IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 15, 2010 Session

JOHN ERNEST HAYES v. AMERICAN ZURICH INSURANCE COMPANY ET AL.

Appeal from the Chancery Court for Hamilton County
No. 08-380 Howell N. Peoples, Chancellor

No. E2010-00099-WC-R3-WC- FILED - MAY 25, 2011

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. The trial court found that the employee had sustained a compensable injury. In addition, it found that the employee had a meaningful return to work, and his award of permanent partial disability ("PPD") benefits was limited to one and one-half times his anatomical impairment pursuant to Tennessee Code Annotated § 50-6-241(d)(1). On appeal, the employee contends the trial court erred by finding that he had a meaningful return to work. The employer contends the trial court erred by admitting a discovery deposition of an expert into evidence over its objection based upon Tennessee Rule of Civil Procedure 32.01(3), and finding that the injury at issue was not concurrent with injuries which were the subject of a separate lawsuit. We affirm the judgment.

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

JON KERRY BLACKWOOD, SR.J., delivered the opinion of the Court, in which CORNELIA A. CLARK, C. J., and WALTER C. KURTZ, SR.J., joined.

Flossie Weill, Chattanooga, Tennessee, for the appellant, John Ernest Hayes.

Jeffrey L. Cleary and Michael A. Kent, Chattanooga, Tennessee, for the appellee, American Zurich Insurance Company.

Robert E. Cooper, Jr., Attorney General & Reporter; Joshua Davis Baker, Assistant Attorney General, for the appellee, Tennessee Department of Labor and Workforce Development, Second Injury Fund.

MEMORANDUM OPINION

Factual and Procedural Background

1. *Procedural*

This appeal arises from the second of two workers' compensation cases filed by John Ernest Hayes ("Employee") against American Zurich Insurance Company, which provided workers' compensation insurance to his employer, Alstom Power, Inc. (hereinafter collectively referred to as "Employer"). The first complaint filed in 2005 alleged that Employee had sustained gradual injuries to his elbows, wrists, hands, left shoulder and neck in November 2003. The second action was filed in 2008, alleging that he sustained an acute injury to his left shoulder on or about April 2, 2006. The Second Injury Fund was named as a defendant in the second action.

Employer filed a motion to consolidate the two cases. The record does not contain an order in the record disposing of that motion. However, the order which sets the 2008 case for trial states that the trial will occur "after the conclusion" of the trial of the 2005 case, effectively denying the motion to consolidate. Counsel for the Second Injury Fund raised the consolidation issue again on the day of trial. The trial court denied the motion, stating: "I think the plaintiff is taking the risk that if the Court finds there is a concurrent injury of all of them together the plaintiff may not be able to recover for the left shoulder." The cases were then tried consecutively. By agreement of counsel, certain testimony from the trial of the 2005 case was introduced into evidence at the trial of the 2008 case. Employer contended in both cases that the left shoulder injury at issue in the 2008 case was concurrent with the gradual injuries at issue in the 2005 case.

The only other issue in the 2005 case was the extent of disability. Compensability was not disputed. Because Employee implicitly abandoned his gradual shoulder injury claim, only scheduled injuries remained, and the two and one-half times impairment cap in effect at the time of the injuries, Tenn. Code Ann. § 50-6-241(a)(1), did not apply. The trial court found that the shoulder injury was not concurrent with the other injuries, citing *Building Materials Corp. v. Britt*, 211 S.W.3d 706 (Tenn. 2007). It awarded 32.5% PPD to both arms. A judgment was entered in accordance with that decision. Neither side has filed an appeal from that judgment.

Compensability was not disputed in the second trial involving the injury to Employee's left shoulder. Employee asserted that he did not have a meaningful return to work, and therefore the one and one-half times impairment cap in effect at the time of the injury pursuant to Tennessee Code Annotated § 50-6-241(d)(1), did not apply. Employer took the position that it had made reasonable efforts to accommodate Employee's medical

restrictions and he had voluntarily retired. Therefore, Employee had a meaningful return to work and his award of benefits was subject to the cap. The trial court ruled that Employee had a meaningful return to work and awarded 12% PPD to the body as a whole. Employee filed this appeal from that judgment.

2. *Factual*

Employee was employed as a boilermaker helper from 1970 to 2009. His responsibilities consisted of assisting boilermakers in repair and maintenance of steam boilers. The job required use of heavy tools and lifting of heavy parts. In late 2003, he developed symptoms in his hands and arms which he reported to Employer in November 2003. He was referred to Dr. James Kennedy, a plastic surgeon who specializes in the treatment of hands and arms. Dr. Kennedy diagnosed bilateral cubital tunnel and carpal tunnel syndrome. He eventually performed surgery to address these conditions in March, April and October 2004. There were complications involving one of Employee's fingers, which required additional surgical procedures in November 2005 and May 2006. Employee returned to work, with restrictions, after each surgical procedure. Dr. Kennedy released Employee in March 2007, assigning a permanent anatomical impairment of 13% to each upper extremity. He also placed permanent restrictions upon Employee against lifting, pushing, or pulling of weights greater than forty pounds.

On April 3, 2006, Employee was injured as he was lifting a "metal insert." The "metal insert" struck him on the left shoulder causing immediate pain. He reported the injury to the plant nurse and was given ibuprofen and a cold pack. Employee continued to have pain and, during the next few weeks, returned to Employer's medical department on several occasions. On May 12, he requested to see a doctor, and the nurse completed an incident report. Employee was initially referred to Sentef Medical Center, an occupational medicine clinic, on May 18. The record of that visit contains this history: "L shoulder began to hurt over time from working regular duties w/ twisting and putting in panels." Employee was subsequently referred to Dr. John Nash, an orthopaedic surgeon.

A deposition of Dr. Nash was taken by Employer. This deposition was introduced at the second trial by Employee over Employer's objection. Dr. Nash performed surgery on Employee's left shoulder on August 10, 2006. He found that Employee had two separate problems in his shoulder: a partial thickness rotator cuff tear, and a labral tear. Dr. Nash testified that the former condition was more likely than not a gradual injury, while the latter condition was more likely than not an acute injury. He repaired both injuries and assigned permanent anatomical impairment of 8% to the body as a whole. That impairment was inclusive of both conditions, and he did not believe there was a practical way to assign separate impairments for each condition. He placed various restrictions upon Employee's activities, including requiring the use of a jib (a type of crane) to lift heavy objects, lifting

from floor to knuckle height to be limited to fifty pounds occasionally, twenty-five pounds frequently, knuckle to overhead lifting twenty pounds occasionally, ten pounds frequently, floor to shoulder with left arm fifteen pounds occasionally, carrying fifty pounds occasionally and twenty-five pounds frequently.

Employee returned to work in January 2007. The normal requirements of his job exceeded the various restrictions placed upon him by Dr. Nash. However, Employer had a policy to accommodate medical restrictions. Employee's immediate supervisor, Rick Yanna, was provided with a written document outlining Employee's medical restrictions. The restrictions were also placed in a database maintained by the medical department, and accessible by other supervisors. Employee was instructed not to work outside of his restrictions. Mr. Yanna was instructed to find alternate work when Employee advised he was unable to perform a particular task. Employee testified this method of accommodating his limitations was not practical. He testified there was no scale present in his department which permitted him to determine whether or not the weight of a particular part or tool exceeded his restrictions. He also testified it would not be apparent at times that a specific task exceeded his restrictions until he was already engaged in it. He agreed he had been instructed to work within his restrictions, and when he was unable to perform a task, Mr. Yanna would find alternative work (often sweeping) for him. Employee testified another supervisor advised him that if he was unable to perform alternate work, he could leave work. Time records of the period after Employee's return to work suggest that he left early on a number of occasions.

In June 2008, Employee suffered a broken hand as a result of a fall in his home. He was off work until November 2008. In December 2008, he gave a letter to Employer requesting information concerning health insurance and retirement benefits available to him. In January 2009, he submitted a retirement letter. Both letters stated the decision to retire was based upon his work injuries.

Employer called three witnesses to testify concerning its policy of accommodating injured workers in general, and Employee in particular. Rick Yanna, Employee's immediate supervisor, testified he attempted to assign work to Employee within his restrictions. He stated he did not request Employee to perform any task outside of those restrictions, nor did he observe Employee performing such work. If Employee told Mr. Yanna he was unable to perform a particular task, alternate work was assigned. Nancy Clark, the company nurse, explained the system used by Employer to make supervisors aware of employee medical restrictions. Debbie Best, a human resource specialist for Employer, testified concerning the specific restrictions in effect at various times for Employee.

Each side presented a vocational expert. William Way, called by Employee, testified that Employee was able to read on a third-grade level, and to perform arithmetic at a fourth-

grade level. He opined that Employee had a 51% vocational disability due to the arm injuries that were the subject of the 2005 lawsuit, and an 86% vocational disability as a result of the shoulder injury at issue in the 2008 lawsuit. It was apparent from his testimony that the second rating included most or all of the jobs considered in the first rating. Robert Bradley, who testified on behalf of Employer, opined that Employee had a 51% vocational disability based upon the combined effects of both injuries.

On appeal, Employee asserts that the trial court erred by finding that he had a meaningful return to work, and by dismissing his claims against the Second Injury Fund. Employer asserts the trial court erred by admitting the discovery deposition of Dr. Nash into evidence, and by finding that Employee's left shoulder injury was not concurrent with the injuries at issue in the first workers' compensation action.[1]

Standard of Review

We review issues of fact *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(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315 (Tenn. 1987). We may, however, draw our own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989). We review a trial court's conclusions of law *de novo* upon the record with no presumption of correctness. *Ridings v. Ralph M. Parsons Co.*, 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

1. *Meaningful Return to Work*[2]

In its findings, the trial court noted Employer's policy of accommodating restrictions, Mr. Yanna's testimony that he assigned work to Employee within his restrictions, and

[1] Employer also asserted in its brief that the trial court erred by denying its motion to consolidate the two actions. However, counsel explicitly waived this issue at oral argument.

[2] The dismissal of claims against the Second Injury Fund followed from the trial court's finding that Employee had a meaningful return to work and that his award was therefore capped by Tennessee Code Annotated section 50-6-241(d)(1). It is therefore unnecessary to consider the issues separately.

Employee's testimony that he had been instructed not to work outside of those limits. It then stated:

> So the key is, was he required to work outside of his restrictions, or did he do that of his own volition[?] The only person who's testified that he had to work beyond his restrictions is [Employee]. None of his fellow employees have come in to testify that he was required to work beyond his restrictions.
>
> The Court finds that he worked beyond his restrictions of his own accord and his own volition. And if he sustained further pain or discomfort and it caused him to leave his employment, then that was voluntary on his part. No doctor has come forward to testify that a change in his medical condition required him to leave his employment. He didn't file for disability pension or disability retirement. He took his regular pension.

On the basis of those findings, the trial court concluded that Employee had a meaningful return to work. Employee argues that this conclusion by the trial court was in error and points to his own testimony that his job included tasks which he could not reasonably determine beforehand exceeded his restrictions. Employee further points out that once those tasks were started, he could not stop. He also notes Dr. Nash's testimony that the requirements contained in the written job description for a boilermaker helper exceeded Employee's restrictions, and it would be "reasonable" for Employee to retire if he was unable to avoid working outside of his restrictions. In addition, he points out that he missed a substantial number of days of work between his return to work in January 2007 and his non-work injury in June 2008.

In support of the trial court's conclusion, Employer points to the evidence concerning its policy of accommodating medical restrictions, and its specific efforts to accommodate Employee. The trial court explicitly accredited this evidence. It also noted that Employee returned to work for seventeen months after being released by Dr. Nash, and he chose, as the trial court noted, to apply for a regular pension, rather than disability.

Our Supreme Court directly addressed this issue in *Tryon v. Saturn Corp.*, 254 S.W.3d 321 (Tenn. 2008). In that decision, it stated:

> 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.

Id. at 328 (citations omitted). The evidence in this case is consistent with a conclusion that Employer took every possible step to provide Employee with work consistent with the limitations placed upon him by his physicians, and to prevent him from engaging in activities which exceeded those limitations. With these modifications, Employee was able to continue in his pre-injury job, albeit with some difficulty, for approximately seventeen months. He stopped working in June 2008 due to a non-work injury. He inquired about retirement almost immediately after returning from that injury in November 2008, and retired shortly thereafter. Weighing these facts in light of the *Tryon* standard, we conclude that the evidence does not preponderate against the trial court's conclusion that Employee had a meaningful return to work and that his award was subject to the cap contained in Tennessee Code Annotated section 50-6-241(d)(1).

3. *Admission of Dr. Nash's Deposition into Evidence*

Employer contends that the trial court erred in admitting the deposition of Dr. Nash into evidence at the trial of this case. It asserts the deposition, which was taken by Employer, was a discovery deposition and therefore not admissible under Tennessee Rule of Civil Procedure 32.01(3). That Rule provides, in pertinent part: "[D]epositions of experts taken pursuant to the provisions of Rule 26.02(4) may not be used at trial except to impeach . . . ." *See Brown v. United Parcel Serv., Inc.*, No. M2007-00343-WC-R3-WC, 2008 WL 902971, at *4-5 (Tenn. Workers' Comp. Panel April 1, 2008). The deposition was offered by Employee and admitted over Employer's objection. In its brief, and in the trial court, Employer asserts that the deposition was taken at its instance for discovery purposes, after the Supreme Court's decision in *Overstreet v. TRW Commercial Steering Div.*, 256 S.W.3d 626 (Tenn. 2008), which held that an employer was not permitted to communicate *ex parte* with an employee's authorized treating physician without first obtaining a release from the employee. *Id.* at 631-36.[3] It does not appear to be disputed that Employee declined to provide such a release. Therefore, a discovery deposition was the only method available for Employer to learn Dr. Nash's answers to several questions relating to the concurrent injury issue. Employer asserts it is apparent from the questions asked during direct examination that the deposition was taken for discovery purposes. A review of the transcript provides some support for that assertion. The first part of the deposition consisted primarily of Employer's counsel providing various medical records and other documents to Dr. Nash for review. Counsel then stated on the record, "So those are the records I wanted to acquaint you with because they're not in your file. And because [Employee's] lawyer has objected to me talking to you in advance of today, I couldn't come and bring all this to you and show it to

[3] *Overstreet* was abrogated by the enactment of 2009 Public Chapter 486, which amended Tennessee Code Annotated section 50-6-204(a)(1) and (2) to require employees seeking workers' compensation benefits to authorize direct communication between his employer and authorized treating physicians. See 2009 Tenn. Pub. Acts __.

you because of their objection. So I had to do that here on the record during this deposition." Employer's attorney then asked Dr. Nash to discuss the causal relationship between Employee's left shoulder injury, gradual work-related trauma, and the April 2006 incident. The questions appear to be genuine inquiries, rather than direct or cross examination.

Employee asserts the trial court properly admitted the deposition into evidence. He points out that Employer offered the deposition into evidence during the trial of the 2005 case, and listed it as a potential exhibit in the trial of this case. He also argues that there was no surprise or unfair prejudice caused by admission of the deposition into evidence in this case. He asserts that the deposition transcript bears the captions of both lawsuits. However, the transcript contained in the record on appeal bears only the caption of the 2005 case. Employee also points out that the Second Injury Fund, which was a party in this lawsuit only, participated in the deposition. Employee does not cite any case law in support of his position that offering an item into evidence in the course of one trial constitutes a waiver of an otherwise valid objection in a separate, subsequent proceeding between the same parties.

We conclude that the trial court did not err in its decision to admit Dr. Nash's deposition into evidence over Employer's objection. If the deposition was taken pursuant to Tennessee Rule of Civil Procedure 26.02(4) for the purpose of discovering facts and opinions of an opposing party's expert witness, Rule 32.01(3) would prohibit its admission as substantive evidence. However, having examined the transcript, we are unable to determine with any certainty that the deposition was taken solely for the purpose of discovery. As outlined above, there are circumstances which support Employer's position on this point, notably the form of the questions asked by Employer's counsel on direct examination. However, there are other factors, including the reporter's certificate stating that the deposition was being taken by agreement of the parties for evidentiary purposes, Employer's use of the deposition during the trial of the 2005 claim, and the participation of counsel for the Second Injury Fund, which are consistent with Employee's position. A clear opening statement of the deposition's purpose by counsel, a Notice of Deposition referring to Rule 26.04, or correspondence between counsel which stated that the deposition was being taken for a limited purpose, would resolve the question in Employer's favor. However, the only unequivocal statement about the deposition's allegedly limited purpose was made by Employer's counsel at the time Employee offered the deposition into evidence at the trial of the 2008 claim. Under these circumstances, we are unable to find that the trial court abused its discretion in admitting this item into evidence. *See Biscan v. Brown*, 160 S.W.3d 462, 468 (Tenn. 2005).

4. *Concurrent Injury*

Employer contends the trial court erred by finding that Employee's April 2006 left shoulder injury was not concurrent with the pre-existing gradual injury at issue in the 2005

lawsuit.

Dr. Nash's testimony, discussed above, is to the effect that Employee had both a gradually occurring rotator cuff tear, and an acute labral tear. He also testified that it was not practical to apportion the resulting impairment between the injuries. That evidence may have been sufficient to support a finding that the injuries were concurrent pursuant to Tennessee Code Annotated section 50-6-207(3)(C). "The word 'concurrent' conveys the meaning of multiple injuries and multiple disabilities, acting in conjunction with each other and resulting in permanent disabilities to a scheduled member or to the body as a whole." *Crump v. B & P Const. Co.*, 703 S.W.2d 140, 143 (Tenn. 1986). However, the trial court found that Employee sustained an injury to his left shoulder on April 3, 2006 and that this injury was a separate injury from the gradual injuries sustained by Employee to his arms and hand. We conclude that the evidence supports the trial court's finding that these injuries were not concurrent.

Conclusion

The judgment is affirmed. Costs are taxed one-half to John Ernest Hayes and his surety, and one-half to American Zurich Insurance Company, for which execution may issue, if necessary.

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JON KERRY BLACKWOOD, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

JOHN ERNEST HAYES v. AMERICAN ZURICH INSURANCE COMPANY ET AL.

Chancery Court for Hamilton County
No. 08-0380

No. E2010-00099-SC-WCM-WC

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by John Ernest Hayes pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed one-half to John Ernest Hayes and his surety, and one-half to American Zurich Insurance Company, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM