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

September 24, 2007 Session

SANDRA DELLER v. FEDERAL EXPRESS CORPORATION

Direct Appeal from the Chancery Court for Shelby County
No. CH-05-1783-I Walter L. Evans, Chancellor

No. W2007-00668-SC-WCM-WC - Mailed December 21, 2007; Filed April 1, 2008

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. Employee sustained an injury to her lower back in the course of her employment as a pilot. Her treating physician placed permanent restrictions upon her activities which prevented her from returning to that job. While recovering from her injury, she obtained three licenses concerning sale and appraisal of real estate in California. She testified that she was unable to work in that field because the physical demands conflicted with her restrictions. The trial court awarded permanent total disability benefits. The trial court also declined to grant Employer a set-off pursuant to Tennessee Code Annotated section 50-6-114(b) for payments made pursuant to its long-term disability plan. Employer has appealed, contending that the trial court erred in awarding permanent total disability and also in declining to grant a set-off. We agree and modify the judgment accordingly.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2006) Appeal as of Right; Judgment of the Chancery Court Modified

D.J. ALISSANDRATOS, SP.J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and DONALD P. HARRIS, SR.J., joined.

Joe Lee Wyatt and William J. Wyatt, Memphis, Tennessee, for the appellant, Federal Express Corporation.

John F. Canale, III, and Donald A. Donati, Memphis, Tennessee, for the appellee, Sandra Deller.

MEMORANDUM OPINION

Sandra Deller ("Employee") is a resident of San Jose, California. She was an airplane pilot for Federal Express Corporation ("Employer"). She worked for Employer for approximately twenty years. During part of that time, she actually worked for a separate air freight concern that was later acquired by Employer. She had been a pilot for twenty-eight years altogether.

The injury at issue occurred on February 11, 2004. Employee fell down some stairs while exiting a plane. She testified that she fell approximately five feet to the ground. Compensability of the injury is not disputed.

Employer referred her to Dr. Ralph Pietrobono, an orthopaedic surgeon in San Jose. Dr. Pietrobono provided conservative treatment from February 2004 to March 2006. His diagnosis was a low back sprain superimposed upon pre-existing degenerative changes. He testified that Employee reached maximum medical improvement on May 12, 2005. At that time, he placed the following permanent restrictions upon her activities: "No repeated or sustained bending of her low back. Limit sitting to three to four hours. No weight lifting over thirty-five pounds and no squatting." Dr. Pietrobono assigned an 8% permanent impairment to the body as a whole to Employee. On direct examination, he stated that she had no impairment prior to the February 2004 injury. On cross-examination, he testified that one-fourth of the impairment existed before the injury.

Because her job often required her to sit for periods in excess of three or four hours, Employee was unable to return to work as a pilot for Employer. Subsequent to the injury, she passed examinations and received licenses in California to act as real estate agent, real estate broker, and real estate appraiser. She did not actually work in any of these professions, however. She testified at trial that the physical requirements of inspecting and showing homes were not compatible with her permanent restrictions. She had not applied for work elsewhere. She testified that she did not look for work because she did not believe that there were any jobs she could perform consistent with the restrictions placed upon her.

Employee was fifty-six years old on the date of the trial. She had a B.A. from San Jose State University, with a major in nutrition and minors in aviation and business. The parties agreed that federal law would have required her to retire as an active pilot at age sixty, regardless of her health.

The parties also stipulated that Employee had received benefits from Employer's long-term disability plan. The parties further stipulated to the amount to be set off if the trial court found that Employer was entitled to receive a set-off pursuant to Tennessee Code Annotated section 50-6-114(b).

The trial court found that Employee was permanently and totally disabled and awarded benefits accordingly. The trial court also ruled that Employer was not entitled to a set-off against the permanent disability award for payments made under the long-term disability plan. Judgment

was entered accordingly.

STANDARD OF REVIEW

Our standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2006); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). When issues of credibility of witnesses and the weight to be given their in-court testimony are before the reviewing court, considerable deference must be accorded to the factual findings of the trial court. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002); *see Rhodes v. Capital City Ins. Co.*, 154 S.W.3d 43, 46 (Tenn. 2004). When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another. *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675, 676-77 (Tenn. 1983). This Court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997). Questions of law are reviewed de novo with no presumption of correctness afforded to the trial court's conclusions. *Gray v. Cullom Machine, Tool & Die*, 152 S.W.3d 439, 443 (Tenn. 2004).

ANALYSIS

1. Permanent Total Disability

In his findings, the learned chancellor noted that Employee had been a pilot for twenty-eight years and that the injury prevented her from engaging in that line of work any longer. He then stated:

> "[T]he Court feels that for up to age 60, she would be totally disabled. But because she has other skills, she has sought and has received other licenses, that she could perform some job activities after age 60, but based upon the limiting requirements of Dr. Pietrobono's report, that she would not be able to perform any other meaningful job activity at 100 percent. So it would appear to the Court that up until age 60 she would be totally disabled. But after age sixty for the remainder of the 400 weeks, that her permanent partial disability would be six times the 8 percent, which would be 48 percent permanent partial disability after age 60.

After a colloquy with counsel, the trial court stated that Employee was permanently and totally disabled. Judgment was entered accordingly. We respectfully disagree and modify that judgment for the following reasons.

An injured employee is permanently and totally disabled when she is totally incapacitated "from working at an occupation which brings the employee an income." Tenn. Code Ann. § 50-6-207(4)(B) (2005). In this case, Employee was unable to return to work for Employer, as a

direct result of the medical restrictions resulting from her injury. The learned chancellor apparently found this to be a critical factor in reaching his conclusion. However, return to work is not the sole criterion for determination of the extent of permanent disability. Many of those criteria are listed in Tennessee Code Annotated section 50-6-241(a)(1) (2005): "[E]mployee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition."

Employee is an older worker. She has extensive education and the capacity for learning new skills, as evidenced by the three real estate licenses she obtained after the injury. The record is silent concerning the usefulness of the highly technical skills she acquired as a pilot; it is also silent concerning job opportunities for a person of her background in either Memphis or San Jose. The restrictions placed upon her by Dr. Pietrobono are not severe or unusual. Taken as a whole, the evidence does not support a finding of permanent total disability.

Because we find that Employee is not permanently and totally disabled, we must determine the extent of her permanent partial disability. Employer argues that an anatomical impairment of 6% to the body as a whole is the appropriate bench mark for making that assessment. That contention is based upon Dr. Pietrobono's statement that one-fourth of Employee's 8% impairment existed prior to her work injury. There is no evidence in the record that Employee's pre-existing degenerative condition had manifested itself at any time prior to February 2004. Likewise, there is no evidence of a previous injury to the low back, or of any medical treatment for low back symptoms. In light of those factors, we find that an 8% impairment to the body as a whole is the appropriate starting point.

As noted above, Employee has extensive education and has performed successfully in a job which requires the highest level of skill and judgment. She is capable of exploring and learning new skills, as evidenced by the various licenses she secured after the injury. However, virtually all of her work experience has been in a single job, airplane pilot. She is also fifty-six years old. These factors make a career adjustment potentially more difficult than might be the case for a person with a broader range of experience or an equally skilled younger person. Considering the evidence in light of the factors to be used in making such determinations, we find that Employee has sustained a permanent partial disability of 32% to the body as a whole.

2. Set-off for Disability Payments

Tennessee Code Annotated section 50-6-114(b) (2005) provides:

> Any employer may set off from temporary total, temporary partial, and permanent partial and permanent total disability benefits any payment made to an employee under an employer funded disability plan for the same injury; provided, that the disability plan permits such an offset. Such an offset from a disability plan may not result in an employee's receiving less than the employee would otherwise receive under the Workers' Compensation Law,

> compiled in this chapter. In the event that a collective bargaining agreement is in effect, this provision shall be subject to the agreement of both parties.

The parties submitted a stipulation to the trial court, which stated that Employee received payments for a specified period of time from Employer's Long-Term Disability ("LTD") Plan, which was an employer-funded plan. The stipulation included documents that set out the terms of the plan. One section of the plan document is titled "Benefit Offset." That section includes this language: "LTD benefits are reduced by any amount you are entitled to receive from: Workers' Compensation or any similar law to the extent that it represents compensation for lost wages."

Employee urges an interpretation of this language that the LTD plan offsets only those workers' compensation benefits which represent lost wages, and that permanent disability benefits[1] paid pursuant to Tennessee's workers' compensation law represent "lost earning capacity," rather than lost wages. The learned chancellor apparently agreed with this argument and declined to set off benefits received by Employee in accordance with the LTD plan against the permanent disability award.

In support of her position, Employee cites a portion of the employment security law, Tennessee Code Annotated section 50-7-213(d)(1)(B) (2005), which excludes workers' compensation benefits from the earnings used to calculate unemployment compensation benefits. This argument is not persuasive. The exclusion of workers' compensation and other disability benefits from calculation of unemployment benefits is patently rooted in the concept that the amount of benefits should be based upon earned income because that is what those benefits replace. Indeed, workers' compensation benefits are not used to calculate an employee's average weekly wage under the workers' compensation law. Tenn. Code Ann. § 50-6-102(3)(A) (2005).

More to the point, the difference between "lost earning capacity" and "lost wages" is more semantic than substantive. The Supreme Court has said that "[t]he purpose of workers' compensation is to provide injured workers with periodic payments as a substitute for lost wages in a manner consistent with the worker's regular wage." *Perdue v. Green Branch Mining Co., Inc.*, 837 S.W.2d 56, 59 (Tenn. 1992); *see also Van Hooser v. Mueller Co.*, 741 S.W.2d 329, 330 (Tenn. 1987). We therefore conclude that the learned chancellor erred in declining to set-off benefits paid pursuant to the LTD plan.

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[1] Employee did not contest setting off LTD payments as to temporary total disability benefits paid by Employer.

CONCLUSION

The judgment of the trial court is modified to award 32% permanent partial disability to the body as a whole. The case is remanded to the trial court for determination of the amount of set off payments made by Employer under the LTD plan. Costs are taxed to the appellee, Sandra Deller, for which execution may issue if necessary.

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D. J. ALISSANDRATOS, SPECIAL JUDGE

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Sandra Deller 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to appellee, Sandra Deller, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holder, J., not participating