IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
August 6, 2018 Session

CHARLES STEVEN BLOCKER v. POWELL VALLEY ELECTRIC COOPERATIVE ET AL.

Appeal from the Chancery Court for Claiborne County
No. 18-519 Elizabeth C. Asbury, Chancellor

No. E2017-01656-SC-R3-WC – Mailed September 20, 2018

Charles Steven Blocker ("Employee") sustained a compensable injury to his cervical spine while working for Powell Valley Electric Cooperative ("Employer") in November 2010. After returning to work, Employee suffered a second, gradual injury to his cervical spine in January 2013, which rendered him permanently and totally disabled. Employee filed an action against Employer and the Tennessee Department of Labor and Workforce Development, Second Injury Fund ("the Fund"). The trial court initially found Employee's 2013 injury caused 9% vocational disability and apportioned 9% of the award to Employer and 91% to the Fund. After the Fund appealed, the Special Workers' Compensation Appeals Panel remanded the case for the trial court "to reassess Employee's 2013 vocational disability" and "to make the appropriate assignment of the award to Employer and the Fund." On remand, the trial court found the 2013 injury caused 20% vocational disability and apportioned 20% of the award to Employer and 80% to the Fund. The Fund again appeals, asserting the trial court incorrectly apportioned the award. 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 trial court's judgment.

Tenn. Code Ann. § 50-6-225(e) (2014) (applicable to injuries occurring prior to July 1, 2014) Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM B. ACREE, SR.J., delivered the opinion of the Court, in which SHARON G. LEE, J., and Don R. Ash, SR.J., joined.

Herbert H. Slatery III, Attorney General and Reporter, Andrée S. Blumstein, Solicitor General, and Alexander S. Rieger, Assistant Attorney General, for the appellants, Tennessee Department of Labor and Workforce Development, Second Injury Fund, and Abigail Hudgens.

W. Stuart Scott, Nashville, Tennessee, for the appellees, Powell Valley Electric Cooperative and Federated Rural Electric Insurance Exchange.

Ameesh A. Kherani, Knoxville, Tennessee, for the appellee, Charles Steven Blocker.

OPINION

Factual and Procedural Background

It was stipulated and thus undisputed that Employee is permanently and totally disabled as a result of work-related injuries. At issue is the apportionment of liability between Employer and the Fund.

Employee sustained two injuries while working for Employer. The first injury occurred in 2010 and resulted in an award for permanent partial disability. Employee returned to work after the 2010 injury, but was injured again in 2013. He was unable to work after the 2013 injury.

The case was tried in 2016, and the benefits were apportioned 9% to Employer and 91% to the Fund.

In *Blocker v. Powell,* No. E2016-01053-SC-R3-WC, 2017 WL 2199177, (Tenn. Workers' Comp. Panel May 18, 2017) ("*Blocker* I"), the panel held that the trial court erred in applying the cap provided for in Tennessee Code Annotated section 50-6-241.[1] The panel reversed and remanded to the trial court to reassess Employee's 2013 vocational disability consistent with the opinion and to make the appropriate award assignment to Employer and the Fund. On remand, no additional evidence was submitted to the trial court. Upon reconsideration of the evidence submitted at the 2016 trial, the trial court found that the 2013 injury resulted in 20% vocational disability and apportioned 20% of the award to Employer and 80% to the Fund.

The facts of the case are summarized in *Blocker* I as follows:

> Employee at the time of trial was a fifty-two-year-old male who worked for Employer from 1988 until 2013. His educational history consisted of high school and attending Tennessee Institute of Electronics in Knoxville, where he completed a twelve-month program on the theory of

[1] Citing Tenn. Code Ann. § 50-6-241, the trial court found that as a result of the 2013 injury, Employer sustained an anatomical impairment at 6% to the body as a whole and applied the one and one-half cap applicable to an employee who successfully returns to work after the injury.

electricity and electronics. Following this program, he served in the Air Force as a wide-band communication equipment specialist, an electronic-related position. The technical training he received from these sources is now obsolete.

Employee's first ten years with Employer were spent as a lineman. Thereafter, he served as Director of Apparatus Maintenance. This job consisted of maintenance and repair of electric substations. The work was physically demanding, requiring daily lifting of nitrogen bottles weighing between forty and fifty pounds. Several times a month, he had to lift bottles weighing up to 185 pounds. He normally worked alone.

On November 19, 2010, Employee injured his neck while changing out a nitrogen bottle on a power transformer. He felt something pop in his neck and experienced a burning sensation. Over the next couple of days, pain started to radiate down his left arm.

When conservative therapy did not provide relief, Employee's treating physician, Dr. James Killeffer, performed a fusion of the C5, C6, and C7 vertebrae and placed a steel plate in the front of Employee's neck. Much of the numbness in his left arm went away, but the pain in the back of his neck continued to a lesser degree. He was released to return to work in July 2011. As permanent restrictions, he was advised not to lift with his arms outstretched and to keep his elbows as close as possible to his torso when working. He was instructed to use common sense and do whatever he could do but to stop doing anything that hurt.

Employer accommodated Employee by providing assistance for tasks outside his limitations. He was able to continue his duties as Director of Apparatus Maintenance but adjusted the manner in which he performed certain tasks, such as checking overhead insulators. He also used over-the-counter medications such as Tylenol and Ibuprofen to manage his pain.

Employee's workers' compensation claim was settled in February 2012 based on an approximate 19.6% permanent partial disability. In January 2013, Employee reported to Employer that his neck pain had increased, and the numbness and tingling in his left hand relieved by the 2011 surgery had returned. The increased pain and numbness was not triggered by any specific event; rather, it developed gradually. Dr. Killeffer diagnosed a herniated disc at the C4-5 level and concluded that the 2011 surgery had placed Employee at risk for disc problems at adjacent levels of the cervical spine. Dr. Killeffer performed a fusion of the C4 and C5

vertebrae in June 2013. Dr. Killeffer released Employee to return to work on November 8, 2013, and gave restrictions of sedentary work with no lifting greater than ten pounds and no overhead work. Employer was not able to accommodate these limitations, and Employee was terminated.

Dr. William Kennedy, an orthopedic surgeon, performed an independent medical examination of Employee on October 6, 2014. He completed a C-32 medical report. Employer then conducted a cross-examination deposition pursuant to Tennessee Code Annotated section 50-6-235(c)(1) (2014) (applicable to injuries occurring prior to July 1, 2014). Dr. Kennedy confirmed that one of the risks of the 2011 surgery was that additional stress was placed on the discs above and below the fused area, thereby increasing the risk of additional injury. He assigned 8% impairment for the second injury using the same table from the Sixth Edition of the American Medical Association Guides used by Dr. Killeffer, who had assigned 15% impairment for the 2010 injury and added an additional 4% for the 2013 injury and surgery.

Dr. Kennedy opined that cumulative trauma occurring between July 2011 and January 2013 was the primary cause of Employee's C4 disc herniation; if Employee had not had the 2010 injury and 2011 surgery, the 2013 disc herniation would not have occurred; and if only the 2013 injury had occurred, Employee would have been able to return to work. He concluded that Employee was currently unable to work because of the combined effects of both injuries.

Dr. Kennedy agreed that Employee described his job between 2011 and 2013 as very demanding and that he understood the job was essentially the same before and after the 2010 injury. He observed that the restrictions imposed on Employee after the 2013 injury were "dramatically different" than his prior work restrictions. He agreed with these restrictions and added that Employee should be able to control his posture with regard to sitting, standing, and walking; be able to maintain a comfortable neutral position of his head as in looking forward; and should not be expected to turn or tilt his head to extremes or maintain a position other than neutral for prolonged periods.

Michael Galloway, a vocational evaluator, vocational rehabilitation counselor, certified rehabilitation counselor, and board-certified disability analyst, conducted an assessment of Employee on August 19, 2015. Mr. Galloway interviewed Employee about his education, work history, activities of daily living, and medical history. He also administered some academic testing, which revealed that Employee was able to read words at

an 11th grade level and perform math above the 12th grade level. He also reviewed the medical records and reports from Drs. Killeffer and Kennedy.

Mr. Galloway noted that Employee was a 1982 high school graduate who had received technical training at the Tennessee Institute of Electronics in 1983 and some training related to electronics while serving in the United States Air Force. He was employed by Employer in 1988, and this was his essential and past relevant employment, which was greater than fifteen years. Employee's technical training in electronics quickly became outdated because of rapid changes in technology.

Mr. Galloway stated that the most important information for his evaluation of Employee's vocational disability consisted of the permanent restrictions placed on him by the medical doctors, which limited Employee to "less than sedentary" work. The skills he acquired in his work for Employer were not transferrable to other types of work. As a result, Employee no longer had access to any job in the local labor market or the larger Knoxville Metropolitan labor market. Mr. Galloway opined that Employee was 100% disabled and that there were no jobs in the local labor market for unskilled, less than sedentary workers.

During cross-examination by Employer, Mr. Galloway confirmed that he was not a medical doctor and relied on the findings of the medical doctors who treated or examined Employee. He stated that he did not attribute Employee's vocational disability to any particular injury. He was asked a hypothetical question based on Dr. Kennedy's testimony that perhaps the 2013 injury would not have occurred but for the changed spinal mechanics caused by the 2010 injury. Mr. Galloway responded that, if Employee had not undergone surgery or had restrictions and had successfully returned to work, there would have been no vocational disability. Viewing the matter from another perspective, Mr. Galloway stated that if only the 2013 injury had occurred, and Employee had successfully returned to work, the disability from that injury would have been minimal.

Questioned by the Fund, Mr. Galloway stated that, if there had been no previous injury, Employee would be 100% disabled based on the medical restrictions assigned after the 2013 injury and surgery. Mr. Galloway also testified that, based on the restrictions assigned after the 2010 injury and 2011 surgery, Employee would have had a "minimal" disability. He added that Employee's pre-injury job would be classified as "heavy to very heavy" work according to the Dictionary of Occupational Titles. Based on Employee's statements, Mr. Galloway understood that the

job duties of Director of Apparatus Maintenance did not change after Employee returned to work in 2011 and that Employee was still able to perform the job, albeit with some pain and assistance. Mr. Galloway restated that his analysis was not based on medical impairment or course of treatment. Further, causation is not relevant to determining vocational disability.

In response to additional questioning by Employee and Employer, Mr. Galloway noted that he did not disagree with Dr. Kennedy's testimony that Employee's disability was due to the combination of the two injuries and surgeries. Finally, he restated his opinion, based on the information provided to him, without consideration of hypotheticals or additional medical information, that Employee was 100% disabled from the 2013 injury.

See Blocker, 2017 WL 2199177, at *1–3.

In his deposition, Mr. Galloway also offered the following testimony:[2]

Question: Okay. My understanding is that your overall conclusion is that Mr. Blocker is permanently and totally disabled from any work whatsoever, but you have not attributed this finding to any particular injury; correct?

Answer: Correct. The basis of the hundred-percent vocational disability is based on the permanent restrictions we have of record.

Question: All right. And those come from a combination of the 2010 and 2013 injuries as you understand it; correct?

Answer: That's my understanding. I would note I have not had a chance to read any depositions, but that's my understanding, yes.

* * *

Question: Okay. I want to differentiate between when something happens and what causes something. You were asked a bunch of questions about the restrictions that came out after the 2013 injury, and the assumption was they came because of the 2013 injury. Just because the restrictions came after the 2013 injury, you're not telling the court they came because of the 2013 injury; correct?

[2] This testimony was not included in the summary of facts in *Blocker* I.

Answer: Correct, that would be what I consider to be a medical causation issue. I would defer to medical doctors in that judgment.

Trial Court Ruling

After reviewing the record and hearing the arguments of counsel, the trial court found, pursuant to the parties' stipulation and the undisputed evidence, that Employee was totally and permanently disabled. The court apportioned 20% to Employer and 80% to the Fund.

In reaching this conclusion, the trial court relied, in part, upon Dr. Kennedy's testimony:

Question: And is it fair to say that you are telling the Court that if this man had not had this old 2010 injury and the surgery from it, the bilateral fusion, and he just had the C4 surgery that he had, that you feel he would not have had near as significant restrictions, he would be back at work and able to work successfully today?

Answer: Yes.

The trial court also relied on Mr. Galloway's testimony:

Question: And if the medical testimony is that this man could have gone back to work and would have been able to go back to work, within a reasonable degree of medical certainty, following the 2013 injury, a single-level neck fusion, then you testified that he would have just had the minimal vocational disability as a result of the 2013 incident, in and of itself, perhaps 5 to, at most 10 percent, if I understand you correctly. Is that true?

Answer: Correct.

Question: Okay. Your report indicates the 2013 injury caused all of this. You're not telling the Court today that the 2013 injury is responsible for 100 percent of the vocational disability in this case at all. Is that fair to say?

Answer: That's fair. Again, I defer to the medical doctors in that judgment.

Issue Presented

The issue is whether the trial court properly determined the amount of disability caused by Employee's 2013 injury, and thus, the proper apportionment of the award for total and permanent disability between Employer and the Fund.

Analysis

Review of factual issues is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. *See* Tenn. Code Ann. § 50-6-225(a)(2). Considerable deference is afforded to the trial court's findings with respect to the credibility of witnesses and the weight to be given their in-court testimony. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 733 (Tenn. 2002). When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another. When all of the medical proof is by deposition, the reviewing court may draw its own conclusions about the weight and credibility to be given to expert testimony. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997). Questions of law are reviewed de novo with no presumption of correctness. *Seal v. Charles Blalock & Sons, Inc.*, 90 S.W.3d 609, 612 (Tenn. 2002).

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 or her capacity to work at the kinds of employment available in his or her disabled condition. *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990). The trial court is not bound to accept physicians' opinions regarding the extent of an employee's disability, but should consider all of the evidence to decide the extent of the employee's disability. *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675, 677 (Tenn. 1983).

In cases involving a prior injury, the trial court must also consider Tennessee Code Annotated section 50-6-208(a):

> (a)(1) If an employee has previously sustained a permanent physical disability from any cause or origin and becomes permanently and totally disabled through a subsequent injury, the employee shall be entitled to compensation from the employee's employer or the employer's insurance company only for the disability that would have resulted from the subsequent injury, and the previous injury shall not be considered in estimating the compensation to which the employee may be entitled under this chapter from the employer or the employer's insurance company; provided, that in addition to the compensation for a subsequent injury, and after completion of the payments for the subsequent injury, then the employee shall be paid the

> remainder of the compensation that would be due for the permanent total disability out of a special fund to be known as the second injury fund.

Tenn. Code Ann. § 50-6-208(a); *see Allen v. City of Gatlinburg*, 36 S.W.3d 73, 77 (Tenn. 2001) ("[I]t is essential that the trial court determine the extent of disability resulting from the subsequent injury without consideration of the prior injury.").

The Fund contends the trial court's apportionment of the award between Employer and the Fund should be modified because the record preponderates against the trial court's determination that the 2013 injury resulted in a 20% disability to the body as a whole. The Fund asserts the 2013 injury caused a significantly higher disability.

The Fund relies upon the testimony of Michael Galloway, the vocational rehabilitation expert, who testified for Employee. The Fund argues that Mr. Galloway opined that Employee suffered a 100% vocational disability as a direct consequence of the work injury in 2013.

Additionally, the Fund relies upon the following hypothetical questions posed to Mr. Galloway during his deposition:

> Question: Okay if I were to ask you to assume that Mr. Blocker, at the time he injured himself in 2013, that he had no prior injury or condition, what would you assess his vocational disability as a result, following the 2013 injury?
>
> Answer: If—again, assuming hypothetically, if he had had no prior injury of any kind the restrictions would have been, at this time, based on this last injury, it's my opinion he would be permanently and totally a hundred percent vocational disabled based on the restrictions we have of record with this last injury.

Finally, the Fund argues that because Employee was able to return to work after the 2010 injury but not after the 2013 injury, the latter injury caused substantially more disability than the first.

The Fund's arguments are misplaced for two reasons. First, Mr. Galloway is an expert in vocational disability. He accepts the restrictions placed upon a person and determines the person's ability to find and perform work in the labor market. He readily admitted that he is not an expert in determining the causation of the disability and that is a question for medical experts. Consequently, any opinion expressed by Mr. Galloway as to causation is improper opinion testimony and will not be considered by the Court.

Second, the decision of the trial court is supported by the evidence. According to the medical testimony, in 2010, Employee had a fusion at three levels in his cervical spine – C5, C6, and C7 – and he had a steel plate inserted. Afterward, he was allowed to return to work with restrictions. Gradually, his condition worsened until 2013 when he reported increased pain and a return of symptoms to Employer. He again had a fusion which was at C4 and C5. Following the fusion, he was unable to return to work with the restrictions placed upon him.

Dr. William Kennedy testified that the surgery following the 2010 injury placed additional stress on the disc above and below the fused area, thereby increasing the risk of further injury. If Employee had not had the 2010 injury and the 2011 surgery, the 2013 disc herniation would not have occurred. The 2013 injury, standing alone, would not have prevented Employee from returning to work.

The testimony of Dr. Kennedy is undisputed. Dr. Kennedy's conclusion is that the combination of the 2010 and 2013 injuries created Employee's disability; the first surgery was more serious and was the cause of the second surgery; and if only the 2013 injury had occurred, Employee would have returned to work.

Giving deference to the trial court's factual findings and conducting our own review of the record before us, including deposition testimony, we cannot conclude that the evidence preponderates against the trial court's decision.

Conclusion

For the foregoing reasons, we affirm the judgment of the trial court. Costs of this appeal are taxed to the Fund, for which execution may issue if necessary.

WILLIAM B. ACREE, JR., SENIOR JUDGE

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

CHARLES STEVEN BLOCKER v. POWELL VALLEY ELECTRIC COOPERATIVE ET AL.

Chancery Court for Claiborne County
No. 18519

No. E2017-01656-SC-R3-WC

JUDGMENT ORDER

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 are assessed to the Fund, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM