

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT KNOXVILLE
(October 13, 2004 Session)

**THEODORE CARL WILHOIT v. WAL-MART DISTRIBUTION CENTER,
INC.**

**Direct Appeal from the Chancery Court for Greene County
No. 20010039 Thomas R. Frierson, Chancellor**

Filed June 3, 2005

No. E2003-02378-WC-R3-CV - Mailed January 31, 2005

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 hearing and reporting of findings of fact and conclusions of law. The employee asserts he is permanently and totally disabled and appeals a finding of 80 percent permanent partial disability. We modify the award.

Tenn. Code Ann. § 5-6-225(e) (1999) Appeal as of Right; Judgment of the Greene County Chancery Court is modified.

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, JUSTICE, and ROGER E. THAYER, SP. J. joined.

John T. Milburn Rogers, Rogers, Laughlin, Nunnally, Hood & Crum, Greeneville, Tennessee for Appellant Theodore Carl Wilhoit

Robert M. Asbury, Allen, Kopet & Associates, PLLC, Knoxville, Tennessee for the Appellee Wal-Mart Distribution Center, Inc.

MEMORANDUM OPINION

Facts

Theodore Carl Wilhoit, age 32, is married with a five-year old son. He left school in the 12th grade and received no formal education or training after that time. He has only been employed at manual labor and has no special skills. Before the birth of his son, he practiced martial arts five or six hours each evening, and participated in the heavyweight division of “tough man contests;” he continued to participate in martial arts after the birth of his son. He was employed as a “rock breaker” at Minco.

On July 1, 1998, he began working for Wal-Mart Distribution Center (“Wal-Mart”) as a loader. His job loading and unloading tractor-trailer trucks involved heavy lifting. He spent his spare time caring for his young son and working on a small farm. At the time of his accident he was working as an “end runner” whose responsibility it was to lift and move the heaviest and/or largest items that could not be moved on a conveyor. On October 25, 1999, he was helping unload a trampoline when his partner stumbled and the weight shifted causing Mr. Wilhoit to fall on his back. The trampoline struck the rear area of Mr. Wilhoit’s right leg. He was treated for injuries to his back and right leg by Dr. Russell Betcher and Dr. Berta Bergia.

On November 9, 2000, he was sent to Dr. James Wike at Pain Consultants at St. Mary’s Hospital. Dr. Wike referred him to Dr. Leonard Miller, a psychologist, and Dr. Katherine Gyurik, a psychiatrist, for psychiatric treatment. Dr. Wike continued to administer pain blocks without success. Wal-Mart then sent Mr. Wilhoit to Dr. Jeffrey Uzzle at Tennessee Orthopedic Clinic on March 20, 2001. By May 2001, Mr. Wilhoit started blacking out in addition to the severe back and leg pain and emotional problems. He went to Takoma Hospital Emergency Room on May 3, 2001 and in July 2001 for blackouts. In August 2001, Dr. Uzzle recommended that he go to a pain clinic at Vanderbilt Hospital or Emory Hospital. He was eventually sent to Pain Management Clinic at Emory Hospital in Atlanta, Georgia in early 2002. He returned from Atlanta and was treated by Dr. Steven Lucas of Pain Consultants of East Tennessee. Dr. Lucas testified that Mr. Wilhoit has sustained a permanent medical impairment of 19 percent to the body as a whole.

Mr. Wilhoit testified that since the injury, he has to rely on his wife to drive him because of his blackout spells and other injuries. His emotional condition is such that he cries for no reason; he forgets what he is doing. He cannot walk without crutches and cannot stand on crutches for as long as four hours a day. He cannot sleep at night or engage in sexual relations with his wife because of the pain. He no longer engages in martial arts competitions, fishing, hunting, farming or other physical activities he enjoyed before the injury at Wal-Mart. He testified that he cannot do a job where he could sit and stand as needed for four hours, and that he is not able to do any type of meaningful work. He takes Trileptal for his nerves, Duragesic Transdermal patches for pain, Fentanyl suckers for extreme pain that can cause him to pass out, and Wellbutrin for psychiatric illness.

Dr. Gyurik testified by deposition that Mr. Wilhoit had marked to extreme impairment of activities of daily living, social functioning, concentration and adaptation. She opined that he

has a 75 percent psychiatric impairment resulting from the physical injury he sustained at Wal-Mart. No contradictory testimony regarding Mr. Wilhoit's psychological injury was presented.

Mr. Wilhoit was seen for evaluation by Dr. William E. Kennedy on March 13, 2003. Dr. Kennedy testified that Mr. Wilhoit suffered Complex Regional Pain Syndrome or reflex sympathetic dystrophy of the right leg that resulted in a 43 percent impairment to the body as a whole based upon the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Ed. He recommended that Mr. Wilhoit use crutches at all times, that he protect his right leg from touching or contact with objects, wear a brace to support his right foot at all times, walk only over universally accessible surfaces, and be able to sit 90 percent of the time. He should not attempt to climb stairs or ladders, nor should he walk over rough terrain or sloping or slippery surfaces. He should not stand or walk longer than five minutes per hour, and should not push, pull, lift or carry more than two pounds. He cannot operate vehicles or machinery that would require the use of the right leg. A functional capacity evaluation determined that Mr. Wilhoit is able to work at the sedentary level for a four-hour day according to the *Dictionary of Occupational Titles*, U.S. Department of Labor, 1991.

Kim Wilhoit, Appellant's wife, testified that prior to the accident her husband weighed approximately 200 pounds and he had lost at least 40 pounds since the injury. She corroborated Mr. Wilhoit's testimony about pain, depression and blackouts. It was stipulated that other witnesses, if called, would testify that Mr. Wilhoit engaged in all types of physical activities before the injury and that after the injury, he suffers blackout spells, has tremendous pain, cries, and has an emotional condition that is extremely troubling.

Dr. Norman E. Hankins, a vocational expert called by Appellant, testified that Mr. Wilhoit was limited to sedentary work of no more than four hours per day based on his functional capacity evaluation. He administered the Slosson Intelligence Test and Mr. Wilhoit had an IQ score of 80, a score that would be exceeded by 89 percent of the population. On the Wide Range Achievement Test, Mr. Wilhoit was able to read on the sixth grade level and do arithmetic on a third grade level. Dr. Hankins opined that Mr. Wilhoit was 100 percent disabled. Dr. Hankins had not considered the mental or emotional impairment assessed by Dr. Gyurik, but testified that extreme impairment in social functioning and extreme impairment in concentration in a psychiatric context would be significant in determining vocational impairment.

Dr. Craig R. Colvin testified as a vocational expert for Wal-Mart that Mr. Wilhoit could perform sedentary work for four hours each day. He testified that he "would take issue with Dr. Hankins in the area of psychiatric impairment, marked or severe. Those aren't work restrictions per se." Dr. Colvin testified that he did not give an opinion with respect to Mr. Wilhoit's vocational disability rating because he was asked not to by counsel for Wal-Mart. Significantly, he identified no jobs or employments that could be performed by Mr. Wilhoit.

The trial court awarded Mr. Wilhoit workers' compensation benefits for 80 percent permanent, partial disability to the body as a whole.

Standard of Review

The standard of review in a workers' compensation case is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Houser v. BiLo, Inc.*, 36 S.W.3d 68, 70-71 (Tenn. 2001). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases to determine where the preponderance of the evidence lies. *Vinson v. United Parcel Service*, 92 S.W.3d 380, 383-4 (2002). When the trial court has seen the witnesses and heard the testimony, especially when issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's findings of fact. *Houser*, 36 S.W.3d at 71. However, this court is in the same position as the trial judge in evaluating medical proof that is submitted by deposition, and may assess independently the weight and credibility to be afforded to such expert testimony. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002).

Questions of law are reviewed *de novo* without a presumption of correctness. *Tucker v. Foamex, LP*, 31 S.W.3d 241, 242 (Tenn. 2000).

Issue

Did the trial court err in finding that the employee was entitled to an award of benefits for only 80 percent permanent partial disability instead of permanent total disability?

Discussion

The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999); *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990). In this case, the trial court found that Mr. Wilhoit's mental injury could be combined with his physical injury to determine the extent of vocational disability. *Cutler-Hammer v. Crabtree*, 54 S.W.3d 748 (Tenn. 2001). Mr. Wilhoit argues that the evidence preponderates in favor of permanent total disability. Permanent total disability is defined by statute as follows:

When an injury not specifically provided for in this chapter as amended, totally incapacitates the employee from working at an occupation which brings him an income, such employee shall be considered "totally disabled," and for such disability compensation shall be paid as provided in subdivision (4)(A). . .

Tenn. Code Ann. § 50-6-207(4)(B)

As pointed out in *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000), in disputes over vocational disability, the focus of the Court is on the employee's ability to return to

gainful employment. *Davis v. Reagan*, 951 S.W.2d 766, 767 (Tenn. 1997). “(T)he assessment of permanent total disability is based upon numerous factors, including the employee’s skills and training, education, age, local job opportunities, and his capacity to work at the kinds of employment available in his disabled condition.” *Robertson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986). A rating of anatomical disability by a medical expert is one of the relevant factors, but “vocational disability is not restricted to the precise estimate of anatomical disability made by a medical witness.” *Henson v. City of Lawrenceburg*, 851 S.W.2d 809, 812 (Tenn. 1993). “In this case, as in all workmen’s compensation cases, the claimant’s own assessment of his physical condition and resulting disabilities is competent testimony and cannot be disregarded.” *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972).

In assessing Mr. Wilhoit’s vocational disability, we find his only skills to be manual labor and heavy lifting. Other than a public education, he has no other training. He left school in the twelfth grade and he reads at the sixth grade level and does arithmetic at the third grade level; his IQ measures in the eleventh percentile. He is relatively young at age 32, but he has a 19 to 43 percent permanent medical impairment to the body as a whole. Although Dr. Lucas and Dr. Kennedy differ about the numerical medical impairment, there is no controversy over the limitations identified by the functional capacity evaluation. Mr. Wilhoit must use crutches to walk at all times, must protect his leg from any contact, can walk only over universally accessible surfaces, and cannot climb stairs or ladders or walk on rough or slippery surfaces. He has severe lifting restrictions and cannot operate machinery or vehicles requiring the use of his right leg. His physical impairment limits him to sedentary employment up to four hours per day. In addition, he suffers extraordinary and unusual depression and anxiety as a result of the mental injury that causes impairment with respect to the activities of daily living, social interaction and concentration. The trial court reached the same findings regarding Mr. Wilhoit’s physical and psychological condition.

Dr. Hankins testified that Mr. Wilhoit has a vocational disability of 100 percent. Mr. Wilhoit testified that he could perform no gainful employment. Their testimony is uncontroverted. Dr. Colvin identified no work or jobs available to Mr. Wilhoit and rendered no opinion with respect to his vocational disability rating. The trial court mentioned no particular jobs or employment available to Mr. Wilhoit and merely stated: “Considering all pertinent factors, including the anatomical impairment rating established, this Court concludes that Mr. Wilhoit’s permanent, partial vocational disability is eighty percent (80%) to the body as a whole.” With due deference to the findings of the trial court, when we consider the extraordinary physical, intellectual, and psychological impairments and limitations and the lack of transferable job skills, we can conceive of no employment opportunities for Mr. Wilhoit, who can only work at sedentary employment for four hours per day and who requires working conditions and accommodations accessible to one who must ambulate on crutches. We conclude that Mr. Wilhoit is totally disabled as defined in Tenn. Code Ann. § 50-6-207 (4)(B).

Disposition

The judgment of the trial court is modified to award permanent total disability and the case is remanded for any necessary proceedings. Costs of the appeal are taxed to the Appellee, Wal-Mart Distribution Center, Inc.

Howell N. Peoples, Special Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

**THEODORE CARL WILHOIT V. WAL-MART DISTRIBUTION CENTER,
INC.**

**Greene County Chancery Court
No. 20010039**

June 3, 2005

No. E2003- 02378-WC-R3-CV

JUDGMENT

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 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 memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellee, Wal-Mart Distribution Center, Inc., for which execution may issue if necessary.