

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 24, 2011 Session

**TONY WAYNE WILSON v. BILL JENNINGS, INDIVIDUALLY AND D/B/A
B & L CONSTRUCTION COMPANY AND WAYNE NEELEY.**

**Appeal from the Circuit Court for Bradley County
No. V06235 J. Michael Sharp, Judge**

No. E2010-02028-WC-R3-WC-MAILED-12-21-11 / FILED 03-06-12

Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation 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. In this case, the employee alleged that he was working as a carpenter for the defendant, Wayne Neeley, when he fell from the roof of a house and seriously injured his right ankle. Neeley denied that he was the employer and also denied that he was a subcontractor for the defendant, B & L Construction, the general contractor. The trial court held that the employee was employed by Neeley and that Neeley was a subcontractor of B & L Construction. Because Neeley did not have workers' compensation insurance, the trial court found B & L Construction liable for workers' compensations benefits pursuant to Tennessee Code Annotated section 50-6-113 and awarded both temporary total disability benefits and accrued medical expenses, but nothing else. On appeal, the employee contends that the trial court erred by failing to award permanent disability benefits and future medical benefits. In response, the defendant contends that the trial court erred by awarding temporary disability benefits. We hold that the trial court properly awarded temporary total benefits, but erred by failing to award permanent disability benefits and future medical benefits to the employee. The judgment is reversed in part and the case is remanded for further proceedings.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery
Court Affirmed in Part, Reversed in Part and Remanded**

E. RILEY ANDERSON, SP. J., delivered the opinion of the Court, in which GARY R. WADE, J. and JON KERRY BLACKWOOD, SR. J., joined.

Jimmy W. Bilbo, Cleveland, Tennessee, for the appellant, Tony Wayne Wilson.

John T. Rice, Chattanooga, Tennessee, for the appellee, Bill Jennings individually and d/b/a B & L Construction Company.

MEMORANDUM OPINION

Factual and Procedural Background

Tony Wayne Wilson, the employee, worked as a frame carpenter for Bill Jennings d/b/a B & L Construction (“B & L”) on the construction of a number of homes in Bradley County, Tennessee for several months during the summer of 2005. Wilson was laid off by B & L, and was out of work for “a couple of months.” Jennings suggested that Wilson seek employment from Wayne Neeley, who was framing houses for B & L. Wilson testified that he went to work for Neeley as a frame carpenter at a house off Waterlevel Highway in Bradley County. On October 27, 2005, he slipped in sawdust and fell 23 feet from the roof of the house to the ground, severely injuring his right ankle.

Wilson was transported to the emergency room at Bradley Memorial Hospital and admitted for treatment. He was examined by Dr. Beasley, who determined that the right ankle had a pilon fracture. Dr. Beasley performed surgery on Wilson’s ankle that evening and applied a plate. Wilson remained in the hospital for approximately one week and was then released. Dr. Beasley recommended that he avoid weightbearing on the right leg for eight to ten months. In January of 2006, Wilson fell on some steps and was treated at the emergency room, although he testified that the fall did not significantly change his symptoms. In February of 2006, Wilson had an additional surgery to repair a migrating screw in the ankle from the original surgery.

The defendants denied liability and neither provided a panel of physicians nor paid any medical expenses. As a result, and after a period of time without treatment, Wilson selected Dr. Walter King, an orthopaedic surgeon in Chattanooga, to become his treating physician. Dr. King examined Wilson on March 21, 2006. He was on crutches and complaining of right ankle pain and swelling. He stated that any weightbearing significantly aggravated his symptoms and reported constant pain. Dr. King, who found tenderness and soft tissue swelling, instructed Wilson to continue to avoid weightbearing and prescribed medication for chronic pain.

Wilson contacted Dr. King on May 9, 2006, seeking a Lortab prescription because he could not afford the prescribed long-acting analgesic. Dr. King prescribed the Lortab and referred him to pain management for better control of the pain. On June 19, 2006, Wilson complained to Dr. King of severe pain and swelling. He said he had attempted to walk daily, using a cane for support, but that his efforts caused swelling and discomfort.

On August 31, 2006, Wilson was seen by Dr. King, reporting chronic pain and requesting pain medication until he was admitted to pain management. On March 20, 2007, Wilson was again seen by Dr. King. He had twisted his ankle, and the swelling was worse. He reported that he could not participate in pain management because he could not afford their services. There was continued swelling and marked limitation of motion in the ankle. Dr. King's clinical note stated that he "d[id] not expect a good result for this patient given the severity of his original injury."

Dr. King treated Wilson for a period of twenty-one months until January 23, 2008, when he provided pain medication. In November of 2007, Dr. King determined that Wilson had reached maximum medical improvement. His examination revealed that there was a decrease in plantar flexion, narrowing of the ankle joint, and a gait disturbance. By use of the Fifth Edition of the *AMA Guides to the Evaluation of Permanent Impairment* ("AMA Guides"), Dr. King determined that Wilson had a 22% permanent anatomical impairment to the body as a whole as a result of his injury. Dr. King, who testified by deposition, was not asked about Wilson's permanent restrictions or limitations. His last examination, however, indicated that the ankle had decreased flexion, a narrowing of the joint, a gait disturbance, and chronic pain. On cross-examination, Dr. King acknowledged that he was not aware that Wilson had received emergency room care for his right ankle after the January 2006 fall, but that the information did not change his ultimate opinion as to impairment. In addition, Wilson testified that there was no significant change in his symptoms as a result of the fall.

Dr. King also testified that the hardware placed in Wilson's ankle during the October 2005 surgery should be removed, explaining that such removal might increase, but more likely would decrease, his impairment rating. In his opinion, an examination would be necessary six months after the removal in order to determine the impairment rating.

At the time of trial on June 30, 2010, four years and eight months after his work injury, Wilson described its continuing effects. He testified that his ankle did not "bend like it should and I can't climb on hills and stuff." He said the ankle "hurts every day" and that he was unable to run, jump, or walk long distances. He described how it affected his ability to work in several ways. Wilson stated that he was unable to carry heavy pipes on his shoulder, that he could not climb, that it was necessary for him to "sit down a lot," and that he sometimes had to take off his work boot to allow "the swelling to go down." He also testified that about four months prior to the trial, the hardware that had been placed in his ankle by Dr. Beasley was removed.

Wilson also testified that he was unemployed for eight months after the injury. He eventually applied for work as a pipefitter in July of 2006 at a company named Penn Gulf. On a questionnaire that he completed in connection with the job application, he answered

“no” to the following question: “Do you have a physical or mental disability, illness or condition?” His rate of pay was \$14.00 or \$15.00 per hour, which was more than he had earned while working for Neeley. Wilson was laid off by Penn Gulf in October of 2006 after trying to work for approximately three months. He testified that he was terminated because his ankle injury prevented him from doing the job. At the time of the trial, he was employed by Fletcher Firesystems as a pipefitter/foreman, but still experienced pain and limitations.

Wilson, thirty-eight years old at the time of the trial, did not graduate from high school, but had later obtained a GED. He had worked as a pipefitter for most of his adult life, but he had also worked occasionally as a carpenter. He testified that Jennings, the owner of B & L, admitted during a telephone conversation that he was the general contractor on the project at the time of his injury. He was paid for his work on that project by checks from Neeley’s account.

Wayne Neeley testified that he was not a subcontractor for B & L, and that Wilson did not work for him as a subcontractor or employee. Neeley contended that he was merely an employee of B & L. He also testified that Jennings, the owner of B & L, was ill at the time the project was taking place and that by agreement, Neeley paid the other employees on the project from his own account and was then reimbursed by Jennings.

The trial court found that on the date of the injury, Wilson was an employee of Neeley, who was a subcontractor of B & L. Neeley did not have workers’ compensation insurance, and, therefore, B & L (and its insurer) was liable for workers’ compensation benefits pursuant to Tennessee Code Annotated section 50-6-113. The trial court, while acknowledging the 22% permanent partial disability impairment to the body as a whole assigned by Dr. King, pointed out the “contradictory” statement made by Wilson during his application for employment with Penn Gulf. Although the trial court awarded temporary total disability benefits and ordered B & L to pay Wilson’s accrued medical expenses, it declined to award permanent partial disability benefits and held that B & L would not be liable for future medical expenses.

Wilson has appealed, contending that the trial court erred by failing to award permanent partial disability benefits and by failing to require B & L to pay for future medical expenses related to his injury. In response, B & L contends that the trial court erred by awarding temporary disability benefits.

Standard of Review

In Tennessee workers’ compensation cases, this Court reviews the trial court’s findings of fact de novo, accompanied by a presumption of correctness of the finding, unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); *Wilhelm*

v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). “This standard of review requires us to examine, in depth, a trial court’s factual findings and conclusions.” *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991) (citing *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 675 (Tenn. 1991)). We give considerable deference in reviewing the trial court’s findings of credibility and assessment of the weight to be given to that testimony when the trial court has heard in-court testimony. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). On questions of law, our standard of review is de novo with no presumption of correctness. *Wilhelm*, 235 S.W.3d at 126. The extent of vocational disability is a question of fact to be decided by the trial judge. *Johnson v. Lojac Materials, Inc.*, 100 S.W.3d 201, 202 (Tenn. Workers’ Comp. Panel 2001). “Although workers’ compensation law must be construed liberally in favor of an injured employee, it is the employee’s burden to prove causation by a preponderance of the evidence.” *Crew v. First Source Furniture Grp.*, 295 S.W.3d 656, 664 (Tenn. 2008).

Analysis

Permanent Partial Disability Benefits

The trial court found that Wilson sustained a compensable injury and that B & L was liable for workers’ compensation benefits arising from that injury by operation of Tennessee Code Annotated section 50-6-113. The only medical evidence concerning the consequences of that injury was the testimony of Dr. King, who opined that Wilson sustained a 22% anatomical impairment to the body as a whole under the AMA Guides. Although Dr. King was not asked to testify concerning restrictions or limitations related to the injury by either attorney, he did find during his last examination that the right ankle had decreased flexion, that the joint had narrowed, that there was gait disturbance, and that there was continued chronic pain. Dr. King’s final examination of Wilson occurred approximately two and one-half years prior to trial, which took place almost five years after the injury.¹ Dr. King treated Wilson over a period of twenty-one months. The record is clear that Wilson’s financial situation limited his physician visits, prevented him from attending pain management treatment, and deprived him of pain medication. The deposition of Dr. King, a clinical medical professor, established that he is a board certified orthopedic surgeon with 40 years of experience. The proof is uncontradicted that Wilson experienced pain in his ankle “every day,” and that the injury limited his ability to run, jump, walk long distances, and also interfered with his ability to climb and carry heavy weights, skills specifically required of a pipefitter.

¹ Tennessee Code Annotated section 50-6-225(f) requires that workers’ compensation cases be given “priority over all cases on the trial and appellate dockets.” The record indicates that there were service of process issues, and a delay due to the filing of bankruptcy, but at this writing, more than six years have passed since Wilson’s work injury. It is the responsibility of the trial courts and the attorneys, as officers of the court, to assure compliance with this statute.

In assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and his capacity to work at the kinds of employment available in his disabled condition. Tenn. Code Ann. § 50-6-241 (2008 & Supp. 2010); *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990); *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986). Further, the employee's own assessment of his or her physical condition and resulting disabilities cannot be disregarded. *Uptain Constr. Co. v. McClain*, 526 S.W.2d 458, 459 (Tenn. 1975); *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972).

In *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 458 (Tenn. 1988), our Supreme Court observed that “[i]n determining vocational disability, the question is not whether the employee is able to return to the work being performed when injured, but whether the employee's earning capacity in the open labor market has been diminished by the residual impairment caused by a work-related injury.” That an injured worker is re-employed after an injury is a relevant factor in the determination of the extent of vocational disability, regardless of whether the employee returns to the same employment or to some other work. *Id.* at 459. Nevertheless, this factor is not controlling and is only one of many that must be considered. *Id.* “Despite the employee's return to any employment, if the employee's ability to earn wages in any form of employment that would have been available to him in an uninjured condition is diminished by an injury, then that is what is meant by vocational disability” in the determination of workers' compensation benefits. *Id.*

In our view, this language and similar statements in other cases, *see, e.g., Lang v. Nissan N. Am., Inc.*, 170 S.W.3d 564, 570 (Tenn. 2005) (noting that factors such as “missing no work and returning to work,” although relevant to determining vocational disability, “are merely single factors among the total circumstances and are not themselves dispositive”), reinforces the policy of the workers' compensation law to provide compensation to employees who suffer permanent impairment as a result of compensable injuries. In its determination that Wilson was not entitled to permanent partial benefits, the trial court's analysis emphasized only two factors: the increase in the employee's pay in later employment after the injury and the content of his application with Penn Gulf. The trial court failed to properly consider expert medical testimony as to the level of Wilson's impairment and his undisputed testimony of the limitations caused by the injury.

The defense elected not to have Wilson independently examined to assess disability and chose not to present any proof as to vocational disability. As a result, the expert evidence of permanent impairment, limited education and training, and limited capacity to work was undisputed, and should have resulted in a substantial award of vocational disability.

It was not inappropriate for the trial court to consider Wilson's misrepresentation of his physical condition to his post-injury employer in assessing the credibility of his testimony concerning the effects of his injury on his ability to work. He had, however, at the time he applied for a job with Penn Gulf, been unemployed for eight months, had been instructed to not bear any weight on the ankle, and was trying to walk daily using crutches and later a cane. Because of the denial of liability by the defendants, Wilson had no income and no workers' compensation benefits, including no payment of his medical expenses. Under the circumstances, the misrepresentation of his physical condition to obtain a job was inaccurate and inexcusable, but perhaps understandable, given his dire circumstances, lack of income, and need for employment. In addition, his misrepresentation was not successful, as he was employed only three months at Penn Gulf before losing the job because of the physical limitations caused by his injury.

The uncontradicted medical evidence in this case established that Wilson's work injury had resulted in a substantial permanent anatomical impairment of 22% to the body as a whole because of a decrease in ankle flexion, a narrowing of the ankle joint, and a gait disturbance. The uncontradicted lay evidence was that Wilson continued to have pain, restrictions, and limitations in the performance of his job. Under these circumstances, we conclude that the evidence preponderates against the trial court's finding that he sustained no permanent partial disability for the purposes of the workers' compensation law. The judgment of the trial court is therefore reversed.

Future Medical Treatment

The trial court held that B & L's insurer "shall have no further liability with regard to future reasonable and necessary medical treatment expenses." No specific reason for this ruling was given. The employee contends that B & L should be liable for all future medical expenses that are reasonable and necessary as a result of the work injury. A previous Workers' Compensation Panel considered a similar order in *Hegger v. Ford Motor Co.*, No. M2007-00759-WC-R3-WC, 2008 WL 4072047 (Tenn. Workers' Comp. Panel Sept. 2, 2008). That Panel stated as follows:

In general, the causal relationship between the need for a particular medical procedure or course of treatment [and the original work injury] should be considered at the time such treatment is sought. . . . Whether or not a particular medical treatment is "made reasonably necessary" by [the employee's work injury] is a question which must be answered based upon the proof presented at the time the treatment is proposed.

Id. at *4 (citation omitted).

The same principles are applicable in this case. Wilson sustained a compensable injury. B & L and its insurer are liable for all future reasonable and necessary medical expenses resulting from the work injury.

Temporary Total Disability Benefits

The trial court awarded temporary disability benefits from the date of the work injury until June 30, 2006, when Wilson's employment at Penn Gulf began. B & L contends that temporary benefits should have ended on January 8, 2006, the date that Wilson allegedly fell down some stairs and aggravated his work injury. B & L does not cite any authority in support of this contention. It apparently contends, however, that the January 2006 fall was an independent intervening event that caused Wilson's temporary disability after that date. *See Anderson v. Westfield Grp.*, 259 S.W.3d 690, 700 (Tenn. 2008) (finding that employee's re-injury of finger did not arise out of employment and "sever[ed the employer's] chain of legal responsibility").

The evidence concerning the fall is quite vague. Dr. King testified that such a fall could exacerbate the underlying injury. He did not testify, however, that the fall either lengthened Wilson's period of recovery or increased his permanent impairment. He did testify that it did not change his opinion as to permanent impairment from the work injury. In the absence of any evidence to support it, B & L's contention is without merit, and the trial court's action is affirmed.

Conclusion

We affirm the trial court's ruling that Wilson was employed by Neeley at the time of the work injury and that B & L was liable for workers' compensation benefits pursuant to Tennessee Code Annotated section 50-6-113. The trial court's judgment awarding temporary total disability benefits and all accrued medical expenses is affirmed. The trial court's judgment declining to award permanent partial disability benefits and future medical expenses is reversed and the case is remanded for further proceedings consistent with this opinion. Upon remand, the trial court shall make a finding on the extent of Wilson's vocational disability in accordance with the statutes and case law previously cited. The findings shall consider Dr. King's permanent impairment rating, the present record, and any additional evidence the parties may wish to present about physical limitations or restrictions upon Wilson's activities and job performance, including evidence as to whether the removal of the surgical hardware from his right ankle caused any change in his impairment rating and, if so, the amount. Because of the delay in this case, the remand to the trial court shall be as expeditious as possible. On receipt of the remand, the trial court shall, within 90 days, hear any new evidence, rule on the outstanding issues, and enter a judgment. Costs are taxed to Bill Jennings individually and d/b/a B & L Construction Company.

E. RILEY ANDERSON, SPECIAL JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

TONY WAYNE WILSON v. BILL JENNINGS ET AL.

**Circuit Court for Bradley County
No. V06235**

No. E2010-02028-SC-WCM-WC - FILED - 03-06-12

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Bill Jennings d/b/a B&L Construction Company pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(A)(ii), 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 Bill Jennings individually and d/b/a B&L Construction Company, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

WADE, GARY R., J., NOT PARTICIPATING

