IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 30, 2019 Session

RICHARD VAUGHN V.
CITY OF MURFREESBORO AND THE SECOND INJURY FUND

Appeal from the Circuit Court for Rutherford County
No. 66411 J. Mark Rogers, Judge

No. M2018-02048-SC-R3-WC – Mailed July 24, 2020

Employee injured his left shoulder during a training session. He was diagnosed with a torn shoulder ligament which required a surgical repair of the left shoulder. Nine months later, Employee's treating physician performed a posterior capsular release of the left shoulder. When his symptoms failed to improve, Employer authorized follow up care with a different orthopedic surgeon, who performed another surgery to release the bicep tendon that had been previously repaired. Employer was provided with a letter from Employee's treating physician that Employee's restrictions had been lifted. Employee was required to take a return to duty test, which he ultimately failed. Subsequently, Employee developed intermittent violent movements of his head and was diagnosed with conversion disorder. At the request of Employee's counsel, Employee underwent an independent medical examination by a psychiatrist, who concluded that the conversion disorder arose out of Employee's work injury. However, because the psychiatrist noted issues regarding symptom magnification, he reduced Employee's psychiatric impairment rating to ten percent. Following a trial, the court awarded benefits for injuries to Employee's left shoulder and for the psychiatric injury; however, it found that Employee was not permanently and totally disabled. The trial court also declined to apply a multiplier to the impairment rating for the psychiatric injury and award temporary total disability related to that injury. The Employee appealed. 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 pursuant to Tennessee Supreme Court Rule 51. We affirm the trial court's judgment.

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

ROBERT E. LEE DAVIES, SR. J., delivered the opinion of the court, in which JEFFREY S. BIVINS, C. J., and DON ASH, SR. J., joined.

D. Russell Thomas, Murfreesboro, Tennessee, for the appellant, Richard Vaughn.

Richard W. Rucker, Murfreesboro, Tennessee, for the appellee, City of Murfreesboro.

Matt D. Cloutier, Nashville, Tennessee, for the appellee, Second Injury Fund.

OPINION
Factual and Procedural Background

Employee, Richard Vaughn, began working as a firefighter for the City of Murfreesboro ("Employer") in 1998. On September 14, 2009, Employee was undergoing a training session which involved heavy lifting. As he and a fellow employee were reaching down to pick up another colleague, Employee began to experience pain in his left shoulder and in the left side of his neck. He reported his injury to Employer and was provided treatment by Dr. Tom Johns, an orthopedic surgeon, who diagnosed a torn shoulder ligament and performed a superior labrum anterior and posterior (SLAP) repair of the left shoulder on November 9, 2009. Post-surgery, Employee continued to complain of pain and stiffness in his shoulder and neck, even after physical therapy. On August 13, 2010, Dr. Johns performed a posterior capsular release. Employee saw other specialists for second opinions regarding his shoulder and neck. When his symptoms did not improve, Employer authorized follow up care with Dr. Chad Price, an orthopedic surgeon. When Dr. Price first saw Employee on March 3, 2011, Employee was still experiencing pain following his prior surgeries. He complained of having shoulder pain that was consistent with his bicep tendons and rotator cuff being irritated. Dr. Price believed he could address those issues by performing another surgery to release the bicep tendon that had been previously repaired. Employee had a second complaint of abnormal sensations down to his hand and arm. This issue could not be explained as a result of the shoulder injury, and Dr. Price did not think he could provide any relief. On April 29, 2011, Dr. Price performed the release of the bicep tendon.

At an appointment with Dr. Price on August 9, 2011, Employee reported that he did not have any specific pain in his shoulder. Dr. Price noted that Employee had good range of motion in his shoulder, consistent with his time period post-surgery. Employee also indicated that the tenderness and tightness around his shoulder were gone. At that point in time, Dr. Price felt he had successfully treated Employee's complaints. He made a return

to work notation of light duty with restrictions of no overhead work, no lifting, no pushing, and no pulling greater than twenty pounds.

On September 22, 2011, the Employee's range of motion was the same as his prior visit, but Employee was complaining of some pain that had not been noted before. Dr. Price gave an injection to determine if there was residual inflammation around the shoulder which was causing pain. However, Employee did not improve, which led Dr. Price to believe that portion of the shoulder was not causing the problem.

Employee saw Dr. Price again on November 3, 2011. By that time, Employee had seen a physician for his cervical spine and a neurosurgeon. These physicians concluded that Employee's neck was normal and that the symptoms he was having were not consistent with a nerve root compression in his neck. On November 3, 2011, Dr. Price found Employee had a full range of motion in his cervical spine, with occasional pain but not in the same range of motion. Although Dr. Price performed the examination several times, each time Employee's pain was different at different times. Dr. Price testified that Employee was difficult to rate for impairment because his range of motion changed often as did his symptoms. For example, Employee had negative Spurling's tests on March 3 and June 2, 2011, which indicated his neck was normal, but on June 28, 2011 he had a positive Spurling's test. Dr. Price ultimately decided that Employee needed a functional capacity evaluation ("FCE") to determine his permanent limitations. The FCE was performed on November 16, 2011 by a physical therapist. Dr. Price testified that the report from the physical therapist indicated Employee did not make a full effort in trying to represent what he was able to do.

Dr. Price also testified that at the appointment on November 3, 2011, Employee told him his physical therapist had worked on some cervical traction, and that afterwards he experienced an uncontrollable twitch that occurred randomly. However, Dr. Price testified based on his observations, the twitch was inconsistent because Employee did not twitch whenever he was distracted by talking.

After the office visit of November 3, 2011, the City received a note from Dr. Price's office that lifted the restrictions on Employee on November 17, 2011. Although Dr. Price confirmed that the note came from his office, he had no knowledge who sent it and why it was sent. Dr. Price agreed that he never changed the restrictions on Employee after he imposed them, and his office confirmed by letter dated March 30, 2012 that there had been no changes to Employee's restrictions since November 3, 2011.

However, based upon the unauthenticated letter from Dr. Price's office, Employer

informed Employee that his restrictions had been lifted, and he needed to take the "return to duty test." Employee described his reaction to the turn of events as follows:

> And I was appalled. I just couldn't believe. I said, I haven't been back to the doctor. How can this be? And I said, well, can I see the paper? So, they showed it to me. I said I was just blown away. I was like, I mean, who's trying to frame me here. What's going on here? I called my wife. I was just totally just messed up. And I told myself, wow. Then they kept asking me questions, can you pass this test? And I knew immediately from talking to my captains, they said you answered right. Do not say you can't, just say schedule it. So, at that point when I walked out of the admin, I called Mr. Thomas because I never – I didn't have any representation because I trusted the City of Murfreesboro. They was – that they were doing the right thing by me. I never would have thought that they would do anything dishonest, or anybody would do anything dishonest. So, I don't know where the restrictions came from saying that they were lifted. I never went back to the doctor.

Although Employee did not believe his restrictions had been lifted, he took the test, stating, "they told me I had to take it, plus I'm trying to save my job to support my family, and plus I love being a firefighter. I just wanted to come back to work." Employee testified that the test mentally and psychologically drained him and that at one point during the test he stopped and just stood on a ladder because he felt paralyzed.

The return to work test was conducted on December 1, 2011. The Assistant Fire Chief, Allen Swader, was present for the test. Mr. Swader testified that on the day of the test, Employee never stated that he wanted to speak further with Dr. Price even though Mr. Swader had told Employee that if he felt like he had not been released, he should take it up with Dr. Price. Employee passed all of the tasks in the test except for the final one, which involved the ladder. Employee did not complete that task because he stopped at the end and ran out of time. As a result, he failed. Under the Department's policy, if an employee does not pass the return to duty test, they have seven days to retest and three total opportunities to pass. Employee never took the test again. Mr. Swader confirmed that if Employee had permanent restrictions of light duty with no lifting, pushing or pulling more than twenty pounds, he would not have been eligible to take the return to duty test. Mr. Swader described Employee as a warrior who you would want to go into a burning building with, because he was going to give it his all. He had known Employee for over twenty years and described Employee as an experienced leader and passionate about his responsibilities.

Dr. Price ultimately imposed permanent restrictions on Employee of light duty, no overhead work, and no pushing or pulling greater than twenty pounds. He assigned Employee a one percent upper extremity impairment with a one percent impairment to the body as a whole based on the Sixth Edition of the AMA Guides. Dr. Price opined Employee was a chronic pain patient who will continue to have problems.

After the test, Employee realized he was having additional complications, and he saw his family doctor, who referred him to the Veteran's Administration Hospital. The VA diagnosed Employee with conversion disorder.

On March 7, 2012, Employee was seen by Dr. David Gaw, an orthopedic surgeon who performed an independent medical examination at the request of Employee's counsel. Dr. Gaw stated that Employee had no atrophy or wasting of his shoulder muscles. He indicated there was no evidence of nerve damage or any localized weakness. Although Employee complained of pain throughout the examination, Dr. Gaw could not find an explanation for the pain. He concluded that Employee was not a candidate for any further surgery or diagnostic procedures. Based on the history provided by Employee, Dr. Gaw concluded that the injury on September 14, 2009 was the most likely cause of his condition. Dr. Gaw opined that Employee should not lift or carry more than fifty pounds and should only lift or carry thirty pounds frequently. Dr. Gaw assigned a six percent impairment rating to the body as a whole based on loss of movement in the left shoulder as a result of the three surgeries. He also assigned a two percent impairment rating to the body as a whole based on continued pain in the neck, for a combined permanent impairment rating of eight percent to the body as a whole. During his examination of Employee, Dr. Gaw did not observe any kind of jerking motions or head shaking.

Dr. Davis is a neurologist who saw Employee at the VA Movement Disorders Clinic in 2014. At that time Employee had complaints of chronic pain following his injury and subsequent surgeries as well as involuntary movement. Dr. Davis described these as "intermittent violent movements of his head that were nonrhythmic and varied in frequency and direction and would vary with activation." Dr. Davis diagnosed Employee with conversion disorder, which is a physical abnormality thought to be triggered by an external stressor. Dr. Davis opined that if conversion disorder has been present for more than a year, it is probably permanent. Dr. Davis indicated that these involuntary movements wax and wane with distractibility and that given the unpredictability and magnitude of the movements, Employee was totally disabled. For that reason, Dr. Davis testified he would not have recommended that Employee drive a car because his episodes were unpredictable.

On December 21, 2016, Employee saw Dr. Greg Kyser for an independent medical examination requested by Employee's counsel. Dr. Kyser is a psychiatrist, and he concluded that Employee was depressed and had conversion disorder. He opined that Employee's conversion disorder was directly related to his work injury, difficulty healing after surgery, his inability to return to work, and his perception of being mistreated and being pushed back into work. Dr. Kyser concluded that the conversion disorder more likely than not arose out of Employee's September 2009 work injury.

Using the Sixth Edition of the AMA Guides, Dr. Kyser assigned a fifteen percent psychiatric impairment rating. However, because Dr. Kyser felt there were issues regarding symptom magnification, he recommended a thirty percent reduction, which yielded a ten percent psychiatric impairment rating. Dr. Kyser discussed the issue of malingering in his deposition:

> I think one has to, when looking at a case such as this and looking over the totality of the medical record and the numerous people that have seen him and some concerns that have been expressed about that, one can't exclude the possibility that there could be an element of malingering. I can't say with a reasonable degree of medical certainty that he is a malingerer. I think that he clearly does have bizarre symptoms, unusual symptoms, symptoms that at times are not consistent, that are likely exaggerated to some degree. And subsequently, that's what led to my reduction in his impairment rating.

Dr. Kyser observed that when Employee came in for his examination, he was in a wheelchair and kept "knocking stuff off" Dr. Kyser's desk, and that his wife had to hold him back to keep him from coming out of his wheelchair. Dr. Kyser was then asked to compare those symptoms with the Employee being able to drive an automobile. Dr. Kyser noted this inconsistency stating: "You know, how can someone be sitting in this chair and they can't control their arms, . . . they are flinging themselves on the floor or have to be restrained, . . . but they can hop in a car and drive to Murfreesboro? That doesn't make sense to me."

Employee appeared in court in a wheelchair with one of his hands raised in the air. He testified that his hand was stuck in that position and that it happened all the time. He testified he had been using a wheelchair since 2012 and that he also uses a scooter because the majority of the time he cannot walk. Employee indicated he does drive a car but knows when he should not be driving. Employee stated that prior to 2009, he never had any kind of seizure activity. Employee testified he takes Diazepam, which is valium, Primidone for seizures, Citalopram for depression, Mefocarbamol for spasms, and Gabapentin for nerve

damage. He testified he has not earned any income since his injury and has no job prospects.

On cross examination, Employee testified that from approximately 2012 to 2014, he travelled to Florida, California, Chicago, Atlanta, and St. Louis and that he drove during those trips. He indicated that his doctors do not recommend him driving, but they have never told him he could not drive.

Action of the Trial Court

The case was tried on October 30 and October 31, 2017 in the Circuit Court of Rutherford County, Tennessee. On February 28, 2018, the trial court heard closing arguments and took the case under advisement. On March 26, 2018, the trial court reconvened the parties and gave its ruling from the bench, which included extensive findings of fact and conclusions of law. The trial court found Employee sustained an injury on September 14, 2009 to his left shoulder for which he underwent three surgeries. Although there were occasions where Employee had complaints of pain to other parts of his body, there was no diagnosed injury to his neck. The trial court found that Employee did not suffer a second compensable injury at the time he took his functional capacity evaluation or his return to duty test.

With regard to impairment, although Dr. Price assigned a one percent and Dr. Gaw assigned a six percent whole body impairment, the City agreed that the appropriate rating was six percent. Turning to the use of a multiplier, the trial court found that the City was not guilty of any misconduct regarding the lifting of the restrictions by Dr. Price's office. However, the trial court found that, based upon the continuing restrictions by Dr. Price and the testimony of Chief Swader, the City would not have allowed Employee to take the test had they known of the restrictions. Therefore, it was reasonable for Employee not to return to work, and Employee was not capped at the multiplier of 1.5. However, the trial court rejected Employee's argument that he was entitled to the statutory escape from the statutory cap on multipliers.

Using the six percent permanent impairment rating to the body as a whole, the trial court applied a multiplier of 4.99, and assessed an award of 29.94 percent permanent disability for the left shoulder. Considering the opinions of Dr. Davis and Dr. Kyser, the trial court found Employee also suffered from conversion disorder that was proximately caused by the September 14, 2009 injury and the physical complications from that injury. The trial court assigned a ten percent permanent medical impairment to the body as a whole; but did not apply a multiplier, leaving the award of permanent disability for the

conversion disorder at ten percent. Finally, the trial court denied any temporary total disability for the conversion disorder because of Employee's prior injury to his shoulder which prevented him from returning back to work after December 2011.

Standard of Review

The standard of review of issues of fact in a workers' compensation case is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2014) (applicable to injuries occurring prior to July 1, 2014). When credibility and weight to be given testimony are involved, considerable deference is given to the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Madden v. Holland Group of Tennessee Inc., 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Employee raises six issues on appeal.

Should the trial court have found Employee to be permanently and totally disabled?

An employee is permanently and totally disabled when a work-related injury "totally incapacitates the employee from working at an occupation that brings the employee an income." Tenn. Code Ann. § 50-6-207(4)(B) (for injuries occurring prior to July 1, 2014). "The extent of the vocational disability is a question of fact for the trial court to determine from all the evidence, including lay and expert testimony, the rating of anatomical disability by the experts and the testimony of the injured employee, which is relevant in determining the extent of vocational disability in Workers' Compensation cases." Pittman v. Lasco Ind., Inc. 908 S.W.2d 932, 936 (Tenn. 1995) (Citing Corcoran v. Foster Auto GMC, Inc., 746 S.W. 2d 452 (Tenn. 1998)). Employee relies on his testimony and that of his wife and brother to show that he is permanently and totally disabled as a result of his conversion disorder. Employee presented no proof of his vocational disability

other than his own statements and those of his family that he cannot work. However, there were a number of questions raised with the psychiatrist, Dr. Kyser, and on cross-examination of Employee, that Employee was malingering. In fact, Dr. Kyser, the Employee's own expert, reduced his psychiatric impairment rating because of symptom magnification. The trial court also concluded that it was "unexplainable" for Employee to drive a car "as much and often as he does," and that it "just does not add up." Thus, it appears to us that although the trial court found Employee credible in some respects, it specifically did not find Employee to be credible on this issue that he was permanently and totally disabled. Accordingly, we find this issue to be without merit.

Was Employee entitled to relief under Section 242 of the Workers' Compensation Act?

Employee contends that the trial court erred in holding that the "escape clause" in Tenn. Code Ann. § 50-6-242 did not apply. That clause allows a court to award greater vocational disability than allowed by the statutory multipliers where at least three of the following are satisfied:

1. The employee lacks a high school diploma or general equivalency diploma or cannot read or write on an eighth-grade level;
2. The employee is fifty-five years of age or older;
3. The employee has no reasonably transferrable job skills from prior vocational background and training; and
4. The employee has no reasonable employment opportunities available locally considering the employee's permanent medical condition.

Tenn. Code Ann. §50-6-242 (b) (for injuries occurring prior to July 1, 2014).

There is no disagreement that the first factor is not applicable, but the second factor is applicable. The issue is whether the third and fourth factors are satisfied in this case. The trial court found that these factors did not apply because there was no proof regarding transferrable job skills or reasonable employment opportunities in the area. On appeal, Employee has failed to point out any specific evidence in the record to support those factors, which must be supported by clear and convincing evidence. Accordingly, we agree with the trial court's conclusion.

Did the trial court err in limiting Employee's award of permanent partial disability under section 241(c) to a multiplier of less than five times his anatomical impairment?

Employee contends that if the escape clause did not apply, the trial court should have used a multiplier of six, the maximum allowed by statute. Tennessee Code Annotated section 50-6-241 (applicable to injuries occurring prior to July 1, 2014). The statute provides that a trial court shall "consider all pertinent factors" in determining permanent partial disability benefits. Here, the trial court applied a multiplier of 4.99 to the impairment rating for the shoulder injury. However, other than relying upon his psychiatric injury, Employee offers no argument as to why he should receive a higher multiplier for his shoulder injury. This issue is without merit.

Did the trial court err by failing to find that the cervical injury was not compensable?

Employee contends he was injured while performing his return to duty test on December 1, 2011. However, the trial court made a specific finding that there was no injury.

> **The Court**: He never struck his head. I think he sat down and sat back. And, yet, he completed the task and finished the test and passed the test. . .
>
> And notwithstanding the injured worker's efforts to advance that there was another injury and he sustained injuries to his neck, this court does not find that carried by the medical proof that was presented on behalf of the Employee. There simply was not another injury . . .

Employee failed to articulate any evidence of a separate injury to his cervical spine. He only cites to evidence of neck pain. An employee "does not suffer a compensable injury where the work activity aggravates a preexisting condition merely by increasing the pain." Trosper v. Armstrong Wood Prod., Inc., 273 S.W. 3d 598, 607 (Tenn. 2008). We agree with the trial court that there is no evidence in the record of a separate compensable injury to the cervical spine. However, to the extent the left shoulder injuries are causing pain to radiate into the neck, then Employee may receive treatment for those issues.

Did the trial court err by failing to apply any multiplier to the impairment rating for the psychiatric injury?

The trial court accepted Dr. Kyser's ten percent psychiatric impairment rating but elected not to apply any multiplier and awarded ten percent disability for the conversion disorder. Employee argues the trial court should have applied the same multiplier to the psychiatric injury that it applied to the shoulder injury. Tenn. Code Ann. § 50-6-241 (applicable to injuries occurring prior to July 1, 2014) requires the trial court to "consider all pertinent factors" in determining permanent partial disability benefits. The trial court was clearly troubled by the conflicting testimony regarding the extent of Employee's conversion disorder, particularly in light of Employee's extensive driving activity. In contrast, there was no dispute that Employee's shoulder injury prevented him from working as a firefighter. The trial court weighed the evidence regarding the conversion disorder and properly exercised its discretion in declining to apply a multiplier to the psychiatric injury.

Did the trial court err by failing to award temporary total disability as a result of the psychiatric injuries?

Finally, Employee argues that if he is not permanently and totally disabled, the trial court should have awarded temporary total disability arising from his psychiatric injury. The trial court found that based on the shoulder injury, Employee was not able to return to work after December 2011, and the parties stipulated to an MMI date of April 12, 2012.[1] In addressing the issue of temporary total disability, the trial court explained:

> The temporary total has all been paid for the left shoulder injury. In fact, probably overpaid by the City doing what it did and through the period of time. And this gentleman did not go back to work because of his shoulder injury, so, alone, he wasn't going to go back because mental injury developed after he made the decision not to go back to work. So, he wasn't going back to work, at least, with the City of Murfreesboro.
>
> So, the court has to assess what do I do about any claim for temporary total disability related to the claimed mental injury? And I've read all of the medical, I've gone over it again with all of you today, and here's where I am on that. The burden to establish the periods of temporary total disability or

[1] This is the date that Dr. Price imposed permanent restrictions.

> temporary partial disability are on the injured worker to establish that through sufficient medical proof. And I understand the law and definition of "temporary total disability," the healing time where someone – for instance, you have an injury and your back is broken and you go to the hospital and you have surgery, and it's the healing time when you receive your treatment up until you either go back to work or obtain maximum medical improvement.
>
> In this case, in the unique circumstances of this case, Mr. Vaughn wasn't going back to work after December of 2011. It just wasn't going to happen due to his shoulder injuries. So, the question is, what proof do I have of the period of temporary total disability for his mental injuries? And, unfortunately, or fortunately, however you want to review it, I don't think I have any proof that I can make a ruling on that. So, therefore, I deny any request for temporary total disability based on the evidence that was presented.

Employee contends that the period of temporary total disability related to the conversion disorder began in April 2014 when Dr. Davis made a diagnosis of conversion disorder and stated in his note that Employee was "totally disabled and unable to safely work at this time due to these movements." Employee argues the time period then ends either when Dr. Davis testified at his deposition on January 23, 2017 that the conversion disorder was likely permanent, or when Dr. Kyser concluded that Employee was at MMI for his psychiatric injury on December 21, 2016.

"[T]emporary total disability benefits are only appropriate where an employee is totally disabled and unable to work." Stewart v. Kenco Group, Inc., 2009 W.L. 348523 (Tenn. Special W.C. Panel, Feb. 12, 2009). Here, the trial court already concluded that Employee was not totally disabled as a result of the conversion disorder. The record does not indicate that Employee's condition during the time period he identified for proposed temporary total disability was any different than his condition at the time of trial. Thus, if the evidence was insufficient to show that Employee was permanently and totally disabled, then the evidence also is insufficient to show Employee was entitled to temporary total disability.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Employee, for which execution may issue if necessary.

ROBERT E. LEE DAVIES, SENIOR JUDGE