IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
(April 26, 2000 Session)

GRATZ CARDEN, JR. v. THE TENNESSEE COAL COMPANY

Direct Appeal from the Circuit Court for Anderson County
No. 97LA0353 James B. Scott, Jr., Judge

No. E1999-01213-WC-R3-CV - Mailed - July 5, 2000
Filed: September 18, 2000

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and reporting of findings of fact and conclusions of law. The appellant/defendant challenges the trial court's award of permanent and total disability benefits to the appellee/plaintiff. Also, the appellant contends that the evidence does not support the trial court's award of benefits to the body as a whole. After an in-depth review of the entire record, briefs of the parties and applicable law, we affirm the trial court's judgment.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court is Affirmed.

LAFFERTY, SR. J., delivered the opinion of the court, in which BARKER, J., and PEOPLES, SP. J., joined.

Robert W. Knolton, Oak Ridge, Tennessee, for the appellant, The Tennessee Coal Company.

Roger L. Ridenour, Clinton, Tennessee, for the appellee, Gratz Carden, Jr.

MEMORANDUM OPINION
Trial Testimony

The plaintiff, age 56, testified that he left the eighth (8th) grade to help supplement the family income. He worked in service stations, construction, and spent two years in the United States Army. In 1968, the plaintiff went to work in the coal mines of east Tennessee until his injury of November 15, 1995. The plaintiff stated that he started out as a laborer, was a boss on the job, and served as safety director. At the time of his injury, the plaintiff was a scoop operator. The plaintiff described the coal mines in the Tennessee area as low seam mines. These mines are approximately four (4) feet high. Most of the time a miner must walk bent over or be on their knees. At the time of his injury, the plaintiff was operating a head drive, which drives a belt line. This belt line removes coal

from the mine. The plaintiff testified that he had the scoop of the head drive at the top of the mine when he slipped off the back of the head drive, falling about four (4) feet, striking the side of the scoop. The plaintiff was removed from the mine and taken to the Oak Ridge Hospital, where he spent three (3) days. The plaintiff was seen by Dr. John Jernigan for loss of balance, stomach sickness, and loss of hearing.

The plaintiff stated that he underwent surgery but his loss of hearing did not improve. After three (3) months, his balance improved where he could walk by himself. Without Dr. Jernigan's knowledge, the plaintiff returned to work, "thinking I was going to get over this . . . I was being told the right side of my brain would block out all this damage." At work, the plaintiff would answer the telephone and occasionally grease the belt line. However, the plaintiff would become sick and have to leave work on occasion. The plaintiff testified that he was laid off after sixteen (16) months when the company closed the mine. Since the injury, the plaintiff testified that he cannot work around the home and has difficulty with walking or gardening. The plaintiff described his vision problems at night, "I'm like a drunk man trying, when I'm in the dark, I just cannot function. I can shut my eyes and go from the living room to the bedroom, if I leave my eyes open I'm bouncing off the walls."

The plaintiff stated that he had always worked and provided for his family. His wife did not work outside of the home because he wanted her to stay home and take care of the children. The plaintiff testified that he had sustained two (2) past injuries on the job. The plaintiff broke his right foot, and on another occasion he broke his jaw. As a result, he only missed enough work for the doctor to treat his injuries and returned immediately to work. Since the plaintiff's lay off, he has received no income, but he and his wife have existed on his withdrawn retirement fund. The plaintiff stated that he cannot work an eight (8) hour day or a five (5) day week, due to his dizziness and balance problems. The plaintiff testified that about the time of this surgery, he took medication for his dizziness.

Mrs. Bobbie Jean Carden, the plaintiff's wife, testified that her husband has been a great husband and father. She stated that she has never had to work outside the home since it was not necessary. Since the accident, she stated that her husband does not have any balance, and he must be slow in whatever he is doing. Mrs. Carden testified that she cleans houses and cooks for the elderly ladies in the neighborhood for five dollars ($5) an hour. When describing her husband's driving, Mrs. Carden stated, "he scares me to death . . . he cannot hear." Mrs. Carden testified that her husband must wear sunglasses since the sun kills his eyes and gives him a headache. She stated that her husband has a high tolerance for pain. When he broke his jaw and foot he went back to work immediately.

Dr. Rodney E. Caldwell, a vocational consultant, testified that he met the plaintiff on December 8, 1998. Dr. Caldwell obtained the plaintiff's beliefs as to his ability to return to work, and he also reviewed the deposition of Dr. Jernigan. Dr. Caldwell stated that, in the interview, the plaintiff had not exaggerated his symptoms, and that they were consistent with what the plaintiff had told Dr. Jernigan. Dr. Caldwell described Dr. Jernigan's definition of "good balance function to mean normal balance function," as rather vague. Dr. Caldwell stated that one with balance problems would have difficulty lifting, climbing and bending over because one would tend to topple over.

Considering the plaintiff's balance problems and loss of hearing, the plaintiff sustained a vocational disability impairment of 45 to 50 percent. Dr. Caldwell testified that the plaintiff could return to light duty, such as answering the telephone and sitting down at work. The plaintiff does not have a high school degree, or a GED, and given the restrictions on his work duties, the plaintiff has no transferrable work skills. Also, Dr. Caldwell opined that the plaintiff has no job opportunities available in the community where he lives. In cross-examination, Dr. Caldwell indicated that the plaintiff had normal balance, according to Dr. Schwaber. Disregarding Dr. Jernigan's opinion, Dr. Caldwell opined that the plaintiff had approximately a 15 percent vocational disability impairment.

MEDICAL TESTIMONY

Dr. John F. Jernigan, an otolaryngologist, testified that he examined the plaintiff on November 20, 1995, with a complaint of a head injury sustained at work. The plaintiff's right ear and scalp were lacerated. The right temporal bone was injured. The plaintiff complained of dizziness, vertigo, and a whirling sensation, along with a loss of hearing. On November 24, 1995, the plaintiff went to the emergency room of Methodist Medical Center of Oak Ridge, for difficulty with closing his right eye and the right side of his mouth was drooping. This symptom indicated that the facial nerve, through the temporal bone, was swelling and it was suspected that the temporal bone was fractured. Between November 30, 1995, and January 29, 1996, Dr. Jernigan saw the plaintiff on four occasions. The plaintiff continued to complain of dizziness, which had leveled off. On February 6, 1996, the plaintiff complained of a loss of balance.

As a result, on February 13, 1996, Dr. Jernigan surgically lifted the plaintiff's right ear drum to observe if the plaintiff had a fistula, which he did. Dr. Jernigan found ear fluid leaking around the third little bone, which was dislocated. This third little bone had been knocked out of position by the trauma. Dr. Jernigan removed the dislocated third little bone and replaced it with a stainless steel prosthesis. On both February 19 and March 4, 1996, the plaintiff still complained of dizziness. On April 1, 1996, Dr. Jernigan conducted a hearing test on the plaintiff which established that the plaintiff had a moderate to moderately severe range of hearing loss in the right ear. On May 13, 1996, the plaintiff was still complaining of continued dizziness. Dr. Jernigan recommended that he see Dr. Mitchell Schwaber in Nashville. After seeing Dr. Schwaber, the plaintiff continued to experience dizziness. In April 1997, the plaintiff attempted the use of a hearing aid, which was unsatisfactory. Dr. Jernigan testified that he last saw the plaintiff on September 9, 1997, with a complaint of persistent dizziness and no change in his hearing. As to the plaintiff's hearing loss, Dr. Jernigan opined that the plaintiff sustained a 5 percent permanent impairment to the body as a whole. Also, Dr. Jernigan stated that the plaintiff should not work in a situation which requires acute hearing or good balance function, which he described as normal balance function.

In cross-examination, when asked if the plaintiff had any permanent residual impairment from this balance problem related to the injury, Dr. Jernigan responded, "I think that that's not necessarily true. I think his balance problem is related to the injury, yes." Dr. Jernigan stated that the plaintiff sustained a 55 percent loss of hearing in his right ear.

Dr. Mitchell K. Schwaber, a neurotologist, testified that he first saw the plaintiff on May 16, 1996, upon a referral by Dr. John Jernigan of Oak Ridge. Dr. Schwaber received Dr. Jernigan's medical file. Dr. Schwaber's examination revealed that the plaintiff had a slight right beating nystagmus. Dr. Schwaber had the plaintiff perform a posturography test, which revealed that the plaintiff had fully recovered from any problems of dizziness. An audiogram test revealed that the plaintiff had a mixed type of hearing loss in his right ear. Dr. Schwaber, next saw the plaintiff on July 11, 1997. On this date, the plaintiff underwent another posturography test. This test showed a very abnormal pattern, which was inconsistent with independent ambulation. Dr. Schwaber stated that this meant that if the plaintiff could not do some of the basic things he did on the test, then he should not be able to walk, period. Dr. Schwaber opined that the test was invalid. When asked if the plaintiff had any permanent residual problems with dizziness as a result of the injury, Dr. Schwaber responded, "Well, as I noted in my letter, I do think he has residual complaints but not documentable by objective test findings."

LEGAL ANALYSIS

As its main issue, the defendant has challenged the trial court's finding that the plaintiff has incurred a permanent and total disability from a work-related injury. In two sub-issues, the defendant asserts that the trial court was in error for not limiting the plaintiff's permanent residual injury to the schedule member provisions of Tennessee Code Annotated § 50-6-207(3)(A)(ii)(r); and the lack of competent expert testimony to support the findings of the trial court of permanent injury beyond the hearing loss sustained by the plaintiff. Quite naturally, the plaintiff asserts that the evidence supports the trial court's award of permanent total disability benefits.

Issues of fact in workers' compensation cases are reviewed *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. Tenn. Code Ann. § 50-6-225(e)(2). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings. *McIlvain v. Russell Stover Candies, Inc.*, 996 S.W.2d 179, 183 (Tenn. 1999); *see Collins v. Howmet Corp.*, 970 S.W.2d 941, 943 (Tenn. 1998). When issues involve expert medical testimony and all the medical proof is contained in the record by deposition, as it is in this case, then this Court may draw its own conclusions about the weight and credibility of that testimony, since we are in the same position as the trial court. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997).

As required, we begin our in-depth review of the record to determine whether the evidence supports the trial court's judgment. First, the defendant asserts that if clear and convincing evidence is required to establish one's entitlement to permanent partial disability benefits, therefore, this same evidentiary standard should apply to awards of permanent total disability. *See* Tenn. Code Ann. § 50-6-241; Tenn. Code Ann. § 50-6-242; *Middleton v. Allegheny Elec. Co.*, 897 S.W.2d 695 (Tenn. 1995); *Seiber v. Greenbrier Indus. Inc.*, 906 S.W.2d 444 (Tenn. 1995). We respectfully disagree with the defendant's argument. Permanent total disability as statutorily defined, is not based on a purely objective assessment or an anatomical mathematical computation. *Davis v. Reagan*, 951 S.W.2d 766, 768 (Tenn. 1997); *see generally Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452,

458 (Tenn. 1988) (holding vocational disability is based on both lay and expert testimony and is not restricted to precise disability estimates made by experts.) The definition instead focuses on the injured employee's ability to earn wages. *Id*. Since the trial court must make factual determinations based upon lay oral testimony and expert deposition testimony, we believe the proper standard for appellate review of such factual determinations is governed by Tennessee Code Annotated § 50-6-225(e)(2). Thus, this case will be reviewed *de novo* upon the record accompanied by a presumption of the correctness of the findings of the trial court, unless the preponderance of the evidence is otherwise.

Likewise, our workers' compensation statute requires a liberal construction. Tenn. Code Ann. § 50-6-116 (1991 Repl.). "We are required to construe the Workers' Compensation Law liberally in favor of the employee and in furtherance of the sound public policy that dictated the legislation. The Statute is not to be construed strictly as in derogation of the common law but is to be treated as a remedial statute and construed accordingly." *Crump v. B & P Const. Co.*, 703 S.W.2d 140, 144 (Tenn. 1986). The purpose of the workers' compensation law is to secure benefits to those workers who fall within its coverage. *Galloway v. Memphis Drum Service*, 822 S.W.2d 584, 586 (Tenn. 1991).

In finding that the plaintiff was permanently and totally disabled from a work-related injury to earn future wages, the trial court found the following facts to be of significance:

> [T]he plaintiff is fifty-six years old and [t]he Court mentions the age only to show that his work history has been such that he has been committed to coal mining for a period of time. He has established a reputation for dependability and reliability, there is no doubt he has no transferrable skills in that the physical condition from which he suffers has left him an inability to pursue meaningful work in the area of his occupational abilities. He is a self-made company man, greatly motivated and has led by example; he has reached the responsibility of being foreman in spite of his limited education.
>
> When he was injured each time, he returned to work immediately without even making a claim. He and his family has suffered economically since this injury and it is this hardship that he has suffered that convinces me of his sincerity. Even though this Court may have the responsibility in a case of this nature to call in another doctor giving expert testimony regarding the vertigo condition from which the plaintiff says he suffers, for this Court finds that the doctor who has examined the plaintiff did not convince [t]he Court that he had been committed sufficiently to listening and knowing the facts about the man's past history of work.
>
> This Court finds that the plaintiff in this action is occupationally unemployable and I find, therefore, that he is one hundred percent disabled, even though there is medical proof by a specialist to the contrary. His work history and his devotion over all these years seem totally inconsistent with his returning to work with a broken jaw

while it was still wired together and attempting to do his work related duties. Now he is no longer employed there simply because the mine was shut down; am I right?

Mr. Knolton: Yes, Your Honor.

Mr. Ridenour: Yes, that's right.

***

Well, he's fifty-six years old , there are no jobs for him within the general area, he has no transferrable skills, he was foreman but he can no longer even drive an automobile and he has been in just such poor economic condition, he's supported his wife and he's just one of these just salt of the earth types of individuals. And after all this time, it just seems to me he has been through the hardened test of what I would consider to be sincerity and that is the reason for it. I could be wrong, but the three out of four there, he didn't have a high school education, the three of four criteria under, what is it, 242 –

Mr. Ridenour: Actually, it's four of them, Your Honor, he doesn't have the high school degree, he is fifty-five years of age or older, has no transferrable job skills and no reasonable job opportunities from what you had told us.

***

Well, he was having dizzy spells there at work answering the phone, everything, he was driving a vehicle if I remember correctly, he was having a difficult time. And so, what I'm saying is, I know it's a documented proof and I know it says clear and convincing evidence, but I'm finding it's clear and convincing and they may disagree with me, but, all those aspects. But this is that typical coal miner that I feel like is a company man, gave his life to his occupation. And even though the doctor who was a specialist at Vanderbilt, I'm somewhat going against him under 783, I just don't believe his testimony. I think as a tr[ier] [of] fact, as I tell the jury, you can either accept or you can reject expert testimony. But in this case, as in all workman's comp it's a typical part of any decision you make.

It is undisputed that the plaintiff sustained a hearing loss from his work-related injury. However, the parties disagree as to whether this hearing loss is limited to a scheduled member loss as set forth in Tennessee Code Annotated § 50-6-207(3)(A)(ii)(r), or whether the plaintiff sustained an additional injury to a bone in the ear which caused him to have dizziness and nausea. Causation in a workers' compensation case need not be established by absolute certainty. *Jackson v. Greyhound Lines, Inc.*, 734 S.W.2d 617, 620 (Tenn. 1987). However, medical proof regarding the cause of an injury must not be speculative or so uncertain that attributing the injury to the claimant's employment would be arbitrary or a mere possible conclusion. *Tindall v. Park Ass'n*, 725 S.W.2d 935, 937 (Tenn. 1987). If, however, equivocal medical evidence combined with other evidence supports a finding of causation, a court may draw an inference of causation. *Jackson*, 734 S.W.2d at 620. *See International Yarn Corp. v. Casson*, 541 S.W.2d 150 (Tenn. 1976) (lay testimony is sufficient to establish causation.) We, as did the trial court, find that the plaintiff sustained an

additional injury of dizziness and loss of balance from his work-related injury of November 1995. Notwithstanding Dr. Schwaber's expert opinion that the plaintiff had recovered from the accident of November 1995, the record reveals that the plaintiff continued to have dizziness for approximately two years. We quote Dr. Jernigan, "I think that's not true. I think his balance problem is related to his injury, yes." We affirm the trial court's judgment that the plaintiff sustained a permanent injury from a work-related injury.

Next, the defendant asserts that the plaintiff's injury must prevent him from working at any occupation which brings him an income. *Prost v. City of Clarksville Police Dept.*, 688 S.W.2d 425 (Tenn. 1985). The defendant contends that since the plaintiff returned to work for one and one-half years after injury, supports this position. Tennessee Code Annotated § 50-6-207 in pertinent parts states:

> PERMANENT TOTAL DISABILITY:
>
> (B) When an injury not otherwise specifically provided for in this chapter, as amended, totally incapacitates the employee from working at an occupation which brings the employee an income, such employee shall be considered "totally disabled," and for such disability compensation shall be paid as provided in subdivision (4)(A); provided, that the total amount of compensation payable hereunder shall not exceed the maximum total benefit, exclusive of medical and hospital benefits.

Also, factors that a trial court may consider in determining vocational disability of a workers' compensation are plaintiff's age, job skills, education, training, duration of disability and job opportunities. *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990). The plaintiff is 56 years old, an eighth (8^{th}) grade drop out, has over thirty (30) years of coal mining experience as his source of income. The record reflects that the plaintiff was an excellent employee, who in times past, put his own best interests aside for on the job injuries, and continued to work and support his family. Due to his continued dizziness, the plaintiff is limited in his home activities and his driving ability is hazardous. Even when the plaintiff returned to work at the request of his employer, he continued to have dizzy spells while answering the telephone and found it necessary to leave work on occasion. The only reason the plaintiff is not working is that the employer felt it necessary to close the mining operations. Medical evidence established that the plaintiff cannot do any work that requires normal balance, such as lifting, climbing, and bending. The vocational consultant found that the plaintiff has no transferrable job skills due to his age and job experience, and there are no job opportunities in the community where he lives. Considering the plaintiff's age, job skills, education, duration of his disability and job opportunities, we find that the evidence does not preponderate against the trial court's award of 100 percent permanent total disability. In analyzing the trial court's opinion, this Court could not have said it any better.

The judgment of the trial court is affirmed and the costs are assessed against the defendant

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

GRATZ CARDEN, JR. v. THE TENNESSEE COAL COMPANY

No. E1999-01213-WC-R3-CV - Filed September 18, 2000

ORDER

This case is before the Court upon motion for review 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, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well-taken and should be denied 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 on appeal are taxed to the defendant.

IT IS SO ORDERED this ____ day of _____, 2000.

PER CURIAM

Barker, J. - Not participating.

.