

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

February 22, 2010 Session

TRANSPORT SERVICE, LLC v. DONALD ALLEN

**Appeal from the Chancery Court for Hawkins County
No. 16370 Thomas R. Frierson, II, Chancellor**

No. E2009-01268-WC-R3-WC - Filed July 26, 2010

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. The employee alleged a compensable injury to his right shoulder and a compensable mental injury. His employer denied that the alleged mental injury was compensable. The trial court found both injuries to be compensable and awarded 50% permanent partial disability to the body as a whole. On appeal, the employer contends that the trial court erred by awarding benefits for the mental injury and by finding that the employee did not have a meaningful return to work. The employee contends that the trial court erred by accepting the impairment rating of the Medical Impairment Rating Registry physician and in the trial court's application of the concurrent injury rule. We conclude that the evidence preponderates against the trial court's finding that the employee sustained a compensable mental injury and modify the judgment accordingly.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery Court Modified

SHARON G. LEE, J., delivered the opinion of the Court, in which DONALD P. HARRIS, SR. J., and SHARON BELL, SP. J., joined.

Meredith B. Weaver, Knoxville, Tennessee, for the appellant Transport Service, LLC.

Anthony A. Seaton and Mary M. Renfroe, Johnson City, Tennessee, for the appellee Donald Allen.

MEMORANDUM OPINION

Factual and Procedural Background

Donald Allen (“Employee”) worked as a tanker truck driver for Transport Service, LLC (“Employer”). He was injured on August 30, 2005, in Charleston, South Carolina, when he fell while disconnecting a hose during a delivery. The injury was reported almost immediately. He was taken to a local clinic by employees of the customer. The record is disputed as to whether he drove his truck back to Tennessee or was picked up and returned home by his family. He was initially referred to Dr. Samuel Breeding, the company physician. Dr. Breeding conducted a magnetic resonance imaging (“MRI”) scan which revealed a possible right shoulder injury. Employee was ultimately referred to Dr. John Holbrook, an orthopaedic physician, for further treatment.

Dr. Holbrook, testifying by deposition, described the arthroscopic surgical repair he performed on Employee’s right shoulder on February 1, 2006. The procedure consisted of a debridement, or shaving, of a frayed area of Employee’s biceps tendon and an acromioplasty, which involved “remov[ing] a spur on the point of the shoulder to minimize the rotator cuff from rubbing or impinging on that spur.” Dr. Holbrook subsequently ordered physical therapy and then permitted Employee to return to work on a light-duty basis. On July 11, 2006, he determined that Employee was at maximum medical improvement. He assigned an anatomical impairment rating of 8% to the right upper extremity.¹ He placed a permanent restriction upon Employee to “minimize overhead pushing and pulling with his right shoulder.” He thought that Employee was capable of driving a truck. On cross examination, he agreed that “it would be reasonable” to advise Employee to avoid climbing ladders. This restriction was significant because one of the requirements of Employee’s job was to climb to the top of the tanks which he transported in order to make sure that they were properly sealed.

When Dr. Holbrook allowed Employee to work on a light duty basis, Employer accommodated that restriction. Initially, Employee was placed in a position shredding outdated records. This task lasted for a period of weeks. Employee testified that one or more of his fellow drivers “harassed” him during this assignment by throwing gloves at him and telling him to be careful to avoid paper cuts. After the shredding project was completed, he was assigned to make an inventory of couplings used to attach hoses from transport tanks to customers’ holding tanks. Employee testified that during this period, his fellow drivers harassed him by hiding rubber and wooden snakes in areas where he would find them. He

¹ This is equivalent to 5% to the body as a whole under the 5th edition of the American Medical Association Guides to the Evaluation of Permanent Impairment (“AMA Guides”).

testified that he had a fear of snakes and that these incidents caused him to have great anxiety and, eventually, depression.

When Dr. Holbrook released Employee to return to work, Employer sent him to back to Dr. Breeding, to re-certify that he was eligible to drive a tractor-trailer under U.S. Department of Transportation standards. At that time, Employee was taking several anti-anxiety and anti-depression medications. Dr. Breeding deferred approving a return to work until he received additional information concerning the medications that Employee was taking. Although Dr. Breeding was deposed, he was not asked if he received that information. Because Employee was not certified as eligible to drive, his employment was terminated.

At the request of Employee's attorney, Dr. William Kennedy, an orthopaedic surgeon, conducted an independent medical evaluation ("IME"). He opined that Employee retained a total anatomical impairment of 9% to the body as a whole due to his shoulder injury. Of this impairment, 6% was due to loss of range of motion, and the remaining 3% was related to the acromioplasty performed by Dr. Holbrook. Dr. Kennedy also recommended numerous activity limitations, including:

avoiding "rapid repeated motions or jerking or hammering with his right hand. [No] maximum reaching with his right hand. [No] work with his right hand elevated above the level of his shoulder. [No] climb[ing] ladders or work[ing] at heights . . . Lifting and carrying or pushing and pulling should not exceed 20 pounds occasionally or 10 pounds frequently. . . ."

Dr. Thomas Koenig, also an orthopaedic surgeon, was selected to conduct an IME through the Medical Impairment Rating ("MIR") registry, pursuant to Tennessee Code Annotated section 50-6-204(d)(5). He opined that Employee retained a 6% anatomical impairment to the body as a whole as a result of the shoulder injury. In his deposition, he explained that he disagreed with Dr. Kennedy's assignment of additional impairment due to the acromioplasty because the purpose of that procedure was to restore the anatomy of the shoulder to its normal state and thus, the AMA Guides award no impairment for that procedure. Dr. Koenig suggested activity restrictions similar to those of Dr. Kennedy.

Dr. Norman Hankins, a vocational evaluator, testified on behalf of Employee. He administered an intelligent quotient ("IQ") test which found Employee to be in the mildly retarded range. Dr. Hankins expressed concern that this result was inconsistent with Employee's work history, which suggested an ability to function at a ninth-grade level. He

ultimately concluded that Employee had a 71% vocational disability based upon the restrictions assigned by Drs. Kennedy and Koenig.

Dr. William Diebold, a psychiatrist, conducted an IME at the request of Employee's attorney on April 25, 2007. His examination consisted of an interview of Employee, which lasted approximately one and one-half hours. His diagnosis of Employee was "major depression, single and severe, with psychotic features." He also found that Employee had "features consistent with post-traumatic stress disorder" but did not meet all of the criteria for that diagnosis. He opined that Employee had a Class IV psychiatric impairment according to the AMA Guides. The Guides describe this as a "Marked Impairment," which would "significantly impede useful functioning." Dr. Diebold testified concerning causation as follows:

A: From the visit I had with him and the history I took from him, as best that I could tell the depression was generated subsequent to the fall that he had [on the job.] I feel that he had become injured to a point that limited what he could do, how well he could function, and from that he became very depressed. So it was kind of a cause and effect thing. So in my mind if, in other words, if his pain and injury were all of [a] sudden miraculously healed I would argue he probably wouldn't be depressed any more.

Q: All right. So is it your opinion that his depression was caused from his work accident and the effects thereafter?

A: Yes.

Dr. Diebold also testified that Employee "felt that [Employer] had treated him badly" because of his physical limitations during the time he was on light duty. He also briefly mentioned the alleged harassment by Employee's co-workers but did not express any clear opinion concerning the relationship of those events to Employee's mental condition.

Dr. Diebold's report stated, inter alia, that prior to the injury, "[Employee] used to be really a very happy person and had never needed treatment for any psychological problems." On cross examination, Dr. Diebold admitted that he had not reviewed any records of medical or psychological treatment that Employee had received prior to the August 2005 injury. He was unaware that Employee had been under the treatment of a psychiatrist from 1992 through 1998 for major depression and anxiety and had been totally disabled for three years as a result of those problems. He also did not know that Employee had been regularly taking Xanax, an anti-anxiety medication, for at least ten years prior to the injury. Employee also

represented to Dr. Diebold that his childhood was “okay” and did not disclose that his mother had been murdered when he was approximately seven years old, his father had died shortly thereafter, and he had been raised in foster care.

Dr. Diebold conceded that Employee had either lied or answered questions inappropriately concerning the matters listed above. However, he opined that neither the additional information nor Employee’s misrepresentations or omissions changed his opinions concerning diagnosis, causation, or impairment.

Dr. Margaret Robbins, also a psychiatrist, conducted an IME at the request of Employer’s attorney on May 31, 2008. She was assisted by Dr. Thomas Schacht, a psychologist. Testifying by deposition, Dr. Robbins said she reviewed Employee’s medical records from before and after the work injury and interviewed Employee. As part of the evaluation, Dr. Schacht also administered psychological tests. Based upon that information, Dr. Robbins opined that Employee was malingering, that he had pre-existing anxiety and depression which were not affected by the work injury, that many of his anxiety-related problems were the result of his consumption of extremely large amounts of caffeine, and that he was very angry at Employer over the circumstances of his termination.

Dr. Robbins explained that, based upon Employee’s performance on an achievement test given early in the evaluation, the decision was made to administer the Test of Memory Malingering (“TOMM”). According to Dr. Robbins, this test is designed so that a subject answering the questions randomly would be expected to give correct responses to roughly 50% of the questions. Employee correctly answered forty of the one-hundred-fifty questions, approximately 27%. Dr. Robbins opined that this result could only be achieved by a subject who deliberately selected answers he knew to be incorrect. She added that Dr. Schacht had calculated the probability of Employee’s score occurring at random as less than one in one million.

Dr. Robbins also testified that Employee suffered from chronic anxiety prior to the August 2005 injury. This finding was reflected in the records of Dr. Moffett, the psychiatrist who treated Employee from 1992 to 1998. In addition, she noted that Employee had, on more than one occasion, sought emergency room treatment for chest pains, which he perceived to be heart attacks. However, on each occasion a full battery of cardiac tests gave normal results. Dr. Robbins testified that this pattern was consistent with anxiety and/or panic attacks. She also noted records which indicated that Employee had seen a nurse practitioner with complaints of anxiety in 2003 and 2004, and as well as pharmacy records which indicated he had been taking anxiety medication continuously since 2000 and anti-depressant medication for two or more years prior to August 2005.

Employee told Dr. Robbins that he drank ten or more cups of coffee per day. His wife told her that he drank two or more pots (ten to twelve cups each) of coffee per day. Dr. Robbins opined that this was an extremely large amount of caffeine, and many of Employee's symptoms of anxiety and his sleep difficulties were likely related to that. She pointed out that prior medical records documented that Employee had been advised to reduce his caffeine intake.

Employee was forty-three years old when the trial occurred. He had completed the eleventh grade and received no additional education. He had been primarily an over-the-road truck driver for approximately seventeen years. He had also been an operations manager at a concrete plant and a supervisor at a John Deere repair facility. He had supervised ten employees in one of those positions and thirty employees at the other. He had not worked, or sought work, since being terminated by Employer.

He admitted that he had received psychiatric care from Dr. Moffett for six years, and that he had been unable to work for three of those years. He testified that he had "done just fine" after he returned to work in 1998. He denied having any psychiatric or psychological treatment after that time, other than taking Xanax, which he had been taking "most of my life." During cross-examination, he agreed that he had also been taking nortriptyline, an anti-depressant, prior to his work injury. He described the incident or incidents when other drivers had teased him about getting paper cuts. He did not state how many times this occurred. He also testified that two or three times he found rubber snakes while working in the warehouse area. He testified that he complained about these events to Jeff French, his supervisor. Testifying on rebuttal, French denied that any such conversations occurred.

Employee testified that he had nightmares about snakes and also had difficulty sleeping due to anxiety. On cross examination, he confirmed that he drank ten to twelve cups of coffee per day but denied that this had interfered with his ability to sleep before August 2005. He stated that he rarely left his house. He did not believe he was capable of climbing a ladder, due to his shoulder problems.

In a written memorandum, the trial court found that Employee had sustained compensable injury to his shoulder and a compensable mental injury. The injuries were found to be concurrent, in accordance with Tennessee Code Annotated section 50-6-207(3)(C). The trial court determined that Employee had an anatomical impairment of 8% to the body as a whole from the shoulder injury. It found that he had sustained 35% permanent partial disability ("PPD") due to the shoulder injury and 50% PPD due to the psychiatric injury. Referring to section 207(3)(C), the trial court awarded a 50% PPD, the longer of the two periods of disability.

Employer filed a motion to alter or amend, contending that the trial court had erred by not adopting the impairment rating of the MIR physician, Dr. Koenig, for the shoulder injury. Employee filed a cross motion asserting that he was entitled to a larger award based upon the concurrent injury rule. After hearing the motions, the trial court revised its earlier order, finding that the MIR impairment rating should have been used and that Employee had 24% PPD due to the shoulder injury. It also revised its conclusions concerning the method of application of the concurrent injury rule and determined that Employee had sustained a 50% PPD as a result of his combined injuries.

Employer appealed, contending that the trial court erred by finding that Employee's alleged mental injury was compensable, by finding that Employee's proof of a mental injury was sufficient, and by finding that Employee did not have a meaningful return to work.² Employee asserts that the trial court erred by accepting the MIR physician's impairment and by incorrectly applying the concurrent injury rule.

Standard of Review

The standard of review of issues of fact 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) (2008). When credibility and weight of 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. *See Madden v. Holland Group of Tenn., Inc.*, 277 S.W.3d 896, 898 (Tenn. 2009) (citing *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008)). When the issues involve expert medical testimony 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.*, 272 S.W.3d 560, 571 (Tenn. 2008) (citing *Orick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006)). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009) (citing *Goodman v. HBD Indus., Inc.*, 208 S.W.3d 373, 376 (Tenn. 2006); *Layman v. Vanguard Contractors, Inc.*, 183 S.W.3d 310, 314 (Tenn. 2006)).

² Employer also argued in its brief that the trial court erred by awarding benefits in a lump sum. It abandoned that contention at oral argument, because all due benefits had accrued by that time.

Analysis

Compensable Mental Injury

Employer asserts that the trial court erred by finding that Employee had sustained a compensable mental injury. Tennessee law permits recovery for a mental injury in two circumstances: when it is “caused by either (1) a compensable physical injury, or (2) a sudden or unusual mental stimulus, such as a fright, shock, or even excessive, unexpected anxiety.” *Cutler-Hammer v. Crabtree*, 54 S.W.3d 748, 754 (Tenn. 2001). The trial court did not make a specific finding as to which type of causation applied in this case. Employer argues that the evidence preponderates against a finding that Employee sustained his burden of proof under either theory.

Dr. Diebold’s testimony, set out above, is based on the premise that Employee’s depression and anxiety were caused by the ongoing pain from his shoulder injury. Employer argues that his opinion is inconsistent with the medical records concerning treatment of the shoulder injury (which Dr. Diebold did not examine), which do not suggest that Employee had intractable or disruptive pain after his shoulder surgery. To the contrary, those records reflect gradual improvement, with occasional complaints of pain, which were treated with over-the-counter products such as naproxen. Moreover, Employer also asserts that Dr. Diebold’s opinion is at odds with Employee’s testimony at trial, in which he focused on the alleged harassment by his co-workers as the source of his anxiety.

Employee testified that no particular incident of alleged harassment triggered his alleged depression and anxiety but that his condition gradually worsened as the events continued. Employer submits that, taken at face value, this testimony establishes that the alleged mental injuries were not compensable because they were not caused by the physical injury nor by a sudden or unusual stimulus.

Employer further asserts that Dr. Diebold’s testimony is of limited value because he relied completely upon Employee’s self-description of his condition before and after the work injury. Consequently, he lacked knowledge of any of Employee’s prior psychiatric problems or treatment. Employer compares Dr. Diebold’s limited knowledge of Employee’s medical and psychiatric history with that of Dr. Robbins, who reported that she reviewed over eight hundred pages of medical records concerning Employee in preparation of her evaluation.

The medical proof on this issue was presented by deposition. Thus, we are able to reach our own conclusions concerning the relative weight to be given to the testimony of Drs. Diebold and Robbins. *See Foreman*, 272 S.W.3d at 571. In doing so, we consider, among

other things, the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991); *Woods v. Modine Mfg., Co.*, No. 03S01-9810-CV-00110, 1999 WL 421147 at *2-3 (Tenn. Workers Comp. Panel June 23, 1999). In that context, both doctors appear to be well-qualified psychiatrists. Dr. Robbins's examination of Employee included an interview and the administration of various psychological tests, while Dr. Diebold's examination consisted solely of an interview. As part of her evaluation, Dr. Robbins also reviewed many medical records from the period of time prior to Employee's work injury, including the records of his prior psychiatric treatment. Dr. Diebold reviewed no prior medical records, and was apparently unaware, until he was cross examined on the subject, that Employee had undergone six years of psychiatric care prior to his work injury for the same conditions which Dr. Diebold attributed to that injury. We are compelled to conclude that Dr. Robbins's opinions were based upon more extensive and more reliable information than Dr. Diebold's. In addition, Dr. Diebold's expressed lack of concern regarding both Employee's previous history of psychiatric treatment and Employee's failure to disclose that history to him casts some doubt upon his judgment. We, therefore, find that Dr. Robbins's opinion is entitled to greater weight than that of Dr. Diebold. For that reason, we conclude that the evidence preponderates against the trial court's finding that Employee sustained a compensable mental injury.

Meaningful Return to Work

The trial court found that Employee did not have a meaningful return to work and that his award of benefits was, therefore, not capped at one and one-half times the anatomical impairment by operation of Tennessee Code Annotated section 50-6-241(d)(1)(A). Employer argues this finding was erroneous. The premise of the argument is that the restrictions placed upon Employee by the treating physician, Dr. Holbrook, would not have prevented him from returning to work. There is, however, no dispute that Dr. Holbrook never re-certified Employee's ability to drive a tractor-trailer nor that the restrictions suggested by Drs. Kennedy and Koenig precluded Employee from driving a tanker truck. Moreover, during his deposition, Dr. Holbrook expressed reservations about Employee's ability to climb a ladder to inspect the top of the tanks which he transported, an essential function of his job. Considering the medical testimony as a whole, we are unable to find that the evidence preponderates against the trial court's finding that Employee did not have a meaningful return to work.

Impairment Rating

Employee argues that the trial court erred in amending its ruling to adopt the impairment rating of Dr. Koenig, the MIR doctor. Tennessee Code Annotated section 50-6-204(d)(5) provides that the rating of the MIR doctor is presumed to be accurate unless rebutted by clear and convincing evidence. The primary difference between Dr. Koenig's rating and Dr. Kennedy's concerned the acromioplasty procedure performed by Dr. Holbrook. Dr. Koenig testified that the AMA Guides do not provide an impairment for that procedure because its purpose is to return the anatomy to its normal configuration. Dr. Kennedy agreed with Dr. Koenig on those points but opined that, according to his interpretation of Dr. Holbrook's report, it was appropriate to add additional impairment in this case because of the amount of bony material removed during the procedure.

In *Beeler v. Lennox Hearth Products, Inc.*, No. W2007-02441-SC-WCM-WC, 2009 WL 396121 (Tenn. Workers Comp. Panel Feb. 18, 2009), a prior panel held that "clear and convincing evidence," for purposes of Tennessee Code Annotated section 50-6-204(d), meant "evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Beeler*, 2009 WL 39612 at *4 (quoting *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)). Inasmuch as the Guides do not provide an impairment for this procedure, Dr. Kennedy's testimony concerning his interpretation of Dr. Holbrook's operative report is not sufficient to raise a "serious or substantial doubt" regarding Dr. Koenig's opinion. The trial court correctly adopted Dr. Koenig's impairment rating in determining the extent of Employee's permanent disability.

Concurrent Injury Rule

Initially, the trial court incorrectly applied the concurrent injury rule by awarding only the amount of the larger of the two disabilities which it found to result from Employee's injury. Both injuries should be taken into account, but a single award, apportioned to the larger member (the whole body in this case), should be made. *See Crump v. B & P Constr. Co.*, 703 S.W.2d 140, 143-44 (Tenn. 1986). The trial court addressed this issue and correctly applied the rule in its order on the parties' motions to alter or amend.

Conclusion

The finding that Employee sustained a compensable mental injury is reversed. The judgment is modified to award 24% permanent partial disability to the body as a whole for Employee's shoulder injury. The judgment is affirmed in all other respects. Costs are taxed

one-half to the appellant Transport Service, LLC and its surety and one-half to Donald Allen, for which execution may issue if necessary.

SHARON G. LEE, JUSTICE