IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 27, 2010 Session

STANLEY JENKINS v. YELLOW TRANSPORTATION, INC., ET AL.

Appeal from the Chancery Court for Rutherford County
No. 09-0068 WC Robert E. Corlew, III, Chancellor

No. M2009-02471-WC-R3-WC - Mailed - February 2, 2011
Filed - April 13, 2011

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. In this action, Stanley Jenkins ("Employee") sustained a compensable injury to his left leg in the course and scope of his employment with Yellow Transportation, Inc. ("Yellow Transportation"). Employee settled his workers' compensation claim with Yellow Transportation and returned to work. A few months later, Yellow Transportation merged with another corporation to create YRC Inc. ("YRC"), a completely new corporation. After the merger, Employee was laid off due to an economic downturn and thereafter sought reconsideration of his earlier settlement. The trial court ruled that Employee was no longer employed by his pre-injury employer after the merger and was entitled to reconsideration under Tennessee Code Annotated section 50-6-241. The trial court awarded him additional permanent partial disability benefits. Yellow Transportation has appealed, arguing that Employee is not entitled to reconsideration. We affirm the judgment of the trial court.

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

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the Court, in which SHARON G. LEE, J., and JERRI S. BRYANT, SP. J., joined.

Stephen K. Heard, Adam O. Knight, and Autumn L. Gentry, Nashville, Tennessee, for the appellant, Yellow Transportation, Inc.

Aubrey T. Givens, Nashville, Tennessee, for the appellee, Stanley Jenkins.

Terry L. Hill and Michael L. Haynie, Nashville, Tennessee, for the amici curiae, Tennessee Self-Insurers Association and Bridgestone Americas, Inc.

MEMORANDUM OPINION

Factual and Procedural Background

Employee was 42 years of age at the time of trial. He had completed high school through the eleventh grade, obtained his general equivalency diploma, and attended business college at ITT Technical Institute. His first employment was in 1986 as a cook in the food service industry and over the next several years he worked in a variety of jobs that included loading and unloading airplane freight, apprenticing with an electrician, and driving a truck. In July 2004, Employee began his employment with Yellow Transportation, an interstate freight transport company, where his job duties consisted of loading and unloading freight on a trucking dock.

On February 6, 2008, Employee fractured his left ankle when he attempted to move a pallet in the course and scope of his employment. Approximately one week later, Dr. Blake Garside, an orthopaedic surgeon, performed surgery to repair the fracture. On April 16, 2008, Dr. Garside released Employee to return to work without any restrictions. On June 11, 2008, Dr. Garside determined that Employee had reached maximum medical improvement and assigned him a 7% anatomical impairment to the left lower extremity, and that same month Employee returned to his employment at a rate equal to or higher than his previous wage. Subsequently, Employee asserted a claim against Yellow Transportation, for workers' compensation benefits and, by order entered August 12, 2008, the parties agreed to settle the claim based upon a 10.5% permanent disability to the lower left extremity, consistent with the cap of one and one-half times medical impairment rating set forth at Tennessee Code Annotated section 50-6-241(d)(1)(A).[1]

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[1] Tennessee Code Annotated section 50-6-241(d)(1)(A) (2008) provides in pertinent part as follows:

> 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 (1½) times the medical

(continued...)

On October 1, 2008, Yellow Transportation merged with Roadway Express, Inc. ("Roadway Express"), to form Yellow Roadway Corporation, which was subsequently renamed YRC Inc. ("YRC"). On that date, as a result of the merger, Yellow Transportation ceased to exist. Due to a downturn in the economy, a few weeks after the merger, Employee was notified by letter dated October 30, 2008, that he was "being placed in layoff status." After his layoff, Employee received unemployment benefits and was able to find sporadic employment painting houses and mowing grass. In August of 2009, he began working full-time as a school bus driver for Nashville public schools. After his layoff, Employee received no monies or other benefits, such as health insurance, from Yellow Transportation or YRC.

After Employee was laid off, YRC entered into negotiations with the Teamsters Union, which represented Employee and the other union member employees at YRC, and these negotiations resulted in an across-the-board 10% cut in union employee wages, effective January 2009, and an additional 5% cut, effective August 2009, for a total pay reduction of 15%. In addition to these pay reductions, YRC eliminated all pension plans, 401K plans, and a program for increasing health care contributions.

On January 20, 2009, Employee sued Yellow Transportation, contending that he is no longer employed by Yellow Transportation, and that his prior workers' compensation claim settlement is subject to reconsideration as is allowed pursuant to the following subsections of Tennessee Code Annotated section 50-6-241(d)(1)(B):

> (ii) If an injured employee receives benefits for schedule member injuries pursuant to (d)(1)(A), and the employee is subsequently no longer employed by the pre-injury employer at the wage specified in subdivision (d)(1)(A), the employee may seek reconsideration of the permanent partial disability benefits. The right to seek the reconsideration shall extend for the number of weeks for which the employee was eligible to receive benefits under § 50-6-207, beginning with the day the employee returned to work for the pre-injury employer.
> (iii) Notwithstanding the provisions of 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 does not result from the

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[1](...continued)
impairment rating determined pursuant to the provisions of § 50-6-204(d)(3).

> work-related disability that is the subject of such reconsideration; or
> (b) The employee's misconduct connected with the employee's employment.

Tenn. Code Ann. § 50-6-241(d)(1)(B)(ii),(iii) (2008).

In response to Employee's complaint seeking reconsideration, Yellow Transportation argued that notwithstanding his layoff, Employee continued to be employed by Yellow Transportation, pursuant to a collective bargaining agreement negotiated on his behalf by the Teamster's Union, that contemplates layoffs and vests Employee, as union member, with "call back rights and retention of seniority." Yellow Transportation's response further averred that Employee's layoff was not related to any vocational disability and that in accord with the collective bargaining agreement Employee would be recalled to employment upon "an increase in freight" and therefore he does not qualify for reconsideration. The response further contended that Employee does not qualify for reconsideration because when Yellow Transportation has offered him employment, he has refused it.

Employee's case was heard on October 9, 2009. Employee argued that he is entitled to reconsideration because he was laid off and is no longer working for Yellow Transportation; that as result of the merger, Yellow Transportation no longer exists; and that the 15% wage reduction that went into effect after his layoff shows that he is no longer employed at a wage equal to or greater than the wage he was receiving at the time of his injury. The trial court ruled that Employee was on indefinite layoff with no expectation of returning to work and therefore was entitled to reconsideration. The trial court ruled in the alternative that Employee was entitled to reconsideration because he was no longer working for his pre-injury employer as a result of the merger of Yellow Transportation, and Roadway Express, Inc., which created the new and separate entity, YRC. The trial court concluded that in light of these rulings, it was not necessary to determine whether the 15% decrease in wages that went into effect after Employee's layoff also made him eligible for reconsideration. Finally, upon considering Employee's age, education, past work experience and transferable job skills, the trial court awarded Employee an increased vocational disability rating of 21%. YRC appeals.

Analysis

YRC raises several issues for our review; however, the issue of whether Employee is entitled to a reconsideration under Tennessee Code Annotated section 50-6-241 based on the October 1, 2008, merger of Yellow Transportation and Roadway Express that resulted in Yellow Transportation ceasing to exist is dispositive of this appeal.

Our review of issues of fact is *de novo* upon the record accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)2 (2008). We review a trial court's conclusions of law *de novo* upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

The effect of an employer's merger with another company or a buy-out that results in a new employer has been previously reviewed by the Tennessee Supreme Court. In Perrin v. Gaylord Entm't Co., 120 S.W.3d 823 (Tenn. 2003), an employee who worked for TNN, which was owned by Gaylord Entertainment Company ("Gaylord"), sustained a compensable injury in December 1996. In early October 1997, TNN was purchased by CBS Corporation ("CBS"), and, later that month, the employee settled his workers' compensation claim with Gaylord. Thereafter, the employee continued to work for TNN, now owned by CBS, until he was terminated in December 1998. In September 1999, the employee filed an action for reconsideration of his claim pursuant to Tennessee Code Annotated section 50-6-241(a)(2), which provided that reconsideration of the issue of industrial disability may be made "where the employee is no longer employed by the pre-injury employer and makes application to the appropriate court within one (1) year of the employee's loss of employment." The Tennessee Supreme Court stated that the statute required 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 827. The Court ruled that the pre-injury employer was Gaylord, that the employee's employment with Gaylord ended when TNN was purchased by CBS on October 1, 1997, and that the one-year statute of limitations for a reconsideration action began to run on that date. Accordingly, the Court ruled that the employee's action filed in September 1999 was time- barred. The employee argued that "pre-injury employer" and "loss of employment" should be construed to include a broader range of possible employers, and that it would be unfair to require an employee to know if and when their employer has been purchased, acquired, or merged with another business entity. In response, the Court noted that had the legislature intended a broader construction, the legislature could have deleted the "pre-injury employer" limitation from the statute or have included specific language showing that "pre-injury employer" includes a later or successor entity. Id. at 827.

The Tennessee Supreme Court reiterated its holding in Perrin in Barnett v. Milan Seating Sys., 215 S.W.3d 828 (Tenn. 2007). In Barnett, an employee of Milan Seating Systems ("Milan Seating") was diagnosed with carpal tunnel syndrome in May 2003. Surgery was performed with positive results, and the employee was returned to work without restrictions. Thereafter, in June 2003, the employee filed a complaint for workers' compensation benefits, which was settled in November 2003. Almost one year after the settlement, the employee was again diagnosed with carpal tunnel syndrome, and thereafter

in December 2004, she filed a second complaint for workers' compensation benefits. In June of 2005, Milan Seating was sold to Kongsberg Automotive ("Kongsberg"). The sale did not result in any changes to employee's job, which she continued to perform at the same place and at the same wage, except that she was now working for Kongsberg. The Supreme Court held that the trial court erred in ruling that the employee had returned to work for her "pre-injury employer" such that her benefits would be subject to the one and one-half times medical impairment rating caps as provided at Tennessee Code Annotated section 50-6-241(d)(1)(A). In so holding, the Court relied on Perrin and noted that the trial court's conclusion that the employee was working for her pre-injury employer was inconsistent with Perrin, given that Kongsberg had purchased Milan Seating several months after the employee filed her second complaint and over eight months before trial.

Yellow Transportation contends that both Perrin and Barnett are factually distinguishable from the present case. It asserts that in the instant matter, Employee's rights are governed by a collective bargaining agreement that was arrived at after negotiations between management and representatives of employee union members and that this agreement has not been substantially modified since it went into effect in 2003. Further, it notes that the union approved, ratified, and voted on the October 1, 2008, merger; that the collective bargaining agreement contemplates mergers and includes procedures that become effective in the event of a merger; that the purpose of the merger was to economically benefit the employer by making two companies one and thereby benefit the employees; and that "the merger did not affect the application of the rights and provisions of duties of the union members in any substantial manner." Yellow Transportation notes that neither Perrin nor Barnett reference a collective bargaining agreement or union.

We are not persuaded by Yellow Transportation's argument that, because the collective bargaining agreement anticipated the merger, Employee continued to work for his pre-injury employer after the merger where it is undisputed that Yellow Transportation no longer existed after the merger. Nor are we persuaded by the argument that after the merger Employee was still employed by his pre-injury employer because he was similarly employed within the meaning of the collective bargaining agreement as he was prior to the merger. As has been noted, the purchase of the pre-injury employer in Barnett did not result in any changes to the employee's job in that case and thus, whether Employee remained similarly employed as he was before the merger is not determinative.

Yellow Transportation notes that the following recent amendment to Tennessee Code Annotated section 50-6-241(d)(1)(C)(i), which abrogated Perrin and Barnett, now excludes an employee from reconsideration where the employee has received permanent partial disability benefits before the pre-injury employer is sold:

> Notwithstanding any other of 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 . . . .

Tenn. Code Ann. § 50-6-241(d)(1)(C)(i) (Supp. 2010).

Yellow Transportation contends that by this amendment the Legislature indicated how an employee's claim for reconsideration should be analyzed when there is a sale or acquisition of the employee's pre-injury employer and apparently, by implication, when there is a merger such as occurred in the case now before us. In essence, Yellow Transportation argues that we should apply this amendment, which by its terms applies only to "injuries occurring on or after July 1, 2009," retroactively. In accord with prior decisions of this panel, we decline to do so. See Day v. Zurich Am. Ins. Co., No. W2009-01349-WC-R3-WC, 2010 WL 1241779 (Tenn. Workers' Comp. Panel Mar. 31, 2010); Tomlinson v. Zurich Am. Ins. Co., No. W2009-01350-WC-R3-WC, 2010 WL 3418319 (Tenn. Workers' Comp. Panel Aug. 30, 2010); Meeks v. Hartford Ins. Co. of Midwest, No. W2009-01919-WC-R3-WC, 2010 WL 3398835 (Tenn. Workers' Comp. Panel Aug 30, 2010).

Finally, Yellow Transportation argues that "if it is determined that [Employee] has, in fact, lost his employment with his pre-injury employer, the pivotal question becomes whether his loss of employment was 'reasonably related' to his workers' compensation injury." Yellow Transportation asserts that because Employee was laid off due to the poor economy and not because of his injury, his petition for reconsideration should be dismissed. We disagree. We note Tennessee Code Annotated section 50-6-241(d)(1)(B)(iii)(a), which provides in pertinent part that "under no circumstances shall an employee be entitled to reconsideration when the loss of employment is due to . . . the employee's voluntary resignation or retirement; provided, however, that the resignation does not result from the work-related disability that is the subject of reconsideration . . . ." Thus, the question of whether the employee's absence from employment is related to his injury becomes relevant upon the employee's "voluntary resignation or retirement." In this case, Employee did not voluntarily resign or retire but was laid off against his own volition, and Yellow Transportation has never offered him a return to full-time employment.

Accordingly, Employee is entitled to reconsideration due to the October 1, 2008, merger at which time Yellow Transportation ceased to exist. All other issues are pretermitted and need not be addressed.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to the appellant, Yellow Transportation, and its surety, for which execution may issue if necessary.

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JON KERRY BLACKWOOD, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
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Chancery Court for Rutherford County
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No. M2009-02471-SC-WCM-WC - Filed - April 13, 2011

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Yellow Transportation, 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 Yellow Transportation, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

LEE, Sharon G., J., Not Participating