IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 12, 2016 Session

TONY GRAY v. VISION HOSPITALITY GROUP, INC., ET AL.

Appeal from the Chancery Court for Davidson County
No. 14-1013-I Claudia Bonnyman, Chancellor

No. M2016-00116-SC-R3-WC – Mailed December 14, 2016
Filed January 26, 2017

Tony Gray ("Employee") sustained a back injury on August 6, 2013 while working as a chief engineer at the Hyatt Place Hotel Airport in Nashville, Tennessee ("Employer"). Employee's injury occurred while lifting and moving thirty rolls of carpet padding. After notifying Employer of his back injury, Employee was referred to Concentra Medical Clinic, where he was subsequently diagnosed with a back sprain and prescribed physical therapy. Employee experienced a slight improvement in his condition and was released in September 2013 to full-time work for a trial period in a light duty capacity. Upon his return to Employer, Employee was terminated for several issues relating to his job performance. Employee's symptoms worsened, and he eventually required lower back surgery. He did not return to work for any employer thereafter. Based on Employee's physical injuries, the trial court determined that Employee was permanently and totally disabled. Employer appealed, arguing that the trial court erred in its determination of permanent and total disability. Pursuant to Tennessee Supreme Court Rule 51, the appeal was referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. Upon our review of the record and the applicable law, we affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (2014) Appeal as of Right;
Judgment of the Chancery Court Affirmed

JEFFREY S. BIVINS, C.J., delivered the opinion of the court, in which, ROBERT E. LEE DAVIES, and PAUL G. SUMMERS, SR. JJ, joined.

James H. Tucker, Jr., and Travis J. Ledgerwood, Nashville, Tennessee, for the appellants, Vision Hospitality Group, Inc., and Amerisure Insurance, Inc.

Brian Dunigan, Goodlettsville, Tennessee, for the appellee, Tony Gray.

OPINION

Factual and Procedural Background

Tony Gray ("Employee") began working for the Hyatt Place Hotel Airport in Nashville, Tennessee ("Employer") as a chief engineer in April 2013. As chief engineer, Employee's responsibilities involved overseeing the physical plant of the hotel, including but not limited to HVAC, plumbing, electrical, painting, refrigeration, drywall, and coordinating inspections by government agencies such as OSHA and TOSHA. Prior to his employment with Employer, Employee worked primarily as a chief engineer or equivalent position in building maintenance and was also an assistant relief manager for a movie theater, journeyman plumber, and delivery driver.

While at work on August 6, 2013, Employee suffered a back injury after Employer directed him and his assistant to remove approximately thirty rolls of carpeting and carpet padding from a storage pod. The rolls were in eight and ten foot lengths, and Employee and his assistant had to carry the rolls and place them in Employee's truck. They then drove to the main building where they offloaded the rolls onto a dolly and transported the rolls to a storage area. During this process, Employee felt something "move" in his lower back. He continued to work, and the job was completed by the end of the day. Employee testified that later that evening the pain in his back increased dramatically. He called Employer the same evening to report his injury and was referred to Concentra Medical Clinic for treatment. There, Employee was diagnosed with a back sprain and prescribed physical therapy. Employee was allowed to continue working in a light duty capacity, and he gradually improved but was never pain-free. On September 6, 2013, he was released to return to full-duty work.

On September 10, 2013, Employee was terminated when he was given a corporate separation notice. The notice stated that the reasons for his termination were poor work, insubordination, and a verified customer complaint with a list of specific infractions attached. Employee denied that he had received either written or verbal warnings about any of the infractions. He admitted that the incidents described in the list had occurred; however, he testified that he did not understand his conversations with his supervisors about the incidents to be disciplinary, but as conversations regarding work assignments to be completed.

After his termination, Employee's symptoms began to worsen. He returned to Concentra, where he was advised that an MRI of his lower back was needed. He then was referred to Dr. Christopher Kauffman, an orthopedic surgeon, for additional evaluation and treatment. Dr. Kauffman first saw Employee on December 26, 2013. He

took a medical history from Employee, performed a clinical examination, and reviewed the MRI ordered by Concentra. His diagnosis was that Employee had an L4-5 disk herniation with left lower extremity sciatica. Dr. Kauffman recommended an epidural steroid injection and prescribed different medications from those previously prescribed for Employee.

Employee returned to Dr. Kauffman for a follow-up appointment on January 23, 2014. Employee had received two epidural injections, which provided only "transient relief." At that time, Dr. Kauffman recommended surgery to remove the damaged disk. That procedure took place on January 29, 2014. After the procedure, Employee reported that the pain in his left leg had improved, and his overall level of pain had also improved. Dr. Kauffman ordered a functional capacity evaluation ("FCE") prior to a March 25, 2014 appointment with Employee. At that appointment, Employee's main complaints were "pain in his low back, [and] paresthesias of both feet, which . . . waxed and waned with activity."

The FCE report found that Employee was able to perform light work for eight hours per day. Dr. Kauffman placed Employee at maximum medical improvement as of March 25, 2014. He assigned permanent restrictions limiting Employee's lifting to twenty pounds occasionally and ten pounds frequently. He placed no limitations on sitting, standing, or reaching. In addition, he stated that Employee could do occasional walking and stair climbing. Dr. Kauffman also opined that Employee retained a seven percent permanent anatomical impairment to his body as a whole due to his injury.

Employee returned to Dr. Kauffman on April 22, 2014. He reported that he had discontinued his use of opioid pain medication and that he was slightly better. Dr. Kauffman continued the previous permanent restrictions. He also reported that Employee had significant arthritic changes at the levels above and below L4-5. Those changes were not related to his work injury. Dr. Kauffman opined that Employee displayed symptom magnification during his course of treatment—in other words, Employee's reported symptoms were not proportional to Dr. Kauffman's physical findings. Dr. Kauffman reviewed the report of Employee's independent medical evaluator, Dr. Steven Neely. Following his review of Dr. Neely's report, Dr. Kauffman's opinions concerning Employee's condition remained unchanged.

During cross-examination, Dr. Kauffman agreed that the August 6, 2013 injury had caused Employee's herniated L4-5 disk. He agreed that he had prescribed opioid pain medication to Employee during his course of treatment and that Employee had produced a valid effort during his FCE.

Employee testified that the January 2014 surgery "took care of" his sciatic nerve

issue, but he continued to have soreness in his back, numbness in his left calf, and tingling in his left foot. He felt a crunching sensation when he attempted to lift more than forty pounds, and he had difficulty walking and climbing stairs or hills. He testified that he used a cane to assist in walking but that the cane was not prescribed by a doctor. Additionally, he testified that standing, walking, or sitting for long periods was painful, and he reported sleep disturbance. At the time of trial, Employee also was receiving antidepressant medication recommended by his primary care physician. Employee did not believe he could perform any of the jobs he had held prior to his injury.

Dr. Neely, an orthopedic surgeon, conducted an independent medical examination on September 12, 2014, at the request of Employee's attorney. He reviewed and summarized all relevant medical records and performed a clinical examination of Employee. Dr. Neely's diagnosis was that Employee had a herniated disk with radiculopathy in the left leg. He stated that Employee's use of a cane was reasonable and opined that Employee retained a twelve percent permanent anatomical impairment to his body as a whole. His impairment rating differed from Dr. Kauffman's because he found that Employee had a verifiable radiculopathy, while Dr. Kauffman did not. He accepted the restrictions set out in Employee's FCE, and during cross-examination, he stated that Employee was capable of working within those restrictions.

John McKinney, a vocational evaluator, testified on behalf of Employee. He interviewed Employee on October 20, 2014. As part of his evaluation, he reviewed Employee's medical records and administered the Slosson Intelligence and Wide Range Achievement Tests. These tests revealed results in the average range. He found that Employee was able to read at a ninth-grade level, spell at a seventh-grade level, and perform mathematics at a sixth-grade level.

Based on Dr. Kauffman's activity restrictions, Mr. McKinney determined that Employee had lost access to eighty-one percent of the jobs previously available to him. In reaching this conclusion, Mr. McKinney performed a computer analysis using a program called "Oasis." Mr. McKinney also determined that Employee had no reasonably transferrable job skills, observing that some of Employee's past employments were skilled but that each involved significant amounts of physical labor.

Mr. McKinney then opined that Employee was not employable in the open job market. He based his conclusion on additional factors including Employee's age, two-year absence from the job market, use of a cane, need to frequently change standing or sitting positions, slow gait, demeanor, and other "negative employability factors." Mr. McKinney ultimately concluded that Employee was 100% vocationally disabled.

During cross-examination, Mr. McKinney agreed that he was not a medical

doctor, that he was not qualified to give medical opinions, and that he performed no tests of Employee's physical abilities. He testified that Employee had supervisory experience and also agreed that Employee's FCE placed Employee at a "light" exertion level.

Michelle Weiss, a vocational evaluator, testified on behalf of Employer. She testified that she interviewed Employee at his attorney's office on September 21, 2015. As a part of her evaluation, she also reviewed Employee's medical records and administered the same tests as Mr. McKinney, obtaining similar results. Ms. Weiss based her analysis on Dr. Kauffman's permanent restrictions, which had been approved by Dr. Neely. Using the same computer program utilized by Mr. McKinney, and Skilltran, an additional program, she analyzed Employee's transferrable skills and concluded that Employee had sustained a seventy-nine percent loss of access to jobs. Ms. Weiss also performed a wage-loss analysis.[1] She opined that, if Employee was able to return to "light supervisory work," he had suffered no wage loss. If he was not able to return to such work, Employee had sustained a thirty-nine percent to fifty-six percent loss of earning potential. Combining these findings, Ms. Weiss opined that, if Employee was able to return to light supervisory work, he had sustained a forty percent vocational disability, but if he was not able to return to those jobs, he had sustained a sixty-three percent disability. Ms. Weiss listed employability factors in her report and considered those factors to the extent possible. She was critical of Mr. McKinney's analysis because it was based in part on subjective considerations. Ms. Weiss testified that analysis of the effect of subjective factors is outside the scope of vocational evaluation standards. During cross-examination, Ms. Weiss testified that she did not believe that Employee could return to work as a plumber, maintenance man, electrician, or painter. She added that he could not perform hands-on maintenance and probably could not return to work as a chief engineer for Employer.

Jeff Woods testified that he was the assistant general manager at the Hyatt Place Hotel Airport from July 2013 until December 2013. In that job, he was in charge of all departments when the general manager was not present. Thus, he was Employee's direct supervisor when the general manager was not on-site. Mr. Woods recalled receiving a telephone call from Employee reporting his back injury in August 2013. He also recalled that Employee was sent to a physician the next day. He testified that Employee was able to work after the injury and that Employee worked under some restrictions and was allowed to leave the premises for physical therapy and medical appointments.

Mr. Woods considered Employee's job performance to be inconsistent, describing

[1] Because he concluded that Employee was unable to return to any work, Mr. McKinney did not perform a wage loss analysis.

it as good on some days and bad on others. When Mr. Woods began working for Employer, he learned that the general manager, John Tanner, was keeping records concerning the performance of Employee and other workers. The records were maintained on Mr. Tanner's computer and were arranged in roughly chronological order. Mr. Woods also made entries on the document after starting as assistant general manager, and he and Mr. Tanner made entries concerning various incidents as they occurred, documenting the issue, its resolution, and any follow-up. Mr. Woods then testified about some of the documented incidents. These included: failing to complete a test of the sprinkler system; failing to test or repair an air conditioning failure in the lobby; declining to return to work when a laundry dryer malfunctioned, thereby causing smoke to circulate; refusing a request to assist an injured employee in moving some trash; painting over a roof leak instead of repairing it; failing to repair a kitchen freezer door for several days, thereby causing the unit to shut down completely; and failing to clean up paint that he spilled in an elevator. Mr. Woods testified that, after being warned that further incidents would not be tolerated, Employee's response was "I got you." Therefore, Mr. Woods considered Employee's termination to be reasonable.

During cross-examination, Mr. Woods stated that documents about several workers' performance problems, including those of Employee, were in existence when Mr. Woods began working for Employer on July 1, 2013. He agreed that Employer gave Employee no written warnings, called "Associate Notices," until his termination. He also agreed that the paperwork did not reflect that all of the incidents listed in the Word document were discussed with Employee. Similarly, the list of infractions was not given to Employee until his termination, but Mr. Woods testified that he discussed some of them with Employee and told him that a list was being kept.

After hearing this evidence, the trial court announced its findings from the bench. After a thorough summary of the proof, the court noted that Employee appeared to be older than his actual age. The court credited the testimony of both Mr. McKinney and Ms. Weiss. The court adopted Dr. Neely's impairment rating of twelve percent to the body as a whole, stating that Dr. Neely had provided a more detailed explanation of his rating than Dr. Kauffman.

The trial court determined that Employer had sufficient reason to terminate Employee but that Employer did not have reason to terminate him so soon after he returned to full-duty work. The court adopted Mr. McKinney's opinion that Employee was not able to return to the workforce. Therefore, it awarded permanent total disability benefits to Employee. The court went on to make alternative findings in the event the total disability award was overturned on appeal. It found that Employee's award was not capped at one and one-half times the medical impairment; that Employee had presented clear and convincing evidence of three of the four criteria set out in Tennessee Code

Annotated 50-6-242(b); and that the alternate award of permanent partial disability would be seventy-two percent to the body as a whole. Judgment was entered in accordance with those findings, and Employer appealed to the Supreme Court. The Court assigned the case to this Panel in accordance with Tennessee Supreme Court Rule 51.

Standard of Review

In workers' compensation cases, this Court reviews the trial court's findings of fact de novo with a presumption of correctness unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(a)(2); Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 898 (Tenn. 2009); Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). This standard "requires us to examine, in depth, a trial court's factual findings and conclusions." Williamson v. Baptist Hosp. of Cocke Cnty., Inc., 361 S.W.3d 483, 487 (Tenn. 2012) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)).

Considerable deference must be afforded any factual determinations made by the trial court when the trial judge had the opportunity to observe the witness' demeanor and hear in-court testimony. See Madden, 277 S.W.3d at 900. But 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 contents of the depositions, 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). The trial court's conclusions of law are reviewed de novo with no presumption of correctness. Lambdin v. Goodyear Tire & Rubber Co., 468 S.W.3d 1, 9 (Tenn. 2015) (citing Wilhelm, 235 S.W.3d at 126).

Analysis

Employer contends that the evidence preponderates against the trial court's finding that Employee was permanently and totally disabled. Assuming that contention is correct, Employer then asserts that the trial court erred by adopting Dr. Neely's impairment rating instead of Dr. Kauffman's, by finding that Employee did not have a meaningful return to work, and by finding that Employee had established three of the four criteria set out in Tennessee Code Annotated § 50-6-242(b) (2008 & Supp. 2013). Because we conclude that the evidence does not preponderate against the award of permanent total disability benefits, we do not address Employer's subsequent contentions.

An individual is permanently and totally disabled when he or she is incapable of "working at an occupation that brings [him or her] an income." Fritts v. Safety Nat'l Cas.

Corp., 163 S.W.3d 673, 681 (Tenn. 2005) (citing Tenn. Code Ann. § 50-6-207(4)(B) (1999)). When determining whether an individual is permanently and totally disabled, this Court looks to "a variety of factors such that a complete picture of an individual's ability to return to gainful employment is presented to the Court." 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, job opportunities in the immediate and surrounding communities, and the availability of work suited for an individual with that particular disability." Id. at 535-36 (citing Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000)). Although an assessment of these factors is usually made and presented at trial by a vocational expert, "it is well settled that despite the existence or absence of expert testimony, an employee's own assessment of his or her overall physical condition, including the ability or inability to return to gainful employment, is 'competent testimony that should be considered.'" Vinson, 92 S.W.3d at 386 (quoting Cleek, 19 S.W.3d at 774).

To support its argument that the evidence preponderates against the trial court's finding of permanent and total disability, Employer alleges that Employee's education, skills, and vocational background permit him to obtain employment despite his physical limitations. Employer points to Employee being a high school graduate, his supervisory experience in several jobs, and his work in the property maintenance field as a chief engineer and equivalent positions where his duties included supervising staff, bidding jobs, and working with contractors. Employer further argues that the medical proof shows that Employee is not totally incapacitated from earning an income, pointing to Employee's FCE; the absence of assigned limitations on sitting, standing, or reaching; and the permanent impairment ratings assigned by Dr. Kauffman and Dr. Neely. Employer also points out that neither vocational expert found that Employee had a 100% loss of access to employment.

Employee counters that his education, skills, and vocational background are insufficient to overcome the physical limitations caused by his work injury and their effect on his employability. Specifically, he argues that he has had no education beyond high school; that he was fifty-eight years old when the trial took place; that his academic abilities fall short of eighty-four percent of his peers; that the resulting physical limitations from his injury have excluded him from almost every job he has ever held in his life; and that, for what few jobs might remain, his inability to stand, sit, or walk for extended periods of time without pain would make work nearly impossible. Employee also argues that his reliance on a cane to walk and his elderly appearance further erode his employability.

"For permanent total disability benefits to be awarded, the disability must prevent the employee from working at an occupation that brings the employee an income." Fritts,

163 S.W.3d at 681 (citing Tenn. Code Ann. § 50-6-207(4)(B) (1999)). We conclude that the lay and expert testimony in this case establish that Employee is unable to work due to his physical limitations resulting from his work injury.

The record indicates Employee was fifty-eight years old at the time of trial and had worked his entire life almost exclusively in physically demanding jobs involving hands-on maintenance and repair. Employee testified that, following his injury, he has difficulty walking and climbing stairs or hills and that he uses a cane to walk for support. He testified that standing, walking, or sitting for long periods of time is painful to him, and that, as a result of his injury, he had sleep disturbance and has been treated for depression by his primary care physician. Such testimony is competent evidence that the trial court should consider in determining the extent of disability. See McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn. 1999).

Employee's testimony supports the notion that he is not able to function daily within his medical restrictions. The trial court observed Employee's demeanor in court and heard his testimony in-person. It made observations about Employee's frail appearance in its findings and clearly accredited Employee's testimony that he is unable to return to gainful employment. We defer to a trial court's findings as to the weight and credibility of this testimony. See Madden, 277 S.W.3d at 900.

Both medical experts recognized that Employee has permanent restrictions that limit him to lifting twenty pounds occasionally or ten pounds frequently, with only occasional walking and stair climbing. Both vocational experts testified that Employee has lost significant access to employment opportunities that were previously available to him and that Employee is unable to perform any of his previous jobs. Further, both vocational experts testified that Employee's academic ability is below a twelfth grade level. Mr. McKinney testified that Employee's appearance, slow gait, and demeanor further erode his employability, and the trial court credited this testimony after observing Employee in court. While Ms. Weiss opined that Employee could seek employment in a maintenance supervisory position, Mr. McKinney testified that Employee would not likely be hired in a supervisory position given his physical limitations.

The trial court weighed the appropriate factors by considering Employee's skills, training, education, age, job opportunities in the immediate and surrounding communities, and the availability of work suited for his particular disability. After a thorough review of the record and consideration of all relevant factors, we hold that the evidence does not preponderate against the trial court's finding that Employee was permanently and totally disabled.

Conclusion

Based upon our review of the factors pertinent to a determination of permanent and total disability, the arguments raised by Employer, and the entire record, we hold that the trial court correctly determined that Employee was permanently and totally disabled. Accordingly, the judgment of the trial court is affirmed. Costs are taxed to the appellants, Vision Hospitality Group, Inc. and Amerisure Insurance, Inc., and their surety, for which execution may issue if necessary.

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SPECIAL WORKERS' COMPENSATION APPEALS PANEL
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JUDGMENT ORDER

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 are assessed to the appellants, Vision Hospitality Group, Inc. and Amerisure Insurance, Inc., and their surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

JEFFREY S. BIVINS, CHIEF JUSTICE