IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT MEMPHIS
October 29, 2018 Session

VENTURE EXPRESS v. JERRY FRAZIER

Appeal from the Chancery Court for Madison County
No. 74856 James F. Butler, Chancellor

No. W2018-00344-SC-R3-WC – Mailed January 2, 2019; Filed March 27, 2019

Jerry Frazier alleged that he sustained a compensable injury in the course of his work as a truck driver for Venture Express. The trial court held that Mr. Frazier's January 29, 2014 accident at work caused his neck, back and mental injuries, that the 1.5 times cap on permanent disability benefits did not apply, and that Mr. Frazier was permanently and totally disabled. Venture Express has appealed. 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.

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

ROBERT E. LEE DAVIES, SR.J., delivered the opinion of the court, in which HOLLY KIRBY, J., and WILLIAM B. ACREE, SR.J., joined.

Geoffrey A. Lindley and Jennifer Vallor Ivy, Jackson, Tennessee, for the appellant, Venture Express.

David Hardee, Jackson, Tennessee, for the appellee, Jerry Frazier.

OPINION

Factual and Procedural Background

On October 12, 2016, Venture Express filed a complaint in the Chancery Court of Madison County, Tennessee, to determine workers' compensation benefits. Jerry Frazier filed an answer and counterclaim on November 7, 2016, along with a third-party complaint against MPTS, Inc., Cherokee Insurance Company, and the Second Injury Fund. The case was tried on September 26, 2017. The trial court took the case under advisement and on December 12, 2017, issued its written opinion. A final judgment was entered on January 29, 2018, from which Venture Express properly perfected its appeal.

Mr. Frazier, age 57 at the time of the trial, is a high school graduate whose job history consists primarily of driving trucks. This work involved heavy lifting, handling chains and binders, bending over, cranking dollies, climbing into trailers, and a lot of sitting and bouncing. He began working for Venture Express in June 2010. He had a physical examination and advised Venture Express of his 1998 back surgery related to a sports injury. Except for occasional flare-ups of arthritis, Mr. Frazier was fine after his 1998 back surgery. Starting in about 2011, his primary care physician, Dr. Jerry Wilson, prescribed pain medication for his back.

On January 29, 2014, Mr. Frazier was pulling into the parking lot of Venture Express in his truck when his wheel hit a pothole. The impact threw him into the side of his door where his head struck the top of the window, which was partially down. Mr. Frazier told the dispatcher about the incident and later informed his supervisor, Gary Rinks, about his injury. Mr. Frazier indicated he had immediate pain in his right shoulder, which ran down his right arm. He went to an urgent care facility where his wife worked, and the facility referred him to his primary care physician, Dr. Wilson. Dr. Wilson then referred Mr. Frazier to Dr. John Neblett.

Dr. Neblett is a board-certified neurosurgeon. Dr. Neblett first saw Mr. Frazier on February 27, 2014. He ordered an MRI which showed stenosis at C6-7 on the right side and a herniated disc at C5-6 on the right. After a conservative regimen of physical therapy failed to resolve Mr. Frazier's symptoms, Dr. Neblett recommended surgery, and on January 19, 2015, Mr. Frazier underwent a cervical discectomy with fusion at C5-6 and C6-7. Five months later, Mr. Frazier was still having numbness in his right thumb and index finger along with pain in the back of his neck. At one point, Mr. Frazier had tried to mow his yard and use a tiller but had to stop because of neck pain. Dr. Neblett prescribed cervical facet blocks for the pain which did not provide much relief. Dr.

Neblett indicated Mr. Frazier had reached MMI on October 21, 2015, and opined that Mr. Frazier had suffered a permanent neck injury from striking his head in the cab. Dr. Neblett rated Mr. Frazier's impairment at fifteen percent to the body as a whole for his neck injury.[1] Dr. Neblett declined to assign any permanent restrictions based upon a functional capacity evaluation. However, Dr. Neblett indicated Mr. Frazier's permanent neck injury would likely interfere with driving, yard work, mowing, or operating machinery that vibrates or causes him to use his arms or shoulders.

On March 10, 2016, Mr. Frazier was seen by Dr. Samuel Chung. Dr. Chung is a physiatrist, who performed an IME for Mr. Frazier's low back injury. Mr. Frazier reported to Dr. Chung that he continued to experience mild back pain which was aggravated by extended standing, stooping or turning to the right side. Dr. Chung was aware of Mr. Frazier's 1989 low back injury and his 1998 surgery on L4-5. Although he agreed Mr. Frazier had received good relief from the prior radiculothopy, Dr. Chung opined there was ongoing right lumbar radiculitis from hitting the pothole and being thrown around in his cab. Dr. Chung found that this was a permanent injury which resulted in a three percent whole body impairment. He indicated Mr. Frazier should avoid prolonged walking, standing, stooping, squatting, bending, climbing, and excessive flexion or extension of his back. Dr. Chung also agreed with Dr. Neblett that, if an impairment rating was done from the prior surgery in 1998, Mr. Frazier would have a permanent impairment rating from that surgery.

Subsequent to his neck surgery in January 2015, Mr. Frazier began to develop depression. As time went on, Mr. Frazier became more depressed. He explained that he stays in bed all day; does not get dressed; does not go out except to Walmart once a month to get medicine; and does not like to be around other people, which causes him to become nervous and break out in a cold sweat. He explained that now he feels useless and has suicidal thoughts on occasion. From a physical standpoint, Mr. Frazier indicated that his neck was still stiff and that he has right leg pain and cramps. He indicated he could stand for approximately twenty minutes before the onset of pain. On a typical day, Mr. Frazier watches television while he naps. He stays in the house and has never taken up his former hobbies such as fishing, hunting, and golf. He no longer works in the yard or does any household chores. For these reasons, Mr. Frazier testified he could not return to work as a driver for Venture Express, which required eleven hours of driving time a day.

[1] Dr. Neblett was also aware of Mr. Frazier's prior back surgery in 1998. He indicated Mr. Frazier would have a five percent permanent impairment to the body as a whole if his pain and radiculothopy had resolved and a nineteen percent impairment if it was unresolved.

Mr. Frazier admitted that he failed to renew his Department of Transportation physical, which is required to operate an eighteen-wheel truck, and that no physician has told him he could not drive; however, Mr. Frazier claimed that, because of his pain, he was unable to return to work and further that he was not going to attempt to do so because he was afraid he might injure someone.

Kim Frazier, Mr. Frazier's wife for seven years,[2] testified regarding the effects of his injury on her husband. On the day of the injury, she observed a gash on the top of her husband's head and confirmed he was complaining of right shoulder pain and right arm numbness. Mrs. Frazier then went on to describe the changes in her husband. Before the accident, Mr. Frazier was up at 5:00 a.m. every morning and would be on the go all day. He was always the provider and had worked all his adult life. She described her husband as a very outgoing person. "He'd kid around, joke around, just always happy-go-lucky. Jerry was always the person to be around, funny, laughing." She and Mr. Frazier enjoyed going to the lake and having the family over for barbecuing. Mr. Frazier enjoyed woodworking and had many woodworking tools in the barn. He fished, hunted, and played golf. He also enjoyed cooking in cast iron skillets and pots, in which he excelled in making cobblers and biscuits.

Mrs. Frazier then described the changes that took place in her husband after his injury and surgery. Much of the time, Mr. Frazier sat in a dark room by himself. There were no more family get-togethers. Many days, he stayed in his pajamas and laid in bed. He cried a lot and was angry and quick-tempered. He no longer helped with housekeeping; he never cooked anymore or went to the barn to use his woodworking tools. Mrs. Frazier now does all of the yard work and has sold all of the chickens since her husband can no longer lift the fifty-pound bags of feed. Finally, she described her husband's anxiety if he finds himself in a group of people.

On April 21, 2017, Mr. Frazier saw Dr. Sidney Moragne for a mental IME. Dr. Moragne is a psychiatrist. The vast majority of his practice consists of treating adults, of which less than ten percent involves litigation. Dr. Moragne conducted an extensive interview and a review of Mr. Frazier's medical records. At that time, Mr. Frazier was already being treated for depression for not being able to work and enjoy his hobbies. Mr. Frazier reported having suicidal thoughts, worthlessness, difficulty sleeping, physical pain, and weight gain. He also described panic attacks that were triggered whenever he was in a crowd. Dr. Moragne diagnosed Mr. Frazier with major depressive disorder,

[2] Mrs. Frazier testified her relationship with her husband actually went back twenty years.

recurrent, moderate to severe. Dr. Moragne also opined that the depression and anxiety were permanent conditions. Utilizing a combination of the brief psychiatric rating score, global assessment and functioning score, and the psychiatric impairment rating scale, Dr. Moragne found Mr. Frazier had an eighteen percent permanent impairment to the body as a whole, and he noted it would be a big hurdle for Mr. Frazier to return to work full time with these symptoms. Subsequent to the IME, Dr. Moragne began treating Mr. Frazier. Dr. Moragne increased Mr. Frazier's antidepressant medication because of Mr. Frazier's continued depressed mood, social isolation, and resistance to leave the house. Dr. Moragne noted that prior to the injury, Mr. Frazier had no mental disorder. Thus, the injury from the truck, in Dr. Moragne's opinion, was the cause of Mr. Frazier's depression and anxiety.

Venture Express hired Dr. Joel Reisman to perform an IME on its behalf. Dr. Reisman is a psychiatrist and is board certified. Dr. Reisman reviewed Mr. Frazier's medical records and performed a forensic interview. He also interviewed Kim Frazier and administered the Minnesota Multi-facet Personality Index ("MMPI") test to Mr. Frazier. Dr. Reisman concluded that the results of the MMPI indicated Mr. Frazier reported his symptoms in such a manner that invalidated the testing. There was also some indication of under-reporting, which Dr. Reisman indicated might affect Mr. Frazier's credibility. Dr. Reisman disagreed with Dr. Moragne's diagnosis and could not identify any diagnosis that fit Mr. Frazier. Dr. Reisman suggested that the most likely reason for Mr. Frazier's present mental state was boredom and deconditioning. Ultimately, Dr. Reisman concluded that Mr. Frazier had zero mental impairment.

Standard of Review

The 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(e)(2) (2014) (applicable to injuries occurring prior to July 1, 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's demeanor and to hear in-court testimony. Madden v. Holland Grp. of Tenn. Inc., 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) (citing Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006)). 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) (citing Goodman v. HBD Indus., Inc., 208 S.W.3d 373, 376 (Tenn. 2006); Layman v. Vanguard Contractors, Inc., 183 S.W.3d 310, 314 (Tenn. 2006)).

Analysis

The trial court held: (1) Mr. Frazier's January 29, 2014 accident at work caused his neck, back, and mental injuries; (2) the 1.5 times cap on permanent disability benefits did not apply; and (3) Mr. Frazier was permanently and totally disabled. Venture Express has appealed all three of these issues. The Second Injury Fund has not appealed the trial court's ruling that it is responsible for 17% of the benefits awarded to Mr. Frazier.

Causation

Under the Workers' Compensation Law, "injury" is defined as "an injury by accident, arising out of and in the course of employment, that causes either disablement or death of the employee . . . ." Tenn. Code Ann. § 50-6-102(12)(A) (2014) (applicable to injuries occurring prior to July 1, 2014). The Workers' Compensation Law is to be construed liberally as to the persons entitled to its benefits. Tenn. Code Ann. § 50-6-116 (2014) (applicable to injuries occurring prior to July 1, 2014). "'Except in the most obvious, simple and routine cases,' a [workers' compensation] claimant must establish by expert medical evidence the causal relationship between the [alleged] injury and [the claimant's] employment activity." Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 643 (Tenn. 2008) (quoting Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991)). The claimant must establish causation "by the preponderance of the expert medical testimony," as supplemented by the evidence of lay witnesses. Id. An "employee does not suffer a compensable injury where the work activity aggravates the pre-existing condition merely by increasing the pain." Trosper v. Armstrong Wood Prods., Inc., 273 S.W.3d 598, 607 (Tenn. 2008). "However, if the work injury advances the severity of the pre-existing condition, or if, as a result of the pre-existing condition, the employee suffers a new, distinct injury other than increased pain, then the work injury is compensable." Id.; *see also* Cloyd, 274 S.W.3d at 645-46. The claimant is granted the benefit of all reasonable doubts regarding causation of his or her injury. Excel Polymers, LLC v. Broyles, 302 S.W.3d 268, 274-75 (Tenn. 2009) (citations omitted).

Initially, Venture Express argues that Mr. Frazier's description of the circumstances of his injury is not plausible. To support its position, Venture Express relies upon the testimony of Gary Rinks, the fleet manager for Venture Express.

Although Mr. Rinks had no personal knowledge of the events surrounding the accident on the day in question, he attempted to suggest that Mr. Frazier was not thrown about in his cab as Mr. Frazier described. However, on cross-examination, Mr. Rinks admitted he did not know the model of truck driven by Mr. Frazier; he did not know the extent that his seat was inflated; and he was not even aware that Mr. Frazier had hit a large pothole. The trial court gave no weight to this testimony, and in fact explicitly found Mr. Frazier to be a credible witness. It is the trial court who has the opportunity to observe the witnesses and their manner and demeanor while testifying and therefore is in a far better position than an appellate court to decide issues of fact. Machinery Sales Co., Inc., v. Diamondcut Forestry Products, LLC, 102 S.W.3d 638, 643 (Tenn. Ct. App. 2002). "The weight, faith, and credit to be given to any witness's testimony lies in the first instance with the trier of fact, and the credibility accorded will be given great weight by the appellate court." Id.

Venture Express also argues that the expert medical proof before the trial court was based upon the history and subjective complaints provided by Mr. Frazier. Venture Express elected not to offer any expert medical proof to counter the proof presented by Mr. Frazier regarding his neck and back injuries. Regarding Mr. Frazier's mental injury, the trial court found:

> With reference to Frazier's mental impairment, the Court has highly disputed testimony from Dr. Reisman and Dr. Moragne. Dr. Moragne saw Frazier for an evaluation and also treated him and seen him on other occasions. He is a psychiatrist regularly engaged in the treatment of mental disorders, with a regular practice. He places causation of Frazier's mental condition with the work accident noting that he had no prior mental health treatment or issues of any significance and that Frazier was credible. . .. Dr. Reisman and Dr. Moragne just totally disagree after interviewing the same patient. Dr. Reisman feels that Frazier was credible other than what he interpreted from the MMPI, but disagreed that he had any impairment or depression.

Dr. Moragne found Mr. Frazier to be credible. Although one of the tests on the MMPI raised a credibility issue, Dr. Reisman did not conclude that Mr. Frazier was not credible and found Mrs. Frazier to be credible. The trial court found that Dr. Moragne's opinion was "more in line with the factual situation," and the trial court correctly noted the liberal bias, purposefully written into the law in workers' compensation cases, favoring the employee. The weight of a physician's testimony must be weighed in light of the trial court's concern about the plaintiff's credibility. Brow v. Penske Logistics,

Inc., No. W2006–00096–WC–R3–CV, 2006 WL 2726210 (Tenn. Workers' Comp. Panel Aug. 30, 2006). Here, the trial court expressly found that Mr. Frazier was a credible witness. The evidence does not preponderate against the trial court's finding that Mr. Frazier sustained neck, back, and mental injuries from the January 29, 2014 accident in the course and scope of his employment.

The Multiplier Cap

An award of permanent partial disability benefits is capped at one-and-one-half times the medical impairment rating when "the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury." Tenn. Code Ann. § 50-6-241(d)(1)(A) (2014) (applicable to injuries occurring prior to July 1, 2014). "In making the determinations, the 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 claimant's disabled condition." Id. "When determining whether a particular employee had a meaningful return to work, the courts must assess the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to either return to or remain at work." Tryon v. Saturn Corp., 254 S.W.3d 321, 328 (Tenn. 2008) (citing Lay v. Scott Cnty. Sheriff's Dep't, 109 S.W.3d 293, 297-98 (Tenn. 2003); Nelson v. Wal-Mart Stores, Inc., 8 S.W.3d 625, 630 (Tenn. 1999)).

Venture Express argues that Mr. Frazier's failure to return to work was unreasonable. It points out that Mr. Frazier made a unilateral decision not to return to work and that no physician placed any work restrictions upon him. Accordingly, Venture Express contends the trial court erred by failing to apply the one and one-half times cap to the award of permanent partial disability benefits. The trial court found, however, that Mr. Frazier was unable to perform his job as a truck driver based upon his physical condition after the accident and subsequent treatment. The trial court's assessment of vocational disability should include the employee's job skills and training, education, age, extent of anatomical impairment, duration of impairment, local job opportunities, and the employee's capacity to work at the kinds of employment available to him in his disabled condition. In making this determination, an employee's own assessment of his physical condition and resulting disability is competent testimony that should be considered by the trial court. McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn. 1999) (citing Perkins v. Enterprise Truck Lines, Inc., 896 S.W.2d 123, 127 (Tenn. 1995)). Mr. Frazier explained the physical nature of his work as a truck driver, and he testified at length as to why he is unable to continue in his former job. No other

job was offered by Venture Express, and Gary Rinks, admitted that the only work available for Mr. Frazier was driving a truck. In addition, Mr. Frazier would be required to pass a DOT physical, which is problematic considering his permanent injuries. Both Mr. and Mrs. Frazier described his experiences with depression and anxiety which Dr. Morange found would prohibit Mr. Frazier from obtaining a job as a truck driver. The trial court considered Mr. Frazier's assessment of his physical condition and resulting disabilities as competent testimony along with the medical testimony and other proof. The evidence does not preponderate against the trial court's finding that Mr. Frazier did not have a meaningful return to work and, therefore, the 1.5 multiple impairment cap does not apply.

Permanent Total Disability

The trial court found Mr. Frazier was permanently and totally disabled. The Workers' Compensation Law provides that

> When an injury not otherwise specifically provided for in this chapter totally incapacitates the employee from working at an occupation that brings the employee an income, the employee shall be considered totally disabled . . . .

Tenn. Code Ann. § 50-6-207(4)(B)(2014)(applicable to injuries occurring prior to July 1, 2014).

"[T]otal disability as statutorily defined is not based on a purely objective assessment or an anatomical mathematical computation." Davis v. Reagan, 951 S.W.2d 766, 768 (Tenn. 1997) (citing Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 458 (Tenn. 1988)). The determination of permanent total disability is based on a variety of factors to give the court a complete picture of an individual's ability to return to gainful employment. Hubble v. Dyer Nursing Home, 188 S.W.3d 525, 535 (Tenn. 2006) (citing Vinson v. United Parcel Serv., 92 S.W.3d 380, 386 (Tenn. 2002); Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000)). These factors include an employee's skills, training, education, age, job opportunities, and the availability of work suited for an individual with that particular disability. Id. at 535-536 (citing Cleek, 19 S.W.3d at 774). Regarding the extent of an employee's disability, the trial court is not bound to accept physicians' opinions but is entitled to consider all of the evidence, both expert and non-expert. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 677 (Tenn. 1983). "When medical testimony differs, it is within the discretion of the trial judge to determine which expert testimony to accept." Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn.

1976)(citing Hinson, 654 S.W.2d 675).

The trial court found that Mr. Frazier "has limited range of motion in his neck now from the surgery which makes it difficult to drive any particular vehicle, particularly over the length of his normal route which was ten[to]eleven hours. His bending is also affected." Considering the foregoing as well as Mr. Frazier's age, education, and job history consisting mainly of physical work and truck driving, the trial court found his vocational disability for his neck injury was fifty percent to the body as a whole, fifteen percent disability to the body as a whole for his back injury, and thirty-six percent vocational disability to the body as a whole for his mental injury.

Venture Express argues that Mr. Frazier failed to carry his burden of proving that he is permanently and totally disabled because there were no medical restrictions by his physicians. Although Dr. Chung did not assign permanent work restrictions, he testified that Mr. Frazier should avoid prolonged walking, standing, stooping, squatting, bending, climbing and excessive flexion, extension, and rotation of his back. His lifting should be modified as to what Mr. Frazier can do to keep from reinjuring his back. Likewise, Dr. Neblett testified the neck injury could interfere with driving, yard work, operating machinery that causes vibration or causes Mr. Frazier to use his arms or shoulders. Venture Express offered no proof to contradict these findings, and the trial court accepted the testimony of Dr. Moragne who found that Mr. Frazier was unable to do his job as a truck driver. Neither party presented testimony from a vocational expert regarding Mr. Frazier's employability in the labor market. Given that the trial court accredited Mr. Frazier's testimony, as well as the testimony of Mr. Frazier's experts, the evidence does not preponderate against the trial court's finding that Mr. Frazier is totally and permanently disabled.

Conclusion

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

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ROBERT E. LEE DAVIES, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

VENTURE EXPRESS v. JERRY FRAZIER

Chancery Court for Madison County
No. 74856

No. W2018-00344-SC-WCM-WC – Filed March 27, 2019

ORDER

This case is before the Court upon the motion for review filed by Venture Express, Inc. and Cherokee Insurance Company pursuant to Tennessee Code Annotated section 50-6-225(a)(5)(A)(ii), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well taken and is, therefore, denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Venture Express, Inc. and Cherokee Insurance Company, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

HOLLY KIRBY, J., not participating