

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 31, 2020 Session

CHARLES HOPPER V. UGN, INC.

**Appeal from the Chancery Court for Madison County
No. CH 72437; James Butler, Chancellor**

**No. W2019-00524-SC-WCM-WC – Mailed December 1, 2020;
Filed March 26, 2021**

Charles Hopper filed this workers' compensation action after suffering a work-related injury to his neck. The trial court found that Mr. Hopper is permanently and totally disabled. Employer concedes that Mr. Hopper suffered a work-related injury but argues that the evidence preponderates against the trial court's judgment as to permanent and total disability. Employer also argues that any award should be limited to 1.5 times the impairment rating. The appeal has been referred to this Panel for a hearing and a report of findings of fact and conclusions of law under Tennessee Supreme Court Rule 51. We affirm the trial court's judgment.

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

ROBERT E. LEE DAVIES, SR. J., delivered the opinion of the court, in which JEFFREY S. BIVINS, C.J., AND DON R. ASH, SR. J., joined.

Hailey H. David, Jackson, Tennessee, for the appellant, UGN, Inc.

Ricky Boren, Jackson, Tennessee, for the appellee, Charles Hopper.

OPINION

Factual and Procedural Background

On June 12, 2013, Charles Hopper suffered a work-related injury to his neck. After exhausting the benefit review conference process, he filed this worker's compensation action on October 27, 2014. A trial was held on November 20, 2019.

Trial Testimony

Mr. Hopper was 63 years old at the time of the trial. Although he left school in the 9th grade, he later joined the military and earned a GED. After an undesirable discharge from the military, Mr. Hopper worked in construction, maintenance, loading and assembly. Although he had some supervisory experience, all of his positions involved heavy lifting and physical labor.

In 2012, Mr. Hopper started working for UGN, Inc. (Employer). His duties included driving a forklift and lifting 40 to 50 pounds. On June 12, 2013, Mr. Hopper was injured when the fork lift he was operating was struck from behind by another fork lift "at a high rate of speed," and the impact "jarred his neck back." Mr. Hopper estimated the speed of the fork lift as 12 to 15 miles per hour, but a witness for Employer stated that the fork lifts had a top speed of 6 miles per hour. Mr. Hopper stated that his fork lift moved 6 feet after the impact.

Mr. Hopper reported the incident to Employer and was referred to Physician's Quality Care where he was given medication and directed to undergo an MRI. When he returned to work, he was given a job scanning labels but later was assigned to a production line that required "moving, bending, and stretching," which caused more pain in his neck. At the recommendation of his attorney, Mr. Hopper was examined by Dr. Apurva Dalal. Mr. Hopper was later referred for treatment that included injections and pain medication.

In February 2014, Mr. Hopper contracted bronchitis and missed work. Although he completed a leave of absence form, he accumulated points based on Employer's attendance policy. Mr. Hopper acknowledged that he had also missed work and accumulated points for various absences before the neck injury. In March 2014, when he told Employer that he could no longer work because of his neck pain, Employer fired him based upon its attendance policy. Mr. Hopper applied for and received unemployment benefits. He testified that he applied for 12 or 13 jobs, but he has not worked since being fired.

Before this injury, Mr. Hopper had no problems with his neck. Since the injury, he has pain in his neck that sometimes goes down his left arm, which he has treated with pain medication and injections. He has trouble turning his head to the side and moving his head up and down, which interferes with driving and operating a riding lawn mower. He does not believe he can do any heavy lifting or perform any of his prior jobs because of pain. Although during his deposition, Mr. Hopper testified that he could do some of his prior jobs, at trial he explained that the deposition was taken several years before trial and that his condition had worsened. Now, he takes one hydrocodone per day.

Robert Kennon, Ph.D., testified that he evaluated Mr. Hopper on June 18, 2018. Mr. Hopper's work history included construction, sewer pipe installation, maintenance, loading, car repairs, and bartending. Most of the jobs involved lifting and physical labor. According to Dr. Kennon, Mr. Hopper's age, injury, mild depression, insulin dependent diabetes, and use of pain medication affect his ability to find employment. Based on the restrictions imposed by Dr. Dalal, who conducted an independent medical evaluation, Dr. Kennon concluded that Mr. Hopper meets the criteria for sedentary work. Dr. Kennon pointed out, however, that Mr. Hopper lacks the skills and training that many sedentary positions require. According to Dr. Kennon, Mr. Hopper had a 92.94 percent loss of highly transferrable job titles when considering the restrictions imposed by Dr. Dalal. Dr. Kennon conceded that Mr. Hopper did not tell him he had prior supervisory experience or that he had applied for 12 or 13 jobs after being fired. Regardless, Dr. Kennon believed Mr. Hopper was honest and never observed any indications that Mr. Hopper was manipulating the evaluation.

Katrena Fortwengler, Employer's Human Resources Manager, testified that Employer had a point system for employee absences. She explained that excused absences were limited to those under the Family Medical Leave Act, disability, workers' compensation, bereavement, and jury duty. An illness, even when verified by a note from a physician, is not an excused absence. The point system is described in the employee handbook, which employees are presumed to know. Ms. Fortwengler described Mr. Hopper's employment history and stated that he was terminated in March 2014 for accumulating too many points for his absences.

Deposition Testimony

Dr. Keith Williams, a board-certified orthopedic surgeon, examined Mr. Hopper on November 8, 2013. Mr. Hopper complained of neck pain, stiffness, and tingling in his left arm and fingers. Although Mr. Hopper had normal strength and neurological functions, he

had severe stiffness and a severe loss of motion when extending his neck. According to Dr. Williams, an MRI taken in July 2013 showed moderate degenerative changes at C4 and C5 but “no other significant abnormalities” that were attributable to a specific incident. Mr. Hopper did not have decreased sensation in his ulnar nerve or decreased strength in his upper extremities. Dr. Williams recommended exercise and anti-inflammatories, but he saw no need for surgery. He assigned a 2 percent permanent impairment to the body as a whole. He did not impose permanent restrictions, but he cautioned that Mr. Hopper could incur more damage if he performed certain types of jobs. Dr. Williams acknowledged that a person with a degenerative condition can “begin symptoms” after a specific incident or “trauma of some sort.”

Dr. Apurva Dalal, a board-certified orthopedic surgeon, examined Mr. Hopper on March 26, 2014. Mr. Hopper reported “significant pain” in his neck, “decreased range of motion,” and “tingling and numbness between his scapular blades.” An examination of Mr. Hopper’s cervical spine showed tenderness with paraspinal muscle spasms, decreased sensation, and decreased bilateral strength. A Spurling’s test was positive on the left side. X-rays revealed mild degenerative disease of the cervical spine. Dr. Dalal opined that the “forklift accident aggravated [Mr. Hopper’s] pre-existing degenerative disease.” He assigned a 3 percent permanent impairment to the body and recommended restrictions on lifting over 15 pounds, pulling, pushing, and overhead work.

Standard of Review

Review of factual issues is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court’s factual findings, unless the preponderance of the evidence is otherwise. *See* Tenn. Code Ann. § 50-6-225(e)(2) (2014) (applicable to injuries occurring prior to July 1, 2014). Considerable deference is afforded to the trial court’s findings with respect to the credibility of witnesses and the weight to be given their in-court testimony. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733 (Tenn. 2002); Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 898 (Tenn. 2009). When expert medical testimony differs, it is within the trial judge’s discretion to accept the opinion of one expert over another. The reviewing court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008).

Analysis

I.

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Employer argues that the evidence preponderates against the trial court's finding that Mr. Hopper is permanently and totally disabled because Mr. Hopper had an impairment rating of 2 to 3 percent, was fired for missing work, and did not look for new employment.

An employee may be found permanently and totally disabled “[w]hen an injury not otherwise specifically provided for in this chapter totally incapacitates the employee from working at an occupation that brings the employee an income.” Tenn. Code Ann. § 50-6-207(4)(B) (2014) (applicable to injuries occurring prior to July 1, 2014). In determining whether an employee is permanently and totally disabled, courts consider a number of factors to ascertain “a complete picture of an individual’s ability to return to gainful employment.” Hubble v. Dyer Nursing Home, 188 S.W.3d 525, 535 (Tenn. 2006). These factors include the employee’s skills, education, age, training, “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. 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.” Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000) (quoting McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn. 1999)). The extent of an employee’s vocational disability is a question of fact to be determined from both lay testimony and medical evidence. Id. at 773.

There is no dispute that Mr. Hopper suffered a work-related injury to his neck when the forklift he was operating was struck by another forklift. Mr. Hopper reported the injury, underwent an MRI, and received treatment for pain management. The trial court accredited Mr. Hopper’s testimony about his ongoing pain and related symptoms, his inability to work, and his inability to engage in everyday activities. The trial court also accredited Dr. Kennon’s testimony that Mr. Hopper had a history of medium and heavy physical work and a 92 percent loss of highly transferable job titles when applying the restrictions imposed by Dr. Dalal. Dr. Kennon testified that Mr. Hopper’s history of physical labor, age, illnesses, and use of pain medication all affected his ability to find employment.

In considering the deposition testimony, the trial court emphasized Dr. Dalal’s testimony that Mr. Hopper had “significant pain” in his neck, “decreased range of motion,” and “tingling and numbness between his scapular blades.” Dr. Dalal opined that the “forklift accident aggravated [Mr. Hopper’s] pre-existing degenerative disease.” He assigned a 3 percent impairment and recommended restrictions on lifting over 15 pounds, pulling, pushing, and overhead work. In contrast, Dr. Williams assigned a 2 percent

impairment rating with no permanent restrictions.

The trial court analyzed the trial testimony and medical evidence as it related to Mr. Hopper's injuries, skills, training, education, age, and vocational opportunities. The trial court accredited the trial testimony of Mr. Hopper and Dr. Kennon. Employer did not present a witness to counter Dr. Kennon's testimony, nor does the evidence in the record refute his testimony. Accordingly, we conclude that the evidence does not preponderate against the trial court's judgment that Mr. Hopper is permanently and totally disabled. McCloud v. Charter Comm'ns, Inc., W2018-02166-SC-R3-WC, 2019 WL 5556252, *4 (Tenn. Workers Comp. Panel Oct. 24, 2019) (upholding trial court's determination that employee was permanently and totally disabled); Gray v. Vision Hosp. Grp., Inc., No. M2016-00116-SC-R3-WC, 2017 WL 384430, *7 (Tenn. Workers Comp. Panel, Jan. 26, 2017) (upholding trial court's determination that employee was permanently and totally disabled).

II

In addition to arguing that Mr. Hopper is not permanently and totally disabled, Employer argues that an award of permanent partial disability should be limited to 1.5 times his impairment rating because he had a meaningful return to work but was fired for excessive absences. Mr. Hopper argues that the trial court accredited his testimony and found that he did not engage in misconduct or intentional actions with regard to his absences. Because we have affirmed the trial court's finding of permanent and total disability, we need not address this issue. See, e.g., Gray, 2017 WL 384430, at *5 (declining to address employer's meaningful return to work argument because "the evidence does not preponderate against the award of permanent total disability benefits").

Conclusion

We conclude that the evidence in the record does not preponderate against the trial court's determination that Mr. Hopper is permanently and totally disabled and affirm the trial court's judgment. Costs of this appeal are assessed to Employer, UGN, Inc., for which execution issue shall issue if necessary.

ROBERT E. LEE DAVIES, SENIOR JUDGE

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**Chancery Court for Madison County
No. 72437**

No. W2020-00524-SC-WCM-WC – Filed March 26, 2021

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by UGN, Inc. 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 UGN, Inc., for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Bivins, Jeffrey S., C.J., not participating