

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

**RALPH L. POORE V. BI-LO, LLC AND TENNESSEE DEPARTMENT OF LABOR,
SECOND INJURY FUND**

**Direct Appeal from the Circuit Court for Anderson County
No. A5LA0436 Donald R. Elledge, Judge
Filed August 13, 2007**

E2006-01575-WC-R3-WC - Mailed May 16, 2007

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 findings of fact and conclusions of law. The trial court found that the employee was permanently and totally disabled as a result of the work-related back injury and awarded permanent and total disability benefits, allocating the responsibility for paying those benefits 85% to Bi-Lo and 15% to the Secondary Injury Fund. The employer, Bi-Lo has appealed the trial court's award contending that the trial court erred in finding the employee permanently and totally disabled. The employer also appeals the allocation of responsibility for the vocational disability between itself and the Second Injury Fund. After a careful review of the record, we conclude that the trial court should be affirmed as modified.

**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 WILLIAM M. BARKER, C.J., and JON KERRY BLACKWOOD, Sr. J., joined.

Thomas O. Sippel, Chattanooga, Tennessee, for the appellant, Bi-Low, LLC.

Roger L. Ridenour, Clinton, Tennessee, for the appellee, Ralph L. Poore.

Robert E. Cooper, Jr. Attorney General and Reporter, Nashville, Tennessee and Juan G. Villasenor, Assistant Attorney General, Nashville, Tennessee, for the appellee, Tennessee Department of Labor, Second Injury Fund.

OPINION

I. Facts and Procedural History

Ralph L. Poore was thirty-six years of age on the date of the trial. Mr. Poore has a ninth grade education and has not achieved a GED. His work history has been that of a manual laborer working in heavy activities with a number of employers. Over the years, Mr. Poore has suffered work-related injuries to his left middle finger and another to his left shoulder. He has also had four front teeth knocked out and an injury to his left ankle while working for the Anderson County Highway Department. The ankle injury was the subject of a workers' compensation claim which was settled March 14, 2001 on the basis of an award of 37.5% permanent partial disability to the left leg, or seventy-five weeks of compensation.

On November 30, 2004, Mr. Poore was working for Bi-Lo picking up pallets within the course and scope of his employment, when he felt something in his back pull and start burning. Six days after the injury, Mr. Poore saw Dr. Carroll, a family practitioner, and Dr. Carroll scheduled an MRI. However, the MRI was not performed at that time because it lacked the approval of the employer. Mr. Poore was then referred to Dr. Mathiesson, a neurologist in Oak Ridge, Tennessee. Dr. Mathiesson ordered an MRI and nerve conduction test then referred Mr. Poore to Dr. Whitley, a neurosurgeon. On January 28, 2005, Dr. Whitley determined after reviewing the MRI that Mr. Poore had suffered a large disc herniation on the left side at level L5-S1, that clearly compromised the left S1 nerve root. Dr. Whitley was of the opinion that Mr. Poore had an S1 radiculopathy and that he had S1 nerve impingement.

Based on the severe pain that Mr. Poore was experiencing, Dr. Whitley thought that surgery would be the best treatment option. Dr. Whitley testified that the length of time which passes after an injury is a factor which affects the success of surgery. If a radiculopathy has existed for many, many months, there is an increased likelihood that the nerve may actually be damaged in such a fashion that the patient could develop painful, chronic neuropathy.

On March 2, 2005, Dr. Whitley performed a hemilaminotomy, removing a lamina of the L5 vertebrae. During the course of the surgery, Dr. Whitley found a fragment of disc material that had broken free of the disc space. The fragment was located in the axilla of the left S1 nerve root. The fragment compromised the nerve root by pushing it up and because of its location within the axilla of the nerve root. There was potential for moderate to severe injury of the nerve root because it was extremely compressed by the herniated disc. After the surgery, Mr. Poore still had difficulty walking. He had gait disturbance, extreme weakness in his left foot, and numbness and sensory changes in his left leg. Dr. Whitley sent Mr. Poore for an additional MRI which revealed that there was no longer herniated disc material present but there was a moderate amount of scar tissue that had formed around the nerve root. Dr. Whitley was of the opinion that long term period of acute compression of the nerve root appeared to have caused chronic nerve injury.

Because of the continued pain after surgery, Mr. Poore received treatment from Dr. Browder

at St. Mary's Pain Management and Pain Consultants of East Tennessee. Dr. Browder administered epidural shots which were unsuccessful in alleviating pain. Dr. Whitley ultimately recommended that Mr. Poore be approved for a spinal cord stimulation trial. However, this was not approved by the employer. Mr. Poore was then seen by Dr. Pinzon and Dr. Workman at the direction of the workers' compensation carrier and without the recommendation of his treating physician, Dr. Whitley. Dr. Workman, a neuropsychiatrist specializing in pain medicine, evaluated Mr. Poore on November 15, 2005 and on November 18, 2005. It was Dr. Workman's opinion that Mr. Poore suffered from a mixed pain disorder with psychogenic pain components or psychological issues that impaired his coping with pain and that Mr. Poore suffered mixed personality disorders. Dr. Workman was of the opinion that these psychiatric factors precluded Mr. Poore from recovery from the work-related injury and caused him to have poor stress tolerance, poor pain tolerance, and that the spinal cord stimulator would not be a successful procedure. Further, Dr. Workman was of the opinion that due to the personality disorders, Mr. Poore perceived the pain to be much greater than another person with the same injury would, and that the pain is more of an emotional valance for him than the same pain might be for someone who is psychologically stronger.

Many of the enumerated health care providers recorded expressions of pain that appeared to be exaggerated. However, Dr. Workman explained that malingering is actually rare in people with the personality disorder that Mr. Poore suffers. He also stated that increased Waddell signs are frequently due to inability to cope with pain as a result of his or her personality makeup rather than a conscious symptom exaggeration.¹ Ultimately Mr. Poore underwent two separate functional capacity evaluations, one at Striker Physiotherapy and another at Clinton Physical Therapy Center. Dr. Whitley opined that Mr. Poore had sustained a 10% to 15% medical impairment rating to the body as a whole for the work-related injury. This calculation included a pain component. Further, Dr. Whitley imposed permanent restrictions limiting Mr. Poore to sedentary and very light work activities.

Mr. Poole filed a workers' compensation complaint August 23, 2005, seeking a determination of his benefits. Answers were filed both by Bi-Lo and the Second Injury Fund. This case was tried April 28, 2006. The court considered reports from a Dr. Duncan McKellar and a Dr. Howard Brown who had treated Mr. Poore for injuries that preceded the workers' compensation claim which is the subject of this litigation. Those documents were placed into evidence by stipulation. In addition, the court considered deposition testimony of Dr. John M. Whitley and Dr. Edward A. Workman and certain other medical records and documents which were submitted as exhibits at the trial. Mr. Poore testified as to his background and work history and the effect of this work-related injury. Mr. Poore stated that he desired to work but because of the debilitating pain associated with his back injury, he found it impossible to do so. According to Mr. Poore, the least physical activity causes him to be bedridden to relieve the pain. He also testified that because of the continuous nature of the pain, he is unable to sleep more than a few hours each night.

¹ A Waddell test is a diagnostic test that is used in an attempt to determine symptom magnification.

Dr. Rodney Caldwell, a vocational expert, testified at the trial that he had viewed the medical records of Dr. Carroll, Dr. Mathiesson, Dr. Whitley and Dr. Workman as well as the two functional capacity evaluations. He also interviewed Mr. Poore to determine his educational background and work history. Based upon this information, Dr. Caldwell was of the opinion that Mr. Poore had no skills that were transferable other than manual labor skills and that, as a result of his impairment rating and work limitations that 80% to 85% of jobs which he was qualified to perform were no longer available to him. Dr. Caldwell concluded that Mr. Poore “is actually unable to do any kind of activity for any significant length of time.” For those reasons, it was Dr. Caldwell’s opinion that Mr. Poore was 100% disabled.

Bi-Lo presented one witness, Dr. Craig Colvin, also a vocational expert. Dr. Colvin testified that he had not interviewed Mr. Poore but had reviewed the various medical reports and depositions of Dr. Whitley, Dr. Pinzon, Dr. Workman, Dr. Brown and Dr. McKellar. He had also reviewed Mr. Poore’s deposition and both of the functional capacity evaluations. Dr. Colvin opined that Mr. Poore had an occupational disability between 75% and as high as 90%. It was Dr. Colvin’s view that Mr. Poore could do some light work. However, on cross examination, Dr. Colvin candidly admitted that if he was a human resource person and was presented with Mr. Poore as an applicant for a job, he would not hire him. The trial court commented on this testimony, stating that in effect, Dr. Colvin agreed that he was 100%.

At the conclusion of the trial, the court found Mr. Poore to be a credible witness and found him to be permanently and totally disabled. Responsibility for payment of these benefits was allocated 81.5% to Bi-Lo and 18.5% to the Second Injury Fund. A judgment was entered which calculated benefits based upon payment of a total of four hundred weeks. Subsequently, the trial court amended its judgment on June 28, 2006. The amended judgment calculated benefits based upon payment until plaintiff reached age 65. The amended judgment also changed, without explanation, the allocation of responsibility to 85% to Bi-Lo and 15% to the Second Injury Fund and dealt with discretionary costs, attorneys fees and other matters.

Bi-Lo has appealed contending that the court erred in finding Mr. Poore permanently and totally disabled. Bi-Lo also contends that the court erred by assigning it to pay 85% to the disability benefits until Mr. Poore is eligible for old age social security benefits, as opposed to limiting their responsibility to 85% of four hundred weeks pursuant to Tennessee Code Annotated section 50-6-208(b). The Second Injury Fund contends that the percentage allocation between the employer and the Second Injury Fund is inappropriately calculated based on the prior injury that Mr. Poore had received workers’ compensation benefits for.

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. Tenn. Code Ann. § 50-6-225(e)(2) (2005). 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 judge 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). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court’s factual findings. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002); Townsend v. State, 826 S.W.2d 434, 437 (Tenn. 1992). Our standard of review of questions of law is de novo without a presumption of correctness. Perrin v. Gaylord Entm’t Co., 120 S.W.3d 823, 826 (Tenn. 2003). When medical testimony is presented by deposition, this Court is 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); Houser v. Bi-Lo, Inc., 36 S.W.3d 68, 71 (Tenn. 2001).

III. Total Disability Determination

Bi-Lo has appealed the trial court’s determination that Mr. Poore is totally disabled. Awards of permanent total disability must be in compliance with the statutory definition contained in Tennessee Code Annotated section 50-6-207(4)(B)(2001). That section provides in pertinent part that “When 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,” and for such disability compensation shall be paid as provided in subdivision (4)(A) . . .” The determination of total disability is to be based on a variety of factors such that a complete picture of the individual’s ability, or inability to return to gainful work is presented before the court. Vincent v. United Parcel Service, 92 S.W.3d 380, 386 (Tenn. 2002).

In determining whether an injury has rendered an employee permanently and totally disabled from a legal prospective, the court must focus on the employee’s ability to return to gainful employment. Davis v. Reagan, 951 S.W.2d 766, 767, (Tenn. 1997). Trial courts are under an obligation to make this determination by making assessments of numerous factors. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000) provided the following guidance:

Accordingly, ‘[t]he assessment of permanent total disability is based upon numerous factors, including 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. Enterprise Truck Lines, Inc., 896 S.W.2d 123, 127 (Tenn. 1995). Although a rating of 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) (citing Corcoran v. Foster auto GMC, Inc., 746 S.W.2d 452, 458 (Tenn. 1988)). In addition, the employee’s ‘own assessment of her 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)

With these principles in mind, we turn to the record in this case. The treating physician ascribed a 15% anatomical disability rating to Mr. Poore and placed work limitations on him of sedentary and light work activities. Mr. Poore’s work history is limited to manual labor and he has a very limited education having completed only the ninth grade and not having a GED. The vocational expert testimony demonstrates that from 75% to 90% of the jobs in his locale that were previously available to him have been eliminated by his physical limitations. After our independent review of the record, we cannot find that the trial court erred in determining that Mr. Poore was permanently and totally disabled as a result of his work-related injury.

IV. Assessment of Vocational Disability to Employer

In this appeal Bi-Lo contends that the trial court erred by requiring it to pay benefits until Mr. Poore becomes eligible for full benefits under the Old Age Insurance Benefits Program under the Social Security Act. It is the position of Bi-Lo that its responsibility should be limited to four hundred weeks of disability payments. The Supreme Court explicitly considered and rejected this interpretation of the workers’ compensation statute in Bomely v. Mid-American Corp., 970 S.W.2d 929 (Tenn. 1998). We are bound by that holding.

Bi-Lo contends that the trial court erred in its allocation of liability between it and the Second Injury Fund pursuant to Tennessee Code Annotated section 50-6-208. The Supreme Court has established a method for apportioning liability between an employer and the Fund for permanent total disability when, as here, the employee’s pre-existing disability is the result of a prior compensable injury. Perry v. Sentry Ins. Co., 938 S.W.2d 404 (Tenn. 1996); Bomely, supra; Allen v. City of Gatlinburg, 36 S.W.2d 73 (Tenn. 2001); Watt v. Lumbermens Mut. Cas. Inc. Co., 62 S.W.3d 23 (Tenn. 2001). In summary, the trial court must determine the extent of disability caused solely by the last injury, without regard to other injuries or disabilities. Previous compensable injuries are then to be converted to the body as a whole and combined. Liability is then allocated based upon the figure which is most favorable to the employer.

In this case, the trial court found that the injury which Mr. Poore sustained as a result of his employment at Bi-Lo caused him to be permanently and totally disabled without regard to any pre-existing disabilities. The evidence does not preponderate against that finding.

On March 14, 2001, Mr. Poore entered into a settlement of a previous workers’ compensation

claim against the Anderson County Highway Department in which he received benefits on the basis of an award of 37.5% disability to the lower extremity which represented seventy-five weeks of compensation. Seventy-five weeks of compensation equates to 18.75% whole body impairment. Allocation between the responsible parties using this figure should have been 18.75% to the Second Injury Fund and 81.25% to Bi-Lo.

In this case, our review of the record leads us to conclude that liability should be allocated based upon Mr. Poore's previous workers' compensation award of 18.75% disability to the body as a whole. Therefore, Bi-Lo would be responsible for the balance of the permanent total disability, i.e., 81.25% and the Second Injury Fund would be responsible for 18.75%.

V. Conclusion

After a careful review of the record, we find no error in the trial court's conclusion that Mr. Poore was totally and permanently disabled as a result of the work-related injury he suffered while in the employ of Bi-Lo November 30, 2004. We modify the allocation of responsibility for the payment of the permanent and total disability of Mr. Poore to reflect that Bi-Lo is responsible for 81.25% and the Second Injury Fund is responsible for 18.75% of the payments and that those payments be in accordance with Tennessee Code Annotated section 50-6-207(4)(B) "during the period of permanent total disability until the employee is, by age, eligible for full benefits in the Old Age Insurance Benefit Program under the Social Security Act." Costs of appeal are taxed against Bi-Lo and its sureties for which execution may issue if necessary.

J. S. DANIEL, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

RALPH L. POORE v. BI-LO, LLC ET AL.

**Circuit Court for Anderson County
No. A5LA0436**

No. E2006-01575-SC-WCM-WC

ORDER

This case is before the Court upon the motion for review filed by Bi-Lo, LLC 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 Bi-Lo, LLC and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

WILLIAM M. BARKER, C.J., not participating