IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
February 27, 2012 Session

CHRISTOPHER ALLEN SCOGGINS v. JENKINS MASONRY, INC.

Appeal from the Chancery Court for Hamilton County
No. 10-0706 Jeffrey M. Atherton, Chancellor

No. E2011-01176-WC-R3-WC-MAILED-MAY 16, 2012/FILED-JUNE 27, 2012

In this workers' compensation case, the employee acquired contact dermatitis, which caused a chronic skin condition of his hands and feet, due to his exposure to potassium dichromate in the workplace. The trial court found that he was permanently and totally disabled as a result of the condition. The employer has appealed,[1] contending that the evidence preponderates against the trial court's finding. We affirm the judgment.

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

LARRY H. PUCKETT, SP.J., delivered the opinion of the Court, in which SHARON G. LEE, J., and THOMAS R. FRIERSON, SP.J., joined.

C. Douglas Dooley and Mi W. Belvin, Chattanooga, Tennessee, for the appellant, Jenkins Masonry, Inc.

Michael A. Wagner, Chattanooga, Tennessee, for the appellee, Christopher Allen Scoggins.

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[1] 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.

MEMORANDUM OPINION

Factual and Procedural Background

Christopher Allen Scoggins ("Employee") was employed intermittently as a masonry laborer by Jenkins Masonry ("Employer") for approximately ten years. His last period of employment began in March 2009 and ended in August 2009. In Spring of 2009, small blisters appeared on Employee's hands and shortly thereafter, his feet exhibited similar symptoms. He promptly advised his supervisor, Jeff Jenkins, of the problem, and Employer referred Employee to a doctor in Chattanooga who prescribed medication and ointments. Eventually, Employee was referred to Dr. John Zic, a dermatologist at Vanderbilt University Medical Center.

Employee subsequently filed a complaint against Employer in the Hamilton County Chancery Court seeking workers' compensation benefits. He alleged that he had reached maximum medical improvement, that he been assigned an anatomical rating of 15% to the whole person and that he had been placed under severe work restrictions that prevented him from performing any future work activities. In response, Employer disputed the extent of Employee's injuries and entitlement to benefits. Thereafter, the matter came on for hearing.

Dr. Zic, testifying by deposition, said he first examined Employee in October 2009. He diagnosed Employee with dyshidrotic eczema, a type of chronic hand and foot dermatitis. He prescribed the use of additional ointments to treat dryness of the skin caused by this condition. He later conducted a "patch test," in which various substances were applied to Employee's skin, to determine if his condition was caused by an allergic reaction. The patch test showed that Employee was allergic to potassium dichromate, which is a chemical compound used in a wide variety of products and processes, including the cement used in masonry work.[2]

Dr. Zic prescribed an oral medication, methotrexate, for a short period of time. However, he discontinued that medication because it affected Employee's liver function. Thereafter, he prescribed a steroid ointment, Clobetasol, which Employee continued to use at the time of the trial. Dr. Zic testified that thinning of the skin was a

[2] A list of uses of potassium dichromate was supplied to Employee and was also an exhibit to Dr. Zic's deposition. Items on the list included: cement, tanned leather, textiles (printing and dyeing, military green), wood preservatives, metallurgy (alloys), ceramics, foundries (added to sand for bricks, automotive and aircraft industries, television manufacturing, cosmetics (chromium oxide pigments in mascara and eyeshadow, tattoo pigments, paints (yellow, orange and green), match heads, detergents and bleaches (not a significant risk to the consumer), waxes and polishes, and corrosion protective in antifreeze, oils and paints.

potential side effect of this medication, and for that reason he recommended that Employee use it no more than twenty-eight times per month. Dr. Zic testified that Employee reached maximum medical improvement on June 17, 2010. At that time, Dr. Zic assigned an anatomical impairment of 15% to the body as a whole, based upon the Sixth Edition of the American Medical Association ("AMA") Guides. He observed that Employee's dermatitis was active 30% to 60% of the time.

Dr. Zic testified that it was a "reasonable recommendation" that Employee avoid tight gripping with his hands. He also recommended that Employee avoid jobs requiring repetitive hand motions with gripping, especially while the dermatitis was active. In addition, he opined that it would be "uncomfortable approaching painful" for Employee to handle rough materials such as bricks and boards. He also testified that persons with dyshidrotic eczema could experience foot discomfort when walking distances of one-half mile or more. During cross-examination, Dr. Zic agreed that, during periods when Employee's condition was in remission, "he may be able to use his hands much more so than times when they're exacerbated."

Employee testified that he was forty-four years old at the time of trial. He had attended school until he was sixteen years old, but left after failing his third attempt to complete the seventh grade. His work experience was primarily as a laborer in construction and landscaping. He had also been a cook and dishwasher. He had not worked since being laid off by Employer in August 2009. He testified that his feet became blistered if he walked more than one-half mile. Standing for approximately an hour also caused foot discomfort. He described an episode when he attempted to assist his pastor in removing some carpet, and that activity "took pieces of my skin off of my hands because they're so sensitive." His ability to grip was inadequately improved by the use of gloves. He also described an incident in which he used a screwdriver to attach some "shields" to a bed frame. Employee testified that the activity took about twenty minutes and left a mark on the palm of his hand for about two weeks. On cross-examination, he admitted that he performed chores around his house, but didn't "push [him]self."

Mark Boatner, a vocational evaluator, evaluated Employee at the request of his attorney and testified live at trial. Mr. Boatner administered tests that revealed that Employee was able to read at a sixth-grade level and perform arithmetic at a fourth-grade level. However, his ability to spell was below kindergarten level. Mr. Boatner opined that Employee was not "able to perform any of his past jobs or any other regularly defined job that exists in the local or national economy." He based this opinion on Dr. Zic's estimate that Employee's condition was symptomatic 30% to 60% of the time. In Mr. Boatner's opinion, this would cause a level of absenteeism that would not be acceptable in any of the jobs that Employee was qualified to perform.

During cross-examination, Mr. Boatner conceded that if Dr. Zic's restrictions were considered without regard to potential absenteeism issues, Employee had a 50% vocational disability. He also conceded that he did not perform tests of Employee's dexterity. He did not believe the results of those tests would be relevant "because you [have] got to have sustained use of both of your upper extremities in order to perform the range of jobs that exist at the unskilled level."

Two witnesses testified on behalf of Employer—Jeff Jenkins, president and part owner of Jenkins Masonry, and Jason Wilkerson, a surveillance investigator hired by Employer to investigate Employee.[3] However, neither of these witnesses refuted the testimony of Employee, Mr. Boatner, or Dr. Zic as to the extent of Employee's injury or its effect on his employability.

The trial court took the case under advisement, and issued a written memorandum decision. It found that Employee was permanently and totally disabled by his dyshidrotic eczema, noting that when the condition was active, Employee

> cannot engage in any of the types of employment in which he has experience; and, as noted by Mr. Boatner, he is also excluded from the types of employment that may be otherwise available to [Employee] in the local job market when considering his significant educational limitations as well as a skill set that is limited to employment areas requiring significant physical activity. When coupled with the physical limitations including "no tight gripping" and limitation of walking to 1/2 mile, the limitations prohibit him from performing the types of employment activities available to him in his disabled condition. As noted by Mr. Boatner, with the condition active 30-60 percent of the time, it means that the condition is only "inactive" 40-70 percent of the time. This simply does not provide adequate periods of consistent remission or dormancy for the Court to hold that [Employee] is anything but permanently totally disabled.

[3] Employer does not reference the testimony of either of these witnesses in support of its argument on appeal that the evidence preponderates against the ruling of the trial court that Employee is totally and permanently disabled. Our independent review of the testimony of these two witnesses does not show that their testimony is of probative value as to any matter contested in the present appeal.

Judgment was entered in accordance with those findings. Employer has appealed, contending that the evidence preponderates against the finding of permanent and total disability.

Standard of Review

We are statutorily required to review the trial court's factual findings "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." Tenn. Code Ann. § 50-6-225(e)(2). Following this standard, we are further required "to examine, in depth, a trial court's factual findings and conclusions." Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)). We accord considerable deference to the trial court's findings of fact based upon its assessment of the testimony of witnesses it heard at trial, although not so with respect to depositions and other documentary evidence. Padilla v. Twin City Fire Ins. Co., 324 S.W.3d 507, 511 (Tenn. 2010); Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). We review conclusions of law de novo with no presumption of correctness. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). Although workers' compensation law must be liberally construed in favor of an injured employee, the employee must prove all elements of his or her case by a preponderance of the evidence. Crew, 259 S.W.3d at 664; Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992).

Analysis

Employer argues that Employee did not satisfy his statutory burden of proving that he is "totally incapacitate[d] . . . from working at an occupation that brings the employee an income . . . ." Tenn. Code Ann. § 50-6-207(4)(B) (2008 & Supp. 2011). Employer offers two lines of reasoning in support of this argument, both directed at Mr. Boatner's interpretation of Employee's physical limitations. First, Employer submits that Mr. Boatner incorrectly applied Dr. Zic's (and Employee's) estimate that Employee's dyshidrotic eczema was active 30% to 60% of the time. According to Employer, that evidence merely shows that Employee was precluded from full-time work, because he still would have been able to work 40% to 70% of the time, and thus he was capable of part-time employment. We do not find this argument to be persuasive.

Contrary to Employer's contention that, in determining Employee's vocational impairment, the trial court should not have considered employee's inability to comply with a regular work schedule, the law required the trial court to consider the effect of his work induced dyshidrotic eczema upon his "ability to find and keep employment." Courier

Printing Co. v. Sim's ex rel. Bly, No. M2010-01279-WC-R3-WC, 2011 WL 2936350 at *8 (Tenn. Workers Comp. Panel July 15, 2011) ("In order for a trial or appellate court to assess accurately the effect of a particular injury on an individual's ability to find and keep employment, it must take into account the employee's ability to find and keep employment prior to the injury.").

The trial court and an appellate court must consider numerous factors, including the employee's age, education, skills and training, local job opportunities and his capacity to work at types of employment available in his disabled condition. Cleek v. Wal-Mart Stores, Inc., 19 S.W. 3d 770, 774 (Tenn. 2000).

Mr. Boatner, the vocational expert, explicitly based his conclusions on an analysis of full-time jobs. However, as he noted, "all jobs do require attendance." The gist of Mr. Boatner's testimony was that the limited types of work available to Employee, in light of his education, intellectual abilities and skill set, require the ability to work a regular schedule.[4] Employee does not have the education, training or skill to operate independently on a schedule of his own making. He is limited to unskilled and semi-skilled positions requiring little or no reading and writing. Obtaining and maintaining such employment, whether part-time or full-time, will nearly always require conforming to a regular schedule. The evidence in this record does not support a conclusion that Employee would be able to do that. Rather, his symptoms appear to wax and wane intermittently, and his ability to use his hand and feet to perform work decreases and increases in relation to those symptoms. The evidence also is clear that activities that require repetitive use of his hands, standing or walking for any significant period of time, or exposure to any of the many materials containing potassium dichromate, are likely to cause those symptoms to flare up. Conversely, Employer presented no evidence that there was any job available, full-time or part-time, for a person with Employee's education, skill set and limitations.

Employer also submits that the evidence does not demonstrate that Employee is unable to work with his hands when his dyshidrotic eczema is symptomatic. Insofar as Mr. Boatner's opinion and the trial court's findings are based upon that assumption, Employer argues that those findings are incorrect. Employer points out that Dr. Zic did not state that Employee is precluded from any use of his hands during flare-ups, but only limited him from "tight gripping" during such periods. We find that this is a selective view of the evidence, and is not consistent with the record viewed as a whole.

[4] Mr. Boatner testified: "[When a] neurosurgeon wants the day off, they get a day off . . . . but for the average working person, 30 to 60 percent of the time being absent is just excessive and not tolerated."

First, it must be noted that Employee testified that even the relatively light task of attaching parts to a bed with a screwdriver caused blisters to appear and left bruises which remained for several days. Likewise, he testified, and Dr. Zic confirmed, that walking one-half of a mile, or standing for as long as an hour, caused blisters to appear on the bottom of his feet. No contrary evidence was presented. Our courts have long held that an injured employee's own assessment of her 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). Moreover, Dr. Zic specifically testified that Employee should avoid working in "most manufacturing settings, [because] he will have to perform repetitive hand motions that will most likely involve some level of gripping," that he would "have to avoid handling rough materials with his present skin condition," and that he should avoid contact with products containing potassium dichromate.

Employee's entire work history involved repetitive use of his hands to handle materials, use tools, or manipulate controls. Both his testimony and that of Dr. Zic lead to the conclusion that his ability to perform those tasks is limited when his symptoms are active. Further, repetitive hand motions typical of manufacturing and construction work are likely to cause his symptoms to become active. Because of Employee's relatively narrow work experience and limited ability to read and write, any clerical or administrative jobs that Employee might have the physical capacity to perform when his dyshidrotic eczema is symptomatic are simply not available to him. We therefore conclude that the evidence does not preponderate against the trial court's finding that Employee is permanently and totally disabled as a result of his work-related medical condition.

Conclusion

The judgment is affirmed. Costs are taxed to Jenkins Masonry, Inc. and its surety, for which execution may issue if necessary.

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JUDGE LARRY H. PUCKETT

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No. E2011-01176-WC-R3-WC

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 appeals 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 of this appeal are taxed to Jenkins Masonry, Inc., and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM