IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
MAY 17, 2006 SESSION

CALVIN MILLER V. ALLOY CLADDING COMPANY, INC., AIG INSURANCE COMPANY, INC. AND TENNESSEE DEPARTMENT OF LABOR SECOND INJURY FUND

Direct Appeal from the Circuit Court for Hardin County
No. 3867 Hon. C. Creed McGinley, Circuit Judge

No. W2005-01928-WC-R3-CV - Mailed July 3, 2006; Filed August 7, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the appellants contend that the trial court erred in finding that the employee is permanently and totally disabled and in refusing to limit the employee's aware to 400 weeks. We conclude that the record supports the trial court finding of permanent and total disability. Therefore, under the provisions of Tennessee Code Annotated section 50-6-207(4)(A)(I) (Supp. 1996), total disability benefits are payable to age sixty-five without regard to the monetary cap imposed by the 400-week maximum total benefit provisions of Tennessee Code Annotated section 50-6-102(a)(6) (Supp. 1997). We further conclude that the trial court's allocation of the responsibility for the payment of these benefits between the employer and the Second Injury Fund was proper. Accordingly, we affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right;
Judgment of the Circuit Court Affirmed.

J. S. (Steve) Daniel, Sr. J. delivered the opinion of the court, in which Janice M. Holder, J., and Joe C. Loser, Jr., Sp. J., joined.

Jill Hanson, Nashville, TN, for the appellants, Alloy Cladding Company, Inc. and AIG Insurance Company, Inc.

Curtis F. Hooper, Savannah, TN, for the appellee, Calvin Miller.

Juan G. Villasenor, Nashville, TN, for the appellee, Second Injury Fund.

OPINION

I. Facts and Procedural History

At the time of trial Mr. Calvin Miller was fifty-four years old and had been employed the last nineteen and one-half years as a boilermaker. Mr. Miller has a high school education and has been engaged in basic manual labor as a boilermaker for many years prior to the injuries which are the subject of this lawsuit. On May 30, 1996, while working for the employer, Alloy Cladding Company, Inc., Mr. Miller suffered a work-related injury when he slipped and fell while performing his duties in the course and scope of his employment. As a result of this fall, Mr. Miller suffered a ruptured disk at L-4 and L-5. Mr. Miller received conservative treatment for this work-related injury and ultimately returned to his employment without having surgical intervention. On December 3, 1997, Mr. Miller settled his workers' compensation claim by agreeing to a lump sum award based on a 30% impairment to the body as a whole. Mr. Miller was returned to his employment and ultimately obtained a supervisory position with the employer. On August 18, 1998, while he was in the course and scope of his employment, Mr. Miller fell approximately sixteen feet in a steel tank, landing on his back and neck. This fall resulted in a cervical disk herniation at the C-3, C-4, and C-5 level. This herniation was repaired surgically. Ultimately it became necessary for Mr. Miller to have two surgeries in the area of his low back which had been injured in 1996, one surgery in 1999 and the second in March of 2000.

At the time of the trial, Mr. Miller was under the care of Dr. Green for the management of pain. Mr. Miller was taking a wide variety of drugs which included pain medications, Celebrex, Morphine patches, and Oxycontin, and he was using a spine stimulator. Testimony revealed that the medications make Mr. Miller dizzy; he shakes, cannot move his neck left to right, and has to turn his entire body to look to the right or left. He cannot look up without pushing his head up. He cannot rotate his neck. His pain is to such a degree that he cannot sleep in a bed but sleeps four hours at intervals in a chair. Mr. Miller indicates that he has to take afternoon naps and that some of his pain medications, particularly Oxycontin and Morphine, cause him to be drowsy. He has indicated that he is limited in his driving because of the medication and pain. His hands and arms go to sleep if he attempts to drive for extended periods of time. He feels that the drugs cause him to be impaired for appropriate driving reactions. Mr. Miller testified that the pain and depression associated with his medical impairment resulted in suicidal thoughts and that he had been provided psychological care by his employer through Dr. Blair and Dr. Bond who had prescribed Zoloft for his depression. Mr. Miller admitted that initially part of his depression was associated with marital problems but that aspect of his life had resolved prior to trial as a result of his remarriage. He continued to take Zoloft for depression associated with his medical condition and pain. His wife substantiated his testimony as to the effects of the medication, pain, and limitation of his ability to be gainfully employed.

Dr. Samuel Chung performed an independent medical examination of Mr. Miller in which he concluded that Mr. Miller had a 28% anatomical disability to the body as a whole for the injuries to his cervical spine occasioned by the fall on August 18, 1998. Dr. Chung imposed a number of restrictions on Mr. Miller's work activities including permanent restrictions to the extent of maximum carrying of fifteen pounds, frequent lifting of ten pounds, occasional lifting of ten pounds for three hours, standing and walking for six hours, sitting for six hours, and a limit on pushing and

pulling to the extent that Mr. Miller could withstand. Dr. Chung opined that Mr. Miller should never stoop, kneel, crouch, crawl, or twist and should only occasionally climb and balance. Dr. Chung concluded that Mr. Miller could engage in some limited sedentary work activities. Dr. Chung was of the view that the neck surgery for the ruptured disk at C-4, C-5, and C-6 was a necessary surgical intervention and that the surgery intervention could also add and contribute to further demise or deterioration of the spinal canal necessitating the later lumbar surgery at L-4. Dr. Chung ultimately concluded that it was a very high possibility that the ultimate surgical intervention for the L-4 back injury was occasioned by the fall which is the subject matter of this litigation.

Mr. Miller testified about excruciating pain and depression to the point in which he had contemplated suicide and the psychological care provided by his employer. Mr. Miller related this depression to the work-related injury at issue in this case.

Dr. David Strauser opined as a vocational counselor and director of the Center for Rehabilitation and Employment Research at the University of Memphis that Mr. Miller was 100% disabled. Dr. Strauser based his opinion on the records demonstrating the anatomical impairment, the psychological claims, the effects of the drugs, and Mr. Miller's exclusion from all labor-related jobs. Dr. Strauser found Mr. Miller to be unqualified for sedentary jobs as he had no computer skills or training for those types of jobs, nor was any available in the job market in a small county such as Hardin County where Mr. Miller resides.

The employer presented no proof and conceded all aspects of the case with the exception of the disability associated with the work-related injury of August 18, 1998.

The trial court found that based on the proof presented by Mr. and Mrs. Miller, Dr. Chung, and Dr. Strauser that Mr. Miller was permanently and totally disabled as a result of the fall on August 18, 1998. The trial court rested its findings on evidence establishing that due to the medications that Mr. Miller was required to take as well as his anatomical impairments, he was disqualified from any type of gainful employment as a result of the injury.

The employer appeals the trial court's determination asserting that the preponderance of the evidence presented at the trial does not support the trial court's award of permanent and total disability benefits. In this regard, the employer takes the position that Mr. Miller has failed to prove a causal relationship between his depression and his workplace accident. The employer further contends that Mr. Miller failed to meet his burden of proof that there was causal relationship between the lumbar spine condition and his workplace accident. It is the employer's position that without expert testimony to prove medical causation for depression and the lumbar spine injury, Mr. Miller has failed to meet his burden of proving permanent total disability as a result of the August 18, 1998, accident. The employer maintains that Mr. Miller is entitled to an award only to the extent of permanent partial disability benefits and that his recovery should be limited to the statutory "maximum total benefits."

II. Standard of Review

Review of the findings of fact made by the trial court is de novo upon the record of the trial

court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tennessee Code Annotated section 50-6-225(e)(2). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. The standard governing appellate review of the findings of fact of a trial court requires this Panel to examine in depth the trial court's factual findings and conclusions. GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. Workers' Comp. Panel 2001). Conclusions of law are subject to a de novo review on appeal without any presumptions of correctness. Niziol v. Lockheed Martin Energy Sys., Inc., 8 S.W.3d 622, 624 (Tenn. 1999). When medical testimony is presented by deposition, we are able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000).

III. Analysis

The employer contends that without expert medical proof to establish medical causation of the psychological and lower back injury from the August 1998 fall, Mr. Miller has not proven by a preponderance of the evidence that he is entitled to permanent and total disability benefits. Medical causation and permanence must be established by expert medical proof in most cases. Floyd v. Tenn. Dickel Distilling Co., 463 S.W.2d 684 (Tenn. 1971). However, there is no requirement that the medical anatomical proof equate to the vocational disability impairment. The permanency or anatomical disability and the extent of vocational disability are separate issues. Uptain Constr. Co. v. McClain, 526 S.W.2d 458 (Tenn. 1975). Expert testimony is required to establish permanency in most cases, but the extent of vocational disability is a question of fact for the trial court which must determine the issue after a consideration of all of the evidence, including lay and expert testimony. The medical expert's anatomical disability rating is just one of a number of relevant factors used to make this determination. Corcoran v. Foster Auto GMC, Inc. 746 S.W.2d 452 (Tenn. 1988); Forest Prods. v. Collins, 534 S.W.2d 306, 309 (Tenn. 1976); see also Gregory Co. v. Durdin, 537 S.W.2d 701, 703 (Tenn. 1976); Employers Ins. Co. of Ala. v. Heath, 536 S.W.2d 341, 342-43 (Tenn. 1976); Employers-Commercial Union Cos. v. Taylor, 531 S.W.2d 104, 105 (Tenn. 1975); Skipper v. Great Cent. Ins. Co., 474 S.W.2d 420, 424 (Tenn. 1971).

In cases of unscheduled injuries, the court in Corcoran pointed out that once the threshold issue of permanency was established by competent medical evidence, the inquiry becomes how much the injury impairs the employee's earning capacity, that is, the extent of vocational disability. 746 S.W.2d at 458. On this issue, nonexpert evidence is also relevant, including the testimony of the injured employee. In all workers' compensation cases, the claimant's own assessment of his physical condition and resulting disabilities is competent testimony and cannot be disregarded. Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn. 1992); see also Floyd, 463 S.W.2d at 686.

Total disability is defined in Tennessee Code Annotated section 50-6-207(4). The statute defines "permanent total disability" as follows: "When an injury not specifically provided for in this chapter as amended, totally incapacitates the employee from working at an occupation which brings him an income, such employee shall be considered 'totally disabled,' and for such disability compensation shall be paid as provided in subdivision (4)(A). . . ." Tennessee. Code Annotated section 50-6-207(4)(B) (Supp. 1998).

The definition of permanent total disability set forth in the statute above, does not carry the same meaning as permanent and total medical disability as pointed out by the court in Cleek, 19 S.W.3d at 774, in which the court stated that the inquiry as to whether the employee is permanently and totally disabled from a legal prospective must focus on the employee's ability to return to gainful employment. Davis v. Reagan, 951 S.W.2d 766, 767 (Tenn. 1997). The court also in Cleek set forth the factors to determine permanent total disability and those factors included an assessment by the trial court of "the employee's skills and training, education, age, local job opportunities and his [or her] capacity to work at the kinds of employment available in his [or her] disabled condition." Roberson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986); see also Perkins v. Enter. Truck Lines, Inc., 896 S.W.2d 123, 127 (Tenn. 1995). Repeatedly it has been emphasized that although a "rating of an anatomical disability by a medical expert is also one of the relevant factors, the vocational disability is not restricted to the precise estimate of anatomical disability made by a medical witness." Henson v. City of Lawrenceburg, 851 S.W.2d 809, 812 (Tenn. 1993). As we have previously discussed in this inquiry, an "employee's own assessment of her physical condition and resulting disability is competent testimony that should be considered." McLlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn. 1999).

Therefore, although no expert medical testimony existed as to the depression being related to the 1998 fall, it appears that the trial court was well within its authority to consider Mr. Miller's testimony on this issue. There appears as well to be a sufficient basis for the trial court to attribute part of the pain that Mr. Miller suffers as a result of the 1998 fall to an exacerbation of his underlying low back injury. However, it is clear from the authorities that the trial court was well within its authority in concluding that Mr. Miller was permanently totally disabled as a result of the 28% anatomical impairment rating associated with the cervical injuries and the impact that those injuries have rendered on his ability to obtain any employment in Hardin County. The severe work restrictions imposed on Mr. Miller as well as his limited educational background, minimal skills and the lack of local job opportunities in sedentary occupations justify a permanent total disability award.

The next question that is presented is an assertion that because of the lack of proof that it was inappropriate for the trial court to conclude that Mr. Miller was permanently totally disabled as opposed to finding that Mr. Miller was only permanently partially disabled and, therefore, limited to the maximum four hundred weeks of benefits. As we have stated, we find that the trial court appropriately determined that Mr. Miller was permanently and totally disabled. Once such finding is made and substantiated as this one is by the record, the statutory definition of maximum total benefits provided in Tennessee Code Annotated section 50-6-102(a)(6) become inapplicable. The court in Bomely v. Mid-America Corp., 970 S.W.2d 929, 933 (Tenn. 1998), concluded that such a limitation does not apply to permanent total disability findings under Tennessee Code Annotated section 50-6-207(4) and that the benefits payable on such a finding are paid until age sixty-five without regard to a monetary cap imposed by maximum total benefit provisions of Tennessee Code Annotated section 50-6-102(a)(6). Mr. Miller had a previous workers' compensation injury in 1996 that was settled by the parties with a 30% whole body impairment associated with his first fall. Both the injury in question in this litigation as well as the previously settled claim were with the same employer. The trial court allocated the responsibility for the payment of the permanent total disability benefits as 70% to the employer and 30% to the Second Injury Fund. No part of the parties' briefs

or the record indicates any complaint about this allocation, and in fact it appears appropriate.

In conclusion, we conclude that the evidence was sufficient to support an award of permanent total disability benefits to Mr. Miller, and we affirm. We also affirm the allocation of the responsibility for the payments of those benefits and assess the cost of this appeal to the appellants, Allow Cladding Company, Inc. and AIG Insurance Company, Inc, or their sureties in which execution may render if necessary.

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J. S. DANIEL, SENIOR JUDGE

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No. W2005-01928-WC-R3-CV - Filed August 7, 2006

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 Appellants, Alloy Cladding Company, Inc., and AIG Insurance Company, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM