

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 21, 2008 Session

JOHN W. KRANTZ, III, v. NISSAN NORTH AMERICA, INC. ET AL.

**Direct Appeal from the Chancery Court for Rutherford County
No. 06-0287WC Robert E. Corlew, III, Chancellor**

**No. M2007-01812-WC-R3-WC - Mailed - July 31, 2008
Filed - October 6, 2008**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The employee, John W. Krantz, III, sustained a compensable back injury. His authorized physician placed restrictions upon his activities. The employer, Nissan North America, Inc., had a pre-existing written policy requiring adherence to medical restrictions at all times, including while away from the workplace. Mr. Krantz violated the restrictions in question by engaging in competitive horsemanship, and was terminated as a result. The trial court found that he did not have a meaningful return to work and awarded permanent disability benefits in excess of 1.5 times the anatomical impairment. Nissan has appealed, contending that the trial court erred by finding that Mr. Krantz did not have a meaningful return to work. We agree, and modify the judgment accordingly.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right; Judgment of the Chancery Court Modified

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and ALLEN W. WALLACE, SR. J., joined.

Terry L. Hill, Nashville, Tennessee, for the appellants, Nissan North America, Inc. and ESIS, Inc.

Tim L. Bowden, Goodlettsville, Tennessee, for the appellee, John W. Krantz, III.

MEMORANDUM OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Most of the relevant facts are not disputed. John Krantz was employed by Nissan at its Smyrna, Tennessee, facility. He sustained an injury to his back as a result of a slip and fall at work in 1999. The injury was accepted as compensable. In 2002 and 2003, he had recurrences of back pain. Mr. Krantz was treated by Dr. George Lien. Dr. Lien prescribed conservative treatment and eventually released him with no impairment or restrictions in December 2002 and again in November 2003.

In May 2005, Mr. Krantz experienced another episode of back pain after beginning to work on a new job. Nissan accepted this as a new claim and provided a panel of physicians. Mr. Krantz selected Dr. Richard Berkman, a neurosurgeon. He first saw Dr. Berkman on May 13, 2005. Dr. Berkman's note of that date states, in part:

He switched his position at Nissan just two weeks ago to a different shift and developed intense back pain, which has just about resolved at this time. Other than his hard work at Nissan, he also works on a farm, bush hogs, and loves to ride walking horses. None of these activities are particularly good for his back, but he is actually quite healthy and quite fit. Given that this is a walking horse and not really a galloping horse or jumping horse, I am not quite as offended by this.

Based upon a review of an MRI from 2002 and his examination of Mr. Krantz, Dr. Berkman expressed the opinion that it was unnecessary to place any restrictions upon his activities at that time. The note mentioned, but did not order, a repeat MRI.

As indicated in Dr. Berkman's note, Mr. Krantz was an avid horseman. He participated in competitive western riding and shooting events. These activities were well known to his co-workers and supervisors. On May 18, 2005, a "Hot Topics" meeting was held at Nissan's premises. These were regular meetings concerning employees with work-related injuries. Participants in these meetings included company officials involved in safety, medical services and workers' compensation. Mr. Krantz's injury was discussed at the May 18 meeting. A concern apparently arose at this meeting concerning the potential effects of Mr. Krantz's recreational activities upon his injury. After the meeting, Nissan arranged for a case manager to contact Dr. Berkman regarding that subject. As a result of that contact, Dr. Berkman sent a letter to Nissan on May 24. In the letter, Dr. Berkman suggested that a repeat MRI be performed. The letter went on to indicate that any change in Mr. Krantz's restrictions would be based upon the result of that study.

Mr. Krantz returned to Dr. Berkman on May 27. By that time, the repeat MRI study had been completed. Dr. Berkman noted that Mr. Krantz's degenerative disc disease had advanced since 2002. On that basis, he assigned permanent restrictions. These included lifting limits of fifty pounds occasionally, thirty pounds frequently and fifteen pounds continuously, and no sitting on a hard surface while being bumped up and down. Dr. Berkman stated in his letter: "I

certainly wouldn't want him riding a lawn mower or riding a horse with this type of disc that has already caused him problems, at least twice in the past three years. It's not a serious problem, but it certainly is prone to becoming aggravated with his work at Nissan or with riding a horse."

Nissan had a pre-existing written policy, included in the employee handbook, that employees were to abide by restrictions that were medically imposed on account of a work-related injury at all times, including away from the workplace. A case manager asked Mr. Krantz to sign a document acknowledging that Dr. Berkman's restrictions were in effect at all times. While he did so, Mr. Krantz was upset with the situation, and complained to Glen Lewis, a human resources manager for Nissan, concerning the restrictions on riding. On June 9, Mr. Lewis met with Mr. Krantz to discuss the matter. Mr. Lewis testified that he advised Mr. Krantz that it was likely that his restrictions would become more stringent over time. He suggested that Mr. Krantz consider how his activities both at work and away from work would affect him. Mr. Krantz interpreted this, justifiably, as meaning that it would become necessary for him to choose between riding and his job with Nissan.

Mr. Krantz returned to work in a modified job within his restrictions. On July 16, he participated in a two-day "western shooting" competition. An investigator hired by Nissan made a video recording of the event, which showed Mr. Krantz riding a horse. The video was provided to Nissan. A memorandum was prepared by Sean Sweeney, the section manager for Mr. Krantz's department, which recommended that Mr. Krantz be terminated for violating Dr. Berkman's medical restrictions. On August 2, Mr. Lewis met with Mr. Krantz again. He questioned Mr. Krantz about riding horses, specifically mentioning the July 16 event. Mr. Krantz admitted that he was present at the event, but denied that he had participated. He also acknowledged that if he had ridden in the event it would have violated the restrictions imposed by Dr. Berkman. Mr. Krantz was terminated shortly thereafter. Mr. Krantz later admitted participating in the competition during his deposition and at trial.

Dr. Berkman testified by deposition. He stated that riding a horse was one of the worst things a person with back trouble can do, because of the stress placed on the spine by bouncing up and down. He agreed that he considered the issue of restrictions at Nissan's request, but denied that Nissan had asked him to impose particular restrictions. He further denied that he would have agreed to do so had he been asked. He was shown the video recording of Mr. Krantz's activity on July 16. He testified that for most of the two hours of riding shown, Mr. Krantz was riding at a very moderate pace that was not likely to worsen his condition. However, during the actual rounds of competition, which took less than a minute each, the riding was faster and involved rapid changes of direction. Dr. Berkman believed that those activities could worsen the condition of Mr. Krantz's back. He assigned 5% permanent anatomical impairment to the body as a whole.

Dr. Joseph Trubia, an orthopaedic surgeon, conducted an independent medical examination of Mr. Krantz at the request of his attorney. He testified by deposition. He agreed with Dr. Berkman's diagnosis, but did not impose a restriction against riding. Dr. Trubia's failure to include a riding restriction was based primarily upon Mr. Krantz's reports that he rode

walking horses for pleasure and his riding did not cause him pain.¹ Dr. Trubia agreed with Dr. Berkman's other restrictions, and assigned an 8% permanent impairment.

At some point, Mr. Krantz requested a second opinion concerning the restriction against riding. Dr. Scott Standard, a neurosurgeon, conducted the "second opinion" examination on September 16, 2005. His report is exhibited to Dr. Trubia's deposition. He also found the restriction against riding unnecessary because Mr. Krantz reported that he mainly engaged in pleasure riding and rode without pain.

Mr. Krantz was thirty-two years old at the time of trial. He was a high school graduate. He began working for Nissan in 1995. His prior experience was in a grocery store and as a sheet metal apprentice. After being terminated by Nissan, he worked as an apprentice electrician. At the time of trial, he had started his own business, installing residential wiring.

The only issues presented to the trial court were application of the 1.5 cap and the extent of Mr. Krantz's vocational disability. The court found that he had a 6% anatomical impairment, that he had not had a meaningful return to work, and awarded 18% permanent partial disability to the body as a whole. Judgment was entered accordingly. Nissan has appealed, contending that the trial court erred by holding that the award was not limited by the 1.5 times impairment "cap" contained in Tennessee Code Annotated section 50-6-241(d)(1)(A).

STANDARD OF REVIEW

Where, as here, there is no conflict in the evidence as to any material fact, the questions on appeal are entirely of law. Lawrence County Educ. Ass'n v. Lawrence County Bd. of Educ., 244 S.W.3d 302, 309 (Tenn. 2007); Billington v. Crowder, 553 S.W.2d 590, 595 (Tenn. Ct. App. 1977). Questions of law are reviewed de novo upon the record with no presumption of correctness. Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79, 80 (Tenn. 1996).

ANALYSIS

Nissan contends that Mr. Krantz was terminated for misconduct, and therefore his recovery should be limited to the lower "cap" for employees who make a meaningful return to work. Mr. Krantz contends that because his termination was based upon legal conduct away from the workplace, he did not have a meaningful return to work.

There do not appear to be any cases directly on point. Nissan cites Carter v. First Source Furniture Group, 92 S.W.3d 367 (Tenn. 2002) in support of its position. In Carter, the employee was terminated after she had reported her injury, but before she had surgery. She had been "involved in an altercation at work. Another employee called [her] a 'bitch,' and [she] responded by chasing the other employee with a box cutter and kicking him." Id. at 368. The trial court found that she had not had a meaningful return to work and made an award in excess

¹ Mr. Krantz did not tell Dr. Trubia about riding horses in western style shooting competitions.

of the 2.5 times impairment cap which was in effect at that time.² The Tennessee Supreme Court reversed. The Court defined the issue in that appeal as “whether the employer, having fired an employee for misconduct prior to treatment of the employee’s injury, is required to make an offer of re-employment following treatment in order to take advantage of the two and one-half times cap.” Id. at 371. In order to answer that question, the Court stated that it was appropriate for a trial court to investigate the reasons that an offer of re-employment was not made. Id. In that context, the Court further stated that “an employer should be permitted to enforce workplace rules without being penalized in a workers’ compensation case.” Id. See also, Davis v. Avron Truss Co., No. E2000-00780-WC-R3-CV, 2001 WL 767014, at *2 (Tenn. Workers’ Comp. Panel July 5, 2001).

Nissan notes that Mr. Krantz was terminated for violation of a company rule, viz. adherence to medical restrictions at all times. On that basis, it contends that the termination was based upon misconduct, and the facts of this case are therefore analogous to Carter and Davis. Nissan also points to the provisions of Tennessee Code Annotated section 50-6-241. Subsection (d)(1)(B) contains provisions that allow employees whose disability benefits are capped by the code section to seek reconsideration of those benefits if they lose their employment within specified time periods. Subsection (d)(1)(B)(iii)(b) provides that an employee is not entitled to reconsideration of disability when the loss of employment is due to his or her misconduct connected with the employee’s employment.

As Mr. Krantz points out, the conduct involved in those two cases occurred at the workplace, and was inherently wrongful. In this case, Mr. Krantz’s activity occurred away from the workplace and was essentially benign, other than its potential for worsening his degenerative back condition. He also argues that the courts should give the benefit of any doubt to employees when the nature of alleged misconduct is uncertain, citing Moore v. Best Metal Cabinets, No. W2003-00687-WC-R3-CV, 2004 WL 2270751 (Tenn. Workers’ Comp. Panel Oct. 7, 2004).

The trial court based its decision upon the following factors: “There was no misconduct within the workplace. There was no failure of the employee to properly perform his job. The restriction at issue had no bearing upon any duties which [Mr. Krantz] performed for [Nissan], but was a lifestyle issue which affected the employee only outside the workplace.” On those bases, the trial court found that Mr. Krantz had not had a meaningful return to work and awarded permanent partial disability in excess of the one and one-half times impairment “cap” contained in Tennessee Code Annotated section 50-6-214(d)(1)(A).

In Newton v. Scott Health Care Ctr, 914 S.W.2d 884, 886 (Tenn. Workers’ Comp. Panel 1995), our Supreme Court provided a broad framework for evaluating issues associated with the concept of meaningful return to work:

There will be a variety of factual situations wherein the courts will be required to construe the meaning of the words in question here. The ultimate resolution of their meaning will be leavened by an assessment of the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to return to work.

² Tenn. Code Ann. § 50-6-241(a) & (b) (1999)

With that as a starting point, we note that Mr. Krantz initially sustained a work injury to his back in 1999. He had flare-ups of lower back problems on several occasions thereafter, and an apparent re-injury in 2005. Dr. Berkman testified that, based upon comparison of MRI scans, the condition of Mr. Krantz's back had worsened between 2002 and 2005. He also testified that riding a horse placed stress on the lower back, which could exacerbate a degenerative condition such as Mr. Krantz's.

One of the factors the courts consider in determining whether an employee has made a meaningful return to work is the willingness of the employer to accommodate the work restrictions imposed by the employee's attending physician. Hardin v. Royal & Sunalliance Ins., 104 S.W.3d 501, 505-06 (Tenn. 2003); Nelson v. Wal-Mart Stores, Inc., 8 S.W.3d 625, 630 (Tenn. 1999). It seems equitable to allow the employer to require the employee to comply with those restrictions outside the workplace as a condition of continued employment. Medical restrictions are recommended by physicians in order to give the employee and the employer limitations on the activities of the employee so as to avoid exacerbating the existing injury or the re-injury of a weakened employee. An employer who knows the employee is complying with those medically imposed restrictions is able to gauge the costs of accommodating those restrictions and the risks of re-employing a partially disabled worker, in exchange for limiting its liability for the disability to one and one-half times the impairment. These costs, risks and the resultant advantage may then be compared to the costs of refusing to re-employ the injured worker which subjects the employer to liability in an amount up to six times the impairment rating. In order for an employer to accurately evaluate the risks of continued employment, however, it should be allowed to require that the employee comply with medically imposed restrictions off the job as well as while he or she is at work.

In addition to the foregoing, as referred to above, an employee who receives "capped" disability benefits for whole body injuries and becomes unable to continue his or her employment within 400 weeks of returning to work is eligible for reconsideration of his or her permanent partial disability benefits pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(B)(i). Where the inability to continue working is occasioned by the failure of the employee to comply with medically imposed restrictions, the employer will have incurred whatever costs that may have been associated with accommodating the injured employee's restrictions but still have lost the advantage of returning the injured employee to work. The employer may also incur additional medical, administrative and legal expenses as a result.

One of the goals of Tennessee Code Annotated section 50-6-241 is to encourage employers to retain disabled workers. Brown v. Campbell County Bd. of Educ., 915 S.W.2d 407, 417 (Tenn. 1995). In Brown, the Tennessee Supreme Court described the goal of this code section as follows:

It encourages employers to retain injured workers at wages equal to or greater than wages received prior to the injury by providing for smaller disability awards if the employee is retained. Re-employment of injured workers is a legitimate state objective which justifies the distinction between those injured employees who are returned to work and those who are not.

Id. (No. 4)

In our view, it is consistent with the stated goal of Tennessee Code Annotated section 50-6-241 to allow employers to minimize the risks of returning an employee to work by conditioning continued employment upon the employee's compliance with medically imposed restrictions both at work and off the job.

Employing the Newton standard, stated above, viewed in the context of the considerations we have outlined, this Panel finds it more reasonable that Mr. Krantz abide by Nissan's policy that injured employees comply with medically imposed restrictions outside the workplace than Mr. Krantz's insistence that he can ignore medical restrictions in his private affairs, thus increasing the potential exposure of his employer to additional liability. Because we find the conduct prohibited by Nissan to have an impact on the employer-employee relationship, we find it sufficiently connected to the employment that an employee who is discharged for such misconduct would not be entitled to escape the 1.5 cap. See Tenn. Code Ann. § 50-6-241(d)(1)(B)(iii); Carter, 92 S.W.3d at 371; Davis, supra. As a result, we conclude that Mr. Krantz had a meaningful return to work for purposes of application of the caps. We therefore reverse the trial court's finding on that issue, and modify the award.

CONCLUSION

The award of permanent partial disability benefits is modified to 9% to the body as a whole. The judgment is affirmed in all other respects. Costs are taxed to John W. Krantz, III, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE
IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

JOHN W. KRANTZ, III v. NISSAN NORTH AMERICA, INC. ET AL.

No. M2007-01812-SC-WCM-WC - Filed - October 6, 2008

ORDER

This case is before the Court upon the motion for review filed by John W. Krantz, III, pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to John W. Krantz, III, and his surety, for which execution may issue if necessary.

PER CURIAM

CLARK, J., NOT PARTICIPATING