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

October 25, 2010 Session

TIMOTHY COOK v. GENERAL MOTORS CORPORATION

Appeal from the Circuit Court for Bedford County
No. 11788 Franklin L. Russell, Judge

No. M2010-00272-WC-R3-WC - Mailed: December 1, 2010
Filed - February 16, 2011

The Employee suffered a compensable injury while working on an automobile assembly line. A few months after the Employee filed a claim for workers' compensation benefits, his employer, through a highly-publicized bankruptcy, sold a majority of its assets to a newly-created entity. The trial court held that because the Employee, who was employed by the new entity, had not returned to work for his pre-injury employer, he was entitled to permanent partial disability benefits in excess of the cap established by Tennessee Code Annotated section 50-6-241(d)(1)(A). The employer has appealed, contending that the unique circumstances of its bankruptcy sale compel this Panel to rule that the Employee returned to work for his pre-injury employer.[1] We affirm the judgment of the trial court.

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

GARY R. WADE, J., delivered the opinion of the court, in which WALTER C. KURTZ, SR. J., and JON KERRY BLACKWOOD, SR. J., joined.

Jason Andrew Lee and David Brett Burrow, Nashville, Tennessee, for the appellant, General Motors Corporation.

Larry R. McElhaney, II, Nashville, Tennessee, for the appellee, Timothy Cook.

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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

Facts and Procedural Background

On November 20, 2007, Timothy Cook (the "Employee") injured his right biceps while working on a powertrain assembly line at General Motors Corporation's ("GM") Spring Hill manufacturing plant. Prior to his injury, he made $28.76 per hour, plus an additional fifty cents per hour for his status as a team leader. His treating physician, Dr. Jeffrey Adams, assigned a 9% anatomical impairment to the right upper extremity. At the request of the Employee's attorney, Dr. Robert Landsberg, another orthopedic surgeon, examined the Employee, performed an independent medical evaluation, and assigned a 10% anatomical impairment. On May 5, 2008, following surgery, the Employee returned to his position at the Spring Hill plant, where he resumed his duties at his pre-injury wage of $28.76 per hour. He voluntarily chose to relinquish his team leader title and responsibilities, thereby forfeiting the extra fifty cents per hour he made prior to his injury.

Thirteen months later, on June 1, 2009, GM filed a voluntary petition for bankruptcy. GM offered the testimony of Russell Bratley, a twenty-year veteran of the finance department, who had intimate familiarity with GM's decision-making process in the time leading up to the initiation of bankruptcy proceedings. Bratley testified that after careful consideration about the various bankruptcy options available, GM chose to undergo a Section 363 sale:[2]

> [I]t was important for the company that we get through bankruptcy as quickly as possible. And looking at the different scenarios of bankruptcy, because of the ability to sell the majority of assets to a new company . . . that would be created under the 363 scenario, that one seemed to be the quickest way to get through bankruptcy.

Bratley stated that under the Section 363 sale, a new company, NGMCO, Inc. ("NGMCO"), was formed for the express purpose of purchasing a majority of GM assets. Among the assets transferred to NGMCO were "plants, properties, equipment, intellectual property, all the assets that would be necessary for the new company to be viable." NGMCO also assumed some of GM's liabilities, including liability for all workers' compensation claims in Tennessee. Bratley testified that as a result of the bankruptcy sale, GM was able to reduce its debt by approximately 26 billion dollars.

The newly-formed NGMCO, which later changed its name to General Motors Company ("GM Company"), emerged from bankruptcy on July 10, 2009. That same day,

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[2] See generally 11 U.S.C. § 363 (2004 & Supp. 2010).

all GM employees, including the Employee, automatically became GM Company employees. They continued to work at the same locations, perform the same tasks, and receive the same rate of pay, but were simply working for the newly-created GM Company, rather than the defunct GM.

The differences between GM and GM Company extend beyond their names and creation dates. Whereas GM, now known as Motors Liquidation Corporation, was a publicly-traded company, GM Company was, until recently, privately-owned by a number of different entities, including "the U.S. Government, the Canadian Government, the UAW VEBA trust . . . and Motors Liquidation Corporation."[3] The two companies have different boards of directors and federal employment identification numbers.

In November of 2009, GM Company chose to transfer the manufacture of the "Traverse" vehicle to Lansing, Michigan, resulting in significant layoffs at the Spring Hill plant. The Employee and roughly half of the Spring Hill workforce were laid off. At that point, the Employee sought to transfer to a position within the company at another location. He applied to work at a number of plants throughout the Midwest, including facilities in Indiana, Michigan, Ohio, and Kentucky. Pursuant to GM Company policy, requests for transfers take into account a number of criteria, including the employee's seniority status and the availability of positions at the employee's requested location. The Employee accepted the first offer that he received, a position at a GM Company plant in Kansas City. His rate of pay at the Kansas City plant was $28.71 per hour, $.05 per hour less than his pay at Spring Hill had been after he had given up the position of team leader.

On March 12, 2009, prior to GM's initiation of bankruptcy proceedings, the Employee filed a workers' compensation claim against GM seeking benefits for the injury to his right biceps. Following the Section 363 sale of GM, the Employee filed a motion for partial summary judgment arguing that the one and one-half times medical impairment statutory cap established by Tennessee Code Annotated section 50-6-241(d)(1)(A) (2008 & Supp. 2010) should not apply to him because GM's bankruptcy sale precluded his return to work, and thus he did not return to work for his pre-injury employer.[4] The trial court, relying on our

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[3] On November 17, 2010, GM Company conducted one of the largest initial public offerings in American history, resulting in the sale of approximately 550 million shares at an estimated price of $18.1 billion. As a result of the IPO, the United States Treasury hoped to decrease its ownership of the company from 61% to 26%. Sharon Terlep & Randall Smith, GM Stock Sale in High Gear, The Wall Street Journal, Nov. 18, 2010, http://online.wsj.com/article/SB10001424052748704648604575620833385520438.html.

[4] Section 50-6-241(d)(1)(A) provides:

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Supreme Court's decisions in Perrin v. Gaylord Entertainment Co., 120 S.W.3d 823 (Tenn. 2003), and Barnett v. Milan Seating Systems, 215 S.W.3d 828 (Tenn. 2007), granted the Employee's motion, ruling that the Employee was no longer working for his pre-injury employer and that, in consequence, the statutory cap did not apply. The case proceeded to trial and, at the conclusion of the proceedings, the trial court ruled that because the Employee was laid off from Spring Hill and thereafter accepted a lower-paying position at a GM Company plant in Kansas City, he did not return to work at an equal or greater rate of pay. Thus, even if GM Company had qualified as the pre-injury employer, the Employee, because he was not compensated at a wage equal to or greater than his pre-injury wage, did not experience a meaningful return to work.

In this appeal, GM contends that the trial court erred by failing to apply the one and one-half times medical impairment statutory cap pursuant to section 50-6-241(d)(1)(A). GM argues that the trial court's reliance on Perrin and Barnett was misplaced, given the unique circumstances of the bankruptcy sale and our General Assembly's recent amendment to our workers' compensation laws. GM also advances the argument that the insignificant decrease in the Employee's wages after his transfer to Kansas City did not preclude a meaningful return to work.

Standard of Review

Review of a trial court's findings of fact in a workers' compensation case is de novo, accompanied by a presumption of correctness, unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). "This standard of review requires us to examine, in depth, a trial court's factual findings and conclusions." Nichols, 318 S.W.3d at 359 (quoting Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008)). Considerable deference must be afforded credibility or factual determinations by the trial judge when he or she has had an opportunity to hear in-court testimony and observe the demeanor of the witnesses. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). We need not afford the same deference,

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[4](...continued)

> 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 . . . , 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 the injury, the maximum permanent partial disability benefits that the employee may receive is one and one half (1½) times the medical impairment rating . . . .

Where an employee does not return to work for his pre-injury employer or at a wage equal to or greater than the employee's pre-injury wage, the applicable cap is six (6) times the impairment rating. See Nichols v. Jack Cooper Transp. Co., 318 S.W.3d 354, 361 n.1 (citing Tenn. Code Ann. § 50-6-241(d)(2)(A)).

however, to findings based on documentary evidence, such as depositions. Trosper v. Armstrong Wood Prods., 273 S.W.3d 598, 604 (Tenn. 2008). Our standard of review of questions of law is de novo with no presumption of correctness. Wilhelm, 235 S.W.3d at 126.

Analysis

The primary question is what effect the sale of GM through bankruptcy had upon the applicability of the lower statutory cap of one and one-half times the medical impairment rating. Our supreme court's holdings in Perrin and Barnett are established precedent. In Perrin, an employee was injured while working for The Nashville Network, which was owned by Gaylord Entertainment Company. 120 S.W.3d at 824. In October of 1997, a few months after the employee returned to work, The Nashville Network was purchased by CBS Corporation. Id. at 825. In March of 1998, the employee settled his workers' compensation claim with Gaylord. Id. Nine months later, he was terminated by CBS. Id. In September of 1999, he filed for reconsideration of his award against Gaylord. Id. After determining that "an application for reconsideration must be made within one year of the employee's loss of employment with the pre-injury employer and not within one year of the loss of employment with a later or successor employer," id. at 826, our supreme court held that a successor entity is not the same as an employee's pre-injury employer for purposes of the Tennessee Workers' Compensation Act. Id. at 827. Because the employee did not file for reconsideration within one year of the date of CBS's purchase of Gaylord, the date he lost his employment with his pre-injury employer, his application for reconsideration of benefits was not timely filed. Id.

Similarly, in Barnett, an injured employee filed a claim for workers' compensation against her employer. 215 S.W.3d at 830. After the filing of the complaint, but prior to trial, the employer was purchased by a separate entity. Id. The trial court ruled that the employee was, in effect, still working for her pre-injury employer at the time of trial and, therefore, was subject to the lower statutory cap established by section 50-6-241(d)(1)(A). Id. at 831. The supreme court reversed, reaffirming the rule established in Perrin and holding that "an employee is no longer working for his or her pre-injury employer if that company is purchased by a new entity, and [that] this is so even if that employee is performing the same job duties at the same rate of pay at the same location." Id. at 833 (citing Perrin, 120 S.W.3d at 827). As a result, the employee's recovery was not limited by the lower statutory cap. Id. The Barnett Court found support for its conclusion by noting that the General Assembly, after the decision in Perrin, had amended parts of section 50-6-241, but had not altered the Court's interpretation of the statutory term "pre-injury employer." Id.[5]

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[5] "In 2004, the General Assembly passed a sweeping overhaul of the workers' compensation statutes (continued...)

Although a sale in bankruptcy is different from the transactions conducted in Perrin and Barnett, these facts fit squarely within the rule announced in those decisions. The record demonstrates that through the Section 363 sale, GM, the Employee's original employer, was purchased by a new entity which later became known as GM Company. Indeed, GM representative Russell Bratley confirmed the nature of the new transaction, testifying that "the majority of the assets of General Motors Corporation were sold to a new entity that was formed that eventually became General Motors Company." According to Bratley, the "new company . . . was formed in order to purchase the assets and take on the certain liabilities from General Motors Corporation."

As the holding in Barnett confirms, it is immaterial that, following the transaction, the Employee continued to perform "the same job duties at the same rate of pay at the same location." 215 S.W.3d at 833 (citing Perrin, 120 S.W.3d at 827). Despite the similarity in names, GM Company is an entirely separate entity from GM. As a result, this Panel must conclude that the Employee did not return to work for his pre-injury employer following the bankruptcy sale. Because the Employee cannot be classified as having had a meaningful return to work, the lower statutory cap outlined in Tennessee Code Annotated section 50-6-241(d)(1)(A) does not apply to his benefits.

Of note, the General Assembly has recently amended our workers' compensation law so as to cast considerable doubt on the precedential value of the rulings in Perrin and Barnett:

> Notwithstanding any other law to the contrary, for injuries occurring on or after July 1, 2009, if an injured employee receives permanent partial disability benefits for body as a whole injuries or if the injured employee receives permanent partial disability benefits for schedule member injuries pursuant to subdivision (d)(1)(A) and the pre-injury employer is sold or acquired subsequent to the receipt of the permanent partial disability benefits, then the injured employee shall not be entitled to seek reconsideration . . . .

Act of June 5, 2009, ch. 364, § 1, 2009 Tenn. Pub. Acts ___, ___ (codified at Tenn. Code Ann. § 50-6-241(d)(1)(C)(i)).[6] As a separate panel has recently concluded, this amendment

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. . . ." Nichols, 318 S.W.3d at 360; see Act of May 20, 2004, ch. 962, 2004 Tenn. Pub. Acts 2346-74. With regard to section 50-6-241, "the Act reduced the cap on permanent partial disability benefits to 1.5 times the impairment rating when the employee has returned to his place of employment at the same or greater wage[,]" and "placed specific limitations on a request for reconsideration." Id. at 360-61 (citations omitted).

[6] By its terms, the 2009 amendment only applies to claims for reconsideration. Because, however,
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"essentially abrogat[es] Perrin and Barnett." Day v. Zurich Am. Ins., No. W2009-01349-WC-R3-WC, 2010 WL 1241779, at *3 (Tenn. Workers' Comp. Panel Mar. 31, 2010). GM, pointing out our supreme court's acknowledgment of legislative inaction in the Barnett case, argues that this Panel should now defer to the intent of the legislature, as embodied by the 2009 amendment. As observed in the decision in Day, however, a panel is obligated to follow established precedent. Id. ("Obviously, it is not within the power of this panel to [overrule Perrin and Barnett].").

Of equal significance, the amendment applies only to those "injuries occurring on or after July 1, 2009." Tenn. Code Ann. § 50-6-241(d)(1)(C)(i) (emphasis added). As the panel in Day properly recognized, the plain language of the amendment demonstrates a legislative intent for prospective application only – to injuries occurring on or after July 1, 2009. 2010 WL 1241779, at *3; see also Meeks v. Hartford Ins. Co. of the Midwest, No. W2009-01919-WC-R3-WC, 2010 WL 3398835, at *3 (Tenn. Workers' Comp. Panel Aug. 30, 2010); Tomlinson v. Zurich Am. Ins., No. W2009-01350-WC-R3-WC, 2010 WL 3418319, at *2 (Tenn. Workers' Comp. Panel Aug. 30, 2010). Because the Employee's injury occurred on November 20, 2007, it is outside of the scope of the amendment. Accordingly, Perrin and Barnett control the disposition of this claim. Because the Employee did not return to work for his pre-injury employer, the trial court did not err by choosing to impose a multiplier in excess of one-and-one-half times the medical impairment rating.

In light of our decision concerning the effect of GM's bankruptcy sale on the Employee's meaningful return to work, we decline the opportunity to address whether the Employee, whose pay was reduced by only $.05 per hour, was, in substance, compensated at a rate of pay equal to or greater than his pre-injury wage as a result of his transfer to Kansas City.

Conclusion

The judgment of the trial court is affirmed. Costs of this appeal are taxed to the Defendant, General Motors Corporation, for which execution may issue if necessary.

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GARY R. WADE, JUSTICE

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[6](...continued)
"[o]ur courts have applied a similar [meaningful return to work] analysis to interpret and apply the benefits cap and reconsideration provisions," Nichols, 318 S.W.2d at 361, the amendment will necessarily have an influence on the interpretation of the term "pre-injury employer" when determining whether the lower statutory cap should be applied to an initial claim for benefits pursuant to section 50-6-241(d)(1)(A).