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

JEFFREY WHITE v. NISSAN NORTH AMERICA, INC., ET AL.

Appeal from the Chancery Court for Rutherford County
No. 02-4137 Royce Taylor, Judge

No. M2009-02189-WC-R3-WC - Mailed - January 26, 2011
Filed - April 14, 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. Jeffrey White ("Employee") sustained work-related injuries while employed by Nissan North America, Inc. ("Employer"). He returned to work after each injury and settled both claims. In 2005, he was terminated, allegedly for failure to comply with Employer's policies concerning medical leave. He filed for reconsideration of his previous settlements, as permitted by Tennessee Code Annotated section 50-6-241(a)(2). Employer contended that he had been terminated for misconduct and was not eligible for reconsideration. Following a full trial, the trial court found that Employee was eligible for reconsideration, but that Employee failed to prove that his industrial disability was greater than the amount of the settlements. Employee filed a motion to alter or amend pursuant to Tenn. R. Civ. P. 59.04, requesting that the trial court permit the taking and presentation of additional evidence. The trial court granted the motion. After a second trial, the trial court awarded additional permanent partial disability ("PPD") benefits. Employer has appealed. We conclude that the trial court erred in granting the motion to alter or amend and reverse the judgment.

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

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

Van French, Murfreesboro, Tennessee, for the appellants, Nissan North America, Inc. and Royal Insurance Company.

R. Steven Waldron, Murfreesboro, Tennessee, for the appellee, Jeffrey White.

MEMORANDUM OPINION

Procedural Background

Employee was a production worker for Employer, an automobile manufacturer. In 1997, he sustained a compensable injury to his cervical spine. Dr. George Lien, a neurosurgeon, assigned a 9% permanent anatomical impairment to the body as a whole as a result of the injury and placed no permanent restrictions on Employee's activities. Employee returned to work for Employer. His workers' compensation claim was settled for 18% PPD to the body as a whole and was court approved on January 20, 2000.

Employee sustained another compensable injury, this time to his right shoulder, on March 1, 2001. Dr. James Rungee, an orthopaedic surgeon, assigned a 6% permanent anatomical impairment to the body as a whole as a result of the injury and placed no permanent restrictions on Employee's activities. Employee returned to work for Employer. His workers' compensation claim was settled for 12% PPD to the body as a whole and was court approved on February 28, 2002.

Employer terminated Employee in January of 2005. After his termination, he filed petitions for reconsideration of both settlements pursuant to Tennessee Code Annotated section 50-6-241(a).[1] The cases were consolidated, and a trial was held on January 22, 2007. Employer argued that Employee was not entitled to receive reconsideration because he had been terminated for cause. The trial court ruled that Employee was eligible for

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[1] Tennessee Code Annotated section 50-6-241(a)(2) (2008) provides:

> In accordance with this section, the courts may reconsider, upon the filing of a new cause of action, the issue of industrial disability. Such reconsideration shall examine all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition. The reconsideration may be made in appropriate cases 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, if the loss of employment is within four hundred (400) weeks of the day the employee returned to work. In enlarging a previous award, the court must give the employer credit for prior benefits paid to the employee in permanent partial disability benefits, and any new award remains subject to the maximum established in subsection (b).

reconsideration of his prior awards, but that he had failed to carry his burden of proof that he was entitled to an increase in his PPD award.

Employee thereafter filed a timely motion to alter or amend pursuant to Tenn. R. Civ. P. 59.04.[2] The motion requested that the trial court either amend its ruling to award additional PPD, or reopen the proof to permit the presentation of additional evidence, specifically the depositions of Dr. Lien and Dr. Rungee, and also testimony of a vocational evaluator. The motion was supported by an affidavit of counsel which stated that he had advanced more than $4,000 to prepare the case for trial, and he

> could not, in good faith, advance additional monies for the taking of medical depositions as well as securing the opinion of a vocational expert . . . because my client, in my opinion . . . lacks the ability to bear the costs of this litigation. Now that it has been established by the trial court's ruling that [Employee's] termination by [Employer] does not preempt his right to reconsider vocational disability, I am in a position, because it is now financially feasible, to advance sufficient funds [to obtain the proposed additional evidence.]

The trial court granted the motion, stating: "Pursuant to T.C.A. § 50-6-116,[3] it appears that [an] appropriate remedy would be to allow [Employee] to supplement the record with such evidence, if available, as will provide the plaintiff with an appropriate remedy." The trial court entered an order setting aside the judgment.

A second trial was held on May 5, 2009. Employee testified briefly and introduced the deposition of Dr. James Talmage, an occupational medicine specialist who had performed an independent medical evaluation ("IME") at the request of Employee's attorney. Dr. Talmage expressed opinions concerning impairment from Employee's work injuries, and

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[2] Tennessee Rule of Civil Procedure 59.04 provides that "[a] motion to alter or amend a judgment shall be filed and served within thirty (30) days after the entry of the judgment."

[3] Tennessee Code Annotated section 50-6-116 (2008) provides:

> The rule of common law requiring strict construction of statutes in derogation of common law shall not be applicable to this chapter, but this chapter is declared to be a remedial statute, which shall be given an equitable construction by the courts, to the end that the objects and purposes of this chapter may be realized and attained.

from other causes unrelated to his employment. Dr. Talmage did not place any activity restrictions on Employee due to the work injuries.

The trial court issued a written decision finding that Employee had PPD of 29.7% to the body as a whole from the neck injury (an increase of 11.7% from the 2001 settlement) and 19.8% PPD to the body as a whole from the shoulder injury (an increase of 7.8% from the 2002 settlement), a total of 49.5% PPD to the body as a whole. Employer appealed.

Factual Background

Employee was 46 years old at the time of trial and had a high school education. His prior work experience consisted primarily of factory work. He began working for Employer in 1994, and his last day of work was August 24, 2004.

He testified at the January 2007 hearing that, during the spring and summer of 2004, he had a number of physical ailments, including acid reflux, hypertension, thyroid dysfunction, and emphysema. He was off work for a period of time to receive treatment for alcoholism. He also had additional, unspecified, personal problems involving his ex-wife and/or girlfriend. In either April or August of 2004, Employee received a written warning from his supervisor, David Bell, concerning the quality of his work. The warning caused him to have anxiety concerning his job. He testified that as a result of these (and perhaps other) factors, he began to suffer symptoms of depression. On August 25, 2004, he called Mr. Bell and told him that he was unable to work due to depression. Mr. Bell testified that he advised Employee to "make sure he went through proper channels and got his paperwork filled out."

On approximately September 2, 2004, Employee met with Dr. Karen Oldham, a physician whom Employer had contracted with to provide on-site medical services, and Gail Robinson, a human resources representative, to discuss a leave of absence. According to a summary of the meeting later drafted by Ms. Robinson, Employee explained that he was unable to work due to his mental problems. He also mentioned his emphysema and acid reflux at that time. Ms. Robinson testified that Employee was given a packet of materials which set out Employer's leave policy and provided instructions concerning medical and other documentation required for leave to be granted and extended. Employee was aware of those policies. He testified that he had received similar materials in connection with his leaves of absence earlier in the year. Among other things, those instructions stated that a physician's statement should be provided every thirty days during leave.

At the time of the meeting, Employee had not seen a physician. He had contacted or been referred to Doyle Kermicle, a clinical social worker, through Employer's Employee Assistance Program. Mr. Kermicle had previously treated Employee in 2003 and earlier in

2004. Employee returned to him on August 30, 2004. On September 1 or 2, Mr. Kermicle drafted a letter to Employer which stated that if Employee "gets some medication and continues his therapy he should be able to return to work within a month." Employer received this letter on September 2, 2004. Although Mr. Kermicle testified concerning its contents, the letter is not contained in the record. Employee continued to see Mr. Kermicle thereafter. He did not see a psychiatrist or other physician.

On September 20, 2004, Dr. Oldham sent a certified letter to Employee stating:

> [D]ue to your multiple ongoing medical conditions, we are requiring you to undergo a medical evaluation before returning to work. You must complete the following before your return to work will be reconsidered:
>
> 1. A physical examination by your Primary Physician (family practice or internal medicine) showing that you are able to work without fear of a relapse.
>
> 2. A treatment plan from your psychiatrist (Dr. Anderson) explaining the dates and types of treatment you will be receiving. You will have to continue to follow this plan once you return to work.

Employee testified that he did not receive this letter until October 17.

Ms. Robinson testified that she spoke to Employee by telephone on several occasions between September 2 and October 21, 2004. On October 21, Employee called her and advised that he had been unable to make an appointment with Dr. Anderson. Ms. Robinson testified that she told Employee to: "Try to get an appointment with somebody. Go back through and call whoever [sic] or call back with Dr. Oldham to try to get help to get through. But we needed to make sure -- if he didn't get it in within 15 days, then he was subject to termination." Employee agreed that the October 21 conversation took place, but denied that Ms. Robinson mentioned a fifteen-day deadline.

On October 25, a second meeting among Employee, Dr. Oldham and Ms. Robinson took place. Ms. Robinson testified that Employee again discussed the difficulty of obtaining an appointment with Dr. Anderson. Ms. Robinson also stated that she again advised Employee that it would be necessary for him to produce a doctor's statement to support his continuing leave within fifteen days. Employee again denied that any specific time limit was mentioned.

Later that day, Employee went to a walk-in clinic for a physical examination. The examination was conducted by a nurse practitioner, who prepared a handwritten note that listed Employee's medications and stated that Employee was "in my opinion, capable of performing normal work duties that may be required of him." Employee testified that he personally delivered this document to Employer's medical department shortly thereafter. Dr. Oldham testified, however, that the document was not received until November 9.

On October 26, 2004, Mr. Kermicle wrote a letter directed to "To whom it may concern," which stated that he had seen Employee on eight occasions beginning August 30. The letter also stated that Mr. Kermicle had referred Employee to Dr. Bradley Anderson, a psychiatrist, but that Employee "has been unable to see get in to see him because of a delay in obtaining records from his former psychiatrist." Mr. Kermicle also said in the letter that "I have encouraged him to see [a] different psychiatrist, Dr. Libby Weeks[,] who[m] he has seen before." The letter concludes with the statement "Prognosis in his recovery from depression and anxiety is very dependent on his physical health which is now under evaluation." Mr. Kermicle's letter does not indicate whether he was aware of the nurse practitioner's examination of Employee on the previous day, or of the nurse practitioner's opinion concerning Employee's ability to return to work. On or near the same date, Mr. Kermicle completed an "Attending Health Care Provider's Statement" for purposes of Employee's leave of absence. In that document, Mr. Kermicle stated that Employee was unable to work and that the estimated duration of his disability was "unknown due to general medical condition." Dr. Oldham received the letter and Health Care Provider's Statement on October 28. Dr. Oldham testified that these documents did not satisfy leave of absence requirements because Mr. Kermicle was not a physician.

On November 17, Employee saw Dr. Renee Glenn, a psychiatrist. Dr. Glenn made a handwritten note stating that she was treating him for anxiety and depression, and that her plan was to meet with him on a monthly basis. Dr. Glenn sent this note by fax to Dr. Oldham on November 18.

On the same day, Ms. Robinson and Ross Barnett, department manager over Nissan's paint plant where Employee worked, prepared a memorandum recommending that Employee be terminated because he had exhausted his Family Medical Leave Act and Accident and Sickness leave, and he had not provided medical documentation as required during his leave. The memorandum was circulated to approximately ten company officials for approval. Employer terminated Employee in January of 2005.

After his termination, Employee was unemployed for a period of time. He then worked at Dell Computer through a temporary personnel agency, but according to his testimony he was unable to perform the job due to neck and shoulder pain. He next worked

as a plumber for Mr. Rooter Plumbing. Mr. White later went to work for Don Wood Plumbing, performing the same type of work – clearing of drain lines, repair of kitchen and bathroom fixtures, and replacement of residential water heaters. He missed only a few days of work at each of these employers. He testified, however, that he believed he was unable to perform the same type of repetitive factory work that he had done for Employer and at previous jobs.

Employer has appealed, contending that the trial court erred by finding that Employee was eligible to seek reconsideration of his prior settlements. Alternatively, Employer argues that the trial court erred by granting Employee's Tenn. R. Civ. P. 59.04 post-judgment motion to reopen the proof and by considering evidence of Employee's post-settlement medical condition in making its eventual award.

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, we afford considerable deference to the trial court's factual findings in this regard because the trial court had the opportunity to directly observe the demeanor of the witnesses and to hear in-court testimony. Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 900 (Tenn. 2009). 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

Reopening of the Proof

The trial court cited Tennessee Code Annotated section 50-6-116, the "liberal construction" rule, as its basis for granting Employee's Rule 59.04 motion to alter or amend the judgment and permit introduction of additional evidence in a second trial. Employer contends that the trial court erred in granting Employee's motion because it did not satisfy any of the permissible bases for setting aside a judgment. When a party files a Rule 59.04 motion seeking to alter or amend a judgment and attempts to present additional evidence in support of such a motion, the trial court should consider the following factors:

> the moving party's effort to obtain the [additional] evidence [that the moving party seeks to present]; the importance of the new evidence to the moving party's case; the moving party's explanation for failing to offer the evidence

> [at the earlier stage in the proceedings]; the unfair prejudice to the non-moving party; and any other relevant consideration.

Stovall v. Clarke, 113 S.W.3d 715, 721 (Tenn. 2003) (citing Harris v. Chern, 33 S.W.3d 741, 744 (Tenn. 2000)). "The trial court's ruling on a motion to alter or amend will be reversed only for an abuse of discretion." Id.; see also Henry v. Goins, 104 S.W.3d 475, 479 (Tenn. 2003).

In the present case, Employee made no effort to obtain the additional proof – the depositions of Dr. Lien and Dr. Rungee, and the testimony of a vocational expert – that he sought to present following his Rule 59.04 motion, even though they were equally available to Employee before the first trial on his petition for reconsideration of his earlier workers' compensation settlements. Although the additional evidence was arguably important to Employee's case, we are of the opinion that the explanation provided for his failure to obtain and offer the evidence before the trial court's judgment at the conclusion of the first trial was insufficient to justify the reopening of proof and conducting a second trial. The only reason offered by Employee's counsel for his failure to obtain and present the additional evidence was counsel's belief that Employee "lack[ed] the ability to bear the costs of this litigation."

Moreover, the prejudice to Employer resulting from the granting of the motion to alter or amend was significant in this case. Employer was essentially required to prepare for and participate in a second trial re-litigating the same issue – the extent of Employee's additional industrial disability, if any. In Harris, the Supreme Court set forth the standard trial courts should apply in ruling on a rule 54.02 motion[4] and observed a significant difference between cases in which a party is seeking a first trial and cases where a party is seeking to re-litigate an issue upon which he or she has already had an opportunity to be heard:

> In Schaefer [v. Larsen, 688 S.W.2d 430 (Tenn. Ct. App. 1984)], the [court] rejected application of the stringent "newly discovered evidence" rule to motions to alter or amend. . . . *The newly discovered evidence standard, the court observed, was primarily applied in cases where the litigants have already had a trial. In such cases, courts should be cautious in altering their judgments*. In contrast, a litigant seeking to alter or amend a grant of summary judgment "is only seeking that which he is basically entitled to – a first trial." Schaefer, 688 S.W.2d at 433.

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[4] Tennessee courts have subsequently applied the Harris standard and analysis to Rule 59.04 motions to alter or amend a judgment. Stovall, 113 S.W.3d at 721; Kenyon v. Handal, 122 S.W.3d 743, 763 (Tenn. Ct. App. 2003) (stating "[e]ven though Harris v. Chern involved a Tenn. R. Civ. P. 54.02 motion, we have consistently used its standards to review Tenn. R. Civ. P. 59.04 motions.").

Harris, 33 S.W.3d at 744 (emphasis added); see also Henry, 104 S.W.3d at 480, 481 (noting the "considerable overlap between" Rule 59.04 and Rule 60.02 and observing that "[c]ourts construe requests for relief pursuant to Rule 60.02 much more liberally in cases involving default judgment than in cases following a trial on the merits.").

Employee, however, citing Landers v. Fireman's Fund Ins. Co., 775 S.W.2d 355, 359 (Tenn. 1989), and City of Bolivar v. Jarrett, 751 S.W.2d 137, 139 (Tenn. 1988), attempts to analogize the trial court's action to workers' compensation cases in which the Supreme Court found the medical evidence to be insufficient and remanded to the trial court for the taking of additional proof. In Landers, the trial court found that the employee had not sustained permanent impairment as a result of his work injury. The trial court did not make an alternative finding concerning the extent of disability. The Supreme Court vacated the judgment and remanded for additional proof, noting the existence of conflicting evidence concerning the extent of impairment. In doing so, it stated, "[t]he evidence already on file may be considered as well as any additional medical proof which may be adduced by either party." Landers, 775 S.W.2d at 359. In City of Bolivar, the Supreme Court reversed the trial court's finding that the employee's kidney injury was not compensable. The only medical witness to testify on the subject, a urologist, was unable to state at the time of his deposition whether the condition was permanent. The Court remanded the case "to permit the medical proof to be supplemented on the issue of permanency or, if permanency cannot be adequately established, consideration of Defendant's eligibility for temporary partial disability would be appropriate." City of Bolivar, 751 S.W.2d at 139.

We are not persuaded that either Landers or City of Bolivar is applicable here. In this case, two issues were placed before the trial court. The first was whether Employee was eligible for reconsideration of his earlier settlements. If so, then it would be necessary for the trial court to determine the full extent of permanent disability sustained by Employee as a result of the injuries at issue. Employee did not seek to bifurcate the issues and was provided a full opportunity to present any evidence material to either issue. He prevailed on the first issue, but failed to sustain his burden of proof as to the second. Employee's motion to alter or amend is essentially a request to re-litigate the same issue with different evidence. The evidence described in the motion was available at the time of the trial. There had been no change in the applicable law. The trial court's original judgment was not based upon a clear error of law, nor did it result in a *sui generis* injustice. Further, there is no allegation or indication of excusable neglect by Employee or his counsel. We conclude that the trial court erred by granting Employee's post-trial Tenn. R. Civ. P. 59.04 motion.

Award of Additional PPD Benefits

Employee makes the alternative argument that the evidence presented at the January 2007 trial alone was sufficient to support the trial court's eventual award of additional permanent partial disability benefits. In effect, he contends that the evidence at the 2007 trial preponderates against the conclusion announced by the trial court at that time. "The extent of vocational disability is a question of fact to be determined from all the evidence, including lay and expert testimony." McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn. 1999); Seals v. England/Corsair Upholstery Mfg. Co., 984 S.W.2d 912, 915 (Tenn. 1999). Among the factors a trial court should consider for enlargement of an award under Tennessee Code Annotated section 50-6-241(a)(2) are the "employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in the claimant's disabled condition." Brewer v. Lincoln Brass Works, Inc., 991 S.W.2d 226, 229 (Tenn. 1999) (internal quotation marks omitted); McIlvain, 996 S.W.2d at 183. The employee's own assessment of his or her physical condition and resulting disability is competent testimony that the trial court should consider as well. McIlvain, 996 S.W.2d at 183.

As we have noted, Employee was 46 years old at the time of trial, had a high school education, and an employment history consisting mainly of factory work. At the 2007 trial, Employee testified that he had pain in his shoulder, neck, and hands on a daily basis, and that he didn't think he could return to his job for Employer. After he was terminated, he worked at Dell Computer for a few weeks, but left that job because he couldn't do the required reaching. He then worked at a plumbing company, doing residential plumbing work, which consisted of changing water heaters, bathroom and kitchen faucets, commodes, cleaning out drain lines and the like. Employee admitted being physically able to do that work and was so employed at the time of the 2009 trial. He also testified that in mid-November of 2004, he was willing and able to return to work doing his regular job with Employer. No medical proof was introduced at the 2007 trial concerning Employee's condition at the time he returned to work from his injuries, or at the time of the hearing. The trial court, after having had the benefit of observing the witnesses live, ruled as follows after the conclusion of the January 2007 trial:

> There is no medical testimony with regard to the effect of [Employee's] prior injuries upon the plaintiff's ability to work nor is there any way for the Court to extrapolate what, if any, additional vocational disability is related to [Employee's earlier injuries]. In addition, the plaintiff has other significant health injuries which were unrelated to the work history and there is no proof as to how those medical conditions relate to any additional vocational disability.

> The plaintiff also testified that at the time of his termination, he was willing and able to return to work doing the same job he had been doing since the last injury. His supervisor also testified that at the time plaintiff last worked, he was capable of performing his job in a satisfactory manner. The plaintiff has failed to carry the burden of proof that he is entitled to an increase in his vocational disability rating.

Considering the evidence in the record as a whole, we are unable to conclude that it preponderates against the trial court's finding that Employee did not sustain his burden of proof under Tennessee Code Annotated section 50-6-241(a).

In light of our above conclusions, we find it unnecessary to address Employer's argument that the trial court erred by finding that the circumstances of Employee's termination barred him from seeking reconsideration of his prior settlements.

Conclusion

The judgment of the trial court is reversed. The case is remanded to the trial court for entry of an order consistent with this opinion. Costs are taxed to Jeffrey White, for which execution may issue if necessary.

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SHARON G. LEE, JUSTICE

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No. M2009-02189-SC-WCM-WC - Filed - April 14, 2011

JUDGMENT

This case is before the Court upon the motion for review filed by Jeffrey White 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 Jeffrey White and his surety, for which execution may issue if necessary.

LEE, J., NOT PARTICIPATING