IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
February 27, 2012 Session

LARRY A. RENFRO v. STARNET INSURANCE COMPANY

Appeal from the Chancery Court for Roane County
No. 16659 Frank V. Williams III, Chancellor

No. E2011-00839-WC-R3-WC-MAILED-MAY 16, 2012/FILED-AUGUST 15, 2012

In this workers' compensation case, the employee, a truck driver, sustained a compensable back injury. After having surgery, he returned to his pre-injury job for a year and was able to drive with the aid of narcotic medications prescribed to treat his back pain. He subsequently left his employment after results of an annual U.S. Department of Transportation ("DOT") medical examination determined that his use of the narcotics prohibited him from driving. The trial court found that the employee did not have a meaningful return to work and awarded benefits in excess of one and one-half times the anatomical impairment rating. The employer's workers compensation insurance carrier has appealed,[1] asserting that the employee's loss of employment was unrelated to his work injury and that the award should have been limited to one and one-half times the impairment. We affirm the judgment.

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

LARRY H. PUCKETT, SP.J., delivered the opinion of the Court, in which SHARON G. LEE, J., and THOMAS R. FRIERSON, SP.J., joined.

T. Joseph Lynch and Jesse D. Nelson, Knoxville, Tennessee, for the appellant, Starnet Insurance Company.

James H. Hickman III, Knoxville, Tennessee, for the appellee, Larry A. Renfro.

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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[2]

Larry A. Renfro ("Employee") worked as a dump truck driver for Roger Daniels Trucking ("Employer") from 1989 until August 30, 2010. Employer's workers' compensation insurance carrier was Starnet Insurance Company ("Starnet"). Employee alleged that he suffered a compensable low back injury on February 26, 2009. He testified that, on that date, he was at an asphalt plant in Harriman, Tennessee, waiting for his truck to be loaded. He parked his truck next to some other trucks and got out of his truck to speak with the other drivers waiting there. As he stepped down out of the truck, he experienced an immediate onset of pain in his right hip and leg and into his foot. He completed his workday. After he returned to his home, his pain worsened. He called his sister, a registered nurse, to come to his home and assist him. She transported him to a nearby hospital emergency room, where he was given an injection for pain and a magnetic resonance imaging ("MRI") was performed.

Employee's condition did not improve. Within one or two days, he consulted his primary care physician, Dr. Dwight Willett. Dr. Willett referred him to a neurosurgeon, Dr. David Hauge. Dr. Hauge diagnosed a "disc herniation of L4-5 on the right with a right L-5 radiculopathy with compression of the L-5 nerve root." Due to the severity of Employee's symptoms, Dr. Hauge performed surgery the next day, March 18, 2009. Dr. Hauge followed Employee until June 17, 2009.

At the time of surgery, Dr. Hauge prescribed OxyContin to Employee for pain relief. Throughout his course of treatment, Dr. Hauge slowly reduced the level of that medication. At the time he released Employee, Dr. Hauge had tapered Employee's prescription to "Oxy[C]ontin 10 to be dosed orally twice a day." Dr. Hauge placed no permanent restrictions on Employee's activities, but he referred Employee to Dr. Lisa Bellner, a physical medicine and rehabilitation specialist, for the purpose of improving Employee's level of functioning, and "hopefully" to further reduce his use of pain medication. Employee did not consult Dr. Bellner. At oral argument, counsel for Starnet conceded that Starnet had denied any medical benefits to Employee, so that payment for Dr. Bellner's treatment would have been Employee's personal responsibility.

[2] Compensability was an issue at trial, and both sides presented evidence relevant to that subject. Because the Employer does not contest the trial court's ruling on that issue, we have omitted a portion of that evidence from this opinion.

After Employee was released by Dr. Hauge in June of 2009, he returned for treatment to his primary care physician, Dr. Willett, who prescribed hydrocodone, a narcotic pain reliever, to be taken four times a day for pain. Dr. Willett's records and testimony established that he had prescribed similar narcotic medication for treatment of Employee's arthritic pain from 2005 to 2009. However, Dr. Willett's prescription records and his medical records, which were made exhibits to his deposition, did not document Employee's actual frequency or daily level of use of the pain medications between 2005 and 2009, only that the prescription drug continued to be listed as one of the Employee's prescribed medications as noted by the Employee on his office visits. Dr. Willett was asked by Starnet's counsel whether Employee could alter his medication schedule:

Q. Would it be reasonable for him to alter his medication schedule in order to drive the truck?
A. Yes.
Q. How would he do that, Doctor?
A. He could take it once before he went to work. He could take it when he got home. He might take one at lunch. It depends on I guess what he was going to do.
Q. Doctor, the DOT requirements require a driver, as far as I understand it, not to take medications eight hours prior to -- prior to operating a truck. Is that something that with his prescription regimen would be realistic?
A. Now, that, I don't -- it would be hard. I guess he could take it when he got home and not take it before he went to work.
Q. Could he substitute non-prescription medications while he was at work?
A. He could.
Q. Do you have patients that do that?
A. Some, yes.
Q. Does it work for them?
A. It can.

Employee returned to work for Employer in June of 2009, performing the same job and receiving the same rate of pay. During the year he returned to work after the injury, Employee testified that he took hydrocodone, as prescribed by Dr. Willett, four times a day every six hours so he could drive.

Dr. William Kennedy, an orthopaedic surgeon, examined Employee at the request of his attorney. Dr. Kennedy found that Employee had pre-existing degenerative disc disease

which the February 26, 2009 incident had aggravated by causing a herniated disc. He further opined that Employee retained a 13% anatomical impairment to the body as a whole as a result of his injury and surgery. He recommended that Employee avoid repetitive bending, stooping or squatting, operating vehicles over rough terrain, crawling, and lifting more than twenty pounds occasionally or ten pounds frequently. On cross-examination, Dr. Kennedy stated that there were alternative treatments to hydrocodone that could allow patients to cope with low back pain, and that he "would certainly encourage" Employee to attempt such treatments.

Dr. Kennedy noted indications of severe pain in Employee:

> [A]s Mr. Renfro went through the maneuvers of the examination, his body mechanics were consistent with marked deconditioning, which indicated to me that apparently his pain, based on my examination, caused me to conclude that his pain was still such that he was still having difficulty engaging in the types of activities that would help him return to reasonable conditioning in the body mechanics and in his strength and his torso and his lower extremities.

Dr. Kennedy concluded that "more likely than not Mr. Renfro has ongoing pain from more than one disc level even though primarily most likely from the L4 disc segment."

Employee testified that before his February 26, 2009 injury, he took hydrocodone prescribed by Dr. Willett for arthritis in his neck and shoulders and sometimes ibuprofen. He took the hydrocodone so he could sleep, and he only took it infrequently, just when he needed it. After his on-the-job injury, he said he did "pretty good as long as I could take my medicine." He told Employer's general manager, Glen Daniel, he "was working on my hydrocodone, and if I didn't have it, I didn't know if I would be able to work or not. I told him I was taking hydrocodone to - - to keep me going."

Employee left his job after a July 20, 2010 annual medical examination required to maintain Employee's U. S. Department of Transportation certification to drive a commercial truck revealed his use of the pain medications.

To support Starnet's contention that Employee's injury did not cause him to stop work, Starnet introduced DOT examination certificates for 2007, 2008, 2009, and 2010 into evidence. Although Employee admittedly used hydrocodone during these years, the 2010 certificate was the only one that reflected Employee's use of hydrocodone. He testified that he informed the previous examining doctors that he "was on medications, different kinds of

medications," but they did not note it on the examination form. He also testified that he advised Employer's general manager, Glenn Daniels, of his hydrocodone use at an unspecified time before July 2010. Mr. Daniels denied that contention.

At the July 20, 2010 medical examination, Employee was unable to recall the medications that he was taking at the time. Because this information was required for the examination, the examining doctor obtained Employee's pharmacy records. Those records showed that Employee took hydrocodone on a daily basis. In accordance with DOT regulations, the examining doctor directed that Employee could not operate a vehicle within eight hours of taking hydrocodone.

After Employee was told he could not drive while on hydrocodone or within eight hours of taking it, he signed a form stating that he would not take hydrocodone eight hours before driving and tried to drive without taking his hydrocodone. Employee attempted to follow this direction and tried to return to work, but after returning for a few days he was unable to continue because of pain.

Employee testified that after a couple of days, he reported to Mr. Daniels "the only reason I am driving is on the medication, and they took me off that and . . . I am hurting so bad I can't drive." Mr. Daniels told him to "do the best I could." Employee explained that "[f]or a few days I'd tried to get out of the truck and I was having trouble in having to check the oil, and then have trouble lifting the hood and everything, and I told them I'm hurting so bad, I'm going to have to go home." According to Employee, Mr. Daniels suggested that he could put him down lower on the drivers list and when he was not called for work he could draw unemployment for the week.

Both Employee and Employer unsuccessfully attempted to keep Employee working. Employee's counsel cross-examined Mr. Daniels about Employer's willingness to accommodate Employee:

> Q. Did you see that he was having some difficulty after he came back to work in '09?
> A. No, not -- you know, I could see that he was having trouble walking and his back was hurting. And I worked with Larry, I let him off if he needed off or whatever.
> Q. And by the time 2010 came and you all talked about the DOT report and him not taking that medication eight hours before he drove, did you talk to him about the list, him being on the list, you know, the -- the driver list I guess it's called? What do you call that list?

A. Larry told me to drop him to the bottom until he got to feeling better.
Q. Did you come to him about that?
A. Well, you know, Larry, he was number two on my seniority list. But when I set a truck up in the evening, I need to know if that driver is going to be there or not. And Larry would tell me, said I don't know if I can make it or not, --
Q. So did --
A. -- he said I'll just have to wait until in the morning.
Q. Did you suggest to him at some point in time that maybe it would be better if he did go on the bottom of the list then?
A. No. Larry suggested that.
Q. And you -- you went along with it, you felt that was a good idea?
A. Yeah.

Because of his back pain, Employee ceased working for Employer on August 30, 2010, and has not worked for anyone else. He testified that he is no longer able to work:

A. - - I still have a lot of pain in anything I do. Of course, the [h]ydrocodone helps a little bit, but I still - - I still can't do what I used to do. I can't - - I can't mow the yard and stuff like that, or weed-eat, or wash dishes, or clean the house, anything. I can't - - of course, I have a deceased wife; I'm at home by myself. I can't do any of it without pain.
Q. All right. And you've never done any other kind of jobs like work in an office or anything like that, have you?
A. No, sir.
Q. Do you think you could go back and do the truck driving work at Roger Daniels again?
A. No, sir.
Q. Do you think you would have trouble whether or not you were able to take the medication or not?
A. Do what, sir?
Q. Do you think you would have trouble with or without the medication?
A. I would have trouble both ways, especially without the medication.

Employee was sixty-one years old at the time of trial. He attended school into the ninth grade and later obtained a graduate equivalency diploma. Before 1989, he had worked as a bread truck driver and as an over-the-road truck driver. Employee testified that, although hydrocodone "help[ed] a little bit," he was unable to mow his yard, wash dishes, or clean house due to back pain. During cross-examination, he agreed that he had been able to perform his regular job after his surgery. However, he did not think that he would be able to do so without pain medication.

The trial court found that Employee "made a meaningful attempt to return to work," but that he was no longer "able to operate a truck . . . that part of his life is over with." On that basis, the court determined that the one and one-half times impairment cap did not apply, and awarded 52% permanent partial disability to the body as a whole. Starnet has appealed, contending that the trial court erred by finding that Employee did not have a meaningful return to work.

Standard of Review

We are statutorily required to review the trial court's factual findings "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." Tenn. Code Ann. § 50-6-225(e)(2) (2008). Following this standard, we are further required "to examine, in depth, a trial court's factual findings and conclusions." Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)). We accord considerable deference to the trial court's findings of fact based upon its assessment of the testimony of witnesses it heard at trial, although not so with respect to depositions and other documentary evidence. Padilla v. Twin City Fire Ins. Co., 324 S.W.3d 507, 511 (Tenn. 2010); Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). We review conclusions of law de novo with no presumption of correctness. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). Although workers' compensation law must be liberally construed in favor of an injured employee, the employee must prove all elements of his or her case by a preponderance of the evidence. Crew, 259 S.W.3d at 664; Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992).

Analysis

Starnet contends that the trial court erroneously found that Employee did not have a meaningful return to work. It makes two separate, but similar, arguments in support of that position. First, it contends that the reason for Employee's termination — his continued use of hydrocodone — was unrelated to his work injury. In addition, Starnet argues that

Employee did not try to wean himself from his narcotic pain medication and so did not make a reasonable attempt to return to work.

It is not disputed that Employee returned to work in June 2009 and continued to work in his pre-injury job with the aid of medications forbidden by DOT regulations until August 2010. His physical condition did not change during that period. His loss of employment occurred after Employer and Employee learned that applicable DOT regulations prohibited Employee from driving a truck within eight hours of taking hydrocodone.

Starnet points out that Employee had been taking hydrocodone for several years prior to his work injury and contends that he returned to the same regimen after being released by Dr. Hauge. Thus, Starnet argues, the hydrocodone use was not related to or caused by Employee's work injury and his consequent loss of employment was likewise not related to the work injury. In response, Employee asserts that the evidence supports the trial court's finding that he was unable to continue driving because of pain from the work injury. He also contends that Starnet's argument that he would be able to drive if he modified or discontinued his use of hydrocodone is mere speculation.

Employee testified that before his on-the-job back injury he infrequently took hydrocodone for arthritis in his neck and shoulders at night to help him sleep when he needed to do so. After he injured his back, he took this medication four times a day. The evidence preponderates in favor of the Employee's contention that his use of hydrocodone was caused by his work injury.

Tennessee Code Annotated section 50-6-241 provides that when an injured employee returns to his or her job at the same pay, any award of permanent partial disability benefits is capped at one-and-one-half times the medical impairment rating. Tenn. Code Ann. § 50-6-241(d)(1)(A) (2008 & Supp. 2011). However, when the injured employee has not had a meaningful return to work, compensation is capped at six times the medical impairment rating. Tenn. Code Ann. § 50-6-241(d)(2)(A); Tryon v. Saturn Corp., 254 S.W.3d 321, 328 (Tenn. 2008). A three-factor analysis applies in determining whether an employee has had a meaningful return to work: "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 v. Baptist Hosp., ___ S.W.3d ___, No. E2010-01282-SC-WCM-WC, 2012 WL 626224, at *5 (Tenn. 2012) (citing Tryon at 329). Applying these factors, we conclude that Employee's work injury rendered him unable to perform his truck driving job, that efforts of Employer and Employee could not overcome Employee's physical limitations though both attempted to do so, and that Employee's pain did not permit him to continue driving.

In Tryon, the Court observed that the reasonableness of both Employer and Employee is a pertinent consideration in assessing whether the Employee had a meaningful return to work:

> The circumstances to which the concept of "meaningful return to work" must be applied are remarkably varied and complex. See Newton v. Scott Health Care Ctr., 914 S.W.2d 884, 886 (Tenn. Workers Comp. Panel 1995). 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. Lay v. Scott County Sheriff's Dep't, 109 S.W.3d 293, 297–98 (Tenn. 2003); Nelson v. Wal–Mart Stores, Inc., 8 S.W.3d 625, 630 (Tenn. 1999). The determination of the reasonableness of the actions of the employer and the employee depends on the facts of each case. Hardin v. Royal & Sunalliance Ins., 104 S.W.3d 501, 505 (Tenn. 2003) (quoting Newton v. Scott Health Care Ctr., 914 S.W.2d at 886).

254 S.W.3d at 328.

The fact-intensive nature of the analysis required to evaluate "meaningful return to work" and the related issue of "loss of employment" following a return to work is illustrated by decisions that have followed Tryon. In Howell v. Nissan N. Am., Inc., 346 S.W.3d 467 (Tenn. 2011), our Supreme Court affirmed a trial court's determination that an employee who did not return to work because she believed herself to be physically unable to perform the job to which she would be assigned did not have a meaningful return to work. Id. at 473. In contrast, the Special Workers' Compensation Appeals Panel has reversed trial court findings that the employee had not had a meaningful return to work when (1) the employee declined an offer of a transfer to an alternative job at the same rate of pay, based upon his subjective belief that he would not be able to perform the alternative job because of his injury, see Douglas v. Dura-craft Millwork, Inc., No. W2008-02010-SC-WCM-WC, 2009 WL 3108740, at *5 (Tenn. Workers' Comp. Panel Sept. 29, 2009), and (2) when an employee declined to attempt to return to employment within her medical restrictions based upon her subjective belief that she could not perform the job. See Blair v. Wyndham Vacation Ownership, Inc., No. E2009-01343-WC-R3-WC, 2010 WL 2943144, *5-6 (Tenn. Workers' Comp. Panel July 27, 2010).

The particulars of the case before us support Employee's contention that without regular pain medication in violation of DOT restrictions, his pain from his on-the-job back injury is too great to allow him to continue working.

In its decision concerning this issue, the trial court found that Employee "is not able to operate a truck, . . . that part of his life is over with." Our review of the record leads us to conclude that the evidence preponderates in favor of this finding. The factors that determined Employee's ability to continue working are his level of pain from his back injury and his ability to control the pain by methods permitted by DOT regulations.

Secondly, Starnet contends that there are various treatments for back pain that do not involve the use of narcotic medications such as hydrocodone, and that Employee could have tapered off his use of hydrocodone and his voluntary failure to do so is what prevented him from returning to work. Starnet also notes that Employee did not follow Dr. Hague's recommendation to consult Dr. Bellner for treatment that could assist him in tapering off hydrocodone. Starnet, however, refused to pay for these treatments before this case came to trial. It would be inequitable to deny Employee compensation based on his failure to avail himself of treatments of speculative efficacy for which he would have been personally liable to the health care provider. Under all the circumstances confronting him, Employee acted reasonably.

The preponderance of the evidence supports the conclusion that as a result of Employee's on the job injury he was prescribed pain medications and had to use them at a frequency not allowed by DOT regulations and that Employee did not have a meaningful return to work. Thus, the trial court's award of permanent partial disability benefits in excess of one and one-half times the anatomical impairment is affirmed.

Conclusion

The judgment awarding permanent partial disability to the body as a whole of 52%, four times employee's medical impairment rating, is affirmed. Costs are taxed to Starnet Insurance Company and its surety, for which execution may issue if necessary.

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LARRY H. PUCKETT, JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

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Chancery Court for Roane County
No. 16649

No. E2011-00839-SC-WCM-WC-FILED-AUGUST 15, 2012

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Starnet Insurance Company, pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Starnet Insurance Company, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

LEE, Sharon G., J., Not Participating