

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

November 24, 2014 Session

ALEXANDER KNIGHT v. PUBLIX SUPERMARKETS, INC. ET AL.

**Appeal from the Circuit Court for Maury County
No. 13755 Jim T. Hamilton, Judge**

**No. M2014-00126-SC-R3-WC - Mailed February 26, 2015
Filed March 31, 2015**

A grocery store employee alleged that he sustained an injury to his back at work and that he also sustained a mental injury as a result of the back injury. His employer denied that he suffered a permanent physical injury or any mental injury at all. The trial court awarded benefits for both injuries. The employer has appealed, asserting that the evidence preponderates against the trial court's findings. 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 affirm the judgment.

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

CORNELIA A. CLARK, J., delivered the opinion of the Court, in which DON R. ASH, SR. J. and PAUL G. SUMMERS, SR. J., joined.

Christian M. Garstin and Lance W. Thompson, Nashville, Tennessee, for the appellants, Publix Supermarkets, Inc. and Hartford Insurance of the Midwest.

Brian Dunigan, Goodlettsville, Tennessee, for the appellee, Alexander Knight.

OPINION

Factual and Procedural Background

Alexander Knight (“Employee”) began working for Publix Supermarkets (“Employer”) at its Spring Hill, Tennessee store in 2005. On June 27, 2010, he was assigned as a grocery stocker in the frozen food department. On that date, he felt a popping sensation in his back as he tried to move a box of frozen french fries from a poorly-stacked dolly. He fell to the floor for a brief period, then reported the incident to his immediate supervisor, Eric Sprague. Mr. Sprague completed an accident report and then immediately took Employee to a nearby walk-in clinic. After being examined at the clinic, Employee was released to return to light duty work that same day, with restrictions of lifting or carrying no more than five pounds and avoiding repetitive bending at the waist. To conform with those limitations, the store manager, Noreen Rector, assigned Employee to “block” shelves throughout the store. This activity consisted of pulling merchandise to the front of the display shelves. Employee testified that he had difficulty performing this activity, often having to leave work after only working part of his eight-hour shift.

Thereafter, Employee received a list of physicians for further treatment, and he selected Dr. Michael McNamara, an orthopaedic surgeon. Dr. McNamara first saw Employee on August 4, 2010, and observed that Employee had a slightly diminished range of motion in his lumbar spine, but found that his clinical examination was otherwise normal. Dr. McNamara ordered an MRI, which showed degenerative disc disease and an annular tear at the L5-S1 level of the spine. Dr. McNamara described an annular tear as follows:

[The] [b]est description for an annular tear that I can give you is the annulus fibrosis is a very dense collection of collagen bundles that are oriented, if you will, much like belts on a tire. And so the belts run one way and run another way and they hold in the nucleus, which is the kind of soft-gelatinous material. And the annular tear is a tear of one or some of those belts, not all. So it’s a tear of the annulus. Is it a pre-herniation type thing, no, not necessarily, but it can cause pain and it can cause significant back issues.

Dr. McNamara restricted Employee from lifting weights in excess of fifteen pounds and from frequent bending and stooping. He also recommended an epidural steroid injection to treat the problem but Employer’s utilization review provider declined to approve that treatment, and the denial was upheld by the Department of Labor and Workforce Development. Two subsequent requests for that treatment were also denied. Dr. McNamara last examined Employee on December 15, 2010 but provided no further treatment thereafter

because the treatment he had proposed was not approved. In July 2013, Dr. McNamara issued an impairment rating at the request of Employee's attorney, opining that Employee retained a nine percent permanent impairment to the body as a whole. He determined that Employee attained maximum medical improvement by December 2010, explaining that Employee's condition had been stable for approximately six months at that time.

After the Department of Labor denied Employee's Request for Assistance, he filed this action. Thereafter, he filed a motion to compel medical treatment, which the trial court granted on August 15, 2011. Employee then came under the care of Dr. J. Frederick Wade, an orthopaedic surgeon. After examining Employee on November 29, 2011 and reviewing the August 2010 MRI, Dr. Wade opined that Employee had a "narrowed, slightly degenerative L5-S1 disc with mild annular change." Dr. Wade acknowledged that the changes in the disc "could have been at least partially related to an injury," but he did not observe "an annular tear [or] herniated disc" and opined that Employee's complaints were out of proportion to his physical findings. Dr. Wade recommended epidural steroid injections and physical therapy and referred Employee to Comprehensive Pain Specialists ("CPS") for further treatment. Dr. Wade did not see Employee again after that date.

The Employee was treated by CPS from December 22, 2011 until October 9, 2012. The records of CPS were introduced as exhibits to the deposition of Dr. Steven Neely, an orthopaedic surgeon who evaluated Employee at the request of Employee's attorney. From these documents, it can be discerned that Employee's treatment included epidural steroid injections, a TENS unit, chiropractic treatments, physical therapy and narcotic pain medications. At the conclusion of that course of treatment, his condition was much the same as before.

In February 2012, a nurse practitioner for CPS noted that Employee had "lots of stress" and discussed a possible referral for psychological or psychiatric treatment. An April 24, 2012 note in the CPS records stated that Employee had not received any such treatment, but felt he no longer needed it. Subsequent notes reflect the CPS staff's continuing concerns about Employee's psychological problems, but also indicate that Employee "had learned to cope" with his stressors. Employee was prescribed antidepressants for a short time, but discontinued using them due to side effects. Employee declined to participate in a recommended psychiatric evaluation in February 2013, stating, "they'll just [put me] on antipsychotics and then I'll have to give up my permit to carry a concealed weapon." Employee confirmed this conversation during his trial testimony.

Dr. Neely evaluated Employee on April 9, 2013. During his clinical examination, he found that Employee had decreased range of motion in his lower back, muscle spasm and decreased sensation in his left leg. He opined that Employee had a seven percent permanent

anatomical impairment to the body as a whole and testified that Employee's pain was due to inflammation in the area of the annular tear at L5-S1. Dr. Neely described Employee's injury to this disc as "like a tear in any ligament." He found no nerve impingement. He also found no positive Waddell's signs (indicators of symptom magnification) during his examination. During his deposition, he did, however, admit to being unaware of a August 2012 Functional Capacity Evaluation ("F.C.E.") in which the examining doctor found signs of symptom magnification. That being said, after reviewing the F.C.E. records, Dr. Neely's opinions remained unchanged.

Dr. Scott Ruder, a psychiatrist, examined Employee on May 23, 2013, at the request of his attorney. Prior to meeting Employee, he reviewed the records of Dr. Wade, Dr. McNamara, and CPS. Dr. Ruder opined that Employee suffered from depression, which was caused by his work injury. Using the method contained in the Sixth Edition of the AMA Guides, Dr. Ruder opined that Employee had sustained a ten percent permanent psychiatric impairment due to that condition and that Employee was a candidate for psychiatric treatment. Although Dr. Ruder was aware that Employee had tried antidepressant medications, he was not aware that Employee had declined to pursue treatment in February 2013. When informed, Dr. Ruder was skeptical as to whether the gun permit issue was the actual reason for Employee's decision to refuse treatment.

At Employer's request, Dr. John Griffin, also a psychiatrist, evaluated Employee on August 23, 2013. Dr. Griffin testified that Employee expressed anxiety and frustration with the workers' compensation process, said that he was "more angry than depressed" with his current situation, and stated that he "would have gone to counseling, but workers' comp would not approve it." Employee also told Dr. Griffin that the light duty assignment Employer offered him did not conform to what he thought it should include. Employee hoped for "total chaos of the system" because of his frustration. Dr. Griffin observed that Employee had an odd affect, sometimes blunted, during the interview. Dr. Griffin concluded that Employee had no specific psychiatric diagnosis, displayed some symptoms of depression, but did not seem to be depressed during their meeting. Dr. Griffin was uncertain if counseling would be useful to Employee, because Employee did not seem to be open to revising his ideas. During cross-examination, he testified that several behaviors displayed or described by Employee were possible symptoms of depression. These included anger, memory lapses, poor appetite, blunted affect, and pessimism.

Employee testified that the task of blocking shelves required him to bend from the waist at times, which caused him to have back pain. Although he was expected to work a full eight-hour shift, he was allowed to rest when necessary. Over time, he was able to work only about one hour per day before his back pain required him to leave. He missed work on all or part of thirty-eight scheduled work days between June 27 and November 23, 2010. Some

of these absences were the result of a foot injury unrelated to his work and a previously-scheduled trip to Las Vegas with his brother, who had just returned from overseas military duty. Employee admitted that he did not always call in advance to report his absences. Pursuant to Employer's regular procedures, Employee was required to complete a written form when he arrived late to work. The form completed on June 22, 2010 listed the reason he was late as "because I said so." On a subsequent tardiness form, he answered the same question with a stick figure drawing.

Employee was twenty-eight years old when the trial occurred. He had completed high school and thereafter attended Middle Tennessee State University for a single semester. Prior to being hired by Employer in 2007, he had worked as a "warehouse runner" and at various fast food establishments. Prior to his work injury, Employee participated in hiking, swimming, weightlifting, and boating. After the injury, he did not engage in any of these activities. His last contact with Employer was November 23, 2010, when he had a meeting with Ms. Rector, the store manager. According to both Employee and Ms. Rector, she told him that he could either work within the restrictions placed by Dr. McNamara, or stay off work until he was able to do so. He never returned after that meeting and was eventually terminated in November 2011. Employee had neither worked, nor applied for work, nor investigated any job openings since that time. His daily activities at the time of the trial consisted of sitting on his parents' couch and playing video games. Employee stated that he was qualified only for manual labor jobs and his injury prevented him from doing that type of work.

Noreen Rector, Employer's store manager testified concerning Employer's efforts to accommodate Employee's work restrictions. As previously noted, Employee was assigned to blocking product on shelves throughout the store, which consisted of pulling merchandise forward from the backs of shelves that ranged from eighteen to twenty-two inches deep. The job could be performed standing or sitting in a rolling chair. Employee never requested a rolling chair. After Employee complained that the bending required to block lower shelves aggravated his back pain, the assignment was modified to require him to block only those shelves from waist to shoulder level.

Ms. Rector confirmed that Employee began leaving work early not long after his injury. Ultimately, this led to the November 23, 2010 meeting. Ms. Rector testified that she told Employee that his doctors said he was capable of working an eight-hour shift and that he was going to have to work full shifts within his restrictions or not work at all. She stated that Employee's attendance problems were disruptive to the smooth operation of the store. During cross-examination, Ms. Rector testified that the blocking assignment was not strenuous. The only lighter position in the store was food demonstrator, an irregular position.

She added that Employee never approached her about physical problems with the blocking assignment.

The trial court took the case under advisement and issued written findings of fact and conclusions of law on December 10, 2013. It found Employee to be a credible witness concerning the effects of his injury and Ms. Rector to be credible concerning Employer's efforts to accommodate his restrictions. It found that Employee acted reasonably in refusing to work and therefore his recovery was not limited to one and one-half times the impairment rating. It adopted Dr. Neely's impairment rating of seven percent to the body as a whole for the back injury. It further found that Employee had sustained a mental injury and adopted Dr. Ruder's ten percent impairment rating, finding a combined medical impairment rating of sixteen percent, pursuant to the AMA guidelines. It then awarded permanent disability benefits based on eighty percent permanent partial disability to the body as a whole for the combined injuries and temporary total disability benefits for the period November 23, 2010 to July 25, 2012. Employer has appealed, contending that the evidence preponderates against the trial court's findings on these issues.

Analysis

Appellate review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2008), 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 the 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). It is not the job of the reviewing court to "substitute our own judgment for that of the trial court merely because we might have chosen another alternative." Brown-Harper v. Nissan N. Am., Inc., No. M200600044WCR3CV, 2007 WL 789527, at *3 (Tenn. Workers Comp. Panel Mar. 16, 2007). No similar deference need 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).

In its appeal, Employer contends that the trial court erred by finding that Employee sustained a permanent impairment from his back injury; by finding that he sustained a compensable mental injury; by finding that Employee did not have a meaningful return to

work; by making an excessive award of permanent partial disability benefits; and by awarding temporary total disability benefits. We address these contentions in the order they are raised.

Back Injury

First, Employer asserts that the evidence preponderates against the trial court's finding that Employee sustained a compensable permanent injury to his lower back. Specifically, Employer asserts that the trial court erred by accrediting the testimony of Employee's experts, Dr. McNamara and Dr. Neely, because neither doctor reviewed all of Employee's medical records before rendering an opinion.

We begin by observing that Employee testified that he sustained immediate pain in his lower back after lifting a box of frozen french fries on June 27, 2010 and that he immediately reported this incident to his supervisor. There is no evidence in the record to the contrary. The proof is thus undisputed that the incident occurred as Employee described it. The issue presented, then, is whether or not that incident caused a permanent injury to his lower back.

In order to prove causation, a plaintiff in a workers' compensation case must establish "the causal relationship between the alleged injury and the claimant's employment activity." Excel Polymers, LLC v. Broyles, 302 S.W.3d 268, 274-75 (Tenn. 2009). Proof of causation, in all but the most obvious cases, requires expert medical proof. Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 643 (Tenn. 2008). Where expert medical testimony is presented by deposition at trial, an appellate court may independently assess where the preponderance of the evidence lies. Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991). This does not mean, however, that "the deposition testimony of experts should be read and evaluated in a vacuum." Id. Rather, "[w]hile causation and permanency of an injury must be proved by expert medical testimony, such testimony must be considered in conjunction with the lay testimony of the employee as to how the injury occurred and the employee's subsequent condition." Id. When a trial includes live testimony from lay witnesses, an appellate court must afford "considerable deference . . . to the trial court's evaluation of such oral testimony." Id. Moreover, when faced with a situation, such as the instant case, with conflicting expert medical testimony "it is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation." Id. In making that determination, the trial judge should consider "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." Cloyd, 274 S.W.3d at 644 (citing Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991)).

Dr. McNamara, the original treating physician, testified that Employee had an annular tear at the L5-S1 level. Employee's symptoms were consistent with that condition. Dr. McNamara testified that annular tears can occur naturally or be caused by trauma. He followed Employee for five months. During that time, he recommended epidural steroid injections to treat the condition, but that treatment was not approved. Employee's condition in December 2010 was much the same as it had been at his first visit in August 2010. On that basis, he opined that Employee had reached maximum medical improvement and provided an opinion on permanent impairment. That being said, Dr. McNamara rendered his opinion on permanent medical impairment in July 2013 at the request of Employee's attorney without first doing a further physical examination of Employee or reviewing any medical records created subsequent to Employee's last visit in December 2010.

Dr. Wade saw Employee on a single occasion in November 2011 at the request of Employer's attorney. Dr. Wade conceded the L5-S1 disc had an annular change, but he did not observe an annular tear. He opined that this condition could have been partially caused by an injury. He opined that Employee's symptoms were out of proportion to the physical findings, but he nevertheless recommended epidural steroid injection, the same treatment Dr. McNamara had recommended, as well as referral to a pain management clinic. The records of that clinic demonstrate that numerous treatment modalities were used, and while some of those treatments provided temporary relief, none provided significant permanent relief. Given the length of time Employee had gone without treatment, this was not a surprising result. Dr. Wade himself was skeptical about the efficacy of long-delayed treatment.

Dr. Neely conducted a single examination after the conclusion of Employee's course of pain management treatment. He found diminished range of motion, muscle spasm and decreased sensation in the left leg. Those findings were consistent with the examinations of Dr. McNamara and Dr. Wade and consistent with a problem at the L5-S1 level of the spine. He concluded that an annular tear or abnormality at that level was the source of Employee's symptoms and assigned Employee a seven percent permanent impairment to the body as a result of his condition. While Dr. Neely had not seen the August 2012 F.C.E. of Employee prior to his deposition, he was thoroughly cross-examined regarding the contents of this F.C.E. and concluded that nothing contained in the F.C.E. changed his opinions in this case.

We have examined the evidence carefully and are unable to conclude that it preponderates against the trial court's findings. There is no evidence that Employee had any problems with his lower back until June 27, 2010. On that date, he had immediate pain after attempting to lift an object at work. The incident was promptly reported. From that day forward, Employee had lower back pain and related symptoms. Diagnostic testing revealed a possible anatomical source for those symptoms in the form of an annular tear or abnormality. All three orthopaedic surgeons who testified agreed that a lifting incident *could*

damage the annulus of an intervertebral disc. Expert testimony in combination with credible lay witness testimony from Employee is more than sufficient to prove causation. See Glisson, 185 S.W.3d at 354 (“Although causation cannot be based upon speculative or conjectural proof, absolute medical certainty is not required, and reasonable doubt must be resolved in favor of the employee.”)

Moreover, the trial court’s judgment order makes it clear that in accrediting Employee’s experts over Employer’s experts, the trial court considered, among other things, the materials reviewed by these experts prior to rendering their opinions. In assigning Employee the seven percent impairment rating to the body as a whole suggested by Dr. Neely, the trial court explicitly rejected the nine percent impairment rating suggested by Dr. McNamara because, “Dr. McNamara assigned his impairment rating based upon [Employee’s] condition before he reached maximum medical improvement.” The trial court’s decision to accredit Employee’s medical experts is further corroborated by Employee’s live testimony and by the trial court’s own observations of Employee’s physical condition during trial. The trial court specifically found that Employee offered “credible testimony as to the ongoing nature and severity of his chronic lower back pain” and noted that, having had the opportunity to observe Employee for more than four and one half hours of trial, the trial court “could see that he was in severe physical discomfort.” Although the proof is not overwhelming, the evidence does not preponderate against the trial court’s finding that an injury occurred and that permanent impairment resulted from that injury.

Mental Injury

Employer next contends that the evidence preponderates against the trial court’s finding that Employee sustained a permanent mental injury as a result of his back injury. Employer alleges that Dr. Ruder’s opinion is not credible because Dr. Ruder failed to review Employee’s complete medical records, and in particular, was unaware of a note in CPS records dated February 2013, indicating Employee declined psychiatric treatment because he did not want to lose his permit to carry a concealed weapon.

Employee’s mental state is documented throughout the treatment notes of CPS. However, the notes lack clarity and consistency regarding the seriousness of Employee’s mental condition and his attitude concerning his mental state. On some occasions, Employee is described as actively seeking approval of psychiatric treatment through his attorney. However, no other evidence in the record supports these assertions. Other CPS records suggest that Employee thought his emotional problems had resolved, that he was able to cope with them, or even that he had no interest in psychiatric treatment. The most explicit discussion of the subject is contained in the February 2013 note, in which Employee declined to pursue mental health treatment because of alleged concerns about losing his concealed

weapon permit. However, we note that this discussion did not occur until nearly three years after Employee's injury and is simply one of several conflicting CPS treatment notes regarding Employee's psychiatric state. For these reasons, we are unable to view the February 2013 CPS note as critically important to our analysis of the case.

After a de novo review of the depositions of Dr. Ruder and Dr. Griffin, we agree with the trial court's decision to accredit the testimony of Dr. Ruder. Both doctors conducted one-time evaluations. Dr. Ruder had some of the CPS records. Dr. Griffin had a more complete set of Employee's medical records. Most importantly, both noted that Employee displayed some tendencies consistent with depression, including blunt affect, anger, and pessimism. However, as the trial court found in its judgment order, despite making positive findings on several attributes that could have been rated on the Brief Psychiatric Rating Scale, Dr. Griffin failed to do so. He also failed to assign any Global Assessment of Functioning or Psychiatric Impairment Rating Scale scores, instead concluding that Employee suffered no psychological impairment. Although Dr. Ruder had not seen the February 2013 CPS record prior to his deposition and admitted that the record was "pertinent," he was thoroughly cross-examined about the record and his opinion remained unchanged. In light of Dr. Ruder's opinion and Employee's testimony regarding his mental state, the evidence does not preponderate against the trial court's finding of a ten percent psychiatric impairment rating.

Meaningful Return to Work

Employer argues that the trial court incorrectly found that Employee did not have a meaningful return to work, thereby permitting an award of permanent partial disability benefits in excess of one and one-half times the medical impairment rating. Tenn. Code. Ann. § 50-6-241(d)(1)(A) & (B) (2008). The trial court specifically found that "[w]hile . . . [Employer] did make an effort to return the [Employee] to work, it was reasonable for [Employee] to refuse to work in a position when his doing so caused excruciating pain. Furthermore, it was reasonable for [Employee] to leave his job at [Employer] when he had been advised that he would be given no choice but to work the kind of long hours that were not possible for him."

In Tryon v. Saturn Corp., our Supreme Court established the analytical framework to be used in determining whether or not a meaningful return has occurred:

When determining whether a particular employee had a meaningful return to work, the courts must assess the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to either return to or remain

at work. The determination of the reasonableness of the actions of the employer and the employee depends on the facts of each case.

254 S.W.3d 321, 328 (Tenn. 2008). As Tryon explained, an employee who returns to work but later resigns or retires has had a meaningful return to work when

(1) the employee’s workplace injury rendered the employee unable to perform his or her job, (2) the employer refused to accommodate the employee’s work restrictions arising from the workplace injury, and (3) the employee’s workplace injury caused too much pain to permit the employee to continue working.

Id. at 329 (footnotes omitted). Moreover, in Yang v. Nissan N. Am., Inc., 440 S.W.3d 593, 600 (Tenn. 2014), the Supreme Court made it clear that evaluating whether an employee has had a meaningful return to work is a “fact-intensive determination . . . [that] is typically best left to the trial judge who has had the opportunity to observe the witnesses [and] determine their credibility[.]”

Giving due deference to the trial court’s credibility determinations based on its observation of the witnesses, we conclude the evidence does not preponderate against the trial court’s finding Employee did not have a meaningful return to work. Despite being returned to work as a “blocker,” Employee testified that he still had to bend regularly at the waist to reach products at the back of shelves and pull them forward. He further testified that these duties caused him such severe pain that often he was only able to work one hour of his scheduled eight-hour shift. Both Employee and Employer’s store manager testified regarding a November 2010 meeting where Employee was told that he could not come back to work until he was able to work his entire eight hour shift. Because Employee was unable to complete a full shift due to pain from his low back injury, he never returned to work after this meeting. Inasmuch as the trial court found Employee to be credible and determined that his reasons for effectively abandoning his employment were reasonable, we defer to those findings.

Excessive Award

Employer next contends that the award of 80% permanent partial disability benefits is excessive in light of Employee’s relative youth, his high school and post-high school education, and the absence of any specific medical restrictions on his activities. Employer also questions Employee’s motivation to return to work, based on his absolute failure to make any attempt at all to seek or obtain employment since November 2010.

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)). As such, we review the trial court's findings using the preponderance of evidence standard, according a presumption of correctness to the trial court's decision. Tenn. Code Ann. § 50-6-225(e)(2) (2008). Tennessee Code Annotated section 50-6-241(d)(2)(A) (2008) provides that

[f]or injuries arising on or after July 1, 2004, in cases in which the pre-injury employer did not return the injured employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability benefits that the employee may receive for body as a whole and schedule member injuries subject to subdivision (d)(1)(A) may not exceed six (6) times the medical impairment rating determined pursuant to the provisions of § 50-6-204(d)(3).

In assessing the extent of an employee's permanent partial disability, the trial court "shall 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 claimant's disabled condition." Id.; see also Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990); Roberson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986). Further, the claimant's own assessment of his physical condition and resulting disabilities cannot be disregarded. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975); Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn. 1972).

In assigning Employee an eighty percent permanent partial disability rating the trial court made detailed findings of fact regarding Employee's condition as required by Tennessee Code Annotated section 50-6-241(d)(2)(B):¹

The Court finds that a vocational impairment rating of 80% is appropriately assigned to [Employee] in this matter. . . . The Court credits [Employee's] testimony that most physical activities exacerbate his pain and believes that he would be limited to mostly sedentary work. He studied art and Japanese during his only year in college, but dropped out due to poor performance. There is no evidence that he has ever earned money from his artistic talents, or that he is fluent in the Japanese language. His prior work required a large

¹Tennessee Code Annotated section 50-6-241(d)(2)(B) provides that "[i]f 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."

amount of standing, which he is no longer capable of doing, and he appears to have acquired few, if any, transferable skills. The Court observed [Employee] to have difficulty walking, that he was stooped over in pain when he did so, and that this appeared to worsen over the course of the trial. The Court considers the employment opportunities in this area, and believes it would be extremely difficult for [Employee] to procure and maintain employment in his disabled condition.

The trial court found Employee to be a credible witness and relied very heavily on his testimony to make its findings. Under the applicable standard of review, we afford considerable deference to the trial court's factual findings based on live witness testimony, and we are not at liberty to substitute our own judgment for that of the trial court merely because we might have chosen another alternative. See Brown-Harper, 2007 WL 789527, at *3. After having reviewed the record in this case, we conclude that the evidence does not preponderate against the trial court's finding as to the extent of Employee's permanent partial disability.

Temporary Total Disability Benefits

Finally, Employer seeks reversal of the trial court's award of temporary total disability benefits. Its position on this issue is primarily based on the testimony of Dr. McNamara and Dr. Wade that Employee was capable of working some type of light duty work during their course of treatment of him as well as its earlier argument that Employee had a meaningful return to work. Temporary total disability benefits "are intended to compensate the employee during the period he is recuperating from his injury and is unable to work." Carrigan v. Davenport Towing & Recovery Servs., LLC, No. W2012-00586-SC-WCMWC, 2013 WL 1461844, at *4 (Tenn. Workers Comp. Panel Apr. 11, 2013) (internal citations omitted). To establish a prima facie case for temporary total disability benefits, an employee must show that "(1) he or she was totally disabled and unable to work as a result of a compensable injury; (2) that a causal connection exists between the injury and the employee's inability to work; and (3) the duration of the period of the employee's disability." Id. Temporary total disability benefits terminate upon a claimant returning to work or reaching maximum medical improvement. Id.

Employee testified that he was not physically able to perform the light duty assignments provided to him by Employer. The trial court, having seen and heard Employee's live testimony, accredited that testimony, finding that "it will be extremely difficult for [Employee] to procure and maintain employment in his disabled condition." Moreover, it must be observed that Employee went for a substantial period without medical treatment due to the refusal of Employer's utilization review provider to approve epidural

steroid injections in 2010. That same treatment was approved and administered on Dr. Wade's order in 2011, though it provided Employee with little permanent relief. The trial awarded temporary total disability benefits from November 23, 2010, the date Employee met with Ms. Rector and was told he would be required to work full eight-hour shifts or not work at all, through July 25, 2012, the date of maximum medical improvement. The evidence does not preponderate against the trial court's finding.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Publix Supermarkets, Inc. and Hartford Insurance of the Midwest and their surety, for which execution may issue if necessary.

CORNELIA A. CLARK, JUSTICE

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

ALEXANDER KNIGHT v. PUBLIX SUPERMARKETS, INC. ET AL.

**Circuit Court for Maury County
No. 13755**

No. M2014-00126-SC-R3-WC- Filed March 31, 2015

JUDGMENT

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 Memorandum 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 Memorandum 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 will be paid by Publix Supermarkets, Inc. and Hartford Insurance of the Midwest, and their surety, for which execution may issue if necessary.

PER CURIAM