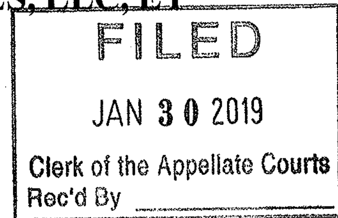
IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 24, 2018 Session

MOHAMMAD HAMAD v. REAL TIME STAFFING SERVICES, LLC, ET AL.



Appeal from the Circuit Court for Rutherford County
Nos. 69172, 69173 J. Mark Rogers, Judge

No. M2017-02538-SC-R3-WC – Mailed December 28, 2018
Filed January 30, 2019

In April 2011, Mohammad Hamad ("Employee") was working at a Pillsbury factory through the defendant agency, Real Time Staffing Services ("Employer"), when he slipped on a wet floor and tore his left meniscus. After undergoing knee surgery, he returned to work at the factory. In September 2012, Employee once again was injured while lifting a heavy box. He sustained an injury to his left shoulder and an inguinal hernia. Employee has not returned to work since this second injury. Employee filed suit, arguing that he was totally and permanently disabled. The trial court found Employee only permanently partially disabled. Employee timely appealed, arguing that this Court should: (1) reverse and remand to the trial court to reconsider his contention that he is permanently and totally disabled under Tennessee Code Annotated section 50-6-207(4)(B); (2) increase his disability award under Tennessee Code Annotated section 50-6-242 ("the Escape Clause"); or (3) increase his disability award under Tennessee Code Annotated section 50-6-241. 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) (2014) Appeal as of Right;
Judgment of the Circuit Court for Rutherford County Affirmed.

JEFFREY S. BIVINS, C.J., delivered the opinion of the court, in which DON R. ASH, SR. J. and ROSS H. HICKS, SP. J., joined.

D. Russell Thomas, Murfreesboro, Tennessee, for the appellant, Mohammad Hamad.

Kenneth D. Veit, Nashville, Tennessee, for the appellees, Real Time Staffing Services, LLC, and ESIS, Inc.

Brian A. Pierce, Nashville, Tennessee for the appellee, Tennessee Department of Labor/Second Injury Fund.

OPINION

Factual and Procedural Background

The plaintiff and employee in this case is Mohammad Hamad ("Employee"). Employee is a U.S. citizen who was seventy-three (73) years of age at the time of trial. Employee was born in Kuwait and lived in Jordan for a period of time, where he completed his secondary education. This education was in Arabic, which is Employee's native language. Employee can speak English, but states that he is not fully conversant and testified at trial via an interpreter. Prior to moving to the United States, Employee worked for seventeen (17) years in an administrative job in Kuwait and also owned and operated a bakery in Jordan for seven (7) years. Employee graduated from a Certified Nurse's Assistant Course in 2008. The course was four months and was taught in English. At the time of trial, Employee had lived in the United States for twelve (12) years.

When Employee first arrived in the United States, he worked for approximately two (2) years at a CITGO gas station. Employee's duties included pumping gas, preparing food, and occasionally checking water and oil levels in customer's vehicles. After two years at CITGO, Employee went to work for Select Staffing ("Employer"), a temporary staffing agency. Select Staffing assigned Employee to a job at Pillsbury, where he worked on the production line doing food preparation for six (6) years. He did not have an interpreter while working for Pillsbury. On April 5, 2011, Employee slipped on a puddle of water in the Pillsbury plant, and twisted his knee. Due to this injury, Employee received treatment and underwent surgery for a torn meniscus by Dr. Tom Johns. Employee was able to return to work at Pillsbury following this treatment.

On September 13, 2012, Employee suffered a second injury while lifting a heavy box at the Pillsbury factory. During this incident, he injured both his left shoulder and his groin. Immediately following this second accident, Employee was sent to the emergency room for treatment, where he was diagnosed with an inguinal hernia and damage to his left shoulder. Employee returned to Dr. Johns for a second surgery, this time on his shoulder. He also saw Dr. Gregory Neal for hernia surgery. Employee completed

physical therapy, and Dr. Johns released him with no work restrictions in December 2013. In Dr. Johns' opinion, Employee's shoulder was "doing superbly" at that time. However, Employee testified that Employer would not let him return to work after these incidents. According to Employee, no administrators or human resource individuals at either Select Staffing or Pillsbury made any attempt to engage in the interactive process with Employee or to discuss the ADA or the FMLA. Employee has not worked since the second injury on September 13, 2012.

Actions Leading to Trial

Two complaints were filed on January 26, 2015 with the Circuit Court of Rutherford County — case number 69713 for recovery of benefits from Employee's knee injury of April 5, 2011 and case number 69172 for the recovery of injuries to Employee's shoulder and groin suffered on September 13, 2012. A motion to consolidate was jointly filed by the parties, and an order consolidating the cases was entered on September 2, 2015. Three doctors provided deposition testimony, Dr. David West, Dr. Kyle Joyner, and Dr. Choudhury Salekin. Employee and Mr. John McKinney, Employee's vocational expert, testified at trial.

Also entered at trial were the medical opinions of Dr. Tom Johns and Dr. David Gaw, which were introduced via stipulation. Dr. Johns rendered an opinion that Employee suffered a ten percent (10%) impairment to the right upper extremity due to the shoulder injury and a five percent (5%) impairment to the lower extremity due to the prior knee injury. Dr. Johns did not address permanent restrictions. Dr. Gaw performed an Independent Medical Evaluation ("IME") on behalf of the Appellees. He opined that Employee suffered a two percent (2%) impairment to the lower extremity or one percent (1%) to the body as a whole impairment due to the knee injury, and a seven percent (7%) impairment to the upper extremity or a four percent (4%) impairment to the body as a whole as the result of the shoulder injury. Dr. Gaw also did not render an opinion regarding permanent restrictions.

Employee countered with an IME performed by Dr. Choudhury Salekin. The deposition of Dr. Salekin was introduced during trial. He assessed a thirty percent (30%) impairment to the left lower extremity due to the left knee injury, a seventeen percent (17%) impairment to the left upper extremity or a ten percent (10%) impairment to the body as a whole due to the left shoulder injury; a five percent (5%) impairment to the body as a whole due to the inguinal hernia; and a four percent (4%) impairment to the body as a whole due to sleep disorders secondary to the knee, shoulder, and groin injuries. Regarding restrictions, Dr. Salekin testified, "Given the fact that he has got [sic]

severely advanced knee injury, very advanced shoulder injury, and left inguinal hernia, if he does not follow the restrictions, there is a significant chance of significant worsening of all those three anatomic locations, so he should avoid pushing, pulling, and lifting more than 20 pounds and should avoid prolonged weight bearing on the left lower extremity." Ultimately, Dr. Salekin determined that Employee's impairment to the body as a whole from both the September 13, 2012 work injury and the April 5, 2011 injury was thirty three percent (33%). However, Dr. Salekin admitted that he included sleep problems in his medical impairment rating despite the American Medical Association guidelines explicitly stating that sleep problems associated with pain or orthopedic injury are not to be used as part of calculating an impairment rating.

Employer then requested a medical impairment rating ("MIR") examination, and the parties selected Dr. David West. Dr. West identified three conditions which he felt were rateable and causally related to a work injury: (l) the twisting of the knee, which led to a partial tear of the medial meniscus, to which he assigned a two percent (2%) impairment to the lower extremity, or a one percent (1%) impairment to the body as a whole; (2) a complete tear of the left rotator cuff and subsequent rotator cuff repair, which resulted in a five percent (5%) impairment to the upper extremity, or a three percent (3%) impairment to the body as a whole; and (3) an inguinal hernia, to which he assigned a zero percent (0%) impairment rating. When asked if Employee would be subject to any specific work restrictions, Dr. West responded, "I would say overall no. The only thing I would consider to be cautious of would be significant lifting based on his history of the hernia. And I know from just recalling his previous notes he had a previous hernia repair, so certainly he has to use good judgment on what weight restrictions he could lift." Dr. West stated that there was nothing about his present condition that would prevent Employee from returning to work full time.

Trial

The parties entered into numerous stipulations that were set forth in the Joint Pre-trial Memorandum announced before the Court during the proceedings and incorporated into the final order. The depositions of Dr. Johns, Dr. Salekin, and Dr. Joyner were introduced at trial. Employee and Employee's vocational expert, Mr. McKinney, testified live at trial.

Employee testified that his physical condition was the primary issue he thought was preventing him from returning to work. He testified that his language barrier was also part of what was preventing him from returning to work but that it was mostly his physical condition. On cross-examination, Employee testified that he was a high school

graduate who completed six years of English in school. He also stated that he received a CNA[1] certificate from Tennessee Tech University, and completed the United States citizenship test all in English with no translator. He also testified that he never had an interpreter at any job while in the United States, but that his jobs rarely required communication.

Employee's vocational expert, Mr. McKinney, testified that, based on Dr. Salekin's work restriction of lifting less than twenty pounds, along with Employee's age, "the fact that he's been out of the labor market now for going on five years, his appearance, his communication problems, and all those factors together, I don't believe he's employable . . . . [H]e would be 100 percent vocationally disabled." On cross-examination, Mr. McKinney testified that Employee "wouldn't have any vocational disability rating if he has no restrictions at all."

Employer presented video surveillance evidence of Employee jogging/fast-walking in the early morning around his local mosque in Murfreesboro. No other witnesses were called to testify at trial.

Actions of the Trial Court

In an order entered on September 20, 2017, the trial court awarded a 2% impairment rating to the left lower extremity, which equated to a 1% to the body as a whole for the knee injury. The court awarded a 3% impairment to the body as a whole for the second injury. The trial court concluded that those ratings equated to a 4% impairment rating to the body as a whole. The court did not find Employee to be permanently and totally disabled. Employee moved to modify or amend the judgment on October 13, 2017. This motion was denied on November 27, 2017. Employee filed a timely appeal on December 27, 2017.

Standard of Review

Appellate review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2014) (applicable to injuries occurring prior to July 1, 2014), which provides that appellate courts must "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Reviewing courts must conduct an in-depth

[1] CNA is a certified nurse's assistant course.

examination of the trial court's factual findings and conclusions. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court's findings based upon documentary evidence such as depositions. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Issue One

First, Employee argues that he should have been awarded permanent and total disability. An employee is permanently and totally disabled when an injury "totally incapacitates the employee from working at an occupation that brings the employee an income." Tenn. Code Ann. § 50-6-207(4)(B). The court can make a determination of permanent total disability based on a variety of factors that give the court a complete picture of an individual's ability to return to gainful employment. Hubble v. Dyer Nursing Home, 188 S.W.3d 525, 535-36 (Tenn. 2006). Courts should review factors that include an employee's skills, training, education, age, and job opportunities in the surrounding area. Id. The extent of a disability is a finding of fact, which this Court reviews de novo with a presumption of correctness. Tenn. Code Ann. § 50-6-225(e)(2); See also Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993). Likewise, the extent of a vocational disability is a question of fact. Cleek v. Wall-Mark Stores, Inc., 19 S.W.3d 770, 773 (Tenn. 2000).

Employee's primary argument is that the trial court erred in relying on Dr. West's testimony and in rejecting the testimony of Employee's vocational expert, Mr. McKinney. Specifically, Employee argues that the trial court failed to give any weight whatsoever to Mr. McKinney's testimony. Employee also argues that the trial court confused vocational disability and medical disability, writing, "One can have a one percent (1%) disability and yet be one hundred percent (100%) disabled."

In contrast, Employer argues that, "[d]espite Mr. Hamad's injuries, none of his treating or evaluating physicians, except for Mr. Hamad's personal-IME physician, Dr. Salekin, assigned him any work-place restrictions." Employer continues: "Mr. McKinney[] admitted that he based his opinion, that Mr. Hamad is 100 percent disabled, primarily on Dr. Salekin's asserted restrictions. Mr. McKinney even acknowledged that

if it were not for Dr. Salekin's restrictions, Mr. Hamad would have no vocational disability rating." Employer also argues that Employee does not have as limited English skills as it may appear. Employer points to the fact that Employee has completed a certified nurse's assistant course, taken and passed his driver's license test, taken and passed his citizenship test, and relayed medical information to all his doctors without the assistance of an interpreter.

The Second Injury Fund is also a party to this lawsuit and filed a brief in support of the trial court's ruling.[2] The Second Injury Fund argues that a "review of other evidence presented at trial, including the doctors' evaluations, were sufficient for the trial court to discredit [Mr. McKinney's] opinion and find that Employee was not totally and permanently disabled." The Second Injury Fund contends that the fact that Employee was given no physical restrictions weighs in favor of the trial court's finding that he could be gainfully employed. It also points to the fact that Mr. McKinney had not reviewed the video of Employee jogging and bending over while getting into and out of his vehicle. Thus, The Second Injury Fund concludes that the trial court properly discounted Mr. McKinney's opinion that Employee was permanently and totally disabled and that the trial court's decision was supported by a preponderance of the evidence.

The trial court rejected Dr. Salekin's impairment rating and thus discounted Mr. McKinney's vocational disability finding, which was based almost entirely on Dr. Salekin's evaluation and conclusions. With regard to the disagreement between Dr. Salekin and the other doctors, Dr. Johns, Dr. Gaw, and Dr. West regarding Employee's impairment rating, the trial court stated: "But when one compares the impairment ratings of Dr. Salekin, a 30 percent, with the five percent of Dr. Johns, the two percent of Dr. Gaw, and two percent of Dr. West, either somebody is misreading the book or we're in trouble with a number of people misreading the book." We note as well that, in accordance with Tennessee Code Annotated section 50-6-204, Dr. West as the independent medical examiner is presumed to have provided the accurate impairment rating. See Mansell v. Bridgestone Firestone N. Am. Tire, LLC, 417 S.W.3d 393, 406 (Tenn. 2013).

In this case, we have little trouble affirming the trial court. There is ample evidence to support the trial court's ruling. Dr. Johns, Dr. Gaw, and Dr. West, provided impairment ratings of 5%, 2%, and 2%, respectively. It was only Employee's physician, Dr. Salekin, who assessed a 30% impairment rating to the body as a whole. With the

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[2] The Second Injury Fund only argues this first point. The Second Injury Fund states that "because the Fund is not liable for any award of partial disability, the Fund takes no position on the remaining issues raised in this appeal . . ."

exception of Dr. Salekin, none of the physicians assigned Employee any work restrictions. Thus, the trial court correctly rejected Dr. Salekin's findings.

The trial court also correctly rejected Mr. McKinney's testimony. Mr. McKinney specifically stated that "[Employee] wouldn't have any vocational disability rating if he has no restrictions at all." Thus, the fact that Mr. McKinney's conclusions were based on Dr. Salekin's findings, and the fact that the trial court rejected Dr. Salekin's findings, leads logically to the discounting of Mr. McKinney's recommendation of total and permanent disability.[3]

Issue Two

Next, Employee argues that, if he is not found to be totally and permanently disabled, he should have been awarded 260 weeks of disability benefits because he met at least three of the four criteria set forth in Tennessee Code Annotated section 50-6-242 (the "Escape Clause"). The Escape Clause allows an injured employee to be awarded an additional compensation above the standard multiplier found in Tennessee Code Annotated section 50-6-241. In order to satisfy the Escape Clause, an employee must prove three of the following four provisions by clear and convincing evidence: (1) the employee lacks a high school diploma or equivalent or that the employee cannot read or write on an eighth grade 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; or (4) the employee has no reasonable employment opportunities available locally considering the employee's permanent medical condition. Tenn. Code Ann. § 50-6-242(b).

We agree with the trial court that Employee did not prove three of the four requirements by clear and convincing evidence. It is undisputed that Employee is over fifty-five years of age. However, Employee admitted to receiving a secondary education prior to coming to the United States. In addition, the trial court was not convinced by Employee's vocational expert, who opined that Employee suffered a 100% vocational disability, because the vocational testimony was based "primarily—quite frankly, totally on Dr. Salekin," who the trial court also did not find convincing. The trial court's discrediting of Dr. Salekin and Mr. McKinney, which we affirm, negates any possible

[3] Employee argues that, in addition to his physical and age-related issues, "There is also a decidedly [] anti-Muslim feeling in the Murfreesboro area." No evidence is provided for this vitriolic assertion. Instead, Employee contends that the case of Estes v. Rutherford County Regional Planning Commission, No. 10-cv-1443 (Chancery Ct. for Rutherford County), proves that all of Murfreesboro harbors anti-Muslim sentiment. We strongly reject this argument as totally devoid of merit.

finding that Employee offered clear and convincing evidence of the existence of factors (3) and (4)—lack of transferable job skills and lack of reasonable local employment opportunities. Accordingly, we also affirm the trial court's decision not to award greater benefits under Tennessee Code Annotated section 50-6-242.

Issue Three

Finally, Employee argues that, if his Court does not find him totally and permanently disabled, and if the Court does not find him entitled to a greater award under Tennessee Code Annotated section 50-6-242, then he should have been awarded in excess of five times the medical impairment pursuant to Tennessee Code Annotated section 50-6-241(d)(2)(B). Section 50-6-241(d)(2)(B) requires a court to include specific findings of fact in the order that details the reasons for awarding more than five times the multiplier. Tenn. Code Ann. § 50-6-241(d)(2)(B). The trial court in this case chose not to award a multiplier greater than five times. Employee argues that "the record is replete with examples of very specific challenges unique to Mr. Hamad's situation that would justify an increased award of up to six (6) times his impairment ratings." Specifically, he argues that he is remarkably old for an injured worker, seventy-five years of age, and that he is facing a language barrier. Employer counters stating that the evidence does not preponderate against "the Circuit Court's decision to assign 4 and 4.9 multipliers to Mr. Hamad's knee and shoulder injuries. . ."

In determining what multiplier to use, the trial judge reviewed all of the exhibits, depositions, and live testimony from the experts at trial. He heard and read the testimony regarding Employee's age, language skills, and job opportunities. He chose not to grant a multiplier higher than five. After reviewing the record and the trial judge's ruling, we agree with the trial court. Accordingly, we hold that the trial court did not err on this issue.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Mohammad Hamad, for which execution may issue, if necessary.

JEFFREY S. BIVINS, CHIEF JUSTICE

FILED
JAN 30 2019
Clerk of the Appellate Courts
Rec'd By

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

MOHAMMAD HAMAD v. REAL TIME STAFFING SERVICES, LLC ET AL.

Circuit Court for Rutherford County
No. 69172, 69173

No. M2017-02538-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 Mohammad Hamad, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM