

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 1, 2006 Session

KELLY LEE BOWERS v. G. BEELER AUTO DELIVERY, INC.

**Direct Appeal from the Chancery Court for Knox County
No. 151184-I John F. Weaver, Chancellor**

Filed October 30, 2006

No. E2005-02006-WC-R3-CV - Mailed August 8, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The Chancellor determined that the plaintiff was permanently and totally disabled as a result of his work-related injury. The defendant appeals, arguing that the evidence preponderates against the trial court's determination of disability. After careful review of the record and applicable authorities, we find no error and affirm the judgment.

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

SHARON G. LEE, SP.J., delivered the opinion of the court, in which E. RILEY ANDERSON, J., and ROGER E. THAYER, SP.J., joined.

Pamela B. Johnson and Kenny L. Saffles, Knoxville, Tennessee, for the Appellant, G. Beeler Auto Delivery, Inc.

Tony Farmer and John P. Dreiser, Knoxville, Tennessee, for the Appellee, Kelly Lee Bowers.

MEMORANDUM OPINION

I. Background

Kelly Lee Bowers injured his neck on January 27, 2001 while attempting to secure a vehicle onto a transport trailer during the course and scope of his employment with the defendant, G. Beeler

Auto Delivery, Inc. Mr. Bowers reported the injury to his employer and was seen at a walk-in medical clinic. Subsequently Mr. Bowers was treated by a neurosurgeon who diagnosed a herniated disc at C-5 and performed a surgical fusion. Later Mr. Bowers developed problems relating to the C-3 and C-6 discs and had two additional surgeries. Mr. Bowers received various other treatments, including physical therapy, caudal blocks and prescription medication. Mr. Bowers did not return to work for the defendant and was not working at the time of trial.

Mr. Bowers filed a complaint seeking workers' compensation benefits. The compensability of the injury was not disputed, only the extent of the disability. Following a trial, the Chancellor determined that Mr. Bowers was permanently and totally disabled.

II. Discussion

A. Standard of Review

Our standard of review of factual issues in a workers' compensation case is *de novo* upon the record, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *see also Rhodes v. Capital City Ins. Co.*, 154 S.W.3d 43, 46 (Tenn. 2004); *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 825-26 (Tenn. 2003). When the trial court has seen the witnesses and heard the testimony, the appellate court must extend considerable deference to its findings, especially where issues of credibility and the weight of testimony are involved. However, when medical proof is presented by deposition, the reviewing court may draw its own conclusions about the weight and credibility of the expert testimony, since it is in the same position as the trial judge for evaluating such evidence. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729 (Tenn. 2002). Under this standard of review, we are required "to weigh in more depth factual findings and conclusions of trial judges in workers' compensation cases." Compare *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315 (Tenn. 1987), with *Anderson v. Dean Truck Line, Inc.*, 682 S.W.2d 900, 901-02 (Tenn. 1984) (stating that under the former material evidence standard of review, the Court was required to accept the findings of fact of trial courts if those findings are supported by any material evidence). Our standard of review of questions of law is *de novo* without a presumption of correctness. *Smith v. U.S. Pipe & Foundry Co.*, 14 S.W.3d 739, 742 (Tenn. 2000).

B. Issue

The issue on appeal is whether the evidence preponderates against the trial court's findings that the plaintiff was 100 percent disabled.

C. Extent of Vocational Disability

The trial court determined that Mr. Bowers was permanently and totally disabled. The defendant takes issue with this ruling, arguing that the only testimony at trial that the plaintiff was unable to return to gainful employment came from Mr. Bowers, whose testimony was contradicted by expert medical proof and was inadequate to support a finding of total disability. The defendant

also contends that the trial court failed to take into account a prior workers' compensation injury sustained by Mr. Bowers which resulted in a disability rating.

Mr. Bowers' proof at trial consisted of the deposition of his treating physician, Dr. Lary A. Schulhof, a board-certified neurosurgeon; the deposition of Dr. William E. Kennedy, an orthopedic surgeon who examined Mr. Bowers at the request of his attorney; and the testimony of Mr. Bowers. The defendant's proof consisted of the deposition testimony of Dr. Fred A. Killeffer, a neurosurgeon who evaluated Mr. Bowers at the request of the defendant.

Dr. Schulhof's testimony related to his treatment of Mr. Bowers and his opinion that Mr. Bowers' neck problems were more likely than not caused by the January 2001 accident. For the purposes of this appeal, the defendant does not take issue with the trial court's ruling that all three surgeries were work-related. Dr. Schulhof was not asked for his opinion regarding Mr. Bowers' medical impairment or whether he had any work restrictions.

According to Dr. Kennedy, a board-certified orthopedic surgeon and independent medical examiner, Mr. Bowers related a history of a painful pop in his neck on January 27, 2001, while reaching to his left pulling a chain diagonally. His treating physician at that time confirmed by medical testing that Mr. Bowers had a herniated disc at the C-5 level. An anterior cervical discectomy and fusion at C-5 was performed. Subsequent testing also indicated a bone spur with foraminal narrowing at C-3 and moderate degeneration at C-6. Surgical decompression was then performed at the C-3 and C-6 levels. Mr. Bowers informed Dr. Kennedy that he had constant pain in his neck, left shoulder and upper arm; intermittent activity-related pain with numbness and tingling in the left forearm and particularly in the left index and ring fingers; and activity-related pain in his right shoulder. The plaintiff noted that sitting and standing longer than five minutes at a time or walking longer than ten minutes at a time regularly increased his symptoms. Mr. Bowers further claimed that riding in or driving in a vehicle longer than forty-five minutes increased the symptoms; as did any attempts at stooping, twisting, bending, kneeling, leaning, pulling, reaching, squatting and lifting and carrying more than about ten pounds at a time. The plaintiff also related that he experienced a loss of appetite and difficulty sleeping. After the accident, Mr. Bowers stated that he no longer engaged in fishing, tennis, softball, hunting, running, hiking and playing with his daughter.

Dr. Kennedy determined that Mr. Bowers had a 28 percent permanent physical impairment to the body as a whole as a result of the accident. He also assigned the following permanent restrictions: (1) no vigorous lifting or pulling, maximum reaching, or rapid repetitive motion of his upper extremities; (2) no attempting to hold his head other than the comfortable neutral position, as in looking forward, for prolonged periods; (3) no working in rough terrain or in rough vehicles; (4) no working with his hands raised above the level of his shoulders or engaging in any jerking or hammering motions; and (5) no lifting and carrying of more than twenty pounds occasionally or ten pounds frequently.

Mr. Bowers was 39 years old at the time of trial. Although he had dropped out of school in the 10th grade, Mr. Bowers later earned his General Equivalency Degree (GED) and received training in aircraft maintenance while serving in the Navy. His past work experience had been primarily as

a truck driver hauling vehicles, but he had also worked briefly as a mechanic, a dry wall hanger and as a bartender.

Since his accident, Mr. Bowers testified that he experiences headaches all the time, chronic pain in his neck and shoulders, and neck stiffness. The plaintiff noted that it hurts his neck to look down, to turn his head, to sit and/or to stay on his feet for too long a period of time, and to bend over and to twist. He also complained of chronic back pain, along with weakness, decreased strength, and loss of mobility in his left arm. Mr. Bowers asserted that at night he is only able to sleep for two hours at a time. The plaintiff indicated that he takes hydrocodone, a narcotic pain reducer, and soma, a muscle relaxer, which make him feel tired and adversely affect his ability to focus and concentrate. Mr. Bowers insisted that while he wants to work, he did not know of any job he could do on a forty-hour-per-week basis. Mr. Bowers claimed his physical problems and use of hydrocodone prevented him from doing the work he did before the accident.

Mr. Bowers was not employed at the time of the trial. On two occasions since the January 2001 injury, he attempted to assist his brother in “cleaning up ... construction,” by “sweeping and picking up for him.” According to Mr. Bowers, he was able to do this type of work for two or three days a week, but only “for maybe two weeks in a row.” Mr. Bowers claimed he could not sustain such efforts because “my body wouldn’t allow me to ... I hurt too bad.”

Dr. Frederick A. Killeffer, a board-certified neurosurgeon who examined Mr. Bowers at the request of the employer, opined in his deposition testimony that the plaintiff had a 17 percent permanent impairment to the body as a whole, assuming that all three surgeries were causally related to the accident. It was Dr. Killeffer’s opinion that Mr. Bowers could return to medium level work; he advised that the plaintiff only avoid excessive overhead work because repetitious and excessive extension of his neck and tilting of his neck backwards would probably trigger pain.

Any award of permanent total disability must be in compliance with the statutory definition of total disability contained in Tenn. Code Ann. § 50-6-207(4). *See Prost v. City of Clarksville, Police Dept.*, 688 S.W.2d 425, 427 (Tenn. 1985). The relevant 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)....

Tenn. Code Ann. § 50-6-207(4)(B). The legal definition of permanent total disability does not carry the same meaning as permanent and total *medical* disability; the legal definition focuses on the employee’s ability to return to gainful employment. *Davis v. Reagan*, 951 S.W.2d 766 (Tenn. 1997).

In making an assessment of vocational disability, the trial court may consider many pertinent factors, including job skills, education and training, age, work experience, duration of disability, local job opportunities, and the employee’s capacity to work at the kinds of employment available

in his disabled condition. *Id.*; *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 678 (Tenn. 1991); *Clark v. National Union Fire Ins. Co.*, 774 S.W.2d 586, 588 (Tenn. 1989); *Holder v. Wilson Sporting Goods Co.*, 723 S.W.2d 104, 107 (Tenn. 1987); *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986). Vocational disability does not depend upon either a medical or vocational expert, but, instead, the extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990); *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 457-8 (Tenn. 1988). Although a rating of anatomical disability by a medical expert is one of the relevant factors, “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) (citing *Corcoran*, 746 S.W.2d at 458). In addition, the employee’s “own assessment of [his] physical condition and resulting disability is competent testimony that should be considered....” *McIlvain v. Russell Stover Candies, Inc.*, 996 S.W.2d 179, 183 (Tenn. 1999).

The defendant argues that the only evidence presented pertaining to Mr. Bowers’ inability to work was his own testimony. According to the employer, all three physicians opined that Mr. Bowers was capable of working in his injured condition. The defendant notes that Dr. Schulhof did not assign the plaintiff any permanent restrictions; Dr. Killeffer stated that Mr. Bowers could return to medium level work and only advised him to avoid excessive overhead work; and Dr. Kennedy only restricted Mr. Bowers from vigorous lifting or pulling, maximum reaching, or rapid repetitive motion of his upper extremities, working in rough terrain or in rough vehicles, working with his hands raised above the level of his shoulders or carrying out any jerking or hammering motions, and lifting and carrying more than 20 pounds occasionally or 10 pounds frequently. Accordingly, the defendant asserts that Mr. Bowers’ trial testimony is contradicted by the medical proof presented, and that the restrictions and impairment ratings assigned are consistent with permanent *partial* disability rather than permanent *total* disability.

The defendant further emphasizes that Tenn. Code Ann. § 50-6-207(4)(B) speaks of “*an* occupation which brings the employee an income,” and contains no reference to the employee’s present or past occupation. *Id.* (emphasis added). The defendant argues that Mr. Bowers did not present any testimony or evidence that he was unemployable in the open labor market as a result of his work-related injury. Instead, his testimony was limited to his ability to return to past jobs.

Vocational disability is ““measured not by whether the employee can return to h[is] former job, but whether [h]e has suffered a decrease in h[is] ability to earn a living.”” *Lang v. Nissan N. Am., Inc.*, 170 S.W.3d 564, 570 (Tenn. 2005) (quoting *Walker v. Saturn Corp.*, 986 S.W.2d 204, 208 (Tenn. 1998)). The test is “whether or not there has been a decrease in the employee’s capacity to earn wages in any line of work available to the employee.” *Corcoran*, 746 S.W.2d at 459.

The Chancellor made the following findings of fact and conclusions of law:

The claimant still has chronic neck pain and stiffness in his neck and difficulty looking up or down, standing on his feet and bending over

or twisting. His back hurts, and he has weakness in his left arm. It is difficult for him to hold his head up. His left arm now tires. He's only able to sleep about two hours per night because he cannot get comfortable, and he remains on narcotic pain medicine prescribed by his family doctor.

* * * *

There is no question in this case but that the claimant is permanently disabled, but as to whether his permanent disability is total, that question depends in part upon whether the Court believes the claimant's testimony concerning his bodily condition, including his ability to sleep only two hours per night and his difficulty in standing and whether his bodily condition prevents him from working, such as sweeping or cleaning up for his brother. This Court finds the claimant to be credible. Having observed the claimant and having considered all of the evidence, including the testimony from the claimant and the medical evidence, the Court finds that the claimant is totally and permanently disabled. ...

As noted earlier, where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, we must give great deference to that finding in assessing whether the evidence preponderates against the trial judge's determination. *See Humphrey*, 734 S.W.2d at 315. The trial judge may make an independent determination of the extent of the employee's disability, and is not bound to accept the opinions of experts. *Williams v. Tecumseh Products Co.*, 978 S.W.2d 932, 936 (Tenn. 1998); *Jaske v. Murray Ohio Mfg. Co., Inc.*, 750 S.W.2d 150, 151 (Tenn. 1988).

Following the injury, the record establishes that Mr. Bowers never satisfactorily performed duties or earned any regular income. While he made an attempt to work for his brother cleaning up construction sites, the plaintiff testified that he was physically unable to do the work. He also testified that he knew of no job he could do. The Chancellor found credible Mr. Bowers' testimony that he was unable to return to gainful employment due to his physical condition and medication use. Based upon our own review of the record, we hold that the evidence does not preponderate against the finding of the trial court that Mr. Bowers was permanently and totally disabled.

D. Effect of Prior Workers' Compensation Injury

In the early 1990's, Mr. Bowers hurt his right shoulder while working for the defendant. Following shoulder surgery, he returned to work. His workers' compensation claim was settled on the basis of a 6 percent impairment to the body as a whole. The defendant argues that it should only be liable for the disability resulting from the injury occurring in 2001 rather than the disability resulting from the first injury in the 1990's *and* the 2001 injury. Relying on Tenn. Code Ann. §50-6-208 (the Second Injury Fund statute), the defendant contends that the trial court erred

by not determining the extent of disability resulting from the second injury without consideration of the first injury.

We disagree with the defendant's argument for several reasons. First, the Second Injury Fund is not a party to this proceeding; thus, there can be no apportionment of benefits between the defendant and the Second Injury Fund. *Travelers Ins. Co. v. Austin*, 521 S.W.2d 783 (Tenn. 1975). Second, the defendant failed to raise this issue regarding the Second Injury Fund at the trial level. An issue not raised in the trial court cannot be raised for the first time on appeal. *Simpson v. Frontier Comm. Credit Union*, 810 S.W.2d 147 (Tenn. 1991); *Harrison v. Schrader*, 569 S.W.2d 822 (Tenn. 1978); *Hill v. Moncier*, 122 S.W.3d 787 (Tenn. Ct. App. 2003); *Moran v. City of Knoxville*, 600 S.W.2d 725 (Tenn. Ct. App. 1979).

Third, while we agree with the defendant that it is liable only for the disability caused by the January 2001 injury, from our independent examination of the record, we believe the trial court based the award of 100 percent disability solely on the January 2001 injury, rather than a combination of the two injuries. The shoulder injury may have resulted in a workers' compensation settlement many years ago, but the preponderance of the evidence supports the conclusion that the plaintiff's disability was caused solely by his most recent work-related injury. There was no lay or expert testimony indicating that he had any physical difficulties because of the old injury. Mr. Bowers returned to work following the shoulder injury and apparently worked without complaint until the January 2001 injury. Additionally, there was no evidence of any prior court-approved settlement in the record to be considered by the trial court. Thus, it is evident from the record that the trial court did not attribute any disability to the old shoulder injury from the 1990's and that all of Mr. Bowers' disability was based on the January 2001 injury. Because the evidence does not preponderate against the trial court's conclusion that Bowers' permanent total disability is solely attributable to the January 2001 injury, there is no basis upon which to apportion any amount of the award to the Second Injury Fund. *Eads v. GuideOne Mut. Ins. Co.*, No. E2005-00501-SC-R3-CV, 2006 WL 1877026 (Tenn. July 7, 2006). Since the defendant is responsible for the disability that resulted from the subsequent injury, which in this case totals 100 percent, the defendant is liable for the entire award.

III. Conclusion

After a thorough review of the record, along with consideration of the relevant authorities, we hold that the evidence does not preponderate against the trial court's award. The judgment is affirmed. Costs of this appeal are assessed to the appellant, G. Beeler Auto Delivery, Inc., for which execution shall issue if necessary.

SHARON G. LEE, SPECIAL JUDGE

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AT KNOXVILLE
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**Chancery Court for Knox County
No. 151184-I**

Filed October 30, 2006

No. E2005-02006-SC-WCM-CV

JUDGMENT

This case is before the Court upon the motion for review filed by G. Beeler Auto Delivery, Inc. pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to G. Beeler Auto Delivery, Inc, and its surety, for which execution may issue if necessary.

ANDERSON, J., NOT PARTICIPATING