

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
August 26, 2013 Session

**SAMUEL ARTHUR SKAGGS v. MARTY PHILLIPS d/b/a PHILLIPS
CONCRETE ET AL.**

**Appeal from the Chancery Court for Sullivan County
No. C0017561 E.G. Moody, Chancellor**

**No. E2012-02479-WC-R3-WC-MAILED-OCTOBER 31, 2013
FILED-JANUARY 15, 2014**

The employee was injured when a concrete grinder he was operating exploded, breaking his jaw and several teeth. After his jaw was surgically repaired and he underwent extensive dental treatment, the employee did not return to work for his employer. The employee filed an action in the Chancery Court for Sullivan County seeking permanent disability benefits. The trial court found that the employee sustained a permanent vocational disability of 35%. The employer appealed, claiming that the trial court erred by failing to exclude the testimony of the treating dentist and by finding that the employee sustained any permanent disability. Pursuant to Tennessee Supreme Court Rule 51, the appeal has been referred to a Special Workers' Compensation Appeals Panel. 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 Chancery Court Affirmed**

GARY R. WADE, C.J., delivered the opinion of the Court, in which J. S. "STEVE" DANIEL, SP. J., and LARRY H. PUCKETT, SP. J., joined.

Jennifer S. White, Knoxville, Tennessee, for the appellants, Marty Phillips d/b/a Phillips Concrete and Erie Insurance Exchange.

Daniel B. Minor, Kingsport, Tennessee, for the appellee, Samuel Arthur Skaggs.

OPINION

I. Facts and Procedural Background

Samuel Arthur Skaggs (the “Employee”) worked intermittently as a carpenter for Marty Phillips d/b/a Phillips Concrete (the “Employer”). On June 17, 2010, the Employee was assisting in the construction of concrete walls which extended from the tunnels located under the main racetrack at Bristol Motor Speedway. After a lunch break, the foreman provided the Employee with an electric grinder and directed him to grind the seams on one of the walls. The grinder did not have a protective guard. When the power switch did not engage the engine, the foreman started the grinder by pounding it on the ground. As the Employee prepared to begin his task, the grinding wheel exploded and its fragments fractured his jaw and damaged several teeth.

The Employee was transported by ambulance to Wellmont Bristol Regional Medical Center, where he was diagnosed with a mandible fracture and facial lacerations. Physicians found a number of metallic fragments in the jaw area. Dr. Michael Hamlin, an oral surgeon, operated on the Employee, wiring his jaw together and removing one tooth. The Employee spent five days in the hospital before his release. Two months later, Dr. Hamlin removed the wiring and cleared the Employee to return to work. After discussing the feasibility of returning to his job, the Employer and the Employee agreed to a layoff period so that the Employee could undergo the extensive dental treatment necessitated by his work injury.¹

From September 16, 2010 to February 28, 2011, the Employee was treated by Dr. John Machen, who extracted several more teeth and rebuilt the lower jaw with three fixed bridges. In a letter to the Department of Labor, Dr. Machen reported that the Employee would lose even more teeth as a result of the injury and would experience temporomandibular joint disorder (“TMJ”). After explaining that the Employee continued to suffer soreness in his joints and have difficulty chewing his food, Dr. Machen assigned a permanent impairment rating of 20% by referring to Table 11-5 of the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition (“AMA Guides”). The AMA Guides provide for a whole person impairment rating of 11%–23% for a Class 3 Facial Disorder/Disfigurement when a “[f]acial abnormality involves absence of normal anatomic part or area of the face, such as loss of the eye or loss of part of the nose with resulting cosmetic deformity.”

On May 11, 2011, the Employee filed suit, claiming that he suffered permanent impairment as a result of the work-related injury and asking for medical expenses and disability benefits. In response, the Employer denied any permanent impairment and sought to avoid responsibility for any further medical care. It was stipulated that the Employer had

¹ The Employer and the Employee dispute whether the conversation regarding the layoff took place in person or over the phone. Nonetheless, it is undisputed that the Employer laid off the Employee after he was released from the hospital so that he could receive the dental treatment.

paid workers' compensation benefits in the amount of \$373.33 per week and all of the Employee's medical expenses up to that time.

The Employer filed a motion for partial summary judgment, alleging that there was no genuine issue of material fact relating to the Employee's claim for permanent partial disability. Dr. Hamlin, who filed an affidavit in support of the motion, disagreed with Dr. Machen's assignment of a 20% permanent partial impairment to the body based upon the AMA Guides. According to Dr. Hamlin, the work injury "did not cause any facial deformity," did not "impact[] [the Employee's] chewing capacity," "did not cause any changes in his voice or speech," and, therefore, did "not meet the requirement for an anatomical impairment rating pursuant to the AMA Guides." The trial court denied the motion, holding that there was an issue of fact as to vocational disability, and that lay testimony was relevant to the determination of benefits.

Later, the Employer filed a motion in limine to exclude Dr. Machen's opinion, arguing that the rating was inadmissible under the Tennessee Rules of Evidence and the Tennessee Workers' Compensation Law, specifically Tennessee Code Annotated section 50-6-204(d)(3)(B) (2008 & Supp. 2013).² While not disputing Dr. Machen's qualifications as an expert or his ability to assign an impairment rating, the Employer asserted that the impairment rating did not meet the requirements set forth in the AMA Guides and otherwise lacked the indicia of trustworthiness required under the Tennessee Rules of Evidence. After reviewing Dr. Machen's deposition, the trial court denied the motion in limine.

At trial, the Employee offered the deposition testimony of Dr. Machen. Dr. Machen, while conceding that he did not own an edition of the AMA Guides and had never previously rendered an impairment rating, nevertheless testified that he based his impairment rating of the Employee's injury on the AMA Guides. He explained that he scanned the first two chapters of the Guides, which cover the basic principles for an assessment, and recalled that he used Table 11-5 located on page 262 in determining the Employee's level of impairment. Dr. Machen also stated that he performed additional internet research in order to learn how similar injuries were classified. Although he acknowledged that the dental bridges likely helped the Employee's appearance, Dr. Machen testified that the Employee would always have lasting effects due to TMJ, joint soreness, and chewing difficulty. In his opinion, the

² The Employer cited Tennessee Rule of Evidence 703, which states that "[t]he court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness." The Employer maintains that Dr. Machen's opinion lacked trustworthiness because he did not own a copy of the AMA Guides, this was his first effort to assign a rating, and his opinion did not comply with the directives of the AMA Guides. Tennessee Code Annotated section 50-6-204(d)(3)(B) provides that "[n]o anatomical impairment . . . rating . . . shall be . . . admissible into evidence at the trial of a workers' compensation matter unless the impairment is based on the applicable edition of the AMA Guides."

Employee would always experience difficulty when trying to eat certain types of food.

The Employee, age fifty-five at the time of trial, stated that he attended school to the ninth grade, received a GED, and pursued vocational training in carpentry from Decker College in Atlanta, Georgia. He testified that since the accident he has had difficulty speaking and has salivated excessively. The Employee also noted that he can no longer eat certain foods either because he cannot open his mouth wide enough or because of soreness in his jaw. He described himself as particularly self-conscious because of his scarring, asymmetrical facial features, and impaired speech. The Employee further testified that after Dr. Machen completed his dental work, he had contacted the Employer several times about returning to work, but the Employer responded that he had little work at that time and could not offer him a job. The Employee stated that his work-related injury did not affect his ability to engage in carpentry work and that he had no work restrictions stemming from the jaw injury.

Gladys Banks, the Employee's girlfriend, testified that it was apparent that the Employee no longer "ha[d] a chin." In addition, Ms. Banks explained that it was difficult to understand his speech. She also stated that the Employee complained of pain in the jaw area and that he was unable to eat some of his favorite foods.

Marty Phillips, the Employer, testified that he did not rehire the Employee because he had failed a post-accident drug screen in violation of company policy and contrary to the rules in the employee handbook.³ He explained that he did not mention the failed drug screen to the Employee because he was "trying to be nice." The Employer claimed that he did not notice any differences in the Employee's speech or appearance after the work injury. Dr. Hamlin did not testify, either by deposition or at trial.

³ The applicable provision of the employee handbook states:

128 Drug Use

....

While on the job, no employee may use, possess, distribute, sell, or be under the influence of illegal drugs or alcohol. The legal use of prescribed drugs is permitted on the job only if it does not impair an employee's ability to perform the essential functions of the job effectively and in a safe manner that does not endanger other individuals in the workplace.

Violations of this policy will lead to disciplinary action, up to and including immediate termination of employment. All employees of Phillips Concrete Construction are required to take random drug test[s] whenever it is asked of them.

The trial court ruled that the Employee had sustained a permanent vocational disability of 35%,⁴ resulting in a lump sum award of \$52, 266.20. Pointing out that the Employer had failed to produce evidence that the Employee was under the influence of marijuana while he was on the job, the trial court ruled that the Employee had not been provided with a meaningful return to work and was entitled to an award greater than one-and-one-half times the impairment rating.⁵ The trial court also did not accredit the Employer’s claim that the Employee was not rehired due to his failed drug screen, and further found that, although Dr. Machen had never previously issued an impairment rating, he qualified as an expert and had made himself sufficiently familiar with the AMA Guides to formulate his opinion as to permanent impairment. The court described Dr. Machen’s testimony as particularly “helpful . . . because he was the treating dentist, there was no other medical testimony, and there was no contradictory evidence.”

In this appeal, the Employer argues that the trial court erred by: (1) denying the Employer’s motion for summary judgment; (2) admitting Dr. Machen’s impairment rating into evidence; and (3) finding that the Employee suffered a 35% vocational disability.

II. Standard of Review

Our review involves not only the propriety of the denial of the motion for summary judgment, but also includes a challenge to the admission of certain evidence and a review of the evidence pertaining to the vocational disability. Asserting that the Employee could not establish the presence of permanent vocational disability, the Employer first argues that the trial court erred by denying the Employer’s motion for partial summary judgment. The trial court’s grant or denial of a motion for summary judgment involves a question of law, which appellate courts must review de novo without a presumption of correctness. Sherrill v. Souder, 325 S.W.3d 584, 596 (Tenn. 2010).

Because the trial court acts as a gatekeeper in assessing the admissibility of expert

⁴ The trial court ultimately concluded that “[a]fter considering the pleadings, the stipulations, the testimony of the witnesses, the exhibits, all other pertinent factors and the record as a whole, the Court finds that the [Employee] sustained a permanent vocational disability of 35%.” It is unclear if the trial court adopted Dr. Machen’s anatomical impairment rating in toto when it determined the extent of the Employee’s vocational disability. The impairment rating, however, is but one factor for the trial court to consider, and, in this case, the trial court was not required to set forth specific findings of fact regarding its decision. See Cox v. McClane Food Serv., Inc., No. W2003-01465-WC-R3-CV, 2004 WL 1621634, at *4 (Tenn. Workers’ Comp. Panel July 20, 2004).

⁵ See Tenn. Code Ann. § 50-6-241(d)(2)(A) (2008 & Supp. 2013); Williamson v. Baptist Hosp. of Cocke Cnty., Inc., 361 S.W.3d 483, 488 (Tenn. 2012) (explaining that the cap on permanent partial disability of one-and-one-half times the impairment rating applies when the employee has a “meaningful return to work”).

testimony, State v. Scott, 275 S.W.3d 395, 401 (Tenn. 2009), a trial court's determination regarding admissibility will not be overturned absent an abuse of discretion. State v. Ferrell, 277 S.W.3d 372, 378 (Tenn. 2009). Otherwise, the standard of review of the trial court's findings of fact is de novo upon the record with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008 & Supp. 2013). Although the reviewing court must conduct an in-depth examination of the factual findings and conclusions, considerable deference must be afforded to the trial court's factual determinations when it has seen and heard the witnesses. Trosper v. Armstrong Wood Prods., Inc., 273 S.W.3d 598, 604 (Tenn. 2008).

In this instance, the Employee presented medical evidence by deposition. On appeal, no deference is afforded when medical evidence is introduced by deposition because the trial court does not see the witness firsthand. Williamson, 361 S.W.3d at 487.

III. Analysis

A. Motion for Partial Summary Judgment

Trial courts may grant summary judgment only when there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; Hannan v. Alltel Publ'g Co., 270 S.W.3d 1, 5 (Tenn. 2008); Byrd v. Hall, 847 S.W.2d 208, 214 (Tenn. 1993). The burden is first placed on the moving party to demonstrate that the nonmoving party cannot establish an essential element of the case or to affirmatively negate an essential element of the claim. Hannan, 270 S.W.3d at 5.⁶ Only upon this showing will the burden of production shift to the nonmoving party to show that a genuine issue of material fact actually exists. Giggers v. Memphis Hous. Auth., 277 S.W.3d 359, 363 (Tenn. 2009). The court, however, must view all evidence and reasonable inferences stemming therefrom in a light most favorable to the nonmoving party. Amos v. Metro. Gov't of Nashville & Davidson Cnty., 259 S.W.3d 705, 710 (Tenn. 2008). Thus, summary judgment will only be granted when reasonable minds could reach only one conclusion. Giggers, 277 S.W.3d at 364.

In establishing vocational disability, permanency of the work-related injury is typically established by expert testimony. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 458 (Tenn. 1988). Once this threshold requirement is established, vocational disability measures the diminishment of the employee's earning capacity. Id. Courts must consider all pertinent

⁶ The General Assembly has purported to change this standard by enacting Tennessee Code Annotated section 20-16-101 (Supp. 2013). Sykes v. Chattanooga Hous. Auth., 343 S.W.3d 18, 25 n.2 (Tenn. 2011). This statutory revision, however, only applies to actions filed on or after July 1, 2011. Because the Employee's complaint was filed on May 11, 2011, the standard set forth in Hannan governs.

factors in determining whether vocational disability exists, including both lay and expert testimony. Id. at 459.

As support for his motion for summary judgment, the Employer submitted excerpts from the Employee's discovery deposition, Dr. Machen's evidentiary deposition, and an affidavit from Dr. Hamlin. Dr. Machen assigned a permanent impairment rating of 20%. Dr. Hamlin, by affidavit, disagreed with Dr. Machen's finding, opining that the Employee did not suffer a permanent disability. Therefore, there was a genuine issue of material fact as to the existence of permanency—the threshold requirement to finding vocational disability.

A trial court's determination of vocational disability requires consideration of numerous statutory factors, "including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in [the employee's] disabled condition." Tenn. Code Ann. § 50-6-241(d)(2)(A). Although the Employer contends that Dr. Machen's and the Employee's testimony affirmatively established that the work-related injury did not affect the Employee's ability to work as a carpenter at the present time, the determination of vocational disability must take into account the impact the injury will have on the Employee's earning capacity in the future. Dr. Machen's deposition testimony established that the Employee will continue to experience medical problems and complications as a result of the injury, and, during the Employee's deposition, he complained of an increased difficulty in speaking, asymmetrical facial features, and excessive salivation.

At the conclusion of the hearing for partial summary judgment, the trial court found as follows:

[A]ccording to the expert testimony, at least according to one of the expert[s] . . . , [the Employee] will continue to have problems in the future that may not directly affect his work, but, certainly, could indirectly affect his work from several standpoints, if nothing else, from a standpoint of pain due to the future TMJ problems, et cetera. The [c]ourt finds that it's not a proper case for partial summary judgment, because the [c]ourt is required in making a determination about an extent of vocational disability, not only taking into consideration the expert testimony, which is contradicted, but also the lay testimony, which the [c]ourt doesn't have the full benefit of at this time in addition to other statutory requirements.

In our view, the trial court properly determined that disputed issues of material fact related to vocational disability precluded summary judgment.

B. Motion in Limine

The Employer next maintains that the trial court erred by admitting as evidence the Employee's anatomical impairment rating as established by Dr. Machen. Admissibility of expert testimony is explicitly governed by Tennessee Rules of Evidence 702 and 703. State v. Copeland, 226 S.W.3d 287, 301 (Tenn. 2007). Under Rule 702, "[i]f scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify in the form of an opinion or otherwise." Expert testimony, however, will be excluded "if the underlying facts or data indicate lack of trustworthiness." Tenn. R. Evid. 703. Generally, the introduction of expert testimony is dependent upon a showing that "(1) the expert is qualified, (2) the evidence is relevant to the suit, and (3) the evidence is reliable." Craven v. Corr. Corp. of Am., No. W2005-01537-SC-WCM-CV, 2006 WL 3094121, at *8 (Tenn. Workers' Comp. Panel Oct. 26, 2006) (citing McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 264 (Tenn. 1997)). Expert testimony, in the form of an anatomical impairment rating, must meet an additional hurdle under the Workers' Compensation Act:

No anatomical impairment or impairment rating, whether contained in a medical record, medical report, including a medical report pursuant to § 50-6-235(c), deposition or oral expert opinion testimony shall be accepted during a benefit review conference or be admissible into evidence at the trial of a workers' compensation matter unless the impairment is based on the applicable edition of the AMA Guides. . . .

Tenn. Code Ann. § 50-6-204(d)(3)(B) (2008 & Supp. 2013).

In this case, the Employer asserts that the impairment rating lacked the indicia of trustworthiness required by the Tennessee Rules of Evidence and the standard set forth in the Workers' Compensation Law. We find that this argument is without merit. First, it is undisputed that Dr. Machen is qualified to issue an impairment rating under the Workers' Compensation Law. Second, the trial court specifically found that Dr. Machen's testimony was particularly helpful in establishing permanency of the injury and constituted the only medical testimony offered at trial. The Employer's argument, therefore, hinges upon the assertion that Dr. Machen issued an inaccurate impairment rating by not properly using the AMA Guides, which rendered the rating unreliable. In support of this argument, the Employer states that Dr. Machen had never previously assigned an impairment rating, that he does not own a copy of the AMA Guides, that he utilized a printout from the AMA Guides provided to him by someone else, that he did not keep any notes concerning his methodology, and that he could not specifically state the page number or chart in the AMA Guides that he had used in formulating his opinion.

In Tomlin v. Federal Reserve Bank of Atlanta/Nashville Branch, an employer similarly argued that the doctor's impairment rating was inadmissible because the doctor failed to identify the specific portions of the AMA Guides that he had used in assigning an impairment rating. No. M2005-01401-WC-R3-CV, 2006 WL 1816157, at *7 (Tenn. Workers' Comp. Panel May 4, 2006). The panel acknowledged that, during the doctor's testimony, the doctor indicated that he had utilized the AMA Guides in making his assessment. Id. Thus, the panel found no error in the accreditation of the expert testimony. Id.

Further, in Morrow v. International Mill Service, Inc., a panel addressed whether a doctor erroneously assigned the employee's impairment rating by utilizing the wrong chart in making his assessment. No. W2003-00410-SC-WCM-CV, 2004 WL 1064299, at *2 (Tenn. Workers' Comp. Panel May 12, 2004). The doctor had testified that the AMA Guides were difficult to use and that he consulted another authoritative source on how to use the tables in the AMA Guides. Id. Even so, the panel ruled in the employee's favor, noting that the "AMA Guides provide guidance for the use of physicians to assist them in evaluating the extent of an injured worker's medical impairment. It is not a legal treatise. Interpretation of medical documents is best left to medical experts." Id.

Both Tomlin and Morrow demonstrate the trial court's gatekeeper function in assessing reliability, which is limited to the determination of whether the opinion is based on sound methodologies and foundations—in other words, whether the expert issued his impairment rating based on the AMA Guides. The relevant authority establishes that the interpretation of the AMA Guides is the job of medical experts. The question of credibility is left for the trier of fact after the expert opinion has been admitted and the expert is subject to cross-examination. Morrow, 2004 WL 1064299, at *2.

In this case, Dr. Machen testified that he assigned the Employee a Class 3 impairment rating of 20% pursuant to the AMA Guides. Admittedly, Dr. Machen lacked experience assessing levels of impairment, but the record establishes that he consulted the AMA Guides prior to formulating his opinion and corroborated his finding with research on comparable cases based upon the AMA Guides. In our view, the record supports a finding that Dr. Machen used the Sixth Edition of the AMA Guides as statutorily required, and the trial court was free to consider his lack of familiarity with the AMA Guides in determining the credibility of his testimony.

C. Finding of Permanent Partial Disability

Finally, the Employer argues that the evidence preponderates against the trial court's determination that the Employee suffered a 35% vocational disability. The extent of vocational disability suffered is not measured by the ability of the employee to return to his

former job. Walker v. Saturn Corp., 986 S.W.2d 204, 208 (Tenn. 1998). Instead, vocational disability is an assessment of whether an employee’s earning capacity has been reduced due to the work-related injury. Id. Moreover, the existence of vocational disability is a question of fact, Williams v. Tecumseh Prods. Co., 978 S.W.2d 932, 936 (Tenn. 1998), and the trial “court shall consider all pertinent factors, including lay and expert testimony, [the] employee’s age, education, skills and training, local job opportunities, and capacity to work at types of employment available in [the employee’s] disabled condition,” Tenn. Code Ann. § 50-6-241(c), including the employee’s own assessment of his physical condition, Walker, 986 S.W.2d at 208. Further, the trial court is not bound to accept an expert’s opinion as to vocational disability, but can independently assess the evidence. Williams, 978 S.W.2d at 936. It is appropriate for the court to consider “how a work-related injury affects an employee’s capacity to engage in normal, everyday activities insofar as that inquiry is oriented toward establishing anatomical or vocational disability.” Lang v. Nissan N. Am., Inc., 170 S.W.3d 564, 572 (Tenn. 2005).

The Employer relies on Stephens v. Henley’s Supply & Industry, Inc., 2 S.W.3d 178 (Tenn. 1999), as generally suggesting that the loss of teeth would unlikely support a finding of permanent partial disability. In Stephens, the employee was injured while working as a carpenter, resulting in the removal of all of his upper teeth and two lower teeth. Id. at 179. The trial court awarded the employee permanent partial disability, but the Special Workers’ Compensation Appeals Panel reversed because no medical proof of permanence was established. Id.

This case is factually distinguishable. Dr. Machen provided medical proof which established that the Employee’s injury resulted in permanent disability. The trial court specifically accredited this testimony:

Dr. Machen’s testimony was the only evidence concerning permanent impairment. . . . Even if Dr. Machen is not very familiar with the [AMA Guides], his testimony was very helpful to the [c]ourt since he was the treating dentist and since there wasn’t any other medical or dental testimony, much less any contradictory testimony.

The Employer nevertheless argues that the testimony of the Employee—who admitted that the jaw injury did not impact his ability to perform carpentry work—and Dr. Machen—who testified that he did not place the Employee on any work restrictions—does not support an award for vocational disability. The Employer insists that the sole cause of

the Employee's inability to work is a heart condition, unrelated to his work injury.⁷

Although the Employer points to several factors that would support a finding that the Employee has not sustained a vocational disability as a result of the work-related injury, this evidence must not be viewed in isolation, and the trial court must consider all pertinent factors. In this instance, the trial court heard the testimony of the trial witnesses firsthand and properly considered the injury's effect on the Employee's everyday activities, including difficulty in speaking and controlling salivation, in the context of vocational disability. Nothing in these findings suggests an impermissible attribution of the Employee's vocational disability to his loss of enjoyment of life, and the trial court could properly find that the Employee's earning capacity has been diminished due to his work-related injury. In summary, the evidence does not preponderate against the trial court's finding that the Employee sustained a permanent vocational disability of 35%.

III. Conclusion

Because the evidence does not preponderate against any of the findings of the trial court, the judgment in favor of the Employee is affirmed. Costs of this appeal are taxed to the Employer, for which execution may issue if necessary.

GARY R. WADE, CHIEF JUSTICE

⁷ Approximately three months after the injury, the Employee suffered a heart attack, and, as a result, was awarded Social Security disability payments.