IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 24, 2011 Session

DEWEY GIBSON, JR. v. HIDDEN MOUNTAIN RESORT, INC.

Appeal from the Circuit Court for Sevier County
No. 20090188III O. Duane Slone, Judge

No. E2010-02561-WC-R3-WC-FILED-DECEMBER 12, 2011

The employee sought workers' compensation for a back injury which arose out of and in the scope of his employment with the employer. The trial court found that because the employee had a meaningful return to work and was subsequently dismissed for job misconduct, he was limited to benefits of 1.5 times the 20% anatomical impairment rating. The evidence does not preponderate against the trial court's factual findings; the judgment is, therefore, affirmed.

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

GARY R. WADE, J., delivered the opinion of the court, in which JON KERRY BLACKWOOD, SR. J., and E. RILEY ANDERSON, Sp. J., joined.

George R. Garrison, Sevierville, Tennessee, for the appellant, Dewey Gibson, Jr.

Elaine Michele Youngblood, Nashville, Tennessee, for the appellee, Hidden Mountain Resort, Inc.

MEMORANDUM OPINION
Factual and Procedural Background

On July 7, 2007, Dewey Gibson, Jr. (the "Employee") suffered a herniated disc while working in maintenance for Hidden Mountain Resort, Inc. (the "Employer") in Sevier County. After undergoing back surgery and following a period of rehabilitation, he returned to light duty work in late March of 2008. A few weeks later, the Employee performed activities outside his work restriction, aggravated the injury to his back, and missed more work. Prior to aggravating the injury, however, he was "written up" by his Employer for three allegedly early clock-ins, an issue that was ultimately resolved with the Employee being

compensated for a few hours of overtime and agreeing to seek permission in the future for any early clock-ins. The Employee returned to work full-time at the same hourly wage on June 17, 2008, but was terminated some seven weeks later. On March 13, 2009, he filed suit for workers' compensation benefits, claiming he had suffered a permanent disability and arguing that he had been denied a meaningful return to work.

While admitting that the injury was compensable, the Employer maintained that the Employee had a meaningful return to work, as provided by Tennessee Code Annotated section 50-6-241(d)(1)(A), and that he was limited to benefits of 1.5 times the anatomical impairment rating assigned by his treating physician, Dr. James Maguire. The Employer contended that the Employee's termination was properly based upon misconduct for violation of a company policy. At trial, the testimony was limited to two issues: (1) the amount of the Employee's permanent impairment as a result of the injury; and (2) whether the Employee, in view of his termination, was denied a meaningful return to work.

Dr. Maguire and Dr. William Kennedy testified by deposition. Dr. Maguire, who had performed a fusion of the L4 vertebral body to the sacrum, stated that he had permitted the Employee to return to work on March 25, 2008, with a twenty pound restriction on lifting. A few weeks later, the Employee reported that he had aggravated the injury by lifting a stove and a refrigerator at his jobsite. Dr. Maguire performed a magnetic resonance imaging ("MRI") test, but found no indication of any new injury. He assessed a 10% permanent partial impairment to the body as a whole. Dr. Kennedy, an orthopedic surgeon, first saw the Employee on August 20, 2008, as a part of an independent medical examination. After treating the Employee and reviewing his medical records, Dr. Kennedy concluded that the July 7, 2007 injury had resulted in a 20% permanent physical impairment.

The Employee, forty-one years of age at the time of trial, finished only the tenth grade of school, but later earned a high school graduate equivalent diploma. Prior to his employment with the Employer in July of 2005, he had held several jobs, including fifteen years of employment at a local textile plant. He sustained his first back injury in 2006 while working for the Employer, had surgery for that first injury, and then missed a period of work time before settling a claim for benefits. After returning to work, the Employee was on the job a little over a month before suffering a second back injury, which is the subject of this litigation. At trial, the Employee testified that he returned to work under a twenty pound lifting restriction but was required to do heavier work by the Employer. He maintained that he had complained to his supervisor, Darryl Layman, before aggravating the injury when lifting appliances and had inquired whether there were any other less demanding jobs available. In support of his claim that his eventual discharge was pretextual and that he was actually dismissed because of his injuries, the Employee contended that he had routinely checked in as much as thirty minutes before his scheduled work hour prior to the second

injury, but had never been "written up" for the practice until April 28, 2008. He complained that he was singled out because at least two other employees performing the same tasks had also clocked in early but were not reprimanded. On June 17, 2008, upon his return to work after recovering from the appliance lifting incident, the Employee was assigned to less strenuous responsibilities. His new assignment required him to inspect cabins before a guest check-in, including the hot tub, smoke alarm, fire extinguisher, grill, and lights. He was also to respond to routine maintenance issues like water leaks, electrical problems, and breakdown of other equipment. The Employee signed an agreement with the Employer at that time confirming that it was his responsibility to work within the restrictions set forth by Dr. Maguire. Just before his termination, however, he received another write-up for violating a policy prohibiting the maintenance staff from being in a cabin with a female housekeeper. The Employee asserted that the write-up was baseless because he had done his work while housekeepers were present "about fifty to sixty percent" of the time. He complained that another maintenance employee, Dennis Adams, had entered a cabin when a housekeeper was present and had not been disciplined in any manner. The Employee also claimed that after his last return to work, Butch Smith, the President of Hidden Mountain Resorts, Inc., had warned the Employee's co-workers that they would be fired if the Employee was hurt in their presence. The Employee acknowledged that the Employer had a three-step policy before termination: (1) a verbal warning; (2) a written warning; and (3) termination.

On cross-examination, the Employee denied being specifically asked by housekeeper Karen Pruitt Lane not to enter a cabin while she was there because of the Employer's policy. He conceded, however, that on August 1, 2008, Betty Farley, the head housekeeper for the Employer, may have warned him to stay away from her housekeepers. A written warning followed. The Employee admitted that after this warning, he had entered a cabin occupied by Ms. Lane and that, on the following Monday, August 4, 2008, Smith informed him that his services were "no longer needed."

Layman, the maintenance staff supervisor, testified on behalf of the Employer. He asserted that the Employer had an unwritten policy precluding the men on the maintenance staff from being in the rental cabins at the same time as the housekeepers. He stated that the policy was discussed in the presence of the Employee at staff meetings, which took place "a couple of times a year." Layman stated that the Employee's job was kept open during the time of his recovery after his first back injury in 2006 and also was kept open after his second injury in 2007 and the aggravation of his injury in 2008 a few weeks after his return to work. Layman testified that he was aware of the lifting restrictions placed upon the Employee and, as a result, limited his work to "mostly . . . check-ins," which did not involve any lifting, and otherwise required that "somebody work with him all the time." He acknowledged that in June of 2008, he met with the Employee and Kevin Headrick, the Employer's Chief Financial Officer, to address the "early clock-in" issue, which involved five or six hours of pay and

which was resolved favorably for the Employee.

Layman testified that sometime later, Ms. Farley informed him that the Employee had entered cabins when Ms. Lane was cleaning, "[h]indering her from her work." He stated that afterward, he emphasized to the Employee not to enter the cabins when the housekeepers were present in order to "keep everybody from getting in trouble." Layman testified that "99%" of the time it was unnecessary for maintenance staff to be in a cabin with a housekeeper. He recalled that a few days later, after receiving a similar complaint, he confronted the Employee, who he found talking to one of the housekeepers, and ordered him to move on to work. He stated that some two hours later, he received word that, despite the directive, the Employee had entered three different cabins with the same female housekeeper. When he called the Employee about the complaint, the Employee responded that he "wouldn't do it no more." Layman then prepared a form, "kind of like a written reprimand," for the Employee to sign regarding the housekeeper policy. He testified that he tried to talk to the Employee "as a friend" when presenting the form, but that he refused to sign, cursing and stating that he intended to call his lawyer. When Layman informed Smith of the incident, the decision was made to terminate his employment.

On cross-examination, Layman denied requiring the Employee to do any work beyond his work restrictions. He contended that he had directed the Employee not to try to repair the stove because it involved a weight heavier than his restrictions, but that he did so anyway. Layman further asserted that he had informed the Employee "not to do anything that he didn't feel like doing."

Betty Farley, who also testified on behalf of the Employer, stated that she became aware of the policy preventing maintenance workers from being in cabins with housekeepers on the day she was hired. She recalled that the Employee was present at staff meetings when the policy was discussed. She testified that she learned that he was violating the policy when she confronted Ms. Lane, who was not cleaning her cabins on a timely basis. She stated that she reported the problem to Layman, but that the Employee continued to enter cabins where Ms. Lane was cleaning. Ms. Farley testified that she once again complained to the Employee's supervisor and that later, when she saw the Employee standing at Ms. Lane's company jeep, ordered him to "quit bothering the housekeepers." Afterward, upon determining that the Employee had been to each cabin Ms. Lane had cleaned that same morning, she again complained to Layman.

On cross-examination, Ms. Farley confirmed that Ms. Lane did not blame the Employee for her failure to timely clean her cabins, but had only made reference to the fact that he had been in cabins with her. She also stated that the Employee, to her knowledge, did not flirt with Ms. Lane or make advances to any of the other housekeepers.

Butch Smith testified that there were approximately seventy employees in his company. He testified that it was company policy never to allow an employee with health issues to perform any activities beyond their restrictions. Smith also stated that the policy preventing the maintenance staff and housekeepers from meeting at the cabins at the same time had been in place for approximately twenty-five years and was regularly addressed, on either a monthly or quarterly basis, at meetings involving the entire staff. He recalled that the maintenance and housekeeping supervisors first informed him of the Employee's violation of the latter policy on August 1, 2008, three days before his termination. Because the Employee had received prior warnings, Smith decided that termination was in order on grounds of insubordination. When asked, he acknowledged that he had stated if the Employee had a future injury, he would "fire" anyone with him, but claimed that the remark was made in jest. He explained his point as follows: "Dewey had been hurt once, he came back and got hurt again, lifting something that he knew better than to lift, and . . . so when he came back this time I said I want somebody with him to help him and watch him. I don't want Dewey lifting anything."

Teresa Eldridge, who had been employed as a housekeeper by the Employer for over twelve years, testified as a rebuttal witness for the Employee. She stated that she and the Employee had lived together between 2005 and 2008 and, after separating, remained good friends. She confirmed that there was a policy prohibiting maintenance men from being in the cabins with the housekeepers and recalled that the topic was discussed at staff meetings, which she assumed the Employee attended. She stated, however, that despite the existence of the policy, a maintenance man would, at least on an occasional basis, be required to enter a cabin occupied by a housekeeper.

At the conclusion of the proof, the trial court found that the Employee was guilty of misconduct for having failed to comply with a company policy, and, further, that his misconduct was the true motivation for the dismissal. The trial court, while pointing out that the supervisor's initial recommendation was to place the Employee on probation or suspension, determined that the Employee's misconduct was the basis for his discharge. In so ruling, the trial court placed particular emphasis on the Employee's failure to check a box on the form permitting him with the option of disagreeing with the Employer's description of the violation:

> The employee refused to even sign the form or give any reasons for his failure to sign the form, or that he disagreed [with] the policy [that] was in effect or that these facts weren't correct. So [when the employee refused to cooperate,] th[e] employer had every . . . right to terminate his employment.

As to the permanent partial impairment assessments, the trial court accredited the

testimony of Dr. Kennedy, who assigned a 20% permanent partial impairment to the body as a whole. While the disability award is not at issue in this appeal, the Employee asserts that the trial court erred by failing to find that the Employer had denied him a meaningful return to work.

Standard of Review

The trial court's findings of fact must be reviewed "de novo upon the record . . . accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (2008). This standard of review requires a careful examination of the factual findings and conclusions made by the trial court. Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008); Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). When credibility and weight to be given testimony are involved, considerable deference must be given the trial court when the trial judge had the opportunity to observe the witnesses' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Questions of law, however, must be reviewed de novo with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003). The interpretation and application of our workers' compensation statutes are questions of law. See Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009). Our primary objective when engaging in statutory construction is to carry out the intent of the legislature without unduly broadening or restricting the statute. Arias v. Duro Standard Prods. Co., 303 S.W.3d 256, 260 (Tenn. 2010).

Analysis

In 2004, the General Assembly overhauled the workers' compensation statutes, Act of May 20, 2004, ch. 962, 2004 Tenn. Pub. Acts 2346, with the goal of reducing the employer's costs for workers' compensation. Lynch v. City of Jellico, 205 S.W.3d 384, 390 (Tenn. 2006). The 2004 Act included amendments to both the benefits cap and reconsideration provisions for injuries occurring after July 1, 2004. Act of May 20, 2004, ch. 962, § 11, 2004 Tenn. Pub. Acts 2346, 2350-53. Significantly, the Act reduced the cap on permanent partial disability benefits to 1.5 times the impairment rating when the employee has returned to his place of employment at the same or a greater wage. The cap on permanent partial disability benefits for an injured employee who is not returned to work by the employer at a wage equal to or greater than his pre-injury wage is six times the impairment rating. Tenn. Code Ann. § 50-6-241(d)(2)(A). This figure remained unchanged as a result of the 2004 amendments to the workers' compensation laws. Act of May 20, 2004, ch. 962, § 11, 2004 Tenn. Pub. Acts 2346, 2351 (codified at Tenn. Code Ann. § 50-6-241(d)(2)(A)).

In Carter v. First Source Furniture Grp., 92 S.W.3d 367 (Tenn. 2002), our Supreme

Court considered the applicability of Tennessee Code Annotated section 50-6-241(a)(1) to an employee who suffered an injury, continued working prior to surgery for the injury, but was terminated for misconduct prior to the surgery. Although the employee in Carter never actually returned to her employment after the surgery, the Court held that she should have been treated as if she had made a meaningful return to work at an equal or greater wage, thus subjecting her to the lower cap. Carter, 92 S.W.3d at 371. The Court reasoned that "the General Assembly, by passage of section 50-6-241(a), did not intend to require an employer to make an offer of re-employment to an employee previously fired for violating workplace rules." Id. While the employee argued that such a rule would encourage discharges by employers so as to benefit from the lower cap, the Supreme Court concluded that "the law of retaliatory discharge protect[ed] employees from this behavior . . . ." Id. at 372.

Nothing in the text or history of Tennessee Code Annotated section 50-6-241(d)(1)(A) warrants any departure from the ruling in Carter. Although neither section 50-6-241(a) nor section (d)(1)(A) explicitly addresses the issue of employees dismissed for misconduct, the legislation governing post-2004 injuries is, if anything, less likely to reward an employee terminated for misconduct than the pre-July 1, 2004 statutory scheme.

By virtue of the Carter ruling, courts are authorized to examine the reasons for an employee's discharge when determining which cap to apply. Although the ground and not the reasonableness of the termination was the determinative issue under Carter, the reasonableness of an employer's action can and should be part of any attempt to ascertain the motivation for a termination. When applying the Carter limitation on recovery, courts must determine (1) that the actions precipitating the dismissal qualified as misconduct under established or ordinary workplace rules and/or expectations; and (2) that those actions were, as a matter of fact, the motivation for the dismissal. When an employee is terminated because of an injury, Carter does not apply. In Moore v. Best Metal Cabinets, No. W2003-00687-WC-R3-CV, 2004 WL 2270751 (Tenn. Workers' Comp. Panel Oct. 7, 2004), for example, a Panel considered whether to apply the lower cap to a case where the employee made a reasonable return to work for an equal or greater salary after an injury that occurred prior to July 1, 2004. The employer argued that the employee had been terminated for insubordination. Id. at *3. The Panel, however, held that the employee's supervisor terminated the employee in a fit of anger unrelated to insubordination or misconduct. Id. The Panel held that because the evidence did not support the employer's claim that the termination was for misconduct, the Carter exception was not applicable and the case was governed by the general rule established by Tennessee Code Annotated section 50-6-241(a). Id. On the other hand, in Davis v. Avron Truss Co., No. E2000-00780-WC-R3-CV, 2001 WL 767014 (Tenn. Workers' Comp. Panel July 5, 2001), a Panel reversed an award in excess of the cap because the evidence established that the employee making the claim had been properly dismissed for job-related misconduct.

In the case before us, the sole issue presented for our review is whether the trial court erred by finding that the Employer terminated the Employee for repeatedly violating a policy that prohibited the maintenance staff from being in a rental unit with a housekeeper. The Employee argues that he was unaware of the policy and had not been previously warned about his violation of the policy. He submits that he was in reality discharged as a retaliatory act for his on-the-job injury.

Except for the Employee, each of the witnesses at trial testified to a long-standing policy of the Employer prohibiting the maintenance staff from being in the cabins at the same time as the housekeepers when at all possible. While the testimony suggested that there were exceptional circumstances occasionally requiring the maintenance staff to be present in a cabin with a housekeeper, the overwhelming evidence was that those occasions were infrequent. Moreover, the Employee's testimony that he had never been warned to adhere to the policy was refuted by the maintenance staff and housekeeping supervisors. Finally, the record contains evidence supporting the Employer's claim that the Employee continued to violate the policy almost immediately after being warned. In summary, the evidence does not preponderate against the finding made by the trial court that the Employee was discharged for failing to comply with a well-known policy of the Employer prohibiting the male maintenance staff from working in a cabin being cleaned by a female housekeeper.

Conclusion

The judgment of the trial court awarding benefits of 1.5 times the 20% permanent partial impairment to the body as a whole, as provided by statute, is affirmed. Costs are taxed to the Employee, Dewey Gibson, Jr., and his surety, for which execution may issue if necessary.

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GARY R. WADE, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
October 24, 2011 SESSION

Dewey Gibson, Jr. V. Hidden Mountain Resort, Inc.

Sevier County Circuit Court
No. 20090188III

No. E2010-02561-WC-R3-WC

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 appeals 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 of this appeal are taxed to the Employee, Dewey Gibson, Jr. and his sureties, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM