

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

September 15, 2006 Session

CHRISTOPHER HARVILLE v. OLIVE HILL LUMBER COMPANY

**Direct Appeal from the Circuit Court for Hardin County
No. 3868 C. Creed McGinley, Circuit Judge**

No. W2005-02863-WC-R3-CV - Mailed December 8, 2006; Filed January 8, 2007

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. At trial, the Appellant, Christopher Harville, was awarded benefits for total loss of his left arm. He has appealed alleging that the trial court erred in limiting benefits to those provided for a scheduled member under the Workers' Compensation Law and in not finding him permanently and totally disabled. We affirm.

**Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Trial Court
Affirmed**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and ROBERT E. CORLEW, III, SP. J., joined.

Jeffrey P. Boyd, Jackson, Tennessee, for the Appellant, Christopher Harville.

Lee Anne Murray, Byron K. Lindberg, Nashville, Tennessee, for the Appellee, Olive Hill Lumber Company.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

Christopher Blake Harville was twenty-one years of age at the time of the trial. He graduated from Hardin County High School in 2002, and began working for Olive Hill Lumber Company in November 2003 as a lumber stacker. His only previous employment was as a cook for Kentucky Fried Chicken.

On January 5, 2004, he was trying to remove a board that was stuck in the conveyer motor. When he reached to grab it, a spur on the cylinder that the conveyor motor turned caught his jacket

and pulled him into the machine. He remembered his arms popping and snapping, and then he blacked out. The humeri in both his right and left arms were broken as well as the ulna in the left arm. He sustained a fracture to his mandible and a fracture of the spinous process of the C7 vertebra. As a result of the accident, Mr. Harville has no function in his left arm and has difficulty doing tasks one usually does with two arms such as dressing, washing dishes, cooking, and driving.

At trial Mr. Harville testified he still experiences pain in the right arm when he uses it. He explained that, because he has to use it so much, it becomes weak and is painful. He also testified that his right arm is a lot weaker than it was prior to the injury. In a deposition taken in November 2004, however, Mr. Harville testified he had no trouble with his right arm.

Dr. James H. Calandruccio's medical records were introduced into evidence. He rated Mr. Harville as having a one hundred percent (100%) impairment in the left upper extremity which equates to sixty percent (60%) to the whole person. His right upper extremity was rated at zero.

The medical records of Dr. Michael S. Muhlbauer of the Semmes Murphy Neurologic and Spine Institute were admitted. An EMG study conducted April 6, 2004, revealed severe avulsion injuries to the cervical nerve roots. As a result, his left arm was rendered totally insensate with total lack of function in the C5, C6, C7, C8 and T1 nerve root distributions. Dr. Muhlbauer diagnosed Harville as having a bilateral brachial plexus injury.

A C-32 Standard Form Medical Report for Industrial Injuries from Dr. Joseph C. Boals, III was introduced into evidence. Dr. Boals is certified by the American Board of Orthopaedic Surgery. He examined Mr. Harville on December 1, 2004. He agreed with the assessment of Dr. Calandruccio that Mr. Harville had a 100% impairment to the left arm. Contrary to Dr. Calandruccio, Dr. Boals assigned an impairment rating to the right arm of 20% based upon a loss of grip strength. These two impairments equate to sixty-five percent 65% to the body as a whole.

Dr. Robert W. Kennon testified by deposition. Dr. Kennon is a licensed psychologist and is certified by the American Board of Forensic Examiners. He performs vocational disability evaluations for the Tennessee Department of Vocational Rehabilitation and for the Social Security Administration.

Dr. Kennon evaluated Mr. Harville on January 26, 2005. As part of his evaluation he conducted an interview with Mr. Harville, reviewed his medical records and performed several procedures involving psychological instruments to evaluate his current intellectual, academic, and vocational status. By observation, Dr. Kennon noted that Mr. Harville had no apparent use of his left hand. Mr. Harville entered the office with his left hand in his pocket and maneuvered the left hand with his right.

Dr. Kennon performed a mental status examination. Mr. Harville admitted that he had some depression related to his loss of activity and had become more withdrawn and detached socially. Mr. Harville scored ninety-one on the Wechsler Adult Intelligence Scale. A full scale I.Q. of ninety one

placed Mr. Harville at the twenty-seventh percentile or the lower limits of the average range. On the Wonderlic Personnel Test, which measures not only intelligence but aptitude, Mr. Harville scored a twenty-one, which is commensurate with people who have achieved a twelfth-grade education. He completed the twelfth grade at Hardin County High School. Cumulatively, Mr. Harville's scores place him at the 46.06 percentile when compared to the adult working population. Dr. Kennon felt Mr. Harville's scores were consistent with what one would typically see in positions such as cashiers, meter readers, printers, police officers, and dispatchers. On the Wide Range Achievement Test, Mr. Harville performed at the high school level in reading and arithmetic and at the post-high school level in spelling. These results were consistent with his aptitude and IQ testing.

Mr. Harville had worked as a lumber stacker and a cook. Dr. Kennon testified that, according to the Dictionary of Occupational Titles, a cook carries a medium strength rating and a freight and stock handler carries a heavy strength rating. As a result, there were no jobs to which Mr. Harville's job skills could be transferred that he could perform. Moreover, it would be difficult for Mr. Harville to work at a manufacturer's production rate pace. Dr. Kennon testified that sedentary jobs are, for the most part, in the professional categories with high levels of skill training. In the opinion of Dr. Kennon, Mr. Harville did have the aptitude, ability, and intellectual capacity to undergo some type of vocational retraining.

The trial court found that Mr. Harville was not permanently and totally disabled. The trial judge noted that Mr. Harville was not lacking in aptitude and intelligence and was very young. The trial court determined that Mr. Harville's injury to the brachial plexus was limited to the left arm which is a scheduled member. The court awarded Mr. Harville a one hundred percent disability to the left arm and no impairment or disability to the right.

Mr. Harville has appealed and alleges that the trial court erred in limiting its award to compensation for a scheduled member rather than to the body as a whole and in failing to award permanent and total disability benefits. Finding no error, we affirm.

II. STANDARD OF REVIEW

The standard of review of issues of fact 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); Lollar v. Wal-Mart Stores, Inc., 767 S.W.2d 143, 149 (Tenn. 1989). Where credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Long v. Tri-Con Indus. Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). Where 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. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

III. ANALYSIS

Mr. Harville first alleges that the trial court erred in limiting its award to compensation for a scheduled member. Tennessee Code Annotated section 50-6-207(3)(A)(ii)(m) provides that for the loss of an arm, the employee will be paid benefits for 200 weeks. The argument advanced on behalf of Mr. Harville is that he completely severed the cervical nerves that supplied motor function to his left arm. In his brief, Mr. Harville alleges that “at some point between his spine and shoulder, the nerves were completely severed.” While Mr. Harville failed to direct us to the place in the record where these facts appear, we have found an EMG report in the records of Dr. Muhlbauer that indicates Mr. Harville had sustained “severe avulsion injuries to the cervical nerve roots.” Dr. Muhlbauer indicated Mr. Harville had lost function in the C5, C6, C7, C8 and T1 nerve root distributions. Dr. Muhlbauer diagnosed Mr. Harville as having a bilateral brachial plexus injury. While there is no explanation contained in the record before us as to the meaning or import of these terms, we are of the opinion that the fact that the nerve damage may have been remote to the left arm does not result in Mr. Harville’s injury being to the body as a whole. Under the Workers’ Compensation Law, an employee who, during the course of employment, loses a scheduled member is entitled to be compensated for the loss of use of that member even though the injury may not have affected the employee’s earning capacity. See Oliver v. State, 762 S.W.2d 562, 565 (Tenn. 1988). Wherever the location of the nerve damage, the evidence before the trial court was that the effect of the damage was the loss of use of Mr. Harville’s left arm. There was no evidence, medical or otherwise, that any other part of Mr. Harville’s body was affected by the nerve damage he sustained. We are of the opinion that the trial court correctly limited its award to compensation for the loss of use of a scheduled member.

The remaining question is whether the trial court erred in failing to find that Mr. Harville was permanently and totally disabled. Permanent total disability is defined in Tennessee Code Annotated section 50-6-207(4)(B), in pertinent part, as “when an injury not otherwise specifically provided for in this chapter, as amended, totally incapacitates the employee from working at an occupation that brings such employee an income, such employee shall be considered totally disabled, . . .”¹ Mr. Harville suggests a trial court can find an employee permanently and totally disabled even though the disability is limited to a scheduled member. We disagree. The Tennessee Supreme Court has previously held that where an employee’s only injury is to a scheduled member, he or she may receive only the amount of compensation provided for in the statutory schedule. Ivey v. Trans Global Gas & Oil, 3 S.W.3d 441, 448 (Tenn. 1999); Wade v. Aetna Cas. & Sur. Co., 735 S.W.2d 215, 217 (Tenn. 1987).

Mr. Harville suggests that the trial court should have considered the injuries to his right arm, mandible, and the spinous process of the C7 vertebra in determining the extent of his disability. The trial court agreed with the opinion of Dr. Calandruccio that Mr. Harville retained no permanent impairment to his right arm. In making this determination, the trial court accepted the opinion of

¹The trial court specifically found Mr. Harville is not permanently and totally disabled under this standard. While, in our view, the evidence does not preponderate against this finding, it is immaterial to the conclusion we reach.

Mr. Harville's treating physician over an evaluating physician. It is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts. Hinson v. Wal-mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). Moreover, Dr. Boals' evaluation took place on December 1, 2004. On November 17, 2004, Mr. Harville testified in a deposition that he had no trouble with his right arm. The evidence does not preponderate against the finding of the trial judge that Mr. Harville retained no permanent impairment to his right arm. There was no medical evidence that Mr. Harville retained a permanent impairment due to the injuries to his mandible or to the spinous process of his C7 vertebra. We conclude the trial court did not err in failing to find Mr. Harville permanently and totally disabled.

IV. CONCLUSION

The judgment of the trial court is affirmed. Costs of this appeal are taxed to the Appellant, Christopher Harville.

DONALD P. HARRIS, 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 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 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 Appellant, Christopher Harville, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

