IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 24, 2017 Session

RAYMOND GIBSON v. SOUTHWEST TENNESSEE ELECTRIC MEMBERSHIP CORPORTATION, ET AL.

Appeal from the Chancery Court for Crockett County
No. 9849 George R. Ellis, Chancellor

No. W2016-01403-SC-R3-WC – Mailed July 13, 2017; Filed August 28, 2017

After Employee suffered a lower back injury in the course and scope of his employment, the parties reached a settlement as to his permanent partial disability benefits. Employee later filed a petition for modification of the award, and the trial court found that Employee is permanently and totally disabled. Employer appeals, contending the trial court erred in finding Employee permanently and totally disabled and in finding Employer liable for ninety percent of the award. Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation 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. We affirm the trial court's judgment.

Tenn. Code Ann. § 50-6-225(e)(1) (2014) (applicable to injuries occurring prior to July 1, 2014). Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM B. ACREE, JR., SR.J., delivered the opinion of the Court, in which ROGER A. PAGE, J., and PAUL G. SUMMERS, SR.J., joined.

Shaterra Reed, Brentwood, Tennessee, for the appellant, Southwest Electric Membership Corporation

Ricky L. Boren, Jackson, Tennessee, for the appellee, Raymond Gibson

Brian A. Pierce, Assistant Attorney General, Nashville, Tennessee, for the appellee, the Tennessee Second Injury Fund

OPINION

Background

Raymond Gibson ("Employee") began working as a mechanic's helper for Southwest Tennessee Electric Membership Corporation ("Employer") in 1999. On March 30, 2012, he injured his back in the course and scope of his employment. The parties reached a settlement as to Employee's permanent partial disability benefits in September 2013. Employee returned to work but continued to experience pain and related symptoms. Employee filed a petition for modification of the prior award on the basis that his back condition gradually worsened to the point of permanent and total disability. The following evidence was presented.

Employee, who was 52 years old at the time of the trial, testified about his employment history. He testified that he obtained a job stocking groceries at age 16 and kept that position for six years. Then, he began working for a tree service company, which required him to climb trees, cut trees, and load wood. Employee testified that the work was "very strenuous," and he maintained that job for eleven years. In 1999, Employee obtained a position with Employer. His duties included lifting up to fifty pounds by himself and up to 100 pounds with assistance. Employee was also required to work underneath vehicles, change tires, and perform other strenuous tasks.

On March 30, 2012, Employee suffered a lower back injury in a motor vehicle accident in the course and scope of his employment with Employer. Employee testified, as a result of the accident, he is unable to walk for exercise because of the pain. Employee further testified that he

has trouble standing and sitting, and he takes pain medication and muscle relaxers twice each day. He is not able to drive for extended periods of time or distances due to the effects of his medication. Employee has never worked in an office and does not know how to use a computer. Although he is a high school graduate, Employee has no training or vocational skills. Employee testified that he has not done a search for employment because he is unaware of a job he can physically perform.

Dr. Lowell Stonecipher, an orthopedic surgeon, testified by deposition that he treated Employee for a herniated disc at L5-S1 in 1991, 2007, and 2008. In 1991, Dr. Stonecipher performed a foraminotomy or a discectomy at L5-S1.[1] In 2007 and 2008, Dr. Stonecipher performed a laminectomy/discectomy on Employee's back at L5-S1. After each surgery, Employee was highly motivated and returned to work without restrictions.

When Employee was injured on March 30, 2012, Dr. Stonecipher treated him for a herniated disc at L4-5, which was a different area in his back from his prior treatments. On October 17, 2012, Dr. Stonecipher performed a laminectomy, discectomy, and foraminotomy at L4-5. Then, in February 2013, Dr. Stonecipher determined that Employee reached maximum medical improvement, and he assigned an impairment rating of 5 percent to the body as a whole.

In April and May 2013, Dr. Stonecipher saw Employee, and Employee reported ongoing back pain and related symptoms. During the May visit, Dr. Stonecipher performed an MRI. The MRI showed that Employee's back was improving and that there was no need for additional surgery. Employee returned to Dr. Stonecipher in June 2013 with complaints of ongoing back pain. In August 2013, when Employee returned with the same complaints, Dr. Stonecipher referred Employee

[1] Dr. Stonecipher testified that he could not report exactly what surgery he performed in 1991 because his records were lost during an office move in 1991, but he was reasonably sure he performed surgery on Employee's back at L5-S1. He was unsure whether the surgery was a discectomy or a foraminotomy.

for a nerve block. After the nerve block, in October 2013, Employee reported that he had some days without as much pain and that he did not want another nerve block. Then, in November 2013, Employee reported that he "was able to do his job, but when he got home he was hurting a lot." Dr. Stonecipher performed an x-ray, and the x-ray showed that the disk spaces were well-maintained except for disc narrowing at L5-S1.[2]

In December 2013, Dr. Stonecipher decided to place Employee in a body cast as a test to see whether spinal fusion would better Employee's condition. Employee testified that the body cast did not help and was extremely unpleasant. On January 21, 2014, Dr. Stonecipher referred Employee for additional pain management and determined that Employee was unable to work. In March 2014, a separation notice stated that Employee was terminated "due to permanent disability."

Dr. Apurva Dalal, another orthopedic surgeon, testified by deposition that he performed an independent medical evaluation of Employee in June 2013, and he assigned an impairment rating of 12 percent to the body as a whole based on the herniated disc at L4-5. Dr. Dalal performed a second independent medical evaluation in November 2014. At that time, Employee reported severe pain in his back, pain that radiated down his leg, and severe tingling and numbness on his left side. Employee was taking OxyContin as needed for pain. Dr. Dalal's physical examination revealed Employee had severe tenderness and muscle spasms in his back; decreased sensation in the L5-S1 region; atrophy of the left leg compared to the right; motor weakness on the left compared to the right; multilevel degenerative disc disease; and severe radiculopathy at L4-5.

[2] Dr. Stonecipher testified that his notes indicated there was disk narrowing at L4-5, but the disk narrowing is really at L5-S1 because L5-S1 has been narrow since Employee's second surgery.

Dr. Dalal assigned an impairment rating of 14 percent to the body as a whole, and he advised Employee against any bending, pulling, pushing, or lifting over five pounds. Dr. Dalal clarified that his findings related to Employee's herniated disc at L4-5, which occurred in March 2012. He strongly recommended that Employee receive an MRI and be evaluated by a neurosurgeon. He was unaware of any jobs Employee could perform other than answering phones.

Trent Hall, a vice-president for Employer, testified that Employee worked as a mechanic's helper and was a good employee. Mr. Hall stated that Employee missed work following back surgeries in 2007 and 2008 but that Employee returned to work without restrictions. When Employee returned to work in December 2012 following surgery for the March 2012 injury, he was placed on light duty and answered phones. When Employee tried to resume his regular duties, he needed help with lifting and had trouble getting up from under the vehicles.

Mark Kyle, a private investigator, testified that he observed Employee at his home from June 26 to June 28, 2014. According to Mr. Kyle's report, he saw Employee driving a truck and performing physical activities for about ten minutes on June 27. He did not see Employee outside of his home on June 26 or June 28.

In seeking to modify his prior workers' compensation award, Employee argued that his back condition has worsened and that he is permanently and totally disabled. Employer argued that Employee failed to show that he is permanently and totally disabled and failed to show that he could not perform other jobs. The Second Injury Fund argued that Employee is not permanently and totally disabled and that, in any event, Employer is responsible for any and all additional benefits.

After accrediting Employee's testimony, the trial court determined that Employee is totally and permanently disabled and "unable to do his former job as a result of the restrictions assessed by his approved treating physician." The trial court also determined that Employer is

liable for 90 percent of the permanent and total disability award and that the Second Injury Fund is liable for the remaining 10 percent. Employer appeals the trial court's judgment, contending the trial court erred in finding that Employee is permanently and totally disabled and in finding Employer liable for 90 percent of the award. We affirm the trial court's judgment.

Standard of Review

Our standard of review of factual issues in a workers' compensation case is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2014) (applicable to injuries occurring prior to July 1, 2014); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). When issues of credibility of witnesses and the weight to be given their in-court testimony are before the reviewing court, considerable deference must be accorded to the factual findings of the trial court. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 733 (Tenn. 2002); *see Rhodes v. Capital City Ins. Co.*, 154 S.W.3d 43, 46 (Tenn. 2004). When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another. This Court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997). Questions of law are reviewed *de novo* with no presumption of correctness afforded to the trial court's conclusions. *Gray v. Cullom Machine, Tool & Die*, 152 S.W.3d 439, 443 (Tenn. 2004).

Analysis

Permanent and Total Disability

Employer contends that the trial court erred in finding that Employee is permanently and totally disabled. In particular, Employer argues that there was "no evidence that consider[ed] [Employee's] age, education, skills and training, local job opportunities, and capacity to work at types of employment available in his disabled condition." Employee argues that the evidence in the record does not preponderate against the trial court's judgment.

An individual is permanently and totally disabled when he or she is incapable of "working at an occupation that brings the employee an income." *Fritts v. Safety Nat'l Cas. Corp.*, 163 S.W.3d 673, 681 (Tenn. 2005) (citing Tenn. Code Ann. § 50-6-207(4)(B) (1999)). When determining whether an individual is permanently and totally disabled, this Court looks to "a variety of factors such that a complete picture of an individual's ability to return to gainful employment is presented to the Court." *Hubble v. Dyer Nursing Home*, 188 S.W.3d 525, 535 (Tenn. 2006) (citing *Vinson v. United Parcel Serv.*, 92 S.W.3d 380, 386 (Tenn. 2002)). Factors considered by the Court include "'the employee's skills and training, education, age, local job opportunities, and his [or her] capacity to work at the kinds of employment available in his [or her] disabled condition.'" *Cleek v. Wal-Mart Stores*, 19 S.W.3d 770, 774 (Tenn. 2000) (quoting *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986)). Although this assessment is usually made and presented at trial by a vocational expert, "it is well settled that . . . an employee's own assessment of his or her overall physical condition, including the ability or inability to return to gainful employment, is 'competent testimony that should be considered.'" *Vinson,* 92 S.W.3d at 386 (quoting *Cleek*, 19 S.W.3d at 774).

In our view, the evidence supports the trial court's determination that Employee is permanently and totally disabled. Dr. Stonecipher

testified that Employee suffered a herniated disc at L4-5 in March 2012, which required surgery in October 2012. Although Employee returned to work for Employer, he continued to report pain and related symptoms to Dr. Stonecipher throughout 2013. In August 2013, he was treated with a nerve block and medication. In December 2013, he was placed in a body cast to ascertain whether a spinal fusion would be effective. Despite these measures, Dr. Stonecipher found that Employee was no longer able to work. Likewise, when Dr. Dalal evaluated Employee in November 2014, he found that Employee suffered from pain in his back, radiating pain in his left leg, numbness, and tingling. Employee also had severe muscle spasms in his back and atrophy in his left leg, such that Dr. Dalal was unaware of any jobs that Employee could perform. Employee testified that he is no longer able to walk for exercise, that he cannot work, that he takes pain medication and muscle relaxers, and that he has no other vocational skills or training. Moreover, the trial court specifically accredited Employee's testimony. In short, we conclude that the evidence supports the trial court's judgment that Employee is permanently and totally disabled. *See, e.g., Vinson*, 92 S.W.3d at 386.

Allocation of Employee's Award

Employer argues that the trial court erred in determining that it is liable for 90 percent of Employee's permanent and total disability because the proof showed that Employee had three injuries before the March 2012 injury. Employee and the Second Injury Fund argue that the evidence supports the trial court's determination.

Tennessee Code Annotated section 50-6-208 governs cases in which an employee who "has previously sustained a permanent physical disability . . . becomes permanently and totally disabled through a subsequent injury." That statute provides, in part:

> (a)(1) If an employee has previously sustained a permanent physical disability from any cause or origin and becomes permanently and totally disabled through a subsequent injury, the employee shall be entitled to compensation from the employee's employer or the employer's insurance company only for the disability that would have resulted from the subsequent injury, and such previous injury shall not be considered in estimating the compensation to which the employee may be entitled under this chapter from the employer or the employer's insurance company; provided, that in addition to such compensation for a subsequent injury, and after completion of the payments for the subsequent injury, then the employee shall be paid the remainder of the compensation that would be due for the permanent total disability out of a special fund to be known as the second injury fund.

Tenn. Code Ann. § 50-6-208(a)(1) (2014).

The Supreme Court has explained the Second Injury Fund provisions as follows:

> In order to claim benefits under subsection (a), the employee (1) must have "sustained a permanent physical disability from any cause or origin, whether compensable or non-compensable," and (2) must become "permanently and totally disabled through a subsequent injury." [Tenn. Code Ann.] § 50-6-208(a)(1). In addition, liability may be apportioned to the Second Injury Fund under subsection (a) only if the employer had actual knowledge of the preexisting injury before the subsequent injury occurred. Tenn. Code Ann. § 50-6-208(a)(3). . . . [I]t is essential that the trial court determine the extent of disability resulting from the subsequent injury without consideration of the prior injury. . . . *In other words, the trial court must find what disability*

> *would have resulted if a person with no preexisting disabilities, in the same position as the plaintiff, had suffered the second injury but not the first*. This is expressly required by subsection (a), which states, 'such employee shall be entitled to compensation from the . . . employer . . . only for the disability that would have resulted from the subsequent injury, and such previous injury shall not be considered in estimating the compensation to which such employee may be entitled . . . .'" Tenn. Code Ann. § 50-6-208(a)(1).

Allen v. City of Gatlinburg, 36 S.W.3d 73, 76-77 (Tenn. 2001) (emphasis added).

In our view, the evidence supports the trial court's determination that Employer is liable for 90 percent of Employee's benefits "resulting from the most recent injury alone." The evidence established that Employee performed all of his duties with no restrictions and with no assistance prior to being injured in March 2012. Although Dr. Stonecipher assigned impairment ratings following Employee's injuries in 2007 and 2008, he explained that those injuries were to L5-S1 and that Employee returned to work with no restrictions. Employee reported no problems between 2008 and 2012, until the injury in March 2012. In addition, Employer testified that Employee was a good employee who rarely missed work and performed strenuous tasks. Dr. Dalal attributed the worsening in Employee's condition to the injury he suffered in March 2012. Under these circumstances, the trial court did not err in assigning 90 percent of the liability for the award to Employer and 10 percent of the liability for the award to the Second Injury Fund. *See LaPradd v. Nissan North America, Inc.*, No. M2014-01722-SC-R3-WC, 2016 WL 197323 at *10 (Tenn. Sp. Worker's Comp. Panel, Jan. 14, 2016) (holding that the trial court properly found that the employee was permanently disabled as the result of a work-related injury and allocated all of the liability to the employer).

Conclusion

For the foregoing reasons, the trial court's judgment is affirmed. Costs are assessed to Employer, for which execution shall issue if necessary.

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WILLIAM B. ACREE, JR., SENIOR JUDGE

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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 are assessed to Appellant, Southwest Electric Membership Corporation, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM