

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 20, 2020 Session

AUGUST HEDRICK V. PENSKE TRUCK LEASING CORP.

**Appeal from the Chancery Court for Shelby County
No. CH 17-0759-2 Jim Kyle, Chancellor**

No. W2019-01522-SC-R3-WC – Mailed – May 18, 2020; Filed June 26, 2020

August Hedrick suffered injuries to his back and shoulder in the course of his employment with Penske Truck Leasing Corporation (“Employer”). The trial court found that Mr. Hedrick is permanently and totally disabled as a result of these injuries. Employer concedes that Mr. Hedrick suffered work-related injuries but argues that the evidence preponderates against the trial court’s judgment as to permanent and total disability. The appeal has been referred to this Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. After reviewing the evidence, we affirm the trial court’s judgment.

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

ARNOLD B. GOLDIN, J., delivered the opinion of the court, in which ROGER A. PAGE, J., AND KYLE C. ATKINS, J., joined.

Eugene S. Forrester, Jr.,¹ and Garret M. Estep, Memphis, Tennessee, for the appellant, Penske Truck Leasing Corp.

Stephen F. Libby, Memphis, Tennessee, for the appellee, August Hedrick.

¹ Mr. Forrester was on the brief for the appellant but did not participate in oral argument.

OPINION

Factual and Procedural Background

August Hedrick was born on July 26, 1968 and was 50 years old on the date of trial. After graduating from high school in 1987, he took vocational classes in hazardous waste and diesel mechanics. From 1987 to 1996, he worked as a chemical operator and was responsible for shipping, receiving, and storing hazardous waste. From 1996 to 2003, he worked as a shop technician, an industrial painter, a forklift operator, and a diesel technician. All of the jobs required heavy lifting or manual labor.

In 2004, Mr. Hedrick began working as a diesel maintenance technician for Employer. His work included changing tires, repairing brakes, and maintaining vehicles. He was required to lift over 75 pounds, crawl under trucks, bend, squat, climb, and perform overhead work. On May 16, 2014, Mr. Hedrick was rolling two large truck tires in a rainstorm when one tire rolled away. As he tried to grab the tire, he lost his balance, was pinned to the ground by the tire, and felt pain in his lower back and right shoulder.

Mr. Hedrick was examined by Dr. Rodney Olinger, a neurosurgeon at the Semmes-Murphy Clinic in Memphis, and subsequently underwent a microdiscectomy to repair a herniated disc in his lower back at L5-S1 on September 24, 2014. Following a recurrence of the herniation, he underwent a second back surgery by Dr. Olinger on October 10, 2014. When Mr. Hedrick continued to have pain and other symptoms, Dr. Olinger referred him to one of his partners at the Semmes-Murphy Clinic, Dr. Todd Fountain, a neurosurgeon specializing in complex spine surgery. Dr. Fountain performed a lumbar fusion on Mr. Hedrick's back on October 14, 2015. When Mr. Hedrick continued to have pain following the lumbar fusion, he was referred to Dr. Dennis McCoy for pain management.² In addition to the procedures on his back, Mr. Hedrick was treated for his right shoulder injury and ultimately underwent surgery to repair a torn right rotator cuff in February of 2015.

Before these injuries, Mr. Hedrick worked at jobs involving heavy lifting and manual labor. He enjoyed racing cars, playing basketball, exercising, and playing with his children. He now has pain in his back that radiates down his left hip and left leg. He suffers from the loss of strength in his shoulder and a decreased range of motion. He takes pain medication three times a day, and he uses a back brace and a cane. He has trouble lifting, carrying, bending, crawling, standing, sitting, and walking. He has limited computer

² The record indicates that Mr. Hedrick was initially referred to Dr. Autry Parker for pain management and that Dr. Parker recommended a lifting restriction of 20 pounds.

experience and no word processing skills. Mr. Hedrick testified at trial that he can no longer perform any of his prior jobs.

Dr. Greg Cates, plaintiff's vocational rehabilitation expert, testified that he interviewed Mr. Hedrick on March 15, 2017, and he analyzed Mr. Hedrick's "loss of job opportunity or vocational opportunity as a result of his injury and treatment." According to Dr. Cates, Mr. Hedrick has a history of doing medium and heavy work and does not have the skills to perform sedentary work. Although he did not perform labor market research, Dr. Cates opined that Mr. Hedrick has "no transferable job skills" and cannot perform a full-time job. According to Dr. Cates' report:

The limitations reported by Dr. McCoy and Dr. Fountain indicate light work on a part time basis or limited. These restrictions are such that an employer would be unwilling to hire or accommodate such an individual. The multiple restrictions recommended by Dr. [Samuel] Chung would not allow for any type of sustained work activity no matter his lifting capacity. [Mr. Hedrick's] appearance, pain behavior, assistive device, brace and medication intake would make him a very poor employee candidate and render him unemployable.

Dr. Cates testified that Mr. Hedrick showed no signs of exaggerating his symptoms.

David Stewart, a certified rehabilitation counselor, examined Mr. Hedrick at Employer's request on August 30, 2017. He interviewed Mr. Hedrick for over two hours and reviewed Mr. Hedrick's employment history, which consisted of manual labor and lifting of at least 30 pounds. Mr. Stewart believed that some of Mr. Hedrick's employment history involved skilled work, such as diesel technology. He also testified that Mr. Hedrick's work-related skills included decision-making, problem-solving, speaking, time-management, and handling a variety of tasks. He conceded that Mr. Hedrick did not do well on a Wide Range Achievement Test; in particular, Mr. Hedrick scored in the 16th percentile in reading, the 1st percentile in sentence comprehension, and the 13th percentile in math computation.

Mr. Stewart also reviewed medical records and depositions that included the findings and recommendations of Dr. Frederick Wolf, Dr. Todd Fountain, Dr. Dennis McCoy, Dr. Donald Sullivan, and Dr. Samuel Chung. Of these records, he emphasized that Dr. Wolf, who performed the surgery on Mr. Hedrick's shoulder, imposed a lifting restriction of 30 pounds and that Dr. Fountain, who performed the lumbar fusion, imposed a lifting limit of 50 pounds.

Mr. Stewart concluded that Mr. Hedrick had a 47 percent loss of access to the labor market. After conducting labor market research in the Memphis area, he found nine full-time job opportunities for Mr. Hedrick, including service writer for auto dealers, electrical assembly, and security guard. He conceded that Mr. Hedrick had never worked in these areas and that the jobs may involve sitting, standing or walking. Mr. Stewart did not think Mr. Hedrick's use of a cane or pain medication disqualified him from working.

Dr. Todd Fountain, a neurosurgeon, performed the lumbar fusion on Mr. Hedrick on October 14, 2015, and he assigned Mr. Hedrick an impairment rating of 13 percent to the body as a whole. Although Dr. Fountain assigned a 50-pound lifting restriction, he agreed that someone in Mr. Hedrick's condition would continue to have residual low back pain, pain down the leg, pain with extended standing, walking or sitting, interference with sleep activities, and burning pain, and stiffness. After seeing Mr. Hedrick for the final time in May of 2016, Dr. Fountain referred him for pain management due to his ongoing symptoms.

Dr. Fredrick G. Wolf, an orthopedic surgeon, repaired a large rotator cuff tear in Mr. Hedrick's right shoulder in February of 2015. He assigned a nine percent impairment to his right upper extremity or a five percent impairment to his body as a whole. Dr. Wolf also imposed a 30-pound lifting restriction and advised Mr. Hedrick to avoid prolonged or repetitive flexion of the shoulder and overhead work. Dr. Wolf acknowledged that someone with Mr. Hedrick's injury could expect to have a loss of strength, difficulty performing overhead work, pain, and limitations in the ability to push and pull.

Dr. Dennis McCoy treated Mr. Hedrick for pain management from December 2016 to April 2019. He testified that Mr. Hedrick had radicular symptoms, pain, burning, stiffness, and spasms in his back for which he was prescribed hydrocodone. According to Dr. McCoy, Mr. Hedrick had been unable to complete a functional capacity evaluation due to his pain and high blood pressure. He concluded that Mr. Hedrick could no longer work in a manual labor job and could not stand or sit without taking multiple breaks. Dr. McCoy stated that Mr. Hedrick "mildly exaggerated" his level of pain, but he did not think Mr. Hedrick was malingering or faking his symptoms. He stated that Mr. Hedrick was not "capable of working" and that his conditions are "disabling."

Dr. Donald Sullivan, a rehabilitation physician who specializes in pain management, examined Mr. Hedrick on December 15, 2016 on behalf of Mr. Hedrick's long-term disability insurance carrier in connection with his request for long-term disability benefits. He found that Mr. Hedrick walked with a limp, had pain and limited flexion in his back,

and had signs of right shoulder impingement. He diagnosed Mr. Hedrick with left lower extremity radiculopathy and recommended that Mr. Hedrick lift no more than five pounds repetitively or 20 pounds occasionally. In addition, he stated that Mr. Hedrick could sit for one hour at a time for a total of six hours per day, could stand for 20 minutes at a time for a total of two hours per day, and could walk for 20 minutes at a time for a total of two hours per day. He concluded that Mr. Hedrick's "self-purported functionality is consistent [with] his ongoing lumbosacral spine radiculopathy" and that Mr. Hedrick's condition is known as "failed back syndrome."

Dr. Samuel Chung performed an independent medical examination at the request of Mr. Hedrick's attorney on May 4, 2016. According to Dr. Chung, Mr. Hedrick reported "constant pain, sharp pain, burning pain, aching, pins and needles, stiffness, spasm and shooting pain" in his lower back. After examining Mr. Hedrick and measuring his back and shoulder movements, Dr. Chung diagnosed left lumbar radiculopathy related to the back injury and ongoing symptomatology related to the right shoulder injury. He assigned an impairment rating of 13 percent to the body as a whole due to the back injury and six percent to the body as a whole due to the right shoulder injury. He recommended that Mr. Hedrick avoid lifting, carrying, pushing or pulling of over 15 pounds and avoid "prolonged walking, standing, stooping, squatting, bending, climbing, [and] excessive flexion, extension and rotation of his back." Dr. Chung believed that Mr. Hedrick was not able to perform physical work.

The trial court found that Mr. Hedrick is permanently and totally disabled as the result of his work-related injuries to his lower back and his right shoulder. After both parties filed motions to alter or amend, the trial court entered an amended judgment restating his finding that Mr. Hedrick is permanently and totally disabled. Employer has appealed.

Standard of Review

Review of factual issues 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 the evidence is otherwise. *See* Tenn. Code Ann. § 50-6-225(a)(2). Considerable deference is afforded to the trial court's findings with respect to the credibility of witnesses and the weight to be given their in-court testimony. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 733 (Tenn. 2002); *see also Madden v. Holland Grp. of Tenn., Inc.*, 277 S.W.3d 896, 898 (Tenn. 2009). When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another. The reviewing court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *Foreman v.*

Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008).

Analysis

I.

Employer argues that the evidence preponderates against the trial court's finding that Mr. Hedrick is permanently and totally disabled because he is not completely precluded from working as the result of his work-related injuries. In contrast, Mr. Hedrick argues that the evidence does not preponderate against the trial court's judgment.

An employee may be found permanently and totally disabled “[w]hen an injury not otherwise specifically provided for in this chapter totally incapacitates the employee from working at an occupation that brings the employee an income.” Tenn. Code Ann. § 50-6-207(4)(B). In determining whether an employee is permanently and totally disabled, courts consider a number of factors to ascertain “a complete picture of an individual’s ability to return to gainful employment.” *Hubble v. Dyer Nursing Home*, 188 S.W.3d 525, 535 (Tenn. 2006). These factors include the employee’s skills, education, age, training, “job opportunities in the immediate and surrounding communities, and the availability of work suited for an individual with that particular disability.” *Id.* at 535-36. “An employee’s own assessment of his or her overall physical condition, including the ability or inability to return to gainful employment, is competent testimony that should be considered.” *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000). The extent of an employee’s vocational disability is a question of fact to be determined from both lay testimony and medical evidence. *Id.* at 773-74.³

The parties agree that Mr. Hedrick suffered significant work-related injuries to his lower back and right shoulder. He underwent two back surgeries to repair a herniated disc at L5-S1, but he continued to have pain and radicular symptoms. He later underwent a third back surgery, a lumbar fusion, by Dr. Todd Fountain and was subsequently referred by him to a medical specialist in pain management. Dr. Fountain assigned an impairment rating of 13 percent to the body as a whole. In addition, Mr. Hedrick had surgery to repair a torn rotator cuff in his right shoulder; Dr. Wolf, who performed the shoulder surgery, assigned

³ Employer cites a number of cases in which employees with significant work-related injuries were not permanently and totally disabled. See *Ayers v. Cracker Barrel Old Country Store, Inc.*, E2007-00077-WC-R3-WC, 2008 WL 8470666 (Sp. Workers’ Comp. Appeals Panel, Sept. 26, 2008); *Ammons v. John Bouchard & Sons Co.*, M2003-00940-SC-WCM-CV, 2004 WL 1088764 (Sp. Workers’ Comp. Appeals Panel, May 11, 2004); *Thweatt v. Travelers Property & Cas. Ins. Co.*, M1999-01903-WC-R3-CV, 2000 WL 1030621 (Sp. Workers’ Comp. Appeals Panel, July 27, 2000). The cases illustrate that the determination is based on the specific facts and circumstances before the court.

an additional impairment rating of 5 percent to the body as a whole as a result of the shoulder injury.

In analyzing the trial testimony, the trial court obviously accredited Mr. Hedrick's testimony about his ongoing pain and related symptoms, his inability to work, and his inability to engage in everyday activities. In addition, Dr. Cates, plaintiff's vocational expert, testified that Mr. Hedrick's work history included only medium or heavy physical work and that he had no transferable job skills. Similarly, Mr. Stewart, Employer's vocational expert, admitted that Mr. Hedrick had a history of heavy work and physical labor, and he acknowledged that Mr. Hedrick scored in the 16th percentile for reading, the 1st percentile in sentence comprehension and the 13th percentile in math computation. Although Mr. Stewart concluded that Mr. Hedrick suffered only 47 percent vocational disability, he reached his conclusions by relying on the lifting restrictions recommended by Drs. Wolf and Fountain and by largely discounting the countering testimony of Dr. McCoy, Dr. Sullivan, and Dr. Chung. On cross examination, Mr. Stewart admitted that if Dr. McCoy's opinions were accepted by the court, Mr. Hedrick would be considered 100 percent vocationally disabled.

In analyzing the medical evidence, the trial court emphasized that Dr. McCoy treated Mr. Hedrick for his ongoing pain from December 2016 to April 2019. In its Amended Order, the trial court explained as follows:

Dr. McCoy, an Employer empaneled doctor[,] has seen Employee at least twelve (12) times since Drs. Fountain and Parker, even as recently as April 8, 2019. Thus, this Court accepts Dr. McCoy's testimony and finds it credible and the most persuasive. Dr. McCoy currently has Employee in an off-work status. Both vocational experts testified that if Dr. McCoy's opinions were accepted, Employee is 100% vocationally impaired.

In contrast, the other physicians, including Dr. Fountain and Dr. Wolf, last examined Mr. Hedrick in 2016 or 2017. Dr. McCoy, who assessed Mr. Hedrick's current condition, testified that Mr. Hedrick continues to take pain medication for his symptoms, cannot perform heavy work or manual labor, and is unable to work. In addition, Dr. Sullivan, who examined Mr. Hedrick in connection with his request for long-term disability benefits, testified that Mr. Hedrick should not lift more than five pounds repetitively or 20 pounds occasionally and should avoid prolonged sitting, standing, and walking. Dr. Chung also recommended restrictions as to prolonged walking, standing, stooping, squatting, bending, climbing, and flexion, extension, and rotation of his back.

In short, the trial court analyzed the lay and medical evidence as it relates to Mr. Hedrick's injuries, skills, training, education, age, and vocational opportunities. The trial court accredited Mr. Hedrick's trial testimony, emphasized Dr. McCoy's testimony, and resolved the conflicts in the remaining proof. We hold that the evidence does not preponderate against the trial court's judgment that Mr. Hedrick is permanently and totally disabled. *See McCloud v. Charter Communications, Inc.*, W2018-02166-SC-R3-WC, 2019 WL 5556252 (Sp. Workers' Comp. Appeals Panel, Oct. 24, 2019) (upholding trial court's determination that employee was permanently and totally disabled).II

Employer argues that the trial court erred in denying its motion to exclude or limit Dr. McCoy's testimony because he was not qualified "to give an opinion on [Mr. Hedrick's] ability to work generally in all occupations." Employer maintains that Dr. McCoy should have limited his testimony to his opinion that Mr. Hedrick can no longer perform his prior jobs. Similarly, Employer argues that the trial court should have excluded portions of Dr. Chung's testimony, even though Employer concedes that the testimony was cumulative to other evidence.

In our view, Employer has not shown that the trial court abused its discretion in considering the testimony. Dr. McCoy treated Mr. Hedrick from December of 2016 to April of 2019, and he explained his findings and the basis for his conclusions. Similarly, Dr. Chung evaluated Mr. Hedrick and explained his findings and conclusions. In any event, the testimony cited by Employer was cumulative to other evidence at trial and did not affect the trial court's judgment.

Conclusion

We conclude that the evidence in the record does not preponderate against the trial court's determination that Mr. Hedrick is permanently and totally disabled and we affirm the trial court's judgment. Costs of this appeal are assessed to Employer, Penske Truck Leasing, Corp., for which execution issue shall issue if necessary.

Arnold B. Goldin, Judge

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

AUGUST HEDRICK v. PENSKE TRUCK LEASING CORPORATION

**Chancery Court for Shelby County
No. CH-17-0759**

No. W2019-01522-SC-R3-WC – Filed June 26, 2020

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 are assessed to the Appellant, Penske Truck Leasing Corporation, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM