IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
August 11, 2015 Session

JEFFREY A. MILLER v. STATE OF TENNESSEE

Appeal from the Tennessee Claims Commission
No. 30100879604 William O. Shults, Commissioner

No. E2015-00034-SC-R3-WC
MAILED-OCTOBER 7, 2015 / FILED-NOVEMBER 6, 2015

A parking lot attendant injured his neck in the course of his employment with the University of Tennessee. He claimed that he was not able to return to his previous work and filed for total and permanent disability. The Claims Commission found that he was permanently and totally disabled. The University has appealed, contending that the Commission erroneously admitted certain testimony from the employee's vocational evaluator. It further contends that the evidence preponderates against the finding of permanent total disability. 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. After our review, we affirm the judgment.

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

PAUL G. SUMMERS, SR. J., delivered the opinion of the Court, in which GARY R. WADE, J. and BEN H. CANTRELL SR. J. joined.

Joshua R. Walker, Knoxville, Tennessee, for the appellant, University of Tennessee Knoxville.

Timothy A. Priest, Knoxville, Tennessee, for the appellee, Jeffrey A. Miller.

OPINION

Factual and Procedural History

Jeffrey Miller ("Employee") was employed by the University of Tennessee ("Employer") as a parking attendant. He worked on a part-time basis for seven years before becoming a full-time employee in 2008. While working for Employer, he also had a part-time job as an exterminator for a local motel. Previously, he had built swimming pools; been a sales associate at a building supply store; installed siding, windows and floors; and been a maintenance man for a motel. He left school in the eleventh grade, but later obtained a GED.

Employee's injury occurred on July 28, 2010. He was assigned to a parking garage at the University Center, where he worked a three o'clock to eleven o'clock shift. His duties included operating the cash register, picking up trash in the area and moving signs as needed. At the end of his shift on July 28, he felt a popping sensation in his neck while moving a sign. He did not consider the event to be serious at the time. He went home as usual and took some Advil before going to bed. Employee testified that he woke up at three o'clock in the morning, "almost completely paralyzed" with pain. His wife and son assisted him in getting to his shower, where he sat under hot water for relief. The next morning he called his supervisor, Bill Gilliam, to tell him he would not be coming in and went to his primary care physician, Dr. Campbell. Dr. Campbell prescribed medications and followed Employee's progress for several weeks.

Dr. Campbell recommended that Employee see a neurosurgeon. His claim was accepted as compensable at approximately the same time. He was referred to Dr. Paul Peterson, who testified by deposition. Dr. Peterson first saw Employee on November 10, 2010. An MRI taken prior to that date revealed a herniated disc at the C5-6 level of the spine, as well as degenerative changes above and below that level. Dr. Peterson ordered a CT scan, which showed potential spinal cord compression at the level of the herniated disc. The doctor recommended surgical decompression and fusion of two levels of the cervical spine. The recommended procedure was performed on January 10, 2011. After surgery, Employee began complaining of pain in his right arm and hand. Dr. Peterson ordered several tests but was unable to conclusively determine the cause of Employee's arm and hand pain. He stated that he believed Employee had a residual nerve injury which could not be confirmed by diagnostic testing. He was not asked to provide an opinion concerning Employee's permanent impairment or physical limitations.

Dr. David Hauge, a neurosurgeon, performed an independent medical evaluation on November 27, 2012, at the request of both parties. He testified by deposition. Dr. Hauge reviewed the medical records of Dr. Peterson and other physicians who had treated Employee. His examination revealed decreased sensation in the C5, 6, and 7 nerve distribution on the right. Employee's motor function was intact. Employee had

diminished reflexes in both upper extremities, but Dr. Hauge was unable to state that this finding was related to the work injury. He opined that Employee had right C7 radiculitis with no radiculopathy or spinal cord dysfunction. He recommended physical therapy and a nerve conduction study to further evaluate Employee's condition. He assigned 15% permanent partial impairment to the body as a whole for the injury and surgery. Dr. Hauge also recounted his initial impression that there was "very little hope [Employee] would be able to get back to meaningful employment." At that time, he recommended that Employee's activity be limited to the sedentary level "in the absence of a functional capacity evaluation ('FCE')." He subsequently reviewed an FCE that had been performed on November 26, 2013. The therapist who conducted that evaluation placed Employee at the "light physical demand" level of work. After reviewing the evaluation, Dr. Hauge had "no problem" with Employee working at that level.

During cross-examination, Dr. Hauge agreed that the light work level described in the FCE report was a "minimal value" and that the examiner was unable to determine a maximum level because Employee self-limited his activity on some of the individual tests conducted during the FCE. He stated that persons with spinal injuries often have difficulty sitting or standing for extended periods. He reviewed a report of a September 2011 nerve conduction study. That report showed right carpal tunnel syndrome, which Dr. Hauge believed to be unrelated to the work injury. The test was otherwise normal. Dr. Hauge stated that electrical studies have limitations and often do not detect the cause of extremity pain caused by nerve root irritation.

Employee had also been referred by Dr. Peterson to Dr. James Fox, a pain management specialist. When Employee first saw Dr. Fox on June 13, 2013, he told Dr. Fox that he would test positive for marijuana because he had consumed "medical marijuana" while attending a wedding in Colorado. Dr. Fox advised him that his treatment would be discontinued if he used marijuana in the future. Dr. Fox prescribed amitriptyline and hydrocodone. In September, Employee tested positive for marijuana and was discharged from Dr. Fox's care. Employee testified at trial that he had smoked marijuana on three to five occasions after returning from Colorado. He had obtained the marijuana at football parties in the Fort Sanders area of Knoxville. He had also consumed "jello shots" of vodka and had taken Xanax left from a previous prescription during the same time period. He testified that he no longer smoked marijuana.

Employee testified that he still has pain in his right arm and right hand. He stated that his thumb and two first fingers "just don't work right anymore." He reported difficulty using a pencil and shooting firearms. He stated that he frequently dropped objects. He described the FCE as "grueling" and stated that he was unable to do anything for a week after the examination. He described his typical day as consisting of sitting in a recliner or lying in bed. Employee also said that he suffers from dyslexia, stating that he often sees letters backwards or upside down, and had to review written material several times in order to retain information.

Michael Galloway, a vocational consultant, evaluated Employee at the request of his attorney. Mr. Galloway interviewed Employee, administered academic tests and reviewed medical records. He noted that all of Employee's previous jobs required medium-to-heavy physical exertion. He also observed that those jobs were either unskilled or semi-skilled. The academic testing revealed that Employee performed word reading at the fifth grade level, sentence comprehension at the eighth grade level, and math at the fifth grade level.

Mr. Galloway offered two opinions concerning Employee's vocational disability. First, based solely on Dr. Hauge's statement that Employee was capable of light duty work, Mr. Galloway opined that Employee sustained a 49% vocational disability as a result of his work injury. However, Mr. Galloway noted that Dr. Hauge's opinion was based on the findings of the therapist who administered the FCE. Examining the raw results of the FCE, Mr. Galloway disagreed with the therapist's conclusion that Employee was capable of light work. Employer objected to the admission of testimony based on Mr. Galloway's interpretation of the FCE, but the trial court overruled the objection. Mr. Galloway then explained:

> When you look at it in its entirety, there are several categories, several categories, where Mr. Miller put forth maximum effort, which is identified in the report. There are limitations identified in those particular categories that, in my opinion, would prevent him from meeting that definition of light physical demand work as defined in the DOT[1].
>
> The limitations identified in the FCE further impact a person's ability to perform even sedentary-type work. For example, the occasional reaching, which Mr. Miller put forth good effort on in that particular task. He was found, at maximum, to be able to perform occasional reaching. That's inconsistent with the ability to perform work for the vast majority of jobs in the local labor market.
>
> There's also an indication that in the FCE Mr. Miller could do occasional standing. That's entirely inconsistent with the ability to do light physical demand work. In order to qualify for light work, which I've got all the definitions outlined on the last page of the report, a person has to be able to stand or walk to a significant degree, which is equated with frequent to constant capacity. And based upon Mr. Miller's performance in the FCE, he does not meet even that threshold for light physical demand work.
>
> And also, his testing from waist to shoulder level was below 20 pounds, it's not a full range of light physical work. Although he did lift a little more below waist level, the majority of all work and physical exertion

[1] The United States Department of Labor Dictionary of Occupational Titles.

takes place between the waist level and shoulder level. In particular, the material-handling, labor-type, activities where a person is reaching out.

Therefore, based on his direct interpretation of the FCE results, Mr. Galloway expressed the opinion that Employee was totally disabled. During cross-examination, Mr. Galloway conceded that the report found that Employee had "self-limited" on 29% of the tasks evaluated. He later pointed out that the report showed that Employee had given maximum effort on the majority of tasks. Mr. Galloway agreed that the report stated that Employee made "subjective pain statements." However, he pointed out that the report also stated that Employee did not exhibit "pain behaviors" and that Employee's statements were consistent with his movement patterns.

Employer called Employee's ex-wife, Ginger Miller, to testify. Ms. Miller testified that she did not recall leaving a voicemail message for Wayne Shannon, assistant director for parking and transit for Employer, stating that Employee had asked her to give false testimony concerning his injury. A recording of the message was played for the purpose of impeaching Ms. Miller's credibility. She agreed that the voice was hers, but denied that the statements were true. She testified that she was going through a divorce with Employee and was receiving psychiatric treatment at the time.

Wayne Shannon testified on behalf of Employer. He stated that communication with Employee was "infrequent" after the injury. He testified regarding the content of letters sent to Employee while he was off work. These letters stated, in part that Employee would not be permitted to return to work until he was released without restrictions. A letter dated February 4, 2011 informed Employee that he was terminated, effective on February 11, 2011. Mr. Shannon said the intent of the letters, in spite of their actual wording, was "to inform [Employee] that we needed communication, we needed an update, the status of his situation, we needed information about when he would be able to return to work."

On cross-examination, Mr. Shannon conceded that Employee had contacted Employer numerous times between the date of his injury and September 27, 2010. He also confirmed that a handwritten notation on a copy of a November 9, 2010 letter stated that Employee would no longer have a job when his FMLA leave expired.

The Commission took the case under advisement. It issued its initial decision in the form of a written "Decision Following Trial." The Commission found that Employee was permanently and totally disabled as a result of his work injury. The Commission found alternatively that, if the finding of permanent total disability was not sustained on appeal, Employee had a permanent partial disability of 90% to the body as a whole. It also awarded additional temporary disability benefits, based on testimony by Employee that he did not receive such benefits until October 26, 2010. Employer filed a motion to alter or amend the judgment, which it supplemented twice. The motion, supported by

Employee's discovery responses and other documentation, asserted that Employee had already received temporary disability benefits for the period beginning July 28, 2010. The Commission granted the motion and revised its award of temporary disability benefits. The Commission again confirmed its finding of permanent total disability. Judgment was entered in accordance with the Commission's findings.

Employer has appealed from the judgment, contending, inter alia, that the Commission erred by admitting Mr. Galloway's opinion that Employee is permanently and totally disabled; by finding that Employee was permanently and totally disabled; and by finding Employee to be a credible witness.[2]

Analysis

The standard of review of issues of fact in a workers' compensation case is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(a)(2) (2014). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe witness demeanor and to hear in-court testimony. Madden v. Holland Group of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions; and the reviewing court may draw its own conclusions with regard to those issues. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Admission of Galloway Testimony

Employer's first contention is that the Commission erred by overruling its objection to Mr. Galloway's opinion that Employee was totally disabled. It argues that Mr. Galloway reached his conclusion by positing different, more stringent, limitations upon Employee's activities than either Dr. Hauge or the therapist who administered the FCE. Employer correctly asserts that it is outside a vocational evaluator's expertise to place medical restrictions on an injured worker. If we agreed that Mr. Galloway's opinion was based on a set of restrictions different than those set out in the FCE report, we would be compelled to conclude that the Commission erred by admitting the opinion. Our careful review of the testimony, however, leads us to the conclusion that Mr.

[2]Prior to oral argument, the Employee filed a "reply brief" in response to the Employer's reply brief. The Employer has filed a motion to strike the brief. While we agree that our rules do not allow a reply brief by the appellee in these circumstances, see Tenn. R. App. P. 27(c), we have considered the brief as an amendment to the Employee's original brief. In any event, the content of the brief made no difference in our determination of the issues in this appeal.

Galloway did not venture beyond his area of expertise. To the contrary, he explicitly accepted the FCE's conclusions regarding Employee's abilities to perform various tasks. In doing so, he considered only those activities in which the FCE evaluator concluded that Employee had given maximum effort and disregarded those activities in which Employee had "self-limited" his efforts.

Mr. Galloway observed that the FCE report placed limits on Employee's ability to perform three specific activities: reaching, standing, and lifting between waist and shoulder level. The Court has reviewed FCE report and finds that Mr. Galloway accurately described its findings concerning these activities. He opined that these limitations were inconsistent with most light exertion jobs. Mr. Galloway testified, and stated in his report, that his information concerning exertion and frequency requirements for various jobs was obtained from the Dictionary of Occupational Titles, 4th ed. (1991), The Revised Handbook for Analyzing Jobs (1991), Classification of Jobs (2000), and "OccuBrowse +" software. These appear to be an appropriate basis for a vocational evaluator's opinion regarding the physical exertion requirements of various jobs. No evidence was presented that these sources are unreliable. Further, there was no evidence that Mr. Galloway misstated or misinterpreted these sources.

Our Supreme Court stated in McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 263-64 (Tenn. 1997) that, "In general, questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court. The trial court's ruling in this regard may only be overturned if the discretion is arbitrarily exercised or abused." 955 S.W.2d at 263-64 (internal citations omitted). The Court elaborated in State v. Begley, 956 S.W.2d 471, 475 (Tenn. 1997):

> First, the evidence must be relevant to a fact at issue in the case. Tenn. R. Evid. 401, 402. Second, the expert must be qualified by specialized knowledge, skill, experience, training, or education in the field of expertise, and the testimony in question must substantially assist the trier of fact to understand the evidence or determine a fact in issue. Tenn. R. Evid. 702; McDaniel, at 264; see also Otis v. Cambridge Mutual Fire Ins. Co., 850 S.W.2d 439, 443 (Tenn. 1992). Finally, when the expert witness offers an opinion or states an inference, the underlying facts or data upon which the expert relied must be trustworthy. Tenn. R. Evid. 703; McDaniel, at 264.

Simply put, scientific or technical evidence will not be admissible unless it is determined to be reliable. State v. Begley, 956 S.W.2d 471, 475 (Tenn. 1997)

Without question, Mr. Galloway's testimony was relevant. He was qualified to offer an opinion concerning vocational disability. Mr. Galloway's opinion was based on specific data contained in the FCE report and technical data from government and private

sources pertaining to physical requirements of various jobs in the labor force. No evidence was presented that his method or interpretation of the underlying data was incorrect. We therefore conclude that the Commission did not abuse its discretion by overruling Employer's objection to consideration of Mr. Galloway's opinion that Employee was totally disabled as a result of his work injury.

Permanent Total Disability

Employer next contends that the Commission erred by finding Employee permanently and totally disabled. In addition to Employer's position that Mr. Galloway's opinion is unreliable, Employer points to findings of "low effort and inconsistent behavior" in the FCE report. Employer also alludes to the report's statement that its findings represent "a minimum ability rather than a maximum ability."

Tennessee Code Annotated section 50-6-207(B) provides that an employee is permanently and totally disabled when his injury "totally incapacitates the employee from working at an occupation that brings the employee an income." Section 50-6-241(d) provides a nonexclusive list of factors to be considered in assessing permanent disability: "the employee's age, education, skills and training, local job opportunities and capacity to work at types of employment available in claimant's disabled condition." In this case, Employee was fifty-one years old when the trial occurred. Although he had obtained a GED, academic testing showed that he read and performed math at a middle-school level. Employee testified that he had dyslexia, and that evidence was uncontroverted. Employee's work history consisted entirely of unskilled and semi-skilled work. Prior to coming to work for Employer, most of Employee's jobs were in the construction industry. His work injury required a fusion of three neck vertebrae. According to the FCE, he was significantly limited in his ability to stand, reach, and lift between waist and shoulder level. Employee testified that he had chronic pain in his dominant right arm and hand, limiting his ability to manipulate objects. Based on these factors, we conclude that the Commission had ample grounds to make its finding of permanent total disability. In light of this conclusion, we are not required to address Employer's contentions concerning the Commission's alternative finding on disability.

Credibility

Employer argues that the Commission erred in finding Employee to be a credible witness. In support of this argument, Employer asserts that Employee's testimony concerning his level of pain at various times is contradicted by contemporaneous medical records; that Employee admitted to smoking marijuana and consuming unprescribed medications during his treatment by Dr. Fox; that Employee allegedly requested his ex-wife to give false testimony in his behalf; and that he testified inaccurately concerning the initiation of temporary total disability benefits.

Employee's credibility was very much at issue in this case. He was vigorously cross-examined, and extrinsic evidence was introduced to demonstrate inconsistencies in his testimony. The Commission examined the issue in both its initial ruling and its subsequent order amending that ruling. In the latter order, the Commission stated:

> The Commission, again, watched [Employee] very closely throughout this trial, and is totally convinced that this gentleman has serious residual problems as a result of his injury and the subsequent necessary surgery. All of the medical doctors who testified and the medical records we have reviewed at great length confirm that conclusion. . . . The proof in this case shows that [Employee's] complaints immediately after surgery were so severe that imaging studies were instituted with great alacrity. This undeniable proof along with Dr. Peterson's evident ire at the delay in getting his patient the proper medical treatment — convinced the Commission, along with our own intense observation of Mr. Miller at the trial, that Claimant has serious, ongoing debilities as a result of his injury, and that he should be awarded significant benefits in light of his relatively young age.

"Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances." Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315, 315 (Tenn. 1987). See also Madden, 277 S.W.3d at 900; Seals v. England/Corsair Upholstery Mfg. Co., 984 S.W.2d 912, 915 (Tenn. 1999); McCoin v. Lumbermens Mut. Cas. Co., No. M2000-00813-WC-R3-CV, 2001 WL 237188, at *2 (Tenn. Workers Comp. Panel Mar. 9, 2001). In this case, Employer placed Employee's allegedly inconsistent statements and his illegal behaviors squarely before the Commission during the trial. Employee provided explanations for those statements and behaviors during direct and cross-examination. The Commission considered the allegations and carefully assessed Employee's explanations. Based on that consideration and those observations, it found that Employee's testimony concerning his physical condition was credible and should be accepted. We find no basis in the record to modify the Commission's finding.

Consideration of Return to Work Issues

Employer's final contention is that the Commission erred by considering, at length, issues related to Employee's failure or inability to return to work. Employer asserts that it "never asserted or argued that the 1.5 multiplier cap applied because [Employee] did not have a meaningful return to work." However, we are unable to verify that assertion. Neither Employee's petition for benefits nor Employer's answer addresses the issue of return to work. The opening and closing statements of counsel at trial were not transcribed, so we cannot determine if the issue was discussed at that time. It is not

disputed that Employee was terminated in February 2011, shortly after Dr. Peterson performed surgery on his neck.

At trial, Employer presented the testimony of Mr. Shannon, who suggested that, in spite of the explicit wording of two letters he sent to Employee, Employer possibly would have attempted to accommodate medical restrictions. He also testified that Employee communicated with him infrequently after his injury, presumably intending to imply that the termination was the result of Employee's inaction. During Employee's cross-examination of Mr. Shannon, it was established that, for reasons unknown, Employer initially treated the injury as an FMLA matter, rather than a workers' compensation claim, which caused delays in medical treatment and payment of temporary benefits. In addition, Mr. Shannon agreed that Employee had called in several times a week in the first months after his injury. In light of Mr. Shannon's testimony, it was appropriate for the Commission to address the return to work issue. Moreover, in light of the finding that Employee is permanently and totally disabled, any error in addressing this issue was harmless.

Conclusion

The judgment is affirmed. Costs are taxed to the State of Tennessee.

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PAUL G. SUMMERS, SENIOR JUDGE

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

JEFFREY A. MILLER v. STATE OF TENNESSEE

[TrialCourt] for Tennessee Claims Commission County
No. 30100879604

No. E2015-00034-SC-R3-WC-FILED-NOVEMBER 6, 2015

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 on appeal are taxed to the State of Tennessee, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM