IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
May 22, 2017 Session

JAMES TUCKER v. TREE & SHRUB TRUCKING, INC., ET AL.

Appeal from the Chancery Court for Coffee County
No. 2014-CV-281 L. Craig Johnson, Judge

No. M2016-01898-SC-R3-WC – Mailed July 21, 2017
Filed August 29, 2017

James Tucker was employed as a truck driver by Tree & Shrub Trucking, Inc. ("Employer") from 2006 until 2014. In 2012, Mr. Tucker sustained a compensable lower back injury. After having surgery, he was able to return to work for Employer. His claim for permanent partial disability benefits was settled, based on one and one-half times the anatomical impairment. Tenn. Code Ann. § 50-6-241(d)(1)(A) (applicable to injuries occurring prior to July 1, 2014). In January 2014, Mr. Tucker had a dramatic increase in his symptoms while bending over to fuel his truck. A claim for a new injury was filed after he was examined by his treating physician. Employer's workers' compensation insurer had changed between the two incidents. Each insurer contended that the other was liable for Mr. Tucker's claim. Mr. Tucker was not able to return to work for Employer. Ultimately, Mr. Tucker settled his claim with the second insurer ("Praetorian"). He pursued a claim for reconsideration of the previous settlement against Employer and the first insurer ("Berkley Risk"). The trial court found that Mr. Tucker was entitled to reconsideration and awarded additional benefits of four times the anatomical impairment. Employer 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 trial court's judgment.

Tenn. Code Ann. § 50-6-225(e) (2014) (applicable to injuries occurring prior to July 1, 2014) Appeal as of Right; Judgment of the Chancery Court Affirmed

ROBERT E. LEE DAVIES, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J. and PAUL G. SUMMERS, SR. J., joined.

Michael W. Jones and Fred J. Bissinger, Nashville, Tennessee, for the appellants, Tree & Shrub Trucking, Inc., and Praetorian Insurance Company.

Joseph E. Ford, Winchester, Tennessee, for the appellee, James Ronald Tucker.

OPINION

Factual and Procedural Background

James Tucker is a high school graduate. After graduating high school, Mr. Tucker enlisted in the United States Navy where he served more than eighteen years as a nuclear weapons technician. After leaving the Navy, he worked short stints as a plumber's helper, lawn care provider, production line worker, and salesman for a cemetery. He also operated a "chicken house" as an independent contractor with Tyson Foods for five years before he began working as a truck driver in 1996. In February 2006, Mr. Tucker hired on with Employer, driving a flatbed truck, carrying trees and shrubs to various locations throughout the country. He also was required to tarp, chain, and bind his freight.

In April 2012, Mr. Tucker injured his lower back while lifting a tarp which weighed approximately one hundred fifty pounds. He was treated by Dr. George Lien, a neurosurgeon in Murfreesboro. Dr. Lien diagnosed Mr. Tucker with a herniated disc at the L4-5 level. When conservative treatment failed, Dr. Lien performed a lumbar discectomy. He opined that Mr. Tucker reached maximum medical improvement on December 19, 2012, and assigned a 12% permanent impairment to the body as a whole. Dr. Lien authorized Mr. Tucker to return to work; however, he imposed restrictions of no frequent lifting greater than twenty-five pounds, no occasional lifting greater than fifty pounds, and no prolonged sitting for more than three hours.

Employer accommodated Mr. Tucker's restrictions by allowing him to drive a refrigerated truck, which required significantly less lifting than driving a flatbed truck with tarps. Mr. Tucker settled his claim for permanent disability with Employer and Praetorian Insurance for 18% permanent disability and continued working for Employer.

In the course of that work, Mr. Tucker stopped, on January 17, 2014, in Cullman, Alabama to refuel his truck. As he stood up from refueling, he experienced a sharp pain in his lower back in approximately the same area of his first injury. He immediately called Terry Gallagher, the president of Employer, and explained he had hurt his back while refueling. Both Mr. Gallagher and Mr. Tucker initially believed Mr. Tucker had

aggravated his prior injury. Mr. Gallagher instructed Mr. Tucker to contact the claims adjuster for the 2012 claim to arrange for medical care. Employee did so and received authorization to return to Dr. Lien on February 11, 2014. In the interim, Mr. Tucker continued to drive for Employer; however, his pain continued to increase to the point that, on February 7, 2014, Mr. Tucker contacted Terry Gallagher and told him he could not continue to drive. Mr. Gallagher instructed Mr. Tucker to return the truck to the office. Mr. Tucker responded that he would drive the truck home over the weekend, clean it, and return it after his appointment with Dr. Lien on February 11th. At the time of this conversation, Mr. Tucker believed that he still had a driving job with Employer, so long as he was able to return to work. This was Employer's standard procedure whenever drivers were unable to work due to illness or injury and was the procedure Mr. Tucker had followed after his 2012 injury.

However, after his appointment with Dr. Lien on February 11, 2014, Mr. Tucker believed that the January 17, 2014 incident was a new injury. He communicated this belief to Mr. Gallagher, and they filed a first report of injury with Berkley Risk Management, which provided Employer's workers' compensation coverage at that time.

At the February 11, 2014 visit, Dr. Lien found Mr. Tucker's main symptoms were bilateral leg pain radiating primarily on the anterior aspect of his thigh, which differed from his symptoms after the 2012 injury. Dr. Lien's diagnosis was lumbar radiculopathy, which was a change from Mr. Tucker's condition in December 2012. Dr. Lien prescribed physical therapy, ordered an MRI of the lower back, and instructed Mr. Tucker not to return to work at that time. When Employee returned to Dr. Lien's office on April 4, 2014, Dr. Lien indicated the MRI showed post-operative changes at the L4-5 level, with some slippage of the L4 vertebra over the L5—a condition known as spondylolisthesis. Dr. Lien also noted a narrowing of the openings from which the peripheral nerves leave the spine as well as degenerative changes at the L3-4 and L5-S1 levels. Dr. Lien recommended epidural steroid injections, but, unfortunately, Employee did not receive the injections due to a dispute between Praetorian and Berkley Risk Management over liability.

In May 2014, Mr. Tucker met with Mr. Gallagher. Dr. Lien still had not released Mr. Tucker to return to driving a truck; however, Mr. Tucker's financial condition had become dire. Mr. Tucker had not received temporary total disability benefits because the two workers' compensation insurance carriers were disputing liability. Mr. Tucker asked Mr. Gallagher if Employer had any kind of job that he could do. Mr. Gallagher responded that if Mr. Tucker could not drive a truck, then Employer did not need him. Mr. Tucker then resigned and asked for his "escrow" money, which Employer had withheld from his earnings in the event he resigned without notice.[1]

[1] The money in escrow amounted to $750.

The trial court conducted a hearing on October 6, 2014, to determine which insurance carrier was responsible for Mr. Tucker's medical treatment. Both Mr. Tucker and Mr. Gallagher testified at that hearing; however, upon the conclusion of the hearing, the trial court requested the parties to submit Dr. Lien's deposition. Dr. Lien was deposed on December 17, 2014, and on April 13, 2015, the trial court issued an order directing Praetorian Insurance Company to provide coverage for Mr. Tucker's medical care.

On March 20, 2015, Mr. Tucker returned to Dr. Lien for treatment of continuing back pain and thigh pain. Dr. Lien again ordered epidural steroid injections. When Mr. Tucker saw Dr. Lien on May 1, 2015, his thigh pain had resolved, but he continued to have lower back pain. Dr. Lien was deposed a second time on October 28, 2015, and opined that the injury in January 2014 occurred when Mr. Tucker bent down to refuel his truck. However, Dr. Lien agreed that the 2012 injury and surgery accelerated the degenerative process at L4-5. Dr. Lien characterized Mr. Tucker's back pain as chronic and said that he could not provide any other treatment for Mr. Tucker. As a result, Dr. Lien opined that Mr. Tucker had sustained an additional 3% whole body impairment from the 2014 injury. Dr. Lien imposed a twenty-five pound lifting restriction and reaffirmed that Mr. Tucker would be unable to continue as a commercial truck driver. Finally, while Dr. Lien agreed the 2014 injury did not result in an anatomical change at L4-5, Dr. Lien emphasized that Mr. Tucker had been able to work as a truck driver prior to the January 2014 injury, but was not able to do so afterwards.

Prior to the trial of this case, Mr. Tucker settled his claim against Berkley Risk Management (Employer's insurer on January 17, 2014) for $30,000. The case proceeded to trial against Praetorian and Employer on July 11, 2016. At the time of trial, Mr. Tucker was fifty-nine years old. Although he always intended to return to work, he had been unemployed since February 7, 2014. He used a back brace and a cane prescribed by the Veterans Administration. He was unable to sit for very long before experiencing spasms in his low back, and sometimes the spasms ensued after as little as fifteen-to-thirty minutes of sitting. He was no longer able to hunt and fish and has difficulty carrying groceries. He also had difficulty sleeping at night because of spasms in his back and legs. Mr. Tucker spent much of each day sitting in a recliner with his feet elevated. His pain remained constant, although he used some unidentified medication prescribed by the Veteran's Administration.

After taking the case under advisement, the trial court issued its written ruling on August 11, 2016, finding that Mr. Tucker's voluntary resignation was related to his work injury, and, therefore, concluding that Mr. Tucker was eligible for reconsideration of the settlement of his 2012 claim. The trial court awarded Mr. Tucker an additional 48% permanent partial disability to the body as a whole and entered its final judgment on August 22, 2016. On September 14, 2016, Employer timely appealed, contending that

the trial court had erred by holding that Mr. Tucker was entitled to reconsideration of the settlement of his prior claim.

Standard of Review

In workers' compensation cases, appellate courts "review the trial court's findings of fact de novo accompanied by a presumption of correctness unless the evidence preponderates otherwise." Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). While the reviewing court must conduct an in depth examination of the trial court's factual findings and conclusions, Id. (citing Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)), considerable deference must be afforded to the trial court's factual findings, Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be accorded to the trial court's findings based on documentary evidence such as depositions. Glisson v. Mohon Intern., Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). Likewise, there is no presumption of correctness to a trial court's conclusions of law. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Employer argues that Employee voluntarily resigned his position prior to treatment and did not afford Employer with any reasonable opportunity to accommodate his restrictions, which were unknown at the time of his resignation in May 2014.

In Clark v. Lowe's Home Ctrs., 201 S.W.3d 647 (Tenn. 2006), the employee was injured and sought reconsideration for prior awards when he was unable to return to work because of a subsequent work-related injury. The court found that a "worker does not forfeit his right to reconsideration simply because he is unlucky enough to have a subsequent work-related injury. Adopting a contrary rule would be inconsistent with both the principles of statutory construction and the remedial nature of the Workers' Compensation Law." Id. at 651. Tennessee Code Annotated section 50-6-241(d)(1)(B)(iii), states:

> (iii) Notwithstanding this subdivision (d)(1)(B), under no circumstances shall an employee be entitled to reconsideration when the loss of employment is due to either:
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> > (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.

Tenn. Code Ann. § 50-6-241(d)(1)(B)(iii). Employer argues that Mr. Tucker voluntarily resigned and therefore is not entitled to reconsideration of the award for his first injury. We disagree.

In Tryon, our Supreme Court established the framework for analyzing the effect of resignation and retirement in cases involving the issue of reconsideration:

> 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.
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> 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. Accordingly, the multiplier in Tenn. Code Ann. § 50-6-241(b) is applicable. 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 which triggers the two and one-half multiplier allowed by Tenn. Code Ann. § 50-6-241(a)(1).

Id. at 328-29.

Mr. Tucker had been unemployed since February 7, 2014, as a result of the January 2014 incident. His authorized physician had restricted him from driving a commercial truck as of February 11, and that restriction was still in place as of May 2014 when Mr. Tucker and Mr. Gallagher met. Because of the dispute between the two insurance carriers, Praetorian and Berkley, Mr. Tucker was not receiving temporary disability benefits. He needed money to pay his regular living expenses, and the purpose of his meeting was to ask Mr. Gallagher if there was any work available. Mr. Gallagher was unequivocal that the only work available was driving a truck. It was only after this conversation that Mr. Tucker elected to resign and request his escrow money.

Under these circumstances, we conclude that Mr. Tucker's decision to resign was reasonably related to his work place injury and that he did not have a meaningful return to work. At the same time, we do not find that Employer acted unreasonably. The only work Employer had available for Mr. Tucker was driving a commercial truck, which Mr. Tucker was unable to perform. Although Dr. Lien's testimony was at times somewhat ambiguous, he ultimately concluded that the January 2014 injury was a symptomatic aggravation of the April 2012 injury. This aggravation caused Mr. Tucker to suffer chronic low back pain, which resulted in Dr. Lien imposing a permanent restriction of no commercial driving.

The trial court found that Mr. Tucker's resignation clearly resulted from his work-related injury and that Dr. Lien had testified unequivocally that Mr. Tucker could not drive a commercial truck as of April 2014. We cannot conclude that the evidence preponderates against the trial court's finding that Employee was entitled to reconsideration of his settlement of the 2012 claim.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Tree & Shrub Trucking, Inc. and Praetorian Insurance Company, and their surety, for which execution may issue if necessary.

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ROBERT E. LEE DAVIES, SR. JUDGE