IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
October 27, 2014 Session

GARY COLLIER v. McEVOY FUNERAL HOME, INC., ET AL.

Appeal from the Circuit Court for Carroll County
No. 12-CV-62 Don R. Ash, Judge

No. W2014-00061-SC-R3-WC - Mailed November 25, 2014;
Filed December 29, 2014

A funeral director sustained injuries to his shoulder and back while assisting with carrying a casket. His injury was accepted as compensable. Within a few days, he submitted a letter of resignation to his employer. After recovering from his injuries, he filed this action seeking permanent disability benefits. He also sought reconsideration of a previous settlement pursuant to Tennessee Code Annotated section 50-6-241(d). His employer asserted that the employee was not entitled to reconsideration of the earlier settlement and that any award for his later injury was subject to the one and one-half times impairment cap because of his voluntary resignation. The trial court found that the employee did not voluntarily resign, granted the petition for reconsideration, and awarded benefits for the second injury in excess of the cap. The employer appealed. The 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 pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment of the trial court.

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

Brandon O. Gibson, JUDGE, delivered the opinion of the Court, in which HOLLY M. KIRBY, JUSTICE and TONY CHILDRESS, CHANCELLOR, joined.

Terri Smith Crider and Kyle C. Atkins, Humboldt, Tennessee, for the appellants, McEvoy Funeral Home, Inc. and Auto Owners Insurance Company.

Julie A. Reasonover, Nashville, Tennessee, for the appellee, Gary Collier.

OPINION

Factual and Procedural Background

Gary Collier ("Employee") suffered a compensable injury to his left shoulder on February 9, 2010. He sustained a 6% anatomical impairment to the body as a whole as a result. He returned to work for his employer, McEvoy Funeral Home ("Employer"). His claim was settled based on 9% permanent partial disability to the body as whole. On August 12, 2011, Employee sustained an injury to his right shoulder, mid-back and lower back. He continued working until August 22, 2011 but did not return to work thereafter. Employee sought reconsideration of the 2010 claim. A Benefit Review Conference ("BRC") held on April 17, 2012 did not resolve that claim. Employee filed a petition for reconsideration on May 14, 2012. A second BRC on September 10, 2012 did not resolve his claim for the August 2011 injury, and he filed a civil action on November 2, 2012. The two actions were consolidated. The matter was tried before the Circuit Court for Carroll County on October 31, 2013.

Employee began working for Employer in 1971. In 1973, he became an apprentice funeral director. He received his Tennessee funeral director's license in 1983 and his Kentucky license in 1984. Employee was co-manager of Employer from 1983 until 1997. From 1997 until 2000, he was a trainer for a business that sold pre-need funeral insurance. In 2000, Employee returned to Employer as sole manager of the business, and he continued in that role until August 22, 2011. Employee's work as an apprentice and co-manager included "shift work," which he described as "on call at night, 24/7. When a death call comes in, making the removal, wherever that might be, at the home, possibly a nursing home, and bringing the body back to the funeral home, and then preparation the next morning to prepare the funeral home for the families to come in." According to Employee's wife, Kathy Collier, and the owner of the funeral home, William Looney, Employee did not perform shift work after becoming manager. However, in June 2011, Mr. Looney asked Employee to take on shift work due to the termination of an apprentice.

On Friday, August 12, 2011, Employee was working on a visitation at First United Methodist Church in Paris, Tennessee. The casket had to be carried up several stairs into the church, and the casket was particularly heavy. Employee and three other men were carrying the casket up the stairs when the casket "rolled." This movement pulled Employee's right arm, causing immediate pain in his right shoulder, neck, and back. Employee told the other men that he had injured himself. He also spoke briefly to his wife, who worked at the church. As soon as he was able to get away, Employee left the church and went home. There, he took ibuprofen and a muscle relaxer and sat for a time in his whirlpool.

On August 13, Employee worked on three funerals. However, there were enough pallbearers and staff that he "didn't have to touch a casket" on that day. He continued to have a "deep ache, and a sharp pain in the right hip, down the right leg." At home, he again took medication and used the whirlpool. When he awoke on the morning of August 14, Employee's legs "were numb from the pelvis down to the toes." He was scheduled to open the funeral home and, with assistance from his wife, he was able to shower and dress and drive to work. He told he wife he "had to do something" because he was concerned about his health. He suggested that he would "probably write a letter" to Mr. Looney about the situation. After arriving at the funeral home, he did so. That letter reads as follows:

> William T. Looney, Vice President
> McEvoy Funeral Home, Inc.
> Paris, TN 38242
>
> Sunday, August 14th, 2011
>
> Dear Bill,
>
> Please accept this letter of my resignation.
>
> I have been associated with McEvoy Funeral Home since May of 1971,which is 40 years. Of that time I have worked 30 plus years as a director and four years as pre-planning sales manager with IFPA which included McEvoy Funeral Home.
>
> I have loved my work in funeral service and I've found that to be my outlet for community service. It has been a wonderful experience.
>
> Having said that, I am now approaching 61 years of age and I find the excess hours taking their toll on my body. I remember hearing all through my career that the average life expectancy of a funeral director to be 62 and I now understand.
>
> Today, I am beginning to plan the rest of my life, and I choose to live. I will start exploring opportunities in our area for work to which I am best suited. I plan to work until about the age of 70.
>
> Please accept this as my official notice and I am prepared to leave today or by December 31, 2011.

Respectfully,

Gary S. Collier

Employee left the letter at the funeral home and called Mr. Looney to alert him to it. He testified that, in spite of the wording of the letter, his only intention at the time he wrote it was to "get [Mr. Looney's] attention to not do shift work, and go back to the regular job as manager." He added that, prior to August 12, 2011, he had no plans to retire or "start a new chapter" in his life.

Employee and Mr. Looney met on Monday, August 15. Their accounts of that meeting differ. Employee testified that the conversation was:

> Very basic. He said about the letter. And I told him about my body, that I couldn't -- I couldn't take that anymore. And on that date, he said, well, I can't accept this now. You have to give me some time. I said, you know, that's not my intent. You've got whatever time that you need.
>
> The letter said, or through December or basically whenever, which meant I -- I just wrote the letter. Whatever happens, I wrote the letter to get Mr. Looney's attention that I could not -- I had injured myself and could not pull the double shift.
>
> He left saying that day, give me some time. I said, you've got whatever you need. He said, you're going to work this week nights. I said, Mr. Looney, I can't. I'm hurt. I can't do that. He said, I will get somebody else to pull nights, and then you just do your job in the daytime, and we'll talk later. That's how it ended.

Mr. Looney, however, testified that Employee called him at home on the morning of August 15 and asked if he needed to come in to work. He told Employee that he needed to come in so they could discuss the situation. Mr. Looney described the discussion as follows:

> My recollection of that is that when we met on the 15th, that morning after he called me, the first thing about that conversation was he couldn't do any more shift work, couldn't do the night work that he had been doing for those two months. I said, that's no problem. I said, somebody will take care of that.
>
> And then we discussed a departure, and it was November 1st. And at the end of which that was agreed upon and everything was done, there was other trivial matters discussed.

During the following week, Employee performed his normal management duties, without any shift work or lifting. On August 22, he met with Mr. Looney again. He testified that Mr. Looney told him he could "go home." Employee testified that he was "shocked," "confused," and that he "had no plan" at that time. After the meeting, he reported his injury to Employer's workers' compensation insurer before leaving the premises. He then wrote a second letter to Mr. Looney. That letter read:

> Monday, Aug. 22, 2011
>
> Bill,
>
> Workman's comp advised, I wait Dr. Schoettle's findings upon examination this week. Then bring that finding to you and abide by his recommendation.
>
> I am in lower back pain now and will be as you suggested in and out until his appointment.
>
> Workman's comp, Peggy Smith is to call with appointment and I will advise you of that date.
>
> If I can help in the meantime let me know.
>
> Gary

Employee did not return to work after August 22. He did not speak to Mr. Looney after that date. Mr. Looney's account of the August 22 meeting differed from Employee's:

> At that time, I told him -- I said I had already interviewed somebody for the night shift work. I was physically doing the night shift work that he couldn't do. I had interviewed a young man, and I offered him the job. He had accepted the job, to do that duty, so that was going to ease some things.
>
> I said, you know, if we need to come up with a different date, rather than staying over until November 1st, we can do that. I used the term -- I said, how about splitting the baby, which is just something I use in my law practice.[1] So that's what we did. We came up then until October 1st, which would be his last day.

[1]Mr. Looney, in addition to being the owner of McEvoy Funeral Home, is a practicing attorney.

Mr. Looney agreed that Employee did not return to work after August 22 and that he had no further direct communication with him. He also stated he first became aware of Employee's injury when he received the August 22 letter. Mr. Looney testified that Employee would still be working at the funeral home if he had not resigned on August 14.

The workers' compensation insurer referred Employee to Dr. Timothy Schoettle, a neurosurgeon, for treatment of his spinal injury and to Dr. Blake Chandler for treatment of the shoulder injury. Both of these physicians treated Employee in the past.

Dr. Schoettle testified by deposition. His diagnoses were strains of the lumbar and thoracic spine superimposed on degenerative disc disease and spasticity of the lower extremities related to a stretch injury of the spinal cord. The latter condition resolved with conservative treatment, but Employee continued to have significant lumbar and thoracic pain. Dr. Schoettle declared Employee at maximum medical improvement on February 6, 2012. He assigned a 4% anatomical impairment to the body as a whole from his spinal injuries. He restricted Employee to lifting no more than forty pounds occasionally and twenty pounds frequently and to avoid repetitive bending and twisting.

Dr. Chandler also testified by deposition. He diagnosed a labral tear, rotator cuff tear, bursitis, and bone spurring in the right shoulder. He performed an arthroscopic surgery to repair those conditions on October 17, 2011. Dr. Chandler released Employee from his care on February 8, 2012, and assigned a 6% permanent anatomical impairment to the body as a whole. He recommended that Employee avoid lifting or carrying more than fifty pounds with his right arm.

Employee was sixty-two years old when the trial occurred. He is a high school graduate and has taken twelve hours of business classes at Bethel College. He attended continuing education programs concerning funeral-related matters throughout his career and also took some correspondence courses regarding the Bible. After being released by his physicians, he applied for employment at a funeral home in McKenzie, Tennessee but was not able to meet the lifting requirements of the job. He testified that he is capable of desk work only.

Employee testified that he continues to have pain in his back and shoulder. He is unable to ride a bicycle. He sold his motorcycle and boat because he was no longer capable of operating them comfortably. He is able to mow his yard "in intervals." He testified that he could not hold an eight-pound jug of milk with his arm outstretched and that he does not attempt to lift anything weighing more than twenty or thirty pounds. Employee's wife testified to the same effect.

After hearing this evidence, the trial court delivered its findings and conclusions from the bench. The trial court found that Employee and his wife were credible witnesses. It further found that Employee's August 14 letter was not intended to be a resignation and that the second injury rendered him unable to perform his job. For those reasons, the trial court determined that he had not had a meaningful return to work and was entitled to seek reconsideration of the 2010 settlement. The trial court found that Employee sustained a permanent partial disability of 18% from the 2010 injury, effectively awarding an additional 9%. It further found that Employee sustained a 30% permanent partial disability as a result of the second injury. The trial court entered judgment in accordance with those findings. Employer appeals, contending that the evidence preponderates against the trial court's finding that Employee did not have a meaningful return to work. Employer further contends it is entitled to a credit for temporary disability benefits paid, in light of Employee's resignation.

Analysis

The standard of review for issues of fact in a workers' compensation case 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(a)(e)(2) (2008 & Supp. 2013). We are required to "give the trial judge, who saw and heard the witnesses, considerable deference with regard to issues of credibility and the weight afforded to witness testimony." *Madden v. Holland Gp. of Tenn.*, 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony 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* with no presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Employer states in its brief that "[the] key legal issue in this case is whether or not [Employee] voluntar[ily] resigned from his employment with [Employer]." It contends Employee did resign and that the evidence preponderates against the trial court's finding that he did not. On that basis, Employer argues that Employee was not entitled to reconsideration of the 2010 settlement and that his award for the 2011 injury should be limited to one and one-half times the impairment pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A). In support of its position, Employer relies on the language of the August 14 resignation letter, as well as its timing and the circumstances surrounding its creation and transmission. The letter explicitly states that it is a letter of resignation. It makes no mention of the injury of August 12, 2011. It contains no request, express or implied, for lighter duty work. On the date he wrote and transmitted the letter, Employee had not reported the injury

to anyone other than his wife. He had not sought or received medical treatment and consequently did not know the nature of his injury or the likely outcome of any course of treatment.

Employee counters that, in spite of its wording, the letter was not intended to end his employment, but to get the attention of Mr. Looney, Employer's owner, concerning his physical health. Employee testified that, although the letter did not refer to the August 11 injury, he told Mr. Looney about it during their meeting of August 15. In addition, he testified that Mr. Looney declined to accept his resignation. After the meeting, he believed he would continue in his job without the lifting and shift work, as he had prior to June 2011. For that reason, Employee testified, he was shocked and confused when he was told to go home on August 22.

As set out above, Mr. Looney gave a substantially different account of the meetings of August 15 and 22. He testified that Employee never mentioned a work injury nor expressed an intention to continue as the manager of the funeral home. Rather, the primary topic of each conversation was setting a date for Employee's departure. In that regard, Mr. Looney testified that the date was initially set at November 1 and then revised to October 1. However, Mr. Looney made no attempt to contact Employee when he did not show up for work after August 22.

The Tennessee Supreme Court's recent decision in *Cha Yang v. Nissan N. Am., Inc.*, 440 S.W.3d 593 (Tenn. 2014), is instructive. In that case, the employer offered a voluntary buyout to all of its manufacturing technicians. *Id*. at 594. Yang resigned his employment in exchange for monetary compensation. At trial, Yang explained that he accepted the buyout because he knew he could not return to work after surgery. *Id*. at 595. The employee agreed to the buyout before reaching maximum medical improvement. *Id*. at 594-596. The trial court determined that the employee did not have a meaningful return to work and therefore did not cap his impairment rating. *Id*. at 596. On appeal, the Special Workers' Compensation Appeals Panel reversed on the issue of the application of the statutory cap, holding that the employee's decision to accept the buyout was not "reasonable" because he made the decision before his doctors determined whether he would be able to return to work and before the employer determined whether it would be able to offer to return him to work. *Id*. at 597.

The supreme court granted review and reversed the Special Workers' Compensation Appeals Panel's decision and affirmed the trial court's original finding. *Id*. at 599-600. In analyzing whether the employee made a meaningful return to work, the court began its analysis with Tenn. Code Ann. [Section] 50-6-241 and noted that "[i]n order for the lower statutory cap to apply, 'the burden is upon the employer to show, by a preponderance of the evidence, that an offer of a return to work is [made] at a wage equal to or greater than the

pre-injury employment and that the work is within the medical restrictions . . . for the returning employee.'" *Id*. at 598 (quoting *Ogren v. Housecall Health Care, Inc.*, 101 S.W.3d 55, 57 (Tenn. Workers Comp. Panel 1998)).

The court went on to state:

> the inquiry of whether an employee has had a "meaningful return to work" depends upon "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." If an employee voluntarily resigns or retires from a pre-injury employer based upon a reasonable and substantiated belief that he or she will be unable to perform the job required upon return to the workplace, the employee has acted reasonably for purposes of the statutory caps.

Yang, 440 S.W.3d at 599, (quoting *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 328 (Tenn. 2008). Ultimately, the court said, "the touchstone of the meaningful-return-to-work analysis is 'reasonableness,' which is a highly fact-intensive inquiry that will depend upon the circumstances in each case." *Id.* (quoting *Tryon*, 254 S.W.3d at 328). In *Yang*, the trial court found no proof that the employer did anything to return the employee to work, and it concluded that the employee's decision to accept the buyout was reasonable. The supreme court noted:

> [t]his fact-intensive determination, however, is typically best left to the trial judge who has had the opportunity to observe the witnesses, determine their credibility, and 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."

Id. (quoting *Tryon*, 254 S.W.3d at 328).

The trial court had two differing accounts of the crucial events before it. It explicitly accredited Employee's version and implicitly discredited Mr. Looney's. Thus, the trial court accepted Employee's statement that he did not actually intend to resign at any time and that he explained that to Mr. Looney and advised him of the work injury on August 15. The trial court had the opportunity to observe the demeanor of the witnesses and hear their voices as they testified. For that reason, its determination that Employee was credible, and its acceptance of his description of events is entitled to our deference. *Madden*, 277 S.W.3d at 900.

Taking into account the importance of Employee's credibility on the meaningful

return issue, as well as the approach mandated by *Yang*, we are unable to conclude that the evidence preponderates against the finding that Employee did not voluntarily resign and that he was unable to return to work as a result of his injury.

Employer also argues that the trial court erred by failing to award it a credit for the temporary total disability payments made to Employee after August 22, 2011. It points to testimony from both Employee and Mr. Looney that Employer had accommodated temporary work restrictions for Mr. Looney's previous injuries and states that it would have accommodated any such restrictions in this case. It also asserts that both Dr. Schoettle and Dr. Chandler "indicate that [Employee] could have worked with a no lifting restriction." Employer does not cite the location in the record on which that assertion is based. Our examination of the record reveals that neither doctor testified concerning temporary disability. However, both doctors completed C-32 Medical reports that were placed into evidence as exhibits to their depositions. In his report, Dr. Chandler indicated that Employee did not sustain any temporary total disability from his shoulder injury. Dr. Schoettle indicated that Employee was totally disabled by his spinal injuries from August 12, 2011 through February 6, 2012. The evidence therefore preponderates in favor of the trial court's determination that Employer was not entitled to the requested credit.

Finally, Employee asks this Panel to award post-judgment interest pursuant to Tennessee Code Annotated 50-6-225(g). That statute provides for interest to be paid in any case in which an appeal is filed. There is nothing in the record that reflects that any dispute regarding post-judgment interest was raised in the trial court. If such a dispute arises, it should be presented to and addressed by the trial court.

Conclusion

The judgment is affirmed. Costs are taxed to McEvoy Funeral Home, Inc. and Auto Owners Insurance Company and their surety, for which execution may issue if necessary.

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Brandon O. Gibson, Judge

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
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JUDGMENT ORDER

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 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 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 on appeal are taxed to the Appellants, McEvoy Funeral Home, Inc., and Auto Owners Insurance Company and their surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM