IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 20, 2017 Session

WILLIAM H. LEWIS v. STATE OF TENNESSEE

Appeal from the Tennessee Claims Commission
Nos. 30101267730, 20050730997, 20070317590, 20070248226
William O. Shults, Commisioner

Nos. M2016-00738-SC-R3-WC – Filed August 8, 2017

William Lewis ("Employee") worked for the Tennessee Department of Transportation ("TDOT") as a Highway Maintenance Worker I from 2002 until June 2010. During the course of his employment, he sustained compensable injuries to his right shoulder, left shoulder, and right eye. The claims arising from these injuries resulted in settlements or awards, all of which provided that Employee retained a right to reconsideration pursuant to Tennessee Code Annotated section 50-6-241(d). On May 24, 2010, Employee collapsed while flagging traffic. He stated that his knees gave out at that time. Employee subsequently filed a claim for bilateral knee injuries, and petitions for reconsideration of the three previous settlements. After hearings on June 14, 2014, and December 7, 2015, the Commission issued a written decision. The Commission awarded ninety percent (90%) permanent partial disability to both legs for the May 24, 2010 injury, but declined to award additional benefits for the reconsideration claims. TDOT has appealed from the Commission's decision pertaining to Employee's knee injuries, and Employee has appealed from the decision to deny additional benefits on the reconsideration claims. 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 on the award of disability to the legs, but reverse on the reconsideration claims and remand to the Commission to recalculate Employee's disability regarding his shoulders.

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

affirmed in part; reversed in part; and remanded to the Commission for further proceedings

ROBERT E. LEE DAVIES, SR. J., delivered the opinion of the court, in which JEFFREY S. BIVINS, C. J. and WILLIAM B. ACREE, J., joined.

Herbert H. Slatery, III, Attorney General and Reporter, Andrée Blumstein, Solicitor General, and Heather C. Ross, Senior Counsel, for the appellant, State of Tennessee.

Rocky McElhaney and Justin Hight, Nashville, Tennessee, for the appellee, William H. Lewis.

OPINION

Procedural Background

This case involved a somewhat complicated procedural history and consists primarily of two components. The first component is Employee's claim for reconsideration for three separate injuries. The second component is a claim for a new injury to both of his knees.

In the first prior claim, Employee sustained an injury to his left shoulder which required surgery. Mr. Lewis was fifty-nine years old at the time he was injured. His treating physician gave Mr. Lewis a six percent (6%) permanent partial impairment to the body and an independent medical examiner gave Mr. Lewis a thirteen percent (13%) impairment rating. Mr. Lewis returned to work from this injury, and reached an agreed settlement of eighteen percent (18%) permanent partial disability to the body as a whole.

Employee's second claim occurred on February 26, 2007, when he suffered a laceration to the right side of his face, including his eyebrow. This injury was caused by a third-party defendant, and Mr. Lewis was sixty-one years old at the time. Mr. Lewis was given a seven percent (7%) permanent partial disability to the body as a whole; however, in return for the State waiving its subrogation lien against the third-party defendant, Mr. Lewis agreed to accept $5,500. He returned to work after this injury.

Employee's third claim occurred when Mr. Lewis overused his right shoulder which resulted in a gradual injury that required surgery in April 2007. This claim was contested, and on December 18, 2009, a judgment was entered by the Tennessee Claims

Commission which found that Mr. Lewis had suffered a thirteen percent (13%) impairment to the whole person and a 19.5% permanent partial disability to the body as a whole. Mr. Lewis was sixty-two years old at the time of this trial and was still working as a highway maintenance worker I for TDOT.

On May 24, 2010, Mr. Lewis claimed that he sustained compensable injuries to both knees while he was part of a crew, flagging traffic at a work zone on Highway 70 South in Davidson County. On August 2, 2012, Employee filed a complaint alleging that he was not offered a meaningful return to work at TDOT following his bilateral knee injuries and surgeries. Since he was still within four hundred weeks of each of his three prior judgments, he claimed he was entitled to reconsideration on the three prior cases, in addition to his current claim for the injuries to his knees.

There was an initial hearing on June 4, 2014, before Commissioner Robert N. Hibbett; however, before Commissioner Hibbett ruled, he recused himself as a result of a motion to enforce a settlement filed by Employee's counsel. The case was then transferred to the Eastern Division which conducted a second hearing on December 7, 2015. The second hearing also included the transcript from the hearing on June 4, 2014. On March 7, 2016, the Claims Commission, through Commissioner William O. Schults, issued a judgment in favor of Employee regarding his new claim for injuries to his knees; however, the Commissioner denied Employee's claim for reconsideration for his three prior workers' compensation cases. Both the State and Mr. Lewis have appealed the decision of the Claims Commission.

Facts

Employee, William Lewis, left the Tennessee Preparatory School at age seventeen, before finishing the eighth grade. He then served in the military for five months but received an honorable discharge because he was not able to adjust to military life at the age of seventeen. After leaving the Army, Mr. Lewis began working for 84 Lumber for three years driving a truck and working as a laborer. For the next seventeen years, Employee worked as a laborer and truck driver for Tyson Foods. After leaving Tyson, he obtained employment with TDOT as a maintenance worker I. During the nine and one half years Mr. Lewis worked for TDOT, he drove a dump truck, pulled brush, patched potholes, and performed flag work and other maintenance on roads and highways.

The facts are undisputed regarding the three prior injuries which were up for reconsideration by the Commission. In July 2005, Mr. Lewis injured his left shoulder. He returned to work from this injury and agreed to a settlement of eighteen percent (18%) permanent partial disability to the body as a whole by an agreed order entered February

20, 2007. On February 26, 2007, Mr. Lewis suffered an injury to his right face and eyebrow caused by a third-party tort feasor. His claim was likewise settled when the State waived its right to subrogation against the third-party tort feasor. Mr. Lewis filed a third claim for compensation for a gradual injury to his right shoulder as a result of overcompensating for his left shoulder injury. The State contested this claim, and on December 18, 2009, the Commission entered a judgment in favor of Mr. Lewis, finding he had suffered a 19.5% disability to the body as a whole.

Mr. Lewis returned to work after all three of these injuries. He testified that even though he had permanent restrictions, he was able to meet his job obligations because his co-workers performed the more physically demanding assignments. Specifically, Employee's co-workers volunteered to patch potholes on his behalf which allowed Mr. Lewis to take an easier task.

The New Injury

Although Employee's knees did not bother him before he started working for TDOT, as time went on, standing on pavement for long hours began to take a toll. In 2008, Dr. Scott Dube performed arthroscopic surgery on Mr. Lewis' left knee, and he returned to work. Finally, on May 24, 2010, Mr. Lewis was with a crew working on Highway 70 South in Davidson County. Mr. Lewis' assignment was to hold the sign, signaling traffic to either proceed slowly or stop. After working approximately five hours without a break, Mr. Lewis testified his "legs just went out from under me," and he collapsed to the ground. He contacted his crew chief by radio to request assistance; however, she was unable to relieve him because the crew was already shorthanded on that day. Mr. Lewis was able to crawl back to his truck and continue flagging for forty-five minutes. He then contacted the crew chief and said he could not continue and drove back to the shop. At the shop, he testified he reported his injury to his supervisor, David Bowker.

Mr. Lewis saw Dr. Scott Dube that same day. Dr. Dube had previously treated Mr. Lewis for his right shoulder injury and his left knee. Dr. Dube ordered an MRI of the right knee. The MRI showed a meniscal tear, arthritis and swelling of the joint. On June 16, 2010, Mr. Lewis was evaluated by Dr. William Gavigan at the request of TDOT. Dr. Gavigan attributed Mr. Lewis' right leg symptoms to his 2005 injury, and he also found Mr. Lewis had bilateral osteoarthritis of the knees.

At approximately the same time, Mr. Lewis filed a request for benefits with the State's Sick Leave Bank. The application asked if a work related injury was the cause of the request since absence due to work injuries were not eligible for Sick Leave Bank benefits. Employee responded "no" to that question and gave the same response on

several similar forms during the following months. On each application Dr. Dube also certified that Employee's injuries were not work related; however, on October 29, 2010, Dr. Dube sent a corrected certification, stating that the knee injuries were, in fact, work related. By that time Employee had received the maximum Sick Leave Bank benefit of ninety days.

Dissatisfied with Dr. Gavigan's opinion, Mr. Lewis returned to Dr. Dube, who ordered additional MRI's of the right leg in September and November, 2010. Dr. Dube testified Employee's knee injuries occurred gradually over time and as a result of repetitive job duties with TDOT. Dr. Dube performed a replacement of Employee's right knee on December 21, 2010, and opined that Mr. Lewis should have reached maximum medical improvement by May 2011. With regard to the left knee, Dr. Dube had performed orthoscopic surgery in December 2008 as a result of a meniscal tear. X-rays performed in October 2011, indicated severe arthritis in the left knee and joint space loss which had progressed from June 2008 to October 2011. Dr. Dube indicated the progression of the arthritis and loss of joint space was an anatomical change caused by Employee's work at TDOT. Dr. Dube performed a total left knee replacement on March 6, 2012, and indicated Employee reached maximum medical improvement on the left knee in October 2012.

Dr. Dube opined Mr. Lewis had a thirty-five percent (35%) impairment to the right knee and a thirty-five percent (35%) impairment to the left knee. He indicated Mr. Lewis would have additional permanent restrictions and he recommended that Mr. Lewis not return to TDOT as a maintenance worker and that he avoid frequent squatting, bending, crawling, and stooping. Ultimately, Dr. Dube recommended that Mr. Lewis apply for Social Security Disability benefits.

After Dr. Dube recommended to Mr. Lewis that he was unable to continue to perform his duties as a Maintenance Worker I, Mr. Lewis went to the regional human resource office at TDOT. He was informed that his initial paperwork from Dr. Dube was not satisfactory. He returned to Dr. Dube's office and received a more detailed explanation and returned with it to the HR department. The regional director of HR was Winston Gaffron, and the assistant regional director was David Layheu. Although it is not clear from the record whether it was Mr. Gaffron or Mr. Layheu, one of them told Mr. Lewis if an employee was not able to return to work, they would be terminated and that Mr. Lewis had the option of either retiring or he would be terminated. Acting on this advice, Mr. Lewis elected to retire.

Standard of Review

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(e)(2) (2014) (applicable to injuries occurring prior to July 1, 2014). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. 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. 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. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

The New Injury

The first argument advanced by the State is that Employee was rendered permanently and totally disabled from his prior injuries to his shoulders and face and therefore is not entitled to any additional benefit for the injuries to his knees. The State cites Princinsky v. Premier Mfg. Support Services, Inc., 2010 W.L. 3715636 (Sup. Ct. W.C. Panel 2010). Princinsky stands for the proposition that an employee who has a subsequent injury and a reconsideration case will not be allowed to receive more than the benefits for permanent and total disability if either the reconsideration case or the subsequent injury leaves the employee permanently and totally disabled. Id. The Commission disagreed that Mr. Lewis was permanently and totally disabled following all three of his prior injuries. In its detailed memorandum, the Commission found:

> The proof also shows that this man has done, simply put, really hard work. That work has included moving building supplies for 84 Lumber and working for Tyson Foods in Shelbyville. The Commission can barely envision work more distasteful than the work involved in preparing chickens for human consumption. Claimant also worked as a maintenance worker for TDOT, the lowest rung on the ladder of available jobs for that department. That too is extremely hard work carried out frequently in various sorts of inclement weather.
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> There is nothing in this record to indicate that Mr. Lewis has other than a stellar work history spanning some forty-six years before his retirement in March of 2011. Those who supervised him all testified

claimant was a hard worker. The Commission observed claimant at the December 7 trial and concurs in that opinion.

The proof in this record does not preponderate against the Commission's findings on this issue. His immediate supervisor, David Bowker agreed Mr. Lewis was a hard worker and an honest employee who was never written up. He worked for years after his surgeries to his shoulders. Other than his own testimony that his co-workers would volunteer to take his place on occasion when patching potholes, there was no other proof in the record that Mr. Lewis was not able and did not perform his duties as a maintenance worker. There was no testimony of any kind from a rehabilitation or vocational expert that Mr. Lewis was incapable of performing his duties after his shoulder surgeries. No special job was created for Mr. Lewis following his 2005 and 2007 injuries. To the contrary, the State did not offer any proof that it accommodated any of Mr. Lewis' restrictions from his physicians following his shoulder injuries.

Our Supreme Court has held that "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. In order for such a situation to occur, the evidence would have to show that the employee was not employable in the open labor market and that the only reason that the employee was currently working was through the magnanimity of his or her employer." Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 48 (Tenn. 2004). The proof in this case does not come close to the "extremely rare situation" envisioned by our Supreme Court that Mr. Lewis was only working because of the magnanimity of TDOT. The record establishes that Employee was able to perform strenuous labor, with occasional assistance, until July 2010.

As an alternative argument, the State contends Employee was rendered permanently and totally disabled after the 2010 total knee replacement to his right knee in conjunction with his prior injuries. Since Mr. Lewis was over sixty years of age at the time, he should be limited to 260 weeks of benefits. The State's argument is based upon the 260 week limit found at Tenn. Code Ann. § 50-6-207(4)(A)(i). This section of the statute applies to a finding of permanent total disability. In McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179 (Tenn. 1999), our Supreme Court addressed the very argument made by the State in this case. In that case, Russell Stover argued that Tenn. Code Ann. § 50-6-207(4)(A)(i) applied not only to injured workers over age sixty who suffered an injury to the body as a whole, but also to workers who suffered injury to a scheduled member. The Supreme Court found that "the 260 week cap set forth in Tennessee Code Annotated Section 50-6-207(4)(A)(i) applies to all injured workers over sixty who are awarded benefits under the Workers' Compensation Statute for permanent partial or permanent total disability." Id. (Citing Vogel v. Wells Fargo Guard Serv., 937 S.W.2d 856, 862 (Tenn. 1996), and the Court held that this section of the statute "applies

to workers over age sixty who suffered injuries to the body as a whole, whether permanent partial or permanent total, **but not to such workers who suffered scheduled member injuries**." McIlvain, 996 S.W.2d at 185 (emphasis added). The Commission noted that the injuries affected a scheduled member, two legs, as defined in Tenn. Code Ann. § 50-6-207(3)(A)(ii)(y). See Davis v. Reagan, 951 S.W.2d 766, 769 (Tenn. 1997).

The Commission then found that Employee was not permanently and totally disabled:

> Certainly, in light of Dr. Dube's testimony and Claimant's own opinion, Mr. Lewis' "capacity to work at types of employment" was severely limited. See Tenn. Code Ann. § 50-6-241(b).
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> However, we cannot turn a blind eye to the fact that Mr. Lewis supplemented his very modest income with TDOT by working as a weight guesser at carnivals in Tennessee and apparently, even since his retirement, for an extended period of time in Florida. The proof shows that Claimant has done that sort of work, and that his pay is calculated on twenty-five percent (25%) of the total "take" at the weight guessing booth. The proof also indicates, according to Dr. Dube, that Claimant could do jobs which could be performed while sitting. Admittedly, Mr. Lewis would not be capable of many sitting jobs because of his extremely limited education and reading comprehension skills. Nevertheless, giving his obvious strong motivation to work, the Commission believes that there is a relatively narrow band of jobs which this man is still capable of doing.

Because Employee's injury is to a scheduled member, the award of permanent disability benefits must be apportioned to that member. Davis, 951 S.W.2d at 769. As the Commission noted, Employee has limited education and has worked in unskilled, relatively heavy, jobs his entire life. Employee himself testified that he did not think he was capable of working after 2010. Such testimony is competent evidence which may be considered by the trial court in determining the extent of disability. Uptain Const. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975). On the other hand, Employee is a hard-working, motivated person who has managed to work on an intermittent basis subsequent to his injuries and retirement. Balancing these factors, we conclude that the evidence does not preponderate against the Commission's findings that Employee is not totally disabled, and that he retains a 90% permanent disability to both legs.

The final argument advanced by the State regarding the 2010 injuries is that the Commission erred in awarding benefits for Employee's left total knee replacement because Employee already had retired. This argument overlooks the fact that Mr. Lewis suffered a bilateral knee injury on May 24, 2010. This is a scheduled member injury to

both lower extremities and is one injury.

The Commission gave little weight to the records or opinions from Dr. Gavigan regarding Mr. Lewis' knee injuries. Instead, the Commission found that Dr. Dube's records and testimony were "quite clear that Mr. Lewis was suffering from serious knee problems on the date of his injury." Dr. Dube testified that the injuries to Mr. Lewis' right knee occurred gradually over time as a result of his repetitive job duties with TDOT. With regard to the left knee, Dr. Dube testified x-rays taken on October 19, 2011, showed severe arthritis and medial bone-on-bone which indicated Mr. Lewis had lost all of the joint space on the inside of his knee. He stated the arthritis and joint space loss had progressed over time since the previous knee arthroscopy in 2008 and that there was an anatomical change from that point until the x-rays on October 19, 2011.

The proof in this case does not preponderate against the Commission's finding that the bilateral knee injuries were the result of Mr. Lewis' employment as a maintenance worker for TDOT. Accordingly, the proof supports the Commissioner's award of temporary benefits for the bilateral leg injury. "In order to receive temporary total disability, an employee must prove that he was 1) totally disabled to work by a compensable injury; 2) that there was a causal connection between the injury and his inability to work; and 3) the duration of that period of disability." Simpson v. Satterfield, 564 S.W.2d 953, 955 (Tenn. 1978). Temporary total disability benefits "are terminated either by the ability to return to work or obtainment of maximum recovery." Id. at 955. Our courts have found that there are occasions when an employee is entitled to a second period of temporary total benefits. Wise v. Murfreesboro Health Care Center, 1994 W.L. 902477 (Tenn. Workers Comp. Panel July 25, 1994); Williams v. Witco Corp., 1993 W.L. 835601 (Tenn. Workers Comp. Panel December 30, 1993). In this case, Mr. Lewis worked up until June 7, 2010. Dr. Dube performed the right total knee replacement on December 21, 2010. Dr. Dube testified that Mr. Lewis would not have reached maximum medical improvement until May 2011 (approximately six months). However, his medical treatment was not complete at that time. Dr. Dube performed surgery on the left knee on March 6, 2012. He indicated Mr. Lewis would have reached maximum medical improvement in October 2012 (approximately seven months). We view the situation as comparable to cases in which temporary restrictions are placed on an injured employee, his employer is unable to accommodate those restrictions, and the employee continues to receive temporary disability benefits until he reaches maximum medical improvement. See Haake v. Saturn Corp., 2009 WL 3925399, at *2 (Tenn. Workers Comp. Panel Nov. 18, 2009); Cf. Brown v. Vintec Co., 2012 WL 3061026, *4 (Tenn. Workers Comp. Panel July 27, 2012). We affirm the trial court's award of temporary disability benefits for surgery and recovery associated with the left knee.

Reconsideration

Employee appeals from the Commission's denial of his three prior claims for reconsideration. The Commission ruled in this case that Mr. Lewis was not entitled to reconsideration in his three prior workers' compensation cases because he failed to prove that the State forced him to retire due to his prior injuries in 2005 and 2007. In other words, because Mr. Lewis failed to establish any connection between his three prior workers' compensation claims and his loss of employment in 2010-2011, he was not entitled to reconsideration.

Before we consider the Commission's conclusions of law on this issue, we first turn our attention to the Commission's findings of fact regarding the end of Mr. Lewis' employment with TDOT. The Commission found that the unrebutted proof was that Mr. Lewis was advised by officials at the highest level of the TDOT human resource regional office that he could either retire or be terminated once he provided them with Dr. Dube's letter that he was unable to perform his duties as a maintenance worker. Acting on this advice, Mr. Lewis elected to retire rather than be fired because he was unable to perform his job. As the Commission pointed out, had the State disputed this proof, one would have expected the State to rebut this proof through testimony of the HR officials (Winston Gaffron or David Layheu); however, neither official testified. Instead, the State called Mr. Lewis' immediate supervisor, David Bowker. Although Mr. Bowker did not remember any conversation with Mr. Lewis where he referenced his prior conversation with the officials at HR, he did not deny that the conversation did take place. Mr. Bowker concluded his testimony that Mr. Lewis was an honest employee and if Mr. Lewis testified he did have a conversation with Mr. Layheu at HR, then that is what happened. The Commission found Mr. Lewis' account of this event to be accurate, and there are no other facts to the contrary.

Although the issue in these cases turns on the 2004 amendments to Tenn. Code Ann. § 50-6-241(d)(1)(B)(iii), we first look to prior rulings of our Supreme Court regarding reconsideration. In Clark v. Lowe's Home Centers, 201 S.W.3d 647 (Tenn. 2006), the employee was injured in 2003 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. The Court concluded that a reconsideration award under Tenn. Code Ann. § 50-6-241(a)(2) was not precluded by a subsequent work-related injury. Id. at 651. In 2004, the Legislature amended the reconsideration statute. It provides in part:

(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:

(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).

In this case, the Commission focused on the fact that Mr. Lewis' resignation was not a result of the three prior work-related injuries which he was asking the Commission to reconsider. In doing so, the Commission overlooked the preceding word of the statute that required the resignation or retirement to be "voluntary". In other words, if the employee's resignation or retirement is not voluntary, then it makes no difference whether the employee's retirement or resignation results from his prior work-related disabilities.

In this case, the Commission found that Mr. Lewis' retirement was not voluntary and that Mr. Lewis did not have a meaningful return to work. In its memorandum, the Commission found:

> To be fair, both Claimant and Dr. Dube appear to agree that Claimant, following his knee replacement surgeries, was simply incapable of returning to the kind of work he had performed for the State over the course of nine and one half years. This consideration will factor into the Commission's decision concerning Claimant's Requests for Reconsideration of prior awards in the three earlier workers' compensation cases.
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> For present purposes, we agree that Mr. Lewis was not, and in all likelihood could not have been, offered a meaningful return to work . . . (emphasis added by the Commission).

Moreover, the Commission specifically found Mr. Lewis' retirement not to be voluntary, that in essence, he was told by the officials at HR to either retire or be fired.

Our interpretation of the 2004 amendment is supported in the decision set forth in Beshires v. Berkley Regional Ins. Co., 2010 W.L. 2482317 (Tenn. Workers Comp. Panel June 18, 2010). Mr. Beshires suffered a new injury for which he sought benefits and sought reconsideration of his previous workers' compensation settlement under Tenn. Code Ann. § 50-6-241(a)(2). He then retired shortly after his return to work from his

subsequent injury. The Special Workers' Compensation Appeals Panel noted that this case involved a voluntary retirement and cited Tryon v. Saturn Corp., 254 S.W.3d 321 (Tenn. 2008) which examined the application of the statutory caps in such situations:

> "[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 which triggers the two and one half multiplier allowed by Tennessee Code Annotated Section 50-6-241(a)(1)."

Tryon v. Saturn Corp., 254 S.W.3d at 328-29.

Turning to the employee's retirement, the Panel stated "in our view, if Mr. Beshires sustained a second work-related injury and did not have a meaningful return to work as a result of that injury, pursuant to the holding in Clark, he would be entitled to a reconsideration of the disability caused by his first injury without being limited by the caps contained in Tenn. Code Ann. § 50-6-241(a). Thus, the initial inquiry should be whether Mr. Breshires had a meaningful return to work following his second injury based upon the standard contained in Tryon . . . . We conclude that Mr. Beshires was able to return to work and received a promotion, but ultimately chose to retire. In our view, the evidence fails to establish that decision was based upon the shoulder injury sustained by him, but was for other reasons unrelated to his work injury. Accordingly, the finding of the trial court that Mr. Beshires was not entitled to a reconsideration was ultimately correct and should be affirmed." Beshires at 6.

We agree with Employee that his retirement was not voluntary. As a result, he is entitled to have both of his prior injuries to his right and left shoulder reconsidered, and we remand this issue to the Commission for a determination of the vocational disability for each claim based upon the factors set forth in Tenn. Code Ann. § 50-6-241(d)(2)(A). However, we do not believe the prior injury to Mr. Lewis' face and eyebrow is capable of reconsideration. That claim was not settled based on any specific finding of vocational disability. Instead, the State paid a lump sum and agreed to waive its subrogation interest in Mr. Lewis' third-party action against the tort feasor.

Conclusion

The judgment of the Commission pertaining to Employee's new injury claim in 2010 is affirmed. The judgment of the Commission pertaining to Employee's reconsideration claims for his shoulders is reversed and remanded for further proceedings. Costs of this appeal are taxed to the State of Tennessee.

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ROBERT E. LEE DAVIES, SR. JUDGE