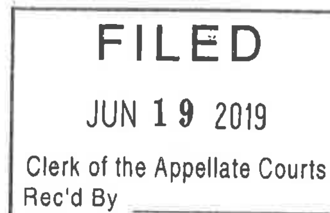
IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
February 25, 2019 Session

DUWAN DUIGNAN v. STOWERS MACHINERY CORP. ET AL.

Appeal from the Workers' Compensation Appeals Board
Court of Workers' Compensation Claims
No. 2017-03-0080 Pamela B. Johnson, Judge



No. E2018-01120-SC-R3-WC – Mailed 4/22/19

The issue in this appeal is whether the evidence preponderates against the Court of Workers' Compensation Claims' judgment that the employee is permanently and totally disabled due to his work-related injury. The Workers' Compensation Appeals Board, in a 2-1 decision, reversed and remanded for a determination of the amount of permanent partial disability. Mr. Duignan appealed to the Tennessee Supreme Court, which referred the appeal to this Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. Tenn. Sup. Ct. R. 51, § 1. We hold the evidence does not preponderate against the trial court's judgment. Therefore, the decision of the Appeals Board is reversed and the judgment of the Court of Workers' Compensation Claims is reinstated.

Tenn. Code Ann. § 50-6-217(a)(2)(B) (Supp. 2018) Appeal as of Right; Decision of the Workers' Compensation Appeals Board Reversed; Judgment of the Court of Workers' Compensation Claims Reinstated

DON R. ASH, SR.J., delivered the opinion of the Court, in which SHARON G. LEE, J., and ROBERT E. LEE DAVIES, SR.J., joined.

Link A. Gibbons, Morristown, Tennessee, for the appellant, Duwan Duignan.

G. Gerard Jabaley, Knoxville, Tennessee, for the appellees, Stowers Machinery Corporation and Zurich American Insurance Company.

OPINION

I.

Duwan Duignan worked for Stowers Machinery Corporation as a warehouse associate or as a delivery driver for more than thirty-seven years. On June 1, 2016, Mr. Duignan injured his low back when he lifted a box weighing nearly sixty pounds. After he reached maximum medical improvement (MMI) in early October 2016, Mr. Duignan and Stowers were not able to agree on an available job he could perform within his post-injury restrictions. Mr. Duignan did not work for Stowers or any other employer after October 31, 2016.

In January 2017, Mr. Duignan filed a Petition for Benefit Determination.[1] At a hearing, he testified he was sixty-one years old and a high school graduate. After attending one year of vocational school in auto body and paint, he worked briefly on his family farm before being hired by Stowers as a warehouse associate in 1979. As a warehouse associate, Mr. Duignan pulled and packed customer orders, put up stock, and cleaned up. Although employees completed their duties on their own for the most part, up to four full-time employees could be working at the warehouse at certain times. After approximately one year in the warehouse position, Mr. Duignan became a delivery driver and began transporting parts for bulldozers, excavators, and other heavy equipment. He last worked in the warehouse in 1995.

On June 1, 2016, Mr. Duignan felt "pressure" in his back when he lifted a box weighing approximately sixty pounds from the bed of the delivery truck. He completed his shift but the next day began experiencing severe pain to his low back and right leg. He sought medical treatment at a local hospital emergency room where he was diagnosed with sciatica and received pain medication. The following day, he visited Doctor's Care, a medical provider approved by Stowers. Doctor's Care took x-rays, prescribed several medications, ordered twelve sessions of physical therapy, and referred Mr. Duignan for an MRI. According to Mr. Duignan, Doctor's Care told him the MRI showed three bulging discs; he was advised not to work until after seeing an orthopedic surgeon.

Mr. Duignan later selected Dr. Patrick M. Bolt from a panel of orthopedic surgeons offered by Stowers. Dr. Bolt confirmed the MRI's findings of one or more bulging discs and told Mr. Duignan he was not a surgical candidate. Dr. Bolt ordered an epidural injection for the pain. After the injection, Mr. Duignan still had significant back pain and was not sure if the procedure "helped all that much" with the leg pain.

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[1] Although not referred to directly in this opinion, Stowers' insurer, Zurich American Insurance Company, was a party to the trial court proceedings and is a party to this appeal.

In late July 2016, after Mr. Duignan's first visit, Dr. Bolt released Mr. Duignan for light-duty work, and Stowers provided Mr. Duignan with a clerical position at the same hourly pay rate of his pre-injury driver position. The clerical position consisted of deleting part numbers on a computer, filing, and occasionally attending to customers. Mr. Duignan explained that although he does not know how to type, he was able to "hunt and peck." He testified Stowers allowed him to use a cane after the injury "for stability and [to] try to reduce the pressure on [his] lower back." Although no physician had prescribed use of a cane, Mr. Duignan uses the cane ninety-five percent of the time. Dr. Bolt never said anything about the cane when Mr. Duignan brought it to appointments.

Dr. Bolt referred Mr. Duignan for a functional capacity evaluation (FCE). Mr. Duignan explained he was able to do lifting tasks during the FCE until he began to have increased pain, at which point the therapist conducting the evaluation had him "sit down and rest for a few minutes." He recalls seeing Dr. Bolt a few days later, being told he had reached maximum recovery, and still having significant low back pain and occasional pain to his right leg. His condition remained the same, and he did not think he was capable of lifting fifty pounds.

According to Mr. Duignan, he and Stowers "determined together" his previous driver position was not suitable to accommodate his physical restrictions. Stowers offered Mr. Duignan a position in the warehouse with two accommodations—assistance from co-workers as needed and lifting devices—but at a lower pay rate than the driver position. In addition, Stowers would not allow use of a cane in the warehouse. Mr. Duignan testified he expressed his concern with the walking involved, not being able to use the cane, not being able to sit enough, and not being able to serve customers adequately. Based on his previous experience in the warehouse, he expected to have to lift in excess of fifty pounds "as high as 20 or 30 times" per day while being alone in the warehouse with no one to help him. He believed the job requirements exceeded the restrictions imposed by Dr. Bolt and—in practice—he could not just grab a co-worker to help him with heavy objects. Stowers advised Mr. Duignan there were no other jobs available to accommodate his physical restrictions. Mr. Duignan believed he had been "forced out" and his last day with Stowers was October 31, 2016.

Mr. Duignan did not seek employment after losing his job at Stowers because he did not believe he was able to work based on his aches and pains. He did not think anyone would hire him "knowing that [he] already ha[s] an injury and nothing can be done about it to correct it." Mr. Duignan did not try the warehouse associate position offered by Stowers because he feared making himself worse. Although he continued to experience pain during activities of daily living, such as taking a shower or sitting for long periods, he admitted he did not receive medical treatment after his last visit with Dr. Bolt in October 2016.

Mr. Duignan's wife, Connie, testified Mr. Duignan complains of back pain several times a day, takes over-the-counter pain medication three to four times a day, and has not looked for work since losing his job at Stowers.

Sherry Boynton, Stowers' human resources manager, was responsible for conducting an interactive process mandated by the Americans with Disabilities Act (ADA) with the goal of finding a viable job for Mr. Duignan given his restrictions. According to Ms. Boynton, Mr. Duignan did not offer suggestions about possible accommodations for the warehouse associate position during three meetings, and he expressed concerns about not being able to sit or stand or walk as needed, not being able to serve the customers, not being able to use the cane, and re-injuring himself. Ms. Boynton said Stowers could not accommodate use of the cane in the warehouse because the job requires the use of both hands. Mr. Duignan did not accept the warehouse associate job with accommodations and Stowers had no other positions available for which he was qualified. Ms. Boynton agreed Mr. Duignan was concerned "about the pain . . . and about becoming re-injured." She added, however, that Mr. Duignan refused to consider the accommodations or try to see what he was capable of doing; he "just assumed . . . that he couldn't do it."

Dr. Bolt testified by deposition on behalf of Stowers that Mr. Duignan's tingling and numbness to his right leg during examination were consistent with the MRI finding of a small disc herniation at L4-5. Although the MRI showed degenerative disc disease—arthritic changes and disc bulges—he concluded the disc herniation at L4-5 was separate from the degenerative disc disease and was work-related. According to Dr. Bolt, Mr. Duignan had a herniated disc in the lumbar region of his back with radiculopathy to his right leg. Dr. Bolt recommended an epidural steroid injection to reduce inflammation. After his initial visit in late July 2016, Mr. Duignan next saw Dr. Bolt on September 9, 2016. Although Mr. Duignan's leg pain had improved after the injection, he continued to have significant back pain. Because Mr. Duignan indicated he was not sure he could return to work with the back pain he was experiencing, Dr. Bolt ordered an FCE and later adopted the FCE findings. Mr. Duignan had his last visit with Dr. Bolt on October 5, 2016. Dr. Bolt determined Mr. Duignan had achieved maximum medical improvement and assigned him an impairment rating of seven percent[2] to the whole body and permanent physical restrictions in the medium physical demand level.[3]

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[2] Dr. Bolt originally assigned an impairment rating of six percent but modified the rating to seven percent during his deposition, acknowledging he had mistakenly assigned the rating for a cervical instead of a lumbar spine injury.

[3] According to the FCE, the medium physical demand level entails occasional lifting of twenty-one to fifty pounds, frequent lifting of eleven to twenty-five pounds, and constant lifting of one to ten pounds.

Dr. Bolt acknowledged Mr. Duignan performed below standard in several activities during the FCE, including walking twelve feet, carrying fifteen pounds (after which, Mr. Duignan declined to carry twenty and twenty-five pounds), balancing, climbing stairs, reaching overhead with his left arm, and standing and sitting. Dr. Bolt agreed these activities would need to be limited in future jobs, but he opined the FCE examiner would have considered these deficiencies when selecting the medium physical demand level. Dr. Bolt agreed Mr. Duignan should neither lift more than twenty-six pounds frequently nor more than sixteen pounds constantly, based on his actual performance during the FCE. Dr. Bolt said he had not and "would not recommend use of a cane for a patient with back pain."

Dr. William E. Kennedy, a board certified orthopedic surgeon, testified by deposition on behalf of Mr. Duignan. Dr. Kennedy met with Mr. Duignan to conduct an independent medical examination on March 2, 2017. His physical examination confirmed Mr. Duignan's radiculopathy to his right leg had subsided, and he agreed Mr. Duignan had reached maximum medical improvement. Dr. Kennedy assigned Mr. Duignan an impairment rating of nine percent and ordered a number of permanent restrictions, which included no lifting, carrying, or pushing and pulling in excess of twenty pounds occasionally or ten pounds frequently. Although reaching a different impairment rating and imposing more strict physical restrictions, Dr. Kennedy did not take issue with Dr. Bolt's diagnosis, treatment, or methodology. However, he would not recommend Mr. Duignan attempt to work in a medium-work category, because doing so could put him at an excessive risk of re-injury and accelerate degenerative changes of his herniated disc. Dr. Kennedy admitted the restrictions he imposed are "somewhat prophylactic" in that they are based on the diagnosis (e.g., herniated disc in the lumbar spine) and without regard to factors such as age or whether the employee is returning to work. He also agreed the restrictions do not prevent Mr. Duignan from gainful employment in an occupation within a light-work category.

According to Dr. Kennedy, Mr. Duignan should be able to use his cane at all times to help relieve pain from weight bearing and for balance. He explained Mr. Duignan had reported increased low back pain when bearing weight on his right leg, sitting in one position for an hour, or standing and walking for as long as twenty to thirty minutes at a time. Mr. Duignan indicated his low back pain radiated into his right thigh as he walked without using a cane. Dr. Kennedy agreed orthopedic physicians rarely recommend canes for back pain, but he did not see any harm in Mr. Duignan using one to help control his residual pain. In his opinion, a cane can be helpful to someone experiencing balance issues.

Michael Galloway, a vocational expert, testified on behalf of Mr. Duignan. Mr. Galloway interviewed Mr. Duignan over the phone after reviewing his medical and employment records. When considering the permanent restrictions imposed by Dr. Bolt,

Mr. Galloway concluded Mr. Duignan's injury resulted in seventy-five percent vocational disability based on his age, education, vocational profile, and the local labor market. When considering Dr. Kennedy's restrictions, Mr. Galloway found Mr. Duignan would have vocational disability of 100 percent. He believed the requirements of the delivery driver and warehouse associate positions at Stowers exceeded the permanent restrictions imposed by either Dr. Bolt or Dr. Kennedy. Mr. Galloway also opined the warehouse associate job did not lend itself to the accommodations offered by Stowers because the position would require, in effect, a second employee to "job shadow" Mr. Duignan at all times. This practice would not be sustainable because the position requires independent work at a consistent pace.

According to Mr. Galloway's Vocational Assessment Report, Mr. Duignan demonstrated reasoning at the 7th-8th grade level, math at the 4th-6th grade level, and language at the 4th-6th grade level. Although Dr. Bolt adopted the medium physical demand level recommended in the FCE, Mr. Galloway's report indicated Mr. Duignan's actual performance during the FCE was "well below and not equivalent to the standard definition of medium physical demand level work as suggested in the report." He described Mr. Duignan's performance as "a hybrid of sedentary to low end medium physical demands with lifting and reduced carrying, pushing, and pulling." The report concluded Mr. Duignan's work injury had resulted in vocational disability of sixty percent[4] based on Dr. Bolt's permanent restrictions and vocational disability of 100 percent based on Dr. Kennedy's restrictions. In addition, based on Mr. Duignan's "actual performance" during the FCE, along with his advanced age and lack of transferable skills, it was "more likely than not" Mr. Duignan was 100 percent vocationally disabled.

Anthony Enoch testified as a vocational expert for Stowers. Mr. Enoch met with Mr. Duignan and administered a number of tests[5] for vocational assessment, including a transferable skills analysis. Mr. Enoch's initial report identified ten job classifications available to Mr. Duignan when using the transferable skills analysis and Dr. Bolt's medium physical demand restrictions; he found no job classifications when using the restrictions imposed by Dr. Kennedy. In his initial report, Mr. Enoch did not identify current job listings for the classifications listed. After Dr. Bolt's deposition, Mr. Enoch issued another report documenting the findings of a labor market survey he conducted to identify available local jobs Mr. Duignan was qualified for and able to perform under Dr. Bolt's restrictions. Through an online job search engine (i.e., www.indeed.com), Mr.

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[4] After Dr. Bolt changed Mr. Duignan's impairment rating to seven percent during his deposition, Mr. Galloway provided an addendum to his initial report to revise his opinion to seventy-five percent vocational disability.

[5] Mr. Enoch's Initial Rehabilitation Report states the Wide Range Achievement Test placed Mr. Duignan at the seventh grade level for spelling, the eighth grade level for arithmetic, and post-high school level for reading.

Enoch identified three "driver" jobs (pizza delivery, college game day courtesy cart driving, and Uber) available to Mr. Duignan, but did not provide the actual number of jobs available. Mr. Enoch admitted he did not consider whether the jobs were for employees or independent contractors, full-time or part-time, or whether they had particular vehicle requirements.

At the hearing, Mr. Enoch testified Mr. Duignan was capable of gainful employment in the greater Knoxville labor market, even when using Dr. Kennedy's restrictions. He acknowledged none of his written reports included this opinion. Mr. Enoch also agreed he is not familiar with assessing vocational disability ratings in Tennessee and had no opinion on that issue.

In a written order, the Court of Workers' Compensation Claims (the trial court) found Mr. Duignan established he was permanently and totally disabled by the preponderance of the evidence. The trial court accepted Dr. Bolt's permanent impairment rating of seven percent, ruling the evidence did not rebut the presumption of correctness afforded to Dr. Bolt under Tennessee Code Annotated section 50-6-204(k)(7).[6] As to permanent vocational disability, the trial court gave "greater weight" to the testimony of Mr. Galloway and found Mr. Duignan's permanent restrictions are the "limitations identified in the FCE report reflecting his actual performance." The trial court, noting the presumption of correctness afforded to Dr. Bolt's impairment rating did not apply to the permanent restrictions he imposed, found Mr. Duignan's testimony supported the conclusion that he is unable to work at any occupation. The trial court did not accept Stowers' argument that Mr. Duignan could not be totally disabled because Stowers had offered him a position at its warehouse with reasonable accommodations. Crediting Mr. Duignan's concerns with unavailability of co-workers to provide assistance, not being able to take breaks, and risk of re-injury, the trial court found his refusal to accept that position was reasonable based on his previous experience working in the warehouse at Stowers.

Stowers appealed to the Workers' Compensation Appeals Board, challenging the award of permanent and total disability. In a 2-1 decision, the Appeals Board concluded Mr. Duignan failed to establish he was unable to work at a job that brings him an income by a preponderance of the evidence. The majority noted Mr. Duignan did not accept the modified warehouse associate position offered by Stowers or try to find alternate employment, and that all medical and vocational experts in the case opined Mr. Duignan was able to work and receive an income. The Appeals Board reversed the trial court's

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[6] "The treating physician's . . . written opinion of the injured employee's permanent impairment rating shall be presumed to be the accurate impairment rating. This presumption shall be rebuttable by the presentation of contrary evidence that satisfies a preponderance of the evidence standard." Tenn. Code Ann. § 50-6-204(k)(7) (2014 & Supp. 2018).

judgment and remanded for a determination of the amount of permanent partial disability benefits.

The Appeals Board dissenting judge concluded the majority overemphasized Mr. Duignan's refusal to accept the accommodated position offered by Stowers. The dissent explained that the "meaningful return to work" concept does not apply to the determination of permanent total disability and that post-injury employment is only one factor to consider in the determination. According to the dissent, a trial court may find a work injury rendered an employee permanently and totally disabled even if the employee had a meaningful return to work. In short, the dissent concluded the trial court's findings of fact support the trial court's conclusion and are entitled to considerable deference.

On remand, the trial court issued a "Remand Compensation Order." Based on Dr. Bolt's impairment rating of seven percent and the parties' pre-trial stipulations concerning the age and non-return to work enhancement factors, the trial court ordered that Mr. Duignan receive $41,801.22 in permanent partial disability benefits.

Mr. Duignan appealed to the Tennessee Supreme Court, which referred the appeal to this Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law under Tennessee Supreme Court Rule 51, Section 1. Mr. Duignan contends the Appeals Board erred in applying the "meaningful return to work" analysis to his claim for permanent total disability benefits and in holding the evidence preponderates against the trial court's decision that he was permanently and totally disabled. Stowers argues the Appeals Board correctly held Mr. Duignan failed to establish he was permanently and totally disabled.[7]

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[7] Stowers also argues this Panel is precluded from hearing the appeal under the "law of the case" doctrine, which provides "an appellate court's decision on an issue of law is binding in later trials and appeals of the same case if the facts on the second trial or appeal are substantially the same as the facts in the first trial or appeal." *Memphis Pub. Co. v. Tenn. Petroleum Underground Storage Tank Bd.*, 975 S.W.2d 303, 306 (Tenn. 1998). That doctrine does not, however, "insulate an issue from review and bind a higher court in reviewing decisions from the lower courts that have not yet been passed upon." *Duck v. Cox Oil Co.*, No. W2016-02261-SC-WCM-WC, 2017 WL 5713077, at *2 (Tenn. Workers' Comp. Panel Nov. 21, 2017) (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988)) ("Just as a district court's adherence to law of the case cannot insulate an issue from appellate review, a court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review."). The Supreme Court, and by extension this Panel, is expressly authorized by statute to review decisions of the Appeals Board. Tenn. Code Ann. § 50-6-217(a)(2)(B) (Supp. 2018); *see also* Tenn. Sup. Ct. R. 51, § 1 (providing that all workers' compensation appeals to the Supreme Court are to be heard and determined by the Panel). Therefore, we find this argument without merit.

II.

We review the trial court's findings of fact 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(a)(2) (2014 & Supp. 2018). We afford the trial court considerable deference where the credibility and weight of a witness's in-court testimony is involved. *Madden v. Holland Grp. of Tenn.*, 277 S.W.3d 896, 900 (Tenn. 2009). However, we draw our own conclusions concerning the weight and credibility of expert medical testimony contained in the record by deposition from the contents of the depositions. *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008). We review the trial court's conclusions of law de novo upon the record with no presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Meaningful Return to Work Analysis

Before determining where the preponderance of the evidence lies in this case as to the nature of Mr. Duignan's permanent disability, we begin by addressing the parties' arguments as to whether a "meaningful return to work" analysis is applicable in the context of a claim for permanent total disability benefits. The meaningful return to work analysis addresses claims by employees who had become permanently and partially disabled by a work injury, returned to work for the pre-injury employer, and later left the employer. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 328 (Tenn. 2008). To determine whether an employee had a meaningful return to work, the trial court assesses the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to either return to or remain at work based on the facts of the case. *Id.* (citations omitted). Moreover, the trial court must determine the cap applicable to an employee's permanent partial disability benefits under Tennessee Code Annotated section 50-6-241. *Id.*; *see also Howell v. Nissan N. Am., Inc.*, 346 S.W.3d 467, 472 (Tenn. 2011) ("If the employee is found to have had a meaningful return to work, his or her benefits are capped using the smaller multiplier of one and one-half in Tennessee Code Annotated section 50-6-241(d)(1)(A). If the employee is found not to have had a meaningful return to work, his or her benefits are capped using the larger multiplier of six in section 50-6-241(d)(2)(A).").

The Panel has declined to apply a meaningful return to work analysis in a case where the employee was permanently and totally disabled. *See, e.g., Gray v. Vision Hospitality Grp.*, No. M2016-00116-SC-R3-WC, 2017 WL 384430, at *5 (Tenn. Workers' Comp. Panel Jan. 26, 2017) (declining to address employer's "meaningful return to work" argument because "the evidence does not preponderate against the award of permanent total disability benefits"); *Cameron v. Mem'l Health Care Sys., Inc.*, No. E2013-01225-WC-R3-WC, 2014 WL 2592906, at *5 (Tenn. Workers' Comp. Panel June

10, 2014) (stating the court "need not decide" meaningful return to work issues after agreeing with the trial court's finding of permanent total disability). That is not to say, however, that the evidence in the record concerning an employer's offer to return an injured employee to work and the employee's response to the offer is not relevant to the determination of permanent total disability. To the contrary, the circumstances relating to the employer's offer and the employee's acceptance or refusal of that offer may bear on the factors the trial court considers in determining whether an employee is permanently and totally disabled, including local job opportunities available to the employee post-injury. *See* discussion *infra* concerning relevant factors.

Here, both the trial court and the Appeals Board considered the relevant circumstances without applying a meaningful return to work analysis in the sense that term is used in cases involving permanent partial disability. On the one hand, the trial court found Mr. Duignan's refusal of the warehouse associate position offered by Stowers was "reasonable based upon his personal knowledge of the job responsibilities and requirements." On the other hand, the Appeals Board majority reasoned, because of Mr. Duignan's refusal to take the job, it had "no way of knowing whether [Stowers] would have been able to provide a position within [Mr. Duignan's] restrictions, and a finding of permanent total disability would require [it] to speculate in that regard." Although neither conclusion alone resolves the question of permanent and total disability, the evidence does not preponderate against the trial court's finding that Mr. Duignan was reasonable in declining the warehouse associate position offered by Stowers.

Preponderance of the Evidence

We now return to the crux of the appeal. Mr. Duignan bears the burden of proving every element of his claim for workers' compensation benefits by a preponderance of the evidence. Tenn. Code Ann. § 50-6-239(c)(6) (2014 & Supp. 2018); *Panzarella v. Amazon.com, Inc.*, No. E2017-01135-SC-R3-WC, 2018 WL 2363592, at *3 (Tenn. Workers' Comp. Panel May 16, 2018). An employee is entitled to permanent total disability benefits if a work injury "totally incapacitates the employee from working at an occupation that brings the employee an income." Tenn. Code Ann. § 50-6-207(4)(B) (2014 & Supp. 2018); *Venture Express v. Frazier*, No. W2018-00344-SC-R3-WC, 2019 WL 1387900, at *5 (Tenn. Workers' Comp. Panel Mar. 27, 2019). The trial court considers a variety of factors in making this determination, so that its decision results from having "a complete picture" of the employee's ability to obtain gainful employment post-injury. *Hubble v. Dyer Nursing Home*, 188 S.W.3d 525, 535 (Tenn. 2006) (citing *Vinson v. United Parcel Serv.*, 92 S.W.3d 380, 386 (Tenn.2002)). Such factors include the employee's skills, training, education, age, local job opportunities, and ability to work at the available jobs in his post-injury condition. *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000) (quoting *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986)). Although vocational experts often present an assessment of these

factors at trial, the employee's testimony concerning his ability or inability to return to gainful employment is "competent testimony that should be considered." *Hubble*, 188 S.W.3d at 536; *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 217 (Tenn. 2006) (quoting *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 458 (Tenn. 1988)) (stating that the employee's "assessment of his physical condition and resulting disabilities is competent testimony and cannot be disregarded"). The extent of an injured employee's vocational disability is a question of fact for the trial court to determine from all of the evidence presented by the parties, including lay and expert testimony. *Cleek*, 19 S.W.3d at 773 (citing *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999); *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990)).

In its Order following the hearing, the trial court cited to the provisions of Tennessee Code Annotated section 50-6-207(4)(B) and the factors set forth in *Cleek* and *Roberson* as the standard for determining permanent total disability. As the trial court noted, Mr. Duignan's testimony indicated he did not have the ability to work at any occupation at the time of the hearing; indeed, he continued to have pain when sitting for prolonged periods, taking a shower, and picking up items weighing fifteen pounds. Likewise, Connie Duignan testified her husband continued to experience pain and used over-the-counter pain medication three to four times a day.

Turning to the vocational experts' reports and in-court testimony, the trial court found Mr. Galloway's testimony "more persuasive and helpful" concerning Mr. Duignan's vocational disability after his work injury. According to Mr. Galloway, Mr. Duignan would have a 100 percent vocational disability based on the deficiencies revealed by his actual performance during the FCE (e.g., carrying fifteen, twenty, and twenty-five pounds, walking twelve feet, balancing). Mr. Duignan's authorized treating physician, Dr. Bolt, acknowledged these deficiencies during his deposition and—on that basis—agreed to make Mr. Duignan's permanent restrictions stricter than those he had originally imposed. Moreover, the trial court observed that Mr. Galloway considered Mr. Duignan's permanent restrictions, as well as his "education and vocational background and age." In contrast, Mr. Enoch's initial report found no job categories that could accommodate the restrictions given by Dr. Kennedy, though he later changed his opinion and concluded at trial—for the first time—that Mr. Duignan could still find gainful employment under Dr. Kennedy's restrictions. In addition, although Mr. Enoch identified three driver jobs as vocational opportunities for Mr. Duignan through his online search, the process did not consider the nature of those jobs (i.e., whether the jobs were full-time or part-time, had specific vehicle requirements, or treated the worker as an employee or as an independent contractor). Finally, in finding Mr. Duignan was permanently and totally disabled, the trial court considered a "hybrid of sedentary to low-end medium physical demands with lifting and reduced carrying, pushing, and pulling[,]" which Mr. Duignan exhibited during the FCE.

Unlike the Appeals Board majority, we are unable to conclude the evidence in the record concerning the factors of (1) local opportunities for employment and (2) Mr. Duignan's ability to perform those jobs preponderates against the trial court's determination that Mr. Duignan was unable to work at any occupation after his injury. We are required to give deference to the trial court's factual findings; moreover, the trial court had "the discretion to determine which testimony to accept when presented with conflicting expert opinions." *Payne v. United Parcel Serv., Inc.*, No. M2013-02363-SC-R3-WC, 2014 WL 7435568, at *6 (Tenn. Workers' Comp. Panel Dec. 30, 2014). In addition to the evidence outlined above, we note Mr. Duignan was fifty-nine years old on the date of his work injury and had worked for Stowers for more than thirty-seven years. During his time there, he worked as a warehouse associate and as a delivery driver—both unskilled positions—at different times. Mr. Duignan had a high school diploma, but tests conducted by both vocational experts showed academic markers for language and math well below the twelfth grade level. Besides his employment with Stowers, Mr. Duignan had virtually no other work experience. He did receive some vocational training in auto body and paint after high school; however, he did not work in that field before joining Stowers at age twenty-two. After injuring his back in June 2016, Mr. Duignan suffered permanent impairment of seven percent, and he continues to suffer pain from his injury.

Stowers nonetheless asserts that Mr. Duignan cannot be permanently and totally disabled because he was able to work in some capacity after his injury. The fact that an employee was able to work after an injury in the same type of employment, earning the same wages, does not "per se preclude [a trial] court from finding [the employee] is totally disabled." *Rhodes v. Capital City Ins. Co.*, 154 S.W.3d 43, 47 (Tenn. 2004) (quoting *Skipper v. Great Cent. Ins. Co.*, 474 S.W.2d 420, 424 (Tenn. 1971)). Rather, employment after an injury is only "a factor to be considered along with all other factors involved when applying the test, which is whether employee, in light of his education, abilities, physical and/or mental infirmities, is employable in the open labor market." *Rhodes*, 154 S.W.3d at 47–48. Although Mr. Duignan worked for Stowers in a clerical position after his injury while the parties participated in the ADA-mandated process, that position involved light duty. Moreover, although Stowers offered a permanent warehouse position, Mr. Duignan testified he was concerned about the walking involved and not being able to sit enough. Based on his previous experience as a warehouse associate, he expected having to lift boxes in excess of the restrictions imposed by Dr. Bolt and that, at times, there would be no one in the warehouse to assist him. Crediting Mr. Duignan's testimony, the trial court concluded he was reasonable in declining to accept the warehouse associate position offered by Stowers. We accept the trial court's conclusion concerning the credibility and weight of Mr. Duignan as an in-court witness. *See Madden*, 277 S.W.3d at 900.

In contrast, the Appeals Board majority reversed the trial court's judgment largely because Mr. Duignan did not attempt to work in the warehouse position offered by

Stowers. As we have explained, however, an offer of employment or actual employment post-injury is only one of several factors to consider in determining whether a work injury has rendered an employee permanently and totally disabled.

Moreover, the cases cited by the Appeals Board majority are distinguishable. For example, the Appeals Board relied on language from *Dowd v. Cassens Transp. Co.*, No. M2005-02632-WC-R3-CV, 2007 WL 715518 (Tenn. Workers' Comp. Panel Mar. 8, 2007), to support its conclusion that Mr. Duignan's refusal of "employment based upon an unfounded fear of re-injury" is "unreasonable within the framework of [the statute]." But the sole issue in *Dowd* was the proper cap for permanent *partial* disability benefits, not whether the employee was permanently and totally disabled; the statute implicated was Tennessee Code Annotated section 50-6-241(a)(1), not section 50-6-207(4)(B). *Id.* at *3. Moreover, the employee in *Dowd* had worked for its pre-injury employer "forty hours per week plus overtime both before and [for eleven months] after his injury and earned the same amount of money" prior to voluntarily leaving his employment. *Id.* at *2, *6. Similarly, in *Iacono v. Saturn Corp.*, No. M2008-00139-WC-R3-WC, 2009 WL 648962 (Tenn. Workers' Comp. Panel Mar. 12, 2009), the Special Workers' Compensation Appeals Panel reviewed the proper cap applicable to a permanent partial benefits award under Tennessee Code Annotated section 50-6-241. As in *Dowd*, the analysis in *Iacono* explicitly focuses on whether the employee had made a "meaningful return to work" in order to determine "whether to apply the lower statutory caps of Tennessee Code Annotated section 50-6-241." *Id.* at *5.

The Appeals Board majority also cited *Brock v. Hewlett-Packard Co.*, No. M2014-01889-SC-R3-WC, 2015 WL 5601660 (Tenn. Workers' Comp. Panel Sept. 23, 2015), for the proposition that where an employee does not present proof of inability to work in the general labor market and does not seek employment except as required to receive unemployment benefits, the employee is not permanently totally disabled. In *Brock*, as in the present case, the employee suffered a back injury and the trial court found the employee was unable to work and, therefore, entitled to permanent total disability benefits. *Id.* at *1. The Special Workers' Compensation Appeals Panel reversed and awarded permanent partial disability benefits. *Id.* However, the employee in *Brock* had education, skills, training, and work experiences that significantly exceeded those of Mr. Duignan and were not affected by her injury. The employee had completed college courses; performed payroll, management, and supervisory tasks as a small business owner; had experience in event planning, which the employee admitted she could conduct by telephone; and had received and declined offers to plan events. *Id.* at *8. Moreover, unlike Mr. Duignan, the employee did not offer proof from a vocational expert that no jobs were available to her in her current condition. *Id.* These circumstances, the Special Workers' Compensation Appeals Panel concluded, "provide no support for the trial court's finding of permanent and total disability." *Id.*

Finally, Stowers takes issue with the trial court's reliance on Mr. Galloway's testimony and reports as to appropriate work restrictions and argues—without citing to any relevant authority—Mr. Galloway does not have a "medical background or relevant qualifications to assign work restrictions." We find guidance in *Miller v. State*, No. E2015-00034-SC-R3-WC, 2015 WL 7013864 (Tenn. Workers' Comp. Panel Nov. 6, 2015), where the employer raised a similar issue. In *Miller*, the trial court awarded permanent total disability benefits to a state employee who had sustained a neck injury. *Id.* at *1. An independent medical evaluator hired by the parties had adopted the "light physical demand" level recommended by an FCE of the employee. *Id.* at *2. The employee's vocational expert, however, offered two opinions concerning the employee's vocational disability: first, he concluded the employee was forty-nine percent vocationally disabled based on the light duty work restrictions; however, he also concluded the employee was totally disabled, based on his direct examination of the FCE's "raw results." *Id.* at *2–3. On appeal, the Special Workers' Compensation Appeals Panel rejected the employer's argument that the vocational expert improperly reached his conclusion by imposing stricter physical restrictions than either the physician or the FCE had, which the Panel agreed would have been outside the vocational expert's area of expertise. *Id.* at *4. Rather, the Panel explained, the vocational expert noted the FCE report placed limits on the employee's ability to perform certain activities and "opined that these limitations were inconsistent with most light exertion jobs" in terms of "exertion and frequency requirements" as set forth in the Dictionary of Occupational Titles. *Id.* at *5. The Panel concluded the vocational expert had an appropriate basis for his opinion about the physical exertion requirements of a job. *Id.*

Here, as in *Miller*, Mr. Galloway gave two opinions concerning Mr. Duignan's degree of vocational disability. First, he concluded Mr. Duignan was seventy-five percent vocationally disabled based on Dr. Bolt's restrictions. Second, he concluded that based on either Dr. Kennedy's restrictions or the deficiencies stated in the FCE report (e.g., carrying fifteen, twenty, and twenty-five pounds, walking twelve feet, balancing), Mr. Duignan had 100 percent vocational disability. He specifically testified that both the delivery driver and warehouse associate jobs at Stowers were heavy in physical demand level capacity and "certainly above the medium capacity as defined in the Dictionary of Occupational Titles." Mr. Galloway was qualified to render an opinion concerning the degree of Mr. Duignan's vocational disability, when comparing the limitations revealed by the FCE and the physical requirements of Mr. Duignan's possible job opportunities. Accordingly, we find no error in the trial court's reliance on Mr. Galloway's testimony and reports.

III.

We reverse the decision of the Workers' Compensation Appeals Board and reinstate the judgment of the Court of Workers' Compensation Claims. We tax the costs of this appeal to Stowers Machinery Corporation and Zurich American Insurance Company, for which execution may issue if necessary.

DON R. ASH, Senior Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

DUWAN DUIGNAN v. STOWERS MACHINERY CORP ET AL.

Workers' Compensation Appeals Board
No. 2017-03-0080

FILED
JUN 19 2019
Clerk of the Appellate Courts
Rec'd By ________

No. E2018-01120-SC-WCM-WC

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Stowers Machinery Corporation, and Zurich American Insurance Company pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's 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 Stowers Machinery Corp. and their surety, Zurich Insurance Company, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

LEE, Sharon G., J., not participating