IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
August 11, 2015

GUY RATLEDGE v. LANGLEY ENTERPRISES, LLC ET AL.

Appeal from the Chancery Court for Hamilton County
No. 130678 Pamela A. Fleenor, Judge

No. E2014-02089-SC-R3-WC-MAILED-AUGUST 28, 2015
FILED-SEPTEMBER 28, 2015

The employee fell from a roof in the course of his employment and sustained fractures of his left leg. The injury required three surgical procedures, including a fusion of his injured ankle, which resulted in the shortening of one leg. He asserted that his altered gait from the leg injury has caused disability to his lower back and that the permanency of his injuries has resulted in severe clinical depression. When the employee and the employer were unable to resolve the issue of workers' compensation benefits, the employee filed suit. At the conclusion of the proof, the trial court found that the leg injury extended to the body as a whole and, further, that the employee, who had been unable to return to work, was entitled to an award of benefits in excess of six times the anatomical impairment pursuant to Tennessee Code Annotated section 50-6-242 (2008 & Supp. 2013). The employer appealed, contending that the trial court erred by assigning disability to the body as a whole and by awarding a 90% vocational disability, which is in excess of six times the anatomical disability of 12%. 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(e) (2008 & Supp. 2013) Appeal as of Right; Judgment of the Trial Court Affirmed

GARY R. WADE, J., delivered the opinion of the Court, in which BEN H. CANTRELL and PAUL G. SUMMERS, SR. JJ., joined.

Jeffrey G. Foster, Jenny Ebersole-Foster, and Nicholas B. Latimer, Jackson, Tennessee, for the appellants, Langley Enterprises, LLC, and Builders Mutual Insurance Co.

Ralph Brown and Timothy A. Roberto, Knoxville, Tennessee, for the appellee, Phillip Guy Ratledge.

OPINION

I. Factual and Procedural History

During the autumn of 2011, Guy Ratledge (the "Employee") was employed by Ryan McClain as a construction laborer. At that time, Langley Enterprises, LLC (the "Employer") employed McClain as a subcontractor and, in consequence, served as "the employer" for purposes of our workers' compensation law.[1] On September 19 of that year, the Employee, while working on the roof of a residence, fell from the roof to the ground below and sustained a compound fracture in the lower left leg. Both the tibia and fibula were broken in the fall. The Employee was transported by ambulance to Erlanger Hospital and came under the care of Dr. Peter Nowotarski, an orthopedic surgeon.

Shortly after the fall, Dr. Nowotarski performed his initial surgery, cleaning out the wound, setting the fractured bones, and stabilizing the ankle with an external fixation device. Several days later, Dr. Nowotarski performed a second procedure, removing the external device, fusing the ankle, and setting the fracture into position with a metal plate. For the next several months, the Employee wore casts and used crutches. In February of 2012, he was allowed to place full weight on his leg for the first time. Unfortunately, the metal plate cracked when he did so. On March 7, 2012, Dr. Nowotarski performed a third surgery, removing the broken hardware, shortening the fibula, and placing a bone graft so as to strengthen the fusion. The Employee was again treated with casting and crutches and gradually began to resume weight-bearing activities on his left leg. In September of 2012, Dr. Nowotarski determined that the Employee could no longer "work at heights," but released him to duty "as a ground laborer." Although he did not assess permanent impairment because it was his policy not to do so, Dr. Nowotarski declared the Employee to be at maximum medical improvement on December 20, 2012, some fifteen months after the date of the injury. On June 13, 2013, the Employee returned to Dr. Nowotarski complaining of lower back pain, anxiety, and depression. Although Dr. Nowotarski recommended an examination and treatment by both a spinal specialist and a psychiatrist, the Employee had not been so treated by the time of trial.

Because Dr. Nowotarski declined to make impairment ratings for the purposes of workers' compensation benefits, the Employee was referred to Dr. Dale Ingram, an orthopedic surgeon, who examined him on April 30, 2013. Dr. Ingram found the Employee's left leg to be two centimeters shorter than his right leg and discovered three centimeters of atrophy in the muscles of his left calf. Based upon loss of range of motion and by use of the Sixth Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment ("AMA Guides"), he initially assigned 30% permanent anatomical impairment of the left leg, but later revised his opinion to a 20% impairment. He recommended that the Employee avoid

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[1] A principal contractor, intermediate contractor or subcontractor shall be liable for compensation to any employee injured while in the employ of any of the subcontractors of the principal contractor, intermediate contractor or subcontractor and engaged upon the subject matter of the contract to the same extent as the immediate employer.

Tenn. Code Ann. § 50-6-113(a) (2008 & Supp. 2013).

working on ladders or scaffolding, explaining that "with a fused ankle, [he] shouldn't be climbing on roofs and things like that." Dr. Ingram added that the Employee would continue to have difficulty climbing stairs, squatting, and kneeling, and that walking on slippery or sloping surfaces would be problematic.

A benefit review conference in the Department of Labor did not produce a settlement. On September 17, 2013, the Employee filed suit against the Employer, claiming workers' compensation benefits.

At trial, the Employee, who was forty-two years old at the time, testified that he attended school into the ninth grade, but did not finish. He had not obtained a GED or received any other education. His early work history included working at a fast-food restaurant, jobs with two tree-trimming companies, and farm labor. Later, he worked primarily as a construction laborer, setting water and sewer lines with trackhoes, bulldozers, and front-end loaders. He had also been employed at a furniture manufacturing plant, where he sanded and stained furniture. The Employee testified that he could no longer perform any of the jobs he had primarily held and did not know of any jobs he was able to perform. He stated that he had neither been employed nor applied for employment since his injury.

The Employee further testified that the fusion of his ankle caused him to walk on the side of his left foot, that he was unable to walk "straight," and that he limped, which caused him considerable back pain. He indicated that because of back pain, he was only able to walk short distances and could not bend over or sit for extended periods. Although walking caused his ankle to swell, the Employee was able to perform some housework at a slow pace, including vacuuming and laundry. He did not believe he was capable of holding a "desk job" because his ability to read and write was so limited; he indicated that he could not read a newspaper because he did not understand "big words." He also explained that he did not have a drivers' license because, prior to his work injury, he had failed to pay a fine for running a red light. He stated that since the injury, he had spent most of his time in a bedroom at his parents' apartment. The Employee acknowledged that he had not sought further treatment from a specialist for his back problems, even though Dr. Nowotarski had recommended that he do so, asserting that the Employer's insurance company would not approve payment for a specialist. He described his back as "getting worse and worse," calling his pain in that area "a life changing experience." The Employee testified that a physician with Cherokee Health Systems in Inglewood, Tennessee, had made a diagnosis of clinical depression and that he had been treated with Zoloft.

John Pope, a lifelong friend of the Employee, testified that he saw the Employee practically every day and often acted as his driver because the Employee had no other means of transportation. Pope stated that he tried to take the Employee on walks because he had been gaining weight during his recovery, but that the Employee could not even make it "half way out the street . . . because his leg was hurting so bad he couldn't stand it." Pope described the swelling of his leg as "real big" and confirmed that the Employee regularly complained about the pain in his back. He further described the Employee as "not the same person he used to

be," crying, "talk[ing] about suicide," and indicating signs of anxiety and depression.

Dr. William Kennedy, who testified by deposition, conducted an independent medical evaluation. Consistent with Dr. Ingram's findings, Dr. Kennedy confirmed that the Employee's left leg was shorter than the right and that there was atrophy in the muscles of the left calf. By use of the AMA Guides, Dr. Kennedy found a 30% impairment of the left leg as a result of his work injury and suggested the following restrictions:

> I would recommend that his activities of daily living and any employment permanently not require excessive stair climbing or any ladder climbing, kneeling, squatting, crawling or working over rough terrain or on slippery or sloping surfaces. He must be able to use a cane and wear his ankle foot orthosis at all times. He must have access to a rail any time he ascends or descends stairs. He should not attempt to ascend and descend more than one flight of stairs per day. He should be able to sit at least 75% of the time with opportunities to change positions at least every 30 minutes. Lifting and carrying or pushing or pulling should not exceed ten pounds occasionally or five pounds frequently.

Dr. Kennedy stated that the nature of the work injury, which had caused the Employee to alter his gait, was consistent with his low back pain, serving as an "objective basis for the diagnosis of associated back injury." He explained that the AMA Guides did not provide for a separate rating from the leg injury as a scheduled member because the injury to the back was caused by the leg injury rather than the fall from the roof. In his opinion, the nature of the Employee's leg injury affected the body as a whole.

When cross-examined by the Employer, Dr. Kennedy pointed out that the Employee could walk only on smooth surfaces and could not walk or stand more than forty-five minutes at a time. Dr. Kennedy believed that the Employee had an increased risk of falling as the result of the pain associated with the injury.

Dr. Craig Colvin, a vocational consultant, examined the Employee and testified at the trial. As part of his evaluation, he interviewed the Employee and reviewed his various medical records. He administered the Wide Range Achievement Test, which indicated that the Employee was only able to spell at a third grade level, read at a ninth grade level, and perform arithmetic at a sixth grade level. Dr. Colvin estimated his vocational disability at 90% based on Dr. Kennedy's restrictions. In his opinion, the Employee was completely unable to work at any of his pre-injury jobs. Because the jobs falling within Dr. Kennedy's medical restrictions, such as hand checking and small parts assembly, which required training, were so rare, he indicated that the Employee did not have any significant employment opportunities given his medical restrictions and his limited education. While acknowledging that he did not use a particularized formula, he based his opinion on his direct "experience with jobs in the competitive labor market, working with the state agencies with vocational rehabilitation, coupled with his ongoing working relationship with business and industry."

Dr. Rodney Caldwell, also a vocational consultant, evaluated Mr. Ratledge at the request of the Employer. He testified that he used a "loss of access" method to measure disability, taking into account the Knoxville and Chattanooga labor markets, as the Employee lived roughly halfway between those cities. Like Dr. Colvin, he administered the Wide Range Achievement Test and concluded that the Employee was able to read at an eighth grade level, had reading comprehension at a sixth grade level, and performed arithmetic at a fourth grade level. Using the restrictions of Drs. Nowotarski and Ingram, he calculated that the Employee had a vocational disability of 10-15%, but applying Dr. Kennedy's restrictions, he found a vocational disability of 90%. Because he interpreted Dr. Kennedy's report to mean that the Employee was capable of standing and walking for forty-five minutes, he opined that the vocational disability would be in the 75% to 80% range. He further stated that the Employee was capable of bench assembly jobs, product inspection, and the like, which constituted approximately 10% of jobs in the Knoxville and Chattanooga labor markets. Dr. Caldwell agreed, however, that the Employee was not capable of performing any of the jobs he had held in the past.

In comparing the quality of the medical testimony, the trial court initially observed as follows: "Because Dr. Ingram changed his initial rating and actually stated several different ratings before finally admitting the higher rating was proper and because Dr. Kennedy performed a more thorough exam . . . than Dr. Ingram[,] . . . not only should Dr. Kennedy's rating be used but also his restrictions." In its memorandum opinion, the trial court accredited the testimony of the Employee and held that his leg injury should be attributed to the body as a whole, with an anatomical impairment rating of 12% and up to 400 weeks of benefits. The trial court also held that because the Employee had, by clear and convincing evidence, established three of the four elements set out in Tennessee Code Annotated section 50-6-242(a), he was not subject to the maximum of six times the anatomical impairment and had sustained a permanent partial vocational disability of 90% to the body as a whole (7.5 times the anatomical impairment), with a weekly compensation rate of $217.66. In response to a post-judgment motion by the Employee, the trial court also ordered the Employer to provide panels of physicians to evaluate him for possible treatment of his lower back and psychological conditions. After observing that there had been no proof at trial that either of these conditions warranted a separate award, the trial court further ordered that the evaluations would be limited to ascertaining the need for treatment and whether such treatment was related to the work injury. In this appeal, the Employer contends that the trial court erred (1) by apportioning the award to the body as a whole and (2) by awarding benefits in excess of six times the medical impairment.

II. Standard of Review

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)).

III. Analysis

A. Apportionment to Body as a Whole

As indicated, after observing that the leg injury had resulted in a two-centimeter discrepancy between the lengths of the left and right leg and had altered the "station and gait" of the Employee, the trial court found that the injury should be attributed to the body as a whole. The trial court cited as authority Hedgecoth v. Harold Moore & Associates, where a special workers' compensation appeals panel, under similar facts, held that the permanent effects of a foot injury from a rooftop fall had caused pain to the back and, therefore, warranted a finding of disability to the body as a whole. No. 01S01-9702-CV-00033, 1998 WL 95401, at *2 (Tenn. Workers' Comp. Panel Mar. 5, 1998).

The Employer argues that the allocation of the injury to the body as a whole is unsupported by the medical evidence and is in conflict with the trial court's post-trial observation that there was little proof of impairment to the Employee's back. According to the Employer, Dr. Nowotarski's observation that the complaints of low back pain "may be due to the injuries [the Employee] sustained from the initial accident" and Dr. Kennedy's more general conclusion that the injury affected the Employee's "entire body" did not sufficiently justify an award to the body as a whole.

Initially, the evidence is undisputed that as a direct result of his work injury, the Employee's left leg is shorter than his right. His ankle is fused. There was proof that although the Employee wears an orthotic device, he nevertheless limps, walks on the side of his foot, and must use a cane except for very short distances. Both Dr. Ingram and Dr. Kennedy confirmed atrophy of the muscles of the left calf. Further, the Employee testified that walking causes significant pain to his back. John Pope, who sees the Employee on a daily basis, corroborated that testimony. See Lambdin v. Goodyear Tire & Rubber Co., No. W2013-01597-SC-WCO-WC, 2015 WL 369349, at *6 (Tenn. Jan. 29, 2015) ("[L]ive testimony by a lay witness may

influence the trier of fact in the consideration of expert medical proof by depositions." (citing Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991))).

Indeed, our Supreme Court has affirmed trial courts' awards to the body as a whole in similar circumstances. In Riley v. Aetna Casualty & Surety, for example, an employee developed plantar fasciitis as a result of standing for long periods of time on a concrete floor. 729 S.W.2d 81, 82 (Tenn. 1987). The condition required two surgeries, leaving the employee with a permanent limp. Id. at 82-83. She developed generalized back problems as a result of the limp, and two physicians recommended that she engage in sedentary work only. Id. Upholding an award to the body as a whole, our Supreme Court observed as follows:

> Although the law does require that a disability limited to a scheduled member be attributed exclusively to that member, "'if an injury to a specific member does not stop with the injury to or loss of that member, but for any reason continues as an injury affecting the body to such extent as to result in permanent [total or partial] disability, a recovery may be had therefor . . . . In such case, the injury is general and not confined to the specific member.'" Claude Henninger Co. v. Bentley, 205 Tenn. 241, 244, 326 S.W.2d 446, 448 (1959) (citation omitted). The evidence clearly demonstrates that the injury was not confined to [the employee's] foot, that she developed a permanent limp as a result of her injury, that this limp caused back pain, and that this back condition would remain associated with her limp. Moreover, [the treating physician] rated [the employee] as retaining a 10% permanent partial disability to the body as a whole. The trial court's determination of the extent of [the] disability is both justified by the evidence and permitted by the law.

729 S.W.2d at 84 (first and second alterations in original) (citation omitted); see also Larkin v. Earl Dunn Pontiac, No. 01S01-9304-CH-00071, 1994 WL 902443, at *2 (Tenn. Jan. 27, 1994) (affirming award to body as a whole based on back pain caused by limp from leg injury); Rayburn v. Hutton Stone, Inc., No. 01S01-9201-CV-00002, 1992 WL 174258, at *3 (Tenn. July 27, 1992) (affirming award to body as a whole based on severe foot injury); Alford v. Bics of Tenn., Inc., No. 01S01-9012-CH-00104, 1991 WL 257463, at *3 (Tenn. Dec. 9, 1991) (affirming body as a whole award based on severe foot injury); McWhirter v. Kimbro, 742 S.W.2d 255, 259 (Tenn. 1987) (upholding an award to the body as a whole stemming from a broken leg). The facts in this case are similar to those in Riley, McWhirter, Alford, Rayburn, and Larkin.

As contrary authority, the employer cites Reagan v. Tennessee Municipal League, in which our Supreme Court reversed an award to the body as a whole because there was "no evidence of any injury to any other part of the body." 751 S.W.2d 842, 843 (Tenn. 1988). While the ruling in Reagan can be distinguished from the facts before us, the Employer has also cited Thompson v. Leon Russell Enterprises, 834 S.W.2d 927 (Tenn. 1992), a decision which is closer factually to the case before us. The pertinent portion of the opinion in Thompson is as follows:

> Here, there is credible evidence indicating that Plaintiff did, in addition to his knee injury, suffer back and hip problems as a result of the work-related accident. However, in order to support a permanent disability award to the body as a whole, it must be shown that the scheduled member injury caused a permanent injury to an unscheduled portion of the body. See Kerr, 793 S.W.2d at 929; Riley, 729 S.W.2d at 84. Because Plaintiff here has failed to establish through expert testimony that his hip or back injuries are permanent, an award to the body as a whole is precluded.

Id. at 929.

Later, in Dotson v. Rice-Chrysler-Plymouth-Dodge, Inc., 160 S.W.3d 495 (Tenn. 2005), our Supreme Court more comprehensively addressed when an injury to a scheduled member may properly be classified as affecting the body as a whole. In that case, the employee's work injury caused reflex sympathetic dystrophy ("RSD") in his left hand, which caused hypersensitivity and pain, among other less serious symptoms. Id. at 498. The Supreme Court rejected the trial court's determination that RSD must, as a matter of law, be classified as an injury to the body as a whole, holding instead that in order to support such a finding, "the claimant's injury must affect a portion of the body not statutorily scheduled, affect a particular combination of members not statutorily provided for, or cause a permanent injury to an unscheduled portion of the body." Id. at 501. Applying this standard, the court ruled that the injury did not qualify as an injury to the body as a whole for the following reasons: (1) it was undisputed that that the symptoms of the employee's RSD, including the pain and hypersensitivity, were limited to his left arm; (2) while the employee presented testimony that the RSD in his left arm could interfere with the treatment of tennis elbow in the right arm, the evidence as to tennis elbow was "too speculative to be classified as a current injury"; and (3) while the employee "suffered secondarily from insomnia, chronic fatigue, and a diminished ability to concentrate," these were properly considered as factors in determining vocational disability rather than distinct injuries to an unscheduled member. Id. at 502-03.

In our view, Dotson is distinguishable. In the case before us, there is testimony that the Employee's injury caused the reoccurring pain to his back; thus, his symptoms were not confined to the scheduled member. Moreover, whereas the secondary injuries in Dotson consisted of conditions such as fatigue that were properly classified factors in the vocational disability to the arm, the Employee's associated lower back issue falls into the category of an injury to an unscheduled member.

Most recently, in Eads v. GuideOne Mutual Insurance Co., 197 S.W.3d 737 (Tenn. 2006), our Supreme Court addressed facts strikingly similar to the instant case. Eads fell in the course and scope of her employment, sustaining a fracture to her right femur and an injury to her right knee. Surgery resulted in her "right leg [being] approximately one-quarter inch shorter than her left leg." Id. at 739. Because of her uneven gait, she developed continuous back pain. The trial court accredited the testimony of an independent medical examiner who

assessed 40% permanent partial disability to the body as a whole. Id. at 740. The employer appealed, arguing that the injury sustained was to a scheduled member rather than to the body as a whole, and that there was insufficient evidence to conclude that the employee's injury was permanent. Id. The Court found that "[w]here an injury to the leg results in unscheduled injuries such as back pain and gait derangement, it is proper to classify the injury as an injury to the body as a whole." Id. at 741; see also Claude Henninger Co. v. Bentley, 326 S.W.2d 446 (Tenn. 1959) (holding that an injury to his foot carried over and affecting his body as a whole); 7 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 87.02 ("The great majority of modern decisions agree that, if the effects of the loss of the member extend to other parts of the body and interfere with their efficiency the schedule allowance for the lost member is not exclusive."). As to the question of permanence, the Eads court held that although there was no medical testimony "explicitly stat[ing] that [the] injury was permanent," the evidence supported a permanent disability rating because the discrepancy in leg length directly caused the patient's gait to be uneven, resulting in back problems, and there was "no indication the discrepancy will change." Id.

Here, the injury began as a fracture to the left leg, a scheduled member. Surgeries to repair the injury required the shortening of the left leg, which resulted in an altered gait and continuous pain in his lower back, an unscheduled body part. Although the Employee's back pain was not specifically described as permanent in the expert testimony, the Eads rationale leads to the logical conclusion that the discrepancy in length between the Employee's injured left leg and right leg will not change; the same is true of the resulting back pain and the effect on his gait. In summary, the evidence here does not preponderate against the trial court's assignment of medical impairment to the body as a whole.

Moreover, we find no contradiction, as the Employer has argued, between an order by the trial court's ruling and the order entered one month after the memorandum opinion directing the Employer to provide panels of physicians for a medical evaluation of the Employee's back and psychiatric conditions. Dr. Nowotarski and others suggested that evaluations and any necessary treatment were in order. An employer's obligation to provide medical care for a work injury exists "even in the absence of vocational impairment that would otherwise entitle the employe[e] to permanent partial or permanent total disability benefits." Wilkes v. Res. Auth. of Sumner Cnty., 932 S.W.2d 458, 461 (Tenn. 1996).

B. Award in Excess of Six Times Medical Impairment

While pointing out that the Employee would ordinarily be limited to six times the medical impairment rating, the trial court found by clear and convincing evidence that the Employee had established three of the four criteria essential for an award of permanent partial disability benefits in excess of the cap. As a result, the trial court exceeded the six-times cap by awarding a 90% vocational ability—7.5 times the medical impairment percentage. At the time of the injury, Tennessee Code Annotated section 50-6-242(a) permitted an award in excess of six times the level of impairment if an injured employee demonstrates at least three of the following factors by clear and convincing evidence:

(1) The employee lacks a high school diploma or general equivalency diploma or the employee cannot read or write on a grade eight (8) level;
(2) The employee is fifty-five (55) years of age or older;
(3) The employee has no reasonably transferable job skills from prior vocational background and training; and
(4) The employee has no reasonable employment opportunities available locally considering the employee's permanent medical condition.

Because the Employee clearly did not possess a high school diploma or GED, he clearly satisfied the first factor. The second factor was not satisfied because the Employee was less than fifty-five years old on the date of his maximum medical improvement. Because the only transferable skills he had acquired in his years of employment related to the operation of heavy construction equipment, jobs he is no longer able to perform, the third criterion has also been met. The only factor challenged by the Employer is the fourth factor: whether, in light of his medical condition, he had no reasonable employment opportunities in his locale. The trial court so found on the basis of Dr. Colvin's testimony that "the few jobs that [the Employee] could perform require on-the-job training and are difficult to find[,] especially with his lack of education."

Dr. Colvin and Dr. Caldwell agreed that according to the restrictions suggested by Dr. Kennedy, the Employee could perform a limited number of jobs, variously described as hand checker, small-parts assembly, or a product inspector and monitor. Dr. Colvin testified that because such jobs were rare, required on-the-job training, and a certain level of education, the Employee had no reasonable employment opportunities in his locale. In making this assessment, Dr. Colvin relied primarily upon his knowledge of and experience with the job market in the area where the Employee resided.

Dr. Caldwell testified that he used data from the U.S. Department of Labor and other sources regarding the educational, skill, and physical requirements of various jobs. Using data from the Knoxville and Chattanooga labor markets, he estimated that "[a]bout 10%" of the locally available jobs were within the Employee's limited abilities.

As stated, section 50-6-242(a) requires that three of the four listed elements be established before a trial court may permit an award in excess of six times the anatomical impairment. In Mansell v. Bridgestone Firestone N. Am. Tire, LLC, our Supreme Court explained the standard as follows:

> "[C]lear and convincing evidence" [is] that "in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.3 (Tenn. 1992). In the . . . context of [workers' compensation], the clear and convincing evidence standard has been [met] "if no [contravening] evidence has been admitted which raises a 'serious and substantial doubt' [as to the matter at issue]." Beeler v. Lennox Hearth Prods., Inc., No. W2007-02441-SC-WCM-WC, 2009 WL 396121

(Tenn. Workers' Comp. Panel Feb. 18, 2009).

417 S.W.3d 393, 411 (Tenn. 2013). The testimony of the employee as to his or her limitations must always be taken into consideration. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975). Moreover, lay testimony may influence the trier of fact as to the opinions of experts. See Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991). Finally, when expert testimony is in conflict, a trial judge, in assessing vocational disabilities, must make a credibility determination—considering the qualifications of the experts, the circumstances of their evaluation, and the information available to them. Kellerman v. Food Line, Inc., 333, 335 (Tenn. 1996); see also Johnson v. Lojac Materials, 100 S.W.3d 201, 202 (Tenn. 2001).

The trial court concluded here that the Employee established the first, third, and fourth criteria by clear and convincing evidence. As indicated, the dispute focuses on the trial court's determination that no other jobs were available considering the Employee's physical limitations and his lack of skill, education, and training. The trial court specifically addressed this criterion: "[The Employee] has no reasonable employment opportunities available locally considering his permanent medical condition."

Based upon his expertise and personal knowledge of the labor market, Dr. Colvin opined that there were no locally available jobs within the Employee's limited abilities. The trial court accredited that testimony, which was consistent with the lay testimony offered by the Employee as to his physical limitations and his lack of education and training. The trial court observed the demeanor of the Employee and John Pope and heard first-hand their testimony as witnesses. Its credibility determination was further based upon hearing the live testimony by Dr. Colvin and Dr. Caldwell. Given the deference to which the trial court's credibility determinations are entitled under these circumstances, see Tryon, 254 S.W.3d at 327, we cannot say that the evidence preponderates against the trial court's finding that the Employee has no reasonable employment opportunities in the relevant labor market. The trial court was therefore entitled to exceed the maximum disability to the body as a whole by virtue of 50-6-241(d), and there is no basis to disturb the trial court's award based on applying a multiplier of 7.5 to the 12% impairment rating.

IV. Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Langley Enterprises, LLC, and Builders Mutual Insurance Co. and their surety, for which execution may issue if necessary.

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GARY R. WADE, JUSTICE

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

GUY RATLEDGE v. LANGLEY ENTERPRISES, LLC, ET AL

Chancery Court for Hamilton County
No. 130678

No. E2014-02089-SC-R3-WC-FILED-SEPTEMBER 28, 2015

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 Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

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

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

Costs on appeal are taxed to Langley Enterprises, LLC, and Builders Mutual Insurance Co. and their surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM