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IMPORTANCE OF VOCATIONAL EXPERTS IN PERMANENT TOTAL DISABILITY CASES

In January 2010, the Tennessee Supreme Court Workers' Compensation Appeals Panel affirmed a Trial Court finding of permanent total disability for an injured employee in Raines Brothers, Inc. v. Barry Wade Johnson, No. E2009-00607-WC-R3-WC, Jan. 19, 2010.

In Raines, the plaintiff/employee was working as a construction contractor when he fell from the second floor of a building upon which he was working. The accident shattered the left side of his pelvis and required multiple surgeries to repair the damage. The plaintiff was left with severe chronic pain in his left leg, and his doctors eventually diagnosed him with meralgia paresthetica which makes any weight or pressure on a part of the body unbearably painful. The employee's pain management doctor, Dr. Greg Ball, put him on an array of pain medications that made his ability to work safely on the jobsite all but impossible. The medication would cause dizziness, nausea and blurred vision.

As for education, the employee had a GED but demonstrated below-average functioning in arithmetic and reading. The plaintiff's attorney secured the services of a vocational expert, Dr. Julian Nadolsky, who came to the conclusion that the employee was 58% vocationally impaired.

However, at trial, Dr. Nadolsky alleged for the first time he heard testimony describing the side effects of the pain medication which the employee was taking. Dr. Nadolsky changed his testimony under examination to conclude that the plaintiff was 100% vocationally disabled as the pain medication would interfere with a construction contractor's jobsite duties.

The court allowed the defendant/employer to recess the case in order to obtain its own vocational expert. The defense expert, Patsy Bramlett, after examining the employee concluded that the employee had

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lost 45% of potential job opportunities and, in the alternative, lost 75% of the job opportunities if the persistent pain continued and the pain medication was necessary to relieve that pain.

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The testimony by the two vocational experts was in addition to that of Dr. Greg Ball, who, while not directly addressing the side effects of the pain medication, gave a general tenor in his deposition that the employee would not be able to function on a jobsite while taking his pain medication. The Trial Court considered all three experts' opinions and discounted the plaintiff's vocational expert due to the shift in his testimony. Furthermore, the Trial Court considered the testimony of Ms. Bramlett and Dr. Ball and concluded that the employee was permanently and totally disabled due to his inability to function on a jobsite due to his pain medication.

The employer appealed the decision, stating that the court improperly took into account the employee's vocational expert, Dr. Nadolsky. The Appeals Panel upheld the Trial Court's assessment of permanent and total disability stating that the Trial Court discounted the testimony of Dr. Nadolsky. Credibility was key, and the Trial Court properly found the employer's vocational expert to be more credible. The Appeals Panel also found particularly persuasive the deposition of Dr. Ball who, while admitting that the employee could perform some sedentary jobs, eventually admitted the employee would be precluded from working if his pain continued, and he was required to take his pain medication. As a result, the Appeals Panel affirmed the Trial Court's ruling in all respects.

This case reaffirms the strategic value in having a defense vocational expert to counter an employee's vocational expert in serious injury cases. Furthermore, insurance adjusters and employers should recognize that, even if an employee may be physically and mentally able to perform a job, the medication required to make such efforts possible must be taken into account.

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