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

Assigned on Briefs November 17, 2020

SANDRA CUMMINGS v. EXPRESS COURIER INTERNATIONAL, INC. ET AL.

FILED
FEB 17 2021
Clerk of the Appellate Courts
Rec'd by________

Appeal from the Chancery Court for Hamilton County
Nos. 13-0171, 13-0172 Pamela A. Fleenor, Chancellor

No. E2020-00548-SC-R3-WC – Mailed January 14, 2021

Sandra Cummings was injured at work on April 29, 2010, and February 7, 2012. She filed complaints against Express Courier International, Inc. ("Employer"), Hartford Insurance Company ("Hartford"), and Zurich American Insurance Company ("Zurich").[1] The trial court found that Ms. Cummings is permanently and totally disabled as the result of an injury to the body and that Employer is entitled to an offset based on Ms. Cummings's social security benefits. Tenn. Code Ann. § 50-6-207(4)(A)(i) (2014) (applicable to injuries occurring prior to July 1, 2014). In this appeal, Ms. Cummings argues that the trial court erred in applying the social security offset because her injury was to a scheduled member. In addition, Hartford argues that the trial court erred in ordering it to pay temporary total disability benefits because Zurich was the insurance carrier at the time of Ms. Cummings's second injury. The appeal has been referred to this Panel for a hearing and a report of findings of fact and conclusions of law. *See* Tenn. Sup. Ct. R. 51. We affirm the trial court's judgment that Ms. Cummings is permanently and totally disabled as a result of an injury to the body and that Employer is entitled to a social security offset. We modify the judgment by requiring Zurich to reimburse Hartford for the payment of temporary total disability benefits.

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

ROBERT E. LEE DAVIES, SR. J., delivered the opinion of the Court, in which SHARON G. LEE, J., and WILLIAM B. ACREE, SR. J., joined.

---

[1] Hartford was Employer's insurance carrier at the time of the 2010 injury; Zurich was the insurance carrier at the time of the 2012 injury.

Ronald J. Berke, Chattanooga, Tennessee, for the appellant, Sandra Cummings.

David Weatherman, Schaumburg, Illinois, and Kenneth D. Veit and Terri L. Daugherty, Chattanooga, Tennessee, for the appellees, Express Courier International, Inc. and Zurich American Insurance Company.

Dana S. Pemberton, Knoxville, Tennessee, for the appellee, Hartford Insurance Company.

OPINION

Factual and Procedural Background

Sandra Cummings was injured while working for Employer on April 29, 2010, and February 7, 2012. After completing the benefit review process, she filed two complaints for workers' compensation benefits on March 14, 2013. The trial court consolidated the two complaints and conducted a trial on October 29, 2019.

Trial Testimony

Ms. Cummings was sixty-nine years of age at the time of the trial. After graduating from high school, she attended Marshall University for three years. She later worked as a power line technician, truck driver, truck driving teacher, and dispatcher.

In 2008, Ms. Cummings began working for Employer as a customer service representative. She later became a dispatcher, which required her to coordinate the routes and schedules for the transportation of medical supplies, pharmaceuticals, medical organs, automotive parts, and office equipment. She was also required to break down pallets and lift boxes weighing over fifty pounds.

On April 29, 2010, Ms. Cummings was reaching overhead when a fifty-pound box fell on her left foot. Although she continued to work for several months, the pain in her foot worsened, and she required treatment. She selected Dr. Mark Sumida from a list of physicians provided by Employer. On November 3, 2011, Dr. Sumida performed surgery on Ms. Cummings's big toe and her second and third toes. Ms. Cummings underwent physical therapy under the supervision of Dr. Sumida. On January 9, 2012, Ms. Cummings returned to work. Although Dr. Sumida had imposed a twenty-five-pound lifting restriction, Ms. Cummings had to lift boxes exceeding that restriction to do her job. On

February 7, 2012, Ms. Cummings dropped a box weighing thirty-five to forty pounds on the same foot.[2] She was examined by Dr. Sumida two days later.

In April 2012, Ms. Cummings met with Ms. Michelle Lynn Diaz-Long, Employer's branch manager, about her salary discrimination complaint. In May 2012, she met with Ms. Diaz-Long and Greg Sloan, Employer's regional manager, about her performance. According to Ms. Diaz-Long, Ms. Cummings was fired based on her inability to work well with others and her performance.

Mr. Sloan gave conflicting testimony. Although he claimed that Ms. Cummings was fired due to her attitude and performance, he admitted that he had praised Ms. Cummings in the past, that she handled more calls than any other employee in May 2011, and that he had nominated her for a performance award. Mr. Sloan stated that Ms. Cummings's termination was not attributed to her work-related injuries or her gender discrimination complaint.

In April 2016, Ms. Cummings was examined by Dr. Richard Alvarez, a board-certified orthopedic surgeon who was in her provider network. In May 2017, Dr. Alvarez fused Ms. Cummings's big toe.

Ms. Cummings testified that she did not have problems with her foot before April 2010 and February 2012. She now has poor balance and has fallen several times. She uses a four-prong cane when she walks and has trouble sleeping. She has a stabbing pain in her toe and has to walk on her heel. She is unable to shop and do housework, and she seldom drives. She also takes pain medication several times per day.

Ms. Cummings's husband, Kenneth Cummings, testified that Ms. Cummings has trouble walking and has fallen several times. On one occasion, she fell in the bathroom and pulled the sink from the wall as she fell to the floor. She uses a cane and takes pain medication that makes her tired.

Deposition Testimony

Dr. Sumida, a board-certified orthopedic surgeon, examined Ms. Cummings on September 29, 2010. Ms. Cummings had swelling in her forefoot and midfoot and a lack of range of motion in her toes. An August 2011 MRI revealed a neuroma between her first and second toes, arthritis in her first toe joint, and a cyst between her second and third toes. Dr. Sumida prescribed custom orthotics, physical therapy, and injections. On November 3, 2011, Dr. Sumida removed the neuroma from between Ms. Cummings's first and second

[2] The trial court found that Employer ignored the restrictions placed on Ms. Cummings.

toes, which he believed was caused by the work-related injury. He imposed restrictions against lifting over twenty-five pounds.

On February 9, 2012, Ms. Cummings told Dr. Sumida that she had dropped a box weighing thirty-five to forty pounds on the foot she had injured in April 2010. Although Dr. Sumida prescribed pain medication and advised Ms. Cummings to avoid lifting over twenty-five pounds, he concluded the February 2012 injury had "minimal effect" on Ms. Cummings's impairment. He stated that she reached maximum medical improvement on June 21, 2012, and he assigned a two percent impairment to the lower extremity.

Dr. Alvarez, a board-certified orthopedic surgeon, saw Ms. Cummings in April 2016. He concluded that Ms. Cummings developed "traumatic hallux rigidus" after her injury in April 2010 and that the 2012 work injury combined with the 2010 work injury caused permanent impairment. In May 2017, Dr. Alvarez fused Ms. Cummings's big toe; he explained that the procedure was the result of her work injuries. Dr. Alvarez stated that Ms. Cummings suffered a ninety-two percent impairment to the big toe, which equated to a four percent impairment to the body.

The trial court found that Ms. Cummings is permanently and totally disabled and entitled to 260 weeks of benefits because her injury occurred after the age of sixty. The trial court also ordered Hartford to pay temporary total disability for the "period after Dr. Alvarez's treatment during which she was totally prevented from working until she reached [maximum medical improvement]." Finally, the trial court determined that Employer was entitled to an offset of $750 per month because Ms. Cummings receives $1500 per month in social security income.

Ms. Cummings filed a post-trial motion arguing Employer was not entitled to a social security offset because her injury was to a scheduled member. Zurich filed a motion for clarification with respect to the payment of temporary total disability.

On March 10, 2020, the trial court entered a judgment finding that Ms. Cummings suffered an injury to the body and that Employer was entitled to a social security offset. The trial court found Ms. Cummings was entitled to temporary total disability benefits of $8,455.72 and that Hartford, which had paid $10,417.26, was entitled to receive $1,961.54 from Zurich. The trial court rejected Hartford's argument that Zurich, as Employer's insurance carrier at the time of Ms. Cummings's injury in February 2012, was required to pay temporary total disability. This appeal followed.

Standard of Review

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(e)(2) (2014) (applicable to injuries occurring prior to July 1, 2014) (current version at 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, 732 (Tenn. 2002); *see also Madden v. Holland Grp. of Tenn., Inc.*, 277 S.W.3d 896, 898 (Tenn. 2009). When expert medical testimony differs, the trial judge may accept the opinion of one expert over another. When all of the medical proof is by deposition, a reviewing court may draw its own conclusions about the weight and credibility to be given to the expert testimony. *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008).

Analysis

I

We begin by considering whether the trial court properly determined that Ms. Cummings suffered an injury to the body as a whole. Employer argues that Ms. Cummings suffered an injury to her big toe and is limited to the remedies for an injury to a scheduled member. Tenn. Code Ann. § 50-6-207(3)(A)(h) (amended 2014) ("For the loss of the great toe, sixty-six and two thirds percent (66 2/3%) of the average weekly wages during thirty (30) weeks[.]"). Although Ms. Cummings agrees that an injury to a big toe is an injury to a scheduled member, she maintains that the trial court correctly determined that she suffered an injury to the body.[3]

As a general rule, workers' compensation benefits for an injury to a "scheduled member" are controlled by the schedule established by the Legislature for that member and may not be apportioned to the body as a whole. *See* Tenn. Code Ann. § 50-6-207(3)(F) (2014) (current version at Tenn. Code Ann. § 50-6-207(3)(H)). That said, "if an injury to a specific member does not stop with the injury to or loss of that member but for any reason continues as an injury affecting the body to such extent as to result in permanent [total or partial] disability, a recovery may be had therefor." *Riley v. Aetna Cas. & Sur.*, 729 S.W.2d 81, 84 (Tenn. 1987) (alteration in original) (quoting *Claude Hensinger Co. v. Bentley*, 326 S.W.2d 246, 248 (Tenn. 1959)). In such a case, the injury "is . . . not confined to the specific member." *Id.* (quoting *Claude Hensinger Co.*, 326 S.W.2d at 248); *see also Eads v.*

[3] However, as discussed later in this opinion, Ms. Cummings argues that her injury is to a scheduled member for the purpose of determining whether Employer was entitled to an offset for social security.

GuideOne Mut. Ins. Co., 197 S.W.3d 737, 741 (Tenn. 2006) ("Where an injury to the leg results in unscheduled injuries such as back pain and gait derangement, it is proper to classify the injury as an injury to the body as a whole.").

In *Rayburn v. Hutton Stone, Inc.*, No. 01S01-9201-CV-00002, 1992 WL 174258 (Tenn. July 27, 1992), the plaintiff suffered a foot injury, had trouble walking, and developed low back problems. In affirming the trial court's finding that the plaintiff suffered an injury to the body as a whole, our Supreme Court reasoned:

> Th[e] testimony was consistent with the medical proof as to the collateral effects of an injury such as that suffered by Plaintiff. Further, Plaintiff's testimony was specifically credited by the trial court. Under the particular circumstances presented, this combination of lay and expert testimony is sufficient to establish a causal relationship between Plaintiff's foot injury and his back problems. Therefore, under our cases, Plaintiff's award was properly assigned to the body as a whole.

Id. at *3. Similarly, in *Ratledge v. Langley Enters., LLC*, E2014-02089-SC-R3-WC, 2015 WL 5677184 (Tenn. Workers' Comp. Panel Sept. 28, 2015), the Panel upheld the trial court's finding that the employee suffered an injury to the body where he fractured his leg, a scheduled member, but later sustained a shortening of the leg, an altered gait and continuous pain in the lower back. *Id.* at *7.

Here, the trial court explained that it "did not find an injury just to a scheduled member, but instead . . . found an injury to the whole person." The trial court emphasized that "Dr. Alvarez opined that the second injury contributed to [the] permanent disability, and that Mrs. Cummings was not over her first injury when the second injury occurred." In addition:

> Dr. Alvarez performed a second surgery on Mrs. Cummings. Dr. Alvarez opined as to permanent impairment to the great toe of 92%. . . . Dr. Alvarez further testified that this translates to 4% or 5% to the body as a whole, or to the whole person. Dr. Alvarez further opined that the second dropped box onto the same foot caused a crush injury and cause[d] hallux rigidus which is a permanent disability. Further, Dr. Alvarez fused the big toe, so it has no motion. Dr. Alvarez further testified that this injury adversely impacted Mrs. Cummings's ability to run, squat, kneel and crawl. Nor could she walk barefoot without pain.

The trial court also accredited Ms. Cummings's testimony that she has severe pain in her foot, cannot move her toes, has trouble walking, has poor balance, has fallen several times, takes pain medication, and uses a cane. She is unable to squat, kneel or crawl. She needs a ramp at her home, as well as handrails in the bathroom and shower. Her husband testified that she is prone to falling and that on one occasion, she fell in the bathroom and pulled the sink from the wall as she fell to the floor. We conclude that the evidence does not preponderate against the trial court's judgment.[4]

II

Next, we consider whether the trial court properly found that Ms. Cummings is permanently and totally disabled. A person is permanently and totally disabled "[w]hen an injury not otherwise specifically provided for in this chapter totally incapacitates the employee from working at an occupation that brings the employee an income." Tenn. Code Ann. § 50-6-207(4)(B). Courts must consider a number of factors to get "a complete picture of an individual's ability to return to gainful employment." *Hubble v. Dyer Nursing Home*, 188 S.W.3d 525, 535 (Tenn. 2006). These factors include the employee's skills, education, age, training, "job opportunities in the immediate and surrounding communities, and the availability of work suited for an individual with that particular disability." *Id.* at 535–36. "[A]n employee's own assessment of his or her overall physical condition, including the ability or inability to return to gainful employment, is 'competent testimony that should be considered.'" *Id.* (quoting *Vinson v. United Parcel Serv.*, 92 S.W.3d 380, 386 (Tenn. 2002)).

The trial court accredited Ms. Cummings's testimony about her injuries, severe pain, and limitations. Although Ms. Cummings has three years of college education and an extensive work history, she was sixty-nine at the time of the trial, had trouble standing, and was experiencing balancing issues. Moreover, she "cannot even work a sedentary job as she is on so much pain medication from her rheumatoid arthritis that she cannot stay awake." Employer did not introduce any lay or vocational testimony to rebut this proof. In short, we conclude that the evidence does not preponderate against the trial court's finding that Ms. Cummings "is permanently and totally disabled as there are no jobs that [she] can perform based on her condition, education, prior work history, and her restrictions."

---

[4] In reaching this conclusion, we reject Employer's argument that the trial court erred in finding Ms. Cummings suffered a permanent injury on February 7, 2012. Although Employer relies on Dr. Sumida's testimony, the trial court believed Ms. Cummings's testimony that she injured her left foot in April 2010 and injured the same foot in February 2012. She was improving after the first injury, but her condition significantly worsened after the second injury. In addition, Ms. Cummings testified that she had no problems before these injuries. Finally, the trial court emphasized that Ms. Cummings's testimony was consistent with Dr. Alvarez's opinion "that the second injury contributed to the impairment."

III

Next, we address Ms. Cummings's argument that the trial court erred in applying the social security offset. Tennessee Code Annotated section 50-6-207(4)(A)(i) states in part:

> [W]ith respect to disabilities resulting from injuries that occur after sixty (60) years of age, regardless of the age of the employee, permanent total disability benefits are payable for a period of two hundred sixty (260) weeks. *The compensation payments shall be reduced by the amount of any old age insurance benefit payments attributable to employer contributions that the employee may receive* under title 42, chapter 7, title II of the Social Security Act, 42 U.S.C. § 401 et seq.

Tenn. Code Ann. § 50-6-207(4)(A)(i) (2014) (emphasis added) (amended 2014). Ms. Cummings argues that Employer was not entitled the statutory offset because her injury was to a scheduled member. *See McIlvain v. Russell Stover Candies, Inc.*, 996 S.W.2d 179, 185 (Tenn. 1999) (holding that social security offset does not apply to scheduled member injuries).

Although Ms. Cummings is correct that the social security offset does not apply where the injury is to a scheduled member, the trial court found that Ms. Cummings's injury was to the body and awarded benefits for 260 weeks. As a result, the decisions cited by Ms. Cummings, in which employers were liable for injuries to scheduled members, are inapplicable. *See id.*; *see also Scales v. City of Oak Ridge*, 53 S.W.3d 649, 654 (Tenn. 2001); *Smith v. U.S. Pipe & Foundry Co.*, 14 S.W.3d 739, 743 (Tenn. 2000). Because the evidence does not preponderate against the trial court's finding that Ms. Cummings suffered an injury to the body, it follows that the trial court properly applied the social security offset under section 50-6-207(4)(A)(i).

In addition, Ms. Cummings argues that Employer did not prove her social security benefits were attributable to Employer's contributions. *See* Tenn. Code Ann. § 50-6-207(4)(A)(i). However, in *McCoy v. T.T.C. Ill. Inc.*, 14 S.W.3d 734 (Tenn. 2000), the Supreme Court rejected the employee's contention that the trial court erred in allowing a fifty percent offset after failing to consider only the contributions made by the employer at the time of the injury:

> [T]he language of the statute calls for an offset equal to "the amount of any old age insurance benefit payments attributable to employer contributions." Significantly, the statute does not say "employer's contributions" or "the

contributions of the employer at the time of the injury." Accordingly, the language of the statute does not support McCoy's argument that the offset is limited to only TTC's contributions. In addition, the legislative history indicates that the trial court correctly computed the offset.

Id. at 738. The Supreme Court concluded that the legislative history "clearly illustrates that the statute was intended to provide a fifty percent offset of the total amount of Social Security old age insurance benefits received by the employee." *Id.* Accordingly, the trial court properly determined that Employer was entitled to a social security offset.

IV

Finally, we address whether the trial court properly ordered Hartford to pay temporary total disability benefits "from May 23, 2017 [the date of Ms. Cummings's surgery on her left foot] until such time as she is released by Dr. Richard Alvarez to return to work or placed at maximum medical improvement, whichever occurs first."[5] The trial court stated that "[t]he [temporary total disability] that was paid by the first carrier [Hartford] remains paid by the first carrier." In addition, the trial court found that Zurich "is responsible for the *resulting* permanent disability, not the [temporary total disability benefits] that [were] previously paid [by Hartford]."

Hartford argues that Zurich was solely liable for the temporary total disability benefits because Zurich was the insurance carrier at the time of the February 2012 injury. As Hartford points out, the trial court accredited Ms. Cummings's testimony and Dr. Alvarez's opinion that the February 2012 injury combined with the April 2010 injury caused her permanent impairment. There is no dispute that Zurich was Employer's insurance carrier in February 2012. Under these circumstances, we conclude that Zurich should reimburse the temporary total disability benefits paid to Ms. Cummings by Hartford. *See Bennett v. Howard Johnsons Motor Lodge*, 714 S.W.2d 273, 277 (Tenn. 1986) ("Where there have been several compensable injuries, received during the successive periods of coverage of different insurers, the subsequent incapacity must be compensated by the one which was the insurer at the time of the most recent injury that bore causal relation to the incapacity." (quoting *Baxter v. Smith*, 364 S.W.2d 936, 941 (Tenn. 1962))). Accordingly, we modify the trial court's judgment by requiring Zurich to reimburse Hartford in the amount of $8,455.72.

---

[5] As Hartford notes, the trial court found that Ms. Cummings was entitled to temporary total disability of $8,455.72 and that Hartford made payments totaling $10,417.26. As a result, the trial court ordered Zurich to reimburse Hartford the difference of $1,961.54.

Conclusion

We affirm the trial court's judgment that Ms. Cummings suffered permanent and total disability as a result of an injury to the body and that Employer was entitled to a social security offset. We modify the judgment by requiring Zurich to reimburse Hartford for the payment of temporary total disability. Costs are assessed to Express Courier International, Inc., for which execution shall issue if necessary.

Robert E. Lee Davies, Senior Judge