

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 19, 2018 Session

**RICKY ARMSTRONG v. ARMSTRONG HARDWOOD
FLOORING COMPANY**

**Appeal from the Chancery Court for Madison County
No. 74458 James F. Butler, Chancellor**

No. W2018-00427-SC-R3-WC – Mailed February 21, 2019; Filed April 5, 2019

Ricky Armstrong (“Employee”) alleged that he injured his lower back, neck, and left shoulder in the course and scope of his employment with Armstrong Hardwood Flooring Company (“Employer”). The trial court determined that Employee was permanently and totally disabled. Employer’s appeal has been referred to the Special Workers’ Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. We affirm the trial court’s judgment.

**Tenn. Code Ann. § 50-6-225(e) (2014) (applicable to injuries
occurring prior to July 1, 2014) Appeal as of Right;
Judgment of the Chancery Court Affirmed as Modified**

WILLIAM B. ACREE, SR.J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and ROBERT E. LEE DAVIES, SR.J., joined.

Ricky Boren, Jackson, Tennessee, for the appellee, Ricky Armstrong.

William Kendall, Jackson, Tennessee, for the appellant, Armstrong Hardwood Flooring Company.

OPINION

Factual and Procedural Background

Employee, age 59 at the time of trial, has a tenth grade education and an employment history of manual labor and machine operation. In December 2013, he began working for Employer as a material handler, which required him to lift up to fifty pounds. On February 25, 2014, he was struck in the head by a falling pipe and knocked unconscious. He was taken to the hospital by ambulance, treated, and released. Employee was referred to Physicians' Quality Care and subsequently treated by Dr. Fereidoon Parsioon and Dr. David Yakin. Dr. Yakin performed surgery on Employee's left shoulder in February 2015 and July 2015.

Employee did not work following the accident. In April 2014, he was laid off due to a reduction in Employer's workforce. Employee has difficulty walking, sleeping, standing, and doing chores with his left arm. He takes hydrocodone for pain. He admitted that he can drive and operate a motor vehicle but not when he is taking medication. Employee can no longer do the type of work he did for Employer and has not sought new employment.

Dr. Yakin, an orthopedic surgeon, testified by deposition that he examined Employee on June 10, 2014. Employee reported pain in his left shoulder, neck, and back due to an incident that occurred at work. An examination revealed "full range of motion of [Employee's] hips and knees," limited rotation on his left side, and limited range of movement in his left shoulder. An x-ray of his cervical spine revealed a loss of lordosis; an x-ray of his lumbar spine was normal. Dr. Yakin concluded that Employee had "left shoulder impingement and cervical and lumbar strain." He gave Employee an injection for his left shoulder and ordered physical therapy. A subsequent MRI of Employee's left shoulder "revealed a high grade partial thickness tear of the supraspinatus tendon, which is one of the rotator cuff tendons." On March 25, 2015, Dr. Yakin performed an arthroscopy with debridement, acromioplasty, and rotator cuff repair. In July 2015, Dr. Yakin performed a second procedure because Employee had developed adhesive capsulitis, also known as frozen shoulder. Employee reported ongoing pain in his shoulder in subsequent appointments. In September 2015, an MRI revealed persistent tendinosis of the rotator cuff. Dr. Yakin recommended a stem cell injection, but the procedure was not approved. Dr. Yakin prescribed anti-inflammatory medication and imposed restrictions on lifting over shoulder level and doing overhead work.

Dr. Yakin recommended Employee undergo a Functional Capacity Examination ("FCE"). In November 2015, Employee completed an FCE with Mr. Reilly. Although the FCE indicated Employee could do light to medium work, it also revealed Employee had decreased oxygen carrying capacity related to COPD that reduced him to sedentary

work. Dr. Yakin agreed that a twenty-pound lifting restriction was reasonable. He also stated, however, that Employee may need as many as three injections per year for tendinosis of the rotator cuff. He concluded Employee suffered 10% impairment to his left upper extremity, which equated to 6% impairment to the body as a whole.

Dr. Fereidoon Parsioon, a neurosurgeon, testified by deposition that he examined Employee on September 29, 2014. Employee reported that he was injured when a steel pipe hit him on the left side of his head and neck and knocked him to the ground. He complained of headaches, neck pain, left shoulder pain, back pain, and hip pain. Employee's hospital records following the incident revealed no sign of trauma to the face, head, or neck and a normal score of 15 on the Glasgow Coma Scale. A CT scan of Employee's neck showed mild arthritis. Employee denied having problems with his back and neck before this incident at work. Dr. Parsioon testified that Employee's physical examination was "basically normal," and he ordered an MRI of the cervical spine, lumbar spine, brain, and left shoulder. The MRI of the cervical spine revealed a bone spur and "chronic degenerative spondylosis or arthritic changes" but no ruptures or fractures. The MRI of the lumbar spine revealed degenerative changes but did not show "any ruptured disc or fractures or tumors or any surgical abnormalities." The MRI of the brain showed severe sinusitis but was otherwise normal. The MRI of the left shoulder showed a rotator cuff tear for which Employee was referred back to Dr. Yakin. Dr. Parsioon assigned zero impairment for the cervical and lumbar injuries.

Dr. Apurva Dalal conducted an independent examination on February 3, 2016. He testified by deposition that Employee had "moderate paraspinal muscle spasms" in his neck and "moderate paraspinal muscle spasms" and tenderness in his lower lumbar spine. Dr. Dalal said that, when stenosis becomes symptomatic, "it's typically aggravation of the preexisting degenerative disc disease." Employee had a significant loss of motion in his left shoulder and had severe adhesive capsulitis. Dr. Dalal imposed restrictions against lifting more than five pounds and recommended Employee avoid pushing, pulling, overhead work, work away from the body, and prolonged walking, bending, stooping, squatting, and climbing. He testified that Employee suffered 3% impairment for his cervical injury, 7% impairment for his lumbar spinal stenosis with non-verifiable radiculopathy, and 23% impairment for his left upper extremity injury. He assigned an overall impairment of 22% to the body as a whole.

Dr. Robert Kennon testified that he performed a vocational assessment on Employee on December 14, 2016. He considered Employee's medical history, mental status, psychological testing, academic testing, work history, and transferable skills. He noted that Employee had a history of working in medium to heavy strength jobs. Medium work requires lifting up to fifty pounds and light work requires lifting up to twenty pounds. In evaluating Employee's cognitive skills, he found that Employee ranked in the fifth percentile, which means that 95% of the population scores at a higher

level than Employee on this measure of intelligence. Additionally, Employee's cognitive ability fell into the borderline range for intellectual deficiency.

Dr. Kennon performed a transferable skills analysis on Employee. He testified:

A. A transferable skills analysis is an analysis that evaluates an individual's prior work history, their experience, the type of jobs that they've conducted historically. It evaluates what their physical capabilities have been historically, what was required to do in each of those jobs, what types of materials, the subject matter that they dealt with, the types of training that they may have had to undergo, and then it looks at — that analysis looks at what possible opportunities an individual might have, particularly in light when you kind of lay over any type of impairment or any type of physical restriction that might be assigned by a physician.

....

A. I did several transferable skills analysis in this case. . . .

Dr. Dalal in his analysis and recommendations opined that Mr. Armstrong will be precluded to five pounds of lifting weight, that he should avoid pushing/pulling, overhead work, work away from the body, and prolonged walking, bending, stooping, squatting, and climbing. When you run a transferable skills analysis on that, in reality he doesn't even meet the criteria for sedentary work activity, which requires you to be able to lift up to ten pounds, so he doesn't meet that criteria. But when I ran an analysis, as you would expect, there was a severe loss of highly and moderately transferable job titles, being 99.83 percent highly and 99.93 percent moderately. . . .

....

A. [The analysis] doesn't take into consideration any type of cognitive limitations that he may have and obstacles that he may have in returning back to the workforce.

....

A. Yes, [cognitive limitations] are significant, very significant in the fact that he doesn't have a lot of vocational skills. He doesn't have a lot of — or developed vocational skills that would offer him alternative opportunities. He's also a — not a really great candidate at this juncture to

undergo vocational rehabilitation just from the standpoint of his age, the standpoint of his low cognitive ability, and his limited academic skills

When asked how the twenty-pound lifting restriction assigned by Dr. Yakin affected the transferable skills analysis, Dr. Kennon said the loss of transferable job titles was 62%.

Dr. Kennon also testified about the FCE performed by Mr. Reilly. In reviewing the FCE, Dr. Kennon noted that Mr. Reilly determined that Employee was only able to perform work duties rated in the sedentary category for cardiovascular endurance because Employee demonstrated decreased oxygen-carrying capacity throughout the FCE testing process. Dr. Kennon opined that Mr. Reilly's assessment was that Employee could physically lift in the light to medium range, but he did not meet a full range of medium work activity because Employee was only able to work in the sedentary range. Dr. Kennon performed an evaluation based on the sedentary criteria, and it produced a 97.96% loss of highly transferable job titles.

Patsy Bramlett conducted a vocational assessment on behalf of Employer on September 18, 2017. She testified that she considered Employee's work history, educational background, and medical records. Citing the findings in the FCE, she found a 33% vocational disability based on Employee's ability to do medium work. She did not consider evidence of Employee's impaired breathing ability during the FCE. If using the twenty-pound lifting restriction imposed by Dr. Yakin, Ms. Bramlett found Employee had a 56% loss of labor market or 45% vocational disability. She agreed Employee's disability would be greater if using Dr. Dalal's five-pound lifting restriction.

After making a detailed analysis of the evidence, the trial court concluded that Employee incurred an impairment of 6% to the body as a whole for his shoulder injury, 7% to the body as a whole for his low back injury, and 3% to the body as a whole for his neck injury. In its analysis, the court noted that it was more persuaded by Dr. Kennon's evaluation of Employee's vocational disability than Ms. Bramlett's evaluation. The court further found that, when Dr. Yakin's statements and twenty-pound weight limit were combined with Employee's breathing rate problem, Employee was in the sedentary category. The sedentary category produced a 99.9% loss of job titles to the Employee. In determining that Employee is not a good candidate for a job, the court considered Employee's academic level, which ranged from fifth to seventh grade; Employee's inability to obtain a commercial driver's license for five years; Employee's daily medications; and Employee's age and difficulty retraining. The court ultimately found that Employee "cannot work at any employment which brings him income and that he is permanently and totally disabled as a result of the injury he received on or about February 25, 2014 while employed and working at Armstrong Hardwood Flooring Company."

Standard of Review

Review of factual issues 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. *See* Tenn. Code Ann. § 50-6-225(e)(2). Considerable deference is afforded to the trial court's findings with respect to the credibility of witnesses and the weight to be given their in-court testimony. *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. The 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).

Analysis

I.

Employer argues that the trial court erred in awarding permanent and total disability, in part, because the trial court considered Employee's decreased oxygen carrying capacity or COPD. Employee argues that the evidence does not preponderate against the trial court's judgment.

“When an injury not otherwise specifically provided for in this chapter totally incapacitates the employee from working at an occupation that brings the employee an income, the employee shall be considered totally disabled and for such disability compensation shall be paid as provided in subdivision (4)(A)” Tenn. Code Ann. § 50-6-207(4)(2014) (applicable to injuries occurring prior to July 1, 2014). Any inquiry as to whether an employee is permanently and totally disabled from a legal perspective must “focus on the employee's ability to return to gainful employment.” *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000) (quoting *Davis v. Reagan*, 951 S.W.2d 766, 767 (Tenn. 1997)). “The assessment of permanent total disability is based upon numerous factors, including the employee's skills and training, education, age, local job opportunities, and his [or her] capacity to work at the kinds of employment available in his [or her] disabled condition.” *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986). Although a rating of anatomical disability by a medical expert is also one of the relevant factors, “the vocational disability is not restricted to the precise estimate of anatomical disability made by a medical witness.” *Henson v. City of Lawrenceburg*, 851 S.W.2d 809, 812 (Tenn. 1993). In addition, the employee's “own assessment of her physical condition and resulting disability is competent testimony that should be considered.” *McIlvain v. Russell Stover Candies, Inc.*, 996 S.W.2d 179, 183 (Tenn. 1999).

The trial court found Employee is permanently and totally disabled after considering the factors outlined above. First, the trial court noted that Employee incurred an impairment of 6% to the body as a whole for his shoulder injury, 7% to the body as a whole for his lower back injury, and 3% to the body as a whole for his neck injury. Second, the trial court was “more persuaded by Dr. Kennon’s evaluation of . . . vocational disability than that of Mrs. Bramlett.” In relevant part, the trial court stated as follows:

Dr. Kennon noted that based on [Employee]’s cognitive ability, which was borderline, his ability to do sedentary work would be adversely [a]ffected because 95% of his peers have higher ability. Thus, [Employee] would be in the manual labor field for the most part. He noted his academic record where [Employee] reads on 7th grade level, spells at 7th grade level, but does math at 5th grade level. He noted his prior manual labor background. He also testified concerning the transferable skills analysis based on the restrictions purposed by Dr. Dalal and Dr. Yakin. The analysis based on Dr. Dalal’s restrictions excluded [Employee] from almost all job descriptions, even without considering his low education, low vocational skills, and other factors, such as his age and health.

Third, the trial court considered Dr. Dalal’s testimony that Employee should not do any manual work with his left upper extremity and “should not lift over 5 pounds of weight and should avoid pushing, pulling, overhead work, work away from the body, prolonged walking, bending, stooping, squatting, and climbing.” Fourth, the trial court considered Dr. Yakin’s twenty-pound weight restriction, which limited Employee to sedentary work. Finally, the trial court emphasized Employee’s intellectual deficits, age, inability to obtain a commercial driver’s license, and history of manual labor.

Despite the trial court’s findings, Employer argues that the trial court erred in considering that Employee’s “breathing rate problem . . . puts [Employee] in the sedentary category which produced a 99.9% loss of job titles.” In addition, Employer argues that the trial court should not have considered evidence that Employee currently takes pain medication for his condition because there was no expert proof to substantiate it.

Although Employee’s breathing problem or COPD was not caused by his work conditions, the trial court noted that Employee’s “low oxygen rate . . . is very important to vocational ability” in that “he could not sustain activity over a period of time.” The trial court did not treat these conditions as work-related injuries. The trial court’s findings as a whole, which considered Employee’s testimony, injuries, rates of impairment, limited intellectual ability, age, history of manual labor, Dr. Kennon’s

testimony,¹ and the work restrictions imposed by Dr. Dalal and Dr. Yakin, support the determination of permanent total disability without consideration of Employee's COPD.² Contrary to Employer's argument, the consideration by the trial court that Employee is taking pain medication that may impact his ability to find employment driving or operating machinery is supported by the evidence. In short, the evidence does not preponderate against the trial court's determination that Employee is permanently and totally disabled.

II.

Employer argues that the trial court erred in considering a lower back injury because Employee's lumber stenosis was not related to his work injury. Employer acknowledged before trial that causation was not a contested issue, and the trial court specifically found that causation was not contested. Moreover, Employee's evidence, including Dr. Dalal's testimony, was sufficient to establish an aggravation of a preexisting degenerative disc disease and was not rebutted by Employer.³ This issue is without merit.

Conclusion

After reviewing the evidence and the parties' arguments, we affirm the trial court's ruling. Costs are taxed to Armstrong Hardwood Flooring Company, for which execution may issue if necessary.

WILLIAM B. ACREE, SENIOR JUDGE

¹ The trial court accredited the testimony of Dr. Kennon, who opined that Employee incurred a 99% loss of job titles when applying the restrictions imposed by Dr. Dalal, even without considering Employee's breathing issues.

² It follows that Employer's argument that the trial court erred in relying on an occupational therapist's "diagnosis of COPD" during the FCE is without merit.

³ See *Trosper v. Armstrong Wood Products, Inc.*, 273 S.W.3d 598, 607 (Tenn. 2008) (noting that an injury is compensable if it "advances the severity of the pre-existing condition, or if, as a result of the pre-existing condition, the employee suffers a new, distinct injury other than increased pain"); see also *Excel Polymers, LLC v. Broyles*, 302 S.W.3d 268, 274-75 (Tenn. 2009) (noting that an employee is granted the benefit of "all reasonable doubts regarding causation of his or her injury").