IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
February 13, 2017 Session

CHARLES STEVEN BLOCKER v. POWELL VALLEY ELECTRIC COOPERATIVE, ET AL.

Appeal from the Chancery Court for Claiborne County
No. 18-519 Elizabeth C. Asbury, Chancellor

No. E2016-01053-SC-R3-WC – MAILED 3/10/2017

Charles Steven Blocker ("Employee") sustained a compensable injury to his cervical spine in November 2010. Surgery was required to treat the injury. He was able to return to work for Powell Valley Electric Cooperative ("Employer") after that injury. His claim for workers' compensation benefits was settled. Employee suffered a second, gradual injury to his cervical spine in January 2013. He was unable to return to work after that injury. He brought suit in the Chancery Court for Claiborne County against Employer and the Tennessee Department of Labor and Workforce Development, Second Injury Fund ("the Fund"). The parties stipulated that Employee was permanently and totally disabled. The only issue presented to the court was apportionment of the permanent total disability benefits between Employer and the Fund. The trial court found that the second injury had caused a 9% permanent partial disability without reference to the prior injury. Benefits were apportioned 9% to Employer and 91% to the Fund. The Fund has appealed, contending that the trial court incorrectly apportioned the award. 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 reverse 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 Chancery Court Reversed and Case Remanded for Further Proceedings

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which SHARON G. LEE, J., and ROBERT E. LEE DAVIES, SR.J., joined.

Herbert H. Slatery III, Attorney General and Reporter, Andreé S. Blumstein, Solicitor

General, and Alexander S. Rieger, Assistant Attorney General, for the appellants, Tennessee Department of Labor and Workforce Development, Second Injury Fund, and Abigail Hudgens.

W. Stuart Scott, Nashville, Tennessee, for the appellees, Powell Valley Electric Cooperative, and Federated Rural Electric Insurance Exchange.

Ameesh A. Kherani, LaFollette, Tennessee, for the appellee, Charles Steven Blocker.

OPINION

BACKGROUND

Employee at the time of trial was a fifty-two-year-old male who worked for Employer from 1988 until 2013. His educational history consisted of high school and attending Tennessee Institute of Electronics in Knoxville, where he completed a twelve-month program on the theory of electricity and electronics. Following this program, he served in the Air Force as a wide-band communication equipment specialist, an electronic-related position. The technical training he received from these sources is now obsolete.

Employee's first ten years with Employer were spent as a lineman. Thereafter, he served as Director of Apparatus Maintenance. This job consisted of maintenance and repair of electric substations. The work was physically demanding, requiring daily lifting of nitrogen bottles weighing between forty and fifty pounds. Several times a month, he had to lift bottles weighing up to 185 pounds. He normally worked alone.

On November 19, 2010, Employee injured his neck while changing out a nitrogen bottle on a power transformer. He felt something pop in his neck and experienced a burning sensation. Over the next couple of days, pain started to radiate down his left arm.

When conservative therapy did not provide relief, Employee's treating physician, Dr. James Killeffer, performed a fusion of the C5, C6, and C7 vertebrae and placed a steel plate in the front of Employee's neck. Much of the numbness in his left arm went away, but the pain in the back of his neck continued to a lesser degree. He was released to return to work in July 2011. As permanent restrictions, he was advised not to lift with his arms outstretched and to keep his elbows as close as possible to his torso when working. He was instructed to use common sense and do whatever he could do but to stop doing anything that hurt.

Employer accommodated Employee by providing assistance for tasks outside his limitations. He was able to continue his duties as Director of Apparatus Maintenance but adjusted the manner in which he performed certain tasks, such as checking overhead insulators. He also used over-the-counter medications such as Tylenol and Ibuprofen to manage his pain.

Employee's workers' compensation claim was settled in February 2012 based on an approximate 19.6% permanent partial disability. In January 2013, Employee reported to Employer that his neck pain had increased, and the numbness and tingling in his left hand relieved by the 2011 surgery had returned. The increased pain and numbness was not triggered by any specific event; rather, it developed gradually. Dr. Killeffer diagnosed a herniated disc at the C4-5 level and concluded that the 2011 surgery had placed Employee at risk for disc problems at adjacent levels of the cervical spine. Dr. Killeffer performed a fusion of the C4 and C5 vertebrae in June 2013.

Dr. Killeffer released Employee to return to work on November 8, 2013, and gave restrictions of sedentary work with no lifting greater than ten pounds and no overhead work. Employer was not able to accommodate these limitations, and Employee was terminated.

Dr. William Kennedy, an orthopedic surgeon, performed an independent medical examination of Employee on October 6, 2014. He completed a C-32 medical report. Employer then conducted a cross-examination deposition pursuant to Tennessee Code Annotated section 50-6-235(c)(1) (2014) (applicable to injuries occurring prior to July 1, 2014). Dr. Kennedy confirmed that one of the risks of the 2011 surgery was that additional stress was placed on the discs above and below the fused area, thereby increasing the risk of additional injury. He assigned 8% impairment for the second injury using the same table from the Sixth Edition of the American Medical Association Guides used by Dr. Killeffer, who had assigned 15% impairment for the 2010 injury and added an additional 4% for the 2013 injury and surgery.

Dr. Kennedy opined that cumulative trauma occurring between July 2011 and January 2013 was the primary cause of Employee's C4 disc herniation; if Employee had not had the 2010 injury and 2011 surgery, the 2013 disc herniation would not have occurred; and if only the 2013 injury had occurred, Employee would have been able to return to work. He concluded that Employee was currently unable to work because of the combined effects of both injuries.

Dr. Kennedy agreed that Employee described his job between 2011 and 2013 as very demanding and that he understood the job was essentially the same before and after the 2010 injury. He observed that the restrictions imposed on Employee after the 2013

injury were "dramatically different" than his prior work restrictions. He agreed with these restrictions and added that Employee should be able to control his posture with regard to sitting, standing, and walking; be able to maintain a comfortable neutral position of his head as in looking forward; and should not be expected to turn or tilt his head to extremes or maintain a position other than neutral for prolonged periods.

Michael Galloway, a vocational evaluator, vocational rehabilitation counselor, certified rehabilitation counselor, and board-certified disability analyst, conducted an assessment of Employee on August 19, 2015. Mr. Galloway interviewed Employee about his education, work history, activities of daily living, and medical history. He also administered some academic testing, which revealed that Employee was able to read words at an 11th grade level and perform math above the 12th grade level. He also reviewed the medical records and reports from Drs. Killeffer and Kennedy.

Mr. Galloway noted that Employee was a 1982 high school graduate who had received technical training at the Tennessee Institute of Electronics in 1983 and some training related to electronics while serving in the United States Air Force. He was employed by Employer in 1988, and this was his essential and past relevant employment, which was greater than fifteen years. Employee's technical training in electronics quickly became outdated because of rapid changes in technology.

Mr. Galloway stated that the most important information for his evaluation of Employee's vocational disability consisted of the permanent restrictions placed on him by the medical doctors, which limited Employee to "less than sedentary" work. The skills he acquired in his work for Employer were not transferrable to other types of work. As a result, Employee no longer had access to any job in the local labor market or the larger Knoxville Metropolitan labor market. Mr. Galloway opined that Employee was 100% disabled and that there were no jobs in the local labor market for unskilled, less than sedentary workers.

During cross-examination by Employer, Mr. Galloway confirmed that he was not a medical doctor and relied on the findings of the medical doctors who treated or examined Employee. He stated that he did not attribute Employee's vocational disability to any particular injury. He was asked a hypothetical question based on Dr. Kennedy's testimony that perhaps the 2013 injury would not have occurred but for the changed spinal mechanics caused by the 2010 injury. Mr. Galloway responded that, if Employee had not undergone surgery or had restrictions and had successfully returned to work, there would have been no vocational disability. Viewing the matter from another perspective, Mr. Galloway stated that if only the 2013 injury had occurred, and Employee had successfully returned to work, the disability from that injury would have been minimal.

Questioned by the Fund, Mr. Galloway stated that, if there had been no previous injury, Employee would be 100% disabled based on the medical restrictions assigned after the 2013 injury and surgery. Mr. Galloway also testified that, based on the restrictions assigned after the 2010 injury and 2011 surgery, Employee would have had a "minimal" disability. He added that Employee's pre-injury job would be classified as "heavy to very heavy" work according to the Dictionary of Occupational Titles. Based on Employee's statements, Mr. Galloway understood that the job duties of Director of Apparatus Maintenance did not change after Employee returned to work in 2011 and that Employee was still able to perform the job, albeit with some pain and assistance. Mr. Galloway restated that his analysis was not based on medical impairment or course of treatment. Further, causation is not relevant to determining vocational disability.

In response to additional questioning by Employee and Employer, Mr. Galloway noted that he did not disagree with Dr. Kennedy's testimony that Employee's disability was due to the combination of the two injuries and surgeries. Finally, he restated his opinion, based on the information provided to him, without consideration of hypotheticals or additional medical information, that Employee was 100% disabled from the 2013 injury.

Prior to presentation of the proof, the parties made the following stipulations:

(1) That Employee is at the maximum compensation rate under Tennessee Code Annotated section 50-6-102, which is $806.00 for the purposes of permanent partial or permanent total disability;
(2) That Employee is permanently and totally disabled, and as such, this case needs to be analyzed under Tennessee Code Annotated section 50-6-208(a);
(3) That the prior orders of workers' compensation stated the disability that has been awarded to Employee.

THE TRIAL COURT RULING

After hearing the proof, the trial court issued its findings and ruling, the pertinent part of which is as follows:

(1) Employee was entitled to the maximum weekly benefits which equated to $806.00 per week;
(2) Employer was provided timely notice of Employee's 2010 and 2013 injuries;
(3) The 2013 injury was causally and primarily related to Employee's employment and resulted in the industrial accident and/or occupational

injury which Employee sustained in January 2013;

(4) Employee was permanently and totally disabled after the subsequent injury;

(5) Employee sustained a 9% vocational disability as a result of the 2013 injury using the one and one half times impairment cap under Tennessee Code Annotated section 50-6-241(d)(1)(A);

(6) Employer is liable for the 9% disability and the Fund is liable for the balance, or 91%, of the permanent and total disability benefits.

The Fund appealed. The appeal was referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law under Tennessee Supreme Court Rule 51.

ISSUE PRESENTED

We consider the issue raised in the appeal to be slightly different from that noted by the parties. Namely, whether the trial court correctly determined the portion of disability caused solely by the 2013 injury standing alone and, thus, made the proper apportionment of vocational disability to Employer and the Fund.

STANDARD OF REVIEW

"The extent of an injured worker's permanent disability is a question of fact." *Lang v. Nissan N. Am., Inc.*, 170 S.W.3d 564, 569 (Tenn. 2005) (citing *Jaske v. Murray Ohio Mfg. Co., Inc.*, 750 S.W.2d 150, 151 (Tenn. 1988)). 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 of testimony are involved, considerable deference is given to the trial court when the trial judge had the opportunity to observe the demeanor of witnesses and to hear in-court testimony. *Madden v. Holland Grp. 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).

In this appeal, the Fund is not challenging the trial court's findings of fact, but rather is taking issue with the court's interpretation and application of Tennessee Code

Annotated sections 50-6-208(a) and 50-6-241. "The interpretation of a statute and its application to undisputed facts involve questions of law." *Seiber*, 284 S.W.3d at 298 (citing *U.S. Bank, N.A. v. Tenn. Farmers Mut. Ins. Co.*, 277 S.W.3d 381, 386 (Tenn. 2009); *Waldschmidt v. Reassure Am. Life Ins. Co.*, 271 S.W.3d 173, 175 (Tenn. 2008)).

THE APPORTIONMENT OF PERMANENT TOTAL DISABILITY BENEFITS BETWEEN THE FUND AND EMPLOYER

The apportionment of permanent total disability benefits between the Fund and Employer is governed by Tennessee Code Annotated section 50-6-208(a)(1) which states:

> 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 under this chapter from the employer or the employer's insurance company; provided, that in addition to the 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.

Id.

The Tennessee Supreme Court explained the method of apportioning liability for subsequent injuries in *Allen v. City of Gatlinburg*, 36 S.W.3d 73 (Tenn. 2001):

> [I]t is essential that the trial court determine the extent of disability resulting from the subsequent injury without consideration of the prior injury. In other words, the trial court must find what disability would have resulted if a person with no preexisting disabilities, in the same position as the plaintiff, had suffered the second injury but not the first. This is expressly required by subsection (a) . . . .

Id. at 77 (citation omitted). The Court further elaborated in *Watt v. Lumbermens Mutual Casualty Insurance Co.*, 62 S.W.3d 123 (Tenn. 2001), as follows:

> [T]rial courts in Second Injury Fund cases must first determine whether the

> employee has been permanently and totally disabled by the combination of two or more injuries. As defined by statute, this inquiry involves a determination whether the employee has been "totally [incapacitated] . . . from working at an occupation which brings the employee an income." Tenn. Code Ann. § 50-6-207(4)(B) (1999 Repl.). The trial court may not reconsider the extent of disability caused by any prior compensable injury; prior courts' findings of disability must be given conclusive effect. The trial court is not barred, however, from concluding that the combined effects of two injuries are greater than the individual disability which would have been caused by those injuries in isolation, so that an employee may be found permanently and totally disabled and may receive benefits under subsection (a) of the Second Injury Fund statute even though the individual percentages of disability attributable to the two injuries do not equal 100 percent when added together.

Id. at 131-32. Similarly, the Court noted in *Seiber*: "[W]ith regard to employees who become permanently and totally disabled, employers are responsible only for the work-related disability that would have resulted from the subsequent injury had the earlier physical disability not existed." 284 S.W.3d at 299 (citing *Bomely v. Mid-Am. Corp.*, 970 S.W.2d 929, 934 (Tenn. 1998)).

ANALYSIS

The trial court's bench ruling states that the disability resulting from the 2013 injury was determined without reference to the previous injury. In that regard, the trial court applied the appropriate principle. However, the trial court then analyzed that injury pursuant to the method set out in Tennessee Code Annotated section 50-6-241(d)(1)(A). First, it fixed the anatomical impairment at 6% to the body as a whole, essentially averaging the impairments assigned by Dr. Kennedy of 8% and Dr. Killeffer of 4%. The trial court then made an implicit finding that Employee likely would have been able to return to work if only the second injury occurred. On that basis, the trial court applied the one and one-half times impairment "cap" applicable to employees who successfully return to work after injury. Tenn. Code Ann. § 50-6-241(d)(1)(A). The only competent evidence presented on that subject was the testimony of Dr. Kennedy, who stated that the second surgery was less extensive than the first and that Employee most likely would have been able to return to work if the 2010 injury had not occurred.

The Fund asserts that the trial court's reliance on Tennessee Code Annotated section 50-6-241 was misplaced, contending that it is applicable only to awards of permanent partial disability and not applicable to awards concerning permanent total disability. This is consistent with *Davis v. Reagan*, 951 S.W.2d 766 (Tenn. 1997), in

which the court stated:

> Both the procedures established by the Workers' Compensation Act and the plain and ordinary language of Tenn. Code Ann. § 50-6-241 convey a specific legislative intent to limit § 50-6-241's application to awards of permanent partial disability. We, therefore, hold that § 50-6-241 is inapplicable to permanent total disability . . . .

Id. at 769.

Neither Employer nor Employee has cited any cases in which the Tennessee Supreme Court or this Panel has directly addressed the interplay, if any, between sections 50-6-208(a) and 50-6-241. Employer appears to concede that application of the "caps" described in section 50-6-241 to this case would be inappropriate. However, Employer reports that the trial court nodded affirmatively in response to a statement of counsel concerning Employer's use of section 50-6-241, arguing that this demonstrates that the trial court made an independent assessment of disability without considering that section. We are unable to make the assumption required to accept this argument. In making its oral findings, the trial court specifically referred to section 50-6-241, and specifically used the one and one-half times impairment cap set out in section 50-6-241(d)(1)(A) to calculate Employee's disability. Those findings were incorporated by reference in the judgment. It is long-established that a court speaks through its written orders. *Williams v. City of Burns*, 465 S.W.3d 96, 119 (Tenn. 2015); *see also Palmer v. Palmer*, 562 S.W.2d 833, 837 (Tenn. Ct. App. 1977). We therefore take the trial court's description of its method at face value. We conclude that the use of the cap described in section 50-6-241 was not appropriate in the circumstances of this case.

Without considering section 50-6-241, we now examine the evidence supporting the trial court's finding that the 2013 injury would have resulted in a 9% permanent partial disability and the evidence contradicting that finding. Employee was fifty-two years old when the trial occurred. He is a high school graduate. He received one year of training in electronics at a technical school and additional training on the subject during his four years of service in the United States Air Force. That training, according to Employee and Mr. Galloway, is now obsolete. After leaving the Air Force, Employee worked for Employer from 1988 until 2013, first as a lineman and then as Director of Apparatus Maintenance. Mr. Galloway testified that both of those jobs fell into the category of heavy work. The jobs were skilled, but, unfortunately, those skills were not transferrable to other types of employment. Employee had no supervisory or management experience.

Prior to the January 2013 injury and the resulting surgery, Employee was able to

perform this heavy work with relatively simple accommodations by Employer. After that injury and surgery, he was assigned draconian restrictions by Dr. Killeffer and Dr. Kennedy. Mr. Galloway testified that Employee's restrictions limited him to sub-sedentary work, which means that he "no longer has the capacity to perform even the most minimal classification of work." Unskilled sedentary work comprises less than 1% of the relevant labor market. Mr. Galloway also testified that Employee was totally disabled based on the restrictions resulting from the 2013 injury, without consideration of the 2010 injury. Presented with a description of Dr. Kennedy's deposition testimony, Mr. Galloway agreed that Employee's disability was a result of the combined effects of the two injuries.

Taking all of these factors into account, we conclude that the evidence demonstrates that Employee suffered substantial disability as a result of the 2013 injury alone and that the evidence preponderates against the trial court's finding that the injury caused a 9% disability to the body as a whole. We reverse the trial court's finding as to the extent of Employee's vocational disability as a result of the 2013 injury and remand this case to the trial court for reassessment of the vocational disability. *See Howell v. Nissan N. Am., Inc.*, 346 S.W.3d 467, 474 (Tenn. 2011) ("Although an appellate court may certainly reverse or modify a trial court's award of workers' compensation benefits under the appropriate circumstances, it is not the role of an appellate court to simply substitute its judgment for that of the trial court in assessing the employee's vocational disability." (citing *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 335 (Tenn. 2008))).

Therefore, we remand this case to the trial court to reassess Employee's 2013 vocational disability consistent with this opinion and thereafter to make the appropriate assignment of the award to Employer and the Fund.

CONCLUSION

This case is remanded to the trial court for further proceedings consistent with this opinion. Costs are taxed one-half to the Tennessee Department of Labor and Workforce, Second Injury Fund and one-half to Powell Valley Electric Cooperative and Federated Rural Electric Insurance Exchange, for which execution may issue if necessary.

JOHN W. McCLARTY, JUDGE