IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 21, 2016 Session

CARLOS MARTINEZ v. STEVE LAWHON, ET AL.

Appeal from the Chancery Court for Davidson County
No. 131145IV Russell T. Perkins, Chancellor

No. M2015-00635-SC-R3-WC – Mailed August 19, 2016
Filed November 21, 2016

An undocumented employee sustained a compensable work-related injury and reported the injury to the employer. Two doctors examined the employee, one assigning a 16% medical impairment rating and the other assigning a 24% medical impairment rating. Because of the employee's undocumented status, the employer did not return the employee to work after the injury. The employee sought workers' compensation benefits and challenged the constitutionality of the statutory provision potentially limiting his award to one and one-half times the medical impairment rating in such circumstances. See Tenn. Code Ann. § 50-6-241(e) (2008 & Supp. 2013). The Attorney General filed an answer defending the constitutionality of the challenged section. The trial court held the challenged statute unconstitutional on the basis of federal preemption and awarded permanent partial disability benefits of 84% to the left arm, or three and one-half times the 24% medical impairment rating. The Attorney General and the employer appealed. 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 judgment of the trial court.

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

PATRICIA J. COTTRELL, SP.J., delivered the opinion of the Court, in which CORNELIA A. CLARK, J., and BEN H. CANTRELL, SR.J., joined.

Herbert H. Slatery, III, Attorney General & Reporter; Andrée S. Blumstein, Solicitor General; and Alexander S. Reiger, Assistant Attorney General, for the appellant, Attorney General of Tennessee.

Michael L. Haynie, Nashville, Tennessee, for the appellant, Steve Lawhon, individually and d/b/a Commercial Services and Auto Owners Insurance Company.

Brian Patrick Dunigan, Goodlettsville, Tennessee, for the appellee, Carlos Martinez.

OPINION

I. Factual and Procedural History

Carlos Martinez ("Employee"), age thirty-nine at the time of trial, emigrated from Guatemala seeking work in 2003 or 2004 and speaks limited English, requiring an interpreter to translate his testimony at trial. Employee has a limited educational background. He attended school in Guatemala but dropped out in the equivalent of ninth grade and does not have a GED. He attended approximately four months of mechanic classes, but failed to graduate from the program, although he received a Certificate of Biblical Studies from Logos Bible Institute on February 21, 2015. Employee's work experience is limited to unskilled manual labor, including painting, remodeling, warehouse work, and basic construction labor. He is not a legal resident of the United States.

Employee began working for Steve Lawhon d/b/a Commercial Services ("Employer"), whose business consists of building and ground maintenance, around March 2011. Employee was hired at a roadside area where day laborers were known to gather. Employer originally intended to hire Employee for a project lasting only four to five days, but ultimately employed him until Employee's injury on August 8, 2011. Employer initially paid him in cash but later transitioned to weekly checks. Employer failed to request documentation or attempt to verify that Employee was eligible to work in the United States. Employer did not require Employee to complete an application form, provide a social security number, or provide any other confirmation that he was a legal resident of the United States. Additionally, on Employee's W-2 tax forms, where Employer was supposed to write Employee's social security number, Employer supplied the tax identification number for his own business instead.

On August 8, 2011, Employee was operating a lawn mower on a hillside in the course of his employment when he slipped on wet grass and fell, losing control of the mower. The mower ran over Employee's left arm, severely lacerating and degloving his elbow area. He was rushed to Vanderbilt University Medical Center, where Dr. Donald Lee, an orthopaedic surgeon specializing in the treatment of hands and arms, treated Employee.

Employee "ha[d] a deep laceration and partial degloving with his exposed bone about his elbow," his radius was fractured into multiple pieces, and "had a laceration of the muscles in his forearm." Dr. Lee performed four surgical procedures in August 2011 and a fifth surgery a year later, in September 2012. Despite appropriate wound care, in the year between the fourth and fifth procedures, Employee developed a rare fungal infection known as Bipolaris and received prolonged antibiotic therapy from the infectious disease doctors at Vanderbilt University Medical Center.[1] In September 2012, Dr. Lee performed the fifth surgery, a tendon transfer surgery, during which he attached the tendons of the thumb and fingers to different arm muscles to permit movement. Prior to this surgery, Employee "didn't have finger and thumb extension or ability to raise the thumb and the fingers," and the procedure restored some function to the finger and thumb. After the five surgeries, the posterior interosseous nerve dysfunction remained and the radial head was removed, though not replaced.

Dr. Lee determined Employee attained maximum medical improvement on January 4, 2013, approximately a year and a half after the injury. He ordered a Functional Capacity Evaluation, performed on February 1, 2013, and based upon the results he imposed the following activity restrictions for Employee: when engaging in frequent activity, Employee should limit (1) floor to waist lifting to sixteen pounds; (2) waist to shoulder lifting to eleven pounds; (3) shoulder to overhead lifting to ten pounds; (4) carrying to sixteen pounds; (5) pushing to twenty-nine pounds; (6) pulling to twenty-four pounds; and (7) single-handed carrying with the left hand to eleven pounds.

Applying the Sixth Edition of the American Medical Association ("AMA") Guides, Dr. Lee assigned a 13% medical impairment rating to Employee's left arm in March of 2013. At his deposition two years later, Dr. Lee admitted that he could not recall which of two tables in the AMA Guides he had used to calculate that impairment. Unprompted, Dr. Lee also testified at his deposition that he "probably would keep [Employee] at the 13[%] for the nerve [injury] and maybe 3[%] for the radial head [injury], and that would be 16% of the upper extremity" if he were performing the impairment evaluation "right [then]." He acknowledged that Employee's radial head had been removed at the elbow due to a severe fracture caused by the work accident, but did not consider its absence a main source of impairment. Instead, he primarily attributed Employee's loss of strength and motion in the left hand and wrist to the significant injury to his posterior interosseous nerve. Therefore, he did not assign any additional impairment based on the loss of the radial head.

[1] Dr. Lee testified that he was not familiar with Bipolaris infection and had not been aware Employee suffered from such an infection.

As a consequence of the physical restrictions Dr. Lee assigned and Employee's status as an undocumented worker,[2] Employee was unable to return to work for Employer. He worked elsewhere intermittently on projects requiring manual labor, including a temporary painting assignment. During some weeks, Employee worked every day, while other weeks, he was unable to find any employment opportunities. Employee attributed his inability to find employment to his physical restrictions.

In May 2013, Dr. Robert Landsberg performed an independent medical evaluation ("IME") and assigned Employee a 24% medical impairment rating to the left arm. He reviewed medical records and conducted a physical examination, which revealed good motion in both elbows and good sensation in the left hand. The examination also revealed tenderness, with hypersensitivity of skin, in the area where bone had been removed, limited range of motion in Employee's left wrist and fingers, and loss of strength in his thumb and fingers on his left hand. Finally, Dr. Landsberg observed partial dislocation of the ulna and radius joint at the wrist (referred to as "subluxation"), which the doctor attributed to the removal of the radial head in the elbow. Dr. Landsberg testified that Employee had "three separate injuries," including the posterior interosseous nerve injury, upon which Dr. Lee based his original impairment assignment. Dr. Landsberg diagnosed two additional injuries resulting from the radial head removal, distinguishing his assessment from Dr. Lee's: decreased motion in the elbow rotation and, separately, increased stress on the wrist from the subluxation of the ulna and radius.

Dr. Landsberg assigned a 13% permanent impairment for the posterior interosseous nerve, which equates to the impairment Dr. Lee assigned for that injury. Dr. Landsberg additionally assessed a 12% medical impairment rating to the arm, based on the radial head arthroplasty table of the AMA Guides, due to the loss of the radial head and consequent wrist problems. Dr. Landsberg assigned an overall 24% medical impairment rating based upon combining the nerve injury and loss of radial head.

At trial, Employer argued that Tennessee Code Annotated section 50-6-241(e)(2) limited Employee's award to one and one-half times the medical impairment rating, while Employee argued that section 241(e)(2) is unconstitutional. The trial court found that Tennessee Code Annotated section 50-6-241(e)(2) applies to the facts of this case, but held that the section is preempted by the Immigration Reform and Control Act of 1986 ("Immigration Reform Act"), at 8 United States Code section 1324a et seq. The trial court explained that by enacting the provision, the General Assembly established "what amounts to a state immigration policy," a field over which the federal government reserves sole power.

[2] We will interchangeably use the terms "undocumented employee," the term used by the trial court, "unauthorized alien," the term used by the Immigration Reform and Control Act of 1986, and "illegal alien," the term used by the General Assembly. See, e.g., 8 U.S.C. § 1324a(a)(1)(A); Tenn. Code Ann. § 50-1-103(a)(4).

The trial court cited Arizona v. United States, 132 S. Ct. 2492 (2012), stating the United States Supreme Court interpreted the Immigration Reform Act as a "comprehensive framework for combating the employment of illegal aliens." The trial court additionally held that the provision imposing a fine on employers of undocumented employees is expressly preempted by the Immigration Reform Act's prohibition of civil penalties upon employers of undocumented employees. The trial court therefore disregarded section 241(e) and decided the case under section 241(d).

The trial court found that Employee sustained a compensable work-related injury to his left arm and adopted the 24% medical impairment rating assigned by Dr. Landsberg. Based upon the severity of the injury and Employee's limited education and skills, the trial court applied a three and one-half multiplier and concluded that Employee sustained a vocational disability of 84% to the left arm. The court ordered Employee's benefits paid in lump sum.[3]

The Attorney General and Employer have appealed. The Attorney General contends that the facts do not implicate Tennessee Code Annotated section 50-6-241(e)(2) and, therefore, the trial court erred by addressing the constitutionality of the statute. In the alternative, the Attorney General argues that neither Tennessee Code Annotated section 50-6-241(e)(2)(A) nor section 50-6-241(e)(2)(B) is preempted by the Immigration Reform Act. In his appeal, Employer argues that Tennessee Code Annotated section 50-6-241(e)(2)(A) is implicated by the present facts, and that the section limiting the benefits to one and one-half times the medical impairment rating is constitutional, while section 50-6-241(e)(2)(B) is expressly preempted by the Immigration Reform Act. In the alternative, Employer contends that applying the higher statutory multiplier for undocumented employees violates the General Assembly's intent in enacting Tennessee Code Annotated section 50-6-241(e).

II. Analysis

A. Standard of Review

In workers' compensation cases, appellate courts "review the trial court's findings of fact de novo accompanied by a presumption of correctness unless the evidence preponderates otherwise." Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007) (citing Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2006)). While the reviewing court must conduct an in-depth examination of the trial court's factual findings and conclusions, see id. (citing Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)), considerable deference must be afforded to the trial court's factual findings, see Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be accorded to the trial court's findings based upon documentary evidence such as depositions. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185

[3] Employee was awarded a total of $44,903.04. See Tenn. Code Ann. § 50-6-207(3)(D) (2011).

S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

B. Application of Tennessee Code Annotated section 50-6-241(e)

Tennessee has a comprehensive statutory system for awarding workers' compensation benefits, and the statutory provisions at issue in this appeal must be considered as part of that whole system. In relevant part, Tennessee law requires that if an employee is not found to be permanently and totally disabled, then the court must assign vocational disability, which becomes the permanent partial disability award. Tenn. Code Ann. § 50-6-241(d) (2008). The vocational disability is based upon the medical impairment rating, as determined by the court. Id.

If an employee with a permanent partial disability has a meaningful return to work, his or her maximum vocational disability award cannot exceed one and one-half times the medical impairment rating. Id. § 50-6-241(d)(1)(A). If the employee does not have a meaningful return to work, the award is capped at six times the medical impairment rating. Id. § 50-6-241(d)(2)(A); see also Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 217 (Tenn. 2006).

Obviously, the lower cap is designed to encourage employers to return to work an employee who has suffered permanent partial disability. But the statute also recognizes that the failure of an employee to return to work is not always due to the actions of the employer. In those situations, the lower cap (the one and one-half multiplier) is to be applied. Id. §§ 50-6-241(d)(1)(B)(iii), (C)(i). The specific situations listed in the statutory provisions are resignation, declining employment, or misconduct of the employee. Id. These provisions allow the imposition of the one and one-half multiplier cap because there is no public policy reason to penalize an employer who has tried to return the employee to work or whose actions are not the reason for the lack of meaningful reemployment. The provisions of subsection (d) do not specifically address the situation where an employer is unable to return an employee to meaningful employment due the legal prohibition against hiring undocumented immigrants.[4]

In part because the language of subsection (d) would work to subject the employer to the higher disability multiplier even though the employer could not legally rehire the employee in such cases, in 2009, the General Assembly amended the workers' compensation

[4] The Immigration Reform Act, 8 United States Code section 1324a et seq., prohibits employers from hiring undocumented employees.

statute to specifically address the re-employment of injured undocumented employees in Tennessee. See id. § 50-6-241(e) (Supp. 2012).[5]

Due to the illegality of returning an undocumented worker to work, the General Assembly adopted limits on compensation available to undocumented workers who have suffered a permanent partial disability, penalties for employers who knowingly hired an undocumented worker, and a standard for determining whether a hire was knowing:

> [(e)(2)](A) For injuries occurring on or after July 1, 2009, in cases in which an injured employee is eligible to receive any permanent partial disability benefits either for body as whole or schedule member injuries, the *maximum* permanent partial disability benefits that the employee may receive is up to *one and one[-]half (1½) times* the medical impairment rating determined pursuant to [section] 50-6-204(d)(3); provided, that the employer did not knowingly hire the employee at a time when the employee was not eligible or authorized to work in the United States under federal immigration laws. It shall be presumed the employer did not knowingly hire the employee at a time when the employee was not eligible or authorized to work in the United States under federal immigration laws if the employer can show, by a preponderance of the evidence, that the employer in good faith complied with the employment eligibility and identity verification requirements of federal law when the employee was hired:
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> > (i) By ensuring the employee completed Section 1 of Form I-9 at the time the employee started to work;
> > (ii) By reviewing the documents provided by the employee to establish the employee's identity and eligibility to work;
> > (iii) By making a good faith determination that the documents presented by the employee for employment and identity authorization appeared to relate to the employee, appeared to be

[5] Tennessee Code Annotated section 50-6-241(e)(2) (Supp. 2012) states:

> The general assembly takes notice that federal law prohibits a pre-injury employer from permitting an employee to return to work following the work-related injury when the employee is not eligible or authorized to work in the United States pursuant to federal immigration laws . . .

The statute has since been amended, and the current statute dealing with undocumented workers differs greatly from the statute at issue in this appeal. See id. § 50-6-207(3)(F) (2014) ("Subdivision (3)(B) shall not apply to injuries sustained by an employee who is not eligible or authorized to work in the United States under federal immigration laws.").

> genuine and that the documents provided were in the list of acceptable documents on Form I-9; and
> (iv) By reverifying the employment eligibility of the employee upon the expiration of the employee's work authorization and by completing Section 3 of Form I-9, if applicable;
>
> (B) The presumption established in subdivision (e)(2)(A) may be rebutted if the employee can show, by a preponderance of the evidence, that the employer had actual knowledge of the ineligible or unauthorized status of the employee at the time of hire or at the time of the injury, or both. If the presumption is rebutted, a sum of *up to five (5) times* the medical impairment rating determined by the authorized treating physician pursuant to [section] 50-6-204(d)(3) shall be paid in the following manner:
>
> > (i) A sum up to *one and one[-]half (1½) times* the medical impairment rating shall be paid in a lump sum *to the employee*, the sum to be paid by the employer's insurer; and
> > (ii) An additional sum up to *three and one[-]half (3½)* times the medical impairment rating shall be *paid by the employer, in a lump sum into, and shall become a part of, the uninsured employers* fund created by [section] 50-6-801; provided, that the sum shall not be paid by the employer's insurer.

Id. § 50-6-241(e) (Supp. 2012) (emphasis added).

The threshold issue in this case is the applicability of Tennessee Code Annotated section 50-6-241(e)(2) to the facts of this case. Familiar rules govern the Panel's consideration of this statute. A court must "first ascertain and then give full effect to the General Assembly's intent and purpose" for enacting the statute. Waldschmidt v. Reassure Am. Life Ins. Co., 271 S.W.3d 173, 176 (Tenn. 2008). The court's chief concern is to carry out the legislature's intent without unduly broadening or restricting the statute. Houghton v. Aramark Educ. Res., Inc., 90 S.W.3d 676, 678 (Tenn. 2002) (quoting Owens v. State, 908 S.W.2d 923, 926 (Tenn.1995)). When the statutory language is clear and unambiguous, the court simply applies its plain meaning. Eastman Chem. Co. v. Johnson, 151 S.W.3d 503, 507 (Tenn. 2004). When a statute is ambiguous, however, the court may refer to the broader statutory scheme, the history of the legislation, or other sources to discern its meaning. Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827, 836 (Tenn. 2008). While the Workers' Compensation Act should be "liberally construed . . . and any doubts should be resolved in the employee's favor," Wait v. Travelers Indem. Co. of Ill., 240 S.W.3d 220, 224 (Tenn. 2007), courts are not authorized to "amend, alter, or extend the workers' compensation statutes beyond their plain meaning," Seiber, 284 S.W.3d at 301.

According to the clear language of the statute, the permanent partial disability benefits that an employee who is not legally allowed to return to work because of federal immigration law may receive are limited by subsection (e)(2) to a cap of one and one-half times the medical impairment rating. Tenn. Code Ann. § 50-6-241(e)(2)(A). This is the same cap that is applied to other injured workers who are not returned to work for reasons outside the employer's control.

Other employees who do not fall within this exception are entitled to a multiplier of up to six times. In the case of an undocumented injured employee, however, the permanent partial benefits are capped at one and one-half times the medical impairment rating, regardless of any other factors. Subsection (e)(2)(A) implies at first that the cap only applies if the employer did not knowingly hire the employee when that employee was prohibited from working because of federal immigration laws. It also provides a standard for determining whether the original hiring was "knowing." However, from the injured employee's viewpoint, the outcome of application of that standard–whether a hiring was knowing or not–simply does not matter. The employee is still limited to the one and one-half multiplier. Id. § 50-6-241(e)(2)(B)(i).

The result of the "knowing" issue, however, has serious implications for the employer. While the recovery by the employee is limited to the one and one-half multiplier, to be paid by the insurer, an employer who is found to have knowingly hired an undocumented worker is subject to an additional payment of up to a three and one-half multiplier to a state fund to be paid by the employer, not the insurer.

It is clear that application of subsection (e) would have a negative impact on the employee and could have a negative impact on the employer. The latter is especially true in this case since the trial court made factual findings that amount to a finding that the employer's initial hiring of a worker who was legally prohibited from employment was made knowingly. Consequently, both employer and employee would suffer consequences if subsection (e) were applied herein, and, therefore, each have standing to challenge its validity.

The Attorney General's argument that the statute does not apply in this case is somewhat difficult to explain. But, it is based upon the position that the pro-employer presumption against a "knowing" hire never arose and could not have been rebutted and, therefore, neither part of subsection (e) was applicable. Therefore, the argument goes, any ruling on the constitutionality of the statutes would be, and was, an advisory opinion. Courts must avoid considering questions of constitutionality unless such adjudication is unavoidable, see, e.g., State v. Taylor, 70 S.W.3d 717, 720 (Tenn. 2002) ("It is well-settled . . . that courts do not decide constitutional questions unless resolution is absolutely necessary to determining the issues in the case and adjudicating the rights of the parties."), and the Attorney General argues it was avoidable here because the statue did not apply.

We disagree with the proposition that subsection (e) does not apply. The legislature has made it clear that subsection (e) applies to undocumented workers who have suffered a permanent partial disability and who, because of their immigration status, cannot lawfully be returned to meaningful work. It also applies to the employers of such workers. Tennessee Code Annotated section 50-6-241(e)(2) specifically states the legislative intent that subsection (e) provide the compensation available to employees who have suffered a permanent partial disability and whose employer is prohibited from returning the injured employee to meaningful work by federal immigration law. Also, subsection (e)(2)(A) establishes the limit on that compensation at one and one-half times the medical impairment rating.

The fact that the remainder of subsection (e)(2)(A) establishes an evidentiary presumption regarding whether the original hiring was "knowing" does not affect the legal standard for the maximum compensation due to an injured undocumented worker. An evidentiary presumption does not alter the general evidentiary standard of preponderance of the evidence; it merely establishes shifting burdens of proof. See, e.g., State v. Pickett, 211 S.W.3d 696, 703 (Tenn. 2007) (finding a mandatory presumption shifts the burden). We reject the argument that subsections (e)(2)(A) and (B) were not implicated in this case, which would moot the constitutional challenge. Accordingly, we hold that subsection (e) applies to the situation presented in this appeal, unless its application is otherwise barred because of federal preemption.

C. Preemption of Tennessee Code Annotated section 50-6-241(e)

Whether all or any portion of Tennessee Code Annotated section 50-6-241(e) is preempted by federal law is a question of law, subject to de novo review, see Stevens ex. rel Stevens v. Hickman Cmty. Health Care Servs., Inc., 418 S.W.3d 547, 557 (Tenn. 2013), and there is a presumption against preemption, see Meditronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). However, pursuant to the Supremacy Clause,[6] federal law may preempt otherwise permissible state laws, rendering the state laws without force. See, e.g., Riegel v. Medtronic, Inc., 552 U.S. 312, 323-25 (2008). "When Congress legislates in an area within the federal domain, it may, if it chooses, take for itself all regulatory authority over the subject, share the task with the states, or adopt as federal policy the state scheme of regulations." Narragansett Elec. Co. v. Burke, 381 A.2d 1358, 1361 (R.I. 1977) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 281, 230 (1947)).

[6] Article VI, clause 2 of the United States Constitution (the "Supremacy Clause") provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Preemption may occur through "express" or "implied" preemption. See Altria Grp. v. Good, 555 U.S. 70, 76 (2008) ("Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose."). Express preemption arises when Congress "define[s] explicitly the extent to which its enactments pre-empt state law." English v. Gen. Elec. Co., 496 U.S. 72, 78 (1990). As relevant to this appeal, the Immigration Reform Act expressly preempts "any State or local law imposing civil or criminal sanctions . . . upon those who employ . . . unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

However, in the absence of express preemption, implied preemption may occur through either conflict preemption or field preemption. See Geier v. Am. Honda Motor Co., 529 U.S. 861, 884 (2000). Conflict preemption applies where it is not possible to comply with both state law and federal law, or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963) (internal citations omitted).

Field preemption occurs when federal regulation of a field is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where federal legislation "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Rice, 331 U.S. at 230. State laws are also precluded by field preemption even if such laws are parallel or complementary to the federal scheme of regulation. See Arizona, 132 S. Ct. at 2502 ("Where Congress occupies an entire field . . . even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.").

1. Preemption of Section 241(e)(2)(B)(ii)

Both Employer and Employee contend that Tennessee Code Annotated section 50-6-241(e)(2)(B)(ii) is expressly preempted. This statute mandates that, where the employee overcomes the presumption and establishes that an employer had actual knowledge of the employee's undocumented status, the employer, *not* the employer's insurer, must pay "[a]n additional sum up to three and one-half (3 ½) times the medical impairment rating" into the uninsured employers fund. Tenn. Code Ann. § 50-6-241(e)(2)(B)(ii). The trial court found that the "additional sum" constitutes a civil penalty against employers who knowingly hire undocumented employees, which is expressly preempted by the Immigration Reform Act. See 8 U.S.C. § 1324a(h)(2) ("The provisions of this section preempt any State or local law imposing civil or criminal sanctions . . . upon those who employ . . . unauthorized aliens."). The Attorney General argues the "additional sum" is not a civil penalty and outside the purview of the Immigration Reform Act.

The plain language of the statute evinces the legislative intent to denominate the "additional sum" as a civil penalty. The statute specifically requires employers, not insurers, to pay the "additional sum" into a state fund, rather than as compensation to the injured employee.

The legislative history also supports the notion that the General Assembly intended the "additional sum" to be a penalty. See Arden v. Kozawa, 466 S.W.3d 758, 764 (Tenn. 2015) (citing Thurmond v. Mid-Cumberland Infectious Disease Consultants, PLC, 433 S.W.3d 512, 517 (Tenn. 2014)) ("Where statutory language is ambiguous, we may decipher legislative intent in other ways, including consideration of the broader statutory scheme, legislative history, and other sources."); see also West v. Schofield, 460 S.W.3d 113, 122-23 (Tenn. 2015). Mr. Bob Pitts, an employer representative on the Advisory Council on Workers' Compensation and affiliated with the Associated Builders and Contractors, clarified that the "additional sum" was included because "the employer *ought to be the one punished* if he did knowingly hire [an undocumented worker]," Hearing on S.B. 2162 Before the S. Comm. on Commerce, Labor & Agric., 2009 Leg., 106th Sess. (Tenn. 2009) (statement of Mr. Bob Pitts) (emphasis added), available at http://tnga.granicus.com/MediaPlayer.php?view_id=77&clip_id=1136, and described the "additional sum" as a "new sort of penalty," Hearing on S.B. 2162 Before the S. Comm. on Fin., Ways & Means, 2009 Leg., 106th Sess. (Tenn. 2009) (statement of Mr. Bob Pitts), available at http://tnga.granicus.com/MediaPlayer.php?view_id=77&clip_id=1490. Senator Jim Tracy, who sponsored the bill, also affirmed the statement that "there's a penalty for the employer who knowingly hired somebody who's an illegal immigrant and that goes into an uninsured employers fund and the department." Hearing on S.B. 2162 Before the S. Comm. on Fin., Ways & Means, 2009 Leg., 106th Sess. (Tenn. 2009) (statement of Sen. Joe Haynes, Member, S. Comm. on Fin., Ways & Means; Sen. Jim Tracy, Member, S. Comm. on Commerce, Labor & Agric.), available at http://tnga.granicus.com/MediaPlayer.php?view_id=77&clip_id=1490.

Both the plain language and legislative history evince the General Assembly's intention that the "additional sum" was enacted as a civil penalty against employers who hire undocumented employees. Consequently, subsection (e)(2)(B)(ii) is expressly preempted by the Immigration Reform Act.

2. Preemption of Section 241(e)(2)(A)

Next, we must address whether subsection (e)(2)(B)(ii) (which we just declared preempted) may be severed from the remaining parts of subsections (e). Under the doctrine of elision, a court may sever an unconstitutional portion of a statute under appropriate circumstances, when doing so would be consistent with the expressed legislative intent.

Lowe's Cos., Inc. v. Cardwell, 813 S.W.2d 428, 430 (Tenn. 1991). The Tennessee Supreme Court has described the doctrine as follows:

> The doctrine of elision is not favored. The rule of elision applies if it is made to appear from the face of the statute that the legislature would have enacted it with the objectionable features omitted, and those positions of the statute which are not objectionable will be held valid and enforceable, . . . provided, of course, there is left enough of the act for a complete law capable of enforcement and fairly answering the object of its passage. However a conclusion by the court that the legislature would have enacted the act in question with the objectionable features omitted ought not be reached unless such conclusion is made fairly clear of doubt from the face of the statute. Otherwise, its decree may be judicial legislation.
>
> The inclusion of a severability clause in the statute has been held by [the Tennessee Supreme Court] to evidence an intent on the part of the legislature to have the valid parts of the statute in force if some other portion of the statute has been declared unconstitutional.

Gibson Cnty. Special Sch. Dist. v. Palmer, 691 S.W.2d 544, 551 (Tenn. 1985) (internal citations omitted). The bill enacting Tennessee Code Annotated section 50-6-241(e) lacked a severability clause, see 2009 Tenn. Pub. Acts c. 526 § 1, but the General Assembly has enacted a general severability statute, see Tenn. Code Ann. § 1-3-110 (2015).[7] Nevertheless, this statute is insufficient to justify elision "where [the unconstitutional portion of a statute] is so interwoven with other portions of an act that [the court] cannot suppose that the legislature would have passed the act with [the unconstitutional portion of the statute] omitted." Hart v. City of Johnson City, 801 S.W.2d 512, 518 (Tenn. 1990) (internal citations omitted).

Section 50-6-241(e)(2)(B)(ii) cannot be elided because it is not "fairly clear of doubt" that the General Assembly would have enacted the statute without the penalty. See Gibson Cnty., 691 S.W.2d at 551. First, the General Assembly did not include a severability clause

[7] Tennessee Code Annotated section 1-3-110 (2015) provides:

> It is hereby declared that the sections, clauses, sentences and parts of the Tennessee Code are severable, are not matters of mutual essential inducement, and any of them shall be exscinded if the [C]ode would otherwise be unconstitutional or ineffective. If any one (1) or more sections, clauses, sentences or parts shall for any reason be questioned in any court, and shall be adjudged unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remaining provisions thereof, but shall be confined in its operation to the specific provision or provisions so held unconstitutional or invalid . . .

in the bill enacting Tennessee Code Annotated section 50-6-241(e) and, second, subsection (e)(2)(B)(ii) is "so interwoven with other portions of an act that [the court] cannot suppose that the legislature would have passed the act with that clause omitted." Hart, 801 S.W.2d at 518. Eliding the provision may also have the unintended consequence of encouraging unscrupulous employers to knowingly hire undocumented employees to gain a windfall, as workers' compensation liability for such employees would be capped at one and one-half times the medical impairment rating, even if the workers had no meaningful return to work.[8]

However, regardless of whether the provision is severable, the remaining portion Tennessee Code Annotated section 50-6-241(e) is preempted under the Immigration Reform Act by both field and conflict preemption because the General Assembly had intended and attempted to "establish what amounts to a state immigration policy." Both the Attorney General and Employer contend the trial court erred in finding the statute preempted and argue that the statute is a state labor and tort law, is not in conflict with federal law, and exists outside a field occupied by the federal government. We disagree with that interpretation.

While the challenged statute administers workers' compensation benefits for undocumented employees, the statute's preamble evinces the General Assembly's intent to establish what amounts to a state immigration policy. Tenn. Code Ann. § 50-6-241(e)(1). To further the stated policy of "clos[ing] the door to illegal workers in this state," section 50-6-241(e)(2)(A) limits undocumented employee benefits to one and one-half times the medical impairment rating. Id. §§ 50-6-241(e)(1), (2)(A). To the extent the statute attempts to establish a state immigration policy, it crosses into Congress's exclusive constitutional power of Congress to "establish a[] uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. Congress has enacted the Immigration Reform Act to specifically occupy the field of regulation of immigration in the workplace, intending the Act to be a comprehensive framework for combatting the employment of illegal aliens. Arizona, 132 S. Ct. at 2504 (quoting Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002)) (internal quotation marks omitted).

The Attorney General cites a Texas appellate case to demonstrate that state labor and tort laws fall outside the field preempted by the Immigration Reform Act. See Grocers Supply, Inc. v. Cabello, 390 S.W.3d 707 (Tex. App.—Dallas, 2012). The case arose from a car accident caused by the defendant, which injured the plaintiffs. Id. at 711. The appellate court rejected the defendant's argument that the Immigration Reform Act preempted awards of lost wages for plaintiffs who have no legal right to work in the United States, finding that the Immigration Reform Act did not preempt state tort laws. Id. at 718-24. The Texas case is wholly distinguishable from this appeal because the Grocers Supply plaintiffs were neither current nor potential employees of the defendant, and their relationship had no bearing on employment opportunities for undocumented employees. Id. at 720 (finding the argument

[8] See infra note 9, at 15.

that the Immigration Reform Act preempts the award "especially attenuated where . . . the party arguing preemption is not an employer or possible employer, but a third-party tortfeasor"). Unlike the Texas case, the stated goal of the statute at issue in this appeal is to directly affect immigration, distinguishing it from state labor and tort law and placing it in the field of immigration, which is thoroughly occupied by federal law.

Moreover, section 50-6-241(e)(2)(A) is subject to conflict preemption. By reducing the liability of employers of undocumented workers to one and one-half times the medical impairment rating, the statute makes it less costly to hire these workers and potentially creates "a perverse incentive for employers to *hire* undocumented workers over other workers, especially in high-risk jobs that often result in workers' compensation claims." Gonzalez v. Performance Painting, Inc., 303 P.3d 802, 807 (N.M. 2013)[9] (emphasis in original). Although capping the benefits undocumented workers may receive is aimed at achieving "one of the same goals as federal law–the deterrence of unlawful employment" the statute does so by a method that conflicts with the method of enforcement provided by the Immigration Reform Act. Arizona, 132 S. Ct. at 2505. As noted by the United States Supreme Court in Arizona, the Immigration Reform Act imposes a "careful balance" of civil and criminal penalties that affect employers and employees alike. Id. Accordingly, subsections (e)(1)-(2)(A) serve as "an obstacle to the regulatory system Congress chose." Id.

D. Benefits for Undocumented Workers

Having concluded that Tennessee Code Annotated section 50-6-241(e)(2) is preempted, we next determine whether any other statute limits the benefits undocumented employees are eligible to receive under the Workers' Compensation Act. Undocumented employees are not excluded from the definition of "employees" in the Workers'

[9] For further explanation, see also Dowling v. Slotnik, 712 A.2d 396, 404 (Conn. 1998) ("[E]xcluding such workers from the pool of [employees eligible for workers' compensation benefits] would relieve employers from the obligation of obtaining workers' compensation coverage for such employees and . . . creat[e] a financial incentive for unscrupulous employers to hire undocumented workers."); Campos v. Daisy Constr. Co., 107 A.3d 570, 578 (Del. 2014) ("[E]nsuring that undocumented workers are given equal treatment under the Workers' Compensation Act . . . reduces the incentive for employers to hire undocumented workers, and thus minimizes the overall incentive for illegal immigration . . ."); Staff Mgmt. v. Jiminez, 839 N.W.2d 640, 650 (Iowa 2013) (holding that excluding undocumented employees from the Iowa Workers' Compensation Act would "encourag[e] employers to hire undocumented workers because the employers would not be liable under the Iowa Workers' Compensation Act for any injuries those workers sustained"); Mendoza v. Monmouth Recycling Corp., 672 A.2d 221, 225 (N.J. Super 1996) (holding that "immunity from accountability [under the Workers' Compensation Act] might well have the further undesirable effect of encouraging employers to hire illegal aliens"); compare Torres v. Precision Indus., P.I. Inc., No. W2014-00032-COA-R3-CV, 2014 WL 3827820, at *9 (Tenn. Ct. App. Aug. 5, 2014) ("[W]e find that depriving unauthorized aliens of an avenue to bring a retaliatory discharge claim could potentially increase the incentive of employers to hire illegal workers that they could terminate if a workers' compensation claim was filed.").

Compensation Act, see Tenn. Code Ann. § 50-6-102(11)(A), and have in the past been granted standing to file claims under the act, see, e.g., Torres v. Precision Indus., P.I. Inc., No. W2014-00032-COA-R3-CV, 2014 WL 3827820, at *9 (Tenn. Ct. App. Aug. 5, 2014) (holding that an undocumented employee has standing to bring a retaliatory discharge claim under the Workers' Compensation Act); Silva v. Martin Lumber Co., No. M2003-00490-WC-R3-CV, 2003 WL 22496233, at *2 (Tenn. Workers' Comp. Panel Nov. 5, 2003) (unpublished) (holding that an undocumented employee is considered an "employee" under the Workers' Compensation Act).

Subsection (d) of the Act provides that the one and one-half multiplier cap applies when the employee experiences a meaningful return to work or does not return to work due to the employee's voluntarily resignation, retirement, or termination for misconduct. See Tenn. Code Ann. §§ 50-6-241(d)(1)(A)-(B)(iii). The Supreme Court has affirmed that an employer's status as "temporary" does not affect the analysis of this issue. See Britt v. Dyer's Emp't Agency Inc., 396 S.W.3d 519, 524 (Tenn. 2013). In Britt, the employer conceded that it could not satisfy the prerequisites necessary for application of the one and one-half multiplier because of the nature of its business as a temporary employment agency and "the inherently temporary nature" of the worker's employment. Id. The Court found these facts irrelevant "to the determination of which multiplier applies. . . . because the statutory language neither draws a distinction between permanent and temporary employees nor permits or requires consideration of the employer's business practices." Id. The Court explained that it could not "alter or amend the statutory language, which focuses only on whether the employer returned the employee to work at a wage equal to or greater than the pre-injury wage, or create a judicial exception to the clear statutory language for temporary employers and employees." Id. The same analysis applies to this case. Outside Tennessee Code Annotated section 50-6-241(e), no statute authorizes courts to limit undocumented workers to benefits of one and one-half times the medical impairment rating, and subsection (e) is preempted. Thus, we apply subsection (d) to the facts of this case and find Employee is not capped at a one and one-half multiplier.

E. Impairment Rating

Employer next contends that the trial court erred by adopting the 24% medical impairment rating assigned by Dr. Landsberg and that the court should have adopted Dr. Lee's 16% medical impairment rating. 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). This Panel "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." Lockard v. Estes Express Lines, Inc., No. W2007-01570-WC-R3-WC, 2009 WL 198023, at *4 (Tenn. Workers' Comp. Panel Jan. 28, 2009) (citing Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997)). However, "[w]hen credibility and the

weight to be given testimony are involved, considerable deference is given to the trial court when the trial judge had the opportunity to observe the witnesses' demeanor and to hear in-court testimony." Mansell v. Bridgestone Firestone N. Am. Tire, LLC, 417 S.W.3d 393, 399 (Tenn. 2013) (citing Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 898 (Tenn. 2009)).

Here, both parties presented expert medical evidence by deposition. Dr. Lee, the treating physician, performed multiple surgeries on Employee, whereas Dr. Landsberg saw Employee only once for an IME. However, Dr. Lee could not recall the method he had used to arrive at his 2013 impairment rating, verbally acknowledged the rating was not entirely correct, and revised the impairment rating during his 2015 deposition without a clear explanation for doing so. Dr. Landsberg physically examined Employee and reviewed his medical records. The 24% medical impairment rating he provided accounted for the posterior interosseous nerve dysfunction Employee sustained, as well as the surgical removal of the radial head, an injury that Dr. Lee's 2013 rating did not address. The trial court also heard Employee's testimony and observed Employee's arm movement during trial, and found that Dr. Landsberg's assessment more accurately reflected its condition. The evidence does not preponderate against the trial court's finding accrediting Dr. Landsberg's 24% medical impairment rating.

F. Permanent Partial Disability

Employer's final contention is that the trial court's award of 84% permanent partial disability benefits is excessive. In determining the employee's vocational disability, the trial court considers the "employee's age, education, skills and training, local job opportunities and capacity to work at types of employment available in [his] disabled condition." Tenn. Code Ann. § 50-6-241(d)(1)(A); see also Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990); Roberson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986). This determination of the employee's vocational disability is a question of fact, Jaske v. Murray Ohio Mfg. Co., Inc., 750 S.W.2d 150, 151 (Tenn. 1988) (citing Roberson, 722 S.W.2d at 384), which this Panel reviews de novo, with a presumption of correctness unless the evidence preponderates otherwise, see Wilhelm, 235 S.W.3d at 126 (citing Tenn. Code Ann. § 50-6-225(e)(2)).

In arguing the award is excessive, Employer notes the relative success of the tendon transfer surgery, which restored some movement and strength to Employee's hand and fingers, and cites testimony that Employee was able to work as a painter after being released by Dr. Lee. Employer also highlights Employee's lack of stable employment prior to his employment with Employer.

Employee testified that his post-injury employment as a painter was temporary. His current employment is intermittent; he finds full-time work during certain weeks, only three

or four hours per day some weeks, and cannot find any opportunity to work other weeks. Additionally, Dr. Lee imposed restrictions on Employee when engaging in frequent activity, limiting the weight Employee should lift, carry, push, or pull in the workplace. The trial court observed his limited arm movement during the trial.

Considering Employee's age, limited education, limited command of English, and history of manual labor in light of the restrictions imposed by Dr. Lee, the evidence does not preponderate against the trial court's finding that Employee sustained an 84% permanent partial impairment to the left arm as a result of his work injury.

III. Conclusion

The trial court's judgment declaring Tennessee Code Annotated section 50-6-241(e) unconstitutional and the award of benefits to Employee is affirmed. Costs are taxed to Steve Lawhon, individually and d/b/a Commercial Services, and Auto Owners Insurance Company and their surety, for which execution may issue if necessary.

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PATRICIA J. COTTRELL, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

CARLOS MARTINEZ v. STEVE LAWHON, ET AL.

Chancery Court for Davidson County
No. 13-1145-IV

No. M2015-00635-SC-WCM-WC – Filed November 21, 2016

Judgment Order

This case is before the Court upon the motion for review filed by the Tennessee Attorney General 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 to the State of Tennessee, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

CORNELIA A. CLARK, J., not participating