

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 26, 2007 Session

KENNETH CONAWAY v. U.S. PIPE AND FOUNDRY COMPANY; ET AL.

**Direct Appeal from the Chancery Court for Marion County
No. 7017 Jeffrey Stewart, Chancellor**

**No. M2006-01177-WC-R3-WC - Mailed - June 25, 2007
Filed - July 26, 2007**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The trial court found that the employee, Kenneth Conaway, was permanently and totally disabled. The employer has appealed that ruling, contending that the Mr. Conaway's work as a minister precludes a finding of total disability. We agree and modify the award of the trial court to seventy-two percent permanent partial disability of the body as a whole.

**Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Trial Court
Modified**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and JERRY SCOTT, SR. J., joined.

David Collier Nagle, Chattanooga, Tennessee, for the appellant, U.S. Pipe and Foundry Company.

Robert Cooper, Attorney General and Reporter; Michael E. Moore, Solicitor General; Lauren S. Lamberth, Assistant Attorney General, for the appellee, Tennessee Department of Labor and Workforce Development, Workers' Compensation Division, Second Injury Fund.

Thomas L. Wyatt, Chattanooga, Tennessee, for the appellee, Kenneth Conaway.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

Kenneth Conaway injured his back on August 19, 2002, lifting brass from a dump pan while working for U.S. Pipe and Foundry Company (U.S. Pipe). Compensability of the injury was not disputed. He was eventually referred for treatment to Dr. Todd C. Bonvallett, a board certified orthopaedic surgeon specializing in spinal surgery. Dr. Bonvallett reviewed an MRI of Mr. Conaway's spine that revealed lumbar spondylosis with annular tears in the discs at the L4-5 and L5-S1 levels. To treat this injury, Dr. Bonvallett performed two-level lumbar fusion surgery on March 25, 2003. Initially following surgery, Mr. Conaway improved but after about eight or nine months the pain returned and his condition worsened. A second surgery was performed on September 14, 2004, extending the disc fusion to the L3-4 level. Again Mr. Conaway initially improved but, after about six weeks, his pain returned. Over time, his symptoms gradually improved until he reached a plateau where, according to Dr. Bonvallett, Mr. Conaway felt he had about a fifty percent improvement.

Dr. Bonvallett testified that Mr. Conaway retained an impairment of 12% to the body as a whole as a result of the injury and surgeries. Based upon the results of a functional capacity evaluation, Dr. Bonvallett believed Mr. Conaway was limited to light duty work and should be restricted from stooping and repeated bending, and limited to less than frequent walking, sitting, standing or kneeling. Dr. Bonvallett believed Mr. Conaway would be able to work, within those restrictions. He believed that future treatment of Mr. Conaway's injury would be required in the form of pain management. Mr. Conaway did not return to work for U.S. Pipe following the second surgery due to U.S. Pipe closing the plant. He has not applied for employment elsewhere since that time.

At the time of the trial, Mr. Conaway was forty-three years of age. He left school during the eleventh grade but later obtained a GED diploma. He had no additional training or education. His prior employment history included working in a grocery store sacking groceries and stocking shelves, a prior period of employment with U.S. Pipe grinding fittings, working as a welder's helper which progressed into his becoming a certified welder and working as a surveyor's assistant. In 1994, he returned to U.S. Pipe and has worked in various positions, most involving heavy labor. Mr. Conaway had received a previous workers' compensation award of eight percent to the upper right extremity as the result of tearing ligaments in his right elbow. He testified at trial that, due to his back injury, he was seeing Dr. Gregory White for pain management. He constantly wears a Duragesic pain patch and has prescriptions for percocet and oxycodone which he takes on a daily basis.

In 1991, Mr. Conaway was ordained as a minister and became the pastor for Pine Grove Baptist Church in New Hope, Tennessee. He served as pastor of that church until, in 1996, he became pastor of Miracle Baptist Church in Soddy-Daisy, Tennessee. He has continuously served in that capacity through the date of trial. He testified he was the sole pastor of that congregation and considered his ministry to be a full time calling. He testified he preaches three times a week; conducts baptisms, marriages and funerals; counsels; and visits members who are sick, homebound or in the hospital. He resides forty-three miles from the church and drives back and forth from his home to the church at least twice weekly. While he has missed some services due to pain and has

tried to limit his trips by combining visitations with church services, he has continued to function as the church's pastor.

At the time of trial, he received a payment of \$600.00 per week from the church. Initially, he received \$150.00 per week but, as the church grew, the payment was increased to \$300.00 per week and, subsequently, to \$600.00 per week. These payments were described by various witnesses as either a gift or as reimbursement for expenses. Mr. Conaway has never been required to submit any statement or summary of those expenses in order to receive the payments. The amount of the payment is the same each week, regardless of his actual expenses, and he has declared the payments as income on his federal income tax return.

Two members of Miracle Baptist Church testified at trial. Brian Reed, a deacon, stated that Mr. Conaway performed the same pastoral duties after his injury that he had performed prior to the injury. He also stated that Mr. Conaway was a good pastor and was worth more to the church than the money he received. Fate Ferguson was a Sunday School teacher at the church. Mr. Ferguson testified that, while Mr. Conaway had changed his method of preaching, he remained satisfied with Mr. Conaway's pastoral work following the injury.

By consent of the other parties, Mr. Conaway introduced a written report of Mark Boatner, a vocational evaluator, into evidence. Mr. Boatner reported that he administered tests revealing Mr. Conaway was able to read and perform arithmetic at the sixth grade level. Based upon his review of the records, testing, and an interview with Mr. Conaway, he opined that Mr. Conaway had a 100% vocational disability until such time as his pain is reduced by treatment or medication.

The trial court found that Mr. Conaway was permanently and totally disabled. The award was apportioned between U.S. Pipe and the Second Injury Fund based upon the prior settlement. Therefore, U.S. Pipe was assigned liability for ninety-six percent of the award. The Second Injury Fund was assigned four percent. U.S. Pipe and the Fund contend that Mr. Conaway's activities as minister of the Miracle Baptist Church demonstrate that he does not meet the requirements of Tennessee Code Annotated section 50-6-207(4)(B) which defines a totally disabling injury as one that "totally incapacitates the employee from working at an occupation that brings the employee an income" and, therefore, the award of permanent total disability is in error.

II. STANDARD OF REVIEW

The standard of review of issues of fact 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) (2005). 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. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where 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. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997). Where the only dispute between the parties is the conclusion to be reached from the undisputed facts and evidence, the question on appeal is one of law and our review of the trial court's conclusions is *de novo* with no presumption of correctness. See Id.

III. ANALYSIS

U.S. Pipe and the Second Injury Fund contend that the trial court erred in finding Mr. Conaway to be permanently and totally disabled as defined by Tennessee Code Annotated section 50-6-207(4)(B). In addition, they assert that Dr. Bonvallett's testimony that Mr. Conaway is able to work, albeit at a light duty level, also precluded a finding of permanent total disability. Mr. Conaway relies upon his own testimony concerning the extent of his disability, and the effects of the narcotic pain medications prescribed for him. He also points to the evaluation of Mark Boatner to support his position that he is permanently and totally disabled.

The standards applicable to consideration of permanent total disability were recently summarized by the Tennessee Supreme Court in Hubble v. Dyer Nursing Home, 188 S.W.3d 525, 535-536 (Tenn. 2006):

The determination of permanent total disability is to be based on a variety of factors such that a complete picture of an individual's ability to return to gainful employment is presented to the Court. Vinson v. United Parcel Service, 92 S.W.3d 380, 386 (Tenn. 2002); Cleek [v. Wal-Mart Stores, Inc.], 19 S.W.3d 770, 774 (Tenn. 2000)]. Such factors include the employee's skills, training, education, age, job opportunities in the immediate and surrounding communities, and the availability of work suited for an individual with that particular disability. Cleek, 19 S.W.3d at 774 (citing Roberson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986)). Though this assessment is most often made and presented at trial by a vocational expert, it is well settled that despite the existence or absence of expert testimony, an 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." Vinson, 92 S.W.3d at 386 (quoting Cleek, 19 S.W.3d at 774).

Tennessee Code Annotated section 50-6-207(4)(B) provides "[w]hen an injury not otherwise specifically provided for in this chapter, as amended, totally incapacitates the employee from working at an occupation that brings the employee an income, such employee shall be considered 'totally disabled', . . ." The cases interpreting this code section are instructive. Rhodes v. Capital City Ins. Co., 154 S.W.3d 43 (Tenn. 2004) concerned an employee who sought recovery for total disability during a period of time that he was employed as a chain saw operator. The employee testified that he had employed another person to assist him in performing his job during this time.

The Supreme Court affirmed the trial court's ruling that total disability benefits commenced at the time the employee stopped working (rather than the time he reached maximum medical improvement) and stated:

It would be an extremely rare situation in which an injured employee could, at the same time both work and be found permanently and totally disabled. In order for such a situation to occur, the evidence would have to show that the employee was not employable in the open labor market and that the only reason that the employee was currently working was through the magnanimity of his or her employer.

Id. at 48.

An example of a person working "through the magnanimity of his or her employer" is found in Cage v. Yasuda Fire & Marine Ins. Co. Of America, No. W2004-01669-SC-WCM-CV, 2005 WL 1412135 (Tenn. Workers' Comp. Panel June 16, 2005). That case also involved a church employee. The employee suffered from severe asthma. He was unable to engage in any manual labor, and had to avoid all odors, smoke, chemicals and dust. He was able to walk only ten feet before becoming exhausted. Nonetheless, his church employed him as a music minister for \$215 per week. His job duty was to play the piano on Sundays. However, he was able to do this for only ten minutes at a time. The Workers' Compensation Panel found his employment to be, essentially, an act of generosity of the church, and affirmed an award of permanent total disability. Id. at *6.

In this case, Mr. Conaway and members of his congregation testified that he continued to perform all of the normal pastoral functions that he had performed prior to his injury. The only change was that after the injury and surgeries, he used a stool in the pulpit, and his preaching style was more subdued. The church members who testified expressed satisfaction with his work, and wanted him to continue as their pastor. Although the payments he received from the church were sometimes referred to as a gift, there is no basis in the record for a finding that they were intended as a form of charity.

The case law which analyzes claims for permanent total disability by employees who are working, or have jobs, present a continuum from heavy labor, such as the chain saw work in Rhodes, to jobs in name only as in Cage. The job held by Mr. Conaway in this case resembles the employee's job in Cage in some ways. The employer is a church; the job title is minister; and the physical demands of the job are relatively light. However, in contrast to Cage, Mr. Conaway's pastoral job has actual and significant functions. He performs those functions satisfactorily and receives payments from those whom he serves. While these payments have been described as reimbursement of expenses, there was no showing the amounts paid have any relationship to the actual expenses incurred by Mr. Conaway. Under these circumstances, we must consider the payments as remuneration and, accordingly, cannot find that he is totally incapacitated from working at an occupation which brings him an income. We must, therefore, modify the trial court's award of permanent total disability benefits.

U.S. Pipe concedes that if Mr. Conaway is not permanently and totally disabled, he would be entitled to the maximum award permitted by Tennessee Code Annotated section 50-6-241, of six times the medical impairment. Clearly, the evidence supports the findings required for a maximum award by Tennessee Code Annotated section 50-6-242(a). Mr. Conaway cannot read or write on an eighth grade level. All the jobs he has held, other than pastor, have required significant physical exertion and, thus, he has no reasonably transferable job skills from his prior vocational background and training. The treating physician has greatly restricted his activities. He takes powerful pain medication on a daily basis. As a result, except for his position as pastor of the Miracle Baptist Church, he has no reasonable employment opportunities available locally considering his permanent medical condition. We agree that Mr. Conaway, while not totally disabled, is entitled to the maximum award in this case.

IV. CONCLUSION

The judgment of the trial court is modified to award a 72% permanent partial disability of the body as a whole.¹ The cause is remanded to the trial court for entry of an appropriate order. The costs of this cause shall be taxed to the appellee, Kenneth Conway.

DONALD P. HARRIS, SENIOR JUDGE

¹Subsequent to oral argument of this matter, Mr. Conaway filed a motion which requested that this Panel consider certain post-judgment facts. The motion was accompanied by an affidavit of Mr. Conaway which stated that he had resigned his position as Pastor of Miracle Baptist Church due to back pain. The motion was denied because the suggested facts were not capable of ready determination without a hearing. The panel notes that the appropriate means of introducing this information into the record is a motion pursuant to Tennessee Code Annotated section 50-6-231 in the trial court.

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JUDGMENT

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 appeals 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 will be paid by the Appellee, Kenneth Conaway, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM