IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
January 23, 2012 Session

ERIC MILLER v. R. J. WHERRY & ASSOCIATES ET AL.

Appeal from the Circuit Court for Davidson County
No. 08C-3768 Amanda McClendon, Judge

No. M2011-00723-WC-R3-WC - Mailed July 18, 2012
FILED SEPTEMBER 19, 2012

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 accordance with Tenn. Sup. Ct. R. 51. After the employee sustained a compensable injury to his lower back, the parties reached a settlement of the claim at a benefit review conference. As part of the agreement, the employer agreed to provide a job for the employee within the medical restrictions arising from the injury. The employer eventually decided not to rehire the employee after he failed to return to work. Thereafter, the employee filed a petition in the Circuit Court for Davidson County seeking reconsideration of his settlement. The trial court granted the petition and increased the disability award. On this appeal, the employer takes issue with (1) the trial court's adoption verbatim of the employee's proposed findings of fact and conclusions of law, (2) the trial court's conclusion that the employee was entitled to reconsideration, (3) the exclusion of evidence related to the employee's prior back problems, and (4) the claimed excessiveness of the award. We affirm the judgment.

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

WILLIAM C. KOCH, JR., J., delivered the opinion of the Court, in which WALTER C. KURTZ, SR.J. and J.S. "STEVE" DANIEL, SP.J., joined.

Thomas W. Tucker, III, Nashville, Tennessee, for the appellants, R. J. Wherry & Associates and Westport Insurance Corporation.

Brian Dunigan, Goodlettsville, Tennessee, for the appellee, Eric Miller.

MEMORANDUM OPINION

I.

Eric Miller was employed by R. J. Wherry & Associates ("Wherry & Associates") as an installer of cabinets and countertops. In September 2007, Mr. Miller injured his lower back. Dr. M. Robert Weiss surgically repaired Mr. Miller's herniated lumbar disk on February 22, 2008. Although Mr. Miller continued to experience back pain, Dr. Weiss determined that he reached maximum medical improvement on April 16, 2008, and opined that Mr. Miller had a 10% permanent anatomical impairment to the body as a whole as a result of the injury and surgery. Dr. Weiss also recommended that Mr. Miller avoid repetitive bending, stooping, and heavy lifting, and observe a 40-pound lifting limit.

At a benefit review conference held on June 10, 2008, the parties settled Mr. Miller's claim for 14.567% permanent partial disability to the body as a whole. Wherry & Associates agreed to provide Mr. Miller a full-time position at his previous salary within the restrictions imposed by Dr. Weiss.

The agreement did not include a specific date on which Mr. Miller would return to work. Several days after the benefit review conference, Mr. Miller returned to Wherry & Associates to tell Colton Wherry that he was in pain and unable to work and that he was going to see a doctor. When Colton Wherry met with Mr. Miller a second time, Mr. Miller told him that he was still unable to work.

When Mr. Miller met with Randall Wherry two or three weeks after the benefit review conference, he insisted that he had fallen on the previous day and that he was unable to work. After Mr. Miller stated that he had been examined by a physician, Randall Wherry told him that he would be required to obtain a medical release before he returned to work.

On July 22, 2008, Mr. Miller requested Sandra Hutchinson, Wherry & Associates' office manager, to provide him with a separation notice. Ms. Hutchinson declined because Mr. Miller had not been laid off or fired. On August 13, 2008, Ms. Hutchinson mailed a letter to Mr. Miller stating that Wherry & Associates continued to hold open a job for him and requesting Mr. Miller confirm that he intended to return to work for Wherry & Associates. The United States Postal Service returned the letter even though it had been mailed to the address Mr. Miller had used on the June 2008 settlement documents. After its letter was returned, Wherry & Associates mailed a copy of the letter to Mr. Miller's attorney.[1]

[1]Mr. Miller later testified that he never received a copy of this letter.

Wherry & Associates decided not to rehire Mr. Miller after it still did not hear from him about returning to work.

On November 13, 2008, Mr. Miller filed a petition for reconsideration in the Circuit Court for Davidson County. At the February 2, 2011 trial, John McKinney, a vocational evaluator, opined, after considering Mr. Miller's age, education, work history, and medical restrictions, that Mr. Miller had sustained a 50% vocational disability. At the conclusion of the trial, the trial court took the case under advisement and directed both parties to email proposed findings of fact and conclusions of law to her law clerk. In an order filed on February 23, 2011, the trial court found that Mr. Miller was entitled to reconsideration because he had not made a meaningful return to work and, therefore, Mr. Miller was entitled to an award of 35% additional permanent partial disability benefits. On March 25, 2011, the trial court denied Wherry & Associates' Tenn. R. Civ. P. 59.04 motion.

II.

Courts reviewing an award of workers' compensation benefits must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When conducting this examination, Tenn. Code Ann. § 50-6-225(e)(2) (2008) requires the reviewing court to "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. *Tryon v. Saturn Corp*., 254 S.W.3d. 321, 327 (Tenn. 2008); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). However, the reviewing courts need not give similar deference to a trial court's findings based upon documentary evidence such as depositions, *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006); *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004), or to a trial court's conclusions of law, *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

III.

Wherry & Associates first insists that the trial court's findings should not be accorded a presumption of correctness under Tenn. Code Ann. § 50-6-225(e)(2) because they were taken verbatim from the proposed findings of fact and conclusions of law prepared by Mr. Miller's counsel. The preparation of findings of fact and conclusions of law is a high judicial function. It is a far better practice for trial courts to prepare their own findings of fact and conclusions of law, and, in prior cases, we have expressed concern about the practice of some

trial courts to do no more than to adopt the findings of fact and conclusions of law of one of the parties. *See, e.g.*, *Blankenship v. Ace Trucking, Inc.*, No. M2010-00597-WC-R3-WC, 2011 WL 1433776, at *8-9 (Tenn. Workers' Comp. Panel Apr. 14, 2011); *Federated Rural Elec. Ins. Exch. v. Hill*, No. M2009-01772-WC-R3-WC, 2010 WL 5313731, at *8 (Tenn. Workers' Comp. Panel Oct. 7, 2010). Despite our misgivings about this practice, we find no statutory basis for employing a different standard of review for findings of fact and conclusions of law prepared by a party and adopted by a trial court than for findings of fact and conclusions of law independently prepared by the trial court.

IV.

Wherry & Associates also insists that the trial court erred by concluding that Mr. Miller was entitled to reconsideration of his previous settlement because he did not have a meaningful return to work. It emphasizes that it was ready and willing to provide Mr. Miller with a job consistent with his medical restrictions and that it was Mr. Miller who failed to communicate his availability to work or to return to work within a reasonable time after the settlement. Mr. Miller responds by pointing out that he was unable to return to work on several occasions because of back pain and that he was told on another occasion that he would not be permitted to return to work without a medical release.

It is undisputed that, at some point in time after August 13, 2008, Wherry & Associates decided to terminate Mr. Miller or rescind its offer to rehire him. It is likewise undisputed that, whatever the intentions of the parties were at the time of the initial settlement in June 2008, Mr. Miller never returned to work.

Deciding whether an employee has had a meaningful return to work is an extremely fact-intensive inquiry. The Tennessee Supreme Court has observed that:

> The circumstances to which the concept of "meaningful return to work" must be applied are remarkably varied and complex. When determining whether a particular employee had a meaningful return to work, the courts must assess the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to either return to or remain at work. The determination of the reasonableness of the actions of the employer and the employee depends on the facts of each case.

Tryon v. Saturn Corp., 254 S.W.3d at 328 (citations omitted).

In this case, there is no question that Mr. Miller did not return to work for Wherry & Associates. It is clear that the parties had different understandings of the provision of the settlement agreement pertaining to Mr. Miller's return to work. Mr. Miller made efforts to return, though he may have actually been unable to work on some occasions. Wherry & Associates eventually made a business decision to rescind its offer of re-employment. We cannot find that either party acted unreasonably. The intentions of the parties at the time of the settlement agreement were simply frustrated by later events. Under these circumstances, we are unable to conclude that the evidence preponderates against the trial court's finding that a meaningful return to work did not occur.

V.

Wherry & Associates also takes issue with the trial court's limitation on its questioning of Mr. Miller regarding his history of back problems. It insists that the testimony it sought to elicit with these questions was relevant because it tended to show that Mr. Miller already had significant limitations prior to the injury in this case. We find that the additional questions Wherry & Associates desired to ask would, for the most part, have elicited testimony about matters that were already in evidence.

During cross-examination, Mr. Miller confirmed that he had a previous back injury that had resulted in a workers' compensation claim and settlement. He also confirmed that he had testified in his discovery deposition that he "had back problems all my life, just pulled muscles and things of that nature." Mr. Miller's counsel objected to further questions on the subject, and the trial court ultimately sustained the objection. Wherry & Associates did not attempt to make an offer of proof regarding the information it was attempting to elicit from Mr. Miller. However, in the course of arguing the objection, counsel for Wherry & Associates described the additional testimony sought as follows: "I do have the testimony that he had a prior back injury that was work-related and that he's had back problems all of his life."

Decisions concerning the admission or exclusion of evidence "are generally accorded a wide degree of latitude and will only be overturned on appeal where there is a showing of abuse of discretion." *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 442 (Tenn. 1992). We note that Mr. Miller testified as to both his prior work injury and his history of minor back problems before any objection was raised. Wherry & Associates did not make an offer of proof, and counsel's statement suggests that the additional information sought was cumulative. We conclude that the trial court did not err by sustaining Mr. Miller's objection to additional questioning concerning his prior back problems.

VI.

As a final matter, Wherry & Associates asserts that the trial court's award of additional permanent partial disability benefits is excessive. When combined with the benefits awarded as a result of the parties' June 2008 settlement, the additional benefits resulted in an award of slightly less than a 50% permanent partial disability award.

The extent of vocational disability is a question of fact to be decided by the trial judge. *Seals v. England/Corsair Upholstery Mfg. Co.*, 984 S.W.2d 912, 917 (Tenn. 1999). When determining the extent of disability, "the court shall consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities and capacity to work at types of employment available in claimant's disabled condition." Tenn. Code Ann. § 50-6-241(d)(1)(A) (2008 & Supp. 2011). Mr. Miller is approximately thirty-six years old. Most of his prior work experience was as an installer of cabinets and countertops. According to his testimony and that of Randall Wherry, the restrictions Dr. Weiss placed on Mr. Miller precluded a return to that line of work. Although he was a high school graduate, Mr. Miller was able to read, write, and perform arithmetic at only a grade-school level. Mr. McKinney opined that Mr. Miller had sustained a 50% vocational disability. Wherry & Associates introduced no evidence to the contrary. Considering these factors, we are unable to conclude that the evidence preponderates against the trial court's finding concerning the extent of disability.

VII.

We affirm the trial court's judgment and remand the case to the trial court for whatever further proceedings, consistent with this opinion, may be required. We tax the costs of this appeal to R. J. Wherry & Associates and Westport Insurance Corporation, and their surety, for which execution, if necessary, may issue.

_____

WILLIAM C. KOCH, JR., JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

ERIC MILLER v. R. J. WHERRY & ASSOCIATES ET AL

Circuit Court for Davidson County
No. 108C-3768

No. M2011-00723-SC-WCM-WC - Filed September 19, 2012

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by R.J. Wherry & Associates et al, 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 R. J. Wherry & Associates et al, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

KOCH, William C., Jr., J., Not Participating