IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
January 29, 2007 Session

WALTER FAUGHT vs. E.W. JAMES & SONS, INC. ET AL.

Direct Appeal from the Chancery Court for Haywood County
No. 12785 Hon. George R. Ellis, Chancellor

No. W2006-00793-WC-R3-CV - Mailed May 25, 2007; Filed July 2, 2007

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with the provisions of Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The Employer has appealed the action of the trial court, which found that the Employee is permanently and totally disabled and that the Employer is responsible for 62.5% of the award and the Second Injury Fund is responsible for 37.5%. We find that the award should be vacated and the case should be remanded for a new hearing.

Tenn. Code Ann. §50-6-225(e) (2005) Appeal as of Right;
Judgment of the Trial Court Reversed; Case Remanded. Costs assessed to Appellee.

ROBERT E. CORLEW, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JAMES F. BUTLER, SP. J., joined.

B. Duane Willis, Jackson, Tennessee, for the appellant, E.W. James & Sons, Inc.

Ricky L. Boren, Hill, Jackson, Tennessee, for the appellee, Walter Faught.

Robert E. Cooper, Jr., Attorney General & Reporter, and Juan G. Villasenor, Assistant Attorney General, for the appellee, Sue Ann Head, Administrator, Division of Workers' Compensation, Tennessee Department of Labor and Workforce Development.

MEMORANDUM OPINION

FACTUAL BACKGROUND

Before the Court is an action in which the facts are very extensive but largely uncontroverted. Despite the lengthy proceedings in the trial court, comparatively little evidence was presented. The suit involves an injury to the Employee's left knee, but much of the proof which the court heard surrounded the Employee's pre-existing condition. The Employer is a grocer in Brownsville,

Tennessee. The Employee, Walter Faught, worked for the Employer and previously had worked for the Employer's predecessor at the same location. This was the only work history provided to the trial court. The Employee's primary duty was that of a "sack person," who assisted the customers of the store, primarily by carrying groceries from the store to customers' cars.

The case is before us in a somewhat unusual posture. The Employee was not permitted to testify pursuant to an Order of the trial court. The trial court was acquainted with the Employee due to proceedings in a prior workers' compensation action, and the trial court determined at that time that the Employee was not mentally competent. The trial court barred the Employee's testimony in the instant case due to his mental incompetency.

The only witness who testified in person was Lowry Pearson, the manager of the store operated by the Employer. Mr. Pearson testified that he knew long before the Employee's alleged left knee injury that the Employee was mentally challenged and that "it took a little bit more than average explanation" in order for the Employee to be able to perform his duties. Mr. Pearson testified that he knew the Employee took medication for bipolar disorder. Further, he knew that the Employee had a condition known as hydrocephalus, which involves water developing on his brain. Nonetheless, Mr. Pearson testified that the Employee's attendance was good and that he worked forty hours per week.

Mr. Pearson remembered that in 1995 the Employee had two separate surgeries which required the placement of a shunt in the Employee's head in order to drain water off of his brain. Mr. Pearson testified that the Employee diminished mentally after the shunt surgery in that he had more trouble staying focused on job tasks. The Employee's work hours were decreased to approximately twenty-five hours per week after a period of time because his stamina had also diminished. Further, Mr. Pearson testified that his quality of work diminished. Although Mr. Pearson had no personal knowledge of other injuries the Employee suffered, he testified about a number of injuries which were reported to him. There was a report of an October 30, 2000 injury in which the Employee fell off of a milk crate and sustained an injury to his hip. Mr. Pearson also received reports that the Employee suffered a right knee injury and that the Employee was "run over" by a car in the store parking lot in February of 2003, but neither of these injuries appeared to affect the Employee's work performance. The right knee injury resulted in a workers' compensation settlement based upon 75% permanent partial disability to the right leg.

Mr. Pearson was not aware of the injury to the Employee's left knee. He referred, however, to company records which showed such an injury in late 2003. He testified that the Employee was treated initially by Dr. Keith Nord and returned to work on January 26, 2004. The Employee returned to working twenty-five hours per week. His number of work hours later decreased to twenty per week, apparently due to factors other than the left knee injury. The Employee later left employment in mid to late January 2005 due to circumstances unrelated to his work injuries. Mr. Pearson testified that during that last year of his employment the Employee made no complaints about his left knee.

Depositions of Dr. Clarey Dowling and Dr. Joseph Boals were marked as evidence, as were medical records from the Semmes-Murphy Clinic, Dr. Harold Antwine, Jackson-Madison County General Hospital, Dr. Obi, Dr. Nord, and the W.T. Surgery Center. Dr. Dowling, a family practice physician, had been the Employee's family physician since 1990. He testified that primarily he treated Employee for bipolar disorder. Dr. Dowling testified that the Employee "was always a little bit slow. . . . [Y]ou could tell [the Employee] was mentally challenged." Dr. Dowling's deposition shows that he treated the Employee in 1998 for an injury to his right hip when he fell at work; a nondisplaced avulsion fracture of the hip was diagnosed. In December of 2001, he treated the Employee for a right knee injury which the Employee suffered when he "banged" his right leg in a car-door. He treated the Employee's hydrocephalus condition in 1995 and testified, contrary to Mr. Pearson's testimony, that this did not make a large difference in the Employee's performance. Dr. Dowling testified that, although "the left knee has severely aggravated this whole situation . . . . I'm not saying that the left knee was the final turning point where he just went from not being able to---being able to work up till that left knee and now not being able to work . . . ."

The left knee injury which is the subject of this workers' compensation claim occurred in October of 2003. The medical records which were marked by the Court as an exhibit show that the Employee suffered a meniscal tear that was repaired by an arthroscopy. Dr. Keith Nord performed surgery on December 12, 2003, wherein he took out a piece of cartilage on both sides and then shaved the chondromalacia. Dr. Nord opined that the Employee suffered 10% anatomical impairment apportioned to the left lower extremity. The Employee returned to work about three months later, working under permanent light duty restrictions. He continued to have ongoing complaints of pain in both knees and difficulty with stooping, squatting, climbing, and prolonged walking.

Dr. Joseph Boals saw the Employee for an independent medical evaluation. He testified as to problems the Employee suffered with respect to both knees. He opined that the Employee sustained 24% anatomical impairment to the left lower extremity. He testified that although the Employee's chondromalacia problems with his left knee were "significant," "it was not quite as severe [as the right knee]. There were not as many compartments involved . . . ." He also testified that the Employee suffered from a mental disability: "He was a little bit halting with his explanations and voice and speech. He was very cooperative and listened to all my questions and tried to do his best, but it was obvious that he had some mental disability." Dr. Boals testified that the Employee should not return to the duties as a sack person, but went on to say that the Employee could return to some other jobs, saying:

> Any patient can go back to work, just like we have a lot of football players that determine even with severe arthritis in their knees and ankles that they're going to play ball in the NFL. Anybody can go back to work. I just know that having been a sack man when I was a young boy that that requires an awful lot of walking and standing, stooping, squatting, and lifting, and I think eventually he'll have enough problems with his knees that he will not be able to do the job; but it will not prevent

him from trying it. . . . The secret there is if he can and if he's not having significant symptoms, I would not hold him back.

The Employee filed a complaint for Workers' Compensation benefits on April 30, 2004. The cause of action proceeded to trial. The trial took place over three separate dates. On November 23, 2005, the sole lay witness, the store manager, testified, and the medical depositions were introduced. On January 4, 2006, the parties argued about the introduction of the Employee's deposition. Closing arguments were held on January 31, 2006.

On the first day of the trial, an issue arose with regard to the deposition testimony of the Employee. At a prior workers' compensation settlement in another case on May 24, 2005, the trial court held that the Employee was not of sound mind. A conservator was appointed at that time since the trial court determined that the Employee was incapable of managing his property. At the January 4, 2006 hearing, the Court, *sua sponte,* decided not to allow the Employee's deposition into evidence. The Employer then moved to withdraw certain stipulations which it made prior to the hearing. The Employer argued that it had entered into those stipulations based on the assumption that the Employee's deposition would be introduced into evidence and had the Employer known otherwise, it would not have agreed to the stipulations. The court did not allow the stipulations to be withdrawn. The stipulations included an agreement that that notice was timely given and also included the date of the Employee's injury, the date of maximum medical improvement, and the compensation rate.

The trial court considered the testimony of the store manager, Lowry Pearson; the deposition testimony of Clarey Dowling, M.D., the treating physician; and the deposition testimony of Joseph C. Boals, III, who conducted an independent medical evaluation. The trial court determined that the Employee suffered a compensable injury, which caused permanent and total disability to the Employee. The trial court apportioned the judgment for permanent total disability between the Employer, who was held responsible for 62.5% of the award, and the Second Injury Fund, who was held responsible for paying the remaining 37.5%.

ANALYSIS

Our review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2005). Thus, we are required to conduct an independent examination of the record to determine the preponderance of the evidence. In determining the preponderance of the evidence, we must consider the evidence presented. With respect to the testimony of the Employee, the trial court had the opportunity to determine his credibility based upon his or her testimony in person before the court. When the trial court has observed the witnesses and heard their testimony, especially where issues of credibility and the weight of testimony are involved, we must extend considerable deference to the trial court's findings. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). When the medical proof is presented by deposition, we must determine the weight to be given to the expert testimony and draw our own conclusions with regard

to the issues of credibility with respect to the expert proof. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). Conclusions of law established by the trial court come to us without any presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003).

In this case, there was no live testimony other than that of Mr. Pearson. Medical depositions, medical records, and the stipulations discussed earlier formed the balance of the record before the trial court. Thus, we must make our determinations regarding the evidence provided by deposition and through stipulations and medical records without deference to the findings of the trial court. The conclusions of law, of course, come to us without any presumptions.

Initially, we are faced with the issue raised by the Employer that the deposition of the Employee should have been admitted, or in the alternative, its motion to withdraw the stipulations should have been granted. The Employer contends that the parties entered into stipulations, however the Employer did so based upon the assumption that the deposition of the Employee would be introduced at trial. The parties had agreed prior to the first day of trial that because of the Employee's condition, he would not be required to testify in person, but rather that his deposition would be introduced. The trial court determined later, however, that the deposition should not be introduced because of the incapacity of the Employee.

The testimony of the Employee, or a stipulation based upon the Employee's knowledge, was crucial to the Employee's case. No person with personal knowledge of the Employee's injury testified. There was no evidence as to what the Employee was able to do after he reached maximum medical improvement, other than the fact that he returned to work for his pre-injury employer for a period of time, performing many of the same duties he did before. Not only was the Employee's testimony important for the presentation of proof on his own behalf, the Employer likewise wanted to produce evidence which exclusively rested with the Employee.

In Tennessee, a *sua sponte* order excluding the testimony of a lay witness is very rare. The Rules of Evidence provide that every person is presumed competent to be a witness. Tenn. R. Evid. 601. The Advisory Commission Comments to this rule state that "[v]irtually all witnesses may be permitted to testify: children, mentally incompetent persons, convicted felons." Accordingly, any prospective witness may testify who has personal knowledge of the matter about which he is to testify. Tenn. R. Evid. 602. The trial judge has the discretion to determine whether a witness is competent to testify. State v. Caughron, 855 S.W.2d 526, 538 (Tenn. 1993). This determination will not be disturbed on appeal absent an abuse of discretion. State v. Howard, 926 S.W.2d 579, 584 (Tenn. Crim. App. 1996) (overruled on other grounds). It has even been held that:

> A lunatic or a person adjudged insane is competent as a witness if, at the time he is offered as a witness, he has sufficient understanding to comprehend the obligation of an oath and capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue.

State v. Garland, 617 S.W.2d 176, 184 (Tenn. Crim. App. 1981).

Perhaps other witnesses might have been obtained in order to produce the evidence which the parties sought to present through the Employee. The parties' stipulation provided the Employee sufficient evidence for him to make a *prima facie* case. The Employer, however, had little time to produce alternate witnesses after the deposition testimony of Employee was excluded.

We find that the judge erred in making the determination that the Employee could not testify. The Employee had already testified in deposition without objection. There was no motion from any party to exclude the Employee's testimony. In discussing the issue with the court, counsel addressed a number of areas wherein the Employee testified in his deposition, which statements of fact were unquestioned. We conclude that the Employee should have been allowed to testify.

The Employer further argues that the problem was then compounded by the fact that it had agreed to stipulations in contemplation of the Employee's testimony. It appears, that without either the stipulation to which the Employee agreed or the testimony of the Employee, the Employee's action could not go forward only upon the medical proof. The only witness who testified, Lowry Pearson, the store manager, had no knowledge of the Employee's injury. He simply provided proof based upon his reading of business records maintained by the Employer.

A stipulation is an agreement between counsel regarding business before a court. State v. Ford, 725 S.W.2d 689 (Tenn. Crim. App. 1986). Stipulations are favored by the courts and are to be encouraged and enforced thereby as they expedite the business of the courts. Ford, 725 S.W.2d at 691. Oral stipulations made during the course of trial are valid. Bearman v. Camatsos, 385 S.W.2d 91, 93 (Tenn. 1964).

A request to withdraw from a stipulation may be granted where there is shown to exist: "(a) mutual mistake; (b) the occurrence of some facts that the stipulation did not foresee; or (c) some misrepresentation, fraud, overreaching, or similar misconduct on the part of the opposing party in making the stipulations." Lawrence A. Pivnick, Tenn. Circuit Court Practice § 10-6 (3d ed. 1991). When these circumstances are present, a prompt motion to withdraw from the stipulation should be made. *Id*. 83 C.J.S. Stipulations 34 (1953) also provides:

> Stipulations are under the control and subject to the direction of the court which has power to relieve the parties therefrom on proper application and a showing of sufficient cause, on such terms as will meet the justice of the particular case; but such matter rests in the sound discretion of the court and relief will be granted only where necessary to prevent injustice.

The duty of the court is to ensure that a fair and impartial hearing is conducted where both parties are allowed equal opportunity to present proof. We find that such an opportunity was not afforded to the Employer here where the testimony upon which the Employer relied was not allowed and its request to withdraw the stipulation, which it made in good faith, was denied. A decision to

the contrary would chill the incentive for parties to reach pre-trial stipulations. Certainly public policy favors the efforts of parties to reach stipulations in the interest of judicial economy. We find that the Employer should have been entitled to withdraw its stipulation when the offer of the Employee's testimony was denied.

Beyond the procedural issues in this cause, the primary substantive issue raised on appeal is whether the Employee's injury entitles him to permanent and total disability benefits, or rather permanent partial disability benefits. Before any award of permanent total disability may be made, the court must insure that such award is in compliance with Tenn. Code Ann. §50-6-207(4). Rhodes v. Capital City Ins. Co., 154 S.W.3d 43 (Tenn. 2004). The statutory definition of total disability focuses on an employee's ability to return to gainful employment. Employees who are totally incapacitated from gainful employment by work-related disabilities not otherwise specifically provided for under the Act are statutorily classified as "totally disabled." Disabled workers falling within the purview of the "total disability" definition shall be paid permanent total disability benefits pursuant to Tenn. Code Ann. § 50-6-207(4)(A) (1999).

The proof in the case at bar shows that the Employee worked at least an additional eight months after incurring the left knee injury and did not leave his employment until nearly a year after he reached maximum medical improvement. We recognize that the return to employment by an injured work does not, in itself, preclude a finding that the worker is totally disabled. It was held in Skipper v. Great Cent. Ins. Co., 474 S.W.2d 420, 424 (Tenn. 1971) that:

> [T]he fact employee is employed after the injury in the same type of employment and at the same wages does not per se preclude the court from finding he is totally disabled as the words are used in T.C.A. 50-1007 (e) [now 50-6-207(4)(B)]. To hold otherwise would have the result of discouraging those few hardy individuals who try to work under great physical handicap, by the threat of denying them compensation which they might otherwise be entitled to if they did not work. We do not think it was the intent of the Legislature that the Workmen's Compensation Statutes be so construed.

More recently, however, the Court has recognized that:

> It would be an extremely rare situation in which an injured employee could, at the same time both work and be found permanently and totally disabled. In order for such a situation to occur, the evidence would have to show that the employee was not employable in the open labor market and that the only reason that the employee was currently working was through the magnanimity of his or her employer.

Rhodes v. Capital City Ins. Co., 154 S.W.3d at 48.

In reviewing the evidence, we are mindful that the permanency of a work-related injury must first be established by competent medical evidence. Harness v. CNA Ins. Co., 814 S.W.2d 733, 734

(Tenn. 1991). Once permanency is established, the trial court may evaluate the factual question of the extent of vocational disability. See Collins v. Howmet Corp., 970 S.W.2d 941, 943 (Tenn. 1998).

When an injury not otherwise specifically provided for in the Workers' Compensation Act totally incapacitates a covered employee from working at an occupation which brings him an income, such employee is considered totally disabled. Tenn. Code Ann. § 50-6-207(4)(B). Based on the evidence presented to the trial court, we are not persuaded from our independent examination of the evidence that the claimant is permanently and totally disabled. The judgment of the trial court is reversed and remanded for a new trial on this issue. We recognize that in light of our ruling on the evidentiary issues the proof presented regarding this issue on retrial may differ significantly from that in the record before us now.

We examine the question of the apportionment of a permanent total award in the event that the proof justifies such an award. The trial court in this case held that the Employer is responsible for 62.5% of the award and the Second Injury Fund is responsible for 37.5%. That apportionment was apparently arrived at by converting Employee's previous workers' compensation settlement of 75% to the right leg to 37.5% to the body as a whole. The trial court did not determine the amount of permanent partial disability resulting from the left knee injury, separate and apart from the other injuries from which the Employee suffers. This method of apportioning liability between an employer and the Second Injury Fund was held to be improper in Allen v. City of Gatlinburg, 36 S.W3d 73 (Tenn. 2001).

The Court in Bomely v. Mid-America Corp., 970 S.W.2d 929, 934 (Tenn. 1998), stated that in order to decide whether a given case is covered by Tenn. Code Ann. §50-6-208(a) or §50-6-208(b), "it is important for trial courts to make an explicit finding of fact regarding the extent of vocational disability attributable solely to the employee's last injury [the left knee injury in this case]." Upon remand, the trial court shall first determine the percentage of vocational disability attributable to the left knee injury and then shall consider whether this injury, coupled with the other problems, causes the Employee to be totally and permanently disabled. If so, the court shall not require the Employer to pay portions of the award greater than that attributable to the last injury.

The Second Injury Fund contends that since some of the Employee's pre-existing disabilities are mental, the Second Injury Fund should not be responsible for the mental portion because the Second Injury Fund Statute specifically refers to physical injuries.

The Employer and the Second Injury Fund both cite the case of Bryant v. Genco Stamping & Mfg. Co., 33 S.W.3d 761 (Tenn. 2000), but each disagrees as to the holding. The Employee in Bryant had a pre-existing mental condition, which included panic attacks. The Employee injured his right shoulder in a work-related incident. As he was being prepared for surgery, he had an adverse reaction as his shoulder was being anesthetized. He felt as though his heart and lungs were shutting down and he incurred a severe panic attack. He later incurred more frequent panic attacks, which exacerbated his depression. At trial, he testified that he was unable to work due to his

aggravated emotional problems and pain. The Court determined the Employer should be liable for the problems that were created by the mental condition and the shoulder injury. We agree with the contention of the Employer that the mental condition was in fact aggravated by the shoulder injury, and thus the shoulder injury contributed to the mental disability. In the case at bar, there appears to have been no aggravation of the Employee's previous psychological problems by the left knee injury.

To hold otherwise would result in exposing an Employer and its insurance company to greater liability than is contemplated under the Second Injury Fund legislation. This could deter employers from hiring handicapped workers. We thus hold that in the event the Employee is found to be permanently and totally disabled after retrial, the trial court must proceed in accordance with the analysis outlined in Bomely, 970 S.W.2d at 935. Specifically, the trial court would determine, pursuant to Tenn. Code Ann. § 50-6-208(a), the extent of disability caused solely by Employee's left knee injury, without consideration of his prior injuries or pre-existing disabilities. Because this injury is to the leg, it will be necessary to convert the resulting percentage of disability to the body as a whole. Employer would only be held liable for that portion of the permanent total disability award; the Second Injury Fund would be held responsible for the remainder.

If the Employee is not found to be permanently and totally disabled, Employer would be liable for the entire award of permanent partial disability to the leg. The Second Injury Fund would not be liable for any portion of the award. This is because an award of even 100% permanent disability to the leg, when combined with Employee's previous award, would result in a total of less than 100% disability to the body as a whole. Tenn. Code Ann. § 50-6-208(b) would not be applicable under those circumstances.

CONCLUSION

For the reasons stated above, we reverse the decision of the trial court and remand for a new hearing. Costs of this appeal are assessed to the Appellee, Walter Faught.

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ROBERT E. CORLEW, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
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WALTER FAUGHT v. E. W. JAMES & SONS, INC., ET AL.,

Chancery Court for Haywood County
No. 12785

No. W2006-00793-WC-R3-CV - Filed July 2, 2007

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 Appellee, Walter Faught, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM