IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 12, 2016 Session

BRANDON THOMPSON v. UNITED PARCEL SERVICE, INC., ET AL.

Appeal from the Circuit Court for Davidson County
No. 14C2387 Kelvin D. Jones, Judge

No. M2015-02526-SC-R3-WC – Mailed December 5, 2016

Brandon Thompson ("Employee") worked as a delivery driver for United Parcel Service ("Employer"). He sustained a compensable injury to his lower back on January 18, 2012. He did not return to work for Employer. After the Benefit Review process was exhausted, he filed this action, seeking permanent total disability benefits. The trial court concluded that Employee was not totally disabled and awarded 44% permanent partial disability benefits. Employee has appealed, contending that the evidence preponderates against the trial court's finding that he was not permanently and totally disabled. He also claims that the judgment entered by the trial court is defective because it does not include certain findings. The appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment of the trial court.

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

PAUL G. SUMMERS, SR. J., delivered the opinion of the court, in which JEFFREY S. BIVINS, C. J. and ROBERT E. LEE DAVIES, SR. J., joined.

B. Keith Williams and James R. Stocks, Lebanon, Tennessee, for the appellant, Brandon Thompson.

David T. Hooper, Brentwood, Tennessee, for the appellees, United Parcel Service, Inc, Liberty Mutual Insurance Corporation,

Herbert H. Slatery, III, Attorney General and Reporter, Andrée S. Blumstein, Solicitor General, and Alexander S. Reiger, Assistant Attorney General, for the appellee, Tennessee Department of Labor/Second Injury Fund.

OPINION

Factual and Procedural Background

Employee was forty-one years old when the trial took place on October 27, 2015. He left school before entering the twelfth grade but obtained his GED shortly thereafter. He started working for Employer as a part-time pre-loader. Employee's job entailed removing packages from a conveyor line, placing the packages in "cages," and loading them onto a delivery truck. In 2006 or 2007, he became a full-time employee, making deliveries and picking up packages. Prior to working for employer, he had worked at Opryland amusement park, as a courier for a delivery service, and as a landscaper/greens keeper for Springhouse Golf Course. He also previously had been employed as a maintenance worker for a retirement village, a project manager for a lawn care company, a worker in a reproduction furniture shop, and a deliverer for a mattress store. While working part-time for Employer, he also worked part-time for a sheet metal and roofing company.

Employee had sustained a previous work injury to his lower back on April 12, 2010. He was diagnosed with a ruptured disk at the L5-S1 level of the spine. Dr. Vaughan Allen, a neurosurgeon, performed a laminectomy to treat the injury. Employee was able to return to his previous job without difficulty. Employee agreed to a settlement of 15% permanent partial disability to the body as a whole, which represented one and one-half times the anatomical impairment assigned by Dr. Allen.

On January 18, 2012, Employee sustained a second injury to his lower back. He had finished his route and was directed to assist another driver at a UPS store on Edmonson Pike. He took packages from the store on a dolly and loaded them onto the other driver's truck. While placing packages on shelves inside the truck, he felt pain running from his back down his right leg to his right foot. He informed Employer of the incident within one day. Employer initially denied the claim, asserting that Employee's symptoms were merely a manifestation of his 2010 injury. He was referred by Employer to Concentra Medical Clinic. An MRI was ordered, and Employee was referred to Dr. Allen for further evaluation and treatment. The first appointment was on February 22, 2012. Dr. Allen determined that Employee had sustained a herniated disk at L4-5, the level above the site of the previous surgery. His examination of Employee revealed, inter alia, motor weakness in the right foot and a positive straight leg raising test. Employer subsequently accepted the claim. Dr. Allen became the authorized treating physician.

Dr. Allen initially believed that surgery would probably be required to treat Employee's injury. Nevertheless, he initially prescribed physical therapy. When Employee returned to Dr. Allen in March of 2012, he still demonstrated a positive straight

leg raising test and motor weakness in his foot. Dr. Allen had received an inquiry from the Department of Labor as to whether the injury was related to the previous injury. He responded unequivocally that the January 18, 2012 event was a new, independent event. Dr. Allen again prescribed physical therapy. When Employee returned on May 23, 2012, Dr. Allen found that his condition had improved. Employee's foot weakness had improved from 4/5 to 2/5. By June 27, 2012, Employee's condition was much better. He reported no leg pain and some back pain. Dr. Allen recommended that he complete physical therapy and then have work conditioning and a functional capacity evaluation ("FCE").[1]

Employee returned to Dr. Allen's office in September of 2012. He advised Dr. Allen's nurse that his pain had increased during the FCE and described renewed radicular pain to Dr. Allen. Dr. Allen ordered a repeat MRI. That study was performed and Dr. Allen testified that this study "looked basically the same as" the January MRI. As a result, Dr. Allen did not think Employee's course of treatment needed to be changed. By late December 2012, Employee's radicular pain was "a good deal better." Dr. Allen opined that Employee's symptoms were "mechanical," related to the L4-5 disk itself, and that Employee's radiculopathy had nearly resolved. At Employee's next appointment, on February 27, 2013, Dr. Allen's diagnosis was mechanical back pain. The treatment plan was for Employee to continue a home exercise plan and to take anti-inflammatory medication. Noting that Employee still had muscle spasms in his back, Dr. Allen recommended additional physical therapy directed to that problem. Dr. Allen also testified that Employee had some sensory loss at that time, which would permit a finding of radiculopathy.

Dr. Allen did not see Employee after February 2013. In May 2013, Dr. Allen issued a report stating that Employee had reached maximum medical improvement in February 2013. Dr. Allen assigned 7% permanent partial disability to the body as a whole. He also assigned permanent limitations at that time. He testified that Employee could lift fifty pounds occasionally, if he used proper lifting technique. He also stated that Employee could lift thirty pounds repetitively and could bend every two or three minutes. Dr. Allen stated that activity within those restrictions would be beneficial to Employee. He also testified that Employee had improved and recovered substantially during his period of treatment, adding that Employee needed to continue his exercise program to improve the strength of his core musculature. Dr. Allen also testified that he had prescribed pain medication to Employee intermittently and that he had referred Employee to pain management at the end of his course of treatment. That treatment was provided by

[1] Dr. Allen measured strength loss using a scale of 1/5 (good strength) to 5/5 (poor strength); Dr. Gaw used a similar scale to measure *retained* strength with 5/5 being normal and 1/5 being poor.

Dr. Matt Rupert, a pain management physician. Dr. Rupert did not testify.

Employee reported to Employer after his release, but was not permitted to enter the premises. It was undisputed that the restrictions placed by Dr. Allen prevented Employee from returning to his previous job.

Employee received various medications while under Dr. Rupert's care, including Percocet, Lortab and OxyContin. Employee did not take his pain medication consistently. He had once gone three months without pain medication, but Dr. Rupert eventually found it necessary to add Tramadol to his regimen. At the time of trial, he was taking OxyContin, a blood pressure medication and a laxative. Employee testified that his medications took "the edge off" of his pain but also caused him to feel sleepy and interfered with decision-making. He testified that he was unable to lift fifty, or even thirty, pounds at all. Employee believed that he was unable to perform any job which he had previously held, because of pain and the side-effects of his medications. He had not applied for any employment since his injury.

Employee reported continuing symptoms of back pain, leg numbness and difficulty balancing and bending. He performed only limited household chores. Employee did, however, occasionally go fishing and turkey hunting but reported that he required special accommodations and assistance from others.[2]

Dr. David Gaw, an orthopedic surgeon, conducted an independent medical examination at the request of Employee's attorney. He took a history from Employee and reviewed medical records, including Dr. Allen's, the radiology report for the January 18, 2012 injury, and limited records from Dr. Rupert. Employee stated to Dr. Gaw that his chief complaints were: pain, greater in his lower back than in his right leg; numbness and tingling in the lateral area of the right leg; and weakness in the right foot. In his clinical examination, Dr. Gaw found that Employee had difficulty getting up and down, that he stood in a bent-forward position, and that his back was "crooked" when he stood. Employee's range of motion was diminished. A straight-leg raising test was positive on the right at fifty degrees. Dr. Gaw also found that Employee had mild weakness of the right foot.

Dr. Gaw's diagnosis was degenerative disk disease with a herniated disk at L4-5 and radiculopathy. He thought pain should be the limiting factor for Employee's activities and stated that Dr. Allen's limitations were appropriate to protect Employee from further injury. He foresaw that Employee would continue to have pain in his back and some

[2] Testimony indicated that employee hunted from a chair in a fixed hunting blind. While fishing, Employee was able to back the boat trailer into the water but required assistance getting into and out of the boat, and friends had to fetch equipment for him while they were on the water.

weakness in his right leg. Dr. Gaw opined that Employee retained a 13% permanent anatomical impairment from the January 2012 injury. He disagreed with Dr. Allen's impairment rating because Employee continued to have radiculopathy.

John McKinney, a vocational evaluator, performed an evaluation at the request of Employee's attorney on September 5, 2013. He interviewed Employee, reviewed medical records, and administered tests of intellectual achievement. The academic testing revealed that Employee was able to read at a twelfth-grade level and that Employee's IQ was ninety-nine, the middle of the average range. Mr. McKinney observed that Employee was taking narcotic pain medications, which he described as a hurdle that Employee would have to overcome to find a job.

Based on Dr. Allen's restrictions, Mr. McKinney found that Employee had sustained a 41% loss of access to jobs previously available to him. He also found that Employee had sustained a 70% loss of earning capacity, that is, the jobs available to Employee paid less than those available to him prior to his injury. These figures were obtained by computer programs based on statistics from the U.S. and Tennessee Departments of Labor. Combining these figures, Mr. McKinney found that Employee had sustained a vocational disabiltiy of 56%. He then analyzed the information further by considering the effects of pain medication, Employee's level of pain, his four-year absence from the labor market, and his physical appearance. Taking those factors into account, Mr. McKinney opined that Employee had sustained a 100% vocational disability.

During cross-examination, Mr. McKinney agreed that he made subjective decisions about the weight to be assigned to the factors used to calculate Employee's loss of market access and earning capacity and that other evaluators could reasonably disagree on those questions. Mr. McKinney reiterated that he increased his estimate of Employee's vocational disability based upon four additional employability factors: Employee's use of narcotic pain medication; his complaints of pain; his four-year absence from the job market; and his physical appearance. Mr. McKinney conceded that these additional employability factors were ambiguous, difficult to quantify, and very subjective. He supported his use of these factors by stating that negative employability factors "are more subjective than just the limitations, yes. They are not any less real."

Employer's attorney requested Michelle McBroom Weiss to conduct a vocational evaluation of Employee in November 2014. Like Mr. McKinney, she reviewed medical records, interviewed Employee, and administered standardized tests to obtain the data needed to analyze his vocational disability. The results of the written tests for reading, mathematics, and comprehension were very similar to the results of Mr. McKinney's tests. Ms. Weiss performed a transferrable skills analysis using a program called SkillTran, and she used the results to measure loss of access to jobs using OASIS, which was the same

program Mr. McKinney used for that purpose. She considered only Dr. Allen's restrictions, as confirmed by Dr. Gaw, because those were the only medical restrictions of record. She did not consider Employee's subjective complaints of pain, stating:

> I know that [Employee's] subjective complaints are different, but that would need to be evaluated by a doctor. I can't add restrictions. I can't evaluate the subjective complaints are appropriate for that disability. I need a physician to evaluate that.

Ms. Weiss added that, based on advisory opinions from the organization that certifies vocational counselors, she believed that it was unethical to base an opinion on information other than clear restrictions from a medical doctor. She did, however, note Employee's subjective complaints in her report.

Ms. Weiss opined that, based on Dr. Allen's restrictions; Employee had sustained a 17% loss of access to the job market. She observed that the FCE report suggested additional postural limitations and testified that, if those limitations were considered, the loss of access would increase to 27%. She further opined that Employee had sustained a 40% to 51% loss of earning capacity. Using the same method as Mr. McKinney, Ms. Weiss found that Employee had sustained 29% to 34% disability. Using the midpoint of that range, she opined that Employee had sustained a permanent vocational disability of 32.5%. For the reasons set out earlier, she did not include an upward adjustment for negative employability factors, as Mr. McKinney had. Ms. Weiss added that some of those factors, such as appearance and time out of the workforce could be addressed through counseling and vocational rehabilitation. She repeated that she was not qualified to assess disability based on pain because she was not a doctor or physical therapist. She also stated that there was no guide for quantifying disability based on subjective factors.

During cross-examination, Ms. Weiss agreed that Dr. Gaw mentioned pain as a limiting factor for his activities. However, she understood Dr. Gaw's later remarks describing Dr. Allen's restrictions as "reasonable" and "common sense" to clarify his earlier statement and to endorse those restrictions. She stated that she assumed that physicians took medications into account when assigning work restrictions. Ms. Weiss was aware that Employee's medication regimen had changed since he last saw Dr. Allen. However, there was no medical documentation regarding the effect of any particular medication on Employee's ability to function. She was aware that OxyContin had side effects but understood that those varied from person to person. Further, Employee stated during his interview that his problems were caused by a medication other than OxyContin. He also stated that he was more functional when taking OxyContin.

The trial court issued its decision from the bench. The court found that Employee

was not permanently and totally disabled, that Employee's vocational opportunities were not completely eliminated, and that the appropriate anatomical impairment was 11% to the body as a whole. On those bases, it found that Employee had sustained a 44% permanent partial disability to the body as a whole. A judgment order was drawn by Employee's attorney and entered by the Court. Employee has appealed from that judgment, and the appeal has been referred to this Panel.

Analysis

Employee has raised two issues for review in this appeal.

1. Whether the trial court erred in finding that employee is not permanently and totally disabled.
2. Whether the trial court's findings and judgment failed to make specific findings and failed to specify an award of proper workers compensation benefits.

Our standard of review of issues of fact in a workers' compensation case is *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) (2014). 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 the witness' demeanor and to hear in-court testimony. Madden v. Holland Group of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). 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). A trial court's conclusions of law are reviewed *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

Employee's first contention is that the evidence preponderates against the trial court's finding that he is not permanently and totally disabled. In support of this position, he relies upon his own testimony about his limitations; the similar testimony of his wife and his friend Mr. Bullington; the opinion testimony of Mr. McKinney; and Dr. Gaw's testimony that pain should be the limiting factor for Employee's activities. In support of the trial court's decision, Employer offers the opinion testimony of Ms. Weiss; Dr. Allen's testimony setting out the permanent limitations he placed on Employee; and Dr. Gaw's statement approving Dr. Allen's restrictions. Employer also argues that Mr. McKinney's opinion should be disregarded because he ventured beyond his area of expertise with the

inclusion of four, admittedly subjective, negative employability factors.

At the outset, we note that Tennessee Code Annotated Section 50-6-207(4)(B) states that an employee is permanently and totally disabled if his injury "totally incapacitates the employee from working at an occupation that brings the employee an income." Our Supreme Court has further addressed the meaning of permanent total disability in Hubble v. Dyer Nursing Home, 188 S.W.3d 525 (Tenn. 2006):

> The determination of permanent total disability is to be based on a variety of factors such that a complete picture of an individual's ability to return to gainful employment is presented to the Court. Such factors include the employee's skills, training, education, age, job opportunities in the immediate and surrounding communities, and the availability of work suited for an individual with that particular disability. Though this assessment is most often made and presented at trial by a vocational expert, "it is well settled that despite the existence or absence of expert testimony, an employee's own assessment of his or her overall physical condition, including the ability or inability to return to gainful employment, is 'competent testimony that should be considered.'"

Hubble, 188 S.W.3d at 535-36 (internal citations omitted).

The extent of an injured worker vocational disability is a question of fact. Worthington v. Modine Manufacturing Co., 78 S.W.2d 232, 234 (Tenn. 1990). Employee testified about his perceived disability at length. He stated that he was unable to work at any of the jobs he had previously held. He described his symptoms and his difficulty with many simple tasks of daily living. He also described the negative effects of the prescribed medications on his cognitive abilities. As set out in Hubble and other cases, the injured employee's testimony concerning his abilities and limitations is evidence that should be considered by the trial court. Employee relies on Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211 (Tenn. 2006), which states: "[T]he claimant's own assessment of his physical condition and resulting disabilities is competent testimony and cannot be disregarded." 184 S.W.3d at 217 (quoting Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn.1972)). Employee implies that such testimony must be accepted by the trial court at face value. However, he cites no authority to support that proposition. Employee testified at trial, and the trial court had the opportunity to observe his demeanor and to hear his in-court testimony, that is, to judge his credibility. Madden, 277 S.W.3d at 900. A "trial court's findings on credibility and weight of the evidence may be inferred from the manner in which the court resolves the conflicts in the testimony and decides the case." Interstate Mech. Contractors, Inc. v. McIntosh, 229 S.W.3d 674, 678 (Tenn. 2007); Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733–34 (Tenn. 2002). If the trial court

in this case had accepted and accredited all of Employee's testimony concerning his abilities and limitations, a finding of permanent total disability would have been in order. Therefore, it is apparent that the trial court chose not to fully accredit that portion of Employee's testimony. We defer to that decision.

Employee also argues that the expert testimony of Mr. McKinney is entitled to greater weight than that of Ms. Weiss. "When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another." Fritts v. Safety Nat. Cas. Corp., 163 S.W.3d 673, 679 (Tenn. 2005) (citing Hinson v. Wal–Mart Stores, Inc., 654 S.W.2d 675, 676–77 (Tenn.1983)). When making that decision, a trial judge "is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts." Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). Mr. McKinney opined that Employee had a 56% vocational disability based on the restrictions assigned by Dr. Allen. These are the only specific restrictions contained in the record. Mr. McKinney increased Employee's vocational disability based on subjective negative employment factors. He was not able to articulate a clear explanation of the method by which he weighed these factors to increase the vocational disability from 56% to 100%.

One of the factors Mr. McKinney considered was the effect of pain medication on Employee's ability to function. However, there is no medical testimony in the record to establish that effect with any medical certainty. Dr. Allen did not testify on the subject, and he had not seen Employee for nearly two years at the time his deposition was taken. Dr. Gaw testified that the effects of opioid medications varied from one individual to another. Dr. Rupert, the pain management specialist, did not testify. Further, Mr. McKinney's primary source of knowledge about the effects of Employee's medications was Employee's description of those effects. The trial court chose not to fully accredit Employee's testimony about his medications.

A factor considered by Mr. McKinney included a four year absence from the job market. Employee was employed in a physically demanding job of moving packages. It is difficult for this Court to understand how a position such as the one held by Employee has changed skill requirements enough that a four year absence would negatively impact his employability.

Mr. McKinney's opinion is based on evidence rejected in whole or in part by the trial court.[3] We, therefore, conclude that the evidence does not preponderate against the

[3] The record does not reflect any specific findings of fact regarding credibility of witnesses. It is clear to this panel that the final judgment of the trial court reflects a greater weight

trial court's finding that Employee was not permanently and totally disabled.

Defects in Final Order

Employee asserts that the final order is invalid based on failure to address three items: (1) future medical benefits; (2) the compensation benefit rate; and (3) the claim for a lump sum payment of benefits. We observe that the order signed by the trial court was prepared by Employee's attorney. The compensation rate was stipulated by the parties at the beginning of the trial. We find nothing in the record to suggest that Employer objected or opposed future medical treatment. The Second Injury Fund objected to Employee's testimony to support a lump sum award, arguing that it was not relevant because of the limitation on lump sum awards set out at Tennessee Code Annotated Section 50-6-102(4)(A)(ii) (2014) (applicable to injuries occurring before July 1, 2014). The objection was sustained, and there was no further mention of a lump sum award thereafter.

Any or all of the alleged deficiencies in the final order could have been resolved informally through consultation among counsel and the court; or by means of a motion to amend the court's findings or make additional findings of fact pursuant to Tennessee Rule of Civil Procedure 52.02, or by means of a motion to alter or amend the judgment pursuant to Rule 59.04. There is nothing in the record to suggest that the trial court was asked to consider these matters before or after the final order was entered. A trial court must be given the opportunity to correct procedural errors or issues. See Bailey v. Blount Cty. Bd. of Educ., 303 S.W.3d 216, 237 (Tenn. 2010); McClellan v. Bd. of Regents, 921 S.W.2d 684, 690 (Tenn.1996). Under the circumstances of this case, we conclude that Employee is not entitled to relief based on the alleged deficiencies in the trial court's order.

Conclusion

After careful review of the record and deposition testimony, the trial court's final order prepared by Employee's counsel, and the apparent weight given to the testimony of all live witnesses, we cannot say that the evidence preponderates against the decision of the trial court. The judgment of the trial court is affirmed.

Costs are taxed to Brandon Thompson and his surety, for which execution may issue if necessary.

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given to testimony of Doctors Allen and Gaw over the testimony of Employee and Mr. McKinney.

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PAUL G. SUMMERS, SENIOR JUDGE