

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT KNOXVILLE

October 26, 2009 Session

**RAINES BROTHERS, INC., ET AL. v. BARRY WADE JOHNSON**

Direct Appeal from the Chancery Court for Bradley County  
No. 05-301 Jerri S. Bryant, Chancellor

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**No. E2009-00607-WC-R3-WC**  
**Filed January 19, 2010**

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This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and report of findings of fact and conclusions of law. The employee, Barry Wayne Johnson, sought benefits for injuries he sustained in the course and scope of his employment with Raines Brothers, Inc. The employee fell fifteen to twenty feet into an air conditioning vent shaft at a construction site, shattering the left side of his pelvis and acetabulum. Following a course of treatment, the employee returned to work and was terminated after he informed his employer that he could not perform the light-duty work assigned to him due to residual and chronic pain. The trial court awarded permanent and total disability benefits. On appeal, the employer argues that the trial court erred in awarding permanent and total disability benefits. After careful review, the judgment of the trial court is affirmed.

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

SHARON G. LEE, J., delivered the opinion of the court, in which JON KERRY BLACKWOOD, SR. J., and THOMAS R. FRIERSON, SP. J., joined.

Clancy J. Covert, Chattanooga, Tennessee, for the Appellant, Raines Brothers, Inc. and National Fire Insurance Company.

William J. Brown and David K. Calfee, Cleveland, Tennessee, for the Appellee, Barry Wade Johnson.

## MEMORANDUM OPINION

### Factual and Procedural Background

Mr. Barry Wade Johnson (“Employee”) was injured on June 23, 2004, in the course and scope of his employment with Raines Brothers, Inc. (“Employer”), a construction contractor operating in Chattanooga, Tennessee. While preparing a second-floor construction area for the pouring of cement, Employee fell approximately fifteen to twenty feet into an air conditioning vent shaft, shattering the left side of his pelvis and acetabulum. Dr. Peter J. Nowotarski performed multiple orthopedic surgeries on Employee. Although these surgeries were successful, Employee complained of residual and chronic pain in his left leg. Due to the persistence of these pain symptoms, Dr. Nowotarski referred Employee to Dr. Gregory N. Ball, a pain management physician.

Dr. Ball’s medical opinions were presented at trial by deposition. Dr. Ball diagnosed Employee with meralgia paresthetica, a condition that can make even the lightest touch “exquisitely painful.” Dr. Ball testified that this condition resulted from nerve injury associated with Employee’s bone fractures and medical treatment and that this type of nerve damage can persist despite a complete orthopedic recovery. To treat the condition, Dr. Ball initially prescribed a course of injection therapy and non-narcotic drugs. Employee returned to work and was placed on light duty as an elevator operator, a job that required him to stand all day. As his pain symptoms persisted, Employee informed Employer that he could not perform this work and was terminated.

After this termination, Dr. Ball began a more intensive course of medications in an attempt to control Employee’s pain. Employee currently takes five medications on a daily basis, as prescribed by Dr. Ball: Opan and Oxycodone for pain, Lyrica for nerve damage to his leg, Bupropion for anxiety, and Skelaxin as a muscle relaxant. Employee, who was 42 years old at the time of trial, claims that he was extremely active prior to the accident, but that he now finds daily activities to be difficult. In particular, he alleges that these medications have caused severe side effects that interfere with his daily life, including dizziness, blurred vision, and nausea. Employee did not mention these side effects on intake questionnaires at Dr. Ball’s office, and Dr. Ball subsequently did not reference these severe side effects in his deposition. Although Dr. Ball’s deposition and medical notes contain Employee’s subjective complaints of pain in connection with nerve damage to his left leg, Dr. Ball concluded that Employee was capable of “sedentary to light duty at best with the ability to change positions freely.” Both Dr. Ball and Employee have noted that Employee wants to work, but that potential employers are hesitant to hire him based on the number and type of medications he is currently taking. Employee, who has a limited education and a history of performing primarily construction work, alleges that his current condition makes him most qualified for supervisory positions, but employers generally do not hire employees directly to fill such positions. Dr. Ball concluded that “[a]t this point, he’s not capable of doing any work that he’s qualified to do or trained to do.”

A Functional Capacity Evaluation (“FCE”) was administered by Benchmark Physical

Therapy after Employee's termination. Employer alleges that Employee did not make a full effort during this evaluation and that Employee refused to attempt certain activities. Employee counters that he had been placed under physical restrictions by Dr. Nowotarski, which included a fifty-pound weight limit and requirements not to bend or stoop, and that some of the activities that he was asked to perform during the FCE caused pain. The FCE concluded that Employee "gave a reliable effort" and that he exhibited consistent behavior even when he was unaware of observation.

At trial, Employee presented an expert on vocational disability, Dr. Julian Nadolsky. Using the Wide Range Achievement Test, Dr. Nadolsky determined that Employee was below average functioning in math and reading. Although Dr. Nadolsky's original report concluded that Employee's vocational impairment was at 58%, his opinion later changed as he listened to testimony at trial and learned about the side effects that Employee was experiencing from his medication. Thus, Dr. Nadolsky ultimately testified that Employee was 100% disabled.

Employer objected to the admission into evidence of Dr. Nadolsky's new conclusions. Although the trial court overruled this objection, it granted Employer a continuance to obtain a vocational expert. At the second phase of the trial, Patsy V. Bramlett, a rehabilitation counselor and vocational consultant, testified for Employer. Ms. Bramlett found that Employee exhibited functioning that was below average in both math and reading based on the results of the Wide Range Achievement Test she administered. She further testified that Employee retains managerial skills, although she acknowledged that employers often fill supervisory positions by promoting from within the current pool of employees. Ms. Bramlett presented two different impairment ratings based on different statements of Employee's restrictions. In consideration of Dr. Nowotarski's restrictions and the FCE, she stated that Employee had lost 45% of his potential job opportunities. In consideration of Employee's subjective complaints of pain (which had been recorded in Dr. Ball's medical deposition), as well as the medications that Employee was taking, Ms. Bramlett concluded that Employee had lost 75% of his potential job opportunities. She conceded that, if the side effects from his medication occurred during the work day, he would be "eliminated" from all employment and acknowledged that there was no reason to question Employee's truthfulness concerning his symptoms and side effects.

In a ruling from the bench, the trial court assessed the credibility and weight of this evidence. The trial court was skeptical of Dr. Nadolsky's opinion, stating that the doctor had learned nothing about Employee's pain symptoms at trial that he had not been aware of when preparing his initial report. However, the trial court found Ms. Bramlett to be very credible. In considering Dr. Ball's deposition, the trial court stressed the qualifications that Dr. Ball placed upon his formulation of Employee's potential work capabilities. In considering Employee's skills and education, the trial court noted that Employee had consistently exhibited "below-average functioning" in reading and arithmetic and emphasized statements by Ms. Bramlett and Dr. Ball to the effect that, although Employee had some transferable skills, it would be difficult to gain entry to employment at the level at which those skills would transfer. In light of the testimony provided by Employee's physicians, the vocational experts, and Employee himself, the trial court ultimately concluded that there was clear and convincing evidence of permanent and total disability. On appeal, Employer asserts as

error the trial court's award of permanent and total disability benefits.<sup>1</sup>

### Standard of Review

The existence and severity of vocational disability are questions of fact. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 773 (Tenn. 2000). Our standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's findings, unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); see also Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe witness demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002); Cleek, 19 S.W.3d at 774. The trial court's conclusions with respect to witness credibility "may generally be inferred from the manner in which the [trial] court resolves conflicts in the testimony and decides the case." Rhodes, 154 S.W.3d at 46. However, where the issues involve expert medical testimony included in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the deposition, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997).

### Analysis

In Tennessee, permanent and total disability occurs "when an injury not otherwise specifically provided for in [the workers' compensation act] totally incapacitates the employee from working at an occupation which brings the employee an income." Tenn. Code Ann. § 50-6-207(4)(B) (2008). This "inquiry . . . must 'focus on the employee's ability to return to gainful employment.'" Cleek, 19 S.W.3d at 774 (quoting Davis v. Reagan, 951 S.W.2d 766, 767 (Tenn. 1997)). Thus, total benefits are not warranted if the employee can perform some type of regular and gainful employment, even if he cannot return to his former job. Prost v. City of Clarksville Police Dep't, 688 S.W.2d 425, 427 (Tenn. 1985). Pertinent factors include the employee's age, education, skills and training, capacity to work in available employment in light of the disability, and the state of the local job market. Rhodes, 154 S.W.3d at 47-48; Perkins v. Enter. Truck Lines, Inc., 896 S.W.2d 123, 127 (Tenn. 1995); Roberson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986). Because both expert and lay testimony are relevant to the determination of disability, Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 677 (Tenn. 1983), an employee's assessment of his own physical condition is competent testimony. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975). Although an employee's testimony is probative to establish the existence of pain or the ability to work, expert medical testimony is required to establish the permanency of an injury. Id.

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<sup>1</sup> In its brief, Employer also argued that the trial court erred in commuting Employee's benefits to a lump sum. At oral argument, the parties stipulated that this issue was moot.

In this case, Employer disagrees with the manner by which the trial court weighed the evidence. In particular, Employer criticizes the trial court's conclusions regarding Employee's current capacity to work in light of his disability. On this issue, Employer focuses special attention on the testimony of Dr. Nadolsky. Although Dr. Nadolsky had found Employee to be capable of work before trial, his opinion changed when he heard Employee testify as to the side effects that he currently experiences from medications. Contrary to Employer's assertions, we do not find that the trial court relied on this testimony in reaching its conclusions. In fact, the trial court questioned Dr. Nadolsky's credibility by stating that the testimony that the doctor had heard at trial was nothing that he had not considered before. Instead, the trial court afforded more weight to Ms. Bramlett's testimony. Although Ms. Bramlett did not testify that Employee suffered from a permanent and total disability, she ultimately qualified her findings in a manner that supports a finding of permanent and total disability. Ms. Bramlett acknowledged during cross-examination that the side effects described by Employee would "eliminate[]" him from employment if they occurred during the work day. In tandem with this concession from Ms. Bramlett, the trial court considered the testimony of Employee himself, who asserted that he suffered from these severe side effects on a daily basis. Neither Ms. Bramlett nor any other witness testified that there was reason to question Employee's truthfulness. On the contrary, evidence was introduced to suggest that Employee wants to work and that he did not exaggerate his limitations during physical evaluations. The trial court, which announced from the bench its conclusion that Ms. Bramlett's testimony was more convincing than that of Dr. Nadolsky, seemed to be swayed by the concessions that Ms. Bramlett made to Employee's current symptoms during cross-examination. We see no reason to disturb the trial court's assessment of these witnesses, particularly considering the deference due to the trial judge's conclusions on such matters. See Whirlpool Corp., 69 S.W.3d at 167; Cleek, 19 S.W.3d at 774.

This conclusion is not altered by our consideration of Dr. Ball's deposition. We review the credibility of evidence contained in a deposition without deference to the conclusions of the trial court. See Bohanan, 136 S.W.3d at 624; Krick, 945 S.W.2d at 712. Employer does not challenge Dr. Ball's medical diagnosis, but instead asserts that the trial court discounted those aspects of Dr. Ball's deposition that allegedly weigh against a finding of permanent and total disability. Although the finding of disability was predicated largely on the side effects that Employee experiences from his medications, Employer suggests that these side effects have not been significant because most of them were never recorded by Dr. Ball. In his deposition, Dr. Ball did not expressly mention the side effects that Employee would later describe at trial, although he referred to the need to find a mixture of medications that would produce minimal side effects and noted Employee's frustration with his medications. Throughout the deposition, Dr. Ball's main emphasis was on the chronic pain associated with the condition itself, and not the side effects associated with medication. Despite the prescribing physician's minimal discussion of side effects from medication, upon a determination of Employee's credibility the trial court could properly rely upon Employee's testimony in order to establish the existence of his symptoms. See Uptain Constr. Co., 526 S.W.2d at 459.

Even in the absence of direct reference to prescription side effects experienced by Employee, Dr. Ball's deposition contains statements that cast doubt on Employee's ability to find gainful employment. Employer suggests that the trial court discounted Dr. Ball's finding that Employee was

capable of “sedentary to light duty at best with the ability to change positions freely.” However, the trial court expressly recognized this finding in its ruling from the bench. Furthermore, although Dr. Ball did conclude that Employee was capable of working with restrictions, in light of the entire deposition it would be reasonable to place emphasis on Dr. Ball’s qualifications to this conclusion. The deposition, which is replete with descriptions of various pain treatments that Employee has undergone without achieving permanent improvement, suggests in its totality that Employee might not be capable of escaping the pain symptoms associated with his nerve damage. Dr. Ball noted that employers will not hire Employee due to the sort of medications that he takes in order to control this pain. At one point, Employee made a voluntary attempt to quit taking his prescribed medications, but eventually informed Dr. Ball that he found the pain to be unbearable without them. In light of Employee’s difficulties, Dr. Ball stated that “[a]t this point, he’s not capable of doing any work that he’s qualified to do or trained to do.” Although Dr. Ball briefly acknowledged the possibility that Employee could return to work with restrictions, the overall tenor of the deposition suggests that this possibility is currently dubious. Upon our review, the preponderance of the evidence does not weigh against the trial court’s treatment of Dr. Ball’s deposition.

Finally, it would not be appropriate to overturn the trial court based upon findings that were drawn from vocational testimony concerning Employee’s skills, training, and education. Based on his experience and current confinement to light duty, Ms. Bramlett suggested that Employee is currently suited to managerial work. Ms. Bramlett conceded during cross-examination, however, that employers generally do not hire directly for managerial positions. The trial court relied upon this statement in its determination that Employee would have difficulty obtaining employment at the level at which his current skill set could transfer. The evidence does not preponderate against the trial court’s conclusion on this matter. Employer further suggests that the trial court discounted Employee’s level of education. Even though Employee had completed the ninth grade and obtained a General Equivalency Degree, the trial court correctly noted that testing by the vocational experts had consistently placed Employee at “below-average functioning” in math and reading. In some areas of comprehension, Ms. Bramlett found Employee’s functioning to be lower than that found by Employee’s own expert, Dr. Nadolsky.<sup>2</sup> We are unable to conclude that the evidence preponderates against the findings of the trial court with regard to Employee’s skills and education.

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<sup>2</sup> Using Revision 3 of the Wide Range Achievement Test, Dr. Nadolsky placed Employee at the sixth grade level in both reading and arithmetic. Using Revision 4 of the Wide Range Achievement Test, Ms. Bramlett placed Employee at the sixth grade level in arithmetic, the fourth grade level in word reading, and the eighth grade level in sentence comprehension.

### **Conclusion**

The judgment of the trial court is affirmed. Costs are taxed to the appellant, Raines Brothers, Inc., and its surety, for which execution may issue if necessary.

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SHARON G. LEE, JUSTICE

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**JUDGMENT**

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

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

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

Costs will be paid by the Appellant, Raines Brothers, Inc., and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM