

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
October 27, 2014 Session

SARAH ELIZABETH ADAMS v. STATE OF TENNESSEE

**Appeal from the Tennessee Claims Commission
No. 200809229966 Nancy C. Miller-Herron, Commissioner**

**No. W2014-00540-SC-R3-WC - Mailed December 2, 2014;
Filed January 5, 2015**

An employee injured her shoulder while working for her employer and failed to make a meaningful return to work. The Claims Commission awarded the employee 55% permanent partial disability. The employer appealed,¹ arguing that the award is excessive because the Commissioner erred in assessing an 11% anatomical impairment rating and in applying a five times multiplier. We modify the Commissioner's judgment, and affirm as modified.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;
Judgment of the Claims Commission Modified and Affirmed as Modified**

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which TONY A. CHILDRESS and DONALD E. PARISH, JJ., joined.

Robert E. Cooper, Jr., Attorney General & Reporter; Joseph Whalen, Acting Solicitor General; Eric A. Fuller, Assistant Attorney General, for the appellant, State of Tennessee.

Jeffrey A. Garrety and Charles L. Holliday, Jackson, Tennessee, for the appellee, Sarah Elizabeth Adams.

¹Pursuant 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.

OPINION

I. Factual and Procedural Background

Sarah Elizabeth Adams was hired as a corrections officer for the Tennessee Department of Correction ("employer") at the Northwest Corrections Complex, in Tiptonville, Tennessee. During the initial weeks of her employment, Ms. Adams received training at the Tennessee Correction Academy in Tullahoma, Tennessee. On or about September 22, 2008, Ms. Adams suffered an injury to her right shoulder when the self-defense instructor used Ms. Adams to illustrate a "take-down" technique.

After notifying her employer of the injury, Ms. Adams saw a local doctor in Tullahoma. When Ms. Adams returned home to Obion County, her employer referred her to Dr. Blake Chandler, an orthopedic surgeon. From January 2009 to January 2010, Dr. Chandler performed three surgeries on Ms. Adams' right shoulder. Ms. Adams returned to work in March 2010, however, she left again after two weeks due to continuing shoulder problems. On June 17, 2010, Dr. Chandler placed Ms. Adams at maximum medical improvement. Because her employer could not accommodate Dr. Chandler's restrictions, Ms. Adams was released from her position.

Ms. Adams had earlier filed a request for assistance with the Department of Labor and Workforce Development ("Department of Labor"). On March 9, 2011, the Department of Labor notified Ms. Adams that the Benefit Review Conference was waived.² On March 16, 2011, Ms. Adams filed this workers' compensation complaint with the Claims Commission, alleging that she has suffered permanent disability as a direct result of her injuries.

After her complaint was filed, Ms. Adams sought treatment from Dr. Adam Smith, an orthopedic surgeon, for continuing problems with her shoulder. Dr. Smith opined that Ms. Adams had suffered a re-tear of her rotator cuff, and he performed a fourth surgery on January 16, 2012. The Commissioner held Ms. Adams' case in abeyance until November 30, 2012, or until Ms. Adams reached maximum medical improvement. Dr. Smith released Ms. Adams on August 29, 2012.

The trial was held on January 7, 2014, and consisted of the live testimony of Ms. Adams and the deposition testimony of Dr. Apurva R. Dalal and Dr. Smith. The parties

²The Department of Labor indicated that pursuant to Tennessee Code Annotated section 9-8-307 (Tennessee Claims Commission) the Department had no authority to hear workers' compensation claims filed by state employees.

stipulated that Ms. Adams gave proper notice of her injury; that her compensation rate was \$313.54; that she did not make a meaningful return to work; and that she sustained some permanent disability as a result of her work-related injury. The parties agreed that the only issue for determination by the Commissioner was the extent of Ms. Adams' permanent and partial disability.

Ms. Adams testified that she was thirty-six-years old at the time of the trial. Upon graduation from high school, Ms. Adams worked as a general office assistant in her mother's company. She was also on active duty for two years in the United States Army where she served in the military police. She remained in the Army Reserve until 2005 at which time she served approximately one year with the Missouri National Guard. Ms. Adams said that she was medically released after a diagnosis of diabetes mellitus and ensuing insulin dependency. In 2005 and 2006, Ms. Adams was employed with the Missouri Department of Correction until she returned to full-time employment with her mother's company. Approximately two years later, Ms. Adams was hired by a security company at the Tyson plant in Obion County, Tennessee. Ms. Adams expressed her belief that she could not return to any of these previous types of jobs because of the lasting effects of her shoulder injury.

Ms. Adams left her job at the Tyson plant to become a corrections officer with the State of Tennessee. When her shoulder injury resulted in her release from that position, Ms. Adams entered a licensed practical nurse (LPN) program. Because she continued to suffer from shoulder pain, however, Ms. Adams contacted the State and received further treatment from Dr. Smith. Ms. Adams explained that she received some initial benefits from the fourth surgery but that the surgery did not relieve all of her shoulder pain.

Ms. Adams completed her LPN certification and began work as an LPN. She initially worked for a company that provided private care to homebound clients. Subsequently, she worked at a nursing home and rehabilitation center before accepting employment at a long-term skilled nursing home. The employers were aware that Ms. Adams required assistance in performing her daily tasks and made accommodations for her. Nonetheless, Ms. Adams continued to have problems in rendering patient care. When asked about the possibility of becoming a registered nurse (RN), Ms. Adams said that the tasks of an RN were more demanding and required even more dexterity than an LPN. Because of the difficulties she experienced as an LPN, Ms. Adams opined that neither an LPN nor an RN was a viable long term option.

Ms. Adams stated that she has daily pain ranging from a dull ache to sharp pain accompanied by loss of function, strength, and range of motion. She also has difficulty with most routine daily tasks including driving, bathing, getting dressed, and washing her hair.

On cross-examination, Ms. Adams confirmed that she graduated from high school, attended a community college for two semesters, and attended the technology center LPN program. She agreed that she was paid minimum wage on many of her earlier jobs and earned \$2,200 per month in her position at the correctional complex. Ms. Adams earned \$13.00, \$15.25, and \$16.00 per hour, respectively, in her LPN positions.

Dr. Dalal, an orthopedic surgeon,³ testified that he performed an independent medical examination (IME) on October 11, 2010, at the request of Ms. Adams' attorney. Dr. Dalal reviewed Dr. Chandler's records and conducted his own physical examination of Ms. Adams. Dr. Dalal was aware that Dr. Chandler performed three surgeries on Ms. Adams. The first surgery was performed on January 22, 2009, "where arthroscopy was performed with subacromial decompression and distal clavicular excision." On May 28, 2009, Dr. Chandler performed a second surgery for "cuff repair and subacromial decompression." The third surgery on January 7, 2010, involved "a scope with repair of the recurrent rotator cuff tear with subacromial decompression" and an added "biceps tenotomy." Dr. Dalal explained that a biceps tenotomy requires a surgeon to cut the biceps tendon. He described the procedure as a drastic measure that should only be performed in extreme cases.

Dr. Dalal said that Ms. Adams complained of constant shoulder pain and stiffness in her right arm. She also informed Dr. Dalal that she had problems with bathing, dressing, eating, sleep, and sexual activity. Dr. Dalal assigned an 18% anatomical impairment rating to the right upper extremity which equates to an 11% rating to the body as a whole. He placed restrictions on Ms. Adams, instructing her to avoid overhead work and lifting of more than twenty-five pounds with her right arm.

On October 1, 2012, Dr. Dalal re-evaluated Ms. Adams after a fourth surgery in which Dr. Smith performed "an open shoulder rotator cuff repair using a graft jacket . . . and extensive debridement of the labral tissue." Ms. Adams reported to him that her functionality diminished with each surgery. She explained to Dr. Dalal that she is unable to lift a gallon of milk without bracing her arm and cannot lift anything away from her body. This second physical examination revealed that Ms. Adams had significant deltoid atrophy on her shoulder. Dr. Dalal observed a ten-centimeter scar on the anterior aspect of Ms. Adams' shoulder resulting from the open rotator cuff repair. He also noted losses in her range of motion. Dr. Dalal added that Ms. Adams is at an increased risk of developing degenerative changes in this joint.

Dr. Dalal adhered to his previous anatomical impairment rating of 18% to the right upper extremity. He explained that the impairment rating for loss of range of motion is 13%

³Dr. Dalal testified that he is listed on the Tennessee Department of Labor's Medical Impairment Rating Registry and is certified by the American Board of Independent Medical Examiners.

and that the impairment rating for undergoing a distal clavicle excision is 12%. Of these alternative ratings, Dr. Dalal chose the 13% impairment rating. He further explained that the biceps tenotomy qualified Ms. Adams for an additional 5% impairment rating for a combined anatomical impairment rating of 18% to the right upper extremity or 11% to the body as a whole. Dr. Dalal amended his lifting restriction to five pounds.

Dr. Smith testified that he saw Ms. Adams on December 5, 2011, for a "second opinion" evaluation and treatment. Dr. Smith was aware of Ms Adams' injury and her three prior surgeries. His examination revealed a re-tear of her right shoulder rotator cuff. Ms. Adams elected to have surgery on January 16, 2012, to repair her rotator cuff and augment it with a patch or graft jacket. During the surgery, Dr. Smith observed signs of post-traumatic arthritis. In the post-operative examinations, Dr. Smith opined that Ms. Adams was progressing well. After a functional capacity evaluation, Dr. Smith placed her on overhead and over-the-shoulder lifting limitations of twenty pounds. Dr. Smith recommended "as little physical activity as possible," recognizing that restrictions can limit a person's ability to find employment. He urged Ms. Adams to self limit according to her pain level.

Dr. Smith and plaintiff's counsel engaged in the following colloquy about Ms. Adams' anatomical impairment rating:

Q. Doctor, do you have an opinion as to how much anatomical impairment this lady will have as a result of this surgical procedure that you provided and her response to it?

A. I put her at 10% upper extremity impairment on 8/29/12.

...

Q. Okay. What is your opinion as to the amount of impairment that she had from your surgery?

A. I rated her at 10% upper extremity impairment.

Q. And would that transpose to 6% to the whole person?

A. Yes.

On cross-examination, the employer's counsel and Dr. Smith had the following exchange:

Q. And when you did release her a couple of weeks later and you issued

your opinion as to her permanent partial disability, you said she had a 10% to the extremity, 6% body as a whole. That is lower than the prior disabling rating, prior to surgery.

Is it fair to say you fixed her?

A. No, I didn't fix her, per se. I -- We got the tendon to heal, but she was doing better.

Q. Is it fair to say that your surgical procedure accomplished its goal of lessening her permanent disability?

A. Yeah. I mean, my goal was to get the tendon to heal, plain and simple. The rest of the cards fall where they may.

Q. And that was accomplished by your --

A. Yes.

Q. -- procedure?

Finally, Ms. Adams' counsel and Dr. Smith ended this inquiry as follows:

Q. And, Doctor, does the rating have anything to do with anything other than the anatomic change that's permanent as a result of the surgery you performed? Does it take into account age, education, background, training, experience, or any of those factors?

A. The rating only took into factor functional abilities demonstrated.

Q. Doctor, would you agree that the anatomical purpose and function of the shoulder is to place the upper extremity and particularly the hand into space for use wherever the shoulder may accomplish that?

A. Yes.

Q. And did I understand your testimony on direct examination correctly that this lady is going to have problems and challenges, that she's not going to be the same right up next to herself, but as that hand and arm and elbow moves away from right at the side or directly in front of her, she's going to have increased challenges and limitations in carrying out

activities of work or daily living, whatever they may be?

A. Yes.

The Commissioner concluded that Ms. Adams had established by a preponderance of the evidence that she suffered significant permanent partial disability as a result of her shoulder injury. The Commissioner characterized the testimony of Dr. Dalal and Dr. Smith as "remarkably consistent," noting that the primary difference in their anatomical impairment ratings was the additional rating Dr. Dalal assigned for the biceps tenotomy. The Commissioner accepted Dr. Dalal's anatomical impairment rating of 11% and applied a five times multiplier to award Ms. Adams 55% permanent partial disability to the body as a whole. The employer appealed.

II. 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 trial court's factual findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). 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).

III. Analysis

The employer argues that Ms. Adams' award is excessive because the Commissioner erred (1) in accepting Dr. Dalal's 11% anatomical impairment rating rather than Dr. Smith's 6% rating and (2) in applying a five times multiplier. We agree that the award of five times the anatomical impairment did not comply with Tennessee Code Annotated section 50-6-(d)(2)(B) and modify the judgment accordingly .

Anatomical Impairment Rating

As noted, Dr. Dalal assessed an anatomical impairment rating of 13% to the right upper extremity while Dr. Smith assessed a 10% rating. Additionally, Dr. Dalal assessed an additional 5% anatomical impairment rating for the biceps tenotomy. The ratings of Dr. Dalal and Dr. Smith equated to 11% and 6% to the body as a whole, respectively. The Commissioner adopted Dr. Dalal's impairment rating.

The employer does not contend that Dr. Dalal's anatomical impairment rating is improper or unwarranted. Instead, the employer asserts that the Commissioner misinterpreted Dr. Smith's testimony and therefore erroneously discounted Dr. Smith's testimony when assessing Ms. Adams' impairment rating. This assertion is based on the Commissioner's remark in her judgment that "Dr. Smith, the treating physician, seemed to suggest that his anatomical rating was related to his surgery and not necessarily to the previous three surgeries." The employer argues that had the Commissioner properly accredited Dr. Smith's testimony, Ms. Adams' anatomical impairment rating would have been lower.

The record reveals that any lack of clarity in Dr. Smith's testimony stems from the questions Dr. Smith was asked during his deposition. As the colloquy illustrates, Dr. Smith was questioned about Ms. Adams' impairment in terms of "this surgery" and "your surgery." As counsel recognized during the closing arguments at trial, neither party requested clarification of Dr. Smith's answers during the deposition.

Because Dr. Smith testified by deposition, we may draw our own conclusions. See Foreman, 272 S.W.3d at 571. Having reviewed the deposition testimony, we conclude that the Commissioner's interpretation of Dr. Smith's testimony was reasonable. Although Dr. Smith was aware of Ms. Adams' entire course of treatment on her shoulder, counsel's questioning arguably narrowed the focus to "this surgery." Counsel could have clarified these issues during the deposition but failed to do so. We cannot speculate on the intended meaning of Dr. Smith's testimony and we resolve any doubt in the employee's favor. See Banks v. United Parcel Service, Inc., 170 S.W.3d 556, 561 (Tenn. 2005).

Notwithstanding the lack of clarity in Dr. Smith's testimony, we agree with Ms. Adams that the Commissioner relied less on the confusion surrounding Dr. Smith's impairment rating and more on the strength of Dr. Dalal's testimony. The Commissioner placed significance on Dr. Dalal's testimony concerning the biceps tenotomy and the additional impairment rating allowed for this procedure in the AMA Guidelines. The record indicates that the Commissioner simply gave greater weight to Dr. Dalal's testimony. Moreover, the employer concedes that nothing in the workers' compensation statute requires the court to give greater weight to the testimony of the treating physician. The evidence does

not preponderate against the Commissioner's findings.

Multiplier

The employer next argues that the Commissioner erred in applying a five times multiplier to Ms. Adams' 11% anatomical impairment rating.⁴ It specifically contends that the Commissioner failed to make "specific findings of fact" to support its award of five times the anatomical disability, as required Tennessee Code Annotated section 50-6-(d)(2)(B). That section states: "If the court awards a permanent partial disability percentage that equals or exceeds five (5) times the medical impairment rating, the court shall include specific findings of fact in the order that detail the reasons for awarding the maximum permanent partial disability."

Initially, we note that the Commissioner did not specifically reference section 50-6-241(d)(2)(B) when making her findings in this case. We have carefully reviewed the Commissioner's order. It contains a lengthy summary of Ms. Adams' testimony and an additional summary of the medical testimony. The trial court's summary of the testimony includes a few observations and general findings of fact. For the most part, however, the order merely summarizes the testimony without indicating which testimony is credited or which facts the trial court relies on to support its award of five times the anatomical disability. The order does not, for example, include specific findings of fact concerning the extent of Ms. Adams's disability. As noted above, Tennessee Code Annotated section 50-6-241(d)(2)(A) mandates "specific findings of fact in the order that detail the reasons for" the enhanced award.⁵

In the absence of such specific findings of fact detailing the reasons for the award, the appellate court would ordinarily remand the case for the trial court to make the required factual findings. In this case, however, we exercise our discretion and modify the award of permanent partial disability benefits to 54% to the body as a whole, below the level for which such specific findings are required. Having reduced the award of permanent partial disability

⁴As noted, the parties stipulated that Ms. Adams did not have a meaningful return to work and that the one and one-half times multiplier was inapplicable. See Tenn. Code Ann. § 50-6-241(d)(1)(A).

⁵ On occasion, an award of five or more times the impairment has been affirmed despite the lack of specific findings to support the award. See, e.g., Clay v. AT & T Mobility Servs., LLC, No. M2013-01557-WC-R3-WC, 2014 WL 3888188, at *5-6 (Tenn. Workers Comp. Panel Aug. 8, 2014); Freeman v. Gen. Motors Co., No. M2011-02284-SC-WCM-WC, 2012 WL 5197672, at *8 (Tenn. Workers Comp. Panel Oct. 22, 2012). The statute, however, mandates such findings if the trial court awards five or more times the impairment. Tenn. Code Ann. Section 50-6-241(d)(2)(A).

benefits to comply with section 50-6-241(d)(2)(B), we go on to examine the evidence in the record to determine if an award of 54% is excessive.

In determining the extent of an employee's vocational disability, the trial court must "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 [her] disabled condition." Tenn. Code Ann. § 50-6-241(d)(2)(A). The employee's own assessment of her physical condition and resulting disability cannot be disregarded. Walker v. Saturn Corp., 986 S.W.2d 204, 208 (Tenn. 1998); Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975).

The Commissioner indicated that she had considered Ms. Adams' age, education, and work history as a military police officer, general office assistant, corrections officer and LPN as summarized in the judgment. The Commissioner also considered Ms. Adam's testimony about her physical condition and resulting disability as well as the medical testimony summarized in the judgment. The Commissioner described Ms. Adams as "an enormously industrious woman" who secured training and employment as an LPN despite having had four shoulder surgeries. The Commissioner noted, however, that Ms. Adams cannot work as an LPN without accommodations from her employer, and recognized that even with accommodations the work caused her significant pain. The Commissioner further noted, based on medical testimony, that Ms. Adams can expect further arthritic changes in the future. The Commissioner also recognized that Ms. Adams suffers from bipolar disorder and is insulin dependent and will have significant challenges in the job market in the future.

The employer disagrees with the Commissioner's assessment of the evidence, specifically arguing that future arthritic problems are uncertain and that Ms. Adams' bipolar disorder and pre-existing diabetes are irrelevant.

We find no merit to these arguments. First, the medical proof revealed that Ms. Adams will likely experience arthritic changes over time. In fact, Dr. Smith personally observed signs of post-traumatic arthritis when he performed Ms. Adams' fourth surgery. Secondly, the Commissioner simply recognized that Ms. Adams suffered from bipolar disorder and diabetes in addition to her shoulder injury. The Commissioner never indicated, however, that these ailments were given any weight in assessing Ms. Adams' vocational disability.

The employer additionally claims that the Commissioner entirely ignored "the best available evidence" of Ms. Adams' vocational ability -- her unbroken chain of employment as an LPN at wages significantly higher than the wage earned from the employer. We disagree. The judgment indicates that the Commissioner was clearly aware of Ms. Adams' wages as an LPN, emphasizing the present willingness of Ms. Adams' LPN employers to

accommodate her restrictions.

An employee's re-employment following an injury is a relevant but not controlling factor in determining the extent of vocational disability and is one of many to be considered. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d at 452, 459 (Tenn 1988). The ultimate question in assessing vocational disability is "whether the employee's earning capacity in the open labor market has been diminished by the residual impairment caused by a work-related injury." Id. at 458. The Commissioner effectively recognized the diminution of Ms. Adams' "earning capacity in the open labor market" in that these accommodations will not likely always be made for Ms. Adams.

From our review of the record, we find that the Commissioner assessed the facts of Ms. Adam's case, including the credibility of the witnesses, and concluded that the five times multiplier was appropriate. We have modified that award to a level below the five-times multiplier because the Commissioner's findings did not comply with Tennessee Code Annotated section 50-6-241(d)(2)(B). However, we are nonetheless satisfied that the evidence establishes that Ms. Adams retains a very substantial disability as a result of her work injury. It is not the role of this Court "to simply substitute its judgment for that of the trial court in assessing the employee's vocational disability." Howell v. Nissan N. Am., Inc., 346 S.W.3d 467, 474 (Tenn. 2011) (citations omitted). We conclude that an award of 54% permanent partial disability is supported by the evidence.

IV. Conclusion

The award of permanent partial disability benefits is reduced to 54% to the body as a whole. As modified, the judgment of the Claims Commission is affirmed in all other respects. Costs are taxed against the State of Tennessee.

HOLLY M. KIRBY, JUSTICE

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

SARAH ELIZABETH ADAMS v. STATE OF TENNESSEE

**Tennessee Claims Commission
No. 200809229966**

No. W2014-00540-SC-R3-WC - Filed January 5, 2015

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's 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 Opinion of the Panel should be accepted and approved; and

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

Costs on appeal are taxed to the Appellant, State of Tennessee, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM