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

MICHAEL JOHNSON v. ZELEDYNE, LLC ET AL.

Appeal from the Circuit Court for Wilson County
No. 2011-CV-67 Clara Byrd, Judge

No. M2013-00147-WC-R3-WC - Mailed November 6, 2013
Filed December 11, 2013

This appeal takes issue with an award of permanent partial disability benefits in a workers' compensation case. After sustaining a compensable knee injury, the employee filed suit seeking workers' compensation benefits in the Circuit Court for Wilson County. Following a bench trial, the trial court awarded the employee the maximum disability award permitted by the circumstances. On this appeal, the employer takes issue with the trial court's exclusion of the testimony of an evaluating physician on the ground that he had not personally examined the employee and with the amount of the disability award. The appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. We find that the trial court erred by excluding the physician's testimony but that this error was harmless. We also find that the evidence supports the trial court's disability award. Accordingly, we affirm the judgment.

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

WILLIAM C. KOCH, JR., J. delivered the opinion of the Court, in which E. RILEY ANDERSON, SP.J. and DON R. ASH, SR.J., joined.

Michael L. Haynie, Nashville, Tennessee, for the appellants, Zeledyne, LLC and Commerce & Industry Company.

Jason G. Denton and Lawrence Alan Poindexter, Lebanon, Tennessee, for the appellee, Michael Johnson.

OPINION

I.

After leaving school following the tenth grade,[1] Michael Johnson worked for Armstrong Rubber Company as a first stage tire assembler for thirteen years. After the Armstrong plant closed in 1997, Mr. Johnson worked off and on as a carpenter until 2007 when he went to work for Visteon Corporation ("Visteon"). Mr. Johnson's job consisted of packaging windshields for shipment to dealerships and auto glass sellers. In April 2008, Zeledyne, LLC ("Zeledyne") purchased Visteon's glass plant, and Mr. Johnson continued his employment with Zeledyne.

Mr. Johnson was injured on September 25, 2008. He twisted his right knee as he was turning to pick up a windshield from a pallet and felt a popping sensation. Mr. Johnson reported the incident but was able to complete his normal shift. His symptoms worsened overnight, and he was referred to Dr. Roy Johnson, who ordered x-rays and physical therapy. When Mr. Johnson's knee did not improve, Dr. Johnson referred him to Dr. Roy Terry, an orthopaedic surgeon, for further evaluation and treatment.

Dr. Terry ordered MRI scans of Mr. Johnson's knee which revealed a full thickness defect of the articular cartilage in the knee, as well as a possible loose body. On March 9, 2009, Dr. Terry surgically removed the loose body and grafted healthy cartilage onto the damaged area. When Mr. Johnson's symptoms did not improve, Dr. Terry ordered another MRI which revealed another loose body in Mr. Johnson's knee. Mr. Johnson's condition improved following a second surgery on April 19, 2010.

Dr. Terry determined that Mr. Johnson reached maximum medical improvement on July 1, 2010. Dr. Terry also assigned 3% permanent anatomical impairment to Mr. Johnson's right leg, the same impairment he had assigned following the first surgery. Mr. Johnson wore a brace to stabilize his knee because he continued to have soreness. Dr. Terry also restricted Mr. Johnson's activities to no squatting, kneeling, or climbing and only occasional walking.

Zeledyne found various light duty positions for Mr. Johnson during his convalescence. However, when Mr. Johnson was released by Dr. Terry, Zeledyne's head foreman informed Mr. Johnson that no work within Dr. Terry's restrictions was available at Zeledyne.

Mr. Johnson has not worked since he left Zeledyne. While he actively sought employment and received several job offers, Mr. Johnson declined the offers because he did

[1]Mr. Johnson later earned his GED.

not believe that he would be able to perform them. He also testified that he was no longer able to play basketball with his son and that he had difficulty sleeping because of pain and soreness in his leg. Mr. Johnson added that he was able to do some yard work at his house but that he sometimes "paid for it" later in terms of soreness and tenderness.

Dr. Richard Fishbein, an orthopaedic surgeon, performed an independent medical examination of Mr. Johnson and testified in person at the trial. Dr. Fishbein stated that his examination revealed (1) that Mr. Johnson had one hundred twenty degrees of flexion, (2) that Mr. Johnson was unable to fully straighten his leg, lacking eight degrees of full extension, and (3) that Mr. Johnson's right leg was bowing out somewhat. After an x-ray showed a nearly complete loss of space between the upper and lower bones in Mr. Johnson's right knee, Dr. Fishbein opined that Mr. Johnson had a 28% permanent impairment of the leg due to his injury.

Dr. David Gaw, an orthopaedic surgeon, reviewed Mr. Johnson's medical records. In his deposition, he opined that Mr. Johnson retained a 9% permanent impairment of the leg due to his injury. He based his opinion on the same section of the Sixth Edition of the AMA Guides[2] used by Drs. Terry and Fishbein. However, Dr. Gaw stated that Dr. Fishbein had used an incorrect method for ascertaining the extent of Mr. Johnson's impairment because the Guides specified that x-rays could not be used to rate an impairment if the subject did not have full flexion of the leg. During cross-examination, Dr. Gaw agreed that the Guides required that an impairment rating be based upon a physical examination. However, he testified that it was not necessary that the examination be carried out by the rating physician and that it was appropriate for him to base his opinion on the findings contained in Dr. Fishbein's report.

John McKinney, a vocational evaluator, testified on Mr. Johnson's behalf. Mr. McKinney stated that Mr. Johnson was capable of performing heavy, semi-skilled work prior to his injury, but that following his injury, he was limited to light to medium work. He opined that Mr. Johnson had lost access to 61% of the jobs he was previously qualified for in the Nashville metropolitan area, and had suffered a 44% loss of earning capacity based upon Dr. Terry's restrictions. Based on these findings, Mr. McKinney testified that Mr. Johnson had a vocational disability of 53 to 58%.

Mike Galloway, another vocational consultant, evaluated Mr. Johnson at Zeledyne's request. Based on his evaluation and Mr. Johnson's work history, Mr. Galloway concluded that Mr. Johnson's injury had caused a 50% vocational disability.

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[2] *See* American Med. Ass'n, *Guides to the Evaluation of Permanent Impairment*, Table 16-3, at 511 (6th ed. 2008).

The trial was held on October 23, 2012. At the outset, the trial court granted Mr. Johnson's motion in limine to exclude Dr. Gaw's deposition because he had not personally examined Mr. Johnson as required by Tenn. Code Ann. § 50-6-204(d)(3)(A) (2008 & Supp. 2012). Despite this ruling, when the trial court announced its findings of fact and conclusions of law at the end of the trial, the trial court stated that it had read and considered Dr. Gaw's deposition. In the trial court's words:

> [L]et me say, although I, quote, excluded Dr. Gaw's opinion, his evidence, I ended up having to read it anyway to try to explain the differences in Dr. Fishbein's and Dr. Terry's opinions and the AMA Guidelines and why they came up with different conclusions. So even though I, quote, excluded it because he didn't physically see Mr. Johnson, I considered it in terms of his knowledge concerning the AMA Guidelines because it's undisputed he, like Dr. Fishbein and Dr. Terry, are all familiar with the AMA Guidelines, and all of them have been previously qualified as experts in this court and others.
>
> To my knowledge, none of them have ever been disqualified or not considered qualified by the court. But in any event, I did go ahead and read Dr. Gaw's opinion because there's a huge difference in a 3 percent impairment rating and a 28 percent impairment rating all under the same AMA Guidelines, Sixth Edition, the same page, and trying to come up with why all three are different. But in any event, I will say I did read all those opinions and the other proof that's in this case.

The trial court did not make an explicit finding with regard to Mr. Johnson's anatomical impairment. It found, however, that Mr. Johnson had sustained a 100% permanent disability of the right leg and entered judgment accordingly. Zeledyne and its insurer have appealed, contending that the trial court erred by excluding Dr. Gaw's testimony and by then considering his testimony for the limited purpose of discounting Dr. Terry's testimony. Zeledyne also asserts that the amount of the award is excessive.

II.

Courts reviewing an award of workers' compensation benefits must conduct an in-depth examination of the trial court's factual findings and conclusions of law. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When conducting this examination, Tenn. Code Ann. § 50-6-225(e)(2) (2008) requires the reviewing court to "[r]eview . . . the trial

court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. *Tryon v. Saturn Corp*., 254 S.W.3d. 321, 327 (Tenn. 2008); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). However, the reviewing courts need not give similar deference to a trial court's findings based upon documentary evidence such as depositions, *Orrick v. Bestway Trucking, Inc*., 184 S.W.3d 211, 216 (Tenn. 2006); *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004), or to a trial court's conclusions of law, *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

III.

We turn first to the trial court's decision to exclude Dr. Gaw's deposition only to then read and consider it because of the "huge difference" between Dr. Gaw's and Dr. Fishbein's impairment ratings. We find that the trial court misconstrued Tenn. Code Ann. § 50-6-204(d)(3)(A) and, therefore, erred by excluding Dr. Gaw's deposition.

The interpretation of a statute involves a question of law. *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 895 (Tenn. 2011). Accordingly, we will review the trial court's interpretation of Tenn. Code Ann. § 50-6-204(d)(3)(A) de novo without a presumption of correctness. *Tidwell v. City of Memphis*, 193 S.W.3d 555, 559 (Tenn. 2006); *Gleaves v. Checker Cab Transit Corp.*, 15 S.W.3d 799, 802 (Tenn. 2000).

Tenn. Code Ann. § 50-6-204(d)(3)(A) provides:

> To provide uniformity and fairness for all parties in determining the degree of anatomical impairment sustained by the employee, a physician, chiropractor or medical practitioner who is permitted to give expert testimony in a Tennessee court of law and *who has provided medical treatment to an employee or who has examined or evaluated* an employee seeking workers' compensation benefits shall utilize the applicable edition of the AMA Guides as established in § 50-6-102 or, in cases not covered by the AMA Guides, an impairment rating by any appropriate method used and accepted by the medical community.

(emphasis added). The trial court interpreted this language to permit medical impairment testimony only from physicians who have personally treated, examined, or evaluated the injured employee.

We must "presume that the General Assembly used every word deliberately and that each word has a specific meaning and purpose." *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010) (citing *State v. Hawk*, 170 S.W.3d 547, 551 (Tenn. 2005), and *Johnson v. LeBonheur Children's Med. Ctr.*, 74 S.W.3d 338, 343 (Tenn. 2002)). The purpose of Tenn. Code Ann. § 50-6-204(d)(3)(A) is to require that the degree of anatomical impairment be based on the "applicable edition of the AMA Guides."[3]

Tenn. Code Ann. § 50-6-204(d)(3)(A) explicitly permits testimony regarding impairment ratings by physicians who have treated, examined, or evaluated the employee. However, the statute does not explicitly limit the healthcare providers who may render an anatomical impairment opinion to only those physicians who have personally treated, examined, or evaluated the employee. Nor does the statute expressly prohibit other healthcare providers from rendering an opinion regarding anatomical impairment in a workers' compensation case.

Dr. Gaw testified without contradiction that while the AMA Guides require a clinical examination as a prerequisite to assigning a permanent impairment, they do not necessarily require that the examination be conducted by the evaluating physician as long as sufficient data is available from other sources. Dr. Gaw's statement is entirely consistent with workers' compensation practice in Tennessee in which physicians routinely express opinions based on the tests and examinations conducted and performed by other healthcare professionals. *See*, *e.g.*, *Glisson v. Mohon Int'l, Inc./Campbell Ray*, 185 S.W.3d 348, 352 (Tenn. 2006) (a physician based the diagnosis on, *inter alia*, prior physician's clinical notes and MRI); *Douglas v. Goodyear Tire & Rubber Co.*, No. W2008-00533-SC-WCM-WC, 2009 WL 2567777, at *3 (Tenn. Workers' Comp. Panel Aug. 19, 2009) (an otolaryngologist based the impairment rating on, *inter alia*, hearing tests administered by consulting audiologist); *Kenney v. Shiroki, Inc.*, No. M2009-02484-WC-R3-WC, 2011 WL 684628, at *2 (Tenn. Workers' Comp. Panel Feb. 28, 2011) (occupational health physician found absence of impairment based on, *inter alia*, tests ordered by prior physician).

In this case, Dr. Gaw neither treated nor examined Mr. Johnson. However, he conducted his evaluation using Mr. Johnson's medical records, including the records of Mr.

[3]Tenn. Code Ann. § 50-6-204(d)(3)(A) also states that ratings of impairments not covered by the AMA Guides should be ascertained "by any appropriate method used and accepted by the medical community." Mr. Johnson's impairment is covered by the AMA Guides.

Johnson's treating physician, Dr. Terry, and his examining physician, Dr. Fishbein. Dr. Gaw's testimony was, therefore, neither inconsistent with Tenn. Code Ann. § 50-6-204(d)(3)(A) nor the AMA Guides. Accordingly, the trial court erred by granting Mr. Johnson's motion in limine and by excluding Dr. Gaw's deposition.

The erroneous exclusion of Dr. Gaw's deposition does not necessarily require us to set aside the trial court's decision regarding Mr. Johnson's impairment rating. The trial court's findings with regard to the extent of Mr. Johnson's impairment are presumed to be correct unless the evidence, including the evidence in Dr. Gaw's deposition, preponderates otherwise. *See* Tenn. Code Ann. § 50-6-225(e)(2). Accordingly, we must review the record to determine whether the evidence preponderates against the trial court's impairment rating.

In addition to providing his own impairment rating, Dr. Gaw questioned the methodology Dr. Fishbein used to arrive at his own rating. Dr. Gaw decided that Dr. Fishbein should not have based his conclusions on an x-ray in which Mr. Johnson was unable to fully extend his leg. However, Dr. Gaw was not present when the x-ray was taken and did not personally observe the measurement at issue. In fact, he did not examine the actual x-ray relied upon by Dr. Fishbein.

Dr. Fishbein, on the other hand, testified that while Mr. Johnson could not fully straighten his leg while sitting on the examination table, he was standing when the x-ray was taken and his leg was perfectly straight. The fact that Dr. Gaw did not personally treat or examine Mr. Johnson affects the weight to be given to his opinion regarding the extent of Mr. Johnson's impairment rating. *See Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991). Here, the trial court accredited Dr. Fishbein's testimony regarding the manner in which he determined Mr. Johnson's impairment.

With regard to Dr. Terry's impairment rating of 3% to the leg, the trial court noted the tension between that relatively low impairment and the very limiting restrictions placed on Mr. Johnson's activities. Both vocational experts confirmed that those restrictions caused a very significant impact on Mr. Johnson's ability to earn a living. A trial court generally has the discretion to choose which expert to accredit when there is a conflict of expert opinions. *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990); *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel 1996). In this case, the trial court was presented with widely varying opinions concerning anatomical impairment, but relatively consistent opinions about the physical effects of the injury. Under these circumstances, we conclude that it did not abuse its discretion by implicitly adopting Dr. Fishbein's impairment rating as the basis for its permanent partial disability award.

IV.

Zeledyne also contends that the award of permanent disability benefits was excessive. The extent of an injured worker's permanent disability is a question of fact. *Lang v. Nissan North America, Inc.*, 170 S.W.3d 564, 569 (Tenn. 2005) (citing *Jaske v. Murray Ohio Mfg. Co.*, 750 S.W.2d 150, 151 (Tenn. 1988)). Mr. Johnson's injury is limited to a scheduled member, his right leg. Vocational disability is not an essential ingredient to recovery for the loss of use of a scheduled member. *Duncan v. Boeing Tennessee, Inc.*, 825 S.W.2d 416, 417 (Tenn. 1992). However, "vocational disability evidence is admissible as one factor to determine the loss of use of a scheduled member." *Duncan v. Boeing Tennessee, Inc.*, 825 S.W.2d at 417-18.

Mr. Johnson was forty-six years old at trial. He had obtained a GED after leaving school in the tenth grade. Tests administered by two vocational evaluators showed him to have average intelligence, reading, and math abilities. His work history consisted of tire-building and carpentry. His treating physician permanently restricted him from squatting, kneeling, or climbing and limited him to occasional walking. Those restrictions effectively exclude him from any of his pre-injury jobs. Considering these facts, and the record as a whole, we are simply unable to conclude that the evidence preponderates against the trial court's finding on the issue of permanent disability.

V.

The judgment of the trial court is affirmed. Costs are taxed to Zeledyne, LLC, Commerce & Industry Company, and their surety, for which execution may issue if necessary.

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WILLIAM C. KOCH, JR., JUSTICE

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No. M2013-00147-WC-R3-WC - Filed December 11, 2013

JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid byZeledyne, LLC, Commerce & Industry Company, and their surety, for which execution may issue if necessary.

PER CURIAM