

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 23, 2007 Session

**WHIRLPOOL CORPORATION v. VIRGINIA LASALLE v. SUE ANN
HEAD, ADMINISTRATOR OF THE DIVISION OF WORKERS'
COMPENSATION ET AL.**

**Direct Appeal from the Chancery Court for Davidson County
No. 41-2134-II Carol McCoy, Chancellor**

**No. M2006-01397-WC-R3-WC - Mailed - August 14, 2007
Filed - October 12, 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 section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The employee asserts that the trial court erred in awarding her a 43.75% permanent partial disability, rather than permanent total disability. We agree and therefore reverse the judgment of the trial court and enter judgment to the employee for permanent and total disability. We also conclude that the trial court erred by failing to calculate the disability resulting from the shoulder injury independent of the employee's preexisting back injury. We therefore remand the case to the trial court for further proceedings.

**Tenn. Code Ann. § 50-6-225(e) (Supp. 2006) Appeal as of Right; Judgment of the Trial
Court Reversed and Remanded**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and ALLEN W. WALLACE, SR. J., joined.

Jerry D. Mayo, Nashville, Tennessee, for the Appellant, Virginia LaSalle.

David T. Hooper, Nashville, Tennessee, for the Appellee, Whirlpool Corporation.

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.

MEMORANDUM OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

This action arises from a shoulder injury which occurred on April 22, 2004. Compensability is not disputed. Virginia LaSalle was fifty-three years old at the time of trial. She had completed the ninth grade and later, in 1980, obtained a GED diploma. Her prior employment experience included working as a sewing machine operator, a short order cook, and a grocery store clerk. She began working for Whirlpool Corporation (Whirlpool) in an air conditioner manufacturing plant in 1989. She sustained a work-related back injury in March 2003. That claim was the subject of a separate action for workers' compensation benefits, which was ultimately settled based upon 56.25% permanent partial disability to the body as a whole.

In April 2004, Ms. LaSalle was assigned to work two tube bending machines that required her to use her arms at shoulder level. She began experiencing pain in her right shoulder which progressed and became severe. She reported the injury to Whirlpool on April 23, 2004, and requested she be seen by a physician. She continued working until June 23, 2004, when she went on leave for surgery for a problem in her heel that was unrelated to either of her work injuries. After repeated requests, Whirlpool made an appointment for her with an internist, Dr. Winifred Lassiter, on July 14, 2004. Ms. LaSalle was treated by Dr. Lassiter for her shoulder injury during the time she was recuperating from her heel surgery. Dr. Lassiter released her to return to work without restrictions on the use of her shoulder despite Ms. LaSalle complaining she was still having problems with it. She resumed her employment at Whirlpool on September 8, 2004.

During this time, Ms. LaSalle was being treated by Dr. Timothy Shoettle, a neurosurgeon, for her back injury. When she related to him that she thought she needed to see an orthopedic physician to evaluate her shoulder injury, he referred her to Dr. J. W. Thomas Byrd.

Ms. LaSalle worked until October 20, 2004, when she went on leave to have surgery for her work-related back injury. She returned to work with temporary restrictions in January 2005. In February, she was determined by Whirlpool to be physically disqualified and was laid off as a result of her back injury. At the time, Whirlpool took the position that the back injury was not work-related and refused to accommodate the restrictions assigned by Dr. Shoettle. Dr. Shoettle released her in March 2005 and assigned a 13% impairment to the body as a whole. He also imposed restrictions of no lifting over twenty pounds, no repetitive lifting over ten pounds, no standing more than two to four hours, no sitting more than two hours at a time, no repetitive bending, stooping or squatting, no climbing, no repetitive pushing or pulling, and no working overhead. As stated above, the back claim was eventually settled.

Following a second MRI, Dr. Byrd diagnosed a rotator cuff tear with possible impingement in Ms. LaSalle's right shoulder. He performed surgery on June 6, 2005. He released her on September 7, 2005, with an impairment of 5% to the body as a whole but would not assign work restrictions without a functional capacity evaluation.

Dr. David Gaw performed an independent medical evaluation regarding Ms. LaSalle's shoulder injury in October 2005. He assessed her impairment at 7% to the body as a whole. He found that she had significant improvement as a result of the surgery on her shoulder. He proposed restrictions of no repetitive overhead or outstretched use of the right arm for pushing,

pulling, or lifting. Ms. LaSalle testified that she had difficulty using her right arm for a number of activities, including housework, fixing her hair, dressing, and reaching overhead or behind her.

Ms. LaSalle presented testimony of a vocational evaluator, Rebecca Williams. Ms. Williams administered the Wide Range Achievement Test, which showed that Ms. LaSalle was able to read and spell at a fifth grade level or in the fourth percentile of functioning and perform arithmetic at a seventh grade level or in the twenty-third percentile. Because all the previous jobs held by Ms. LaSalle were considered unskilled, she had no transferable job skills. She opined that Ms. LaSalle had a vocational disability of 73% as a result of the restrictions imposed as a result of the back injury alone. Considering those restrictions in combination with the restrictions imposed by Dr. Gaw for the shoulder injury, her total disability is 99.66%. Finally, Ms. Williams considered the limitations described by Ms. LaSalle concerning her inability to sit or stand for long periods and believed her disability was 100% as a result of her combined restrictions and limitations. Neither her report nor her testimony made a separate assessment of the shoulder injury, although Ms. Williams testified she was prepared to testify concerning that issue.

At the conclusion of the trial, the trial court issued its ruling from the bench. In its findings, the trial court made the following statements:

[T]he Court finds that Ms. LaSalle is not able to return to gainful employment. She is entitled to be declared permanently and totally disabled from a legal perspective.

The Court does not find that the Second Injury Fund has any obligation, and that's the difference in the percent that the Court awards. Whatever it takes to make a hundred percent, that's what she is, she's a hundred percent disabled.

* * * *

I cannot find that she could return to work in the physical condition she presents herself today. And the instruction that the Court is supposed to consider make me focus on her ability to return to work in her disabled condition as the result of the shoulder injury. And that is what I have attempted to do.

In order to have a disability rating, the Court finds that she's sustained a 43 and three-quarters percent disability to the body as a whole.

After a colloquy with counsel concerning apportionment of liability under Bomely v. Mid-America Corp., 970 S.W.2d 929 (Tenn. 1998), the trial court added the following:

The Court corrects its ruling, finds that Ms. LaSalle is entitled to a disability rating of 43.75 percent as a result of the shoulder injury and is not capable of returning to gainful employment. I delete that portion of my ruling that finds her [permanently] and totally disabled. . . .

* * * *

I don't find her condition sufficient to trigger the permanent and total disability provisions of the statute that impose liability on the Second Injury Fund.

* * * *

[Ms. LaSalle] has a very strong work ethic. She may get to the point where she will find some tasks that she can perform for compensation.

Judgment was entered, awarding 43.75% permanent partial disability benefits to Ms. LaSalle. She appeals, arguing that the evidence preponderates against the trial court's finding that she was not permanently and totally disabled. Whirlpool and the Second Injury Fund argue that the evidence supports the conclusion that Ms. LaSalle was not permanently and totally disabled.

II. STANDARD OF REVIEW

Our standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, 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) (2005); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). When issues of credibility of witnesses and the weight to be given their in-court testimony are before the reviewing court, considerable deference must be accorded to the factual findings of the trial court. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733 (Tenn. 2002). When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). This Court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). Questions of law are reviewed de novo with no presumption of correctness afforded to the trial court's conclusions. Gray v. Cullom Mach., Tool & Die, Inc., 152 S.W.3d 439, 443 (Tenn. 2004).

III. ANALYSIS

Permanent total disability occurs when an injured employee is totally incapacitated "from working at an occupation which brings the employee an income." Tenn. Code Ann. § 50-6-207(4)(B)(2005). The Tennessee Supreme Court recently summarized the applicable standards:

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. 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. 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.

Hubble v. Dyer Nursing Home, 188 S.W.3d 525, 535-536 (Tenn. 2006) (internal quotations and citations omitted).

Both sides point to the statement of findings made by the trial court while rendering its decision. As quoted above, the court initially found Ms. LaSalle not able to return to gainful employment and thus was permanently and totally disabled. This finding was based upon the evidence in the record and the court's observations of Ms. LaSalle during the trial of the case. The trial court reiterated that it could not find Ms. LaSalle was able to return to work in her physical condition as of the time of trial. When it was argued to the trial court that a finding of permanent and total disability would necessarily impose liability on the Second Injury Fund,¹ the trial court attempted to adjust its ruling by stating Ms. LaSalle is "entitled to a disability rating of 43.75 percent as a result of the shoulder injury and is not capable of returning to gainful employment." It is clear from the record that the trial court arrived at this disability rating by subtracting the employee's preexisting disability of 56.25% from 100%. The trial court then deleted the portion of its ruling finding Ms. LaSalle permanently and totally disabled.

In our view, the trial court found Ms. LaSalle unable to obtain gainful employment but erroneously concluded that fact did not render her permanently and totally disabled. The only statement made by the trial court that could be construed otherwise was that, because of Ms. LaSalle's work ethic, she "may get to the point where she will find some tasks that she can perform for compensation." We construe that statement to mean Ms. LaSalle's condition may improve to the point she can find employment. The record is devoid of any evidence her condition may improve over time. The trial court's finding that Ms. LaSalle was unable to return to gainful employment necessitates the conclusion she is permanently and totally disabled. We have conducted a review of the record and conclude the evidence does not preponderate against this finding of the trial court. Ms. LaSalle's age, her limited reading and spelling ability, her history of working in unskilled jobs, and her own testimony concerning her ability to function, when viewed in light of the limitations placed upon her by her previous injury support the trial court's finding on the issue of her ability to work at an occupation which will bring her an income.

The conclusion that Ms. LaSalle is permanently and totally disabled necessitates the trial court consider apportioning the liability between Whirlpool and the Second Injury Fund. The trial court did not consider apportionment of the liability in accordance with Tennessee Code Annotated section 50-6-208, using the procedure described in Bomely and Perry v. Sentry Ins. Co., 938 S.W.2d 404, 407-08 (Tenn. 1996). Specifically, the trial court erred in calculating the employee's disability rating because it simply subtracted the employee's preexisting disability of

¹ This argument was not necessarily accurate. For example, the trial court could find Whirlpool was not aware of a pre-existing permanent disability at the time of the subsequent injury and, thus, no liability would be imposed on the Second Injury Fund pursuant to Tennessee Code Annotated section 50-6-208(a). The trial court could also have found that the disability for the shoulder injury coupled with the disability for the back injury did not exceed 100% and, thus, there would likewise be no liability on the Second Injury Fund pursuant to Tennessee Code Annotated section 50-6-208(b).

56.25% from 100%. The Tennessee Supreme Court explicitly disapproved of this method of calculation in Allen v. City of Gatlinburg, 36 S.W.3d 73, 77 n.4 (Tenn. 2001). In cases where an employee has a preexisting injury, trial courts must determine the percentage of disability attributable to the second injury independent of the first injury. Only after this determination is made, can trial courts properly apportion liability between an employer and the Second Injury Fund. We therefore remand the case to the trial court for the purpose of calculating the disability attributable to the employee's shoulder injury and apportioning the liability for that injury between the employer and the Second Injury Fund pursuant to Tennessee Code Annotated section 50-6-208.

IV. CONCLUSION

The judgment of the trial court is reversed. Ms. LaSalle is awarded permanent total disability benefits. The case is remanded for the trial court to calculate the disability attributable to the employee's shoulder injury and apportion the liability between Whirlpool and the Second Injury Fund. Costs of this appeal are taxed to Whirlpool Corporation.

DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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HEAD, ADMINISTRATOR OF THE DIVISION OF WORKERS'
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Chancery Court for Davidson County
No. 41-2134-II

No. M2006-01397-SC-WCM-WC - Filed - October 12, 2007

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Whirlpool Corporation pursuant to Tennessee Code Annotated section 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 Whirlpool Corporation, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Janice M. Holder, J., not participating

