

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 23, 2013 Session

TIMOTHY GILLIAM v. BRIDGESTONE NORTH AMERICAN TIRE, LLC

**Appeal from the Chancery Court for Coffee County
No. 09-336 Vanessa A. Jackson, Chancellor**

**No. M2012-02436-WC-R3-WC - Mailed November 12, 2013
Filed December 16, 2013**

This appeal involves an employee's eligibility to seek reconsideration of a workers' compensation settlement. An employee who sustained a compensable shoulder injury returned to work and settled his workers' compensation claim. He was later laid off after his physician modified the restrictions for an earlier unrelated injury to his foot. Thereafter, the employee filed suit in the Chancery Court for Coffee County seeking reconsideration of the settlement of his shoulder injury. While this suit was pending, the employee returned to work as the result of a confidential settlement between his employer and the EEOC. Following a bench trial, the trial court determined that the employee could seek reconsideration of the settlement for his injured shoulder and awarded the employee additional disability benefits. The employer appealed and asserted that the employee was not entitled to seek reconsideration because, despite the layoff, he had never been "subsequently no longer employed by the pre-injury employer" as required by Tenn. Code Ann. § 50-6-241(d)(1)(B)(ii) (2008). 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 in accordance with 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 Chancery Court Affirmed

WILLIAM C. KOCH, JR., J., delivered the opinion of the Court, in which ANDY D. BENNETT, J., and E. RILEY ANDERSON, SP.J., joined.

B. Timothy Pirtle, McMinnville, Tennessee, for the appellant, Bridgestone North American Tire, LLC.

Roger J. Bean, Tullahoma, Tennessee, for the appellee, Timothy Gilliam.

OPINION

I.

Timothy Gilliam began working as a “stock cutter” for Bridgestone North American Tire, LLC (“Bridgestone”) in December 1995. Mr. Gilliam’s job required him to load rubber into the back of a machine that made component parts for tires. During the course of his employment, Mr. Gilliam separated his shoulder in 1999 and sustained an ankle injury in 2004. The physician treating Mr. Gilliam for his ankle injury placed certain restrictions on his activities.¹

Mr. Gilliam injured his shoulder on August 7, 2006, when he fell while attempting to remove some rubber from a cart. He promptly reported the injury to his team leader who referred him to the plant nurse. Eventually, Mr. Gilliam was referred to Dr. Sean Kaminsky, an orthopaedic surgeon. Dr. Kaminsky diagnosed Mr. Gilliam with a partial tear of the rotator cuff and a labral tear. After conservative treatment failed, Dr. Kaminsky performed arthroscopic surgery on Mr. Gilliam’s shoulder. On March 20, 2007, Dr. Kaminsky released Mr. Gilliam to return to full duty in early April 2007.

Dr. Kaminsky also determined that Mr. Gilliam retained a 2% impairment to the body as a whole as a result of the shoulder injury and surgery. Mr. Gilliam represented himself at the benefit review conference during which the parties agreed to settle his workers’ compensation claim for 2.5% permanent partial disability to the body as a whole. On June 18, 2007, the Department of Labor and Workforce Development approved this agreement.

Mr. Gilliam continued to work for Bridgestone. However, on January 29, 2009, Bridgestone received a note from Dr. Roger Passmore, the physician treating Mr. Gilliam for his 2004 ankle injury. This note modified the restrictions that had originally been placed on Mr. Gilliam as a result of his ankle injury with regard to the number of hours of combined standing and walking Mr. Gilliam could perform during a shift.

Bridgestone’s in-house occupational physician determined that Mr. Gilliam’s new restrictions would not prevent him from working in final inspection in the curing department. However, Dr. Passmore later clarified his restrictions to provide that Mr. Gilliam could be on his feet for no more than eight hours per shift. Because the regular shift for Bridgestone’s production workers was 12.5 hours, Bridgestone’s occupational physician decided that there

¹Mr. Gilliam also had surgery on his neck in 2010 for a condition not related to his work.

were no jobs available for Mr. Gilliam at Bridgestone that were within Dr. Passmore's limitations. Accordingly, Bridgestone laid off Mr. Gilliam on March 29, 2009.

After leaving Bridgestone, Mr. Gilliam received unemployment compensation benefits and thirty-nine weeks of supplemental unemployment benefits in accordance with the collective bargaining agreement between Bridgestone and Mr. Gilliam's union. During this period, the collective bargaining agreement enabled Mr. Gilliam to continue (1) to accrue seniority, (2) to remain eligible for pension benefits, and (3) to receive health insurance. After the unemployment compensation and supplemental unemployment benefits ceased, Mr. Gilliam received no other income from Bridgestone.

Mr. Gilliam requested reconsideration of the 2007 settlement of his shoulder injury. In addition, he filed a complaint with the EEOC asserting that Bridgestone had failed to accommodate the restrictions arising out of his 2004 ankle injury. On September 9, 2009, after a benefit review conference failed to produce a compromise regarding his request for reconsideration of the 2007 settlement of his shoulder injury, Mr. Gilliam filed suit in the Chancery Court for Coffee County asserting that he was entitled to have the settlement regarding this 2007 shoulder injury reconsidered.

In October 2010, Dr. Passmore again modified the restrictions he had imposed on Mr. Gilliam as a result of his ankle injury. Accordingly, Mr. Gilliam and Bridgestone entered into a confidential settlement of his EEOC claim. As a result of this settlement, Mr. Gilliam returned to work at Bridgestone on February 11, 2011.

At the trial held on July 16, 2012, Mr. Gilliam insisted that he was not a Bridgestone employee from March 29, 2009, when he was laid off, until February 11, 2011, when he was reinstated. During this period, Mr. Gilliam testified he lost approximately \$52,000 in income. Accordingly, Mr. Gilliam argued that he was entitled to reconsideration of the benefits relating to his 2007 shoulder injury because he had not had a meaningful return to work following this injury. Bridgestone disagreed. It asserted that Mr. Gilliam remained an employee while he was laid off because the collective bargaining agreement entitled him (1) to receive supplemental unemployment benefits, (2) to accrue seniority, (3) to remain eligible for pension benefits, and (4) to receive health insurance.

In an order filed on October 3, 2012, the trial court found that

beginning March 29, 2009, for a period of ninety-five weeks, Mr. Gilliam was not employed by Bridgestone at his pre-injury wage of \$980.00 per week and did not have a meaningful return to work. Thus, the Court finds that Mr. Gilliam is entitled to

right of reconsideration pursuant to Tennessee Code Annotated § 50-6-241(d)(1)(B).

The trial court also determined that Mr. Gilliam had sustained a permanent disability of 10% to the body as a whole as a result of his shoulder injury but granted Bridgestone a set-off for the benefits paid pursuant to the earlier settlement. Bridgestone has appealed from that order, asserting that the trial court erred in finding that Mr. Gilliam was eligible for reconsideration.

II.

Courts reviewing an award of workers' compensation benefits must conduct an in-depth examination of the trial court's factual findings and conclusions of law. *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.

Bridgestone's sole argument on this appeal is that Mr. Gilliam is not entitled to reconsideration of the 2007 settlement of his shoulder injury because he continued to be a Bridgestone "employee" after he was released to return to work in 2007. It insists that Mr. Gilliam should be considered an employee between March 29, 2009 and February 11, 2011 because he remained on the employment rolls during the entire period, because the collective bargaining agreement entitled Mr. Gilliam to accrue seniority, and because he remained eligible for retirement benefits and health insurance.

The Tennessee Supreme Court addressed the related concepts of loss of employment and meaningful return to work in *Howell v. Nissan North America, Inc.*, 346 S.W.3d 467, 472 (Tenn. 2011). The Court stated:

In determining whether an employee is eligible for reconsideration of his or her award of permanent partial disability benefits, courts inquire as to whether the employee has had a meaningful return to work following a work-related disability. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 328 & n. 9 (Tenn. 2008); *Lay v. Scott Cnty. Sheriff's Dep't*, 109 S.W.3d 293, 297 (Tenn. 2003); *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 629 (Tenn. 1999). If the employee is found to have had a meaningful return to work, his or her benefits are capped using the smaller multiplier of one and one-half in Tennessee Code Annotated section 50-6-241(d)(1)(A). If the employee is found not to have had a meaningful return to work, his or her benefits are capped using the larger multiplier of six in section 50-6-241(d)(2)(A). See *Nichols v. Jack Cooper Transp. Co.*, 318 S.W.3d 354, 361 (Tenn. 2010); *Tryon*, 254 S.W.3d at 328. As we recently stated in *Tryon*, “[w]hen 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.” 254 S.W.3d at 328. The assessment of the reasonableness of the actions of the employee and employer is highly fact-intensive and “depends on the facts of each case.” *Id.*

Howell v. Nissan North America, Inc., 346 S.W.3d at 472.

The Tennessee Supreme Court’s decision in *Nichols v. Jack Cooper Transportation Co.* is instructive. Don Nichols worked as a truck driver for Jack Cooper Transportation Company. He sustained two work-related injuries, including a neck injury in 2004. Mr. Nichols settled his workers’ compensation claim regarding the neck injury with his employer. *Nichols v. Jack Cooper Transp. Co.*, 318 S.W.3d at 357.

The employer’s business was entirely dependant on the manufacture of automobiles at the Saturn Corporation plant in Spring Hill. Because Saturn briefly shutdown the plant twice each year, the employer had a history of temporarily laying off many of its drivers while the plant was closed. In 2007, Mr. Nichols was laid off, not because of Saturn’s seasonal plant shutdown, but because of retooling at the Saturn plant. His employer provided him with no information regarding when or if he would be called back to work. While he was laid off, Mr. Nichols decided to retire. *Nichols v. Jack Cooper Transp. Co.*, 318 S.W.3d at 358.

After he retired, Mr. Nichols sought reconsideration of the settlement for his 2004 neck injury. His employer responded to this claim in two ways. First, it asserted that Mr. Nichols was not entitled to reconsideration because he had voluntarily retired. Second, it asserted that Mr. Nichols would have been recalled within a short time had he not retired. *Nichols v. Jack Cooper Transp. Co.*, 318 S.W.3d at 358-59.

The trial court found that, notwithstanding his subsequent decision to retire, Mr. Nichols's layoff was a loss of employment that entitled him to seek reconsideration of the settlement of his 2004 neck injury and awarded additional benefits. The Special Workers' Compensation Appeals Panel reversed the trial court's decision. *Nichols v. Jack Cooper Transp. Co.*, 318 S.W.3d at 359. The Tennessee Supreme Court reversed the Appeals Panel. Even though Mr. Nichols considered himself to be an employee after he was laid off, the Court decided that he was no longer an employee because (1) he did not know when or if he would be recalled to work, (2) he received no salary following the layoff, and (3) he did not receive health benefits after he was laid off. *Nichols v. Jack Cooper Transp. Co.*, 318 S.W.3d at 365-66.

Like Mr. Nichols's circumstances, Mr. Gilliam's layoff was not seasonal or routine. Mr. Gilliam was not told when or if he would be recalled. To the contrary, he testified that one supervisor told him that he would never return to work at Bridgestone. While Mr. Gilliam had health insurance coverage and received supplemental unemployment benefits after exhausting his unemployment compensation benefits, he received no payments of any sort after his supplemental unemployment benefits ran out.

Mr. Gilliam's circumstances also bear some similarity to those of the employee in *Flatt v. ERMC*, No. W2012-00483-SC-WCM-WC, 2013 WL 132585 (Tenn. Workers' Comp. Panel Jan. 10, 2013). Terry Flatt settled a workers' compensation claim with his employer with regard to a work-related neck injury. Two years later, he was terminated because his position was eliminated due to economic factors. *Flatt v. ERMC*, 2013 WL 132585, at *1.

Mr. Flatt sought reconsideration of the settlement regarding his neck injury. While this proceeding was pending, his former employer offered him part-time employment and later full-time employment. Mr. Flatt declined both offers. *Flatt v. ERMC*, 2013 WL 132585, at *2. The trial court concluded that there had been a loss of employment that triggered Mr. Flatt's statutory right to seek reconsideration. *Flatt v. ERMC*, 2013 WL 132585, at *3. The Special Workers' Compensation Appeals Panel affirmed the trial court's decision after finding that Mr. Flatt had been terminated and that the subsequent offers to re-employ him had no bearing on his eligibility to seek reconsideration. *Flatt v. ERMC*, 2013 WL 132585, at *4.

In this case, Bridgestone laid off Mr. Gilliam for unique reasons involving the work restrictions placed on him by Dr. Passmore. The layoff was not due to a downturn in the economy or the vicissitudes of his employer's business. Mr. Gilliam had no reason to believe that he would be recalled by Bridgestone, particularly in light of his testimony that a Bridgestone official told him that he would not work for Bridgestone again. Although Mr. Gilliam received benefits and payments for a period of time following his layoff, Mr. Gilliam had no income for over one year before he returned to work at Bridgestone. Consistent with *Nichols v. Jack Cooper Transp. Co.* and *Flatt v. ERMCo*, we agree with the trial court's finding that the March 29, 2009 layoff triggered Mr. Gilliam's right of reconsideration of the settlement of his 2007 shoulder injury. The fact that he later returned to work at Bridgestone does not undermine this right.

IV.

We affirm the trial court's judgment. We also tax the costs of this appeal to Bridgestone North American Tire, LLC, and its surety, for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., JUSTICE

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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 Bridgestone North American Tire, LLC, and its surety, for which execution may issue if necessary.

PER CURIAM