams continued to work for Marvin Windows in a light-duty position until Dr. Crosby released him from his care on January 18, 2010. Mr. Williams testified that he was still experiencing back and leg pain when Dr. Crosby released him and that he did not believe he could do the lifting required in his regular-duty job nor could he perform any of his prior jobs for Marvin Windows. Mr. Williams testified, however, that he returned to work full time for Marvin Windows in the position of inspector from January 18, 2010, until he left for vacation on March 1, 2010. He admitted that he never had any conversation with or expressed any concern to anyone in management at Marvin Windows about his inability to perform his regular-duty job or about other possible jobs with the company.

Mr. Williams testified that he took a vacation on March 1, 2010, because he could no longer do his job. He further stated that while on vacation, he was involved in a serious motor vehicle accident in which he sustained a head injury requiring medical treatment. As a result of the motor vehicle accident, Mr. Williams took family medical leave from March

[1] Although Dr. Hutchison did not testify in this case, his medical records were made a collective exhibit to the deposition of Dr. John Brophy, which was introduced at trial.

12 through April 19, 2010, during which time he also received short-term disability payments through the company's disability plan.

On April 9, 2010, while he was on family medical leave, Mr. Williams applied for Marvin Windows' early retirement program. Mr. Williams testified that although he thought about the early retirement program near the time of his injury in 2009, he decided to apply after Dr. Crosby placed him at MMI in January 2010.

Mr. Williams testified that as of the date of trial, his back would begin to hurt if he did much lifting or if he walked a far distance. He further testified that he could no longer do certain home repair or renovation projects or work on cars because of the bending required and that he had difficulty completing household chores such as vacuuming and sweeping. He also testified that he was unable to perform most of the jobs that he had held before he began working for Marvin Windows because those jobs required climbing, twisting, bending, lifting, sitting, or stooping, all of which he suggested caused him difficulty. He conceded, however, that he could drive a forklift, that he could return to his prior job as a material handler, and that he could perform the job he held for nine years for a prior employer where he oversaw production and trained employees. Mr. Williams testified that the only medication he takes regularly for his back is an over-the-counter pain reliever.

A transcript of Dr. Crosby's deposition was admitted into evidence at trial. Dr. Crosby testified that he first saw Mr. Williams on November 30, 2009, on a referral from Dr. Hutchison. Based on Mr. Williams' history, clinical presentation, and prior MRI, Dr. Crosby believed that Mr. Williams had a ruptured disk in his back that "was going to go on and heal." Dr. Crosby therefore prescribed physical therapy with some work conditioning and home exercises. Mr. Williams returned to Dr. Crosby on January 18, 2010, and reported that he initially felt better after the work conditioning but that his pain had returned. Dr. Crosby's examination, however, revealed that Mr. Williams' condition had not changed since his prior visit. In fact, Dr. Crosby opined that Mr. Williams was "holding his own if not improving." Accordingly, Dr. Crosby placed Mr. Williams at MMI and assigned him a 12% anatomical impairment rating to the body as a whole based on the Sixth Edition of the AMA Guides to the Evaluation of Permanent Impairment. Dr. Crosby testified that Mr. Williams' herniated disk and his radiculopathy were work-related.

Dr. Crosby referred Mr. Williams for a functional capacity evaluation ("FCE"), which was conducted on January 22, 2010. Dr. Crosby reviewed the FCE results prior to his deposition and opined that Mr. Williams did not require permanent work restrictions. Dr. Crosby also agreed with the evaluator's suggestion that Mr. Williams be released to medium-duty work and that he be allowed to transition back into heavy-duty work over a two-to-three-week time frame. Dr. Crosby further testified that Mr. Williams was medically fit to return to work when he underwent the FCE.

Dr. Crosby last saw Mr. Williams in February 2012, at which time Mr. Williams was experiencing some intermittent back pain and some pain into his left buttock. Dr. Crosby noted that Mr. Williams' examination was essentially normal and that Mr. Williams was occasionally taking pain tablets. Dr. Crosby determined that Mr. Williams required no further treatment and released him from his care on that date. Dr. Crosby never recommended that Mr. Williams undergo surgery and was of the opinion that the ruptured disk might heal on its own. In fact, Dr. Crosby opined that the healing process may have already begun by the time of his last visit.

Hal Williams, Marvin Windows' safety and workers' compensation manager, testified at trial. Hal Williams stated that Mr. Williams worked in a full-time, modified-duty position for Marvin Windows' service crew from the date that he reached MMI until he left for his vacation on March 1, 2010. Hal Williams further testified that Mr. Williams did not complain to any member of management about his difficulty in performing the modified-duty position and that it was the company's plan to follow the recommendations made as a result of the FCE. If Mr. Williams had not retired, the company intended to return him to his full-time position as a crew technician over a period of two or three weeks, which would have required him to lift more than 50 pounds, drive for long periods of time, and bend, twist, kneel, stoop, and walk on a regular basis. If Mr. Williams had expressed concern about his ability to return to the position of service technician, Marvin Windows would have looked at all available alternatives and would have made any necessary accommodations consistent with any restrictions.

Hal Williams also explained that the company's voluntary retirement program was a one-time offering to employees who were at least 55 years of age. Under the program, the employee would voluntarily submit a resignation form to the human resource department, which would determine whether the employee qualified for the program. If qualified, the employee would receive payment for any accrued vacation time, two weeks of payment for each year of service, and one year of medical, vision, and dental insurance through COBRA. Mr. Williams was accepted into Marvin Windows' voluntary retirement program on April 28, 2010, with an effective retirement date of April 30, 2010. He received a lump sum payment of $27,488 on May 21, 2010, under this program. Between the time that his family medical leave ended and the effective date of his retirement, Mr. Williams worked six hours on a single day cleaning out his service truck.

After Mr. Williams retired, Marvin Windows referred him to Dr. John Brophy, a neurosurgeon, for a second opinion regarding his work injury. Dr. Brophy testified by deposition that prior to his evaluation of Mr. Williams on December 1, 2010, he reviewed Mr. Williams' 2009 MRI film and report, the FCE report, and Mr. Williams' medical records from Drs. Hutchison and Crosby and obtained a history from Mr. Williams. At the time of the evaluation, Mr. Williams reported no weakness or right lower-extremity symptoms and

exhibited an overall normal neurologic examination. Dr. Brophy's diagnostic impression was radiculopathy associated with a far left lateral L4-5 herniated disc, improved with conservative treatment. He agreed with Dr. Crosby that Mr. Williams reached MMI on January 18, 2010, and testified that no further treatment was recommended. He further opined that Mr. Williams could return to full-duty work, without restrictions. Dr. Brophy expected that Mr. Williams' pain would continue to improve. He therefore assigned Mr. Williams an anatomical impairment of 7% to the body as a whole, using the Sixth Edition of the AMA Guides.

The trial court took the case under advisement and issued written findings on June 10, 2013. The trial court found that "the employee continues to have significant pain as a result of the injury, and that the job required work that he would not physically be able to perform. The employee cho[]se to retire after determining that he would not be able to continue the work." The court determined that "[b]ased on his age, education, skills and training, and capacity to work at types of employment he has done, and continuing pain and discomfort, . . . [Mr. Williams] has a vocational disability of 28%." On July 15, 2013, the trial court entered judgment consistent with these findings. Marvin Windows appealed, contending that the trial court erred in failing to assess the reasonableness of Mr. Williams' decision to retire. Marvin Windows further contends that the trial court should have capped Mr. Williams' vocational disability at one-and-one-half times his anatomical impairment. Mr. Williams also appealed, arguing that the trial court erred in not finding him permanently and totally disabled. This appeal was 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

Courts reviewing an award of workers' compensation benefits must conduct an in-depth examination of the trial court's factual findings and conclusions. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). When conducting this examination, Tennessee Code Annotated section 50-6-225(e)(2) requires us to "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. Tryon v. Saturn Corp., 254 S.W.3d. 321, 327, (Tenn. 2008); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). However, a reviewing court need not give similar deference to a trial court's findings based upon documentary evidence, such as depositions, Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006); Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004),

or to a trial court's conclusions of law, Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Marvin Windows contends that Mr. Williams' decision to retire was unreasonable because he left without attempting to work full duty and did not give the company an opportunity to provide him with an alternative position. Marvin Windows therefore contends that Mr. Williams' award should have been capped at one-and-one-half times his anatomical impairment rating pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A). Mr. Williams, in contrast, contends that the trial court erred in failing to find him permanently and totally disabled. Mr. Williams further contends that because he is permanently and totally disabled, the issue of the statutory cap is moot. For the sake of logic and clarity, we address these issues in reverse order.

A. Permanent Total Disability

An employee is entitled to permanent total disability benefits when he is "totally incapacitate[d] . . . from working at an occupation that brings [him] an income." Tenn. Code Ann. § 50-6-207(4)(B) (2008 & Supp. 2013). In making this determination, the reviewing court must consider a number of factors, including "the employee's skills, training, education, age, job opportunities in the immediate and surrounding communities, and the availability of work suited for an individual with that particular disability." Hubble v. Dyer Nursing Home, 188 S.W.3d 525, 536 (Tenn.2006). Ultimately, however, the "focus [of the court's analysis is] on the employee's ability to return to gainful employment." Davis v. Reagan, 951 S.W.2d 766, 767 (Tenn.1997).

In this case, Mr. Williams' contention that he is permanently and totally disabled is wholly unsupported by the evidence. He was treated conservatively for his back injury and did not require surgery. He was able to work while undergoing treatment and after reaching MMI, albeit in light-duty and modified-duty positions respectively. In his testimony, Mr. Williams identified a number of jobs that he had held in the past and acknowledged that he could perform these jobs at the time of trial. The treating and evaluating physicians both testified that after reaching MMI, Mr. Williams significantly improved, his neurologic exams were essentially normal, he was continuing to improve, and he could return to regular-duty work without restrictions. His FCE was consistent with these opinions. Mr. Williams presented no medical or other expert proof to establish any permanent restrictions or limitations on his ability to perform his job. Although not dispositive, our Supreme Court has noted, "It would be an extremely rare situation in which an injured employee could, at the same time both work and be found permanently and totally disabled." Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 48 (Tenn.2004).

Mr. Williams testified that his injury precludes him from performing certain activities and certain types of work. He conceded, however, that he had training and experience in a number of other positions that he could still perform after his injury. Mr. Williams offered no vocational expert proof concerning either his inability to work at an occupation that would bring him an income or to a lack of jobs that he could perform in the relevant job market. We therefore conclude that under these circumstances, the trial court did not err in finding that Mr. Williams was permanently and partially disabled.

B. Statutory Cap

Tennessee Code Annotated section 50-6-241(d)(1)(A) provides in pertinent part:

> For injuries occurring on or after July 1, 2004, in cases in which an injured employee is eligible to receive any permanent partial disability benefits either for body as a whole or for scheduled member injuries, . . . and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability benefits that the employee may receive is one and one half (1 ½) times the medical impairment rating determined pursuant to the provisions of § 50-6-204(d)(3). In making the determinations, the 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.

Accordingly, when an employee "has the opportunity to return to his place of employment at the same or greater wage," the cap on permanent partial disability benefits is one-and-one-half times the medical impairment rating. Williamson v. Baptist Hosp. of Cocke Cnty., 361 S.W.3d 483, 488 (Tenn. 2012). In contrast, when an injured employee is not returned to work by the employer at a wage equal to or greater than his pre-injury wage, the cap is six times the medical impairment rating. Tenn. Code Ann. § 50-6-241(d)(2)(A); Williamson, 361 S.W.3d at 488. "When the employee has made a meaningful return to work, the lower cap of one-and-one-half times the impairment rating applies." Williamson, 361 S.W.3d at 488 (internal quotation marks omitted).

The concept of a "meaningful return to work" guides the determination of whether the lower statutory cap applies in a given case. Id. As our Supreme Court has explained:

> The circumstances to which the concept of '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.
>
> As a result of extensive litigation over the concept of 'meaningful return to work' in the context of claims for permanent partial disability benefits, we have the benefit of many decisions in which this Court and the Appeals Panel have addressed whether a particular employee has had a meaningful return to work. These decisions provide that 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 . . . . If, however, the employee [] 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 . . . .

Tyrone, 254 S.W.3d at 328-29 (citations omitted). "Three factors guide the analysis: (1) whether the injury rendered the employee unable to perform the job; (2) whether the employer refused to accommodate work restrictions arising from the injury; and (3) whether the injury caused too much pain to permit the continuation of the work." Williamson, 361 S.W.3d at 488 (citations, alterations, and internal quotation marks omitted).

In this case, the trial court determined that "the employee continues to have significant pain as a result of the injury, and that the job required work that he would not physically be able to perform. The employee cho[]se to retire after determining that he would not be able to continue the work." While cognizant of the limited scope of our review of the trial court's findings, the preponderance of the evidence established that the statutory cap of one-and-one-half times the medical impairment rating applies in this case.

Marvin Windows placed Mr. Williams on light duty while he was undergoing conservative treatment for the injury to his back. Dr. Crosby, Mr. Williams' treating physician, testified that Mr. Williams reached MMI on January 18, 2010, and determined that based on the FCE results, Mr. Williams could transition back to his regular-duty position after a few weeks of medium-duty work. Consistent with Dr. Crosby's recommendation and the FCE results, Marvin Windows placed Mr. Williams on modified duty. Mr. Williams continued to work full time on modified duty from this time until he left for vacation. During this period, he voiced no concerns or complaints to Marvin Windows regarding his ability to perform his job.

After an automobile accident and resulting head injury while on vacation, Mr. Williams took medical leave and received short-term disability. Rather than return to work

after recovering from this unrelated injury, he unilaterally decided to apply for Marvin Windows' early retirement program and to retire effective April 30, 2010. Although Mr. Williams testified that he continued to experience pain from his back injury, that he did not believe that he could return to his regular-duty job at Marvin Windows, and that this was the reason that he decided to retire, he never conveyed any of this information to Marvin Windows. Moreover, Mr. Williams never held or attempted any regular-duty job at Marvin Windows after he was released from medical care. Additionally, he never had any conversation with or expressed any concern to Marvin Windows about his ability to perform his regular-duty job. The record establishes that Mr. Williams never spoke to his employer about other positions with the company that might accommodate the pain to which he testified or his self-imposed restrictions.

Mr. Williams' decision to retire rather than to remain at or return to work for Marvin Windows was not based upon any medical advice or opinion. In fact, the only medical proof at trial, including the deposition testimony of two physicians and the FCE results, was that he had been released to regular-duty work without any restrictions and that he was capable of performing his regular-duty job.

Simply put, Mr. Williams failed to demonstrate that he could not perform his regular-duty job with his employer and failed to establish that he retired for reasons related to physical pain from his injury. Consequently, he was not denied a meaningful return to work and is limited to an award of one-and-one-half times the medical impairment rating.

Conclusion

For the foregoing reasons, we hold that the evidence does not preponderate against the trial court's finding that Mr. Williams is permanently and partially disabled, and we affirm the judgment of the trial court in this regard. We reverse, however, the judgment of the trial court to the extent that it failed to apply the statutory cap of one-and-one-half times the medical impairment rating, Tennessee Code Annotated section 50-6-241(d)(1)(A), and remand the case to the trial court for a determination of the Mr. Williams' vocational disability consistent with this opinion. Costs of this appeal are assessed to Bobby L. Williams and his surety, for which execution may issue if necessary.

J.S. "STEVE" DANIEL, SP. J.

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

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Circuit Court for Lauderdale County
No. 6478

No. W2013-02193-SC-R3-WC - Filed June 5, 2014

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 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 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, Bobby L. Williams, and his surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM