IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
June 24, 2013 Session

# GEORGE WAYNE EDWARDS v. VELMA CHILDS ET AL.

**Appeal from the Chancery Court for Bradley County**
**No. 2011CV149 Jerri S. Bryant, Chancellor**

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**No. E2012-02592-WC-R3-WC-MAILED-OCTOBER 3, 2013**
**FILED - DECEMBER 10, 2013**

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An employee worked as a skidder operator for the employer's logging company. The employee's face and eyelid were lacerated when the chainsaw that he was operating "kicked back." The employee briefly returned to work within a few weeks after his accident, but he was unable to continue working due to eye pain. The employee subsequently underwent eight surgeries on his face and eye. Although the employer admitted that the employee's injury was compensable, it argued that his award should be capped at one and one-half times his impairment rating and that the medical testimony concerning his impairment was not credible. The trial court found that the employee was permanently and totally disabled. The employer appealed, arguing that the evidence preponderates against the trial court's findings. The employee, however, contends that the employer's appeal is frivolous and seeks liquidated damages pursuant to Tennessee Code Annotated section 50-6-225(h). We affirm the judgment of the trial court.

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

TONY A. CHILDRESS, SP. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J., and DON R. ASH, SR. J., joined

Kimberly Grueter, Chattanooga, Tennessee, for the appellants, Velma Childs, Childs Logging, Triple C Fiber and QBE Americas, Inc. d/b/a QBE Specialty Insurance.

Samuel F. Robinson, III, Chattanooga, Tennessee, for the appellee, George Wayne Edwards.

## OPINION

### Factual and Procedural Background

George Edwards was hired in October 2007 by Triple C Fibers ("Triple C"), a logging company owned and operated by Velma Childs. Mr. Edwards operated a skidder, which is described as "an oversized tractor with a grapple on the back" and is used to drag felled trees to a landing area where the trees are cut into logs.

On November 8, 2007, Mr. Edwards was working in a two man crew with Tim Childs, the owner's son. Mr. Edwards was operating the skidder and Mr. Childs was felling trees. Mr. Childs' chainsaw ran out of gas, and he walked out to the landing area to refuel his saw. Although accounts differ as to Mr. Childs' instructions to Mr. Edwards, it is undisputed that Mr. Edwards picked up a chainsaw and attempted to finish cutting down the tree. Mr. Edwards' chainsaw hit a "bush," which caused the saw to kick back and strike Mr. Edwards in the face. Mr. Edwards removed his shirt, pressed it against the wound, and walked to the landing area. Mr. Childs then drove Mr. Edwards to Skyridge Hospital for emergency medical treatment.

Mr. Edwards filed a request for assistance with the Tennessee Department of Labor and Workforce Development, and the parties exhausted the benefit review process on June 22, 2011. Mr. Edwards then filed a complaint with the Bradley County Chancery Court on June 24, 2011, and the matter went to trial on October 1 and 9, 2012.

Mr. Edwards, who was fifty-eight at the time of trial, testified that he returned to work as a skidder operator for Triple C in November 2007. Mr. Edwards testified, however, that his post-injury position involved only light-duty work.[1] At the time of his return, Mr. Edwards wore an eye patch and had a number of stitches in his face. Mr. Edwards worked for approximately one week to ten days until he left due to the pain in his right eye. He told Mr. Childs that he was "going home" because he "just couldn't stand the pressure anymore." Mr. Childs, however, testified that Mr. Edwards "just disappeared" and denied that Mr. Edwards ever indicated that he could not perform his job. Mr. Childs said that he and his mother made several attempts to contact Mr. Edwards after his departure to retrieve some of Triple C's property that Mr. Edwards had in his possession. Although this property was returned, neither Mr. Childs nor his mother spoke directly with Mr. Edwards again.

[1] Ms. Childs, the company's owner, also testified that operating a skidder is relatively light-duty work if the operator remains in the skidder's cab.

Mr. Edwards testified that he has worked as a logger "one or two or three days . . . a week or something like that" since his injury. Mr. Edwards did not, however, specify the number of weeks that he has worked nor what he has earned from this work. Mr. Edwards testified that although he does not feel safe doing logging-related work, he admitted, "I have to do it because I've got bills to pay." According to Mr. Edwards, his face is constantly numb and occasionally painful. He also testified that he experiences constant pain in his right eye and that it sometimes becomes bloodshot, which prevents him from seeing through that eye for "about a week." Mr. Edwards also testified that he left school in the seventh grade to begin working in the logging industry, that he has been a logger since that time, and that he became certified as a master logger after field training. Mr. Edwards also testified that he is unable to read or write.

Dr. Kenneth McCarley, an otolaryngologist at Skyridge Hospital, testified by deposition that he surgically repaired Mr. Edwards' wound, which extended from his forehead across his right eyelid to his right cheek. After Dr. McCarley determined that Mr. Edwards' eyelid injury required an ocular surgery specialist, he referred Mr. Edwards to a physician in Chattanooga. Dr. McCarley treated Mr. Edwards until October 13, 2010, by which time Mr. Edwards' wound had healed. Dr. McCarley noted that Mr. Edwards continued to experience numbness on the right side of his forehead and that the wound left a permanent scar on Mr. Edwards' face. Dr. McCarley opined that Mr. Edwards sustained a six percent impairment to the body as a whole from his facial injury. Dr. McCarley cautioned, however, that he was "not confident" that his rating was correct.

Dr. Jody Abrams, an ophthalmologist in Chattanooga, provided followup treatment to Mr. Edwards.[2] Dr. Abrams performed approximately seven surgeries over a two-year period to repair defects and scarring of the eyelid and to alleviate the effects of damage to Mr. Edwards' lacrimal system (tear ducts). On February 16, 2009, Dr. Abrams placed the following restrictions on Mr. Edwards: "P[atient] may return to work with the restriction of no lifting over 40 lbs. and p[atient] may not work in a dusty environment unless wearing safety glasses that seal to face."

Dr. Molly Seal, also an ophthalmologist, testified by deposition that she assumed care of Mr. Edwards' from Dr. Abrams in the fall of 2009. Dr. Seal initially evaluated Mr. Edwards' because of decreased vision that was discovered by Dr. Abrams and his associate, Dr. Kirby. Dr. Seal opined that, although Mr. Edwards recently developed cataracts, she believed that Mr. Edwards' vision loss resulted from damage to his tear ducts, irritation caused by an artificial drainage tube that was temporarily placed in the

[2] Although Dr. Abrams did not testify at trial, some of Dr. Abrams' treatment notes were attached as exhibits to Dr. Molly Seal's deposition, which was offered into evidence at trial.

area, and a defect in the right eyelid that caused Mr. Edwards' eyelashes to rub against his eye. Dr. Seal testified that Mr. Edwards' eyesight in the right eye was 20/60, which was correctable to 20/40 with eyeglasses. According to Dr. Seal, Mr. Edwards also has a diminished visual field and has difficulty keeping his right eyelid open. Dr. Seal opined these vision problems were related to Mr. Edwards' work injury. Dr. Seal did not provide Mr. Edwards with any specific work restrictions, but she did testify that working in a dusty environment would irritate Mr. Edwards' eye. Dr. Seal further stated that it would probably be unsafe for Mr. Edwards to work around heavy machinery, and she explicitly stated that it would be unsafe for Mr. Edwards to work in the logging industry. Dr. Seal assigned Mr. Edwards a 14 percent impairment to the body as a whole and stated that she has assigned impairment ratings "occasionally" in the past.

Dr. William Wray, a vocational consultant who testified at trial, evaluated Mr. Edwards at the request of Mr. Edwards' attorney on May 14, 2012. Dr. Wray testified that Mr. Edwards could not complete a preliminary questionnaire without assistance and that Mr. Edwards' test results revealed that he reads and performs arithmetic at a first or second-grade level. Dr. Wray also noted that Mr. Edwards keeps in his pocket a piece of paper inscribed with his telephone and social security numbers. Dr. Wray reviewed the medical records from several of Mr. Edwards' treating physicians. Based primarily on Dr. Abrams' restriction that Mr. Edwards not engage in work requiring depth perception, Dr. Wray opined that Mr. Edwards is 100% vocationally disabled. Because Dr. Wray knew that Mr. Edwards had worked in the logging industry for roughly thirty years, he analyzed jobs in the Chattanooga area based on Mr. Edwards' education, work experience, and restrictions. Dr. Wray testified that his analysis failed to reveal any jobs that Mr. Edwards could perform. Dr. Wray acknowledged during cross-examination that Mr. Edwards has supervised other workers in the past. Dr. Wray did not, however, consider Mr. Edwards' supervisory experience to be particularly useful because it involved absolutely no record keeping or paperwork. Dr. Wray also was aware that Mr. Edwards had done some logging work after his injury, but he considered it unsafe because of Mr. Edwards' depth perception issues.

At the end of the trial, the court took the case under advisement. The trial court announced its decision from the bench at a hearing held approximately two weeks later. The trial court found that Mr. Edwards' facial disfigurement and right eye injury were work-related. The trial court further found that Mr. Edwards was a credible witness and rejected Triple C's willful misconduct defense. The trial court also found that Mr. Edwards' attempt to return to work in November 2007 was too early, that his decision to leave that job was reasonable, and that he did not have a meaningful return to work. The trial court also concluded that Mr. Edwards was permanently and totally disabled and entered judgment accordingly. Triple C has appealed, arguing that the trial court erred by

finding that Mr. Edwards did not have a meaningful return to work, by accepting Dr. McCarley's testimony concerning impairment, and by finding Mr. Edwards to be permanently and totally disabled. Mr. Edwards, on the other hand, argues that this appeal is frivolous and seeks liquidated damages pursuant to Tennessee Code Annotated section 50-6-225(h) (2008). This 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 in accordance with Tennessee Supreme Court Rule 51.

## Standard of Review

The standard of review of issues of fact is de novo on the record accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When the credibility and weight to be given to the trial testimony are involved, considerable deference is given to the trial court because the trial judge had the opportunity to observe the witnesses' demeanor and to hear in-court testimony. *Madden v. Holland Group of Tenn*., 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the depositions' contents, and the reviewing court may draw its own conclusions with regard to those issues. *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

## Analysis

### *I. Permanent Total Disability*

We first address the trial court's determination that Mr. Edwards is permanently and totally disabled. Our Supreme Court has held that "[t]he test as to whether an employee is permanently and totally disabled requires us to determine if the employee is 'totally incapacitate[d] . . . from working at an occupation that brings the employee an income . . . . '"; "*Hubble v. Dyer Nursing Home*, 188 S.W.3d 525, 535 (Tenn. 2006) (quoting Tenn. Code Ann. § 50-6-207(4)(B) (2005))." We must determine, therefore, whether Mr. Edwards' injury rendered him "totally incapacitated" from working at an occupation that brings him an income. Triple C argues that Mr. Edwards' post-injury work as a logger precludes an award of permanent total disability benefits. Triple C also highlights that Dr. Seal did not impose any *per se* activity restrictions on Mr. Edwards. For these reasons, Triple C contends that the evidence preponderates against the trial court's findings

Although Triple C correctly asserts that Dr. Seal did not impose formal restrictions on Mr. Edwards, Dr. Seal's testimony confirms that Mr. Edwards continued to have irritation in his right eye five years after his accident. The damage to Mr. Edwards' lacrimal system prevented his eye from tearing normally, which negatively affected Mr. Edwards' vision. Damage to his eyelid caused his eyelashes to turn inward and rub against the eye. This eyelash rub caused additional irritation. Mr. Edwards had some loss of visual field and also had difficulty keeping his right eyelid fully open. Dr. Seal opined that working in dusty environments would irritate the eye. Most significantly, she opined that it would be unsafe for him to operate heavy equipment in the logging industry.

Dr. Abrams, who performed multiple surgeries on Mr. Edwards' eye, specifically restricted him from working in dusty environments unless he wore goggles that sealed to his face. Dr. Abrams also directed that Mr. Edwards should not perform work that required depth perception. Mr. Edwards testified that his injured eye would sometimes become bloodshot, causing him to have little or no vision for as much as a week at a time. He further testified that he felt unsafe when working as a logger. An injured employee's "own assessment of his physical condition and resulting disabilities is competent testimony and cannot be disregarded." *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 217 (Tenn. 2006) (quoting *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn.1972)).

Mr. Edwards briefly returned to work for Triple C within a few weeks of his injury. Mr. Edwards quickly left the job because it caused significant pain in his injured right eye. Moreover, Mr. Edwards had as many as six additional surgeries on his eye after he left Triple C. We also recognize Mr. Edwards' admission that he has worked as a logger for about three days per a week after his injury. We are also aware, however, that Mr. Edwards testified that he only works because he has bills to pay and that logging is the only means that he has to generate any income. Our Supreme Court has explained:

> [T]he fact employee is employed after the injury in the same type of employment and at the same wages does not per se preclude the court from finding he is totally disabled as the words are used in [Tenn. Code. Ann. § 50–6–207(4)(B)]. . . . In determining permanent total disability as such is defined in [Tenn. Code. Ann. § 50–6–207(4)(B)], this fact of employment after injury is 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"

*Skipper v. Great Cent. Ins. Co.*, 474 S.W.2d 420, 424 (1971); *accord, Rhodes v. Capital City Ins. Co.*, 154 S.W.3d 43, 48 (Tenn. 2004) .

The record establishes that Mr. Edwards had worked as a logger for most of his adult life and that he was fifty-eight years old at the time of trial. He had a seventh grade education, and Dr. Wray's uncontradicted testimony established that Mr. Edwards is functionally illiterate. Both Dr. Abrams' records and Dr. Seal's testimony raise serious concerns as to whether it was safe for Mr. Edwards to seek employment in the logging industry. Moreover, Mr. Edwards testified that he did not feel safe doing logging work. See *Orrick*, 184 S.W.3d at 217. Dr. Wray, using alternative methods, could not find a single job in the Chattanooga area that was compatible with Mr. Edwards' abilities, limitations and skill set.

As required, we have conducted an independent review of the evidence presented in this case, and we are unable to conclude that the evidence preponderates against the trial court's finding that Mr. Edwards' work-related injury rendered him permanently and totally disabled.[3] We therefore affirm the trial court's finding that Mr. Edwards is entitled to permanent total disability benefits.

### *II. Frivolous Appeal*

Mr. Edwards has requested that we find this appeal to be frivolous and award liquidated damages pursuant to Tennessee Code Annotated section 50-6-225(h). Tennessee Code Annotated section 50-6-225(h) provides "[w]hen a reviewing court determines . . . that the appeal of an employer or insurer is frivolous, or taken for purpose of delay, a penalty may be assessed by the court, without remand, against the appellant for a liquidated amount." The liquidated damages statute, however, only applies "in obvious cases of frivolity and should not be asserted lightly or granted unless clearly applicable–which is rare." *Parra v. Rieth-Riley Const. Co.*, No. W1999-00419-WC-R3-CV, 2001 WL 310414, at *2 n.2 (Tenn. Workers' Comp. Panel March 30, 2001).

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[3] In light of that conclusion, Triple C's arguments concerning the alleged meaningful return to work and the weight to be given to Dr. McCarley's impairment rating have no bearing on the result of this appeal. The concept of "meaningful return to work" is a product of the caps placed on permanent partial disability awards under Tennessee Code Annotated section 50-6-241. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 328 (Tenn. 2008). Permanent total disability, however, is a separate and distinct concept in our workers' compensation statute. *Davis v. Reagan*, 951 S.W.2d 766, 768 (Tenn. 1997). Therefore, when a court finds that an employee is permanently and totally disabled, the existence of an arguably meaningful return to work is irrelevant. *Id.* at 769. Likewise, the percentage of anatomical impairment does not control or limit an award of permanent total disability. *Id.*

After reviewing the record, we are unable to conclude that the present appeal is frivolous or that Triple C took this appeal for the purpose of delay. We therefore decline to award liquidated damages pursuant to Tennessee Code Annotated section 50-6-225(h).

**Conclusion**

The judgment of the trial court is affirmed. Costs are taxed to Velma Childs, Childs Logging, Triple C Fiber, QBE Americas, Inc. d/b/a QBE Specialty Insurance and their surety, for which execution may issue if necessary.

TONY A. CHILDRESS, SPECIAL JUDGE