

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

September 24, 2007 Session

JEFFREY COTTON v. GOODYEAR TIRE & RUBBER COMPANY ET AL.

**Direct Appeal from the Chancery Court for Obion County
No. 22,784 William Michael Maloan, Chancellor**

No. W2006-02291-SC-WCM-WC - Mailed March 12, 2008; Filed May 28, 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 was a diabetic. He suffered a compensable shoulder injury, which required two surgeries and another procedure to correct. He returned to work on light duty status. Some time later, he fell into a diabetic coma. He subsequently developed renal failure and required dialysis thereafter. The trial court found Employee to be permanently and totally disabled, found that the shoulder injury alone had caused a 30% permanent partial disability, and apportioned the award between Employer and the Second Injury Fund. The Fund has appealed, contending that the trial court erred in awarding benefits for permanent total disability. Employee contends that the trial court erred in attributing only 30% disability to the shoulder injury, and in apportioning the award under Tennessee Code Annotated section 50-6-208(a). We affirm the judgment and remand the case for proceedings consistent with this opinion and the Suggestion of Death upon the Record filed in this matter.

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

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

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Lauren S. Lamberth, Assistant Attorney General, for the appellant, Second Injury Fund.

Jeffrey A. Garrety, Jackson, Tennessee, for the appellee, Jeffrey Cotton.

Randy N. Chism, Union City, Tennessee, for the appellee, Goodyear Tire & Rubber Company.

MEMORANDUM OPINION

Factual and Procedural Background

Jeffrey Cotton (“Employee”) sustained an injury to his right shoulder on November 18, 2000. The injury occurred while he was working as a tire builder for Goodyear Tire & Rubber Company (“Employer”). He was treated by Dr. Keith Nord, an orthopaedic surgeon. Dr. Nord diagnosed right shoulder impingement. He performed an arthroscopic surgical procedure to correct this condition on April 5, 2001. Employee had only slight improvement as a result of the surgery. On July 26, 2001, Dr. Nord performed a procedure in which the shoulder was manipulated while Employee was under anaesthesia. The result of this procedure was not satisfactory. Dr. Nord therefore performed a second arthroscopic surgery on October 18, 2001. Employee’s right shoulder symptoms improved thereafter, but did not completely resolve.

Employee returned to work in a light duty capacity in February 2002. He continued to work until May 2003. He had been an insulin-dependent diabetic for a number of years. On May 20, 2003, he lapsed into a diabetic coma. Thereafter he developed renal failure, which made it necessary for him to have dialysis three times per week. He also had an episode of cardiac arrest or heart failure in the summer of 2003.

Dr. Nord released Employee from his care on June 6, 2003. At that time, Employee had good range of motion, with some residual weakness. Dr. Nord assigned an impairment of 6% to the body as a whole and allowed Employee to return to full duty. Employee did not return to work, however, due to the heart and kidney problems caused by his diabetic condition.

Dr. Joseph Boals conducted an independent medical evaluation at the request of Employee’s attorney in July 2003. He opined that Employee retained a permanent impairment of 19% to the body as a whole as a result of the shoulder injury. Dr. Boals recommended that Employee avoid “overhead work, work away from the body and work requiring repetitive flexion-extension of the shoulder.” On cross-examination, Dr. Boals stated that these were recommendations and not restrictions. Dr. Boals also stated that diabetic patients can have more difficulty in recovering from surgical procedures than non-diabetic patients. He stated that multiple surgical procedures can aggravate diabetes due to the interruption of insulin intake. However, he had not reviewed any records concerning Employee’s diabetes and did not testify specifically concerning Employee in this regard.

Employee introduced the deposition testimony of Robert Kennon, Ph.D, a vocational evaluator. Dr. Kennon testified that Employee had an IQ of eighty and that he was able to read and perform arithmetic at a sixth grade level. Dr. Kennon opined that Employee was totally disabled as a result of all of his medical conditions. He further testified that the shoulder injury alone resulted in a 68% vocational disability, based upon the activity limitations recommended by Dr. Boals. He further testified that, based upon Dr. Nord’s opinions, Employee has no permanent vocational disability as a result of the injury.

Employee’s primary care physician, Dr. David Jones, testified by deposition. Dr. Jones

testified that Employee was diagnosed with diabetes in 1990 by his previous primary physician. Dr. Jones became Employee's doctor in 1994. Employee was originally treated with oral medication. According to Dr. Jones, "[A]s a general rule, oral agents will only hold a diabetic for 6 or 7 years. Then, after approximately that amount of time, most of them need insulin." By 1997, Employee was "on insulin." Dr. Jones testified that Employee had difficulty in controlling his diabetes over the years. He testified that factors such as night shift work can make it more difficult for a diabetic to control his disease. Dr. Jones testified that he considered Employee to be totally disabled because he required "chronic dialysis."

Employee was fifty-two years old. He had graduated from high school. He had worked for employer from the time he was nineteen years old until his medical retirement in 2004. He had two previous workers' compensation awards, which totaled 30.5% permanent partial disability to the body as a whole.

The trial court found that Employee was permanently and totally disabled. It found that Employee had sustained a 30% permanent partial disability as a result of his shoulder injury, and apportioned 70% of the liability for the award to the second injury fund pursuant to Tennessee Code Annotated section 50-6-208(a). The Second Injury Fund has appealed from the judgment entered on those findings. During the pendency of the appeal, a Suggestion of Death upon the Record was filed notifying this Panel that the plaintiff died on February 14, 2008.

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, 733 (Tenn. 2002). 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 Mach., Tool & Die, 152 S.W.3d 439, 443 (Tenn. 2004).

ANALYSIS

1. Permanent Total Disability

It is not disputed that Employee is permanently and totally disabled. However, the Fund (and to a lesser extent, Employer), contend that Employee's shoulder injury is not the cause of his total disability, either by itself or in combination with his pre-existing diabetic condition. They contend that the diabetic condition is the sole reason that Employee is totally disabled, and therefore Tenn.

Code Ann. § 50-6-208(a) does not apply. In support of its position, the Fund cites Employee's return to work, albeit in a light duty status, for fifteen months; the testimony of Dr. Jones that Employee was unable to work because of his continuing dialysis; Dr. Nord's testimony that he placed no permanent restrictions upon Employee's activities; and statements by Dr. Boals which imply that the shoulder injury is not totally disabling.

In response, Employee notes that he was able to return to work only in a light duty capacity. He also takes the position that his multiple surgeries and shift work for Employer aggravated or accelerated his pre-existing diabetic condition, and that his total disability is the result of the combination of that condition and the shoulder injury. In making this argument, Employee does not distinguish between the underlying diabetes and the kidney and heart problems that arose after May 2003. This position is based upon the unstated premise that the latter conditions were caused, in whole or in part, by a work-related aggravation of the diabetes.

Employee had returned to work, and continued to work, until May 2003. He stopped working at that time because he lapsed into a diabetic coma. After that event, Employee did not return to work because he suffered renal failure and required dialysis. He also had significant problems with his heart as a result of the worsening of his diabetes.

Dr. Jones testified that the multiple surgical procedures that Employee had in 2001 "were contributing and aggravating factors . . . in the ongoing management of his diabetes." He also testified that the "natural progression of diabetes is 15 to 20 years, they are going to get into renal failure and complications of . . . kidneys, heart, etc." He was unwilling to state whether the surgeries associated with Employee's work-related shoulder injury had accelerated that progression.

Section 50-6-208(a) states, in pertinent part:

If an employee has previously sustained a permanent physical disability from any cause or origin and *becomes permanently and totally disabled through a subsequent injury*, such employee shall be entitled to compensation from the employee's employer or the employer's insurance company only for the disability that would have resulted from the subsequent injury. . . ."

(emphasis added).

Neither the Fund, Employer, nor Employee cite any Tennessee cases concerning this section that directly address a permanent total disability that occurs as a result of a subsequent aggravation or deterioration of a pre-existing condition. We consider Rhodes v. Capital City Ins. Co., 154 S.W.3d 43 (Tenn. 2004) to be useful in analyzing this issue, although not directly on point. In that case, the employee suffered a compensable heart attack. After recovering, he returned to his prior job as a lumberjack for approximately three years. He was able to perform his job, with assistance, during that time. Eventually, he was unable to continue working. He was found to be permanently and totally disabled as of the date he was no longer able to work, but not during the period when he was working. Liability was apportioned to the Second Injury Fund under Tennessee Code

Annotated section 50-6-208(b), rather than 208(a) as in this case. However, neither the trial court, nor the Supreme Court, took issue with permanent total disability arising from a change in condition after a return to work.

Dr. Jones' testimony, as outlined above, provides a basis for finding the existence of a causal relationship between Employee's work-related injury and his eventual permanent total disability. Further, Employee's wife testified that his diabetes was more difficult to control after the work-related injury and subsequent surgeries. Upon our review of the entire record, we are unable to conclude that the evidence preponderates against the judgment of the trial court on this issue.

2. Extent of Disability from Shoulder Injury

The trial court found that the shoulder injury resulted in a 30% permanent partial disability without reference to any other injury or condition, as required by section 50-6-208(a).¹ Employee contends that the evidence preponderates against this finding and in favor of a finding that a much greater disability arose from that injury. In its findings, the trial court observed that the 6% impairment assigned by Dr. Nord was "somewhat low." The court also noted that the 19% rating assigned by Dr. Boals was "somewhat high under the facts." The court also referred to Dr. Boals' testimony that he did not intend for his recommended limitation of activities to exclude Employee from any work. Dr. Nord noted that Employee had residual weakness of the shoulder as a result of his injury, but released him to full duty. Employee returned to work for Employer for fifteen months, albeit in a light duty capacity. Based upon these considerations, we are unable to conclude that the evidence preponderates against the trial court's finding on this issue.

3. Apportionment

Employee contends the trial court should have apportioned the award of permanent total disability pursuant to Tennessee Code Annotated section 50-6-208(b), rather than 50-6-208(a). He reasons that because his work schedule and multiple surgeries aggravated his diabetes, that all disability from the combined effect of the shoulder injury and the aggravation should be attributed to Employer. We disagree. The medical evidence shows that the diabetic condition constituted a significant disability, unrelated to his work, prior to the injury. The existence of a such a disability

¹ Contrary to the assertions of the dissent, trial courts are not permitted to consider the aggravation of a pre-existing injury when apportioning damages between an employer and the Second Injury Fund. The Tennessee Supreme Court has explicitly stated that if an employee is found to be totally and permanently disabled by the combination of a pre-existing disability and a subsequent injury, then the trial court is required to "determine the extent of disability resulting from the subsequent injury without consideration of the prior injury." Allen v. City of Gatlinburg, 36 S.W.3d 73, 77 (Tenn. 2001) (emphasis added). Stated differently, trial courts "must find what disability would have resulted if a person with no preexisting disabilities, in the same position as the plaintiff, had suffered the second injury but not the first." Id.; see also Watt v. Lumbermens Mut. Cas. Ins. Co., 62 S.W.3d 123, 130 (Tenn. 2001); Bomely v. Mid-America Corp., 970 S.W.2d 929, 934 (Tenn. 1998). Considering the extent to which the subsequent injury aggravated the pre-existing injury would require us to ignore the plain language of Tennessee Code Annotated 50-6-208(a) and well-established Supreme Court precedent. Indeed, the dissent's reasoning defeats the Second Injury Fund statute's goal of limiting employer liability and encouraging the hiring of injured workers. See Bomely, 970 S.W.2d at 935.

is precisely the situation addressed by section 50-6-208. For the reasons set out above, we agree with the trial court's finding that Employee would have sustained a 30% permanent partial disability as a result of his shoulder injury, without regard to his pre-existing condition. In accordance with the analysis set out in Bomely, 970 S.W.2d at 934, and Perry v. Sentry Ins. Co., 938 S.W.2d 404 (Tenn.1996), the trial court correctly chose the apportionment method that was more favorable to Employer.

Conclusion

The judgment of the trial court is affirmed. The case is remanded to the trial court for further proceedings consistent with this opinion and the Suggestion of Death upon the Record filed in this matter. Costs are taxed one-third to the Second Injury Fund, one-third to Goodyear Tire & Rubber Company, and one-third to Jeffrey Cotton, for which execution may issue if necessary.

D. J. ALISSANDRATOS, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

**JEFFREY COTTON v. GOODYEAR TIRE & RUBBER
COMPANY ET AL**

**Chancery Court for Obion County
No. 22784**

No. W2006-02291-SC-WCM-WC - Filed May 28, 2008

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Sue Ann Head, Administrator, Division of Workers' Compensation, Tennessee Department of Labor and Workforce Development, 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 one-third to the Second Injury Fund, one-third to Goodyear Tire & Rubber Company, and one-third to Jeffrey Cotton, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holder, Janice M., J., not participating