

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
April 22, 2013 Session

TONY WAYNE WILSON v. BILL JENNINGS ET AL.

Appeal from the Circuit Court for Bradley County
No. V-06-235 J. Michael Sharp, Judge

No. E2012-01966-WC-R3-WC
MAILED-JULY 1, 2013 / FILED-SEPTEMBER 19, 2013

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. This is the second appeal of this case. We previously affirmed the trial court's award of temporary total disability benefits and past medical expenses, but reversed its decision not to award permanent disability benefits and future medical expenses. *Wilson v. Jennings*, No. E2010-02028-WC-R3-WC, 2012 WL 727853 (Tenn. Workers' Comp. Panel Mar. 6, 2012). On remand, the trial court heard additional medical, vocational and other proof as to the employee's anatomical impairment and vocational disability. Based on that evidence, it awarded 200 weeks of permanent partial disability benefits and future medical expenses. The employer has again appealed, contending that the trial court erred by denying its motion for sanctions, by denying its motion in limine to exclude certain medical testimony, by relying on the proof of the employee's vocational expert and by awarding discretionary costs. We affirm the trial court's judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2012) Appeal as of Right; Judgment
of the Trial Court Affirmed**

E. RILEY ANDERSON, SP. J., delivered the opinion of the Court, in which GARY R. WADE, C.J., and JON KERRY BLACKWOOD, SR. J., joined.

John T. Rice, Chattanooga, Tennessee, for the appellant, Bill Jennings individually and d/b/a B & L Construction Company.

Jimmy W. Bilbo, Cleveland, Tennessee, for the appellee, Tony Wayne Wilson.

OPINION

Factual and Procedural Background

The underlying facts in this case are set out in detail in our previous opinion. Tony Wayne Wilson, the employee, worked as a frame carpenter for the defendant employer, Bill Jennings d/b/a B & L Construction Company. On October 27, 2005 Wilson fell twenty-three feet to the ground from the roof of a house in Bradley County, Tennessee, severely injuring his right ankle. Dr. Beasley at Bradley Memorial Hospital determined the right ankle had a pilon fracture and performed surgery applying a plate to the ankle. Dr. Beasley recommended Wilson avoid weight bearing on the ankle for ten months. In February of 2006 Wilson had additional surgery to repair a migrating screw from the original surgery. The defendant denied liability and did not provide a panel of physicians or pay medical expenses. After a period of time without treatment Wilson selected Dr. Walter King, an orthopedic surgeon in Chattanooga, as his treating physician. Dr. King examined Wilson on March 21, 2006. Wilson was on crutches and reported constant pain and swelling increased by any weight bearing. Dr. King instructed Wilson to avoid weight bearing and prescribed pain medication. Dr. King treated Wilson for twenty-one months until January 23, 2008, when he determined that Wilson had reached maximum medical improvement and had a decrease in plantar flexion, narrowing of the ankle joint, a gait disturbance and chronic pain. He determined Wilson had a 22% permanent anatomical impairment to the body as a whole.

At the time of trial on June 20, 2010, four years and eight months after his injury, Wilson described its continuing effects. He testified his ankle did not bend like it should; he could not climb hills; his ankle hurt every day and it limited his walking. He said he could not carry heavy pipes on his shoulders; that he could not climb; that he had to sit down a lot and had to take his work boot off to allow the swelling to go down. He also testified that four months before the June 2010 trial the hardware had been removed from his ankle. He testified that he was unemployed for eight months after the injury, then applied at Penn Gulf in July of 2006 and falsely told them he had no physical disability. He was laid off after three months because his ankle injury prevented him from doing the job. At the time of trial in 2010 he was employed by Fletcher Fire Systems, but still experienced pain and limitations.

The trial court found that Wilson had sustained a compensable injury and awarded past medical expenses and temporary disability benefits. However, although Dr. King, the treating physician, testified that Wilson had 22% permanent anatomical impairment to the body as a whole as a result of the injury, the trial court did not award permanent disability benefits or future medical expenses. We reversed that portion of the trial court's decision, and remanded the case with the following instructions:

Upon remand, the trial court shall make a finding on the extent of Wilson's

vocational disability in accordance with the statutes and case law previously cited. The findings shall consider Dr. King's permanent impairment rating, the present record, and any additional evidence the parties may wish to present about physical limitations or restrictions upon Wilson's activities and job performance, including evidence as to whether the removal of the surgical hardware from his right ankle caused any change in his impairment rating and, if so, the amount.

Wilson v. Jennings, No. E2010-02028-WC-R3-WC, 2012 WL 727853, at *7 (Tenn. Workers' Comp. Panel Mar. 6, 2012). Because it had been almost seven years since the injury with no payment by the defendant we asked the trial court to act expediently on the remand, and the trial court acted very promptly.

The evidence presented by Wilson after remand consisted of additional testimony from Wilson, live testimony from Dr. Julian Nadolsky, a vocational expert, and deposition testimony from Dr. William Kennedy, an orthopedic surgeon. The defendant presented documentary evidence of Wilson's post-injury applications for employment and unemployment benefits, but again offered no medical or vocational evidence of the extent of Wilson's disability.

Wilson testified that he was currently working as a pipefitter for a contractor at Olin Chemical Company, earning \$23.00 per hour. He had worked in similar positions for CHC Mechanical Contractors and Quality Fire Sprinkler Installation Service since the previous trial in June of 2010. He reported that his right foot became swollen and painful at the end of his work day and that he occasionally missed work because of these problems. He had difficulty climbing stairs and ladders and carrying heavy pipes on his right side. During both direct and cross-examination, Wilson admitted that he had made false statements concerning his physical condition on employment applications but explained that he had no income and needed to work. He also admitted that he had been incarcerated on the complaint of his ex-girlfriend for three months, during which time unemployment compensation benefits were paid to his ex-girlfriend. He explained that the claims had been submitted and the payments received by his ex-girlfriend without his knowledge and that he had reported that to the Department of Labor along with evidence of her forgery of his signature on the unemployment checks and deposits to her bank account.

Dr. Kennedy examined Wilson on January 11, 2012. Based on x-rays and his clinical examination, he said that Wilson had developed post-traumatic arthritis in his right ankle and had diminished range of motion in several planes and muscle atrophy in the right leg. He also had a "varus deformity," which Dr. Kennedy described as "residual bowing at the fracture site." Dr. Kennedy concluded that Wilson had a 30% permanent anatomical

impairment to the right leg, based upon the Fifth Edition of the AMA Guides. He recommended that Wilson avoid ladder climbing, excessive stair climbing and working on rough terrain or slippery or sloping surfaces. He also recommended lifting and carrying restrictions of ten pounds frequently or twenty pounds occasionally.

During cross-examination, Dr. Kennedy testified that he was unaware of most of Wilson's post-injury employment history. He also stated that Wilson's representations in job applications relating to his physical disabilities were inconsistent with the information he provided during the examination, but that it did not change Dr. Kennedy's opinion of Wilson's anatomical impairment. He explained that his opinion is based on objective physical findings and the diagnosis and not in any way on Wilson's ongoing symptoms.

Dr. Nadolsky interviewed Wilson on April 16, 2012 and issued a written report on June 18, 2012. His testing revealed that Wilson was able to read at an eighth grade level and perform arithmetic at a high school level. Based on those results, Wilson's work history and the restrictions suggested by Dr. Kennedy, Dr. Nadolsky concluded that Wilson had sustained a 58% vocational loss due to his work injury. Dr. Nadolsky testified that Wilson was not capable of performing the job at which he was currently employed. He conceded that he had not received or reviewed any employment records as part of his evaluation and that he did not have full knowledge of Wilson's post-injury work history. He was also unaware of Wilson's representations in various applications for jobs or unemployment benefits that he was able to perform work without restriction or accommodation. He stated, however, that his lack of such knowledge did not change his opinion that Wilson had sustained a 58% vocational loss due to his injury.

The parties introduced by stipulation Wilson's applications for unemployment benefits and materials from his job applications for three post-injury employers.

The trial court found Dr. Kennedy to be a credible witness, but adopted the 22% anatomical impairment assigned by Dr. King, the original treating physician. The court further found that Wilson had sustained a 58% vocational loss from his work injury and awarded 200 weeks of permanent disability benefits, equivalent to 100% permanent partial disability of the right leg, and future medical expenses. The defendant has appealed from that judgment.

Standard of Review

Appellate review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2008 & Supp. 2012), which provides that appellate courts must "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding,

unless the preponderance of the evidence is otherwise.” As our supreme court has observed many times, reviewing courts must conduct an in-depth examination of the trial court’s factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court’s factual findings. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008). Similar deference need not be afforded the trial court’s findings based upon documentary evidence such as depositions. *Glisson v. Mohon Int’l, Inc./Campbell Ray*, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court’s conclusions of law. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Denial of Sanctions

The defendant first argues that the trial court erred by not granting his motion for sanctions based on Wilson’s alleged failure to seasonably supplement his interrogatory responses prior to the first trial and appeal of this case. The defendant asserts that Wilson failed to provide W-2s and other information concerning his employment in 2009 and 2010. The defendant argues that this Panel’s decision in the initial appeal would have been different if this information had been contained in the record. Wilson responds that the first case in which interrogatories were requested was dismissed and that when the case was re-filed no interrogatories were requested. Wilson argues that the defendant presents no legal authority that would require supplementation of the interrogatories. In any case all the evidence was made available to the trial court and the defendant on remand and the trial court found that the motion for sanctions should be denied.

Our prior opinion refers to Wilson’s work at and before the time of the trial and notes his misrepresentation of his physical condition on an employment application. After remand the discovery responses were supplemented. As a result, the defendant obtained additional information and documents from job and unemployment compensation applications made by Wilson. Some of that information involved Wilson’s employment prior to the 2010 trial and some of the information concerned post-trial employment. All of the information was included in this record by stipulation of the parties. We have examined it carefully, and find it to be cumulative. Some of the documents reflect negatively on Wilson’s credibility. However, it is undisputed that he fell from a roof while working for the defendant’s subcontractor, suffered a severe ankle fracture and retained a significant permanent impairment as a result of the work injury. We conclude that the trial court did not abuse its discretion and correctly denied the defendant’s motion.

Exclusion of Dr. Kennedy’s Testimony

The defendant next asserts that the trial court should have excluded the deposition

testimony of Dr. Kennedy because his opinions lacked trustworthiness and because the Panel's previous opinion "did not allow for additional impairment rating." Our instruction to the trial court to consider "any additional evidence the parties may wish to present about physical limitations or restrictions upon Wilson's activities and job performance, including evidence as to whether the removal of the surgical hardware from his right ankle caused any change in his impairment rating and, if so, the amount[,]" *Wilson*, 2012 WL 727853, at *7, both anticipated and encouraged the presentation of additional medical evidence. The defendant's interpretation of that language is simply incorrect. We note the defendant did not provide any medical evidence. His complaint about the trustworthiness of Dr. Kennedy's opinions appears to be based on alleged inaccuracies in the history provided by Wilson. These concerns address the weight, rather than the admissibility, of Dr. Kennedy's testimony. In that regard, it is noteworthy that the trial court found Dr. Kennedy to be credible but did not adopt his impairment rating in its findings. A trial court generally has the discretion to choose which expert to accredit when there is a conflict of expert opinions. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel 1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990). Accordingly, we find no error in the trial court's denial of the defendant's motion to exclude Dr. Kennedy's testimony.

Dr. Nadolsky's Testimony

The defendant also contends that the trial court erred by adopting Dr. Nadolsky's opinion concerning Wilson's vocational disability. He argues that Dr. Nadolsky's analysis was flawed because it did not include a statistical analysis concerning job availability in Bradley County, Tennessee. The defendant does not cite any authority to support his position that such an analysis is a necessary component of vocational testimony. Tennessee Code Annotated section 50-6-242(b)(4) (2008 & Supp. 2012) requires evidence on the subject of local job opportunities when an injured employee seeks an award in excess of the six times impairment limit contained in Tennessee Code Annotated section 50-6-241(d)(2)(A) (2008 & Supp. 2012). However, the award in this case is less than six times the impairment, and that requirement is not applicable here. The trial court found Dr. Nadolsky to be credible. The defendant presented no evidence that Dr. Nadolsky's method was flawed in any way nor did he present a vocational expert with a contrary opinion. We conclude that the trial court correctly considered and adopted Dr. Nadolsky's conclusion.

Discretionary Costs

The defendant also contends that the trial court erred by granting Wilson's motion for discretionary costs. *See* Tenn. R. Civ. P. 54.04(2). When deciding whether to award costs under Rule 54.04(2) a court should (1) determine whether the party requesting the award is the "prevailing party," (2) limit the award to the costs specifically identified in the rule, (3) determine whether the requested costs are necessary and reasonable, and (4) determine whether the prevailing party has engaged in conduct during the litigation that warrants

depriving it of the discretionary costs. *Massachusetts Mut. Life Ins. Co. v. Jefferson*, 104 S.W.3d 13, 35-36 (Tenn. Ct. App. 2002). Rule 54.04(2) discretionary costs address themselves to the sound discretion of the trial court. *Freeman v. CSX Transp., Inc.*, 359 S.W.3d 171, 180 (Tenn. Ct. App. 2010). Accordingly, on appeal the party contesting an award of discretionary costs has the burden of showing the trial court abused its discretion.

In the case at bar Wilson is the “prevailing party” under Rule 54.04. In addition, there is no proof in the record that the costs awarded are not of the type “specifically identified in the rule,” that the costs are not “reasonable and necessary,” or that Wilson engaged in conduct that would warrant depriving him of discretionary costs. The defendant has the burden of showing that the trial court’s award of discretionary costs was an abuse of discretion. In this case the defendant has provided no evidence that the discretionary costs were unreasonable and unnecessary or that the trial court’s award of discretionary costs was an abuse of discretion. The defendant’s contention is without merit.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Bill Jennings, individually and d/b/a B & L Construction Company, and his surety, for which execution may issue if necessary.

E. RILEY ANDERSON, SP. JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

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**Circuit Court for Bradley County
No. V06235**

No. E2012-01966-SC-WCM-WC-FILED-SEPTEMBER 19, 2013

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Bill Jennings d/b/a B&L Construction Company pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(A)(ii), 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.

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 Bill Jennings, individually and d/b/a B&L Construction Company, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

GARY R. WADE, C.J., not participating