IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 25, 2012 Session

JOHN FREEMAN v. GENERAL MOTORS COMPANY ET AL.

Appeal from the Circuit Court for Maury County
No. 09-CV-12943 Robert L. Holloway, Jr., Judge

No. M2011-02284-WC-R3-WC - Mailed August 30, 2012
Filed OCTOBER 22, 2012

The employee sought reconsideration of workers' compensation settlements concerning a back injury in 2003 and a right knee injury in 2006. The trial court granted the petition and increased the previous permanent partial disability awards to 30% to the body as a whole for the back injury and 100% to the leg for the knee injury. The employer has appealed, contending that reconsideration of the back injury was barred by the statute of limitations, that the awards for both injuries were excessive, that the trial court incorrectly awarded benefits in excess of six times the anatomical impairment for the knee injury, and that the trial court erred by awarding benefits in a lump sum. The employee contends that the trial court erred by failing to award permanent total disability benefits. We conclude that the employee's petition for reconsideration of the settlement of his back injury was not timely filed and reverse that part of the judgment. We affirm the judgment in all other respects.[1]

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

WALTER C. KURTZ, SR. J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., J. and DONALD P. HARRIS, SR. J., joined.

Kent E. Krause, Nashville, Tennessee, for the appellant, General Motors LLC.

Jonathan Williams, Nashville, Tennessee, for the appellee, John Freeman.

---

[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.

Robert E. Cooper, Jr., Attorney General & Reporter; William E. Young, Solicitor General; Shanta J. Murray, Assistant Attorney General, for the appellee, Tennessee Department of Labor and Workforce Development, Second Injury Fund.

MEMORANDUM OPINION

Factual and Procedural Background

John Freeman began working for General Motors Corporation (GM Corp.) in 1981 at a plant in Framingham, Massachusetts. That plant closed in 1987, and he was laid off. In 1995, he was offered the opportunity to work for Saturn Corporation, a wholly-owned subsidiary of GM Corp., at its Spring Hill, Tennessee facility. He accepted that offer and began working for Saturn in January 1996.

Mr. Freeman injured his lower back on the job in January 2003. His treating physician, Dr. Vaughn Allen, assigned 5% permanent anatomical impairment to the body as a whole due to the injury. Mr. Freeman was able to return to work for Saturn at his pre-injury wage. His workers' compensation claim was settled in accordance with the lower "cap" in effect at that time (2 ½), Tennessee Code Annotated section 50-6-241(a)(1). The settlement agreement provided that he retained his right to seek reconsideration in accordance with Tennessee Code Annotated section 50-6-241(a)(2) if he lost his employment within 400 weeks of his return to work.

On January 1, 2005, as a result of corporate restructuring and changes in the collective bargaining agreement between GM Corp. and the United Automobile Workers ("UAW"), GM Corp. became the employer of all workers at the Spring Hill facility. Saturn Corporation continued to exist, but manufacturing activities at Spring Hill were carried out directly by GM Corp., and workers at that facility were paid by GM Corp. GM Corp. and Saturn had separate charters, separate (though overlapping) boards of directors, and separate federal tax identification numbers. Mr. Freeman was aware that he became an employee of GM Corp. at the time the change occurred and continued to work at the Spring Hill facility thereafter.

In June 2006, Mr. Freeman sustained a work injury to his right knee. His treating physician, Dr. James Wiesman, assigned 10% permanent impairment to the right leg for the injury. Mr. Freeman was again able to return to work after his injury, and his permanent disability award was therefore subject to the lower cap (1 ½) set out in Tennessee Code Annotated section 50-6-241(d)(1)(A). The trial court awarded 12.5% permanent partial disability to the right leg. The judgment provided for reconsideration as permitted by Tennessee Code Annotated section 50-6-241(d)(1)(B). Mr. Freeman was laid off from his employment with GM Corp. in April 2009. Mr. Freeman then filed this action, seeking

reconsideration of both the 2003 and 2006 injuries and joining the Second Injury Fund. In July 2009, GM Corp. went through an expedited bankruptcy proceeding. A new entity, General Motors, LLC (GM LLC) emerged from that proceeding. Additional information concerning that transaction is referenced in Cook v. Gen. Motors Corp., No. M2010-00272-WC-R3-WC, 2011 WL 590456 (Tenn. Workers' Comp. Panel Feb. 16, 2011) (Wade, J.).

Mr. Freeman was born on June 7, 1956. He was, therefore, fifty-five years old on June 23, 2011, the date that the trial of his reconsideration claims took place. He was a high school graduate, had completed a two-year electrical maintenance program, and had some additional technical school and junior college courses. Between the 1987 layoff from GM Corp. in Massachusetts and his hiring by Saturn in 1996, he was self-employed as a carpenter. After being laid off in 2009, he attempted to start up an internet marketing business. However, that venture failed. He also received training to become a home inspector. He ultimately did not go into that business because he believed that he was physically unable to perform the bending, crawling, and climbing required by the job.

Mr. Freeman testified that his current authorized physician prescribed several medications for him, including morphine, roxicodone, and a muscle relaxer. He testified that the medications caused drowsiness, forgetfulness, and mood swings. He described his daily activities as beginning by being awakened due to pain in his back and knee. He cleaned and mowed his yard, using a riding mower. He stated that he was able to perform those activities only by moving more slowly and carefully than before his injuries. He engaged in his longtime hobby of assembling and flying large scale radio-controlled airplanes. The planes weighed twenty to thirty pounds and had wingspans of as much as 104 inches. In order to continue with this activity, he had constructed special stands so that he would not have to work on the planes as they sat on the ground.

A functional capacity evaluation ("FCE") was conducted in April 2009, at the request of Dr. William Leone, a pain management specialist who was Mr. Freeman's authorized physician at that time. That test placed him in the light physical demand category of the U.S. Department of Labor Dictionary of Occupational Titles. His leg lift capacity was thirty-one pounds and his torso lift capacity was twenty-one pounds. In addition, the FCE suggested that Mr. Freeman limit bending, squatting, kneeling, and crawling.

John McKinney, a vocational evaluator, testified at trial on behalf of Mr. Freeman. He administered the Slosson Intelligence Test and the Wide Range Achievement Test as part of his evaluation. Those tests showed that Mr. Freeman had an IQ of 98, which is in the average range. He was able to read at an eleventh grade level, spell at a ninth grade level and perform arithmetic at a tenth grade level. Mr. McKinney opined that Mr. Freeman had a 70% vocational disability based upon the current medical restrictions. When considering

additional subjective factors, such as Mr. Freeman's medications, his appearance, and the potential for pain symptoms to affect attendance, Mr. McKinney opined that Mr. Freeman was 100% disabled.

Patsy Bramlett, also a vocational evaluator, testified on behalf of Employer. Based solely on the medical restrictions associated with Mr. Freeman's knee injury, she found that he had a vocational disability of 48%. Similarly, the restrictions from the lower back injury resulted in a 67% vocational disability. Because of the overlap of jobs eliminated by each injury, the combined restrictions resulted in a 71% vocational disability. Ms. Bramlett testified that she considered the subjective negative employment factors discussed by Mr. McKinney. She opined that those factors would not eliminate all jobs available to Mr. Freeman, and that they were counterbalanced by positive factors, resulting in a limited net effect on her evaluation. On cross-examination, she agreed that she had based her analysis on the Nashville metropolitan area, rather than Mr. Freeman's residence, Maury County.

Russell Bratley, finance director for GM LLC, testified that Mr. Freeman was paid by Saturn Corporation in 2004 and by GM Corp. in 2005. W-2 forms reflecting that information were placed into evidence. He further testified that Saturn Corporation was a wholly-owned subsidiary of GM Corp., both before and after January 1, 2005. Saturn was not a publicly traded corporation; GM Corp. was a publicly traded corporation until the 2009 bankruptcy proceeding. He testified that Saturn and GM Corp. had separate boards of directors. On cross-examination, he testified that GM LLC had assumed the workers' compensation liability for GM Corp. and Saturn after the 2009 bankruptcy proceeding. In addition, he stated that Saturn's board of directors had consisted entirely of GM Corp. employees. GM Corp. chose the members of the board. Saturn's liabilities and assets were included in GM Corp.'s annual reports. GM Corp. exercised some oversight of Saturn's sales, accounting and engineering functions. However, the day-to-day operations of Saturn were managed by Saturn. Mr. Bratley also testified that all employees of Saturn's Spring Hill facility became employees of GM Corp. on January 1, 2005. None of those workers, including Mr. Freeman, had the option of continuing to be employed by Saturn after that date.

Lynn Nelson, an hourly employment supervisor for GM LLC, testified that all hourly workers at Spring Hill were employed by Saturn Corporation until December 31, 2004. As of January 1, 2005, GM Corp. became their employer. She also testified that Mr. Freeman continued to be eligible for reemployment by GM LLC in accordance with procedures established in the collective bargaining agreement. He had been offered a position in Kansas City, Missouri, but had declined the offer. He was subsequently offered a position in Flint, Michigan on a "non-volunteer" basis. He was scheduled to report to Flint on the Monday following the trial. She did not know what specific position he would be assigned to in Flint. In light of his medical restrictions, it would be necessary for him to report to the medical

department in Flint. That department would determine if any positions were available within those restrictions.

Mr. Freeman introduced certified copies of several workers' compensation settlements, in which employees injured prior to January 1, 2005, and returned to work after that date, were stipulated to have returned to work for their pre-injury employer, Saturn Corporation.

The trial court took the case under advisement. On August 18, 2011, it issued its decision as a written memorandum (21 pages). It found that "Saturn Corporation and General Motors Corporation, General Motors Company and/or General Motors LLC 'were so completely integrated and commingled' for the purposes of the Workers' Compensation Law 'that neither could be realistically viewed as a separate economic entity[,]' [and it] would be inequitable and unjust for employees injured before January 1, 2005, to lose their right of reconsideration under the facts of this case." The trial court therefore concluded that Mr. Freeman's petition for reconsideration of his lower back injury was timely filed pursuant to Tennessee Code Annotated section 50-6-241(a)(2). The trial court then found that he was not permanently and totally disabled, but had sustained a 90% permanent partial disability to the body as a whole as a result of his combined knee and back injuries.

Mr. Freeman then filed a motion for amendment of the trial court's memorandum, or in the alternative, for additional findings of fact. He requested that the court reconsider its finding that he was not totally disabled or make additional findings to support the award of 90% permanent partial disability and apportion the award between the two injuries. GM LLC filed a response to the motion, setting out its position concerning the issues raised by Mr. Freeman.

On October 17, 2011, the trial court entered a second order (15 pages), modifying some aspects of its previous memorandum. In summary, it confirmed its finding that Mr. Freeman was not totally disabled; found that reconsideration of Mr. Freeman's back injury was governed by Tennessee Code Annotated section 50-6-241(a)(2); that the maximum award for that injury was 30% to the body as a whole; that reconsideration of Mr. Freeman's knee injury was governed by Tennessee Code Annotated section 50-6-241(d)(1)(B) (for that injury Mr. Freeman had proved three of the four elements set out in section 50-6-242, and thus his award of benefits was not limited to six times the anatomical impairment); and, that Mr. Freeman had sustained a 100% impairment of the leg as a result of his work injury. Judgment was entered accordingly.

GM LLC has appealed, raising four issues: (1) Whether the trial court's ruling on the statute of limitations regarding the back injury was erroneous; (2) Whether the trial court's

rulings concerning the extent of permanent partial disability from the knee injury were erroneous; (3) Whether the trial court erred by awarding discretionary costs; and (4) Whether the trial court erred by commuting the award to a lump sum. Mr. Freeman has also raised an additional issue, asserting that the trial court's ruling that he was not permanently and totally disabled was erroneous.

Standard of Review

The standard of review of issues of fact is 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 to the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Madden v. Holland Group of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A 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).

Analysis

Statute of Limitations

GM LLC first asserts that the trial court erred by finding that Mr. Freeman's reconsideration action concerning his 2003 back injury was not time-barred by Tennessee Code Annotated section 50-6-241(a)(2) (1999). That section provides:

> In accordance with this section, the courts may reconsider, upon the filing of a new cause of action, the issue of industrial disability . . . . The reconsideration may be made in appropriate cases where the employee is no longer employed by the pre-injury employer and makes application to the appropriate court within one (1) year of the employee's loss of employment, if the loss of employment is within four hundred (400) weeks of

the day the employee returned to work.[2]

Relying on Perrin v. Gaylord Entm't Co., 120 S.W.3d 823 (Tenn. 2003) and Barnett v. Milan Seating Sys., 215 S.W.3d 828 (Tenn. 2007),[3] GM LLC asserts that a loss of employment occurred on January 1, 2005, when all Saturn workers, including Mr. Freeman, became employees of GM Corp. The trial court did not accept this argument. Rather, it found that Mr. Freeman "after January 1, 2005 continued to be employed by his 'pre-injury employer', as that phrase is used in Tennessee Code Annotated section 50-6-241(d)(l)(B)(i) and (ii). Mr. Freeman is not barred from seeking reconsideration by the one (1) year statute of limitations under Tennessee Code Annotated section 50-6-241 (d)(l)(B)(iv)." In other words, the trial court believed it had reason to ignore the change in corporate structure.

That ruling was based upon a series of factual findings concerning the relationship between GM Corp. and Saturn: "confusion" concerning the effect of the January 1, 2005 changeover; GM Corp.'s assumption of liability for Saturn's workers' compensation claims; and, representations made in post-2005 settlement agreements that the workers in those cases, who were injured before January 1, 2005 but had returned to work after that date, continued to be employed by their "pre-injury employer". Based on those findings, the trial court concluded:

> (11) Saturn Corporation operated under the aegis of General Motors Corporation, both before and after January 1, 2005.
> (12) Saturn Corporation and General Motors Corporation, General Motors Company and/or General Motors LLC "were so completely integrated and commingled" for the purposes of the Workers' Compensation Law "that neither could be realistically viewed as a separate economic entity."
> (13) It would be inequitable and unjust for employees injured before January 1, 2005, to lose their right of reconsideration under the facts of this case, including the facts that (1) General Motor Corporation, General Motors Company and/or General Motors LLC assumed the workers compensation liabilities of Saturn Corporation, (2) General Motors Corporation, General Motors Company and/or General Motors LLC continued to pay

---

[2]This statute has now been suspended by Tennessee Code Annotated section 50-6-241(d)(1)(C)(i) (2009).

[3]The adoption of Tennessee Code Annotated section 50-6-241(d)(1)(C)(i) also effectively abrogated Perrin and Barnett for cases involving injuries occurring after July 1, 2009.

> workers' compensation benefits after January 1, 2005, just as Saturn Corporation had before, and (3) General Motor Corporation, General Motors Company and/or General Motors, LLC filed confusing documents with the Tennessee Department of Labor and Workforce Development and with the Circuit Court of the Twenty-Second Judicial District.

In Perrin, the employee was injured in December 1996. Perrin, 120 S.W.3d at 824-25. He reached maximum medical improvement in October 1997. Id. at 825. He settled his workers' compensation claim in March 1998, based upon the two and one-half times impairment cap then applicable. Id. In October of 1997, after the injury but prior to the settlement, his employer, Gaylord, was purchased by CBS Corporation, and all Gaylord employees became employees of CBS. Id. In December 1998, the employee was terminated. He filed a petition for reconsideration in September 1999. Id. The trial court dismissed the petition as untimely. Id. On appeal, the Supreme Court affirmed, stating: "In short, [section 50-6-241(a)(2)] requires that an application for reconsideration must be made within one year of the employee's loss of employment with the pre-injury employer and not within one year of the loss of employment with a later or successor employer." Id. at 827. Thus, the one year begins to run with the change in ownership.

In Barnett, the employer was purchased by another corporation after the injured employee returned to work, but before the trial of her claim. Barnett, 215 S.W.3d at 830. The trial court held that her award was subject to the one and one-half times impairment cap established in section 50-6-241(d)(1)(A). Id. The Supreme Court reversed, holding that the trial court's

> conclusion is flatly inconsistent with our holding in Perrin. Plaintiff either is or is not working for her pre-injury employer. Perrin holds that an employee is no longer working for his or her pre-injury employer if that company is purchased by a new entity, and this is so even if that employee is performing the same job duties at the same rate of pay at the same location.

Id. at 833. So again, as in Parrin, the change of ownership was a "loss of employment". Id.

The Special Workers' Compensation Appeals Panel has also considered several cases concerning change of employer issues for injuries occurring before the 2009 change in the statute. In Meeks v. Hartford Ins. Co. of Midwest, the injured employee worked for a corporation. 2010 WL 3398835 (Tenn. Workers' Comp. Panel Aug 30, 2010). After his injury, but before he reached maximum medical improvement, all of the stock of the employer

was sold to a different corporation. Id. at *2. The employer's corporate existence continued, and the worker continued to be employed and paid by that corporation. Id. The same corporate transaction occurred in Day v. Zurich Am. Ins. Co., 2010 WL 1241779 (Tenn. Workers' Comp. Panel Mar. 31, 2010) and Tomlinson v. Zurich Am. Ins. Co., 2010 WL 3418319 (Tenn. Workers' Comp. Panel Aug. 30, 2010). In those cases, the employer was merged with another corporation, owned by the same holding company, to become a new entity. Day, 2010 WL 1241779 at *1; Tomlinson, 2010 WL 3418319 at *1. The employees continued to work for the new entity, which retained the same federal tax identification number as the original corporation. Day, 2010 WL 1241779 at *1; Tomlinson, 2010 WL 3418319 at *1. In Jenkins v. Yellow Transp., Inc., the employing corporation merged with another corporation to create a new corporate entity. 2011 WL 1418546, *2 (Tenn. Workers' Comp. Panel Apr. 13, 2011). The terms of employee's employment continued to be governed by the same collective bargaining agreement. Id. at *4.

The common thread of these cases is that the transfer of employment from one entity to another, or a wholesale change in the corporate structure or ownership of the employer was considered a loss of employment under section 50-6-241. It is not disputed that Mr. Freeman in this case worked for Saturn Corporation on December 31, 2004, and that on January 1, 2005 he ceased to work for Saturn and began to work for GM Corp. The terms of his employment were governed by a different collective bargaining agreement after January 1, 2005. Further, Mr. Freeman acknowledged that he was aware of that change at the time it occurred.

The trial court relied upon Stigall v. Wickes Mach., 801 S.W.2d 507, 510 (Tenn. 1990) to conclude that Saturn and GM Corp. were essentially a single entity for purposes of the workers' compensation law.

The facts in Stigall are not analogous to this case, but Stigall contains a good analysis of when a parent and subsidiary become indistinguishable and the corporate structure can be ignored. Stigall discussed the control and dominance necessary to ignore the corporate structure; however, even clear dominance will only dissolve corporate separateness when the sham structure "is an artifice" used to "[commit] fraud or injury upon the complaining victim." Stigall, 801 S.W.2d at 511. With due respect to the trial court, its use of Stigall simply ignored the fraud aspect of the Stigall court's articulated analysis. Accord Cambio Health Solutions v. Reardon, 213 S.W.3d 785, 790 (Tenn. 2006) (reiterates the necessity of fraud in order to disregard separate parent and subsidiary corporations).

While the evidence showed that the parent corporation, GM Corp., controlled the membership of Saturn's board of directors and exercised some oversight of its sales, accounting and engineering functions, there is no evidence in the record that officers of GM

Corp. also served as officers of Saturn, or that officers of Saturn served as officers of GM Corp. Similarly, Mr. Bratley testified that GM Corp. was not involved in the day-to-day operations of Saturn's manufacturing facility in Spring Hill. That testimony was not contradicted. There is also no evidence that Saturn's bank accounts, purchases, or payroll were administered by GM Corp. GM Corp.'s annual reports of the period included Saturn's income and expenses as an undifferentiated part of its financial status. Mr. Bratley testified that this was a normal accounting procedure for financial statements of companies with wholly-owned subsidiaries. That testimony was also uncontradicted. Most importantly, there was not a shred of evidence to indicate that the Saturn-GM Corp. transfers had anything to do with denying workers of their compensation coverage.

The documents from settlements of other workers' compensation claims establish that GM Corp. was sometimes confused in identifying the employer, as Saturn was still sometimes referenced as the employer. However, none of those settlements involved this claim or this claimant. More importantly, Mr. Freeman acknowledged that he knew when he began to work for GM Corp. and was no longer working for Saturn. As previously noted, the Supreme Court found that the plain language of section 50-6-241(a)(2) required dismissal of Mr. Perrin's petition because it was not filed within a year of change in ownership. Perrin, 120 S.W.3d at 827-28. In light of the uniform case law applicable to this claim, we are compelled to conclude that the trial court erred in its decision that reconsideration of Mr. Freeman's back injury claim was not time-barred.

Right Knee Injury

GM LLC makes several arguments concerning the trial court's award of 100% permanent partial disability to the right leg for the June 2006 knee injury. It contends that the court's findings of fact do not support an award in excess of five times the anatomical impairment, per section 50-6-241(d)(2)(B) and that the evidence preponderates against the trial court's finding that Mr. Freeman proved three of the four factors listed in section 50-6-242(b) by clear and convincing evidence. On that basis, it asserts that the award of disability benefits for the knee injury should have been limited to six times the anatomical impairment of 10% to the leg.

Tennessee Code Annotated section 50-6-(d)(2)(B) provides: "If 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." In its October 17, 2011 order, the trial court made extensive findings of fact concerning Mr. Freeman's education, work history, physical limitations, and the effects of the medications prescribed for him by his authorized physician. We do not find it necessary to review these findings in detail, as all

are supported in the record by medical testimony, medical records and/or lay testimony. The trial court's order complies with section 50-6-241(d)(2)(B) in all respects.

GM LLC also asserts that the trial court erred by finding that Mr. Freeman satisfied the requirements of Tennessee Code Annotated section 50-6-242(b). For injuries occurring on or after July 1, 2004, that section permits an award of permanent disability benefits in excess of six times the anatomical impairment, if the trial court makes:

> specific documented findings, supported by clear and convincing evidence, that as of the date of the award or settlement, at least three (3) of the following facts concerning the employee are true:
> (1) The employee lacks a high school diploma or general equivalency diploma or the employee cannot read or write on a grade eight (8) level;
> (2) The employee is fifty-five (55) years of age or older;
> (3) The employee has no reasonably transferable job skills from prior vocational background and training; and
> (4) The employee has no reasonable employment opportunities available locally considering the employee's permanent medical condition.

It is undisputed that Mr. Freeman was a high school graduate. Therefore, in order to satisfy the requirements of this section, it was necessary for him to prove factors (2), (3) and (4) by clear and convincing evidence. Employer asserts that none of those factors were proven by clear and convincing evidence.

Concerning Mr. Freeman's age, it is not disputed that his date of birth is June 7, 1956. GM LLC makes an argument of statutory interpretation regarding this factor. As set out above, the statute requires that an injured employee must prove three of the four factors "as of the date of the award or settlement." GM LLC contends that this language refers to the original award or settlement for which Mr. Freeman sought reconsideration. The trial court held that the "date of the award or settlement" refers to the date of the award concerning the petition for reconsideration. The trial court's original judgment on Mr. Freeman's knee claim was entered on March 20, 2009. Mr. Freeman was fifty-two years old on that date. If GM LLC's interpretation of the statute is correct, it was impossible for Mr. Freeman to prove more than two of the required factors. Conversely, if the trial court's interpretation is correct, then Mr. Freeman satisfied this requirement, because he was fifty-five years old on the date of the trial of his reconsideration petitions (June 23, 2011). Mr. Freeman was born on June 7, 1956 and became fifty-five on June 7, 2011.

In reaching its conclusion, the trial court took note of the language of section 50-6-242(a), which applies to injuries occurring prior to July 1, 2004. That section set the date of maximum medical improvement as the critical date for proof of the statutory factors, which are identical to those listed in section 50-6-242(b). Neither GM LLC nor Mr. Freeman cite any decisions discussing this change of language. Both sections explicitly apply to reconsideration actions (sections 241(a)(2) and (b)) and also to initial actions for benefits by workers who do not have a meaningful return to work (sections 241(d)(1)(B) and (d)(2)). Reference to a previous settlement or award concerning an initial claim for benefits by an employee who has not returned to work for his pre-injury employer is meaningless, because by definition, there could not be such an award or settlement. The language of the statute does not differentiate between initial and reconsideration claims. The legislature could have chosen to apply different standards to these two types of claims, but it did not do so. We therefore conclude that the trial court's interpretation is correct.[4] Section 50-6-242(b) requires an employee to prove three of the four specified factors as of the date of the award in the case before it.

GM LLC next contends that the trial court erred by finding that Mr. Freeman proved by clear and convincing evidence that he had no reasonable employment opportunities available locally considering his permanent medical condition. The trial court explained its finding as follows:

> The vocational experts agreed that Mr. Freeman had lost access to most of the jobs for which he was qualified. Ms. Bramlett testified Mr. Freeman has loss of access to 71% of those jobs. Mr. McKinney testified Mr. Freeman has a loss of access of 70%. Although both Ms. Bramlett and Mr. McKinney made credible witnesses, the Court finds the opinions given by Mr. McKinney to be more persuasive on locally available employment opportunities. Mr. McKinney based his opinions on several factors affecting Mr. Freeman's employment opportunities, such as Mr. Freeman's restrictions, physical limitations and prescription medications. Ms. Bramlett's opinions focus more on the medical impairment ratings. Mr. Freeman has proven factor (4) by clear and convincing evidence.

---

[4]The interpretation of the trial court is further supported by the rule that workers' compensation law should be construed liberally in favor of the employee. Wait v. Travelers Indem. Co. of Ill., 240 S.W.3d 220, 224 (Tenn. 2007). See also Tenn. Code Ann. § 50-6-116 (2008).

GM LLC argues that this finding is "simply wrong," because Ms. Bramlett performed a labor market analysis, based upon Mr. Freeman's vocational and educational background, and made no reference to medical impairment ratings in her testimony. We have reviewed the testimony of both vocational experts. It is true that Ms. Bramlett did not refer to the medical impairment ratings in either her report or her testimony. However, she placed a much greater emphasis on the documented medical restrictions than did Mr. McKinney. For that reason, we do not find the trial court's characterization of her testimony to be inaccurate. More significantly, in our view, Ms. Bramlett did not directly address in her report local job opportunities in Maury County, where Mr. Freeman resides. She based her analysis on the Nashville metropolitan area, which consists of thirteen counties but does not include Maury County. As a result, her testimony had limited value concerning local job opportunities. In contrast, Mr. McKinney explicitly discussed employment opportunities in Maury County during his testimony. For that reason, we are unable to find that the trial court erred by giving greater weight to his testimony. We also are unable to conclude that the evidence in the record preponderates against the trial court's finding on this issue.

GM LLC also asserts that the trial court erred by finding that Mr. Freeman proved by clear and convincing evidence that he had no reasonably transferable job skills from prior vocational background and training. The trial court stated:

> Mr. Freeman has worked in automotive manufacturing off and on since 1981. After the General Motors plant where he worked closed in 1986, and off and on during layoffs, he did carpentry work. He came to the Saturn plant in 1995. John McKinney, Plaintiff's expert, testified Mr. Freeman does not have any reasonable transferrable job skill based on his restrictions. Patsy Bramlett, Defendants' expert, did not give testimony regarding transferrable job skills. Mr. Freeman testified about the physical demands for assembly line work and carpentry work. Mr. Freeman also testified about how his injuries greatly limit his physical activities and about the effects of his medications. The Court finds Mr. Freeman has proven by clear and convincing evidence that he does not have reasonably transferable job skills from prior vocational background and training.

GM LLC recognizes that Ms. Bramlett did not testify on this subject. Instead, it contends that Mr. McKinney's testimony was flawed, and therefore did not provide a sufficient basis for the trial court's finding. Specifically, GM LLC asserts that Mr. McKinney's opinion that Mr. Freeman had no transferrable skills was based upon his stated

understanding that Dr. Wiesman had placed a restriction requiring Mr. Freeman to sit for five to ten minutes during every working hour. GM LLC insists that this restriction was no longer in effect at the time of trial, having been superceded by the results of the 2009 FCE. While Mr. McKinney mentioned this restriction in his explanation of his opinion, this Panel does not see a direct connection between that restriction, or any single restriction, and an analysis of the skills that Mr. Freeman has acquired as a result of his work experience and education. The testimony of Mr. Freeman, Mr. McKinney, and Ms. Bramlett are largely in agreement concerning his skills. Since 1981, he has worked as a factory worker in the automobile industry and as a self-employed carpenter. He is not able to return to carpentry, and it is doubtful that he is capable of returning to factory work. He had some training concerning electrical maintenance while in the military and took some junior college business courses in the seventies. The value of that training and those courses in the twenty-first century labor market is speculative. What evidence there is in the record therefore tends to support a favorable finding on this issue. Moreover, the trial court had the opportunity to view the testimony of all three witnesses live at trial. The determination that the evidence was clear and convincing required the trial court to weigh that testimony, and we give its assessment the deference it is due. Madden, 277 S.W.3d at 900.

Based upon the analysis set out above, we conclude that the trial court did not err by finding that Mr. Freeman satisfied the requirements of Tennessee Code Annotated section 50-6-242(b).

Finally GM LLC contends that the award of disability benefits for the right knee injury is excessive. The extent of vocational disability is a question of fact to be decided by the trial judge. Jaske v. Murray Ohio Mfg. Co., 750 S.W.2d 150, 151 (Tenn. 1988); Johnson v. Lojac Materials, Inc., 100 S.W.3d 201, 202 (Tenn. Workers' Comp. Panel 2001). In assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and his capacity to work at the kinds of employment available in his disabled condition. Tenn. Code Ann. § 50-6-241(d); 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).

Mr. Freeman has had two surgeries for his knee injury and continues to receive frequent medical treatment for it. His restrictions preclude him from the two types of work he has performed for most of his adult life. He takes narcotic pain medications and testified that these cause him to be drowsy and forgetful. Viewing the record as a whole, we are unable to conclude that the evidence preponderates against the trial court's finding

concerning the extent of disability caused by Mr. Freeman's leg injury.

Other Issues Raised by GM LLC

In light of our ruling affirming the trial court's findings concerning Mr. Freeman's right knee injury, we find no basis to reverse its award of discretionary costs. The net increase in the disability award for that injury is 175 weeks of benefits. As Mr. Freeman's last day of work was in April 2009, all of those benefits have now accrued. The issue of a lump sum award is therefore moot.

Permanent Total Disability

Mr. Freeman asserts that the trial court erred by finding that he was not permanently and totally disabled. In its August 2011 order, the trial court found that Mr. Freeman "has numerous skills, experience and training that should open some opportunities." In its October 2011 order the court elaborated, stating that its previous finding:

> was based on existing skills, experience and training of Mr. Freeman not future retraining, rehabilitation, or additional education. Mr. Freeman is a high school graduate and an honorably discharged veteran. He took college courses, including courses in electronic maintenance. He has done carpentry work, cabinet installation, framing and renovation work. He owned and operated his own carpentry business. Even though his attempt to start an internet business was unsuccessful, it did demonstrate that he has computer skills. He is an experienced remote control airplane builder and pilot. He has good communication skills as evidenced by his testimony. The Court finds Mr. Freeman is capable of working in an occupation that would bring in an income.

We find that evidence supports the trial court's finding. Using objective data, both vocational evaluators reached a similar opinion concerning the extent of Mr. Freeman's permanent disability. Mr. McKinney opined that the vocational loss based upon those factors was 70%, Ms. Bramlett opined that it was 71%. Mr. McKinney's testimony that Mr. Freeman was totally disabled was based upon his inclusion of subjective factors such as Mr. Freeman's appearance, and his assessment of the collective attitude of potential employers regarding an applicant who had been out of the work force for an extended period. Like the trial court, we are reluctant to place great weight upon opinions grounded on such highly subjective considerations. Moreover, although Mr. Freeman has lost access to the types of

work he has performed in the past, he has average intelligence, has demonstrated the ability to learn by taking college level courses, and has shown initiative and some technological ability by starting an internet business, albeit an unsuccessful one.

Conclusion

The portion of the judgment finding that the petition for reconsideration of the 2003 injury was timely filed is reversed. The remainder of the judgment is affirmed and the case is remanded to the trial court for entry of an order consistent with this opinion. Costs are taxed one-third to John Freeman and two-thirds to General Motors LLC and its surety, for which execution may issue if necessary.

____
WALTER C. KURTZ, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

JOHN FREEMAN v. GENERAL MOTORS COMPANY ET AL.

Circuit Court for Maury County
No. 09CV12943

No. M2011-02284-SC-WCM-WC - Filed October 22, 2012

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by John Freeman 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-third to John Freeman and two-thirds to General Motors LLC and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

William C. Koch, Jr., J., not participating