IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
May 23, 2013 Session

LISA G. DIXON v. NISSAN NORTH AMERICA, INC. ET AL.

Appeal from the Chancery Court for Franklin County
No. 19,275 Jeffrey F. Stewart, Chancellor

No. M2012-02495-WC-R3-WC - Mailed 7-25-2013
FILED September 5, 2013

The issues in this case are (1) whether the evidence supports an award of 8% to the body as a whole for an injury covered by the Workers' Compensation statutes of this state, and (2) whether the trial judge erred in multiplying that award by a factor of six in the final judgment. The 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 conclude that the medical proof supports the trial court's finding of an 8% anatomical impairment and that the evidence does not preponderate against the trial court's finding that the employee is entitled to receive permanent partial disability benefits of six times the anatomical impairment rating. Accordingly, we affirm the trial court's judgment awarding the employee permanent partial disability benefits of 48% to the body as a whole.

Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2012) Appeal as of Right; Judgment of the Chancery Court Affirmed

BEN H. CANTRELL, SR. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, J., and E. RILEY ANDERSON, SP. J., joined.

Frank C. Lynch, Winchester, Tennessee, for the appellants, Nissan North America, Inc. and Ace American Insurance Company.

Barry H. Medley, McMinnville, Tennessee, for the appellee, Lisa G. Dixon

OPINION

Factual and Procedural Background

Lisa Dixon ("Employee") an assembly line worker for Nissan North America ("Employer"), was performing her job on November 7, 2007 when she felt a popping sensation in her shoulder and neck. She reported the incident to her supervisor and was referred to Dr. Blake Garside, an orthopaedic surgeon, for treatment. Dr. Garside referred her, in turn, to Dr. Robert Clendenin, a physical medicine and rehabilitation specialist. In January 2008, Dr. Clendenin ordered an MRI of Employee's cervical spine, which showed minimal-to-mild disc bulges at C5-6 and C6-7. Dr. Clendenin referred Employee to Dr. Son Le, also a physical medicine specialist, for further treatment.

Dr. Le first examined Employee on February 8, 2008. He diagnosed a sprain/strain of the shoulder and myofascial pain syndrome. He continued the physical therapy Dr. Clendenin had previously ordered and also prescribed pain medication and muscle relaxers. In June 2008, Dr. Le ordered a nerve conduction study, which was normal. In August 2008, Dr. Le ordered a functional capacity evaluation. On August 28, 2008, he concluded that Employee had attained maximum medical improvement. His final diagnosis was a chronic sprain/strain. He restricted her to work in the "light medium" category, which he described as occasional overhead and forward reaching, carrying eleven pounds constantly, and lifting nine pounds from floor-to-waist constantly. Given the lack of objective findings, Dr. Le assigned no permanent anatomical impairment. Dr. Le acknowledged that he had no training in the use of the AMA Guides.

Dr. Le continued to provide Employee symptomatic treatment up to the date of trial in July 2012. During this time, he ordered trigger point injections and facet blocks on several occasions, as well as additional physical therapy. Some of these measures provided temporary relief for Employee, but her overall condition did not improve significantly.

While under Dr. Le's care, Employee's primary care physician referred her to Dr. Ronald Wilson, a neurologist. When Dr. Wilson first examined Employee on August 16, 2011, she complained of headaches, shoulder pain, and insomnia. Dr. Wilson's examination of Employee revealed that she had limited range of motion of her neck and tenderness in her right trapezius muscle, but her neurological examination was normal. Dr. Wilson recommended conservative treatment, including lifestyle changes, and he also prescribed anti-inflammatory and sleep medications. He treated Employee for the next year and adjusted her medications from time-to-time.

After reviewing Employee's January 2008 MRI scans, Dr. Wilson concluded that she had mild degenerative changes in her cervical spine and a repetitive motion injury, caused by her work for Employer. Dr. Wilson assigned Employee an anatomical impairment rating of 9% to the body as a whole and recommended that she avoid overhead lifting and bending of her neck forward or backward to extremes. In addition, he recommended a five-to-ten pound lifting restriction.

During cross-examination, Dr. Wilson acknowledged that he had initially used the Sixth Edition of the AMA Guidelines ("AMA Guides") to calculate Employee's 9% anatomical impairment. When he later learned that the Fifth Edition of the AMA Guides was in effect on the date of Employee's injury, he re-evaluated her and reached the same conclusion of a 9% anatomical impairment, attributing 1% of the impairment to pain. Dr. Wilson confirmed that he had taken an American Medical Association course on the use of the AMA Guides, but he believed the course pertained to the Sixth rather than the Fifth Edition. Dr. Wilson was unaware of the Medical Impairment Registry of the Department of Labor, and he had performed only a limited number of impairment evaluations in his practice.

Dr. Richard Fishbein, an orthopaedic surgeon and member of the Medical Impairment Registry, evaluated Employee on January 18, 2011, at the request of her attorney. Dr. Fishbein testified that Employee's physical examination was "relatively within normal limits," but considering all her symptoms, he arrived at a diagnosis of cervical radiculopathy and assigned Employee an 8% anatomical impairment to the body as a whole. Dr. Fishbein explained that this rating was a combination of 5%, based upon category II of the Diagnosis Related Estimate ("DRE") of the Fifth Edition of the AMA Guides, and an additional 3% "because she's in the pain management program." Dr. Fishbein advised Employee to "avoid repetitive and overhead lifting, excessive flexion and extension of her neck, and to continue her pain management, injection, physical therapy into the indefinite future."

During cross-examination, Dr. Fishbein agreed that Employee's January 2008 MRI did not reveal any encroachment on a nerve root and acknowledged that Employee's cervical range of motion was "painful, but normal." Although the AMA Guides do not explicitly authorize increasing an impairment rating by 3% based on an employee's use of a pain management program, Dr. Fishbein described the increase as "just common knowledge of people who understand the Guides." He confirmed that his examination of Employee was within normal limits and revealed no neurological deficits.

Dr. David Gaw, an orthopaedic surgeon and member of the Medical Impairment Registry, evaluated Employee on May 15, 2012, at the request of Employer's attorney. Dr. Gaw reviewed the MRI and EMG studies and found them to be "basically normal other than

some minimal degenerative changes." His physical examination of Employee revealed tenderness and soreness in her neck and shoulder areas, but no signs of atrophy or reflex changes. His diagnosis was "a strain of the muscles and the ligaments and the joints of her neck as well as just an aggravation of some degenerative disc disease." Dr. Gaw noted that Employee's pain was not radicular in origin. Like Dr. Fishbein, Dr. Gaw, who conducts seminars on the use of the AMA Guides, placed Employee's impairment in DRE category II according to the Fifth Edition of the AMA Guides. Although Dr. Gaw believed it would have been reasonable to place Employee in DRE category I (0% impairment), he felt that her history and symptoms fit more closely into DRE category II, which included a range of 5% to 8%. Dr. Gaw assigned Employee an anatomical impairment of 5% to the body as a whole, at the bottom of the DRE category II range because, unlike Dr. Fishbein, Dr. Gaw did not consider it appropriate to increase Employee's anatomical impairment rating by 3% based on her participation in the pain management program. He explained:

> Q: Now, [c]ategory [II] -- that particular category goes from five to eight. Is it proper to rate somebody at a five and then say . . . I'll add 3% for pain and put it at an eight?
>
> A: No. You should not rate pain with this muscloskeletal. That's already included in the rating. There is a range of five to eight percent for this DRE [c]ategory II and it's a judgment call where to place a person within that range. But at least the way I go about it, if it could be either zero or five percent, I think you should place the person into the lowest range of that class.
>
> If it could be a [c]ategory II or [c]ategory III, then I think they should be placed in the highest range of that which would be an 8%. But it is a judgment call by the examiner.

Dr. Gaw found no basis for considering DRE category III because Employee did not have a pinched nerve due to a ruptured disk. He concluded that Employee's impairment under the Sixth Edition of the AMA Guides would be 2% to the body as a whole. Dr. Gaw believed Employee's symptoms were consistent with her injury. He testified that Employee has "a condition that hurts but it's not harmful[,] and she should decide what she does using common sense. [Lifting restrictions] are artificial restraints that [do not] accomplish anything except [put] her in a bad position as far as getting a job. She should use her common sense[,] and let pain dictate what she does."

Dana Stoller, a vocational evaluator, testified on Employee's behalf. Ms. Stoller interviewed Employee concerning her background, education, and work history. She also

reviewed Employee's discovery deposition and the depositions of Drs. Le, Wilson, Fishbein, and Gaw. Based on the medical depositions and Employee's history of having worked primarily in unskilled jobs requiring medium physical exertion, Ms. Stoller concluded that Employee sustained a vocational disability of 90-95% as a result of her work injury. On cross-examination, Ms. Stoller stated that she had not administered any vocational testing during her assessment.

Employee testified in her own behalf at trial. Employee explained that she did not return to work for Employer when Dr. Le released her because Employer could not accommodate the physical restrictions Dr. Le had imposed. She accepted a voluntary buyout offer in September 2008 and thereafter enrolled in and completed online classes in medical coding and billing. However, Employee testified that she was unable to work in that field because it would require her "to sit at the computer all day and look down and movements of your neck and stuff up and down." In October 2009, she began working for the Franklin County School System as a substitute teacher. In October 2011, she became a full-time teaching assistant in the Franklin County Pre-K program and continued to work in that capacity at the time of trial in July 2012.

Employee, thirty-eight years old at trial, is a high school graduate. She has previously worked as a receptionist, waitress, dining room manager, and assembly line worker. She testified that she is no longer able to perform any of the jobs she held prior to her work injury, and she also explained that she is no longer able to play golf, ride "four-wheelers," or play ball with her two sons, activities she had enjoyed prior to the injury. Employee also testified that household chores, such as vacuuming and mopping, cause pain between her neck and shoulders.

At the conclusion of the proof, the trial court took the case under advisement, issued its findings from the bench at a later hearing, and incorporated these bench findings in the final decree.[1] Although the trial court was "very much impressed with Dr. Wilson and with his testimony," it found that he had incorrectly added 1% to his anatomical impairment rating. The trial court otherwise credited Dr. Wilson's testimony and held that Employee sustained an 8% anatomical impairment as a result of her work injury. Based on Employee's "age, education, lack of education, lack of training and skills, lack of local job opportunities and the physical requirements of all of Plaintiff's prior employment, [and] her capacity to work at types of employment available in her disabled condition[,]" the trial court found that Employee was entitled to permanent partial disability benefits of six times her anatomical impairment for an award of 48% disability to the body as a whole.

[1] Although the final decree incorporated the trial court's September 14, 2012 oral ruling from the bench, the record on appeal does not include a transcript of the September 14, 2012 hearing or bench ruling.

Employer has appealed, asserting that the trial court erred in finding an 8% anatomical impairment. In the alternative, Employer contends that the evidence preponderates against an award of six times the anatomical impairment.

Standard of Review

Appellate review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2008 & Supp. 2012), which provides that appellate courts must "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." As the Supreme Court has observed many times, reviewing courts must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. *Tryon v. Saturn Corp*., 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded a trial court's findings based upon documentary or videotaped deposition testimony. *Glisson v. Mohon Int'l, Inc./Campbell Ray*, 185 S.W.3d 348, 353 (Tenn. 2006); *see also State v. Payne*, 149 S.W.3d 20, 25 (Tenn. 2004) (recognizing that when a trial court's findings of fact are based on videotaped testimony, de novo review applies because appellate courts are as capable as trial courts of reviewing the evidence and drawing conclusions from it); *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000) (same). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Impairment

Employer's first contention is that the trial court erred by adopting Dr. Wilson's 8% anatomical impairment rating. We disagree. All the medical testimony in this case was presented by deposition, with Dr. Wilson testifying by video deposition. Thus, our review of this issue is de novo without a presumption of correctness. *Glisson*, 185 S.W.3d at 353; *Payne*, 149 S.W.3d at 25.

When medical testimony conflicts, the trial judge must decide which testimony to accredit. *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d 638, 644 (Tenn. 2008). In making this determination, trial courts may consider "the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance

of that information by other experts." *Id.* (quoting *Orman v. Williams Sonoma, Inc.,* 803 S.W.2d 672, 676 (Tenn. 1991)).

Dr. Wilson, a board-certified neurologist, treated Employee for an extended period of time. Dr. Wilson was familiar with and had received training in the application of the AMA Guides, although he believed the training related to the Sixth edition. Dr. Wilson had previously performed a limited number of impairment evaluations in his practice. Dr. Wilson's opinion was that Employee sustained a 9% anatomical impairment to the body as a whole, and he recommended that she avoid overhead lifting and bending of her neck forward or backward to extremes. The trial court found, and the parties do not dispute, that Dr. Wilson erred by increasing the anatomical impairment rating from 8% to 9% based on pain; however, the trial court was otherwise "very much impressed" with Dr. Wilson and his testimony.

Dr. Le treated Employee for an even longer period of time and concluded that she retained no permanent impairment. Dr. Le's opinion of no permanent impairment was based solely on the lack of objective findings. Dr. Le had no training in the use of the AMA Guides.

Unlike Drs. Le and Wilson, Drs. Gaw and Fishbein did not treat Employee, and each doctor examined her on a single occasion for the purpose of determining her anatomical impairment. However, both Drs. Gaw and Fishbein had much more training and experience in applying the AMA Guides in workers' compensation cases than either of Employee's treating physicians. Dr. Fishbein placed Employee in the DRE category II range and assigned an 8% anatomical impairment—the top of the range. He explained that assessing Employee's impairment at the top of the range was a totally subjective judgment based on Employee's participation in a pain management program.

Dr. Gaw also placed Employee in the DRE category II range, but he assessed her anatomical impairment at 5%—the bottom of the range. Although Dr. Gaw disagreed with Dr. Fishbein's decision to increase Employee's anatomical impairment rating by 3% based specifically on her participation in a pain management program, Dr. Gaw conceded that the AMA Guides afford examining physicians discretion, explaining"it's a judgment call where to place a person within that [DRE category II] range."

Based on our de novo review of the deposition medical proof in this record, we conclude that the trial court did not err either by accrediting Dr. Wilson's testimony, which was corroborated by Dr. Fishbein's testimony, or by assessing Employee's anatomical impairment at 8%.

Disability Award

Employer also contends that the evidence preponderates against the trial court's decision to award Employee permanent partial disability benefits of six times the anatomical impairment rating—the maximum permitted by Tennessee Code Annotated section 50-6-241(d)(2)(A) (2008 & Supp. 2012). We disagree.

It is undisputed that Employee did not return to work for Employer; thus, Employee is eligible to receive permanent partial disability benefits of up to six times the anatomical impairment rating. Id. In determining an appropriate award, a trial court must "consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in [Employee's] disabled condition." Id.; see also Orman, 803 S.W.2d at 676. Here, the trial judge made detailed findings to support the award.[2]

Employee, thirty-eight at the time of the 2012 trial, has a work history consisting entirely of unskilled or semi-skilled jobs. For thirteen years preceding her injury, she was an assembly line worker. While Employee is a high school graduate and has obtained online training since her work injury in medical coding and billing, she testified that working in this field is not feasible because such work would require her to "to sit at the computer all day and look down and movements of your neck and stuff up and down." Ms. Stoller, a vocational expert, testified that Employee has a 90 to 95% loss of access to the open labor market as a result of her injury. Additionally, the physical restrictions Drs. Le and Wilson imposed, in particular the limitations on reaching, effectively prevent Employee from engaging in all, or nearly all, of the jobs she had performed prior to the injury. Consistent with those restrictions, Employee reported difficulty lifting and performing sustained activity with her arms. The trial court accredited Employee's testimony in this regard, and we see no basis to disturb the trial court's credibility finding. Accordingly, we conclude that the evidence does not preponderate against the trial court's decision to award Employee permanent partial disability benefits of six times the anatomical impairment rating.

Conclusion

We affirm the trial court's finding that Employee sustained an 8% anatomical impairment. We also conclude that the evidence does not preponderate against the trial court's decision to award Employee six times the anatomical impairment rating. Accordingly, the judgment of the trial court awarding Employee permanent partial disability

[2] Although the record on appeal contains no transcript of the September 14, 2012 bench ruling, the final decree includes the trial court's detailed findings.

benefits of 48% to the body as a whole is affirmed. Costs on appeal are taxed to Nissan North America, Inc., Ace American Insurance Company and their surety, for which execution may issue if necessary.

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BEN H. CANTRELL, SENIOR JUDGE

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

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 will be paid by Nissan North America, Inc., Ace American Insurance Company and their surety, for which execution may issue if necessary.

PER CURIAM