IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
February 25, 2013 Session

DAN A. CONATSER v. FENTRESS FARMERS COOPERATIVE AND SENTRY INSURANCE A MUTUAL COMPANY

Appeal from the Chancery Court for Fentress County
No. 11-3 Billy Joe White, Chancellor

No. M2012-01798-WC-R3-WC - Mailed June 25, 2013
FILED JULY 26, 2013

In this workers' compensation action, the employee sustained multiple injuries in a work-related incident in April 2005, when approximately 1,500 pounds of stockade gates fell on him. The employee later returned to work for the employer in his previous position as a truck driver. The parties settled the employee's claim for workers' compensation benefits based upon a 34.5% permanent partial disability to the body as a whole, plus future medical benefits. The employee continued having bilateral shoulder pain as a result of his injuries and in August 2008 had surgery on his left shoulder to repair a torn rotator cuff. After the surgery, however, he developed an infection and required a second surgery, which revealed the failure of the rotator cuff repair. Because of the poor result of those surgeries, the employee declined the recommended surgery on his right shoulder. In February 2011, the employee filed a complaint seeking reconsideration of his previous award, alleging that he had ceased working for the employer in January 2010 because he could no longer physically perform his duties due to his earlier compensable injuries. The trial court found that the employee was entitled to reconsideration and awarded additional permanent partial disability benefits (with credit for the benefits previously paid). The employer has appealed. 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. We affirm the trial court's finding that the employee is entitled to reconsideration but reverse its finding as to permanent partial disability.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;
Judgment of the Chancery Court Affirmed in part, Reversed in part, and Remanded

DONALD P. HARRIS, SP. J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., J. and BEN H. CANTRELL, SR. J., joined.

Lee Anne Murray and Shea M. Brakefield, Nashville, Tennessee, for the appellants, Fentress Farmers Cooperative and Sentry Insurance A Mutual Company.

Michael Anthony Walker, Nashville, Tennessee, for the appellee, Dan A. Conatser.

MEMORANDUM OPINION

Factual and Procedural Background

At the time of trial, Dan Conatser was sixty-four years old and had worked for Fentress Farmers Cooperative ("Co-op") for thirty-four years. Although he worked for the Co-op in other positions when he began his employment, Mr. Conatser soon became a truck driver, the position in which he worked for most of that thirty-four year period. Prior to working for the Co-op, Mr. Conatser served in the military for two years (during which time he obtained his GED), was honorably discharged, and then worked for several other employers in manual labor positions.

On April 27, 2005, when he was fifty-seven years old, Mr. Conatser sustained a fractured pelvis, one or more broken ribs, and injuries to his back, left hip, left knee, and both shoulders when approximately 1,500 pounds of stockade gates fell on him during a delivery for the Co-op. Mr. Conatser was hospitalized for six days and was off from work for approximately four months. Although his original treating orthopedist suspected a torn left rotator cuff, shoulder surgery was not performed at the time of the injuries. Mr. Conatser returned to work as a truck driver for the Co-op in August 2005. In February 2007, the Co-op and Mr. Conatser settled Mr. Conatser's claim for workers' compensation benefits based upon a 34.5% permanent partial disability to the body as a whole, and included future medical benefits.

Mr. Conatser continued having pain from his injuries, and he consulted another orthopedic surgeon, Dr. Richard Williams. In August 2008, Dr. Williams performed surgery on Mr. Conatser's left shoulder to repair the torn rotator cuff. After the surgery, however, Mr. Conatser developed an infection and required a second surgery in October 2008 to clean out the surgical site and to remove scar tissue. During that second surgery, Dr. Williams discovered the failure of the rotator cuff repair. Because of the poor result of those surgeries, Mr. Conatser declined to have surgery on his right shoulder, that Dr. Williams had recommended.

In January 2009, Mr. Conatser returned again to his job as a truck driver for The Co-

op. Dr. Williams had imposed a limitation of lifting no more than ten pounds, no lifting away from the body, no lifting above chest level and no heavy pushing or pulling.. Mr. Conatser testified that he continued having significant pain after his return to work, that he slept poorly due to the pain, that he could not take pain medication because he could not drive while taking such medication, and that he had difficulty performing some of his job tasks.

Mr. Conatser testified that he stopped working for the Co-op in January 2010 because, in his words, the "[p]ain just got more than I could cope with, and I just felt I wasn't safe to be on the road any longer." Mr. Conatser subsequently filed a complaint seeking reconsideration of the earlier award of workers' compensation benefits. After conducting an evidentiary hearing, the trial court found that Mr. Conatser was entitled to reconsideration of his earlier award, and the court awarded benefits based upon a 97.75% permanent partial disability to the body as a whole. The parties stipulated that the Co-op would receive a credit for the benefits previously paid, and that stipulation was included in the trial court's ruling.

Standard of Review

Courts reviewing an award of workers' compensation benefits 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 conducting this examination, Tenn. Code Ann. § 50-6-225(e)(2) requires the reviewing court to "[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." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. Tryon v. Saturn Corp., 254 S.W.3d. 321, 327 (Tenn. 2008); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). However, the reviewing courts need not give similar deference to a trial court's findings based upon documentary evidence such as depositions, Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006); Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004), or to a trial court's conclusions of law, Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

The sole issue on appeal is the extent of Mr. Conatser's vocational disability. The issue is somewhat unusual in that if Mr. Conatser is found to be permanently and totally disabled, he is, pursuant to Tennessee Code Annotated section 50-6-207(4)(A)(I) (2008 & Supp. 2012), entitled to recover benefits "during the period of the permanent total disability

until the employee is, by age, eligible for full benefits in the Old Age Insurance Benefit Program under the Social Security Act, compiled in 42 U.S.C. § 401 et seq." Mr. Conatser's date of birth is August 31, 1947. Thus for a permanent total disability, he would be eligible for benefits from January 10, 2010, until August 31, 2013, a total of 190.43 weeks. For a permanent partial disability of 97.75%, as found by the trial court, Mr. Conatser would be eligible for benefits for that percentage of 400 weeks or for 391 weeks. Thus, the Co-op contends that Mr. Conatser has a permanent total disability. Mr. Conatser asserts that, despite his significant limitations, he only has a permanent partial disability, as found by the trial court.

The standards applicable to consideration of permanent total disability were recently summarized by the Tennessee Supreme Court in Hubble v. Dyer Nursing Home, 188 S.W.3d 525, 535-36 (Tenn. 2006):

> The determination of permanent total disability is to be based on a variety of factors such that a complete picture of an individual's ability to return to gainful employment is presented to the Court. Vinson v. United Parcel Service, 92 S.W.3d 380, 386 (Tenn. 2002); Cleek [v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000)]. Such factors include the employee's skills, training, education, age, job opportunities in the immediate and surrounding communities, and the availability of work suited for an individual with that particular disability. Cleek, 19 S.W.3d at 774 (citing Roberson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986)). Though this assessment is most often made and presented at trial by a vocational expert, "it is well settled that despite the existence or absence of expert testimony, 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.'" Vinson, 92 S.W.3d at 386 (quoting Cleek, 19 S.W.3d at 774).

Tennessee Code Annotated section 50-6-207(4)(B) (2008 & Supp. 2012) provides "[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, the employee shall be considered totally disabled." The cases interpreting this code section are instructive. In Skipper v. Great Cent. Ins. Co., 474 S.W.2d 420, 424 (Tenn. 1971), the Supreme Court stated with regard to this statutory language, the "fact of employment after injury is a factor to be considered along with all other factors involved when applying the test, which is whether employee, in light of his education, abilities, physical and/or mental infirmities, is employable in the open labor market." In Atkinson v. Signage, Inc., No. M2002-01491-WC-R3-CV, 2003 WL 21782292 (Tenn. Workers Comp. Panel Aug. 4, 2003), the employer had created a new job for the employee, based upon the restrictions

placed upon him due to his injury. The panel affirmed the trial court's finding that he was nonetheless totally disabled, stating that "employment after injury is a factor to be considered in determining whether an employee is permanently and totally disabled, but that fact is to be weighed in light of all other considerations." Id. at *2. Rhodes v. Capital City Ins. Co., 154 S.W.3d 43 (Tenn. 2004) concerned an employee who sought recovery for total disability during a period of time that he was employed as a chain saw operator. The employee testified that he had employed another person to assist him in performing his job during this time. The Supreme Court affirmed the trial court's ruling that total disability benefits commenced at the time the employee stopped working (rather than the time he reached maximum medical improvement) and stated:

> It would be an extremely rare situation in which an injured employee could, at the same time both work and be found permanently and totally disabled. In order for such a situation to occur, the evidence would have to show that the employee was not employable in the open labor market and that the only reason that the employee was currently working was through the magnanimity of his or her employer.

Id. at 48.

An example of a person working "through the magnanimity of his or her employer" is found in Cage v. Yasuda Fire & Marine Ins. Co. Of America, No. W2004-01669-SC-WCM-CV, 2005 WL 1412135 (Tenn. Workers' Comp. Panel June 16, 2005). That case involved a church employee who suffered from severe asthma. He was unable to engage in any manual labor, and had to avoid all odors, smoke, chemicals and dust. He was able to walk only ten feet before becoming exhausted. Nonetheless, his church employed him as a music minister for $215 per week. His job duty was to play the piano on Sundays. He was, however, able to do this for only ten minutes at a time. The Workers' Compensation Panel found his employment to be, essentially, an act of generosity of the church, and affirmed an award of permanent total disability. Id. at *6.

The Co-op contends that Mr. Conatser's own "testimony at trial . . . clearly demonstrated he is not employable in the open labor market due to the injuries and limitations he sustained as a result of his April 27, 2005 work-related accident." The Co-op notes, for example, that Mr. Conatser was almost sixty-five years old at the time of trial, that he has an employment history consisting entirely of manual-labor work, that he admitted he has no clerical skills and no computer training, no typing or accounting skills, and that he has never been employed as a clerk or a secretary. The Co-op also notes that Mr. Conatser testified that he continues to experience constant pain in his low back and in his left and right shoulders, and that, to alleviate his pain, he takes prescription pain medications that make him drowsy and prevent him from being able to drive. When asked in a pretrial deposition

whether he thought he was "physically able to return to some type of work, whether it's at the Co-op or elsewhere, in your current physical condition," he replied, "No, I can't stand up and I can't lift. The only training I've got is manual work." Thus, the Co-op asserts that based on his own testimony, Mr. Conatser is permanently and totally disabled.

In response, Mr. Conatser asserts that, although he was unable to continue working at the Co-op, he is able to perform a limited amount of work on his farm. He testified that, at the time of trial, he had eighteen head of cattle, that he and his son make a little hay, and that he is able to fix fences. He also testified that, if a tree falls on a fence, he can cut up the tree; he added, however, that "sometimes it may take two days to get it off or anything." Regarding his ability to work on the farm, Mr. Conatser made it clear that he has limitations as to what he can do. In his words, "I work a couple – about three hours a morning, go in and rest and take pain medicine and go back and work a couple hours in the evening." Mr. Conatser also said that he had filed tax returns for his farm work and that he continued (as of the time of trial) to do part-time limited work on his farm. Mr. Conatser conceded, however, that he would be unable to maintain the farm work without the assistance of his son and, occasionally, his wife, because he is unable to put up hay by himself, and keeping cattle depends on putting up hay for the winter.

The question of whether Mr. Conatser's permanent vocational disability is total or partial should not be based upon which finding will bring him the greatest amount of benefits but upon the evidence in the record. Neither party chose to introduce testimony from a vocational expert concerning the extent of Mr. Conatser's vocational disability. Consequently, the determination must necessarily be made based on the lay testimony in the record, i.e., Mr. Conatser's testimony and the testimony of Dr. Williams.

In an application for Social Security Disability benefits dated February 21, 2010, signed by Mr. Conatser, he was asked in Question 10: "Enter the date you became unable to work because of your illness, injuries, or conditions." His response was January 5, 2010. In his answers to interrogatories submitted by the Co-op, Mr. Conatser was asked, in Interrogatory No. 7 to "Please provide the name of every individual or company where you have applied for employment since your injuries at issue in this case." His response was: "Not applicable. Since my employment with Fentress Farmers Cooperative ended, I have not worked as I am not physically capable of working." As stated above, during his pre-trial deposition, Mr. Conatser was asked: "Do you think that you are physically able to return to some type of work, whether it's at the Co-op or elsewhere, in your current physical condition?" He responded, "No, I can't stand up and can't lift. The only training I've got is manual work." In explaining his answer during the trial of this case, the following questions and answers were given:

Q: Now, you didn't tell me at that time that you thought you could do some

type of part-time work, correct?

A: No, I didn't tell that you (sic).

Q: And you didn't say in your discovery responses that we previously looked at that you thought you could do part-time work either, correct?

A: I ain't done part-time work. I'm piddling. Because there ain't no job, part-time job that you are going to go and work two hours and then go and take you a two-hour nap and they are going pay you. If they are -- if they are, I want to get on it.

Q: But you haven't sought out any type of work like that since your retirement, correct?

A: No. There ain't no kind of work like that in this county.

Dr. Williams testified that he thought Mr. Conatser would be a good candidate for "total disability status" if he applied for Social Security Disability benefits. Mr. Conatser does in fact receive Social Security Disability benefits.

As noted above in setting out the standard of review, we must give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. In this case, the trial court's written opinion appears to have implicitly found Mr. Conatser's testimony to be credible. We defer to that implicit finding, but our doing so does not resolve the issue before us. Using the Skipper and Rhodes standard, the issue before the trial court was whether Mr. Conatser was "employable in the open labor market." The trial court found that he was to a limited extent. The issue before this panel is whether the evidence preponderates against that finding. We find that it does.

The trial court apparently believed that, because Mr. Conatser was making some contribution to the farming operation, he was not totally disabled. The trial court stated:

> The Plaintiff testified he was able to work on his farm for a couple of hours in the morning, take pain medication, sleep a while and then go back to doing farm work. He is unable to do eight (8) hours of sustained labor but able to work. [Sic.] This man has always worked hard and chooses by determination to not be totally disabled. As long as he is able to do some gainful employment, he is not totally disabled.

We disagree that Mr. Conatser's ability to make some contribution to the farming operation establishes that he is employable in the open market. While under our case law, as stated above, this is a factor to be considered, it is not controlling. It is clear that Mr. Conatser would not be able to engage in farming without the aid of his son and wife. He describes his farming activities as "piddling." Noting, as stated in Hubble, supra, that the employee's own assessment of his or her physical condition and ability or inability to return to gainful employment should be considered, it is apparent from his testimony that Mr. Conatser does not consider himself "employable in the open labor market." He testified that there are no part-time jobs available where he could work in the manner in which he is able to work. He stated in his interrogatory responses that he was not physically capable of working. He admitted that during his pre-trial deposition when he was asked whether he was able in his physical condition to return to some type of work, he responded that he was not. He also admitted stating under penalty of perjury in his Social Security Disability application that he became unable to work because of his injuries and conditions on January 5, 2010. Finally, Dr. Williams described him as being a good candidate for "total disability status" should he apply for Social Security Disability benefits. In our view, this evidence outweighs the fact that Mr. Conatser is able to make some contribution to his farming operation and preponderates against a finding that Mr. Conatser is employable in the open labor market. The judgment of the trial court finding a permanent partial disability is reversed and replaced with a finding that Mr. Conatser sustained a total permanent disability.

Conclusion

We affirm the trial court's judgment that Mr. Conatser is entitled to reconsideration, but reverse the trial court's finding that Mr. Conatser has a 97.75% permanent partial disability to the body as a whole. We, instead, find the evidence preponderates in favor of a finding that Mr. Conatser has sustained a permanent total disability. The cause is remanded to the trial court for entry of an order consistent with this opinion. The costs are taxed to Dan A. Conatser, for which execution may issue if necessary.

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DONALD P. HARRIS, SPECIAL JUDGE

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

DAN A. CONATSER v. FENTRESS FARMERS COOPERATIVE AND SENTRY INSURANCE A MUTUAL COMPANY

Chancery Court for Fentress County
No. 11-3

No. M2012-01798-WC-R3-WC - FILED JULY 26, 2013

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 Dan A. Conatser, for which execution may issue if necessary.

PER CURIAM