IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 22, 2019 Session

CAROL NOLAN v. GOODYEAR TIRE & RUBBER CO. ET AL.

Appeal from the Obion County Chancery Court
No. 29534 W. Michael Maloan, Judge

No. W2018-01382-SC-R3-WC – Mailed July 10, 2019; Filed August 16, 2019

Carol Nolan ("Employee") was employed by Goodyear Tire and Rubber Company ("Employer"). The trial court found that Employee was permanently and totally disabled following work-related injuries to her back and knees in April 2011. The trial court apportioned 85% liability of the award to Employer and 15% to the Tennessee Second Injury Fund. Employer has appealed the trial court's finding that Employee is permanently and totally disabled and the apportionment of liability for permanent and total disability benefits. Employer's appeal has been referred to this 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. After review, we conclude that the evidence does not preponderate against the trial court's decision. Therefore, we affirm the trial court's judgment.

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

WILLIAM B. ACREE, JR., SR.J., delivered the opinion of the Court, in which ROGER A. PAGE, J., and ROBERT E. LEE DAVIES, SR.J., joined.

Kirk Moore, Union City, Tennessee, for appellant, Goodyear Tire & Rubber Co.

Ricky L. Boren, Jackson, Tennessee, for appellee, Carol Nolan.

Matt D. Cloutier, Nashville, Tennessee, for appellee, Tennessee Second Injury Fund.

OPINION

I.

Employee graduated from high school in 1982 and began working for Reelfoot Packing Company. From 1987 to 2002, she assembled car windows for Dura Automotive. In November 2002, she began working for Employer, but she was laid off less than one year later. After attending a business school and earning a certificate as a medical assistant, Employee worked in a Walmart jewelry department. In December 2006, Employee began working in the medical records department for Martin Volunteer Community Hospital where her job required her to pack medical records in boxes.

In March 2007, Employee returned to work for Employer in a position that required her to lift and move tread from a conveyor. In April 2011, she fell at work and injured her knees and back. When she stood up from the fall, she hit her head and was knocked unconscious. Employee was taken to the emergency room by ambulance. She was later treated by Dr. Timothy Sweo who performed a left knee replacement, and by Dr. Glenn Crosby, who performed a spinal fusion.

Dr. Sweo, an orthopedic surgeon, testified by deposition that he evaluated Employee for her knee and back injuries in April 2011. She had medial meniscus tears and degenerative disease in both knees, for which Dr. Sweo performed arthroscopic procedures. After Employee continued to have trouble with her left knee, Dr. Sweo performed a left knee replacement in January 2013. According to Dr. Sweo, Employee continued to have pain despite prescriptions for pain medication, and she did not do well with physical therapy. Dr. Sweo opined that she sustained a permanent impairment of 37% to the left lower extremity and 2% to the right lower extremity. Dr. Sweo assigned permanent restrictions against squatting, kneeling, climbing or lifting over 25 pounds. In November 2013, Dr. Sweo referred Employee to a neurosurgeon for further treatment of her back.

Dr. Crosby, a neurosurgeon, testified by deposition that he saw Employee in March 2014. An MRI taken in September 2013 showed that she had a ruptured disk at L5 with a disk fragment compressing the nerve root. An additional MRI taken in April 2014 revealed a completely collapsed L5 disk. In May 2014, Dr. Crosby performed a fusion at L5-S1. Following surgery, Employee had persistent lumbar pain and was referred for pain management in November 2014. Although she continued to report pain in her back in June and October 2015, an additional MRI and a nerve conduction test showed no evidence of nerve damage and no new surgical issues. Dr. Crosby did not believe Employee could return to work for Employer in her prior position. He placed her at maximum medical improvement on October 26, 2015, and he assigned an impairment rating of 14% to the body as a whole.

In a second deposition, Dr. Crosby indicated that he saw Employee in December 2017. He referred her for a Functional Capacity Evaluation ("FCE"), which was performed on January 31, 2018. Dr. Crosby said the FCE rated Employee for sedentary to light work; he concluded that she was "essentially disabled" and that he "was going to keep her off work indefinitely at that point." During the FCE, Employee declined to perform tests that required climbing a ladder, crawling, kneeling, squatting, and crouching due to her fear that the activities would cause pain in her knees. The FCE reported limitations and pain while sitting, standing, walking, balancing, bending, climbing stairs, reaching overhead, and twisting.

Dr. Crosby stated the FCE findings were consistent with his examinations. He acknowledged that the FCE report indicated that Employee may not have given her full effort during the evaluation, and further stated "the results of this evaluation may or may not represent this patient's current maximum functional abilities and may or may not be used for return to work planning." However, Dr. Crosby did not see evidence of faking or malingering during his examinations, and he did not "address the subjective component of the FCE." He agreed Employee could work at the "sedentary to light" level, but he did not know the restrictions that are associated with that range of work.

Robert W. Kennon, Ph.D., testified at trial that he performed a vocational assessment in November 2016. According to Dr. Kennon, Employee had a history of physically demanding work, and her cognitive abilities, which ranked in the 3rd percentile, were below average. Although Employee's education indicated her abilities would be higher, Dr. Kennon did not find any evidence of manipulation or malingering. When applying Dr. Sweo's restrictions against lifting twenty-five pounds, squatting, kneeling, or climbing, Dr. Kennon found Employee sustained a 63.27% vocational loss of highly transferable jobs. Dr. Kennon acknowledged that an employee with multiple injuries had fewer vocational opportunities. Moreover, after Dr. Crosby adopted the findings in the FCE, which included restrictions as to lifting or carrying over twelve to seventeen pounds, walking, balancing, bending, climbing, sitting, and squatting, Dr. Kennon determined that Employee lost 98% of highly transferrable jobs and 98.79% of moderately transferrable jobs.

Dr. Kennon admitted that the FCE report indicated Employee did not put forth her best effort in some of the tasks. In an addendum to his report, Dr. Kennon wrote, "Quite obviously, this [FCE] analysis may not accurately reflect Employee's actual vocational potential or loss as the results of the FCE reflect tenuous findings that were inconclusive." Nevertheless, Dr. Kennon emphasized that Dr. Crosby

> did indeed adopt the findings of the FCE, . . . and he implied that the limitations that were identified in the FCE were consistent with the findings

> of his own assessment and personal physical examination of [Employee]. He also indicated she was essentially disabled and chose to keep her off work indefinitely at that point.

Dr. Kennon found five jobs that remained highly transferable, and twenty-one jobs that are moderately transferable for Employee.

Employee testified that, since suffering her injuries, she takes pain medication twice per day and uses a TENS unit for her back. She can no longer climb stairs, squat, or stand for long periods of time. She has difficulty doing household chores and is afraid to lift things. All of her previous jobs required her to stand for long periods of time, to lift heavy objects, or both. Although she received training in medical coding from January to December 2012, Employee explained that she has never worked in that field and that she would not be able to sit at a desk. Employee admitted that she is able to drive, but she has not worked or looked for work since her April 2011 injuries.

Employee acknowledged that she injured her right shoulder in September 2007 and underwent two surgeries. She received 12% permanent partial disability benefits in March 2009 and an additional 20% permanent partial disability benefits upon reconsideration of the award in December 2011. In addition, she underwent surgery for her right hand/wrist carpal tunnel syndrome in 2009; she received 18% permanent partial disability for this injury plus an additional 30% permanent partial disability in December 2011. Despite these previous injures, Employee was under no work restrictions and was taking no pain medication before her April 2011 injuries.

Michelle Weiss testified by deposition on behalf of Employer. She reviewed Dr. Sweo's deposition and records and found Employee had a 44% loss of access to jobs. She also reviewed Dr. Crosby's deposition and records and found Employee had a 38% loss of access to jobs. Following her review of the FCE, Ms. Weiss prepared a supplemental report finding that the restrictions stated in the FCE resulted in a 73% loss of access to jobs. She opined that "over 6,900 jobs remain available" to Employee in the non-metropolitan West Tennessee area.

After considering the evidence, the trial court found that Employee is permanently and totally disabled as a result of her work-related injuries to her back and knees in April 2011. The trial court apportioned liability for 85% of the award to Goodyear and 15% to the Second Injury Fund.

II.

We review the trial court's findings of fact de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the

preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(a)(2). We afford the trial court considerable deference where the credibility and weight of a witness's in-court testimony is involved. *Madden v. Holland Group of Tenn.*, 277 S.W.3d 896, 900 (Tenn. 2009). However, we draw our own conclusions concerning the weight and credibility of expert medical testimony contained in the record by deposition from the contents of the depositions. *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008). Finally, we review the trial court's conclusions of law de novo upon the record with no presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Permanent Total Disability

Employer contends the trial court erred in finding Employee permanently and totally disabled. Employee argues the evidence does not preponderate against the trial court's judgment.

An employee is entitled to permanent total disability benefits if a work injury "totally incapacitates the employee from working at an occupation that brings the employee an income." Tenn. Code Ann. § 50-6-207(4)(B); *Prost v. City of Clarksville*, 688 S.W.2d 425, 427 (Tenn. 1985). The trial court must consider a variety of factors in making this determination so that its decision results from having "a complete picture" of the employee's ability to obtain gainful employment post-injury. *Hubble v. Dyer Nursing Home*, 188 S.W.3d 525, 535 (Tenn. 2006) (citing *Vinson v. United Parcel Serv.*, 92 S.W.3d 380, 386 (Tenn. 2002)). Such factors include the employee's skills, training, education, age, local job opportunities, and ability to work at the available jobs in his post-injury condition. *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000) (quoting *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986)). Although vocational experts often present an assessment of these factors at trial, the employee's testimony concerning his or her ability or inability to return to gainful employment is "competent testimony that should be considered." *Hubble*, 118 S.W.3d at 536; *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 217 (Tenn. 2006) (quoting *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 458 (Tenn. 1988)) (stating that the employee's "assessment of his physical condition and resulting disabilities is competent testimony and cannot be disregarded."). The extent of an injured employee's vocational disability is a question of fact for the trial court to determine from all of the evidence presented by the parties, including lay and expert testimony. *Cleek*, 19 S.W.3d at 773 (citing *Nelson v. Wal–Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn.1999)).

In the present case, Employer relies primarily on Ms. Weiss's testimony that Employee had access to 56% of available jobs under Dr. Sweo's restrictions and 62% of available jobs under Dr. Crosby's restrictions. In addition, Employer argues that the FCE had "significant flaws and problems" and may not have "represent[ed] the patient's

current maximum functional abilities and may or may not be used for return to work planning."

In contrast, Employee emphasizes that her work-related injuries resulted in a left knee replacement and a spinal fusion. Dr. Sweo assigned an impairment rating of 37% to the left lower extremity and 2% to the right lower extremity. In addition, Dr. Crosby assigned an impairment rating of 14% to the body as a whole. Importantly, before these injuries, Employee performed demanding work without restrictions, accommodations or medication. After the injuries, however, she needed pain management, was unable to stand, sit, or walk for long periods of time, and was restricted from lifting. Dr. Kennon testified that Employee had restrictions from her knee injuries and her back injury and that multiple injuries reduce an employee's vocational opportunities. Dr. Kennon further stated that Employee had a history of physically demanding jobs and below average cognitive ability. Although the FCE noted the her effort was variable, Dr. Kennon relied on Dr. Crosby's testimony that the FCE was consistent with his examinations of Employee. Moreover, neither Dr. Kennon nor Dr. Crosby found evidence that Employee was malingering or exaggerating her symptoms. Dr. Kennon concluded that Employee's restrictions excluded 98% of the highly transferrable job titles and 96.79% of the moderately transferrable job titles.

The trial court's findings indicate that the trial court considered all of the evidence, including the medical testimony of Dr. Sweo and Dr. Crosby and the vocational testimony of Ms. Weiss and Dr. Kennon. The trial court further found that "Dr. Crosby accepted the Functional Capacity Evaluation in its entirety with some equivocation." In addition, the trial court accredited Employee's testimony regarding her injuries, her ongoing pain, and her inability to work or perform chores. We hold that the evidence does not preponderate against the trial court's finding that Employee is permanently and totally disabled.

Second Injury Fund

Employer also argues that the trial court erred in apportioning liability for 85% of the award to Employer and asks for "a more balanced and fairer application of the apportionment award." The Second Injury Fund argues that the trial court correctly apportioned the award.

At the time of Employee's injuries in April 2011, Tennessee Code Annotated section 50-6-208(a)(1) provided as follows:

> 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, the 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 the previous injury shall not be considered in estimating the compensation to which the employee may be entitled under this chapter from the Employer or the Employer's insurance company; provided, that in addition to the compensation for a subsequent injury, and after completion of the payments for the subsequent injury, then the 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.

Tenn. Code Ann. § 50-6-208(a). Thus, the Second Injury Fund is liable only for the portion of the award representing the balance remaining after considering the extent of disability attributable to the subsequent injury. Tenn. Code Ann. § 50-6-208(a)(1); *Allen v. City of Gatlinburg*, 36 S.W.3d 73, 76 (Tenn. 2001).

Here, the trial court "considered all the evidence regarding the apportionment of liability between Goodyear and the Second Injury Fund" and found the "proper allocation of liability to be 85% [to Goodyear] and 15% to the Second Injury Fund." The evidence showed that Employee sustained prior work-related injuries in 2007 and 2009 for which she received workers' compensation benefits. However, she testified that she performed physically demanding work for Goodyear following these injuries without needing assistance, accommodations or pain medication until April 2011. After her April 2011 injuries, Employee underwent a knee replacement and a spinal fusion, was unable to work or perform chores, and required pain medication. As noted above, the trial court clearly accredited Employee's testimony. In sum, we hold that the evidence does not preponderate against the trial court's finding that Goodyear is liable for 85% of the award.

III.

We affirm the trial court's judgment. The costs of this appeal are taxed to Goodyear Tire and Rubber Co., for which execution may issue if necessary.

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WILLIAM B. ACREE, Jr., Sr. J.

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Chancery Court for Obion County
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No. W2018-01382-SC-R3-WC – Filed August 16, 2019

JUDGMENT ORDER

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

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

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

Costs are assessed to Appellant, Goodyear Tire and Rubber Co., for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM