



FILED
Sep 15, 2023
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TENNESSEE COURT OF
WORKERS' COMPENSATION
CLAIMS

**TENNESSEE BUREAU OF WORKERS' COMPENSATION
IN THE COURT OF WORKERS' COMPENSATION CLAIMS
AT JACKSON**

MARK GRAY,) **Docket No. 2021-07-0545**
Employee,)
v.) **State File No. 14771-2020**
TYSON FOODS,)
Self-Insured Employer.) **Judge Amber E. Luttrell**

COMPENSATION ORDER

Mr. Gray requested increased benefits after a settlement for his original award of permanent disability benefits. Tyson Foods denied his entitlement to them because he was earning a greater wage at the time his initial compensation period ended and because of his termination for violating a company policy. For the reasons below, the Court holds Mr. Gray is not entitled to increased benefits.

Claim History

Mr. Gray sustained a compensable injury to his shoulder and spine on February 25, 2020. At that time, he earned \$22.22 per hour.

On February 14, 2022, the Court approved a settlement for an original award of permanent partial disability benefits of \$34,819.99. The settlement agreement reflects Mr. Gray reached maximum medical improvement on August 11, 2021, and was released to “normal duty.” The initial compensation period expired on August 8, 2022.

Mr. Gray returned to work after reaching maximum medical improvement. However, Tyson terminated his employment on November 1, 2021, because Mr. Gray was unwilling to obtain the Covid-19 vaccine required by Tyson’s policy.

The parties stipulated that when his initial compensation period ended, Mr. Gray worked for two companies as an independent contractor. He worked for P&R Tire earning \$25.00 per hour and Roney Rentals earning \$20.00 per hour.

Tyson’s Covid-19 Mandatory Vaccination Policy was implemented on August 3, 2021, and required all team members to be fully vaccinated by November 1. The policy

made an exception for “documented and approved reasonable accommodations for disability or sincerely held religious beliefs, practices or observances.”¹

Mr. Gray testified he was aware of the policy but did not agree with it, so he did not get vaccinated. He acknowledged that he could have taken a leave of absence or requested a medical or religious accommodation to keep his job, but he did not.

Tyson notified Mr. Gray by letter dated November 1, 2021, of his termination. The letter stated he did not submit proof of vaccination or request a medical or religious accommodation. The letter also said Mr. Gray might be eligible for reinstatement if he complied with the vaccination policy within six months from his termination date.

Mr. Gray testified regarding his independent contractor work for P&R Tires and Roney Rentals. He stated he worked for both companies the same weeks and worked approximately four to five days per week. His average weekly wage was less working for Roney Rentals and P&R Tires than at Tyson. In late August or early September 2021, Mr. Gray quit working for both companies and started working elsewhere earning \$33.00 per hour.

Findings of Fact and Conclusions of Law

Mr. Gray must prove all elements of his claim by a preponderance of the evidence. Tenn. Code Ann. § 50-6-239(c)(6) (2022).

Tennessee Code Annotated section 50-6-207(3)(B) states that an employee may seek increased benefits if at the time the initial compensation period ends, the employee has not returned to work with any employer *or* has returned to work earning less than the wage he received from his pre-injury employer on his date of injury.

The Appeals Board examined the history of this provision in *Marshall v. Mueller Company*, 2016 TN Wrk. Comp. App. Bd. LEXIS 74 (July 11, 2016). The Board pointed out that the Reform Act did not define “wages” as used in section 50-6-207(3)(B), nor did earlier versions of the Workers’ Compensation Law define “wages.” *Id* at *12. Further, the term “wage” means “the hourly rate of pay for an employee who is compensated on an hourly basis.” *Id*.

Here, Mr. Gray earned \$22.22 per hour on the date of injury. At the time his initial compensation period ended, Mr. Gray worked four to five days per week for *both* P&R Tires earning \$25.00 per hour and Roney Rentals earning \$20.00 per hour.

Mr. Gray argued that because he worked for these companies as an independent contractor, he did not return to work for an employer under section 50-6-207(3)(B). Thus, this work did not preclude him from increased benefits. The Court is not persuaded.

¹ Section 14-2-102 prohibits private employers from taking adverse action against employees for refusing to provide proof of vaccination. However, it became effective on November 12, 2021, after Mr. Gray’s termination.

When construing a statute, a court must look to the text of the statute and give the words of the statute “their natural and ordinary meaning in the context in which they appear and in light of the statute’s general purpose.” *Henderson v. Pee Dee County Ent., Inc.*, 2021 TN Wrk. Comp. App. Bd. LEXIS 26, at *7 (July 23, 2021). (internal citations omitted.) The plain language of the clause does not require Mr. Gray to return to work as a W2 employee as he argued. He cited no persuasive authority to support his interpretation, and the Court declines to read in a requirement that lawmakers did not include when drafting the statute.

Further, Mr. Gray *returned to work* earning a higher wage rate at the time his initial compensation period ended. Mr. Gray earned an hourly wage of \$25.00 per for P&R Tires. Likewise, he earned an average hourly rate of \$22.50 for both companies. Therefore, the Court holds Mr. Gray is not entitled to increased benefits because his wage rate exceeded his \$22.22 pre-injury wage.

Even if Mr. Gray qualified for increased benefits under section 207(3)(B), the Court holds he is still barred from these benefits under section 207(3)(D), which states that an employee is not entitled to additional benefits when his loss of employment is due to “misconduct connected with the employee’s employment.” “Misconduct refers to an employee’s inability to perform his or her job due to reasons unrelated to a workplace injury.” *Marvin Windows of Tenn., Inc. v. Gardner*, No. W2011-01479-WC-R3-WC, 2012 Tenn. LEXIS 403, at *9 (Tenn. Workers’ Comp. Panel June 8, 2012). Further, “employers should be able to enforce reasonable workplace rules and policies without being penalized in workers’ compensation cases. *Id.* at *10.

The proof showed Mr. Gray returned to full duty work at Tyson after reaching maximum medical improvement and was terminated for reasons unrelated to his work injury. Mr. Gray was aware of the Covid-19 vaccine policy and knew he could have requested an accommodation or leave of absence to keep his job. He declined to do so. His decision not to comply with the safety policy qualified as misconduct under ordinary workplace rules and was, as a factual matter, the true motivation for the dismissal. *Id.* Thus, he is not entitled to increased benefits.²

IT IS, THEREFORE, ORDERED as follows:

1. The Court denies Mr. Gray’s request for increased benefits.
2. Tyson shall pay the \$150.00 filing fee to the Clerk within five business days under Tennessee Compilation Rules and Regulations 0800-02-21-.06 (February 2022).
3. Tyson Foods shall file Form SD-2 with the Clerk within ten business days of this

² Mr. Gray argued that his refusal to comply with the policy was not misconduct because Tyson’s implementation of the vaccine policy *or any change to a work policy* amounts to a change of terms of the employment contract requiring employees to assent to the new terms. The Court finds no merit in this argument.

order becoming final.

4. Unless appealed, this order shall become final in thirty days.

ENTERED September 15, 2023.

Amber E. Luttrell
JUDGE AMBER E. LUTTRELL
Court of Workers' Compensation Claims

Appendix

Technical Record:

1. Petition for Benefit Determination
2. Dispute Certification Notice
3. Request for Scheduling Hearing
4. Scheduling Order
5. Joint Pre-Compensation Hearing Statement
6. Employer's List of Unreported Cases
7. Employee's Pre-Hearing Brief
8. Employer's Pre-Hearing Brief
9. Dispute Certification Notice (post discovery)

Exhibits:

1. Stipulations
2. Approved settlement documents
3. Tyson's Covid-19 Mandatory Vaccination Policy
4. Separation Notice
5. Letter to Mr. Gray

CERTIFICATE OF SERVICE

I certify that a copy of this Order was sent as indicated on September 15, 2023.

Name	Email	Service sent to:
Charles L. Holliday, Employee's Attorney	X	chuckh@garretylaw.com athomas@garretylaw.com
Jared S. Renfroe, Employer's Attorney	X	jrenfroe@spicerfirm.com

Penny Shrum
Penny Shrum, Court Clerk
Court of Workers' Compensation Claims



Compensation Order Right to Appeal:

If you disagree with this Compensation Order, you may appeal to the Workers' Compensation Appeals Board. To do so, you must:

1. Complete the enclosed form entitled "Notice of Appeal" and file it with the Clerk of the Court of Workers' Compensation Claims *within thirty calendar days* of the date the Compensation Order was filed. When filing the Notice of Appeal, you must serve a copy upon the opposing party (or attorney, if represented).
2. You must pay, via check, money order, or credit card, a **\$75.00 filing fee within ten calendar days** after filing the Notice of Appeal. Payments can be made in-person at any Bureau office or by U.S. mail, hand-delivery, or other delivery service. In the alternative, you may file an Affidavit of Indigency (form available on the Bureau's website or any Bureau office) seeking a waiver of the filing fee. You must file the fully-completed Affidavit of Indigency *within ten calendar days* of filing the Notice of Appeal. **Failure to timely pay the filing fee or file the Affidavit of Indigency will result in dismissal of your appeal.**
3. You are responsible for ensuring a complete record is presented on appeal. The Court Clerk will prepare the technical record and exhibits for submission to the Appeals Board, and you will receive notice once it has been submitted. If no court reporter was present at the hearing, you may request from the Court Clerk the audio recording of the hearing for a \$25.00 fee. A licensed court reporter must prepare a transcript, and you must file it with the Court Clerk *within fifteen calendar days* of filing the Notice of Appeal. Alternatively, you may file a statement of the evidence prepared jointly by both parties *within fifteen calendar days* of filing the Notice of Appeal. The statement of the evidence must convey a complete and accurate account of the testimony presented at the hearing. The Workers' Compensation Judge must approve the statement of the evidence before the record is submitted to the Appeals Board. If the Appeals Board must review testimony or other proof concerning factual matters, the absence of a transcript or statement of the evidence can be a significant obstacle to meaningful appellate review.
4. After the Workers' Compensation Judge approves the record and the Court Clerk transmits it to the Appeals Board, a docketing notice will be sent to the parties. You have *fifteen calendar days* after the date of that notice to file a brief to the Appeals Board. *See the Rules governing the Workers' Compensation Appeals Board on the Bureau's website*

If neither party timely files an appeal with the Appeals Board, the trial court's Order will become final by operation of law thirty calendar days after entry. Tenn. Code Ann. § 50-6-239(c)(7).



NOTICE OF APPEAL

Tennessee Bureau of Workers' Compensation
www.tn.gov/workforce/injuries-at-work/
wc.courtclerk@tn.gov | 1-800-332-2667

Docket No.: _____

State File No.: _____

Date of Injury: _____

Employee

v.

Employer

Notice is given that _____

[List name(s) of all appealing party(ies). Use separate sheet if necessary.]

appeals the following order(s) of the Tennessee Court of Workers' Compensation Claims to the Workers' Compensation Appeals Board (check one or more applicable boxes and include the date file-stamped on the first page of the order(s) being appealed):

Expedited Hearing Order filed on _____ Motion Order filed on _____

Compensation Order filed on _____ Other Order filed on _____

issued by Judge _____.

Statement of the Issues on Appeal

Provide a short and plain statement of the issues on appeal or basis for relief on appeal:

Parties

Appellant(s) (Requesting Party): _____ Employer Employee

Address: _____ Phone: _____

Email: _____

Attorney's Name: _____ BPR#: _____

Attorney's Email: _____ Phone: _____

Attorney's Address: _____

** Attach an additional sheet for each additional Appellant **

Employee Name: _____ Docket No.: _____ Date of Inj.: _____

Appellee(s) (Opposing Party): _____ Employer Employee

Appellee's Address: _____ Phone: _____

Email: _____

Attorney's Name: _____ BPR#: _____

Attorney's Email: _____ Phone: _____

Attorney's Address: _____

** Attach an additional sheet for each additional Appellee **

CERTIFICATE OF SERVICE

I, _____, certify that I have forwarded a true and exact copy of this Notice of Appeal by First Class mail, postage prepaid, or in any manner as described in Tennessee Compilation Rules & Regulations, Chapter 0800-02-21, to all parties and/or their attorneys in this case on this _____ day of _____, 20 ____.

[Signature of appellant or attorney for appellant]



Tennessee Bureau of Workers' Compensation
220 French Landing Drive, I-B
Nashville, TN 37243-1002
800-332-2667

AFFIDAVIT OF INDIGENCE

I, _____, having been duly sworn according to law, make oath that because of my poverty, I am unable to bear the costs of this appeal and request that the filing fee to appeal be waived. The following facts support my poverty.

1. Full Name: _____ 2. Address: _____

3. Telephone Number: _____ 4. Date of Birth: _____

5. Names and Ages of All Dependents:

Relationship: _____
Relationship: _____
Relationship: _____
Relationship: _____

6. I am employed by: _____

My employer's address is: _____

My employer's phone number is: _____

7. My present monthly household income, after federal income and social security taxes are deducted, is:

\$ _____

8. I receive or expect to receive money from the following sources:

AFDC	\$ _____ per month	beginning _____
SSI	\$ _____ per month	beginning _____
Retirement	\$ _____ per month	beginning _____
Disability	\$ _____ per month	beginning _____
Unemployment	\$ _____ per month	beginning _____
Worker's Comp.	\$ _____ per month	beginning _____
Other	\$ _____ per month	beginning _____

9. My expenses are:

Rent/House Payment \$ _____	per month	Medical/Dental \$ _____	per month
Groceries \$ _____	per month	Telephone \$ _____	per month
Electricity \$ _____	per month	School Supplies \$ _____	per month
Water \$ _____	per month	Clothing \$ _____	per month
Gas \$ _____	per month	Child Care \$ _____	per month
Transportation \$ _____	per month	Child Support \$ _____	per month
Car \$ _____	per month		
Other \$ _____	per month (describe: _____)		

10. Assets:

Automobile \$ _____	(FMV) _____
Checking/Savings Acct. \$ _____	
House \$ _____	(FMV) _____
Other \$ _____	Describe: _____

11. My debts are:

Amount Owed	To Whom
_____	_____
_____	_____
_____	_____
_____	_____

I hereby declare under the penalty of perjury that the foregoing answers are true, correct, and complete and that I am financially unable to pay the costs of this appeal.

APPELLANT

Sworn and subscribed before me, a notary public, this

day of _____, 20 _____.

NOTARY PUBLIC

My Commission Expires: _____