

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

July 22, 2019 Session Heard at Memphis

MICHAEL MCCLOUD v. CHARTER COMMUNICATIONS, INC.

**Appeal from the Madison County Chancery Court
No. 72578 James F. Butler, Chancellor**

No. W2018-02166-SC-R3-WC – Mailed September 19, 2019; Filed October 24, 2019

The trial court found that Employee was permanently and totally disabled following a work-related injury to his back in January 2012. Employer's appeal has been referred to this Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. Tenn. Sup. Ct. R. 51, § 1. After reviewing the evidence in the record and the parties' arguments, we conclude that the evidence does not preponderate against the trial court's decision and 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 Madison County Chancery Court Affirmed.**

MARY L. WAGNER, J., delivered the opinion of the Court, in which HOLLY KIRBY, J., and WILLIAM B. ACREE, JR., SR.J., joined.

Mark A. Baugh and Ashton E. Banta, for appellant, Charter Communications, Inc.

Ricky L. Boren, Jackson, Tennessee, for appellee, Michael McCloud.

OPINION

I.

Michael McCloud, age 40 at the time of the trial, graduated from high school in 1997. Although he took a college class in phlebotomy, he did not finish the course. He served as a medic in the military from 2003 to 2004 and received an honorable discharge following a bout with pneumonia that precluded him from running. Mr. McCloud's work

history included working as a nurse's aide, a medic, a veterinarian assistant, a computer/printer installer, and a manager of a small restaurant. All of these positions required lifting.

In January 2011, Mr. McCloud began working as a broadband technician for Charter Communications, Inc. In this position, he installed cable and internet connections, which required him to crawl under houses, climb on roofs, and move ladders. The job also included some direct sales. On January 22, 2012, Mr. McCloud injured his lower back while carrying a ladder. He went to the North Jackson Medical Clinic and was referred to Dr. Robert Talac, who performed surgery to repair a herniated disk at L5-S1. When Mr. McCloud continued to have pain, Dr. Talac referred him to Dr. Roy Schmidt for pain management. After being referred to Dr. Laverne Lovell, Mr. McCloud underwent a second surgery on his back in November 2013.

Mr. McCloud continues to be treated for pain by Dr. Schmidt. He takes hydrocodone, gabapentin, and a muscle relaxer on a daily basis. Before being injured, Mr. McCloud exercised, did martial arts, and did not have any problems with his back. Now, he believes he can no longer perform any of his prior jobs. Although he has not applied for work since his injury, he helped train a DJ on software about twice a week for six weeks on a volunteer basis at a friend's club. There was no proof presented that Mr. McCloud did any lifting or moving of equipment when volunteering as a DJ. Mr. McCloud occasionally uses a cane when walking or using stairs. He has lost nearly one hundred pounds since the injury, which has improved his ability to move around, but has not helped with the pain.

Dr. Schmidt, a board-certified anesthesiologist who specializes in pain management, evaluated Mr. McCloud on March 8, 2013. He diagnosed "post laminectomy syndrome" and "lumber neuritis," and he prescribed a butrans patch because Mr. McCloud was in "acute pain." Dr. Schmidt later prescribed hydrocodone and gabapentin. According to Dr. Schmidt Mr. McCloud has a legitimate problem with chronic pain. Dr. Schmidt opined that Mr. McCloud has a permanent condition and is unable "to do manual work that requires any significant amount of lifting."

Based on records shown to him during his deposition, Dr. Schmidt admitted that Mr. McCloud violated an "opioid agreement" with his office, which instructed him not to get pain medications from other physicians and not to take more medicine than prescribed. Dr. Schmidt did not seem concerned by this revelation. In fact, despite this admission, he contended that Mr. McCloud did not exhibit any additive behaviors and was responsible with his medications. Dr. Schmidt was concerned, at times during his treatment, about Mr. McCloud's dependency on pain medication, and he advised him to be as active as possible and to make lifestyle changes. He explained though that dependency is different than addiction. Dr. Schmidt would not label Mr. McCloud as an addict and lauded the progress

they have made in cutting back the amount of pain medications that Mr. McCloud takes. He expressed that Mr. McCloud has made great progress overall.

Dr. Lovell, a board-certified neurologist, evaluated Mr. McCloud on October 23, 2013. Although Mr. McCloud had a lumbar discectomy at L5-S1 in October 2012, he continued to have pain in both legs. He had a positive right straight-leg test, and a left straight-leg test that caused pain. Dr. Lovell performed a microdiscectomy at L5-S1 on November 18, 2013. Although Mr. McCloud reported pain in his left leg after the procedure, Dr. Lovell did not identify anything that would cause left leg pain. Dr. Lovell recommended physical therapy and prescribed pain medication. Two months after surgery, Mr. McCloud indicated that he had fallen on a treadmill during physical therapy; he was using a cane and had a “very guarded gait.” An MRI taken in March 2014 revealed degenerative changes at the L5-S1 level and surgical scar tissue. There was no evidence of recurrent disk herniation and no dural sack compression.

Dr. Lovell sent Mr. McCloud for a functional capacity evaluation (“FCE”), which indicated that Mr. McCloud was limited to “sedentary to light work.” Dr. Lovell opined, however, that Mr. McCloud “did not have a consistent presentation of someone who had the severe level of pain that he [said] he had.” He believed that weight loss would alleviate some of Mr. McCloud’s symptoms. Despite these concerns, he admitted that the FCE results were found to be valid. He opined that Mr. McCloud “is very capable physically of being engaged in the work force [with] maybe lifting restrictions and maybe sit and stand [restrictions].” He, however, emphasized that Mr. McCloud’s restrictions would need to be accommodated. Dr. Lovell recommended vocational rehabilitation training. He stated that Mr. McCloud reached maximum medical improvement on June 10, 2014, and he assigned an impairment rating of seven percent to the body as a whole.

Dr. Apurva Dalal performed an independent medical examination (“IME”) at the request of Mr. McCloud’s counsel on September 10, 2014. He determined that Mr. McCloud had tenderness in the paraspinal area, moderate paraspinal muscle spasms, a positive straight-leg test on the right side, a tender right hamstring, moderate weakness in both legs, and radiculopathy on the right side emanating from the L5-S1 nerve root. An x-ray showed a “complete loss of disc space at L5-S1,” which Dr. Dalal said “crushes the nerves” and leads to radiculopathy. As explained by Dr. Dalal, “[it] can’t get worse than this.” Dr. Dalal assigned an impairment rating of 14 percent to the body as a whole. He recommended no lifting over ten pounds and no bending, pushing or pulling. Dr. Dalal did not find any evidence that Mr. McCloud exaggerated his symptoms.

Dr. Robert Kennon, a licensed psychologist, performed a vocational assessment on March 23, 2015. Mr. McCloud’s work history included jobs with light to heavy strength ratings. According to Dr. Kennon, testing revealed that Mr. McCloud had average intelligence and severe depression. He found no evidence of malingering or

inconsistencies. Dr. Kennon testified that Mr. McCloud did not use a cane at his appointment and was able to communicate despite his stutter. He acknowledged that Mr. McCloud scored high on the military placement test to become a medic and that it was “plausible” that he could be trained for computer processing positions. Dr. Kennon noted that the FCE recommended restrictions that included a maximum lift of 20 pounds occasionally, a frequent lift of 10 pounds, and sitting or standing no more than 50% of the time. He noted that all of Mr. McCloud’s previous jobs required lifting between 20 and 100 pounds.

According to Dr. Kennon a transferable skills analysis using the FCE restrictions resulted in 97.45 percent loss of highly transferable job titles. He admitted that the restrictions adopted by Dr. Dalal resulted in an 89.9 percent vocational loss. Dr. Kennon explained that Dr. Dalal’s restrictions did not take into account the additional restrictions considered by the FCE, resulting in the different ratings. The FCE, as explained by Dr. Kennon, is more specific as to a person’s limitations. Dr. Kennon further opined that Mr. McCloud’s depression and stutter adversely affected his vocational opportunities.

According to Dr. Kennon, Mr. McCloud “really doesn’t have any realistic opportunities in the labor market.” As Dr. Kennon explained, only 11 percent of the jobs in the workforce are sedentary and these types of jobs typically require higher academic training. Dr. Kennon found that Mr. McCloud is currently qualified for only four types of jobs. None of which were available at the time of his analysis. Although Dr. Lovell’s deposition stated that Mr. McCloud is “very cable physically of being engaged in the workforce,” Dr. Kennon understood this to mean that Mr. McCloud could work within the range of restrictions imposed by Dr. Lovell and the FCE. This is in fact what Dr. Lovell said himself.

Jasmine Sadler testified that she works in Human Resources for Charter. She stated that Mr. McCloud started as a Broadband Tech I and was promoted to a Broadband Tech II after receiving additional training and passing a test. In March 2013, Mr. McCloud told Ms. Sadler that he was not interested in a direct sales representative position because “he didn’t feel he would succeed in that position.” Ms. Sadler admitted that Mr. McCloud told her he would have to get his pain under control before he could go back to work. Mr. McCloud had to undergo an additional surgery and treatment following this conversation.

Charles Ellington, an investigator hired by Charter, testified that Mr. McCloud was surveilled in June 2015. Investigators saw Mr. McCloud driving, using stairs, and working as a DJ at a club; they did not see Mr. McCloud use a cane. Mr. Ellington admitted that, when observed, Mr. McCloud moved slowly, that he was stiff and had to stretch when getting out of his car. Additionally, Mr. Ellington admitted that Mr. McCloud was not observed lifting or carrying any equipment. The video surveillance in the record demonstrates that Mr. McCloud walked slowly up four stairs.

II.

The trial court's findings of fact are reviewed 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(a)(2). The trial court is afforded considerable deference when the credibility and weight of a witness's in-court testimony is involved. *Madden v. Holland Group of Tenn.*, 277 S.W.3d 896, 900 (Tenn. 2009). An appellate court, however, may draw its own conclusions concerning the weight and credibility of expert medical testimony contained in the record by. *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008). The 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).

Charter argues that the trial court erred in determining that Mr. McCloud is permanently and totally disabled. Charter emphasizes Mr. McCloud's relatively young age, his varied work history, and his prior training for other jobs. Charter also strongly argued at trial and on appeal that Mr. McCloud is highly trainable. Charter also cites Dr. Lovell's opinion that Mr. McCloud is able to work with appropriate restrictions. In contrast, Mr. McCloud argues that the evidence does not preponderate against the trial court's judgment.

An employee is entitled to permanent total disability benefits if a work injury "totally incapacitates the employee from working at an occupation that brings the employee an income." Tenn. Code Ann. § 50–6–207(4)(B); *Prost v. City of Clarksville*, 688 S.W.2d 425, 427 (Tenn. 1985). The trial court must consider a variety of factors in making this determination, so that its decision results from having "a complete picture" of the employee's ability to obtain gainful employment after the injury. *Hubble v. Dyer Nursing Home*, 188 S.W.3d 525, 535 (Tenn. 2006) (citing *Vinson v. United Parcel Serv.*, 92 S.W.3d 380, 386 (Tenn. 2002)). Such factors include the employee's skills, training, education, age, local job opportunities, and ability to work at the available jobs in his post-injury condition. See *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000). Although vocational experts often present an assessment of these factors at trial, the employee's testimony concerning his or her ability or inability to return to gainful employment is "competent testimony that should be considered." *Hubble*, 118 S.W.3d at 536; *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 217 (Tenn. 2006). The extent of an injured employee's vocational disability is a question of fact for the trial court to determine from all of the evidence presented by the parties, including lay and expert testimony. *Cleek*, 19 S.W.3d at 773 (citing *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn.1999)).

In determining that Mr. McCloud suffered permanent and total disability, the trial court considered the trial testimony of Mr. McCloud, Dr. Kennon, Ms. Sadler, and Mr.

Ellington, as well as the deposition testimony of Dr. Schmidt, Dr. Lovell, and Dr. Dalal. The evidence showed that Mr. McCloud sustained a work-related injury that resulted in two surgeries at L5-S1 and permanent impairment. Dr. Lovell, who performed the second of the two surgeries, imposed a seven percent impairment rating to the body as a whole. He ordered Mr. McCloud to undergo the FCE, which concluded that Mr. McCloud put forth a determined effort and was limited to sedentary to light work with lifting restrictions. Dr. Schmidt stated that Mr. McCloud's condition is permanent and that he is unable to do "significant" lifting. Likewise, Dr. Dalal stated that Mr. McCloud has lifting, bending, pushing, and pulling restrictions, and he assigned a 14 percent impairment rating to the body as a whole.

Notably, Dr. Kennon testified at trial that Mr. McCloud has up to a 97.45 percent loss of highly transferrable job titles. He testified that based upon his search there were no jobs available for which Mr. McCloud qualified. Charter did not present any evidence to refute Dr. Kennon's findings as to available jobs.

Mr. McCloud testified that he continues to be treated by Dr. Schmidt, takes pain medication, and can no longer work at his prior jobs or engage in other activities. The trial court "observed Mr. McCloud during his testimony and [found him] to be a credible witness [on] his own behalf."

Again, in determining whether an individual is employable, the court is to consider the employee's present skills, training, education, and available job opportunities. While Dr. Lovell opines and Charter argues, that with additional training and learning, Mr. McCloud could be employable, that is not the standard. The law does not provide for vocational rehabilitation. Considering the proof in the record as to Mr. McCloud's skills, training, education, age, local job opportunities, and ability to work at the available jobs in his post-injury condition, the evidence does not preponderate against the trial Court's finding that Mr. McCloud is permanently and totally disabled.

III.

We affirm the trial court's judgment. The costs of this appeal are taxed to Charter Communications, Inc., for which execution may issue if necessary.

MARY L. WAGNER, J.

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

MICHAEL MCCLLOUD v. CHARTER COMMUNICATIONS INC.

**Chancery Court for Madison County
No. 72578**

No. W2018-02166-SC-R3-WC – Filed October 24, 2019

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 Charter Communications Inc., for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM