IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
August 15, 2016 Session

UNITED PARCEL SERVICE v. JAMES WYRICK, ET AL.

Appeal from the Circuit Court for Knox County
No. 2-245-14 William T. Ailor, Judge

No. E2015-02523-SC-R3-WC – Mailed – October 24, 2016
Filed – November 30, 2016

An employee was injured in the course and scope of his employment and became permanently and totally disabled. The employer filed a petition asking the trial court to determine the workers' compensation benefits due the employee. The primary disputed issue was the extent of the employee's disability that was attributable to the employer. The trial court ruled that the employer was responsible for 35 percent of the employee's disability. After review, we hold the employer is responsible for 100 percent of the employee's disability. We reverse the trial court's judgment and remand for further proceedings.

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

SHARON G. LEE, J., delivered the opinion of the Court, in which WILLIAM B. ACREE, JR., SR.J., and KRISTI M. DAVIS, J., joined.

J. Anthony Farmer and Christopher H. Hayes, Knoxville, Tennessee, for the appellant, James Wyrick.

Tyler D. Smith, Knoxville, Tennessee, for the appellee, United Parcel Service.

OPINION

Factual Background

In 1978, James Wyrick began working as a truck driver for United Parcel Service ("UPS"). As a part of his job, Mr. Wyrick was required to use a dolly to connect one trailer to another. On May 7, 2012, Mr. Wyrick was hooking two trailers together when he felt immediate pain in his left shoulder. He reported the injury to UPS, who referred him to Dr. Jake Harrison for medical treatment. Dr. Harrison saw Mr. Wyrick several times before referring him to Dr. John Reynolds, an orthopedic surgeon with Tennessee Orthopaedic Clinic.

Dr. Reynolds determined that Mr. Wyrick had severe glenohumeral osteoarthritis in his left shoulder. In September 2012, Dr. Reynolds performed a total left shoulder arthroplasty on Mr. Wyrick. Dr. Reynolds determined that Mr. Wyrick reached maximum medical improvement in March 2013, and he released Mr. Wyrick with permanent restrictions of no overhead or outstretched arm use and a fifty-pound lifting restriction from floor to waist. Mr. Wyrick returned to Dr. Reynolds with complaints of ongoing pain in his left shoulder in August, September, and October 2014, for which he received physical therapy. Dr. Reynolds later adopted the permanent restrictions stated in a Physical Work Performance Evaluation, e.g., "[e]xerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly." Dr. Reynolds found that Mr. Wyrick suffered a permanent impairment of 24 percent to the left upper extremity, which equated to 14 percent impairment to the body as a whole.

Dr. William Kennedy, a board-certified orthopedic surgeon, performed an independent medical examination of Mr. Wyrick on December 16, 2013. Dr. Kennedy's written report noted that Mr. Wyrick continued to have activity-related and positional generalized pain in his left shoulder region multiple times each day and lasting fifteen to twenty minutes at a time. Mr. Wyrick told Dr. Kennedy that he had been unable to regain normal strength or motion in his left shoulder and had to reduce and modify the use of his left hand when twisting, bending, leaning, stooping, squatting, or kneeling. Mr. Wyrick further reported that his ongoing left shoulder symptoms interfered with his sleep, bathing, showering, personal grooming, and hygiene.

Dr. Kennedy found no evidence of impingement and only mild instability in Mr. Wyrick's left shoulder and no loss of coordination or localized atrophy or shortening in any of the scapulothoracic or shoulder girdle muscles that control the movement of the left shoulder. He noted that Mr. Wyrick had mild loss of motion in all six of the standard directions of measuring motion in a shoulder. Dr. Kennedy diagnosed Mr. Wyrick with

severe painful osteoarthritis of the glenohumeral joint of the left shoulder. In Dr. Kennedy's opinion, the 2012 injury caused a sprain of Mr. Wyrick's left shoulder and permanently aggravated and advanced the preexisting underlying osteoarthritis of the glenohumeral joint arousing that condition from dormancy into a continuously painful and disabling condition that required the left total shoulder replacement. Dr. Kennedy concluded that all of the testing and treatment for Mr. Wyrick's left shoulder after the 2012 injury, including the total shoulder replacement, was both appropriate and necessary due to the work-related incident. Dr. Kennedy testified that more likely than not, the total shoulder replacement would not have been required had it not been for the 2012 work-related incident.

Dr. Kennedy assigned Mr. Wyrick a 24 percent impairment to his left upper extremity or 14 percent impairment to the body as a whole. Dr. Kennedy noted that Mr. Wyrick's left shoulder had a guarded prognosis for several reasons: the total shoulder replacement had increased the risk for additional injuries to his left shoulder; the life and endurance of the left total shoulder replacement was unknown; and the loss of motion in the left shoulder increased the risk for additional injuries to his shoulder. Dr. Kennedy concluded that Mr. Wyrick should not attempt to work with his left hand above his shoulder; should avoid activities that require rapid or repeated motions, hammering, or jerking with his left hand; and should not climb ladders, work at heights or on his hands and knees, or lift, carry, push, or pull more than 10 pounds frequently to 20 pounds occasionally using both hands together or 5 pounds occasionally using only his left hand.

Dr. Kennedy acknowledged that Mr. Wyrick suffered a prior work-related injury to his left shoulder in August 1998 and that in December 1998, Dr. Howard Brown performed a resection of the distal end of the clavicle or resection arthroplasty of the left acromioclavicular joint and a repair of the superior glenoid labrum at the origin of the biceps tendon. In June 1999, Dr. Brown performed a second surgery to debride scarring that had formed following the first surgery, to repair the glenoid labrum, and to transfer the biceps tendon to the proximal humerus. Dr. Brown assigned an impairment rating of 10 percent to the left upper extremity, or 6 percent to the body as a whole. In July 2000, Dr. Brown administered a steroid injection to Mr. Wyrick's left shoulder. Dr. Kennedy testified that Mr. Wyrick may not have needed a shoulder replacement in 2012 had he not had osteoarthritis of the glenohumeral joint and had that osteoarthritis not been permanently aggravated and advanced. Dr. Kennedy stated that his conclusions and impairment rating were not affected by information in Dr. Brown's medical records.

Mr. Wyrick, age 84 at the time of trial, testified that he began working for UPS in 1978. Although he started out loading and unloading trucks, he eventually became a feeder driver. As a feeder driver, he did not have to load trucks but used a dolly to connect trailers together. He suffered a work-related injury to his left shoulder in 1998, which led to two surgeries performed by Dr. Brown. After settling his workers' compensation claim, he resumed his position as a feeder driver for UPS. He suffered a

work-related injury to his knee in 2005, had surgery, and returned to work as a feeder driver with no restrictions. He hurt his shoulder on May 7, 2012, reported the injury to UPS, and received medical treatment. Mr. Wyrick did not return to work because he lacked the strength in his left shoulder to connect the trailers with a dolly. Mr. Wyrick testified that although he lives by himself, it takes longer to perform some household chores, and he is unable to do some things like paint his porch or wash windows. He takes Tylenol for pain in his shoulder. Before being injured in 2012, he intended to work until he reached age 85. He has not sought other employment.

Sheena Smith, Mr. Wyrick's granddaughter, testified that before Mr. Wyrick was injured in 2012, he was very active and able to perform all household chores. Following the injury, Mr. Wyrick needed help and became frustrated when he could not complete tasks on his own. Ms. Smith notices when he has trouble with his shoulder or has pain. She acknowledged that Mr. Wyrick is able to take care of himself, perform light house cleaning, and drive.

Procedural History

UPS filed a Petition for Determination of Rights to address the extent of any permanent vocational disability causally related to the May 7, 2012 injury and whether the Tennessee Second Injury Fund was liable for all or part of Mr. Wyrick's disability. Mr. Wyrick responded that he was entitled to permanent disability and medical benefits from UPS. The Tennessee Second Injury Fund denied liability. Before trial, the trial court approved a settlement agreement between Mr. Wyrick and the Tennessee Second Injury Fund.

The parties stipulated that Mr. Wyrick was permanently and totally disabled. The trial court concluded that the permanent total disability attributable to UPS from the 2012 work injury was 35 percent to the body as a whole. Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation 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.

In this appeal, Mr. Wyrick argues that the evidence preponderates against the trial court's decision and the trial court erred in limiting UPS's liability to 35 percent.

Standard of Review

Our standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, with a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). When issues of credibility of witnesses and the weight to be given their in-court

testimony are before the reviewing court, considerable deference must be afforded to the factual findings of the trial court. *Richards v. Liberty Mut. Ins. Co*., 70 S.W.3d 729, 733 (Tenn. 2002); *see also Rhodes v. Capital City Ins. Co.*, 154 S.W.3d 43, 46 (Tenn. 2004). When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another. *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675, 676–77 (Tenn. 1983). "This Court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition." *Fritts v. Safety Nat. Cas. Corp.*, 163 S.W.3d 673, 679 (Tenn. 2005) (citing *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997)). Questions of law are reviewed de novo with no presumption of correctness afforded to the trial court's conclusions. *Tucker v. Foamex, L.P.*, 31 S.W.3d 241, 242 (Tenn. 2000); *Gray v. Cullom Machine, Tool & Die*, 152 S.W.3d 439, 443 (Tenn. 2004).

Analysis

First, Mr. Wyrick argues that the trial court erred by concluding that his benefits were limited to two and one-half times his medical impairment of 14 percent under Tennessee Code Annotated section 50-6-241(a). While conceding that the trial court incorrectly referenced Tennessee Code Annotated section 50-6-241(a), UPS claims that the trial court simply misspoke. The apparent confusion stems from the following comments made by the trial court:

> The Court notes that counsel have agreed that Mr. Wyrick is permanently and totally disabled. The question that the Court is to determine is the impact of that permanent and total disability. . . . [T]he Court is of the opinion that, based on Mr. Wyrick's age, education, skills and training, and local job opportunities and capacity to work at the kinds of employment available in his disabled condition, *that the permanent and partial disability award should be two and a half times the statutory cap found in [Tennessee Code Annotated section] 50-6-241, subsection a.*

(Emphasis added). After the trial court's comments, the following exchange appears in the record:

> **Counsel for Mr. Wyrick**: Your Honor, I'm a little confused. . . . [T]he parties agreed that Mr. Wyrick is permanently and totally disabled. Is the Court rejecting that?
>
> **Court**: No.
>
> **Counsel for Mr. Wyrick**: I'm not sure then . . . what is the thirty-five percent, the two and a half times? I thought the Court just said that was permanent and partial disability.

> **Court**: I'm sorry. The permanent total disability.
> **Counsel for UPS**: *May I ask, Your Honor, is that thirty-five percent, is that what the Court is saying is attributable to this injury* --
>
> **Court**: *Yes.*

(Emphasis added).

The statute cited by the trial court, Tennessee Code Annotated section 50-6-241(a), applies to injuries occurring between August 1, 1992, and July 1, 2004, and

> where an injured employee is eligible to receive any permanent partial disability benefits, pursuant to § 50-6-207(3)(A)(i) and (F), and 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 injury, the maximum permanent partial disability award that the employee may receive is two and one-half (2½) times the medical impairment rating . . . .

Tenn. Code Ann. § 50-6-241(a)(1).[1]

This provision is plainly inapplicable in the present case. Mr. Wyrick was injured in 2012, he suffered permanent and total disability, and he did not return to work following the injury. UPS argues that the trial court intended to cite Tennessee Code Annotated section 50-6-241(b), but that section also only applies to injuries arising between August 1, 1992, and July 1, 2004. *See* Tenn. Code Ann. § 50-6-241(b).[2] In short, to the extent that the trial court referenced Tennessee Code Annotated section 50-6-241(a) or (b) or implicitly applied the statutory cap to the impairment rating to arrive at an award of 35 percent, it did so in error.

The trial court's oral statements and written order confirmed that the 35 percent award was attributable to the 2012 injury. Moreover, the trial court stated that it arrived at the award after considering Mr. Wyrick's "age, education, skills and training, and local job opportunities and capacity to work at the kinds of employment available in his disabled condition . . . ." *See Walker v. Saturn Corp.*, 986 S.W.2d 204, 208 (1998) (citing Tenn. Code Ann. § 50-6-241(b); *Worthington v. Modine Mfg. Co*., 798 S.W.2d 232, 234 (Tenn. 1990)). Thus, despite the trial court's confusing reference to section 50-6-241(a),

[1] The Tennessee General Assembly later reduced the two and one-half multiplier to one and one-half for injuries occurring on or after July 1, 2004. Tenn. Code Ann. § 50-6-241(d)(1)(A). Moreover, section 50-6-241(a) has since been deleted. *See* 2013 Tenn. Pub. Acts 289, § 89.

[2] This section also has been deleted. *See* 2013 Tenn. Pub. Acts 289, § 89.

the record does not conclusively establish that the trial court arrived at the award of 35 percent by applying the statutory cap to the impairment rating. Accordingly, we next turn to the question of whether the evidence in the record otherwise supports the trial court's determination that 35 percent of Mr. Wyrick's permanent and total disability was attributable to the May 7, 2012 injury.

"In assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and her capacity to work at the kinds of employment available in her disabled condition." *Walker*, 986 S.W.2d at 208. The claimant's own assessment of his or her physical condition cannot be disregarded. *Uptain Constr. Co. v. McClain*, 526 S.W.2d 458, 459 (Tenn. 1975). Once expert medical testimony establishes causation and permanence, the trial court must consider all relevant evidence, both expert and lay testimony, to determine the extent of the employee's disability. *Lang v. Nissan N. Am., Inc.*, 170 S.W.3d 564, 570 (Tenn. 2005).

The evidence established that Mr. Wyrick had prior work-related injuries and that he was permanently and totally disabled following the 2012 injury. *See* Tenn. Code Ann. § 50-6-207(4)(B). Tennessee Code Annotated section 50-6-208 governs cases in which an employee who "has previously sustained a permanent physical disability . . . becomes permanently and totally disabled through a subsequent injury." That statute provides in part:

> (a)(1) If an employee has previously sustained a permanent physical disability from any cause or origin and becomes permanently and totally disabled through a subsequent injury, the employee shall be entitled to compensation from the employee's employer or the employer's insurance company only for the disability that would have resulted from the subsequent injury, and the previous injury shall not be considered in estimating the compensation to which the employee may be entitled . . . ; provided, that in addition to such compensation for a subsequent injury, and after completion of the payments for the subsequent injury, then the employee shall be paid the remainder of the compensation that would be due for the permanent total disability out of a special fund to be known as the second injury fund.

Tenn. Code Ann. § 50-6-208(a)(1).

To claim benefits under subsection (a), the employee must (1) have sustained a permanent physical disability and (2) become permanently and totally disabled through a subsequent injury. Tenn. Code Ann. § 50-6-208(a)(1). Liability may be apportioned to the Tennessee Second Injury Fund under subsection (a) only if the employer had actual knowledge of the preexisting injury before the subsequent injury occurred. Tenn. Code

Ann. § 50-6-208(a)(3). The trial court must determine the extent of the disability from the subsequent injury without consideration of the prior injury. *Allen v. City of Gatlinburg*, 36 S.W.3d 73, 77 (Tenn. 2001). This is expressly required by subsection (a), which states that "the employee shall be entitled to compensation from the . . . employer . . . only for the disability that would have resulted from the subsequent injury, and the previous injury shall not be considered in estimating the compensation to which the employee may be entitled . . . ." Tenn. Code Ann. § 50-6-208(a)(1).

The trial court did not cite *Allen* and instead cited *Scales v. City of Oak Ridge*, 53 S.W.3d 649 (Tenn. 2001). In *Scales*, the employee suffered two injuries and filed two separate workers' compensation suits, which were consolidated. After finding that the combination of the two injuries rendered the employee permanently and totally disabled, the trial court apportioned 25 percent of the permanent total disability award to the employer and 75 percent to the Tennessee Second Injury Fund. *Id*. at 651. The Supreme Court reversed, holding that the trial court should have required the employer to pay all of the assigned benefits for the first injury before allocating the payments for the second injury between the employer and the Tennessee Second Injury Fund. *Id*. at 658–59. We find *Scales* to be factually distinguishable.

A case that is similar to the case at bar is *LaPradd v. Nissan North America, Inc.*, No. M2014-01722-SC-R3-WC, 2016 WL 197323 (Tenn. Workers' Comp. Panel Jan. 14, 2016). In *LaPradd*, the employee suffered a work-related injury in 1993 and had surgery two years later. *Id.* at *1. The trial court found that the employee fully recovered from the 1993 injury, with no limitations or restrictions on his activities, returned to gainful employment that required physically demanding activities, and did not require accommodations to perform his work duties. The employee did not experience pain or depression as a result of that injury. *Id.* at *10. The trial court found that the employee was permanently disabled as the result of a 2005 work-related injury and allocated all of the disability to the employer. The Special Workers' Compensation Appeals Panel, applying the standard set out in *Allen*, held that the trial court properly found the employee's total disability resulted solely from the 2005 injury, and the Tennessee Second Injury Fund was not liable under section 208(a). *Id.*

Similarly, in *Stough v. Goodyear Tire and Rubber Co.*, No. W2012-02275-WC-R3-WC, 2014 WL 1422170 (Tenn. Workers' Comp. Panel Apr. 11, 2014), an employee injured his back, settled his workers' compensation claim, and returned to work. The employee reinjured his back, had surgery, and was unable to return to work. *Id.* at *2. The trial court found that the employee was permanently and totally disabled and allocated 50 percent of the disability to the employer and 50 percent to the Tennessee Second Injury Fund. *Id.* at *4. The Tennessee Second Injury Fund appealed, arguing that the second injury would have resulted in permanent and total disability even if the employee did not have a prior injury. *Id.* at *5. The Tennessee Second Injury Fund noted that the employee returned to work after the first injury with no medical restrictions

or limitations, but after the second injury, he was in constant pain, had difficulty sleeping, and could not return to work. Following *Allen*, the Special Workers' Compensation Appeals Panel held that the trial court failed to provide the basis for its apportionment of liability between the Fund and the employer and remanded to the trial court for specific findings regarding the extent of disability caused by the second injury without consideration of the first injury. *Id.* at *1, 6.

Based on our review of the evidence, we find that the evidence preponderates against the trial court's finding that only 35 percent of Mr. Wyrick's permanent and total disability was attributable to the 2012 injury. Before the 2012 work-related incident, Mr. Wyrick was performing his job with no limitations. The injury required him to have a total left shoulder replacement. After surgery, Dr. Reynolds released Mr. Wyrick with significant permanent restrictions, and Mr. Wyrick was unable to return to work or do chores around his house as he did previously. He continued to have pain, experienced loss of strength and motion in his shoulder, and had to modify how he used his left hand. The injury interfered with his ability to work and do daily activities. Dr. Kennedy concluded that the 2012 injury permanently advanced and aggravated a pre-existing nonsymptomatic osteoarthritic condition into a painful and disabling condition that necessitated a total shoulder replacement. In Dr. Kennedy's opinion, Mr. Wyrick, more likely than not, would not have required shoulder replacement had it not been for the 2012 work-related incident.

Mr. Wyrick had a left shoulder injury in 1998 and a knee injury in 2005, but he returned to work with no restrictions after both injuries. When Mr. Wyrick was injured in 2012, he was working five days a week and able to fully perform all duties required of him. After the 2012 injury, he was unable to return to work because of pain and loss of strength and motion in his shoulder. He became permanently and totally disabled after the 2012 accident. There is no evidence that the prior injuries contributed to his disability.

We conclude that the evidence preponderates against the trial court's allocation of 35 percent disability to UPS as a result of the injury suffered by Mr. Wyrick on May 7, 2012. We remand this case to the trial court for an order allocating 100 percent of Mr. Wyrick's disability to UPS.

Conclusion

The trial court's judgment is reversed, and this case is remanded to the trial court for entry of an order consistent with this opinion. Costs are assessed to United Parcel Service and its surety, for which execution shall issue if necessary.

SHARON G. LEE, JUSTICE

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

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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 are assessed to United Parcel Service, and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM