IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

THOMAS E. BLAKE v. NISSAN NORTH AMERICA, INC. ET AL

Circuit Court for Rutherford County
No. 56287

No. M2009-02173-SC-WCM-WC - Filed - November 10, 2010

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Thomas E. Blake, pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Thomas E. Blake, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

WADE, Gary R., J., Not Participating

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 17, 2010 Session

THOMAS E. BLAKE v. NISSAN NORTH AMERICA, INC., ET AL.

Appeal from the Circuit Court for Rutherford County
No. 56287 Robert E. Corlew, III, Chancellor

No. M2009-02173-WC-R3-WC - Mailed - September 14, 2010
Filed - November 10, 2010

The employee sustained a compensable injury to his right arm. After surgery and recovery, he returned to work for the same employer at the same rate of pay. Over a year later, his work week was reduced from forty to thirty-two hours per week as part of a plant-wide reduction in hours due to economic conditions. While working the reduced number of hours, he accepted a buyout offer and voluntarily resigned. Subsequently, his workers' compensation case was tried. The trial court held that he did not have a meaningful return to work because of the reduction in work hours and made an award of more than one and one-half times the impairment. The employer has appealed, contending that employee had a meaningful return to work in spite of the plant-wide reduction of work hours carried out for the purpose of preventing layoffs. We agree that the reduction in force, under these facts, does not impair the determination that the employee had a meaningful return to work, and we modify the judgment accordingly.[1]

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

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

T. Franklin Gilley, III, Murfreesboro, Tennessee, for the appellant(s), Nissan North America, Inc. and Ace Insurance Company.

David H. Dunaway, LaFollette, Tennessee, for the appellee, Thomas E. Blake.

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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.

Terry L. Hill and Michael L. Haynie, Nashville, Tennessee, for the Amicus Curiae, Tennessee Self-Insurers Association.

MEMORANDUM OPINION

Factual and Procedural Background

Thomas Blake ("Employee") was an assembly line worker for Nissan North America ("Employer"). He developed carpal tunnel syndrome and trigger finger in his right hand in February 2006. The injury was accepted as compensable. Dr. Douglas Weikert, an orthopaedic surgeon, performed surgery in September 2006, and Employee returned to work in November 2006 at the same wage as before the injury. Dr. Weikert released him from his care in December 2006 with no permanent restrictions and assigned 3% permanent anatomical impairment to the right arm. Employee continued to work full-time in his regular job until approximately May 2008. At that time (18 months after his return to work at the same wage), his work week was reduced from forty hours per week to thirty-two hours per week as part of a plant-wide reduction. As Employee testified:

> Sales went down. . . . They made the announcement that we had to -- instead of laying folks off -- that is [Employer's] policy. I have been there sixteen years, and nobody has ever been laid off. They just cut their hours back. Everyone understood, but that was a good thing. We still kept our jobs.

In December 2008, while still working a reduced schedule, Employee voluntarily left his job in exchange for a $100,000 payment offered by Employer to reduce its workforce. He thereafter went to work for the Tennessee National Guard on a full-time basis as an instructor. At the time of the May 2009 trial, he had received orders to deploy to Iraq in the near future.

Employee presented C-32 reports of two evaluating physicians, Dr. William Kennedy, and Dr. C. M. Salekin. Dr. Kennedy assigned a 6% impairment to the right arm; Dr. Salekin assigned a 12% impairment to the right arm.

Employee was fifty-two years old when the trial occurred in May 2009. He was a high school graduate and had worked for Employer for sixteen years prior to his voluntary retirement. He testified that he had continued to have pain in his right arm after he returned to work. He also testified that continuing pain from this and some previous work injuries

was one of the reasons he accepted the buyout offer. He understood that the reduction in hours was intended to be a temporary measure and stated that Employer's workforce had returned to a forty-hour week at an unspecified time prior to the trial.

The trial court found that Employee had sustained a 4% anatomical impairment due to this injury. It found that his acceptance of the buyout package was voluntary, was not related to his work injury, and did not constitute a loss of employment for the purposes of Tennessee Code Annotated section 50-6-241(d) (2008). However, it found that his return to work was no longer meaningful after the reduction in hours and that the award of benefits was consequently not limited to one and one-half times the impairment. The trial court was of the opinion that since there was no meaningful return to work, his award would be subject to the six times the impairment cap limit set forth at Tennessee Code Annotated section 50-6-241(d)(2)(A). It therefore awarded 12% permanent partial disability ("PPD") to the right arm. Employer has appealed, contending that the trial court erred by holding that Employee did not have a meaningful return to work.

Standard of Review

The standard of review of issues of fact 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) (2008). 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., Inc.*, 277 S.W.3d 896, 898 (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

We note at the outset that Employee suggests in his brief an alternative reason to sustain judgment. He says the trial court could have found that the decision to retire was based on Employee's injury. That alternative was specifically rejected by the trial court, and we find no reason to question its decision. The issue before this Panel is whether or not the reduction in hours was a sufficient basis to permit the trial court to make an award in excess of the lower cap.

In its ruling, the trial court acknowledged that Employee returned to the same wage he was earning before the injury and continued in this capacity for more than a year until the thirty-two hour work week began. It also acknowledged that Employee then stayed employed until he accepted the voluntary buyout. However, the trial court did not find these facts to be persuasive and instead determined that he did not made a meaningful return to work:

> Where an employee is not returned to a job making the same or higher wage, by definition the statute provides that he has not made a meaningful return to work. TENNESSEE CODE ANNOTATED § 50-6-241. Here, it is clear, that although the Employee returned to work for a short period of time, his wages were then diminished to only 80% of his pre-injury wage. . . . Here, where the employee was not subjected to a lay-off, but experienced a reduction in his wages, we find that this caused him not to enjoy a meaningful return to work.

An Employee who sustains a PPD as the result of workplace injury is entitled to receive PPD benefits in accordance with Tennessee Code Annotated section 50-6-241 (2008). PPD benefits may be "capped" according to section 50-6-241(d)(1)(A), which provides:

> 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 either for body as a whole or for schedule member injuries, except schedule member injuries specified in § 50-6-207(3)(A)(ii)(a)-(l), (n), (q), and (r), 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 (1 1/2) times the medical impairment rating.

Thus, an employee's PPD benefits will be subject to a smaller multiplying cap (1 1/2 times) where the employee is considered to have made a "meaningful return to work."[2] The Supreme Court explained the meaning of a "meaningful return to work" in *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 328-29 (Tenn. 2008):

> When determining whether a particular employee had a meaningful return to work, the courts must assess the reasonableness of the employee in attempting to return to or remain at work. *Lay v. Scott County Sheriff's Dept.*, 109 S.W.3d

[2] Where the employee has not had a meaningful return to work, the benefits may not exceed six times the medical impairment rating. *See* Tenn. Code Ann. § 50-6-241(d)(2)(A).

293, 297-98 (Tenn. 2003); *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 630 (Tenn. 1999). The determination of the reasonableness of the actions of the employer and the employee depends on the facts of each case. *Hardin v. Royal & Sunalliance Ins.*, 104 S.W.3d 501, 505 (Tenn. 2003) (quoting *Newton v. Scott Health Care Ctr.*, 914 S.W.2d 884, 886 (Tenn. Worker's Comp. Panel 1995).

. . . .

[A]n employee has not had a meaningful return to work if he or she returns to the work but later resigns or retires for reasons that are reasonably related to his or her workplace injury. [citing *Lay, supra, and Hardin, supra]* . . . [I]f 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 . . . .

In *Powell v. Blalock Plumbing & Elec. & HVAC, Inc.*, 78 S.W.3d 893 (Tenn. 2002), the employee returned to work after his injury at the same rate of pay.[3] However, he voluntarily chose to work only four days per week, rather than five as he had previously done. The reason for that decision was disputed. The employee testified that he was unable to work as many hours as he had previously, while the employer contended that he was spending additional time working for a side business which he owned. The trial court accepted the employee's testimony and found that his award of benefits was not subject to the lower cap in Tennessee Code Annotated section 50-6-241(a)(1).[4] *Id.* at 895. The Supreme Court affirmed the trial court's judgment, but stated, "This holding . . . does not preclude a finding of a meaningful return to work in every case in which an employee maintains fewer work hours post-injury than were maintained pre-injury." *Id.* at 898.

Subsequently, in *Edwards v. Saturn Corp.*, No. M2007-01955-WC-R3-WC, 2008 WL 4378188 (Tenn. Workers' Comp. Panel Sept. 25, 2008), a Special Workers' Compensation Appeals Panel considered the case of an employee who had returned to work after a compensable injury but was later laid off due to business conditions. Pursuant to a collective bargaining agreement, he received payments from a combination of sources equivalent to approximately 95% of his regular earnings. The trial court ruled that he had

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[3] The *Powell* Court defined "wage" as "the hourly rate of pay for an employee who is compensated on an hourly basis." *Id.* at 898. Upon return to work, Employee in the case sub judice was paid the same hourly rate that he received prior to his injury.

[4] Tennessee Code Annotated section 50-6-241(a)(1) applies to injuries arising on or after August 1, 1992 and prior to July 1, 2004, and it provides for a cap of two and one-half (2 1/2) times the medical impairment rating. The relevant language is identical to that in section 50-6-241(d)(1)(A), which applies to injuries arising on or after July 1, 2004.

a meaningful return to work, the layoff did not constitute a loss of employment, and the award of benefits was therefore limited to the lower cap in effect on the date of the injury. *Id.* at *1. The Panel affirmed. Concerning the threshold issue of a meaningful return to work, the Panel stated, "[U]nder the particular circumstances of this case, this Panel finds that [the employee] both made and maintained a meaningful return to work following his shoulder surgery because, although laid off, he remained an employee .... Therefore, [the employee] is subject to the [lower] statutory [cap]." *Id.* at 7.

The *Edwards* Panel also considered the argument that the lower cap should not apply to the award because the employee was receiving less income during the layoff:

> Upon review of the Workers' Compensation Act and previous case law interpreting the Act, we do not find that the Legislature intended for the statutory minimums to be removed in this situation. Instead, we find that the reduction in Mr. Edwards' and the other 2,600 Saturn employees' take-home pay is analogous to an employer deciding to reduce the wages of its entire workforce by five percent because of economic hardship. It does not appear to this Panel that this is the type of situation that the General Assembly envisioned when it drafted the workers' compensation laws.

Id. at 9.

This case falls into a middle ground between *Powell, supra,* and *Edwards, supra.* Employee clearly sustained a loss of income after making a meaningful return to work. The loss of income was not related to his work injury, but instead was part of a plant-wide reduction in hours, which was projected (and turned out) to be temporary and was for the express purpose of saving jobs. However, as the trial court noted, the amount of the income reduction, 20%, was substantially greater than the 5% loss discussed in *Edwards*. This case also differs from *Edwards* in that there was no collective bargaining agreement involved. Employer's actions in this case were strictly unilateral and not based upon any contractual obligation.

While this appeal was pending, the 2010 General Assembly enacted Public Chapter 1034 and amended Tennessee Code Annotated sections 50-6-241(d)(1)(B)(i) and (ii), which pertain to petitions for reconsideration. It added the following language to each section:

> Employees who continue in their employment after a reduction in pay or a reduction in hours due to economic conditions shall not be entitled to reconsideration of their claims under this section if the reduction in pay or reduction in hours affected at least fifty percent (50%) of all hourly employees operating at or out of the same location. This provision does not apply to or

include employees involved in layoffs, closures or a termination of business operations.

Act of June 11, 2010, ch. 1034, §§ 1, 2, 2010 Tenn. Pub. Acts ___, ___. The amendment applies to "reconsideration of claims approved or adjudicated on or after July 1, 2010." *Id.* at § 3. This new statutory language is consistent with *Edwards*' analysis that a general reduction in wages, caused by economic conditions and undertaken for the purpose of saving jobs, will not automatically open previously "capped" settlements to reconsideration. While this statute is not specifically applicable to this case, it does inform as to the legislative intent related to how reduction in force should impact a determination of whether or not there has been a meaningful return to work.[5]

Although this is an appeal from an initial action for benefits rather than from a reconsideration, our courts have generally applied the same principles in both types of cases to determine whether or not an employee has had a meaningful return to work or loss of employment for purposes of application of the "caps." *See Tryon*, 254 S.W.3d at 333 n. 25. In that light, the enactment of Public Chapter 1034 supports the application of *Edwards* and the lower cap, rather than *Powell* and the higher cap, to the facts of this case. We conclude that the trial court erred by finding that Employee did not have a meaningful return to work as a result of Employer's plant-wide reduction of working hours. Consequently, the award of benefits must be modified. Based upon the trial court's finding that Employee sustained a 4% impairment as a result of his work injury,[6] the judgment will be modified to award PPD benefits of 6% to the right arm.

In reaching our conclusion, we have not relied upon the Supreme Court's recent decision in *Nichols v. Jack Cooper Transport Co.*, ___ S.W.3d ___, 2010 WL 3386469 (Tenn. 2010). *Nichols* involved an employee who suffered two compensable work injuries and returned to work at the pre-injury wage but was then laid off for economic reasons. During the period of layoff, the employee voluntarily retired. At issue was whether the layoff of the employee constituted a "loss of employment" under the workers' compensation laws and, correspondingly, whether he made a meaningful return to work. *Id.* at *4. There is good reason to treat reductions in hours or pay differently from layoffs for purposes of the workers' compensation laws. Indeed, the General Assembly did so in the June 2010

[5] It is well established that "[s]ubsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." 23 *Tennessee Jurisprudence*, Statutes § 23 (2007) (citing *Steiner v. Mitchell,* 215 F.2d 171 (6th Cir. 1954)); *see also Great Northern Ry. Co. v. United States*, 315 U.S. 262, 277 (1942).

[6] Neither Employer nor Employee challenges the impairment finding on appeal.

amendments to the reconsideration provisions, which apply to widespread reductions in pay or hours but not to "layoffs, closures or a termination of business operations." Act of June 11, 2010, ch. 1034, § 2.

Although *Nichols* does not apply here, we are mindful of the Supreme Court's admonition that the determination of whether a particular employee had a meaningful return to work requires an assessment of the reasonableness of the actions of both the employer and the employee, which in turn depends on the facts of each case. *Nichols*, 2010 WL 3386469, at *5 (quoting *Tryon*, 254 S.W.3d at 328). Our conclusion is based upon the facts and circumstances of this case, and does not compel a finding that every employee who returns to work after a compensable injury and receives a reduced schedule or lower wages has had a meaningful return to work. *Cf. Powell*, 78 S.W.3d at 898.

Conclusion

The award of benefits is modified to award 6% permanent partial disability of the right arm. The judgment is affirmed in all other respects. Costs are taxed to Thomas Blake, for which execution may issue if necessary.

WALTER C. KURTZ, SENIOR JUDGE