IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 21, 2015 Session

BOB A. LAPRADD v. NISSAN NORTH AMERICA, INC., ET AL.

Appeal from the Chancery Court for Coffee County
No. 08259 Vanessa Jackson, Judge

No. M2014-01722-SC-R3-WC – Mailed November 13, 2015
Filed January 14, 2016

The employee sustained a back injury in the course of his work. His employer provided medical treatment for the injury, and the employee appeared to recover. He subsequently developed more severe symptoms and the employer denied additional treatment. The employee eventually had a fusion of three vertebrae in the lower back. The trial court found that the injury was compensable and awarded permanent total disability benefits. It found that the Second Injury Fund was not liable for any portion of the award. The court declined to award the employer a set-off for benefits paid by an employer-funded disability plan. The employer has appealed, and the employee raises additional issues on appeal. 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 affirm the award of permanent total disability benefits and the decision not to not assign liability to the Second Injury Fund. We reverse the denial of the set-off to the employer. We deny relief as to the issues raised by the employee.

Tenn. Code Ann. § 50-6-225(a)(2) (2014) Appeal as of Right; Judgment of the Chancery Court Affirmed in Part, Reversed in Part, and Remanded

BEN H. CANTRELL, SR. J., delivered the opinion of the Court, in which JEFFREY S. BIVINS, J., and ANDY D. BENNETT, J., joined.

Thomas W. Tucker, III and Randolph A. Veazey, Nashville, Tennessee, for the appellant, Nissan North America, Inc.

Timothy S. Priest, Winchester, Tennessee, for the appellee, Bob A. LaPradd.

Herbert H. Slatery, III, Attorney General & Reporter; Kathryn A. Baker, Assistant Attorney General, for the appellee, Tennessee Department of Labor and Workforce Development, Second Injury Fund.

OPINION

Factual and Procedural History

Bob LaPradd ("Employee") grew up in Gary, Indiana, and graduated from high school there in 1989. His first full-time employment was at a billboard company in Indiana, where his job consisted of hanging signs and operating a crane. He sustained a work-related injury to his lower back in 1993. The injury required surgical treatment in 1995. He did not return to the workforce until 1997. He did not resume his job with the billboard company but became a security guard, a job he held for less than a year. He then worked for a metal fabrication company, where his job consisted of placing bands on coils of metal.

Employee moved to Tennessee in 2000. His first job in this state was operating a machine that placed grommets in automobile floor mats. He then went to work for a metal fabrication company, where he operated machines that stamped or cut metal blanks. In that job, he also operated a forklift and a crane. Employee began working for Nissan North America ("Employer") as a line operator in August 2004. His job assignment required him to rotate between four separate stations per shift on Employer's automobile assembly line.

On June 29, 2005, Employee was performing a job in which a rod was used to hold an automobile's hood open while four nuts were attached. He dropped a piece to the ground and stepped off the assembly platform to pick it up. He felt immediate pain in his lower back. He informed his supervisor that he was unable to continue working. Employee was taken to Employer's onsite medical clinic for evaluation. At the clinic, he completed part of an "Employee/Manager Medical Statement" that set out the nature and circumstances of his injury. On that document, Employee stated that he injured his lower back. An "Encounter Form" completed by a nurse describes his symptoms as a sharp pain in his lower back. A more elaborate "SOAP"[1] note generated at the time reported that Employee had "no radiating pain, numbness or tingling" and stated that a straight leg

[1] "SOAP" is an acronym for Subjective, Objective, Assessment and Plan.

raising test was negative. Consistent with those documents, Employee testified that his pain was mainly in his lower back at that time. However, he testified that he also had tingling in his right leg at or near that time. He was given ice and ibuprofen and told to report to the clinic before his next shift.

Employee testified that he returned to the clinic the next day, where he was examined by a nurse and received an ice pack and anti-inflammatory medication. There is no record of this encounter in evidence. It is not disputed that physical therapy was prescribed. Employee received treatment over the next several weeks. He also worked in a restricted duty capacity. He stated that he appeared at the clinic several times, but there are no records of those visits. Dr. Karen Oldham, a physician employed at the clinic at that time, testified that the contents of the available records suggested that some notes may have been missing. By July 28, 2005, Employee had completed physical therapy. A SOAP note from that date stated that Employee said: "I am much better, I have my last PT session tonight." Employee did not recall making that statement. He testified that the ice packs and therapy he received during this period provided temporary relief but did not "fix" his problem. The diagnoses listed on the July 28 SOAP note were a lumbar strain and right hamstring strain. Employee was permitted to return to work without restrictions at that time.

The next record of Employee seeking treatment at Employer's clinic is dated October 12, 2005. However, Employee testified that he had gone to the clinic on at least two occasions in September. A SOAP note of October 12 states that, two and one-half weeks earlier, his right hip soreness became a shooting pain down back of right leg to calf. He had seen a chiropractor, and his pain had increased. Employee agreed that he had seen a chiropractor prior to October 12, but it is not clear how many treatments he had received. He had also seen his primary care physician, who had ordered an MRI scan. The MRI scan took place on October 5 and revealed degenerative disc disease and disc protrusions at multiple levels in the lumbar spine. Employee was given a panel of spine physicians from which he selected Dr. Steven Abram. He saw Dr. Abram an unknown number of times. Dr. Abram did not testify, nor were his records placed into evidence. However, he did write a November 18, 2005 letter to Employer's workers' compensation insurer that stated that Employee's

> condition is foraminal stenosis which is a degenerative condition that could be precipitated or brought to disabling reality by trauma. However, it would not be the cause. If the patient says that he was asymptomatic before an inciting event and symptomatic thereafter, we ascribe the disabling reality to the event and therefore it is totally predicated on what the patient says. There is no other means by which I could determine

whether or not it has [precipitated] it . . . and whether or not he would have this condition regardless of stepping off the line at work.

Dr. Karen Oldham, Employer's contracted onsite physician, conducted a review of the available medical information on or about October 27, 2005. Based on her understanding that Employee had fully recovered from his work injury by July 28, 2005, before suffering a severe exacerbation of symptoms in late September or early October, she stated that his October symptoms were not work-related. Thereafter, Employee was denied further treatment through workers' compensation. According to Employee, he was sent home from work on December 1, 2005, with instructions to come back when he was able to work without restrictions. He did not work for Employer, or any other entity, after that date.

Employee sought treatment through his group health insurance and personal physician. His physician referred him for pain management treatment through Dr. Harmuth. Dr. Harmuth provided spinal injections, medication, and physical therapy. Employee testified that these treatments took "the edge off" his symptoms but did not provide complete relief. During this time, Employee received short-term disability benefits for six months and long-term disability benefits from a plan funded by Employer. Employee was discharged from Dr. Harmuth's care late in 2006 when he tested positive for marijuana use. Employee explained at trial that his use of marijuana was a "one-time deal" that occurred when he was watching a NASCAR race with friends. Subsequently, he obtained pain management treatment from Dr. Roth.

Employee consulted Dr. Sayed Emadian, a neurosurgeon, in January 2006. Dr. Emadian recommended surgery. After a long period of consideration, Employee underwent a fusion of the L3, L4, and L5 vertebrae on February 5, 2007. Employee testified that his symptoms worsened almost immediately after surgery. Prior to the procedure, his symptoms had consisted primarily of pain in his lower back and right leg. After the surgery, he experienced numbness and tingling in both legs. Dr. Emadian assured him that those symptoms would improve over time. Employee testified, however, that his symptoms did not improve, and he reported the same symptoms at the time the trial occurred in November 2013. He stated that he had severe back pain, numbness in both legs, and pain in both legs.

Employee was released by Dr. Emadian in 2008 and has not seen him since that time. He continues to receive pain management treatment. He takes Lortab, a muscle relaxer, and Tramadol ER. He began treatment with Dr. Mathis, a psychologist, in 2008 or 2009. He discontinued that treatment when Dr. Mathis moved his practice from Tullahoma to Murfreesboro. His primary care physician continues to prescribe Celexa,

an antidepressant medication. Employee had been diagnosed with diabetes and high blood pressure prior to June 2005. Those conditions were controlled with medication.

Employee did not believe that he was capable of performing any of his previous jobs. Accordingly, he had not sought employment since 2005. As of November 2013, he had lower back pain while sitting, standing, or walking for periods in excess of thirty minutes. He reported that riding or driving in an automobile for more than forty minutes caused swelling and throbbing pain in his back. He was able to make sandwiches for his children and put dishes in the dishwasher. He was also able to mow his lawn, with use of a cushion on his lawnmower. Employee testified that he did not leave his home very often. As an example, he testified that he had previously attended church twice a week but no longer did so because he is not able to sit through an entire service.

In March 2007, shortly after Dr. Emadian performed surgery, Employee received a voluntary buyout offer from Employer. Employee testified that, at or near the time of this offer, Dr. Emadian told him that he would not be able to return to factory work. In light of this information, Employee chose to accept the proposal, in which he received a lump sum payment in exchange for resigning his employment.

Neither Dr. Emadian, nor Dr. Abram, nor Dr. Mathis, nor Employee's primary care physician testified. All of the medical evidence presented at trial was by evaluating physicians through depositions. Records of treatment were attached to some of those depositions. As previously discussed, Dr. Karen Oldham stated, based on Employer's in-house medical records, that Employer suffered lumbar strain on June 25 from which he completely recovered by July 28. She further stated that his symptoms in October 2005 were unrelated to his employment.

Dr. David Gaw, an orthopaedic surgeon, examined Employee on February 6, 2008. At the time of his evaluation, he had only the records of Dr. Emadian. He later saw records from Dr. Abram and others. He generated a report in which he stated that "the incident at work on 6-29-05 is the most likely cause of his present condition." He elaborated that there had been an advancement of Employee's underlying condition because of that incident. Dr. Gaw stated that, based upon the Fifth Edition of the AMA Guides, Employee had a 26% impairment to the body as a whole. During cross-examination, Dr. Gaw stated that Employee would have had a 10% impairment as a result of his 1993 injury and 1995 surgery. Employee would likely have had some loss of motion from that injury and surgery, as well. He stated that Employee could lift up to thirty pounds occasionally and fifteen pounds frequently. He added that Employee would need to change position from sitting to standing as needed.

Dr. Richard Fishbein, also an orthopaedic surgeon, examined Employee on two occasions. The first examination occurred on September 19, 2006, prior to Dr. Emadian's surgery. At that time, Dr. Fishbein stated that Employee had an 8% permanent impairment. He placed no formal restrictions on Employee's activities and recommended against surgical treatment. Dr. Fishbein stated that multilevel fusion surgery to treat lumbar degenerative disease is successful only about 20% of the time. He examined Employee again on July 23, 2013. He stated that Employee had an impairment of 24% to the body as a whole and was unable to resume useful employment. He disagreed with Dr. Oldham's opinion (and the concurring opinion of Dr. William Gavigan) concerning causation of the injury, largely because they based their conclusions on nurses' notes rather than records of a physician.

Dr. William Gavigan, an orthopaedic surgeon, reviewed records and examined Employee on August 7, 2013, at the request of Employer. He stated that Employee suffered a lumbar strain with no permanent impairment from the June 29, 2005 incident. He further stated that the February 2007 surgery was not related to the June 2005 event. He noted that the records of June and July 2005 did not mention leg pain, while the notes of October 12 and thereafter were consistent with sciatica. He testified that symptoms of radiculopathy would have appeared within a couple of days of the original incident if the two were related. He agreed with Dr. Gaw and Dr. Fishbein regarding Employee's permanent impairment after surgery. He also believed that Employee would be able to do "some type of work" in his present state. During cross-examination, he agreed that testing for abnormal sensation is somewhat subjective. However, Employee's responses were consistent with the dermatomes affected by his surgery.

Dr. Greg Kyser, a psychiatrist, evaluated Employee on August 13, 2012. He reviewed the records of Dr. Harmuth, the pain management physician, and Dr. Mathis, the psychologist. He noted that Dr. Mathis had diagnosed Employee in August 2011 with a mood disorder related to chronic pain. He reported that Employee had a troubled childhood and had multiple stressors in his life, including marital and financial problems. While these factors likely predisposed Employee to depression, Dr. Kyser testified that there was no evidence that he suffered from that condition prior to 2006. Dr. Kyser's diagnosis was major depression. He stated that the causes of Employee's depression were multifactorial but that the work injury was "clearly contributory" to that condition. He further stated that Employee had a Class II, or mild, psychiatric impairment according to the Fifth Edition of the AMA Guides. He stated that he did not believe Employee's depression would "necessarily" prevent him from working. He found Employee's Global Assessment of Functioning ("GAF") score to be forty-five. During cross-examination, he stated that a person with a GAF score between forty-one and fifty would have difficulty keeping a job. Dr. Kyser testified that psychiatric impairments are

not based on GAF scores because those scores can vary from one time to another.

Dr. John Griffin, also a psychiatrist, evaluated Employee on December 7, 2011. Like Dr. Kyser, he found that Employee suffered from major depression. Because Employee had no known episodes of, or treatment for, depression prior to the work injury, he found that the injury was the cause of the condition. He assigned a GAF score of fifty-five to Employee. He testified that this meant Employee would have "moderate difficulty in social, occupational, or school functioning." He concluded that Employee had a Class III, or moderate, impairment according to the Fifth Edition of the AMA Guides.

Mark Boatner, a vocational evaluator, testified on behalf of Employee. Mr. Boatner interviewed Employee on September 30 and October 14, 2010. He administered the Wide Range Achievement Test to Employee. The results showed Employee was able to read at a sixth-grade level, comprehend sentences at an eighth-grade level, spell at a sixth-grade level and perform arithmetic at a seventh-grade level. He characterized Employee's work history as ranging from unskilled through skilled and from light to heavy. He stated that, based on Dr. Gaw's restrictions, the psychiatric findings of Drs. Kyser and Griffin, and Employee's self-reports regarding his physical limitations, particularly his need to frequently change body position, Employee was 100% vocationally disabled. Based solely on Dr. Gaw's restrictions, he stated that Employee had a disability of 85%. Mr. Boatner added that, based on Dr. Kyser's opinions, Employee had a disability of 85% to 90%, and based on Dr. Griffin's opinions, Employee had a disability of 90%. Based on Dr. Fishbein's testimony concerning Employee's probable limitations after the 1993 injury and related surgery, Mr. Boatner estimated that Employee would have had a 69% disability from that event.

Vocational evaluator Patsy Bramlett testified on behalf of Employer. She stated that Employee had a 45% vocational disability based on the results of an April 2006 Functional Capacity Evaluation. Based solely on Dr. Gaw's restrictions, she stated that Employee had an 83% disability. She agreed with Mr. Boatner that, if Employee's subjective complaints, such as his statement that he needed to lie down frequently during the day, were taken into account, Employee was 100% disabled. She added that she considered it the court's responsibility to determine how much weight to give to those complaints.

The trial court took the case under advisement and issued written findings. It found that Employee experienced low back pain and pain radiating into his right leg after the June 29, 2005 event, thus accrediting his testimony on that subject. It found that he sustained a permanent injury to his back as a result of the incident and that he retained

26% impairment to the body as a whole. The court further found that he had a permanent mental injury with a moderate psychiatric impairment. Accrediting Employee's testimony concerning his abilities and limitations, it found that he was permanently and totally disabled. The court further found that the Second Injury Fund was not liable for any portion of the award under either Tennessee Code Annotated section 50-6-208(a) or (b). Finally, it ordered Employer to reimburse Employee's health insurer for expenses associated with treatment of his injury.

An order was entered in accordance with the court's findings. Employer filed an objection to the order and a motion for clarification and additional findings. Employee also filed a motion for additional findings. The court entered an order finding that Employee's medical expenses were paid by Employer's self-funded health insurance plan, and, therefore, Employee was not entitled to reimbursement of medical expenses paid by the plan. It further ordered that Employer was not entitled to a set-off pursuant to Tennessee Code Annotated section 50-6-114 because it had denied Employee's claim, and Employer was therefore barred from receiving a set-off pursuant to section 50-6-128.

Employer has appealed, asserting that the trial court committed eight errors in its findings. The appeal has been referred to the Special Workers' Compensation Appeals Panel pursuant to Tennessee Supreme Court Rule 51.

Analysis

A trial court's findings of fact in a workers' compensation case are reviewed de novo, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008 & Supp. 2013); see also Tenn. R. App. P. 13(d). "'This standard of review 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)). When the trial court has seen and heard the witnesses, considerable deference must be afforded to the trial court's findings of credibility and the weight that it assessed to those witnesses' testimony. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008) (citing Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002)).

"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) (citing Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211,

216 (Tenn. 2006)). In this regard, we may make our own assessment of the evidence to determine where the preponderance of the evidence lies. Crew v. First Source Furniture Grp., 259 S.W.3d 656, 665 (Tenn. 2008); Wilhelm v. Krogers, 235 S.W.3d 122, 127 (Tenn. 2007). Further, on questions of law, our standard of review is de novo with no presumption of correctness. Wilhelm, 235 S.W.3d at 126 (citing Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003)).

Employer lists eight issues in its brief on appeal. We have combined and restated several of them in this opinion. Further, some issues are pretermitted by our findings concerning others. Thus, Employer's first argument is that the evidence preponderates against the trial court's finding that Employee suffered a compensable and permanent back injury as a result of the June 29, 2005 event. Second, it asserts that the evidence preponderates against the finding that Employee sustained a compensable mental injury. Third, it contends that the trial court erred by finding Employee to be permanently and totally disabled. Employer's fourth contention is that the trial court erred by failing to apportion liability to the Second Injury Fund. Finally, Employer asserts that the trial court erred by denying offset of payments made pursuant to its fully-funded disability plan because its denial of Employee's claim required him to use those benefits rather than workers compensation benefits. Employee raises three additional issues, which we set out separately below.

Compensability of Back Injury

Employer submits that the evidence preponderates against the trial court's finding that Employee sustained a compensable, permanent back injury. It relies on Dr. Oldham's opinion, and Dr. Gavigan's concurring opinion, to support that position. Dr. Oldham based her opinion on her review of Employer's onsite clinic records from June 29, 2005, until October 12, 2005. She observed that the note from the date of the injury did not reflect any radicular symptoms and that the note of July 28, 2005, referenced a statement by Employee that he was much better on that date. She also considered the October 12 note, which contained a history of right hip soreness becoming a shooting pain down back of Employee's right leg two and one-half weeks earlier. On the basis of those notes, she concluded that Employee's condition in October was unrelated to the June incident.

However, Employee testified that, although his back pain was his primary concern on June 29, he had a tingling sensation in his right leg within a few hours of the work incident. He added that the pain in his leg worsened over time and continued beyond July 28. Further, he denied stating on October 12 that his leg pain had worsened two and one-half weeks earlier. The trial court specifically accredited Employee's testimony.

The July 28, 2005 note relied upon by both Dr. Oldham and Dr. Gavigan contains an "assessment" that Employee had a right hamstring strain at that time. Obviously, that notation is consistent with the ongoing presence of symptoms in the right leg. Dr. Oldham suggested during her testimony that the contents of the available records suggested that some notes may have been missing from the materials she reviewed. Further, she could not state whether she had personally examined Employee at any time. Dr. Oldham and Dr. Gavigan also agreed that a step-down incident such as that described by Employee could cause an aggravation of a previously asymptomatic degenerative condition.

It is not disputed that Employee suffered an injury and underwent surgery on his lower back in the 1990s. However, the uncontradicted evidence shows that he had returned to work in 1997 and had successfully performed jobs in a number of settings, including factories, until 2005. There is no evidence that he received any medical treatment or had any other injuries during this period. Employee was unsure whether or not he had permanent restrictions after 1997. There is a strong suggestion in the evidence that his surgeon released him to regular work at that time. The October 5, 2005 MRI presents indisputable evidence that Employee had one or more lumbar disc protrusions at that time. Both Dr. Fishbein and Dr. Gaw affirmatively testified that the June 29, 2005 incident had caused an exacerbation of Employee's underlying degenerative condition.

"Although causation in a workers' compensation case cannot be based upon speculative or conjectural proof, absolute certainty is not required because medical proof can rarely be certain . . . ." Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004); see also Glisson v. Mohon Int'l, Inc./ Campbell Ray, 185 S.W.3d 348, 354 (Tenn. 2006). All reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. Phillips v. A & H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004). Moreover, 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 the present case, the opinions of Drs. Oldham and Gavigan are based on records which may or may not be complete and accurate. The opinions of Drs. Gaw and Fishbein are consistent with Employee's testimony and consistent with other evidence regarding the condition of his back prior to June 29, 2005. We are unable to conclude, therefore, that the evidence preponderates against the trial court's decision to accept the latter opinions, rather than the former.

Compensability of Mental Injury

Employer next contends that the evidence preponderates against the trial court's finding that Employee sustained a compensable mental injury as a result of the June 29, 2005 event. It points out that neither Dr. Kyser nor Dr. Griffin was a treating physician and that Employee had numerous stressors, including a difficult childhood and marital problems. It also points to the positive marijuana test that led to his discharge from Dr. Harmuth's care, suggesting that chronic marijuana use can be linked to depression.

Both Dr. Kyser and Dr. Griffin concluded that Employee suffered from major depression. Each testified that the cause of his condition was multifactorial, but both clearly stated that the chronic pain and disability caused by his back injury were contributing factors. There is no evidence in the record that Employee sought or received treatment for any psychiatric or psychological condition before June 2005. After that date, he received counseling from Dr. Mathis, a psychologist, and psychotheraputic medication from his primary care physician. The positive drug test fairly raises a question about marijuana use, but Employee testified that he used the drug on a single occasion, and there is no evidence in this record to contradict that testimony. We therefore conclude that the evidence does not preponderate against the trial court's finding on this issue.

Permanent Total Disability

We turn next to Employer's assertion that the trial court erred by finding Employee to be permanently and totally disabled as a result of his work injury. In support of this assertion, Employer states: "At the time of trial, [Employee] was receiving no active treatment for his low back or psychological conditions. He had not seen any physician for his low back since January 2008 and has had no psychological treatment since 2010." Although the statements are accurate in a literal sense, there is evidence in the record that Employee continues to receive treatment for both his physical and mental conditions. Specifically, Employee testified at trial that he was receiving pain management treatment from a medical group in Tullahoma. While he had discontinued seeing Dr. Mathis for financial reasons, his primary care physician prescribed antidepressant medication to him. The evidence is consistent with the existence of ongoing physical and mental problems.

Both vocational experts testified that Employee had a disability of approximately 85% based solely on the restrictions outlined by Dr. Gaw. Both agreed that Employee's depression, as described by Dr. Griffin or Dr. Kyser, presented an additional impediment to employment. Both also agreed that if Employee's own description of his limitations was accepted by the court, Employee's disability was 100%. In that regard, it has long

been held that a "trial court . . . should consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability." Walker v. Saturn Corp., 986 S.W.2d 204, 208 (Tenn. 1998) (citing Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 677 (Tenn. 1983)). Further, "the claimant's own assessment of [his] physical condition and resulting disabilities must also be evaluated." Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 170 (Tenn. 2002) (citing Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975)). The opinions of the vocational witnesses are consistent with Dr. Fishbein's opinion that Employee was unable to engage in useful work.

The results of academic testing by both vocational witnesses found Employee's abilities to be below average in all categories tested. While he has performed some types of skilled labor in the past, most of his jobs required manual labor. His physical limitations exclude him from most types of work, and his mental condition presents a barrier to functioning in a work environment. Taking all factors into account, we conclude that the evidence is consistent with a conclusion that Employee is "totally incapacitate[d] from working at an occupation that brings [him] an income." Tenn. Code Ann. § 50-6-207(4)(B) (2005). In light of this conclusion, it is unnecessary for us to consider Employer's arguments concerning the application of Tennessee Code Annotated 50-6-241(d) or concerning the extent of employee's anatomical impairment. See Davis v. Reagan, 951 S.W.2d 766, 769 (Tenn. 1997).

Liability of Second Injury Fund

Employer next contends that the trial court erred by failing to apportion partial liability to the Second Injury Fund pursuant to Tennessee Code Annotated section 50-6-208 (2005). That statute provides:

> (a)(1) If an employee has previously sustained a permanent physical disability from any cause or origin and becomes permanently and totally disabled through a subsequent injury, such employee shall be entitled to compensation from the employee's employer or the employer's insurance company only for the disability that would have resulted from the subsequent injury, and such previous injury shall not be considered in estimating the compensation to which such employee may be entitled under this chapter from the employer or the employer's insurance company; provided, that in addition to such compensation for a subsequent injury, and after completion of the payments therefor, then such employee shall be paid the remainder of the compensation that would be due for the permanent total disability out of a special fund to be known as the "second injury fund" therein created.

* * * *

(b)(1)(A) In cases where the injured employee has received or will receive a workers' compensation award or awards for permanent disability to the body as a whole, and the combination of such awards equals or exceeds one hundred percent (100%) permanent disability to the body as a whole, the employee shall not be entitled to receive from the employer or its insurance carrier any compensation for permanent disability to the body as a whole that would be in excess of one hundred percent (100%) permanent disability to the body as a whole, after combining awards.

(B) Benefits that may be due the employee for permanent disability to the body as a whole in excess of one hundred percent (100%) permanent disability to the body as a whole, after combining awards, shall be paid by the second injury fund.

(C) It is the intention of the general assembly that once an employee receives an award or awards for permanent disability to the body as a whole, and such awards total one hundred percent (100%) permanent disability, any permanent disability compensation due for subsequent compensable injuries to the body as a whole shall be paid by the second injury fund, instead of by the employer.

(D) The provisions of this subdivision (b)(1) shall apply only to injuries that arise on or before June 30, 2006, and shall have no applicability to injuries that arise on or after July 1, 2006.(2)(A) The burden of proving the existence of previous awards for permanent disability specific to the body as a whole shall be on the party claiming compensation against the second injury fund. The provisions of this subdivision (b)(2)(A) shall apply only to injuries that arise on or before June 30, 2006, and shall have no applicability to injuries that arise on or after July 1, 2006

Tenn. Code Ann. § 50-6-208 (2005)

Our Supreme Court explained the applicability of the Second Injury Fund provisions as follows:

> Subsections (a) and (b) apply in different situations, and benefits are apportioned under the two subsections in different ways. In order to claim benefits under subsection (a), the employee (1) must have "sustained a permanent physical disability from any cause or origin, whether compensable or non-compensable," and (2) must become "permanently and totally disabled through a subsequent injury." Id. § 50-6-208(a)(1). In addition, liability may be apportioned to the Second Injury Fund under

> subsection (a) only if the employer had actual knowledge of the preexisting injury before the subsequent injury occurred. Tenn. Code Ann. § 50-6-208(a)(3). In contrast, subsection (b) applies if the sum of two or more awards for permanent disability to the body as a whole equal or exceed 100 percent permanent disability. See Perry v. Sentry Ins. Co., 938 S.W.2d 404, 407 (Tenn. 1996). Thus, subsection (b) is more narrow in some respects, for it applies only when the employee has sustained a prior compensable injury that resulted in an award of permanent partial or total disability to the body as a whole, whereas subsection (a) applies when the employee has suffered a prior disabling injury from any source, including noncompensable sources, such as would have been attributable to a congenital defect. On the other hand, subsection (b) is broader in that an employee does not have to be rendered permanently and totally disabled by the second injury for subsection (b) to apply, nor does subsection (b) contain any requirement that the employer have notice of the employee's prior injury.
>
> Under either subsection (a) or (b), it is essential that the trial court determine the extent of disability resulting from the subsequent injury without consideration of the prior injury. Cf. Perry, 938 S.W.2d at 407. In other words, the trial court must find what disability would have resulted if a person with no preexisting disabilities, in the same position as the plaintiff, had suffered the second injury but not the first. This is expressly required by subsection (a), which states, "such employee shall be entitled to compensation from the . . . employer . . . only for the disability that would have resulted from the subsequent injury, and such previous injury shall not be considered in estimating the compensation to which such employee may be entitled . . . ." Tenn. Code Ann. § 50-6-208(a)(1).

Allen v. City of Gatlinburg, 36 S.W.3d 73, 76-77 (Tenn. 2001).

In this case, the trial court determined that Employee had sustained a permanent total disability solely as a result of the June 2005 injury:

> With regard to the liability of the [Second Injury Fund], the Court finds that the Plaintiff was 100% permanently disabled as a result of the injury on June 29, 2005. Although the Plaintiff suffered a work-related injury in 1993, he completely recovered from that injury. He returned to gainful employment which required physically demanding activities. He had no restrictions on his activities after his recovery from the 1993 injury,

> and did not require accommodations to perform his work duties. The injury in 1993 did not limit the Plaintiff in any of his daily activities, and he was not experiencing any pain as a result of that injury. He did not suffer from depression as a result of that injury.

Those findings accurately summarize the evidence in the record. Therefore, the trial court properly found that Employee's total disability was solely the result of the 2005 injury, and the Second Injury Fund is not liable under section 208(a). Regarding section 208(b), Employer introduced into evidence the settlement agreement for Employee's 1993 injury. That document appears to have been prepared on a form provided by the Illinois Industrial Commission. A section at the bottom of the form is a section titled: "Lump Sum Settlement Order" and contains language that contemplates approval by the Industrial Commission and dismissal of Employee's claim. However, the "order" is not signed. The document does not have a docket number or any other indication on its face that it was filed with the Commission. In addition, the form does not contain any findings of permanent disability, and it specifically disputes the fact that Mr. LaPradd had any injury at all – much less a work-related injury. Liability of the Second Injury Fund under section 208(b) must be predicated on a prior workers' compensation award or settlement approved by a Tennessee court or "valid and enforceable out-of-state awards that are the functional equivalent of court-approved in-state awards." Huddleston v. Hartford Acc. & Indem. Co., 858 S.W.2d 315, 318 (Tenn. 1993). Section 208(b)(2)(A) provides: "The burden of proving the existence of previous awards for permanent disability specific to the body as a whole shall be on the party claiming compensation against the second injury fund." Employer failed to sustain its burden, and the trial court correctly ruled that section 208(b) does not apply in this case.

Set-off of Employer-Funded Disability Insurance

Employee received payments for short-term and long-term disability from an Employer-funded plan in an undisputed amount. Employer sought to set off the amount of those payments against temporary disability payments awarded by the trial court pursuant to Tennessee Code Annotated section 50-6-114(b). That section states:

> (b) Any employer may set off from temporary total, temporary partial, permanent partial and permanent total disability benefits any payment made to an employee under an employer funded disability plan for the same injury; provided, that the disability plan permits such an offset. The offset from a disability plan may not result in an employee's receiving less than the employee would otherwise receive under this chapter. In the event that a collective bargaining agreement is in effect, this subsection (b) shall be

subject to the agreement of both parties

The trial court found:

> The totality of the proof established that Nissan refused to treat the Plaintiff's injury as a work-related injury which forced the Plaintiff to utilize his health and disability insurance to obtain treatment and income. The Court finds that the Plaintiff [sic] knowingly, willfully and intentionally caused the Plaintiff to utilize his disability and health insurance benefits to obtain treatment for his work related injury and income to support himself and his family. Pursuant to Tenn. Code Ann. § 50-6-128, the Court finds and holds that Nissan is not entitled to set off the disability benefits against the award of temporary and total disability benefits awarded to Plaintiff. In addition, the right of set off is an affirmative defense, and Nissan did not set forth in its pleadings its entitlement to a set off pursuant to Tenn. Code Ann. § 50-6-114.

Tennessee Code Annotated section 50-6-128 prevents an employer from setting off accident and sickness benefits when it:

> "knowingly, willfully, and intentionally causes a medical or wage loss claim to be paid under health or sickness and accident insurance, or fails to provide reasonable and necessary medical treatment, including a failure to reimburse when the employer knew that the claim arose out of a compensable work-related injury and should have been submitted under its workers' compensation insurance coverage[.]"

We hold that the evidence in this record preponderates against the trial court's finding that Employer knowingly, willfully, and intentionally forced Employee to use his benefits in lieu of receiving workers' compensation benefits. The evidence shows that Employer's workers' compensation insurer requested Dr. Oldham, a contract physician, to review Employee's case to determine whether or not his October complaints were related to his June injury. Dr. Oldham had before her, inter alia, a nurse's note from July 28 stating that Employee had recovered from the incident and a second medical record stating that Employee's right leg pain effectively began in late September. She also had no record that Employee had sought or received treatment at the onsite clinic between July 28 and October 12. She also inspected Employee's work area to evaluate the mechanism of injury. Based on that information, she concluded that the October symptoms were not related to the June event. Dr. Gavigan, who had some additional information, reached a similar conclusion. He also found that the mechanism of injury

described by Employee was inconsistent with the extent of his spinal dysfunction. Employee's witness, Dr. Gaw, stated that Dr. Oldham's conclusion was not inherently unreasonable. Employer's denial of the claim was based on Dr. Oldham's assessment. We conclude that the evidence does not establish "knowing, willful and intentional" action on behalf of Employer.

Regarding the employer's failure to plead this set-off, the answer filed by Employer contains the following statement:

> The Defendant Nissan would further show that the Plaintiff has been receiving long term disability (LTD) which is an employer funded disability plan and that said disability plan permits an offset from any award by this Court against temporary total, temporary partial, permanent total and permanent partial disability benefits if any are assessed by this Court. The Defendant Nissan submits its rights to an offset pursuant to T.C.A. § 50-6-114(b).

In light of the foregoing portion of Employer's answer to the complaint, the trial court's finding that the issue was not raised in the pleadings is incorrect. The denial of the set-off is therefore reversed.

Failure to Order Reimbursement of Certain Medical Expenses

The trial court ruled that Employer did not have to reimburse its Employer-funded health insurance plan for medical expenses paid on Employee's behalf. Employee asserts that this action was erroneous. After describing the trial court's decision, the entirety of Employee's argument is: "The plaintiff argues that this was an error on the part of the trial court. Moore vs. The Town of Collierville, 124 S.W. 3d 93 at 100 (Tenn. 2004)." We find that this argument fails to comply with the requirements of Tennessee Rule of Appellate Procedure 27(a)(7). The issue is therefore waived. Sneed v. Bd. of Prof'l Responsibility of Supreme Court, 301 S.W.3d 603, 615 (Tenn. 2010).

Assessment of Penalty

Employee next contends that the trial court erred by failing to assess a bad faith penalty against Employer pursuant to Tennessee Code Annotated section 50-6-225(j). For the reasons set out in our discussion of the set-off issue, we conclude that the evidence in this case does not demonstrate bad faith by Employer in its denial of this claim. Employee is not entitled to relief on this ground.

Order Requiring Parties to Attempt to Agree on a Healthcare Provider

Finally, Employee asserts that the trial court erred by directing the parties to attempt to agree on a provider for Employee's future medical needs arising from this injury. His primary argument is that the parties have not been able to agree on other matters during the course of the litigation. Employee does not assert any prejudice caused by the court's order. The order specifically provides that the court will hear evidence and issue a decision on the subject if the parties are unable to agree. We conclude there is no basis to reverse the trial court's order on this subject.

Conclusion

The portion of the judgment denying a set-off to Employer according to Tennessee Code Annotated section 50-6-114 is reversed. The judgment is affirmed in all other respects. The case is remanded to the trial court for entry of an order consistent with this opinion. Costs are taxed one-half to Nissan North America, Inc., and its surety and one-half to Bob A. LaPradd, for which execution may issue if necessary.

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BEN H. CANRELL, SR. J.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

BOB A. LaPRADD v. NISSAN NORTH AMERICA, INC., ET AL.

Chancery Court for Coffee County
No. 08259

No. M2014-01722-SC-WCM-WC – Filed January 14, 2016

ORDER

This case is before the Court upon the motion for review filed by Nissan North America, 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 Memorandum 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 one-half to Bob A. LaPradd and one-half to Nissan North America, Inc., et al., for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

BIVINS, Jeffrey S., J., not participating