IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 26, 2010 Session

PAUL WAYNE DOUTHIT v. GRIFFIN INDUSTRIES, INC. ET AL.

Appeal from the Circuit Court for Giles County
No. CC-11060 Jim T. Hamilton, Judge

No. M2009-01857-WC-R3-WC - Mailed: August 4, 2010
Filed - September 8, 2010

The employee, Paul Douthit, sustained a compensable injury to his left knee, which resulted in an anatomical impairment of 2% of the leg. He was able to return to his prior employment, and his claim was settled for 3% permanent partial disability to the leg, pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A). He subsequently had a second injury. A committee composed of his peers determined that both injuries were preventable, which led to his termination for violation of a company rule. He filed this petition for reconsideration in accordance with Tennessee Code Annotated section 50-6-241(d)(1)(B)(ii). The trial court found that Mr. Douthit's termination was not the result of intentional misconduct, that his conduct did not rise to the level of ordinary negligence, and that he was eligible for reconsideration. The trial court awarded an additional 9% permanent partial disability to the leg. The employer, Griffin Industries, has appealed, contending that "intentional misconduct" is an incorrect standard, that the findings of the peer committee are not reviewable, and that the trial court, therefore, erred in reconsidering the settlement. We agree that the "intentional misconduct" standard is not in conformity with existing case law, but affirm the trial court's determination that the employee was eligible to seek reconsideration.[1]

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

DONALD P. HARRIS, SR. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, J., and WALTER C. KURTZ, SR. J., joined.

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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.

Desiree I. Hill and M. Neal Cope, Nashville, Tennessee, for the appellants, Griffin Industries, Inc. and Liberty Mutual Group.

Richard T. Matthews, Columbia, Tennessee, for the appellee, Paul Wayne Douthit.

MEMORANDUM OPINION

Factual and Procedural Background

Griffin Industries (Griffin) removes waste oil and by-products from slaughterhouses, restaurants and other establishments. Mr. Douthit was hired in January 2006 as a truck driver, collecting and transporting waste. He later became a "skipper driver," filling in for absent drivers and performing other tasks. On December 20, 2007, he was collecting bones and internal organs of slaughtered animals for disposal. This animal by-product was placed by the slaughterhouse in fifty-five-gallon drums. Mr. Douthit would maneuver the drums onto a portable dolly and roll them to his truck, where he would place them on an automatic lift that emptied the contents of the drum into a container on the bed of his truck. At a slaughterhouse in Huntland, Tennessee, he was attempting to move a fifty-five-gallon drum from a riser onto the floor so that he could get it onto his dolly when he slipped and fell injuring his left knee. The floor where the incident occurred was slippery due to the presence of animal blood and water.

The injury was accepted as a compensable work-related injury. Dr. Jeffrey Adams, the treating physician, diagnosed a torn meniscus and performed arthroscopic surgery. He released Mr. Douthit with a 2% permanent impairment and no work restrictions. Mr. Douthit was able to return to work for Griffin. Unrelated to his work injury, his job was changed somewhat, in that he was assigned to work as a mechanic in addition to his work as skipper driver. Mr. Douthit's claim was settled for 3% permanent partial disability to the left leg in February 2008.

On January 14, 2009, Mr. Douthit sustained a second compensable injury. He was removing a "PTO pump" from a truck. The pump was attached to the truck by three bolts. Mr. Douthit testified:

> I was going to pull the other [bolt] out to take the pump out to check everything, because it was leaking off. So when I hit that bolt with a wrench, it was almost broke off to start with, and when it did, it broke and fell out. And I was trying to -- I was sitting under it, trying to help hold it in . . . and not let it fall. But there wasn't no holding it.

The pump fell from the truck, injuring Mr. Douthit's left shoulder. He reported the injury to his supervisor, and it was accepted as being work-related. The foregoing testimony of Mr. Douthit and a similar account contained in an "Employee's Report of Damage or Injury" completed by him were essentially the only evidence in the record as to how this accident occurred. The claim for benefits for the second injury remained unresolved at the time this case was tried.

Griffin had a policy that any employee who sustained two "preventable" accidents within a three-year period was subject to termination. The policy applied to accidents which caused physical injuries or property damage in excess of $500.00. The question of whether a particular accident was preventable was decided by a "safety committee," composed of "hourly employees" from the geographical area in which the accident occurred. Daniel Moreno, general manager for the Russellville, Kentucky area, in which Mr. Douthit was located, testified that he or another management representative attended the meetings of the safety committee, but had no vote. During cross-examination, Mr. Moreno stated that the determination of whether a particular accident was preventable or not was left to the members of the safety committee and that Griffin did not supply any written guidelines or standards for making that determination. He agreed that Mr. Douthit was not terminated for intentional misconduct.

The safety committee determined that both the December 2007 and January 2009 accidents were preventable. Based upon the aforementioned policy, Mr. Douthit was terminated in January 2009. He then filed this petition for reconsideration, based upon Tennessee Code Annotated section 50-6-241(d) (2008& Supp. 2009). Griffin argued that he was not entitled to any additional benefits because he was terminated for misconduct connected with his employment.

The trial court took the case under advisement and issued a judgment finding that Mr. Douthit's actions did not constitute misconduct which would bar reconsideration of the earlier settlement. It then awarded 12% permanent partial disability to the left leg, the maximum award permitted by section 50-6-241. Griffin has appealed, contending that the trial court erred by determining that Mr. Douthit was entitled to reconsideration of his settlement and, in the alternative, erred by awarding six times the anatomical impairment.

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 to the trial court

when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where 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 deposition, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

Analysis

1. *Is reconsideration barred by employee's misconduct?*

Tennessee Code Annotated section 50-6-241(d)(1)(B) provides, in pertinent part:

> (i) If an injured employee receives benefits for body as a whole injuries pursuant to subdivision (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) within four hundred (400) weeks of the day the employee returned to work for the pre-injury employer, the employee may seek reconsideration of the permanent partial disability benefits.
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> * * * *
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> (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 or retirement does not result from the work-related disability that is the subject of such reconsideration; or
> >
> > (b) *The employee's misconduct connected with the employee's employment.*

(Emphasis added).

Griffin contends here, as it did at trial, that Mr. Douthit is barred from receiving reconsideration of his earlier settlement, because his loss of employment was the result of his

misconduct. Specifically, it argues that he violated the company rule against having two preventable accidents within a three-year period, and that violation constituted misconduct for purposes of section 50-6-241(d)(1)(B)(iii)(b). The trial court rejected Griffin's contention, stating:

> From the testimony of the employer's representative, Dan Moreno, it is obvious to the court that Mr. Douthit at no time was guilty of any intentional misconduct relating to his employment. The reason stated by the employer for Mr. Douthit's termination is that he was involved in two "preventable accidents" at work. The court finds from the evidence that the accidents were just that - accidents. Neither accident involved any misconduct of any sort on the part of Mr. Douthit. The accidents do not even rise to the level of ordinary negligence on the part of the employee. Mr. Moreno agreed in his testimony that Mr. Douthit did not violate any company policy or safety regulation with respect to the accidents. The court finds that the employer unilaterally declared the accidents to be "preventable" but the court finds that Mr. Douthit was guilty of no misconduct in any form relating to his employment. For these reasons, the court finds the employee, Paul Douthit, to be entitled to reconsideration of his prior workers' compensation claim pursuant to T.C.A. 50-6-241.

Two recent Panel decisions have discussed the "misconduct" defense in depth. In Wheeler v. Hennessy Industries, No. M2007-00921-WC-R3-WC, 2008 WL 3342878, at *8 (Tenn. Workers' Comp. Panel Aug. 11, 2008), Justice Koch observed:

> When an employer relies on the misconduct exception to Tenn. Code Ann. § 50-6-241(b), it necessarily concedes that it did not return the employee to work or that the employee is no longer working. Ascertaining whether the misconduct exception applies requires the court to address whether the employer has satisfactorily demonstrated that the employee's misconduct was its actual motivation in terminating the employee.
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> If the employee's behavior cannot be reasonably classified as misconduct, then the employer's misconduct assertion would be merely pretext for discharging the employee, and the larger cap in Tenn.Code Ann. § 50-6-241(b) would apply.

(Citations and footnotes omitted). In Pigg v. Liberty Mutual Insurance Co., No. M2007-01940-WC-R3-WC, 2009 WL 585962, at *5 (Tenn. Workers' Comp. Panel Mar. 9, 2009), the Panel stated:

> The guiding principle to be applied in addressing this issue is "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," Tryon [v. Saturn Corp.], 254 S.W.3d [321,] 328 [(Tenn. 2008)]. "The determination of the reasonableness of the actions of the employer and the employee depends on the facts of each case." Id. "[A]n employer should be permitted to enforce workplace rules without being penalized in a workers' compensation case." Carter [v. First Source Furniture Group], 92 S.W.3d [367,] 371 [(Tenn. 2002)]. However, an employer's decision to terminate an employee for non-compliance with workplace rules is subject to examination by the courts in that employee's workers' compensation lawsuit.

(Fourth alteration in the original)

As these cases indicate, an "intentional misconduct" standard is insufficient. A similar standard was considered and rejected by the Panel in Pigg. 2009 WL 585962, at *5. It is the reasonableness of an employer's work rule and the reasonableness of the application of that rule to a particular employee which determine whether or not a terminated employee's application for reconsideration is barred by his misconduct.

In this case, Mr. Douthit does not appear to contest the reasonableness of the preventable accident rule per se. Rather, he questions the application of the rule to him in this circumstance. Griffin asserts that delegating enforcement of the preventable accident rule to a committee consisting of Mr. Douthit's peers, rather than management, ensures fairness in its application. In response, Mr. Douthit argues that the absence of specific guidelines for the committee to apply makes its decisions inherently arbitrary. Considering these arguments in light of the circumstances of this case and the existing case law, we agree with Mr. Douthit.

In our view, Griffin's policy of terminating employees who have two preventable accidents within three years, if properly fashioned and applied, appears to be reasonable. Griffin's safety review committee system reflects some attempt to provide a fair process for enforcement of its rules. The absence of a standard for the committee to use in determining which accidents are "preventable," however, undermines the reasonableness of Griffin's

policy. The lack of a procedural framework for developing information and the paucity of the information upon which the committee's determination was based in this case, upon which the committee's determination was based, belie the fairness of the system.

With regard to the December 2007 incident, it appears the safety committee was provided the report of Griffin's investigator, who described the incident as follows: "Paul was picking up Jones & Son Processing when while moving F/B barrles (sic) slipped and fell due to slippery condition." Nonetheless, the investigator determined the accident preventable because "Paul knew it was slippery and should have been more attentive to the surrounding conditions." Based apparently on this meager information, the safety committee found the accident could have been prevented because "Paul new (sic) the floor was slick & slippery even with slip resistant shoes on he should have been extra careful and paid more attention to his surroundings."

Based upon the evidence presented to the safety committee, whether Mr. Douthit could have been more attentive and whether being more attentive would have prevented this accident are speculative at best. In our view, the only apparent ways Mr. Douthit could have prevented the December 2007 accident would have been to refuse to load his truck until the loading area was washed clean of the animal blood which caused him to fall or, as Mr. Douthit testified, to have driven his truck back to the dock without loading the waste. Either of these decisions, however, would have disrupted his employer's business operations. Mr. Douthit testified, without contradiction, that the floors of all slaughterhouses are covered with blood and waste, and complaints about such conditions are ignored by operators of those facilities. Both Mr. Douthit and Daniel Moreno, Griffin's regional general manager, testified that they were not aware of any safety procedure, rule or company policy that Mr. Douthit violated relative to this injury or the one that later occurred.

With regard to the January 2009 incident, the information made available to the safety committee was an employee's report of injury filled out by Mr. Douthit and a report filled out by the company investigator. Mr. Douthit's report contained the following description of the incident: "On 1-14-9 when I was pulling PTO pump out of B1914, 3 of 4 bolts were broke. I went to take the other one out, and it broke and the pump fell out on my arm." The company investigator described the incident as follows: "Paul was taking off PTO pump on B1914, a F & B truck, when the pump fell off onto his arm at approximately 11:00 a.m." These two statements were the only descriptions of the incident that the evidence reveals were presented to the safety committee. The investigator made no finding that the accident could have been prevented. Nonetheless, the safety committee found the accident preventable on the ground Mr. Douthit should have used a floor jack to help support the PTO pump. There was no mention of a floor jack in the information presented to the safety

committee, no indication that such a device was available, and no indication that the pump was positioned in the truck such that it could have been supported by a jack.

Most employers expect their employees to engage in some activity that will expose them to a risk of injury in order to complete the employer's business efficiently. It is only where the employee violates some safety rule or unnecessarily exposes himself or herself to a risk of injury, in view of the requirements of the efficient operation of the employer's business, that employer discipline for misconduct is reasonable. Absent such a standard, there is a potential for the arbitrary application of rules imposing discipline for "preventable" injuries, such as what appears to have occurred in the case before us.

Once an appropriate standard has been formulated, it is necessary that the decision maker have sufficient reliable information upon which to base a determination. It would seem desirable that the employee, in such a situation, be made aware of any adverse evidence and be given the opportunity to respond to it. In the present case, the trial court apparently was of the opinion that the evidence presented to the safety committee in both cases did not rise to the level of ordinary negligence on the part of Mr. Douthit. The evidence contained in this record does not preponderate against that finding. Absent an appropriate standard and the presentation of reliable information that would support a determination the standard had been violated, we are unable to conclude that Griffin's termination of Mr. Douthit was reasonable under the circumstances of this case, as shown by the record before us. Thus, we do not find that the trial court erred in determining him eligible, under the statute, to seek a reconsideration of his prior award.

2. *Was the maximum award of six times the anatomical impairment excessive?*

Griffin argues that the evidence does not justify the maximum award. It points to Mr. Douthit's age (43), his professed ability to read and write, his skills as a mechanic, his prior part ownership of a trucking business, and the absence of medical restrictions. In response, Mr. Douthit emphasizes his limited education (eighth grade), his own testimony concerning ongoing pain and swelling in his knee, and the testimony of himself and his wife concerning his limitations in certain activities of daily living, such as yard work and driving a vehicle with a "heavy" clutch.[2] The trial court specifically addressed each of those factors and stated:

> In reconsidering the amount of permanent partial disability associated with the employee's left lower extremity injury, the court has considered all

[2]Mr. Douthit held a commercial driver's license and had previously worked as a semi-tractor, trailer truck driver.

> the factors referred to in TCA 50-6-241. From the records of Dr. Jeff Adams it appears that Mr. Douthit retains a permanent impairment rating of 2% to his left lower extremity following knee surgery. Dr. Adams recommends in his records, regular icing of the knee. Mr. Douthit has testified that he has daily pain in the knee which "hurts all the time." The knee swells with activity, hurts him at night and requires daily medication of ibuprofen. He can't stand for long periods of time and cannot do a job that requires standing 6-8 hours per day. He is unable to run and could not drive a heavy truck requiring him to use a heavy clutch for long periods of time. Pam Douthit testified that her husband is unable to do yard work as he did before the injury and that he takes regular medication for knee pain.
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> Mr. Douthit has a limited education with no GED and has worked only at jobs requiring heavy manual labor his entire work life. The court finds Mr. Douthit to a permanent partial disability associated with the knee injury in the total amount of 12% to the left lower extremity.

Having reviewed the entire record, we are unable to find that the evidence preponderates against the trial court's conclusion.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to the appellants, Griffin Industries, Inc. and Liberty Mutual Group, and their surety, for which execution may issue if necessary.

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DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
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Circuit Court for Giles County
No. CC-11060

No. M2009-01857-WC-R3-WC - Filed - September 8, 2010

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 appears 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 the appellants, Griffin Industries, Inc. and Liberty Mutual Group, and their surety, for which execution may issue if necessary.

PER CURIAM