IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 27, 2009 Session

DELORRIS BATES v. TULLAHOMA CITY SCHOOLS

Direct Appeal from the Chancery Court for Franklin County
No. 18,488 Jeffrey F. Stewart, Chancellor

No. M2008-02192-WC-R3-WC - Mailed - October 12, 2009
Filed - November 12, 2009

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The trial court found that the employee, who was over sixty years of age at the time of her permanent injury, was not subject to the cap set forth at Tennessee Code Annotated section 50-6-241(d)(1)(A), which limits disability benefits to one and one-half times the medical impairment rating and that she had proved three of the four elements in Tennessee Code Annotated section 50-6-242 and could therefore exceed the six-fold medical impairment cap set forth at Tennessee Code Annotated section 50-6-241(b). The court further found that the employee was not totally and permanently disabled and awarded ninety-eight percent permanent partial disability to both arms, a scheduled injury under Tennessee Code Annotated section 50-6-207(3)(A)(ii)(w). The trial court also ordered that the entire award of benefits in the amount of $108,587.92 be paid as a lump sum. The employer contends the trial court erred when it failed to find that the employee was permanently and totally disabled and when it awarded the benefits to be paid as a lump sum. We affirm the trial court judgement.

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

E. RILEY ANDERSON, SP. J., delivered the opinion of the court, in which SHARON G. LEE, J., and ALLEN W. WALLACE, SR. J., joined.

Allison E. Roman, Nashville, Tennessee, for the appellant, Tullahoma City Schools a/k/a Tullahoma Board of Education.

Russell D. Hedges, Tullahoma, Tennessee, for the appellee, Delorris Bates.

MEMORANDUM OPINION

Factual and Procedural Background

Delorris Bates ("Employee") was a custodian at an elementary school operated by Tullahoma City Schools ("Employer"). She reported to Employer on August 15, 2006, that she had injured her hands while emptying fifty-five gallon garbage cans. The injury was accepted as compensable, and Employee was treated by Dr. L. Keith Brown, an orthopedic surgeon, who found a triangular fibro-cartilage complex ("TFCC") tear of the right wrist and a ganglion cyst of the left wrist. Dr. Brown surgically repaired the cartilage tear on October 18, 2006, removed the cyst on December 5, 2006, and prescribed physical therapy until January 18, 2007. On January 27, 2007, Dr. Brown permitted Employee to return to work with a ten pound lifting restriction. Prior to returning to work, Employee met with Wayland Long, Employer's Director of Personnel. Long testified at trial that he offered to accommodate her restrictions, but Employee believed that she would be unable to work at all, due to continuing pain in her hands and as a result, she did not return to work for Employer, or elsewhere.

Employee had two previous injuries to her hands. In 1996, she developed bilateral carpal tunnel syndrome, which resulted in a worker's compensation settlement with her previous employer, based upon eleven percent permanent partial disability ("PPD") to both arms. In 2004, in the course of working for Employer, she fell and fractured both wrists and was treated by Dr. Brown. Her resulting worker's compensation claim was settled, based upon seven percent PPD to the left arm and five percent PPD to the right arm, and after that injury, she returned to her job as custodian without restriction.

In the present case, Dr. Brown opined that both the TFCC tear and the ganglion cyst were caused by heavy work engaged in by Employee during the summer while preparing classrooms for the opening of school. He assigned ten percent permanent anatomical impairment to each arm, based upon loss of strength. He stated that he consulted grip strength records provided by Employee's physical therapists; however, on cross examination, he admitted that Employee's efforts in physical therapy were inconsistent and that he had not specifically measured Employee's grip strength. He also testified that continuing pain and weakness of the hands are common symptoms of the type of injury suffered by Employee.

Dr. David Jemison, an orthopedic surgeon, conducted an independent medical exam ("IME") at the request of counsel for Employer. Dr. Jemison agreed with Dr. Brown's diagnosis and opined that both the TFCC tear and the ganglion cyst were caused by the 2004 fractures. However, during cross examination, Dr. Jemison agreed that Employee's work "aggravated and brought those to light or made them worse quicker." He opined that Employee had five percent permanent anatomical impairment of the right arm and three percent permanent impairment of the left arm due to the most recent injury, based upon range of motion measurements. Although he had grip strength testing performed, he opined that grip strength testing is "not the best test of impairment" because it is subject to manipulation and, therefore, he disagreed with Dr. Brown's use of strength testing to assess impairment. Dr. Jemison did not place any formal restrictions

on Employee's activity because he thought that more objective testing such as a functional capacity evaluation would be necessary to accurately assess her abilities.

Rodney Caldwell, Ph.D., a vocational evaluator appearing as a witness on behalf of Employee, testified that his testing of Employee demonstrated that although she is able to read at a high school level, she cannot perform arithmetic beyond a sixth grade level, that she is at the bottom one percent of the population for manual dexterity, and that she has no transferrable skills. He concluded that Employee has a one hundred percent vocational disability.

Michael Galloway, MS, a vocational evaluator appearing as a witness on behalf of Employer, testified that his tests of Employee's reading and arithmetic abilities yielded results similar to those obtained by Dr. Caldwell. Mr. Galloway did not administer dexterity testing, stating that he preferred to use the restrictions established by medical doctors. He concluded that Employee has a ninety-eight percent vocational disability; however, on cross examination, he testified that if the results of Dr. Caldwell's dexterity testing were accurate, he would assess Employee's disability at one hundred percent.

Employee was sixty-three years old at the time of trial and has an eighth grade education. Prior to beginning work as a custodian for Employer in 2002, she worked for twenty-five years at a factory which manufactured golf clubs and for several years in a shoe factory. Employee has not worked since her most recent injury and receives social security disability benefits. She testified that, while she was able to return to work without limitation after her previous carpal tunnel surgery and the 2004 wrist fractures, she does not believe that she is any longer capable of returning to her job due to pain in her wrists and hands, which is continual and worsens with activity. She described several simple daily tasks which she was either unable to do, or could only perform with difficulty, which included laundering, cooking, yard work, and combing her hair. She also explained why she believes she is no longer capable of performing those tasks required of a school custodian.

The trial court found that Employee had sustained a permanent injury; had not had a meaningful return to work, and therefore, was not subject to the disability benefit cap of one and one-half times her medical impairment rating as provided at Tennessee Code Annotated section 50-6-241(d)(1)(A). The trial court further found that Employee had satisfied three of the four requirements in Tennessee Code Annotated section 50-6-242, and could therefore exceed the six-fold medical impairment cap set forth at Tennessee Code Annotated section 50-6-241(b). Finally, the trial court found that Employee is not permanently and totally disabled, awarded ninety-eight percent PPD, based upon impairment to both of her arms, and ordered that the entire award be paid as a lump sum.

On appeal, Employer has changed the position it adopted at trial where it presented proof and argued that Employee was not permanently disabled. Employer now asserts that the trial court erred in finding that Employee was not permanently and totally disabled. Employer also contends that it should be relieved of liability for the portion of the award that could have been assigned to the Second Injury Fund, if it had been a party. Finally, Employer argues that the trial court erred in awarding benefits in a lump sum.

Standard of Review

Our standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); see also Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004); Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 825 (Tenn. 2003). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the court on appeal must extend considerable deference to the trial court's factual findings. Houser v. Bi-Lo, Inc., 36 S.W.3d 68, 71 (Tenn. 2001). In reviewing documentary evidence such as depositions, however, we extend no deference to the trial court's findings. Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006). Conclusions of law are subject to de novo review without any presumption of correctness. Rhodes, 154 S.W.3d at 46; Perrin, 120 S.W.3d at 826.

Analysis

Permanent Total Disability

In this case, Employee seeks workers' compensation benefits for impairment to both of her arms, an injury that is governed by the statutory schedule for the loss of two arms set forth at Tennessee Code Annotated section 50-6-207(3)(A)(ii)(w) (2008) ("For the loss of two (2) arms, other than at the shoulder, [there shall be paid to the injured employee] sixty-six and two-thirds percent (66 2/3%)of the average weekly wages during four hundred (400) weeks."). Thus, an award of benefits for the loss of two arms is not subject to the 260-week limit for employees over sixty years of age contained in Tennessee Code Annotated section 50-6-207(4)(A)(i). McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 185 (Tenn. 1999) (holding that section 50-6-207(4)(A)(I) does not apply to workers over age 60 who suffer scheduled member injuries).

At trial, Employer argued that Employee was subject to the cap set forth at Tennessee Code Annotated section 50-6-241(d)(1)(A), which provides in pertinent part that "the maximum permanent partial disability benefits that the employee may receive is one and one-half (1 1/2) times the medical impairment rating determined." Employer presented the testimony of vocational expert Rodney Galloway in support of its argument that Employee was not totally disabled by her injury. On appeal, however, Employer contends that the testimony of vocational expert Michael Caldwell, combined with the lay testimony of Employee, establishes that she is effectively unable to return to the workforce and is permanently and totally disabled.

Employee, on the other hand, contended at trial that she was totally disabled, and that the trial court was prohibited from awarding permanent partial disability based upon a scheduled member injury. See, Dotson v. Rice-Chrysler-Plymouth-Dodge, Inc., 160 S.W.3d 495, 501-2 (Tenn. 2005). However, the trial court did not accept that contention, citing cases such as Watt v. Lumbermens Mut. Cas. Ins. Co., 62 S.W.3d 123, 131 (Tenn. 2001), which hold that permanent total disability may be awarded based upon the combined effects of several separate

injuries. On appeal, Employee does not pursue its argument that an award of permanent partial disability may not be based upon a scheduled member injury. Instead, Employee contends that Rodney Galloway's testimony provided a reasonable basis for the court to conclude that she was not totally disabled and that Employer is bound by that testimony since Mr. Galloway was its expert witness.

The extent of permanent disability resulting from a compensable injury is a question of fact which we review de novo. A trial court's factual findings are presumed to be correct and will be upheld unless the preponderance of the evidence is otherwise. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 170 (Tenn. 2002). Given the evidence before it, the trial court was presented with two viable choices. Either Employee was very severely disabled or she was totally disabled. Both sides presented expert testimony as to the extent of Employee's disability, and it was within the trial court's discretion to determine which testimony to accept. Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. Workers' Compensation Appeals Panel Sept. 5, 1996). Upon consideration of all the evidence, the trial court chose to accept Mr. Galloway's testimony that Employee retained the capacity to perform a limited number of jobs in the workplace. Mr. Galloway's status as a vocational expert is not disputed, and he testified as to his extensive experience in that regard. He holds a masters degree in vocational rehabilitative counseling, is a nationally certified rehabilitation counselor, and operates his own vocational consulting business, dealing primarily with vocational evaluations. His evaluation of Employee was based upon information he obtained as a result of personally meeting with Employee and questioning her about, among other things, her employment history, her educational background, her work injury, her daily activities, and her future plans. His evaluation was also based upon his review of documentation relative to Employee's work injury, including reports and depositions of her treating physicians and physical therapy reports and upon administration of a standardized test to determine her reading and math skills. Apparently, the trial court found Mr. Galloway to be a qualified and credible witness and that his conclusion that Employee is partially disabled were well-grounded. The evidence does not preponderate to the contrary, and Employer's argument that the trial court erred is without merit.

Second Injury Fund

Employee also argues that any award to Employee should be shared with the Second Injury Fund pursuant to Tennessee Code Annotated section 50-6-208. However, section 50-6-208 does not come into play unless the employee has become permanently and totally disabled. Tenn. Code Ann. § 50-6-208(a)(1). Given our determination that the trial court did not err in its finding that Employee is not totally disabled, Employer's argument is without merit.

Lump Sum

Next, Employer argues that the trial court erred in awarding Employee benefits as a lump sum. The total amount of the judgment is $108,587.92. Employee testified that she and her husband have recently refinanced their home for an unstated amount, that she has also incurred a small debt for home improvements and that she intends to use the proceeds of the judgment to pay off those debts. At the time of trial, Employee's monthly income consisted of $1600 in

Social Security benefits, plus retirement benefits from a previous employer in the amount of $323.

Tennessee Code Annotated section 50-6-229(a) permits a trial court to commute an award of disability benefits "to one (1) or more lump sum payments." The statute provides that "[i]n determining whether to commute an award, the trial court shall consider whether the commutation will be in the best interest of the employee, and the court shall also consider the ability of the employee to wisely manage and control the commuted award, regardless of whether special needs exist." Commutation of an award of benefits to a lump sum payment is a discretionary matter and a trial court's decision in that regard will not be altered absent a showing of abuse of discretion. Edmonds v. Wilson County, 9 S.W.3d 106, 109 (Tenn. 1999).

One means by which an employee may demonstrate that a commutation is appropriate is by showing the court that he or she has no need for periodic payments to substitute for lost wages. Id. See also, Ponder v. Manchester Housing Authority, 870 S.W.2d 282, 284-85 (Tenn. 1994). In this case, Employee already has two sources of monthly income in the form of $1,600 in social security disability benefits and retirement benefits from her previous employer, and, therefore, she does not need periodic payments to substitute for lost wages. In addition, Employee presented evidence that she would use the commuted award to pay off her home mortgage and the debt she incurred for home improvements, which constitutes wise management and control of the commuted award. Under these circumstances, we find that the trial court did not abuse its discretion by commuting the benefits awarded Employee to a lump sum payment.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed. Costs of this appeal are taxed to Tullahoma City Schools and its surety, for which execution may issue if necessary.

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E. RILEY ANDERSON, SPECIAL JUSTICE

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APRIL 27, 2009 SESSION

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JUDGMENT

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 appeals 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 will be paid by Tullahoma City Schools and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM