

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 26, 2018 Session

KENNETH E. RAYMER v. MAINTENANCE INSIGHTS, LLC, ET AL.¹

**Appeal from the Circuit Court for Rutherford County
Nos. 70561 and 70567 J. Mark Rogers, Judge**

**No. M2017-00986-SC-R3-WC – Mailed May 10, 2018
Filed June 14, 2018**

Kenneth Raymer (“Employee”) sustained a compensable injury to his left shoulder on July 8, 2011, and a compensable injury to his neck on December 18, 2012. He filed separate civil actions seeking permanent disability benefits for his injuries. The actions were consolidated for trial. The trial court awarded 30% permanent partial disability for the shoulder injury and 50% permanent partial disability for the neck injury and commuted both awards to lump sums. Maintenance Insights, LLC and Logistics Insight Corporation (collectively “Employer”) have appealed, contending the disability awards are excessive and that Employee did not demonstrate that the awards should have been commuted. 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(e) (2014) (applicable to injuries arising prior to
July 1, 2014) Appeal as of Right;
Judgment of the Circuit Court Affirmed**

ROBERT E. LEE DAVIES, SR. J., delivered the opinion of the court, in which JEFFREY S. BIVINS, C. J. and J. RUSSELL PARKES, J., joined.

Stephen K. Heard, Nashville, Tennessee, for the appellants, Maintenance Insights, LLC, Logistics Insight Corp., and Cherokee Insurance Company

¹ The Second Injury Fund was a named defendant in this action and participated in the trial. The trial court dismissed all claims against the Fund, and that decision has not been appealed. For that reason, we omit any discussion pertaining to the Fund.

R. Steven Waldron, Murfreesboro, Tennessee, for the appellee, Kenneth E. Raymer

OPINION

Factual and Procedural Background

Employee, Kenneth Raymer began working as a truck mechanic for Maintenance Insights, LLC in October 2007. On July 8, 2011, Mr. Raymer was working on a truck which needed to have its tires replaced. The tires were stacked on pallets and held together by bands. As Mr. Raymer was cutting a band, a stack of tires started to fall towards several people who were walking into the office. Mr. Raymer caught one of the tires to keep it from hitting other employees. The truck tire weighed 175 pounds, and Mr. Raymer immediately felt pain in his neck and left shoulder. He reported the incident to his supervisor, Ricardo Aireolenis, but initially declined an offer for medical treatment. However, over the next few days, his pain increased to the point that he requested treatment. Employer sent him to a walk-in clinic, who then referred Mr. Raymer to Dr. James Rungee, an orthopedic surgeon.

Dr. Rungee performed surgery on December 13, 2011. His post-operative diagnosis was that Mr. Raymer had less than a 50% tear of the rotator cuff and severe AC joint arthritis with impingement. Dr. Rungee found that the arthritis preexisted the date of injury. Mr. Raymer testified that the surgery helped his shoulder symptoms, but the pain in his neck continued. In April 2012, Dr. Rungee released Mr. Raymer to return to work with no restrictions. Mr. Raymer returned to his previous job and was performing all of the same tasks which he had done previously before the July 2011 injury, although he testified he continued to feel pain in his shoulder and neck.

On December 18, 2012, Mr. Raymer slipped while exiting the cab of a tractor. As he was falling, he grabbed the top of the truck door, which jerked his left arm in the process. Mr. Raymer felt pain and fell to the ground. He immediately reported the incident to Mr. Aireolenis, who once again sent Mr. Raymer to a walk-in clinic and then back to Dr. Rungee for further treatment. Dr. Rungee ordered MRI scans and recommended a referral to a spine specialist. Mr. Raymer selected Dr. Gregory Lanford, a neurosurgeon, from a panel provided by Employer.

Dr. Lanford first saw Mr. Raymer on February 14, 2013. Dr. Lanford ordered an MRI study which showed degenerative changes at the C3-4 and C4-5 levels of the spine.

Initially, Dr. Lanford recommended conservative treatment, including physical therapy and light duty work. Employer provided appropriate light work for Mr. Raymer, who improved somewhat over the following months, but he was unable to resume his normal activities. In November 2013, Dr. Lanford recommended surgery to which Mr. Raymer agreed. On January 22, 2014, Dr. Lanford performed a cervical discectomy and a fusion at C4-5. Dr. Lanford declared Mr. Raymer to be at MMI on October 1, 2014, and assigned a 7% permanent impairment to the body as a whole. Dr. Lanford assigned permanent restrictions of avoiding excessive overhead lifting (more than 50 pounds) and recommended that Mr. Raymer avoid placing his neck in awkward positions, which Dr. Lanford defined as flexing his neck completely forward or backward. From that point forward, Mr. Raymer did not return to work for Employer or any other entity.

After the last surgery, Mr. Raymer's diabetes symptoms worsened significantly. His neuropathy, which was previously limited to his toes, progressed to his knees, and his feet became completely numb. Since he was no longer working, he had a difficult time controlling his blood sugar, and as a result, his medication was increased. He then developed neuropathic symptoms in his hands and chest. He was diagnosed with carpal tunnel syndrome and cubital tunnel syndrome in his left arm. However, none of the physicians could say within a reasonable degree of medical certainty that any of these problems were caused by his work injuries. Further complicating his condition was the fact that Mr. Raymer was non-compliant with the medications, diet and exercise recommended by his primary care physician, Dr. Mathew Perkins.

Mr. Raymer believed that he was unable to work because of the effects of his injuries and his neuropathies. Although his neck was somewhat better after the surgery, he still had diminished strength in his left arm and diminished grip in his left hand. He was unable to walk eighty yards back and forth from his house; he no longer did yard work; and he had a difficult time sleeping due to pain. Mr. Raymer testified at times, his depression and anxiety "[got] the best of [him] sometimes." At the date of trial, he was receiving social security disability benefits.

At the request of Mr. Raymer's attorney, Dr. Robert Landsberg, an orthopedic surgeon, conducted an Independent Medical Examination on May 4, 2016. Dr. Landsberg opined that the first injury on July 8, 2011 caused both the rotator cuff tear and the cervical disk protrusion and radiculopathy. He indicated that these injuries were aggravated and advanced when Mr. Raymer hurt himself again on December 18, 2012. Dr. Landsberg assigned a 7% impairment to the body as a whole for the shoulder injury, which was 1% higher than Dr. Rungee's rating. According to Dr. Landsberg, the MRI findings demonstrated there were a number of issues with Mr. Raymer's shoulder, instead

of a single issue.

With regard to the neck, Dr. Landsberg found cervical radiculopathy during his examination. Specifically, he found atrophy, decreased range of motion, wrist weakness and diminished reflexes, all of which were indicators of ongoing radiculopathy. On that basis, Dr. Landsberg found Mr. Raymer had a Class 2 impairment for his neck injury which equated to an 11% impairment to the body as a whole. Dr. Landsberg assigned permanent restrictions of no lifting more than forty pounds from the waist to the chest, twenty-five pounds from the chest to the shoulder, and ten pounds above shoulder level.

Mr. Raymer's attorney hired Michael Galloway, a vocational consultant to evaluate his vocational disability. Mr. Galloway met with Mr. Raymer on November 11, 2014. He obtained information about Mr. Raymer's education, work history and reviewed Mr. Raymer's medical records. He was unable to administer aptitude tests because Mr. Raymer forgot to bring his reading glasses to the evaluation. Mr. Galloway noted that Dr. Rungee did not place any restrictions on Mr. Raymer's activities; and therefore did not assign any vocational disability due to the shoulder injury based on Dr. Rungee's report. He then reviewed Dr. Lanford's medical report and found Mr. Raymer had an 85% vocational disability from the neck injury. However, after considering Mr. Raymer's age,² Mr. Galloway opined that the vocational disability was 100%. After his initial assessment, Mr. Galloway was provided with a copy of Dr. Lanford's deposition. Based upon Dr. Lanford's explanation of the restrictions, Mr. Galloway revised his initial opinion to conclude that Mr. Raymer had a 25% vocational disability. Finally, Mr. Galloway was provided with the IME report from Dr. Landsberg and Dr. Landsberg's deposition. Based upon Dr. Landsberg's permanent restrictions, Mr. Galloway opined that Mr. Raymer would have a 73% vocational disability.

Employer hired Michelle McBroom Weiss as its vocational consultant. Ms. Weiss met with Mr. Raymer on October 7, 2016. She was able to administer academic tests which showed that Mr. Raymer was able to recognize words at a ninth grade level, understand sentences at a twelfth grade level, spell at a fourth grade level and perform arithmetic at a fifth grade level. Mr. Raymer scored 94 on the Slossom Intelligence Test, which is in the average range. Ms. Weiss determined that Mr. Raymer's previous work history required medium to heavy assertion which was in the skilled to semi-skilled range. She found Mr. Raymer's predominant skills related to his knowledge as a mechanic. Ms. Weiss then evaluated Mr. Raymer's disability using the different

² At the time of trial Mr. Raymer was sixty.

restrictions assigned to him by each doctor. Based on Dr. Rungee's restrictions, Ms. Weiss believed Mr. Raymer could have gone back to work and would have access to all of his past type of jobs and some semi-skilled jobs such as a van driver. Considering Dr. Lanford's restrictions, Ms. Weiss believed Mr. Raymer could still perform mechanic jobs which would result in a 12% vocational disability. Based on Dr. Landsberg's restrictions, Ms. Weiss found that Mr. Raymer would suffer a 55% vocational disability.

The case was tried over the course of three days.³ On the last day of trial, the court made very detailed findings of fact and conclusions of law from the bench. The court adopted Dr. Landsberg's 7% impairment for the left shoulder injury and awarded 30% permanent partial disability to the body as a whole. The court also adopted Dr. Landsberg's 11% impairment for the neck injury and awarded 50% permanent partial disability to the body as a whole for that injury. The court then commuted both awards to lump sum payments. Employer has appealed, asserting that the disability awards were excessive and that the trial court erred by commuting them to lump sums. Employee argues that he is entitled to an award of benefits in excess of the statutory caps pursuant to Tenn. Code Ann. § 50-6-242(b).

Standard of Review

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(e)(2) (2014) (applicable to injuries occurring prior to July 1, 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 the 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).

³ February 14, March 8 and March 24, 2017.

Analysis

The Shoulder Injury

We begin our analysis with Tenn. Code Ann. §50-6-241(d)(2)(A) which provides in cases in which the pre-injury employer does not return the injured employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability benefits that the employee can receive for the body as a whole may not exceed six times the medical impairment rating. In this case, Employer asserts that the awards of permanent disability benefits are excessive.

Employer argues that upon completion of treatment for the injury in April 2012, Employee was released to return to work with no limitations of his activities by Dr. Rungee. Although he continued to have pain, Employee returned to his previous job as a mechanic until December 2012, when the second injury occurred. Employer also argues that both vocational experts agree that Employee sustained no vocational impairment since Dr. Rungee did not provide any permanent restrictions.

Employee counters that the trial court's award of 30% vocational disability represents a 4.29 multiple of Dr. Landsberg's impairment rating. We note since the multiple used by the trial court was less than five, the trial court was not required to make specific findings of fact detailing the reasons for its award of 30%. With that in mind, we review the record to ascertain if the preponderance of evidence supports the trial court's award.

Employer argues the vocational disability to the shoulder should be zero since both experts agreed. Both experts also agreed their disability assessments were contingent upon the assessment of a permanent restriction by the physician. Even though there are many other factors which the trial court should consider in determining the extent of vocational disability, both vocational experts agreed they cannot consider any other factors if there is no permanent restriction.

The law is well-settled that once causation and permanency are established, "the extent of vocational disability is a question of fact for the trial court to determine from all of the evidence, including lay and expert testimony; the medical experts' rating of anatomical disability is merely one of a number of relevant factor used to make this determination." Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 458 (Tenn. 1988). In this case, both Dr. Rungee and Dr. Landsberg agreed there was a permanent injury to

Employee's shoulder, with only a 1% difference in their impairment determination.

The other factors which our Supreme Court has held should be considered in determining the extent of vocational disability include the employee's job security, training, education, age, anatomical impairment, duration of impairment, local job opportunities, and the employee's capacity to work at the kinds of employment available to him considering his disabled condition. McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn. 1999). Our Supreme Court has also drawn a clear distinction in workers' compensation cases between anatomical impairment and vocational disability. Perkins v. Enterprise Truck Lines, Inc., 896 S.W.2d 123, 127 (Tenn. 1995). "While expert testimony may be used to establish vocational disability, it is not required. The extent of vocational disability can be established by lay testimony." Id. Moreover, an employee's own assessment of his physical condition and resulting disability must be considered. Fritts v. Safety National Casualty Corp., 163 S.W.3d 673, 680 (Tenn. 2005).

In this case, Employee was sixty years old at the time of trial. He had completed the tenth grade but did not have a GED. Much of his employment has been working as a mechanic, working on large trucks and other heavy machinery. After his return to work in April 2012, he continued to have pain in his shoulder and neck which made it difficult to perform his job. He had been out of work for an extended period of time. He had a diabetic condition which had worsened significantly since the injury. He had neuropathies in both hands, in his legs up to his knees, and in his chest. His feet are now completely numb. He no longer can work in the yard or perform car repair. Finally, his depression and anxiety have taken a toll, and he has reached a point that he simply cannot "soldier on." The trial court made very specific findings as to Employee's creditability to which it gave great weight.

Here, the opinions of the vocational experts were just one of a multitude of factors which the trial court could consider. As always, this type of expert testimony is advisory only and its value, if any, is to be determined by the trier of fact. Chambers v. Bradley City, 53 Tenn. App. 455, 384 S.W.2d 43 (1964). The trial court elected not to give any weight to the opinions of the vocational experts on this issue; however, all the other factors which the trial court considered supports its finding of a 30% vocational disability due to the injury to Employee's shoulder.

The Neck Injury

Employer also argues that the trial court's award of 50% permanent partial disability is excessive. Employer contends Dr. Lanford's opinions should be given

greater weight than those of Dr. Landsberg since Dr. Lanford was the treating physician, while Dr. Landsberg only saw Employee on a single occasion.⁴ Employer also points to Dr. Landsberg's bias, noting that he performs approximately 100 IME's per year, of which the vast majority are for plaintiffs. Based upon Dr. Lanford's testimony, Employee's vocational expert, Mr. Galloway found a 25% disability while Employer's expert, Ms. Weiss, found a 12% disability.

On the other hand, Employee argues that the trial court properly exercised its discretion when it adopted Dr. Landsberg's opinions. Based on Dr. Landsberg's opinion, Mr. Galloway assigned a 71% combined vocational disability and Ms. Weiss assigned a 55% disability. Employee also contends that the trial court cannot ignore Employee's other physical conditions of diabetes, carpal tunnel syndrome, cubital tunnel syndrome, depression, and anxiety, although they were unrelated to his employment.

We decline to assign liability to Employer for any conditions which were unrelated to the employment arising after the work injuries. Employee cites no authority for this proposition, and we conclude that such a position is contrary to the policies underlying our workers' compensation statute.

Nevertheless, Employee was unable to continue his work for Employer after the neck surgery. Based on the radiculopathy found by Dr. Landsberg, he assigned a permanent impairment to Employee's neck of 11%. Dr. Landsberg recommended permanent restrictions that significantly limited Employee's job opportunities. The trial court gave Dr. Landsberg's opinions more weight, and we find no abuse of discretion. "Appellate Courts decline to second-guess a trial court's decision absent an abuse of discretion." Gonsewski v. Gonsewski, 350 S.W. 3d 99, 105 (Tenn. 2011). As we indicated earlier, Employee was sixty years old at trial and did not have a high school diploma. His work history consists of jobs that require occasional to frequent heavy exertion. Undoubtedly, he has skills as an automotive and diesel mechanic, but the value of those skills is limited because of the effects of the neck injury. Accordingly, we are unable to conclude that the evidence preponderates against the trial court's finding that the injury resulted in a 50% permanent partial disability.

As an alternative argument, Employee contends the proof at trial satisfied the criteria set forth in Tenn. Code Ann. § 50-6-242(b), and he is therefore entitled to an award of benefits in excess of six times the anatomical impairment assigned by the

⁴ Dr. Lanford did admit that if Employee had a radiculopathy then Employee would have had an 11% whole person impairment.

medical experts. Since we have affirmed the trial court's award of a 30% disability from the shoulder injury and a 50% disability from the neck injury, we deem it unnecessary to address this issue.

Lump Sum Payment

Finally, Employer argues that the trial court erred by awarding all benefits as a lump sum. Employee reached maximum medical improvement from his shoulder injury in April 2012. Benefits for that injury have fully accrued. Employee reached maximum medical improvement from his neck injury in October 2014. All but a few months of benefits for that injury have accrued. This argument is therefore *de minimis*. Accordingly, Employer is not entitled to any relief on this issue.

Conclusion

The judgement of the trial court is affirmed. We also conclude that the passage of time has rendered the commutation issue effectively moot. Costs are taxed to Maintenance Insights, LLC, Logistics Insight Corp, Cherokee Insurance Co., and their surety, for which execution may issue if necessary.

ROBERT E. LEE DAVIES, SR. JUDGE

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

KENNETH E. RAYMER v. MAINTENANCE INSIGHTS, LLC, ET AL.

**Circuit Court for Rutherford County
No. 70561**

No. M2017-00986-SC-R3-WC – Filed June 14, 2018

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 Maintenance Insights, LLC, Logistics Insight Corp, Cherokee Insurance Co., and their surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM