IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT MEMPHIS
October 12, 2015 Session

CECILIA THOMPSON v. KROGER LIMITED PARTNERSHIP I

Appeal from the Circuit Court for Hardin County
No. 4477 Charles C. McGinley, Judge

No. W2015-00075-SC-R3-WC – Mailed December 18, 2015; Filed February 1, 2016

An employee sustained a compensable injury to her shoulder. She was able to return to work in a transitional modified job and settled her claim within the one and one-half times impairment cap. Tenn. Code Ann. § 50-6-241(d)(1)(A). Her employer offered her a permanent job with accommodations for her medical restrictions. The employee did not accept the position and was terminated. She sought reconsideration of her settlement. The trial court found that the employer had acted reasonably and that the employee had a meaningful return to work. The trial court, therefore, declined to award additional benefits. The 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(a)(2) (2014) Appeal as of Right;
Judgment of the Circuit Court Affirmed

PAUL G. SUMMERS, SR. J., delivered the opinion of the Court, in which HOLLY KIRBY, J. and BEN H. CANTRELL SR. J. joined.

Spencer R. Barnes, Jackson, Tennessee, for the appellant, Cecilia Thompson.

S. Newton Anderson and Lance W. Thompson, Memphis, Tennessee, for the appellee, Kroger Limited Partnership I.

OPINION

Factual and Procedural History

Cecilia Thompson ("Employee") began working in the delicatessen ("deli") section of the Savannah, Tennessee, Kroger supermarket when the store opened in 2001. She was working in that department in April 2010 when she sustained a compensable injury to her left shoulder. The injury required surgical repair, which was performed by Dr. Timothy Sweo. After a period of therapy and rehabilitation, Dr. Sweo released Employee to return to light-duty work. Employer assigned her to a job placing price tags on shelves and moving outdated items to other locations within the store. This was not a permanent position but a "transitional" job designed to accommodate her restrictions.

In April 2011, Employee attended a meeting with Monty Holt, the store manager, and Bea Frank, deli manager and union steward. At that meeting, Mr. Holt advised Employee that her permanent medical restrictions[1] would prevent her from returning to work in the deli. He then offered Employee a position as a cashier in the store's fuel center. Employee had questions about the job, and she was asked to submit the questions in writing and did so. Employer provided written answers to the questions.[2]

Employee expressed concern about her ability to perform certain tasks included in the fuel center job. She specifically mentioned lifting heavy garbage or products such as cases of bottled water and using a long stick to check the level of the center's fuel tanks. Mr. Holt testified that fuel level was measured electronically. He further stated that he told Employee that an inside employee would be sent to assist her when heavy lifting was required. It was not practical to provide similar assistance in the deli department because of the frequency of overhead lifting and one-armed lifting of weights more than five pounds in that department. Mr. Holt testified that Employee would have retained her basic hourly wage rate and seniority if she had accepted the fuel center job. However, she would not have received an additional twenty-five cents per hour that was paid for acting as backup assistant manager of the deli. This supplement was not part of her regular wage but was paid only when she was acting as assistant manager.

A second meeting was held in May 2011 among Employee, Mr. Holt, Ms. Frank, and Mr. Peavy. There was further discussion of the fuel center job. Employee testified that she neither accepted nor rejected the proposed job at that time. However, Mr. Holt

[1] Employee's permanent restrictions are not set out in the record. However, counsel for Employee implied during a question that they were maximum five-pound lifting over the head with the left arm, maximum 25-pound lifting, and maximum 15-pound recurrent lifting.

[2] The written questions and answers were placed into evidence. However, the exhibit is not contained in the appellate record.

testified that she told him she did not want to work in the fuel center. Ms. Frank testified that Employee made the same statement to her. Consistent with that evidence, Employee agreed during cross-examination that "the bottom line is you really just wanted to go back to work at the deli."

Employee continued to hang price tags until October 2011. On October 18, another meeting was held. At that time, Employee was informed that she was being terminated because she was unable to perform the duties of her job in the deli. No discussion of the fuel center job occurred. However, Mr. Holt testified that he would have placed Employee in the fuel center at that time if she had made such a request.

The trial court issued its ruling from the bench. It found that a "meaningful return to work was offered, and was refused by [Employee]." On that basis, it ruled that she was not eligible for reconsideration of her earlier settlement. Judgment was entered in accordance with those findings. Employee appeals, contending that the trial court's finding was erroneous.

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(a)(2) (2014). When issues of credibility and the weight to be given testimony are involved, considerable deference is given to the trial court when the trial judge had the opportunity to observe the witness's demeanor and to hear in-court testimony. See 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. See 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. See Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Employee contends that she initially had a meaningful return to work, that her decision not to accept the fuel center position was reasonable; and therefore, her resulting termination made her eligible for reconsideration of her settlement. In particular, Employee points to her "legitimate concerns regarding her ability to perform lifting and other activities associated with the fuel center position" and also contends that "accepting the fuel center position would result in a twenty-five cent per hour reduction in her wage." The latter argument arises from the supplement associated with work performed as backup assistant manager.

Addressing the concept of meaningful return to work, this Court has stated:

> [A]n 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 later 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.

Tryon v. Saturn Corporation, 254 S.W.3d 321, 328-29 (Tenn. 2008) (citations omitted).

The Court further observed that:

> 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.

Tryon, 254 S.W.3d at 328 (citations omitted).

Recently, in Yang v. Nissan North America, Inc., the Court addressed the situation of an employee who accepted a voluntary buyout offer from his employer while he was still temporarily disabled from his work injuries. 440 S.W.3d 593 (Tenn. 2014). The employee testified that he accepted the offer because he "knew" he would be unable to return to work when his period of recovery was completed. Id. at 594. The trial court found the employee's resignation to be reasonably related to the work injury and awarded benefits in excess of one and one-half times the medical impairment. Id. The circuit court panel reversed,[3] but the Supreme Court granted the Employee's motion for review and reinstated the trial court's judgment. Id. In reaching its conclusion, the Court stated:

> Initially, we agree with the Panel that if an employee retires or resigns or declines an offer to return to work for either personal or other reasons that are not related to his or her workplace injury, the employee has had a meaningful return to work and is subject to the one-and-one-half-times cap. This fact-intensive determination, however, is typically best left to the trial judge who has had the opportunity to observe the witnesses, determine their credibility, and assess "the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing

[3] Special Workers Compensation Appeals Panel, Circuit Court, Rutherford County, Judge Mark Rogers presiding. The Plaintiff sought further review by the Supreme Court.

> to either return to or remain at work." Tryon, 254 S.W.3d at 328. Yang, 440 S.W.3d at 600. See also Howell v. Nissan N. Am., Inc., 346 S.W.3d 467, 473 (Tenn. 2011).

In the case before us, the trial court stated, "Apparently, she made – she considered all of this, and she – it's obvious she enjoyed her job at the deli, and she did not wish to give that up for something that would have been new and different, and [because of a] certain amount of uncertainty because of unfamiliarity."

The trial court then made the factual determination that Employer did everything that they could be reasonably required to do when it was determined that Employee could not accomplish her job at the deli. She then was offered a very reasonable accommodation which she declined.

Employee's concerns about her ability to perform the fuel center job were, by her testimony, based on occasional observations of other employees there. From those observations, she was able to identify a limited number of specific tasks that she thought she would not be able to perform. Mr. Holt testified that these tasks constituted a small part of the job; that Employer had the means to accommodate Employee's limitations by providing assistance when those tasks were required; and that he told Employee those accommodations would be made. Employee testified that she did not recall being told about those accommodations. The trial court clearly weighed the testimonial evidence and resolved that issue in Employer's favor. We defer to the trial court's assessment of the credibility of the witnesses on this subject. See Madden, 277 S.W.3d at 900.

The evidence concerning the twenty-five cent pay supplement is sparse. Employee did not mention the subject during her direct testimony. It appears to be undisputed that Employee received the supplement as a consequence of being the "backup assistant deli manager." Mr. Holt testified that Employee would not be eligible to receive the supplement in the fuel center. However, he also testified that the supplement was not part of Employee's regular wage and that she received it only when she was acting in the capacity of assistant manager. There was no evidence concerning the number of hours worked by Employee in that capacity.

In King v. Gerdau Ameristeel US, Inc., we stated:

> The definition of the term "wage" as used in Tennessee Code Annotated Section 50–6–241 refers to the hourly rate of pay, not the average weekly wage received. Powell v. Blaylock Plumbing & Elec. & HVAC, Inc., 78 S.W.3d 893, 897 (Tenn. 2002), *superseded by statute on other grounds*, 2010 Tenn. Pub. Acts ch. 1034, secs. 1, 2. Although overtime wages may increase the average weekly wage received, overtime wages do not increase

> the hourly rate of pay. Pratt v. Averitt Express, Inc., No. E2002–00864–WC–R3–CV, 2003 WL 358237, at *1 (Tenn. Workers Comp. Panel Feb.14, 2003).

No. W2011-01414-WC-R3-WC, 2012 WL 3064640, at *3 (Tenn. Workers Comp. Panel July 30, 2012).

Based on the limited evidence contained in this record, we conclude that the situation presented is analogous to King. We are certainly unable to find that the evidence preponderates against the trial court's implicit finding that the twenty-five-cent supplement was not part of Employee's pre-injury wage for purposes of section 50-6-214(d)(1).

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Cecilia Thompson and her surety, for which execution may issue if necessary.

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PAUL G. SUMMERS, SENIOR JUDGE

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

CECILIA THOMPSON v. KROGER LIMITED PARTNERSHIP I

Circuit Court for Hardin County
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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, Cecilia Thompson, and her surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM