IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
May 23, 2016 Session

JOSEPH CORSO v. ACCIDENT FUND INSURANCE COMPANY et al.

Appeal from the Circuit Court for Davidson County
Nos. 13C2385, 13C3578 Joseph P. Binkley, Jr., Judge

No. M2015-01859-SC-R3-WC – Mailed August 2, 2016
Filed September 2, 2016

Joseph Corso ("Employee") was employed by D & S Remodelers, Inc., also known as Servpro ("Employer"). On September 29, 2011, he sustained a compensable injury to his left shoulder. While under treatment for that injury, Employee sustained an injury to his right shoulder. Employer denied that claim because of discrepancies about the date of injury. Employee continued to work for Employer until May 2013. However, he was reassigned from a production job to a sales position. He was subsequently terminated based on a customer complaint. The trial court found that the right shoulder injury was compensable and that Employee did not have a meaningful return to work. As a result of its finding that Employee did not have a meaningful return to work, the trial court awarded permanent partial disability benefits in excess of one and one-half times the medical impairment. Employer has appealed, contending that the trial court erred by incorrectly weighing the expert medical proof and by finding that Employee did not have a meaningful return to work. The 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 pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(a)(2) (2014) Appeal as of Right;
Judgment of the Circuit Court Affirmed

JEFFREY S. BIVINS, J., delivered the opinion of the Court, in which WILLIAM B. ACREE and PAUL G. SUMMERS, SR. JJ., joined.

Gordon C. Aulgur, Lansing, Michigan, for the appellants, Accident Fund Insurance Company and D & S Remodelers, Inc.

William J. Butler, Lafayette, Tennessee, for the appellee, Joseph Corso.

OPINION

Factual and Procedural History

Employer is in the business of restoring buildings after fire or water damage. Employee began working for Employer in February 2010 as a "helper" on a salvage crew. His job consisted of removing walls, furniture, and similar items from damaged structures. The work was heavy, requiring a substantial amount of lifting and carrying. In May 2010, Employee was promoted to crew chief. In that role, he had additional supervisory and recordkeeping duties, in addition to physically working as part of the crew he supervised.

On September 29, 2011, Employee went to Lowe's to pick up materials to be used to build a room in Employer's Sumner County warehouse. While he was loading materials onto a cart, a sheet of plywood began to fall, and Employee attempted to catch it with his left hand. The falling plywood jerked him and pulled his left arm. He reported the injury to "Ms. Pat," the human resources director. He was initially referred to Concentra, a walk-in clinic, which provided conservative treatment and ordered an MRI. When Employee's symptoms did not improve, he was referred to Dr. Ronald Glenn, an orthopedic surgeon, for further evaluation and treatment.

Dr. Glenn first saw Employee on November 18, 2011, when he examined Employee and reviewed the earlier MRI. He concluded that Employee had a small labral tear and irritation of the biceps tendon and recommended arthroscopic surgery. That procedure took place on March 27, 2012. Dr. Glenn found several unanticipated conditions during surgery, including a "high grade partial thickness tear" of the rotator cuff. He repaired that problem, performed a debridement of arthritic changes in the shoulder, and then bisected and reattached the biceps tendon to a different area of the shoulder to reduce friction.

Dr. Glenn followed Employee after surgery. Employee continued to have pain and weakness in his left shoulder. A repeat MRI in June 2012 was inconclusive as to whether a re-tear of the rotator cuff had occurred. Based on his clinical examination of Employee, Dr. Glenn thought the repair was holding. Thereafter, he treated Employee with periodic cortisone injections. A functional capacity evaluation ("FCE") was performed in October 2012. Based on the results of that test, Dr. Glenn assigned the following permanent restrictions:

> [L]ifting from floor to waist level, 60 pounds occasionally, 45 pounds frequently, and 21 pounds constantly. Carrying with both upper extremities was limited to 70 pounds occasionally, 53 pounds frequently, and 25 pounds

constantly. Carrying with the right arm only, limited to 60 pounds occasionally, 45 pounds frequently, and 21 pounds constantly.

Lifting and carrying with the left arm only, limited to 50 pounds occasionally, 38 pounds frequently, 18 pounds constantly. Lifting from waist to overhead level was limited to 25 pounds occasionally, 19 pounds frequently, and a negligible amount of weight constantly.

Lifting from waist to shoulder level was limited to 35 pounds occasionally, 26 pounds frequently, and 12 pounds constantly. Pushing and pulling force was limited to 60 pounds occasionally, 45 pounds frequently, and 21 pounds constantly.

With respect to positional restrictions, he demonstrated the ability to sit constantly, stand constantly, walk constantly, climb stairs frequently, climb ladders frequently, bend frequently, squat frequently, kneel frequently, crawl frequently, reach forward frequently. He can overhead reach occasionally. He can grasp with both right and left hands constantly. He can perform fine motor skills with both hands constantly. He can perform leg controls with both legs constantly. And he demonstrated the ability to sit, stand, or walk for eight hours.

Dr. Glenn opined that Employee retained a medical impairment of 9% to the left upper extremity, which translates to 5% to the body as a whole.

Prior to the March 2012 surgery, Employee worked in a limited duty capacity. He went on a previously scheduled vacation trip to Mexico in late November 2011, returning in early December 2011. Employee testified that, after returning to work, he injured his right shoulder on December 14, 2011. He stated that he was working in a burned house with several other crew members. His left arm was in a sling at the time. He testified that the crew was removing the contents of the house's attic. Using one arm, he picked up boxes of books and threw them down the stairs, and then other employees carried the boxes and books to a dumpster. Employee testified that, while he was performing this task, his right arm and shoulder became sore. At some point during the day, Employee climbed into the dumpster to move refuse so as to create more room. While in the dumpster, he slipped and fell, striking his right shoulder on the edge of the dumpster. His shoulder and arm became painful after this incident.

Employee continued to work for several days. He reported the injury to "Ms. Pat" on December 26 or 28, 2011. Employee testified that he was not certain of the specific date of

injury at that time.[1] He discussed the matter with "Ms. Pat," and she told him, "As long as we have an about time, that's fine." He testified that it "[d]idn't matter to me what day it was. I was hurt."

Employee was referred to Dr. Sean Kaminsky, an orthopedic surgeon, for evaluation and treatment of the right shoulder injury. Dr. Kaminsky first examined Employee on November 29, 2012. Dr. Kaminsky's notes of that encounter state that Employee gave a history of shoulder pain beginning in November 2011 after moving some boxes. Employee denied giving this date to Dr. Kaminsky. On examination, Dr. Kaminsky noted pain with cervical motion, pain with right shoulder range of motion, crepitus and positive impingement signs. Dr. Kaminsky's preliminary diagnosis was right shoulder impingement with possible rotator cuff or labral tears. An MRI was ordered. That study, taken on January 30, 2013, showed arthritic changes, bone spurring, "wear patterns" in the rotator cuff, a labral tear and a labral cyst. Dr. Kaminsky recommended arthroscopic surgery, but his request was not approved.

Around this time, Dr. Kaminsky received a letter from Employer's attorney. The letter stated that Employee was not working on December 1 and was accompanied by social media photos.[2] After reviewing that material, Dr. Kaminsky was unable to state whether Employee's right shoulder problems were work-related or were caused by his recreational activities. He testified that either set of activities could have caused the injuries. Dr. Kaminsky confirmed that Employee had stated on an intake questionnaire that his injury was caused by "overcompensating for the left shoulder." Employer thereafter denied the right shoulder claim.

Dr. Roger Duke, a family practice physician, performed an independent medical examination ("IME") at the request of Employee's attorney. The examination took place on August 26, 2014, and addressed both shoulders. Concerning the left shoulder, Dr. Duke summarized the records of Dr. Glenn. On the date of the IME, Employee told Dr. Duke that he had never returned to full strength after the injury, that he had difficulty reaching overhead or behind his back, and that he had numbness in his fingers. Employee stated that his pain level was six on a scale of ten on the day of the IME. His worst level of pain was nine of ten, and his best level was two or three of ten. He was never without pain in the shoulder. Dr.

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[1] Although Employer's attorney referred at trial to a written record of Employee's right shoulder accident report made on December 26 or 28, 2011, that record, which presumably would have included a date of accident, is not included in the record before us. Based upon the letter from Employer's attorney to Dr. Kaminsky, we surmise that the accident report listed December 1, 2011, as the date of the accident.

[2] Employee's Facebook account contained photos of him working on a fence at home, sitting on a bull in Mexico, riding a four-wheeler, and sliding on a waterslide on or near December 1.

Duke measured range of motion in the shoulder and completed a questionnaire from the Sixth Edition of the AMA Guides. Based on that information, he concluded that Employee had a medical impairment of 11% of the left upper extremity, which translates to 7% to the body as a whole.

Dr. Duke testified that Employee told him that his right shoulder injury occurred on December 14, 2011. Employee said that he felt a popping sensation and severe pain in his right shoulder while lifting file boxes weighing fifteen to twenty pounds and that he subsequently fell and struck the shoulder, causing extreme pain. Dr. Duke summarized Dr. Kaminsky's records. Dr. Duke stated that Employee described his right shoulder pain on the examination date as seven of ten, his worst days as nine of ten and his best days as six of ten. Employee had popping and grinding sensations when moving his shoulder, occasional numbness in his fingers and limited range of motion. Dr. Duke testified that those symptoms were consistent with the event of December 14, 2011, as Employee described it to him. He further opined that Dr. Kaminsky had used the wrong date for his assessment of causation and that December 14, 2011 was the correct date of the right shoulder injury. However, he agreed that the records he reviewed indicated that Employee told Dr. Kaminsky that the injury occurred in November 2011. Using the same method that he had used for the left shoulder, Dr. Duke opined that Employee had a medical impairment of 11% to the right upper extremity, or 7% to the body as a whole.

Employee did not miss work after the September 29, 2011, left shoulder injury until Dr. Glenn performed surgery in March 2012. He returned to work in early December 2011 after his trip to Mexico. He was working under restrictions at that time. Employee denied that the activities portrayed in his social media photos caused any symptoms or injury in his right shoulder. After the left shoulder surgery of March 2012, he returned to work in a limited duty status. Employer provided work that was either purely supervisory or office work.

In July 2012, Employee was moved to a position as a sales and marketing representative. The responsibilities of the position were within his medical restrictions. However, his pay was structured differently. As a crew chief, he received $14.00 per hour. Because of the May 2010 flood in Middle Tennessee, and several severe weather events on the east coast, Employee earned a considerable amount of overtime pay. As a sales representative, he received a base salary of $500.00 per week. In addition, he earned commissions, based on his sales. However, he did not actually receive payment for such commissions until Employer was paid by its customers.

Employee continued to work in the sales position until May 1, 2013. James Shelley, Employer's General Manager, testified that he was satisfied with Employee's job

performance. However, in April 2013, Employer received a complaint from a customer concerning actions taken by Employee. The complaint itself was excluded from evidence. However, Mr. Shelley testified that Employee admitted to him that he had referred to the insurance adjuster working the customer's claim as an "effing bitch." Mr. Shelley also testified that he had specifically instructed all personnel not to contact the customer, but Employee admitted that he had called and texted her using a company cell phone. Mr. Shelley did not know if these communications occurred before or after he told Employee not to contact the customer. Mr. Shelley requested Employee to meet with him to discuss the situation. When they met, Employee stated that he had deleted all texts and call records from the company phone because "he assumed that [the meeting] was about [the customer], and that he was upset with her, so he deleted the records." Employee agreed during his subsequent testimony that he had deleted texts and emails between himself and the customer. Mr. Shelley testified that he terminated Employee as a result of the situation.

Employee was fifty-two years old when the trial occurred in June 2015. He is a high school graduate with no additional education or specialized training. In the past, he worked for Ace Hardware, where he unloaded trucks and stocked shelves. He worked in the construction industry on and off for his entire adult life. He worked with his father making cabinets for eight or nine years. He was self-employed for a time, doing plumbing and electrical work. Employee was also a firefighter with the Hendersonville Fire Department. He has not worked since being terminated by Employer and was receiving social security disability payments at the time of trial.

The trial court issued its decision from the bench. It specifically found Employee to be a credible witness. The court further found Employee's right shoulder injury to be compensable and the date of that injury to be December 14, 2011. The court determined that Employee did not have a meaningful return to work based on its finding that, after Employee's transfer to sales, his "wage" for purposes of Tennessee Code Annotated section 50-6-241(d) was less than his pre-injury wage.[3] Accordingly, Employee's recovery was not limited to one and one-half times the medical impairment. The court adopted the impairments ratings assigned by Dr. Duke, 7% to the body as a whole for each shoulder. It then awarded 24.5% permanent partial disability for the left shoulder injury and 31.5%

[3] The trial court also concluded that Employee was not terminated for "willful misconduct" as that term was interpreted in Mitchell v. Fayetteville Pub. Util., 368 S.W.3d 442, 449-51 (Tenn. 2012). Mitchell dealt with an employer's affirmative defense against the compensability of a workplace injury based on an employee's failure to follow an established safety rule. Id. at 444; see also Tenn. Code Ann. § 50-6-110(a)(1) (Supp. 2012) ("No compensation shall be allowed for an injury or death due to . . . [t]he employee's willful misconduct."). While Employer contends that the trial court erred in utilizing the Mitchell interpretation, we need not address this issue because, as set forth below, the trial court concluded correctly that Employee did not have a meaningful return to work based on the post-injury wage issue.

permanent partial disability for the right shoulder injury. Judgment was entered in accordance with those findings.

Employer has appealed from that judgment, asserting that the trial court erred by giving greater weight to Dr. Duke's opinion about causation over that of Dr. Kaminsky, and also that the trial court erred by finding that Employee did not return to work at a wage equal to or greater than his pre-injury wage.

Analysis

We review issues of fact in a workers' compensation case de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(a)(2) (Supp. 2015). "When credibility and weight to be given testimony are involved, considerable deference is given to the trial court when the trial judge has had the opportunity to observe the witness' demeanor and hear in-court testimony." Foreman v. Automatic Sys. Inc., 272 S.W.3d 560, 571 (Tenn. 2008). "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." Id. We review the trial court's conclusions of law de novo upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Employer's first contention is that the trial court erred by concluding that Employee sustained a compensable injury to his right shoulder as alleged in his complaint. It points out that Dr. Kaminsky is an orthopedic surgeon and a treating physician in this case, while Dr. Duke is a general practitioner who evaluated Employee on a single occasion. We agree that, as a specialist in the relevant discipline, Dr. Kaminsky's opinion as to medical issues pertaining to the shoulder, including the issue of causation, would usually be entitled to greater weight than the opinion of a non-specialist. See Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991); Hollars v. United Parcel Serv., Inc., No. M2013-00144-WC-R3-WC, 2013 WL 7868416, at *5 (Tenn. Workers Comp. Panel Dec. 23, 2013), perm. appeal denied (Tenn. Mar. 7, 2014). However, the causation issue in this case does not turn on a medical question. Both doctors agreed that an event such as the alleged December 14, 2011, incident could cause the type of injury Employee sustained. It is clear that Employee provided different dates of his injury to Employer, Dr. Kaminsky, Dr. Duke, and in his trial testimony. Dr. Duke conceded that his opinion was subject to change if it was based on incorrect information. The central issue is whether or not the injury occurred while Employee was working on December 14, 2011, as alleged. That is a factual, rather than a

medical, issue. There were differences among Employee's descriptions of the injury given to various people at various times. Resolution of the issue turns on Employee's credibility.

> Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary.

Wells v. Tennessee Bd. of Regents, 9 S.W.3d 779, 783 (Tenn. 1999) (citations omitted). Here, the trial court found Employee to be a credible witness and explicitly accredited his trial testimony about the date and circumstances of the right shoulder injury. Neither Dr. Kaminsky's, nor Dr. Duke's, professional credentials have any significant impact on those findings. Employer has not presented evidence sufficient to preponderate against the trial court's findings. Therefore, the trial court's finding on the issue of compensability is affirmed.

Employer also contends that the trial court erred by concluding that Employee did not have a meaningful return to work. The court explained its rationale for that finding:

> [Employee's] hourly pay—hourly wage for the purposes of meaningful return to work prior to his injuries was $14 an hour, not counting, as Powell vs. Blalock [Plumbing & Elec. & HVAC, Inc., 78 S.W.3d 893 (Tenn. 2002)] says, on an average weekly wage, you don't count overtime, bonuses, and commissions in addition to the employee's regular pay. You just count his regular pay.
>
> So, again, in my mind, regular pay does not include commissions. And [Employee's] regular pay after he returned to work to his pre-injury employer was a salary, which is less than his regular pay pre-injury, which was $14 an hour. He's making $60 less a week after he returned to work to his pre-injury employer than he was earning before injury with this employer. So he didn't have a meaningful return to work[.]

The issue raised is governed by Tennessee Code Annotated section 50-6-241(d)(2)(A), which states in pertinent part:

> For injuries arising on or after July 1, 2004, in cases in which the pre-injury employer *did not return the injured employee to employment at a wage equal*

> *to or greater than the wage the employee was receiving at the time of the injury*, the maximum permanent partial disability benefits that the employee may receive for body as a whole and schedule member injuries subject to subdivision (d)(1)(A) may not exceed six (6) times the medical impairment rating determined pursuant to the provisions of § 50-6-204(d)(3).

Tenn. Code Ann. § 50-6-241(d)(2)(A) (Supp. 2011) (emphasis added).

The comparison of Employee's pre- and post-injury wage is complicated in this case because the basis of his earnings changed after he became a sales representative. Prior to the injury, he was paid an hourly wage of $14.00 per hour. In a standard, forty-hour week, he would receive $560.00 in pay. However, he worked a substantial amount of overtime, and his wage statements for that time showed that, prior to his injuries, Employee earned, on average, more than $1000.00 per week. As a sales representative, Employee was compensated on a salary-plus-commission basis. His base salary in that job was $500.00 per week. He also was entitled to commissions from sales he made. Before his termination, he received some commission payments. According to Employer's calculations, Employee's actual earnings during this period were $652.25 per week. Overtime pay was not guaranteed in the hourly position, and commissions were not guaranteed in the sales position. We conclude that a comparison of Employee's pre-injury "wage" to his post-injury earnings is not consistent with section 50-6-241(d)(2)(A).

In Powell, cited by the trial court in its findings, our Supreme Court considered whether the employee had been "'return[ed] . . . to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury.'" 78 S.W.3d at 896 (quoting Tenn. Code Ann. § 50-6-241(a)(1)), superseded by statute on other grounds, 2010 Tenn. Pub. Acts ch. 1034, secs. 1, 2. The Court held as follows:

> The term "wage" is undefined in the worker's compensation statute. See Tenn. Code Ann. § 50-6-102. In Wilkins v. The Kellogg Co., 48 S.W.3d 148 (Tenn. 2001), this Court considered the meaning of the term "wage" in construing the temporary partial disability statute, Tenn. Code Ann. § 50-6-207(2) (requiring payments equal to a percentage of "the difference between the wage of the worker at the time of injury and the wage such worker is able to earn in such worker's partially disabled condition."). We held in Wilkins that the terms "wage" and "average weekly wage" are not synonymous. Wilkins, 48 S.W.3d at 152-53. Average weekly wage is defined as "the earnings of the injured employee in the employment in which the injured employee was working at the time of the injury during the period of fifty-two (52) weeks immediately preceding the date of the injury divided by fifty-two

(52) . . . ." Tenn. Code Ann. § 50-6-102(2)(A). It includes amounts such as overtime, bonuses, and commissions in addition to the employee's regular pay. Wilkins, 48 S.W.3d at 153; see also P & L Const. Co. v. Lankford, 559 S.W.2d 793, 795 (Tenn. 1978).

In contrast to the term "average weekly wage," however, the legislature used the term "wage" in determining the amount of temporary partial disability benefits available to an injured employee. Tenn. Code Ann. § 50-6-207(2); see also Wilkins, 48 S.W.3d at 152. When the legislature uses specific language in one section of a statute but omits that language in another section of the same act, we must presume that the legislature acted purposefully in including or excluding that particular language. Wilkins, 48 S.W.3d at 152; Bryant v. Genco Stamping & Mfg. Co., 33 S.W.3d 761, 765 (Tenn. 2000).

The term "wage" is also used in determining the maximum award of permanent partial disability benefits available to an employee . . . who suffers an injury to the body as a whole. Tenn. Code Ann. § 50-6-241. Based upon our reasoning in Wilkins, we must conclude that the term "wage" in § 50-6-241 does not mean "average weekly wage." Instead, the wage of an employee who is compensated on an hourly basis is the employee's hourly rate of pay.

Id. at 896-97; see also King v. Gerdau Ameristeel US, Inc., No. W2011-01414-WC-R3-WC, 2012 WL 3064640, at *3 (Tenn. Workers Comp. Panel July 30, 2012).

In view of the holding set out above, we conclude that the correct, "apples to apples" comparison for purposes of determining whether Employee returned to work at a wage equal to or greater than the wage he was receiving prior to his injuries is between the "base pay" of the two jobs. Prior to his injuries, Employee could anticipate earning a minimum of $560.00 in a forty hour week without regard to overtime. After his placement in the sales department, he could anticipate earning the lesser amount of $500.00 per week without regard to commissions. For those reasons, we conclude that the trial court correctly found that Employee did not have a meaningful return to work and that his award of disability benefits was not limited to one and one-half times his medical impairment.[4]

[4] Employer asserts in its appellate brief that, "[e]ven if this Court determines that [Employee's] 'wages' were not equal to his 'wages' on the date of loss his right shoulder claim is capped at one and one-half times the impairment rating because he was terminated for cause prior to reaching maximum medical improvement." This issue is waived because it was not raised in the trial court. See Dye v. Witco Corp., 216 S.W.3d 317, 321 (Tenn. 2007).

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Accident Fund Insurance Company and D & S Remodelers, Inc., and their surety, for which execution may issue if necessary.

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JEFFREY S. BIVINS, JUSTICE

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

JOSEPH CORSO v. ACCIDENT FUND INSURANCE COMPANY, ET AL.

Circuit Court for Davidson County
No. 12-415-III

No. M2015-01859-SC-R3-WC – Filed September 2, 2016

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 Accident Fund Insurance Company and D & S Remodelers, Inc., and their surety, for which execution may issue if necessary.

PER CURIAM