IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 25, 2008 Session

CHARLIE D. EVANS, JR. v. CHEROKEE INSURANCE COMPANY ET AL.

Direct Appeal from the Chancery Court for Shelby County
No. CH-06-0956-2 Arnold B. Goldin, Chancellor

No. W2007-02769-SC-WCM-WC - Mailed February 23, 2009; Filed May 28, 2009

In 2005, the employee, a truck driver, sustained a compensable injury to his right leg that also aggravated a pre-existing low back condition. As a result of childhood polio, the employee's left leg and foot were substantially smaller and weaker than his right leg and foot. The employee reported this pre-existing condition to the employer when hired in 2003. Medical proof established the employee's combined anatomical impairment at 14% to the body as a whole. The trial court found that the employee was permanently and totally disabled. The trial court assigned 84% of the award to the employer's workers' compensation insurance carrier, Cherokee Insurance Company, and 16% to the Second Injury Fund. The employer appealed, arguing that the trial court erred by finding the employee to be permanently and totally disabled. The Second Injury Fund appealed, arguing that it is without liability because the employee performed his truck-driving duties without restrictions or accommodations, thus, the employer did not have "actual knowledge" of the employee's prior disability. Alternatively, the Second Injury Fund contends that the trial court's award of permanent and total disability is not supported by the evidence. After review, the judgment of the trial court is affirmed.[1]

Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right;
Judgment of the Chancery Court Affirmed

DAVID G. HAYES, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, C. J., and DONALD P. HARRIS, SR. J., joined.

Carl K. Wyatt and Kyle I. Cannon, Memphis, Tennessee for the appellant, Cherokee Insurance Company, and Builder's Transportation, Inc.

Christopher L. Taylor, Memphis, Tennessee, for the appellee, Charlie D. Evans, Jr.

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[1]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 a hearing and a report of findings of fact and conclusions of law.

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

MEMORANDUM OPINION

Factual and Procedural Background

Charlie Evans ("Employee") was employed by Builder's Transportation, Inc. ("Employer") as a "flatbed" truck driver. In addition to driving approximately 600 miles per day delivering freight, Employee was also responsible for securing the load with chains or restraints and tarping the freight if necessary. On April 8, 2005, Employee was securing a tarp on a flatbed trailer in Blytheville, Arkansas, when he lost his balance and fell approximately five feet to the ground, injuring his right leg and foot. Employee was transported to a local "emergency treatment center" where x-rays were taken and his right leg was placed in a boot. Employer's safety director drove Employee to Memphis, where he was met by a family member who returned Employee to his residence in South Carolina.

At the time of the accident, Employee was fifty-one years old. He attended school through the tenth grade and later obtained a GED. Prior to becoming a truck driver in 1994, Employee had worked as a meat cutter for fifteen years. Employee began driving for Employer in June 2003, and, prior to his injury in April 2005, had no problem performing his assigned task.

As a small child, Employee contracted polio, which particularly affected his left leg. As a result of this disease, Employee's left leg and foot were substantially smaller and weaker than his right leg and foot. Additionally, Employee suffered from pre-existing vascular problems in both of his lower extremities, which, along with his history of polio, was disclosed in his application for employment with Employer.

After returning to South Carolina, Employee was referred to Dr. Michael O'Boyle, an orthopaedic surgeon in Greenville, South Carolina. Dr. O'Boyle determined that Employee had a fractured calcaneus, or heel bone. Employee's fracture was surgically repaired with a metal plate and screws. In July 2005, Employee returned to light-duty work for approximately twelve weeks, performing sedentary functions in Employer's office. In November 2005, Dr. O'Boyle released Employee to return to work as a truck driver, with a twenty-five-pound lifting restriction. Before Employee returned to work as a truck driver, however, he underwent vascular surgery on his left leg to remove a blockage. In May 2006, Dr. O'Boyle found Employee to be at maximum medical improvement. Employee was released, and Dr. O'Boyle assigned an anatomical impairment rating of 15% to the right lower extremity.[2] Dr. O'Boyle released Employee to return to work as a truck driver, with permanent restrictions of no walking for excessive periods, no working at heights over six feet, and no excessive walking on uneven ground.

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[2]The parties stipulated that 15% to the lower extremity equates to 6% to the body as a whole.

In June 2005, Employee saw Dr. Robert Schwartz, a specialist in physical medicine and rehabilitation, complaining of pain in his left leg, hip, and lower back. Employee first saw Dr. Schwartz in 2002 for medical problems related to the effects of his childhood polio. After an examination and EMG testing, Dr. Schwartz determined that Employee had an "irritation" of the left L5 nerve. Dr. Schwartz opined that this was related to the April 2005 injury. Specifically, he stated that "[Employee's] work-related injury of 4/8/05 aggravated his underlying polio and low back and hip conditions. The right heel fracture with resultant [surgery] caused additional mechanical compensatory pressure on his low back that resulted in right L5 radiculopathy." Dr. Schwartz assigned an impairment of 8% to the body as a whole for this condition. He expressed the opinion that Employee was not "capable of gainful employment for anything other than sedentary work."

Employee testified that since his injury in April 2005, his left leg has grown progressively weaker and that he is now required to wear a brace on this leg and walk with a cane. Employee states that he has difficulty standing or sitting for any period of time, bending over, or doing simple household chores. Employee testified that he is in pain 100% of the time and that he takes pain medication on a daily basis. As a result of his medical problems, he asserts that he is no longer able to drive a commercial truck. He explained that it is difficult to engage the clutch on a tractor-truck with a brace on his left leg and to depress the truck's brake pedal with a steel plate in his right foot. Moreover, Employee testified that the restrictions imposed by Dr. O'Boyle and Dr. Schwartz would prevent him from holding any of his previous jobs. He expressed the opinion that he was no longer able to work in any capacity.

The trial court found that Employee was permanently and totally disabled. Applying Tennessee Code Annotated section 50-6-208(a), the court apportioned 84% of the award to Employer, and 16% to the Second Injury Fund ("The Fund"). Employer and the Fund appealed, contending that the trial court erred in finding Employee to be permanently and totally disabled. In the alternative, the Fund contends that the trial court erred in finding the Fund partially liable.

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) (Supp. 2007). When 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. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). A reviewing 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); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. *Ridings v. Ralph M. Parsons Co.*, 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

Permanent Total Disability

Employer contends that the evidence preponderates against the trial court's finding that Employee was permanently and totally disabled. In support of this position, Employer cites the testimony of Dr. Schwartz that Employee is capable of sedentary work. Employer points out that Employee performed such work for twelve weeks after being released to light duty by Dr. O'Boyle. Employer further notes that no vocational proof concerning Employee's intellectual abilities or transferrable skills was introduced at trial.

In response, Employee relies upon his own testimony concerning his inability to work. He asserts that essentially all of his adult work experience has been in either one of two occupations, meat cutter or truck driver. He testified that his previous job as a meat cutter required that he stand on his feet for eight hours a day and involved heavy lifting in the unloading of meat products from trucks. Employee stated that he is no longer able to perform either position due to the restrictions imposed by Dr. O'Boyle and Dr. Schwartz.

Permanent total disability occurs when an injured employee is totally incapacitated "from working at an occupation which brings the employee an income." Tenn. Code Ann. § 50-6-207(4)(B) (2008). When determining whether an injured employee is permanently and totally disabled, the Court must consider "a variety of factors such that a complete picture of an individual's ability to return to gainful employment." *Hubble v. Dyer Nursing Home*, 188 S.W.3d 525, 535-536 (Tenn. 2006). "Such factors include the employee's skills, training, education, age, job opportunities in the immediate and surrounding communities, and the availability of work suited for an individual with that particular disability." *Id.*; *see also Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000). These factors are usually presented to the trial court by a vocational expert, nonetheless, "'it is well settled that despite the existence or absence of expert testimony, an employee's own assessment of his or her overall physical condition, including the ability or inability to return to gainful employment, is competent testimony that should be considered.'" *Id.* (quoting *Vinson v. United Parcel Service*, 92 S.W.3d 380, 386 (Tenn. 2002)).

In the present case, the injured employee is fifty-one years old, possesses a GED, and displays no transferrable skills. There is no evidence concerning his ability to read, write, or perform basic arithmetic, or his ability to learn or improve in those areas. His injury rendered him incapable of performing either of the two positions he had occupied for nearly his entire adult life. He was able to briefly perform light duty work in Employer's office in which he "shuffled papers [and] answered phones." It is unclear from the record, however, whether this was a regular position on Employer's payroll or a position created solely for the purpose of providing work to Employee during his period of temporary disability. In *Cleek*, the Supreme Court noted that while "the fact of employment after injury is a factor to be considered in determining whether an employee is permanently and totally disabled, this fact is to be weighed in light of all other considerations." 19 S.W.3d at 775.

Other than the Employee's testimony, the proof is sparse with regard to objective factors relevant in making an assessment of vocational disability. Nevertheless, such independent proof is not a requirement for a finding of permanent and total disability. *Vinson*, 92 S.W.3d at 386. Moreover, Employer presented no evidence to refute Employee's testimony that he is presently unable to work. Our independent review of the record leads us to the conclusion that the evidence does not preponderate against the trial court's finding that Employee is permanently and totally disabled.

Liability of Second Injury Fund

The Second Injury Fund contends that the trial court improperly applied Tennessee Code Annotated section 50-6-208(a)(2), which provides in pertinent part:

> To receive benefits from the second injury fund, the injured employee must be the employee of an employer who has properly insured such employer's workers' compensation liability . . . , and the employer must establish that the employer had actual knowledge of the permanent and preexisting disability at the time that the employee was hired or at the time that the employee was retained in employment after the employer acquired such knowledge, but in all cases prior to the subsequent injury.

The Fund argues that, although Employer was aware of Employee's pre-existing polio, it was not aware of any resulting *disability*. Employee worked under no restrictions, and Employer provided no accommodations to permit him to carry out his job. The Fund cites *Smith v. Fleeman's Transport, Inc.*, No. M2004-01709-WC-R3-CV, 2005 WL 2276892, *1 (Tenn. Workers' Comp. Panel, Sept. 20, 2005) in support of its position. In *Smith*, the employee had several medical conditions of which the employer was aware, including a lazy eye, a knee injury, and surgeries on his wrist. There had been no impairment ratings or disability awards, however, associated with these conditions, and the employee required no special accommodations to perform his job. No evidence was introduced that the employer "was informed that Mr. Smith had a permanent disability or lacked the ability to perform any of his job functions." *Id*. at *2. The trial court apportioned the workers' compensation award to both the employer and the Second Injury Fund. On appeal, the Workers' Compensation Appeals Panel reversed, relying on *E. I. Dupont De Nemours and Co. v Friar*, 404 S.W.2d 518, 522 (Tenn. 1966), which held that section 208(a) required that "the employer know of a physical condition of the employee, at the time of the hiring of the employee, which detracted from such employee's competitiveness in the job market." The Appeals Panel in *Smith* found that the employer had "failed to prove that its knowledge of [the employee]'s prior injuries caused it to believe [the employee] was a less marketable employee" and reversed the decision of the trial court.

Employer asserts that the existence of a pre-existing disability was obvious in this case, as Employee's left leg and foot were considerably smaller and weaker than his right foot and leg. Employer contends that the Tennessee Supreme Court's decision in *Whiteside v. Morrison, Inc.*, 799 S.W.2d 213 (Tenn. 1990) is instructive. In *Whiteside*, the employee had a congenital malformation

of the blood vessels in his brain, which made him susceptible to hemorrhages. *Id*. at 313-14. As a result of the condition, he had limited use of his left hand and arm. The employer was aware of the left arm problem, but not the cause. The trial court dismissed the claim against the Fund, but the Supreme Court reversed. *Id*. at 216. The Court found that the employer's knowledge of the "physical limitations of the employee's left side" was sufficient to satisfy the requirements of section 208(a). *Id.*

In the instant case, Employee had a significant medical condition that substantially limited the use of his left leg. The proof amply demonstrates that Employer had knowledge of that condition. Moreover, while Employee did not require any accommodation in order to perform his job for Employer, there is little doubt from the evidence in this record that a reasonable person would believe that the effects of polio detracted from Employee's "competitiveness in the job market." *Friar*, 404 S.W.2d at 522.

Mindful that "the purpose behind the creation of the Second Injury Fund was to encourage employers to hire individuals with permanent physical disabilities by limiting the employer's liability in the event of a second injury," *Turner v. HomeCrest Corp*., 226 S.W.3d 273, 278 (Tenn. 2007), we conclude that the evidence does not preponderate against the trial court's finding on this issue.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed one-half to Cherokee Insurance Company, and its surety and one-half to the Second Injury Fund.

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DAVID G. HAYES, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

CHARLIE D. EVANS, JR. v. CHEROKEE INSURANCE COMPANY ET AL

Chancery Court for Shelby County
No. CH-06-0956-2

No. W2007-02769-SC-WCM-WC - Filed May 28, 2009

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Cherokee Insurance Company et al, 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 one-half to Cherokee Insurance Company and its surety, and one-half to the Second Injury Fund, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holder, Janice M., C.J., Not Participating