Circuit Court for Charles County
Case No. 08-C-15-001361

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2093

September Term, 2016

LENNAR CORP. et al.

v.

GEORGE SNELLINGS, et al.

Friedman,
Fader,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: June 19, 2018

Lennar Corp. and Old Republic Insurance Co. (hereinafter, collectively, appellants or Lennar) are the employer and insurer in this appeal of an action for judicial review of an award of the Workers' Compensation Commission (the Commission). The Commission had entered an award in favor of the claimant, George Snellings (Snellings), one of the appellees, about two-thirds of which was payable by the other appellee, Subsequent Injury Fund (the Fund). Based on a jury's answers to special interrogatories, the Circuit Court for Charles County entered an award that was payable solely by Lennar.

Aggrieved by this turn of events, Lennar appealed to this Court, raising the following questions for our review:

> "(1) Did the circuit court err in allowing claimant's vocational rehabilitation expert to testify as to the claimant's 'suitable and gainful employment' and that the claimant was not suitably or gainfully employable as it is prejudicial and violated a court order?
>
> "(2) Did the circuit court err by allowing claimant's attorney's utilization of the phrase '100% disability' in conjunction with the term 'suitable gainful employment' in closing argument?
>
> "(3) Did the circuit court err by submitting to the jury a verdict sheet that was insufficient, contained errors of law and fact, led to inconsistent interpretation, and was unclear and prejudicial?
>
> "(4) Did the circuit court err by denying appellant employer and insurer's motion for judgment notwithstanding the verdict when claimant did not present sufficient evidence to overcome the workers' compensation commission decision?"

(Upper case type reduced).

For the reasons that are set forth below, we shall answer each question in the negative and affirm.

Background Facts and Proceedings

Snellings has spent his entire working career in construction, initially working for himself, and the next fifteen years for Lennar Corp., where he worked as a construction manager. Over the years he has suffered injuries to the right hand, the right great toe, both knees, and, in 2003, the neck, which, in 2005, required a fusion of the discs at C5-6 and C6-7. He returned to work full time.

The subject accidental injury occurred in a work-related auto crash on March 15, 2011. He suffered a collapsed cervical vertebra and herniated disc at C4-5. The fusion at C6-7 was damaged and had to be redone.

Snellings was fifty-six years old at the time of the accident in March 2011. Lennar Corp. did not offer the claimant his old job back and did not offer modified duties. He has not worked since. A report from a physical therapy services organization, introduced by the claimant at the Commission hearing in April 2015, concluded that "Snellings is only capable to work with a light physical demand which doesn't involve frequent lifting of more than 10 lbs."

The Commission found, under "Other Cases," that the claimant had suffered an "industrial loss of use of the body" amounting to 85%, apportioned as follows:

> "25% is reasonably attributable to the accidental injury (cervical spine), 56% is due to pre-existing conditions (cervical spine – 35%, right hand – 5%, left leg (knee) – 8%, and right leg (knee) – 8%), and 4% is due to subsequent accidents or deterioration of a pre-existing condition (left leg (knee) – 2% and right leg (knee) – 2%) and is not compensable. [*Subsequent Injury Fund v. Thomas*, 275 Md. 628 (1975)]."

Snellings sought judicial review. By a motion *in limine*, the claimant requested a ruling that he be permitted to introduce evidence of permanent total disability, particularly through a vocational rehabilitation expert. The motion was vigorously opposed. The court ruled that permanent total disability was not raised before the Commission "and I'm not going to allow it." Before any testimony was taken, Lennar asked the court to rule that the testimony of the claimant's vocational rehabilitation expert "be limited only to findings of permanent partial disability." Counsel for Snellings represented: "We will not ask whether she has an opinion as to whether he is permanently totally disabled because of your ruling this morning."

That witness, Jody Malcolm, explained that an injured worker in Maryland is entitled to vocational rehabilitation services, the purpose of which is "to return the injured worker to … suitable, gainful employment." She read the statutory definition.[1] The phrase means "'Employment, including self-employment, that restores the disabled covered employee[,] to the extent possible, to the level of support at the time of […] the accidental personal injury.'" "'Level of support,'" she explained, means "income, what they were earning before."

The witness also read the standard for determining "suitable gainful employment."[2] "'[C]onsideration shall be given to[:] the qualifications, interest[s], incentives, earnings

[1]Maryland Code (1991, 2016 Repl. Vol.), § 9-670(c) of the Labor and Employment Article (LE).

[2]LE § 9-673(b).

before the accidental personal injury or date of disablement from the occupational disease, and future earning capacity of the covered employee.'" The standard further provides that, "We must take into consideration 'the nature and extent of the disability of the covered employee,' and 'the current and future condition of the labor market.'" LE § 9-673(b)(2) & (3).

Ms. Malcolm reviewed the facts of the claimant's situation in relation to the hierarchy of jobs ranging from his job at the time of the accident to vocational rehabilitation. His hourly pay was $25.47 but no job could be identified that would restore the claimant to that level of support in view of his functional capacity limitation of ten pounds of infrequent lifting. Retraining would require him to start at entry level wages and his age prevented him from climbing back up the wage ladder to his pre-accident income before retirement. On direct examination, Ms. Malcolm never expressed a conclusory opinion.

In part of her response to a question by Lennar on cross-examination, Ms. Malcolm testified, "I don't believe that there is a likely opportunity for [Snellings] to be restored to suitable, gainful employment." There was no motion to strike.

Lennar's medical expert opined that the claimant had zero percentage of impairment due to the accidental injury of 2011 and apportioned all of his impairment to pre-existing conditions.

The jury returned the verdict reproduced below.

> 1. Do you find that the decision of the Workers' Compensation Commission is correct?

ANSWER: YES _____ NO ✓

If your Answer to Question #1 is YES, please STOP and tell the Bailiff.

If your Answer to Question #1 is NO, please CONTINUE.

2. What is the total industrial loss of the Claimant's body?

ANSWER: 93 % disability

3. What, if any, is the total industrial loss of the Claimant's body as a result of the occurrence of March 15, 2011?

ANSWER: 65 % disability

4. What, if any, is the percentage of the Claimant's disability due to pre-existing conditions?

ANSWER: 20 % disability

5. What, if any, is the percentage of Claimant's disability due to a deterioration of a pre-existing condition?

ANSWER: 8 % disability

6. Did the Claimant have a permanent impairment prior to the accident of March 15, 2011, which was, or was likely to be, a hindrance to his employment?

ANSWER: YES _____ NO ✓

7. Is the Claimant's permanent industrial disability substantially greater by reason of the combined effects of the previous permanent impairment and the accidental injury than that which would have resulted from the accident injury alone?

ANSWER: YES _____ NO ✓

Lennar's appeal timely followed the entry of final judgment based on the verdict. Additional facts will be presented as required for the discussion of the issues.

I

Lennar contends that when the vocational rehabilitation expert for Snellings testified, in effect, "that the Claimant cannot return to suitable gainful employment" it was "tantamount to an opinion regarding permanent total disability." Thereby, argues Lennar, claimant violated the circuit court's ruling and claimant's counsel's representation. The difficulty with the argument is that the expert witness never uttered the words "permanent total disability" and, if Lennar contended that the testimony could have been so interpreted, Lennar should have objected, but it did not. On an evidentiary level analysis, the issue is not preserved.

The appellants' argument, however, goes deeper. Lennar contends that the court erred in denying its motions for judgment and for judgment notwithstanding the verdict based on the insufficiency of the evidence to overcome the presumptive validity of the Commission's decision. The theory seems to be that the standards for determining industrial loss of use in an unscheduled injury case differ from the standards for determining a right to vocational rehabilitation. Because evidence of the latter, says Lennar, is directed to permanent total disability, which was excluded from the case, the expert's testimony, as a matter of law, violated the court's order. Lennar cites no authority to support its argument. In our view, it seeks to prove too much.

Maryland Code (1991, 2016 Repl. Vol.), § 9-627(k)(1) & (2) of the Labor and Employment Article (LE), provides the standard for determining the extent of permanent partial disability in "other cases" claims.

> "(k)(1) … [T]he Commission shall determine the percentage by which the industrial use of the covered employee's body was impaired as a result of the accidental personal injury or occupational disease.
>
> "(2) In making a determination under paragraph (1) of this subsection, the Commission shall consider factors including:
>
> "(i) the nature of the physical disability; and
>
> "(ii) the age, experience, occupation, and training of the disabled covered employee when the accidental personal injury or occupational disease occurred."

Judicial construction has explained that

> "[T]he difference between wages earned by a claimant at the time of an accident and the post-injury earnings of the injured employee is one of several relevant factors which a trier of fact may consider in deciding the amount of loss of industrial use of an employee who has suffered permanent partial disability."

Hall v. Willard Sand & Gravel Co., 60 Md. App. 260, 264 (1984). *See also Ralph v. Sears Roebuck & Co.*, 102 Md. App. 387, 396 (1994), *aff'd*, *Sears, Roebuck & Co. v. Ralph*, 340 Md. 304 (1995).

Consequently, Maryland Pattern Jury Instruction–Civ. 30:27 (which was given in this case) adds to the factors expressly enumerated in LE § 9-627(k)(2)(ii) "the Employee's earnings before and after the injury."

An injured worker's potential for earnings after the injury, as described here by the claimant's vocational rehabilitation expert, was relevant to the issue of the extent of the

industrial loss of use of the claimant's body. It may well be that, across the spectrum of workers' compensation cases, vocational rehabilitation expert testimony is more frequently found in permanent total disability cases, but that does not convert the testimony of Jody Malcolm into an opinion of permanent total disability.

In *Maldonado v. American Airlines*, 405 Md. 467 (2008), the issue was whether in a judicial review proceeding of a permanent partial disability award the employer could obtain a reduction in the Commission's finding of the degree of disability without the employer's having introduced vocational rehabilitation expert opinion to overcome the presumption of validity of the Commission's award. The Court of Appeals held that vocational rehabilitation evidence was not a per se requirement, but it was permissible in permanent partial cases.

There was no error in the court's denial of Lennar's motion for a judgment notwithstanding the verdict. Inasmuch as there had been no objection to the expert's evidence, the court did not abuse its discretion in denying claimant's alternative motion for a new trial.

II

In his rebuttal closing argument, claimant's counsel reiterated that claimant had done everything he could to return to work but no one had been able to place him. Counsel asked the jurors: "So, is it more likely than not that Mr. Snellings is going to be able to return to substantial, gainful employment? And if he is not, that's one hundred percent permanent partial disability, right?" Lennar objected. At the bench, it submitted that by

claimant's "saying a hundred percent, you are now making a permanent total argument." The court overruled the objection, observing that claimant's counsel "didn't say permanent total." Lennar did not request a mistrial or a curative instruction.

Lennar contends that the circuit court erred in allowing the above-quoted argument. In *Tully v. Dasher*, 250 Md. 424 (1968), an objection was made, without more, to opposing counsel's closing. The Court held:

> "In any event, there was no motion for a mistrial or any request by counsel for the defendants to the trial court to instruct the jury to disregard the remarks, so that the alleged error is not preserved for our consideration."

Id. at 440 (citation omitted). *See also Dorsey Bros., Inc. v. Anderson*, 264 Md. 446, 454-55 (1972); *Feeney v. Dolan*, 35 Md. App. 538, 553-54, *cert. denied*, 280 Md. 730 (1977).

Even if the issue were preserved, the court did not abuse its discretion in allowing the argument. It was well within the evidence.

Appellants' point seems to be that "[w]hile Claimant's argument was not in *form* 'permanent total disability,' his argument allowed the jury to consider 'permanent total disability' in *function*." This argument ignores the fact that permanent total disability was not an issue before the jury and there was no way in which a jury's finding of a percentage of permanent partial disability could convert the amount and duration of compensation into an award of permanent total disability. *Compare* LE § 9-637(b) (permanent total paid for life or until no longer totally disabled), *with* LE § 9-627(k) (permanent partial paid for 500 weeks multiplied by percentage of industrial loss).

III

Lennar is aggrieved by the verdict sheet because it lumped together under the genus, "pre-existing" conditions, all of the species that had appeared separately in the issues submitted by Snellings to which the Commission specifically responded. In a shotgun approach, appellants say the sheet "was insufficient, contained errors of law and fact, failed to apportion properly between pre-existing conditions and the claimant's current disability, leads to inconsistent interpretation, is unclear, prejudicial, and is grounds for a new trial."

The issues submitted by Snellings to the Commission raised accidental injury to the neck and apportionment to the Fund as to "Neck, asthma, gastroesophageal reflux disease, sleep apnea, hepatitis C, right hand, right knee, left knee, right foot." This itemization apparently resulted from Snellings's interpretation and application of a rule of the Commission. It provides in relevant part:

> "On the Issues form, the party shall state with clarity issues to be determined and shall, if relevant:
>
> ….
>
> "(2) For permanent disability, identify each part of the body affected[.]"

COMAR 14.09.03.02D. The Commission's award answered the issues as presented.

The Commission rule does not govern the form of a special verdict in an action for judicial review of a Commission award. Rather, it is within the discretion of the circuit court. "[W]hen it comes to the manner in which the circuit court presents issues properly before it to the jury in the form of verdict sheet questions, 'a court's use of a particular

format will not be reversed absent an abuse of discretion.'" *Electrical General Corp. v. Labonte*, 229 Md. App. 187, 206 (2016) (quoting *Applied Industrial Technologies v. Ludemann*, 148 Md. App. 272, 287 (2002)), *aff'd*, 454 Md. 113 (2017).

Here, the extent of the disability caused by the claimant's pre-existing condition is relevant to the dispute between Lennar and the Fund. In that connection, LE § 9-802(a) provides in relevant part:

> "(a) If a covered employee has a permanent impairment and suffers a subsequent accidental personal injury … resulting in permanent partial or permanent total disability that is substantially greater due to the combined effects of the previous impairment and the subsequent compensable event than it would have been from the subsequent compensable event alone, the employer or its insurer is liable only for the compensation payable under this title for the subsequent accidental personal injury[.]"

It is not necessary for an LE § 9-802(a) determination that the jury find a percentage of disability for each component of the claimant's pre-existing condition. Lennar speculates that in some possible, future, third, accidental injury it may be desirable to know the specific breakdown of the finding that twenty percent of the claimant's disability was due to pre-existing conditions. The circuit court, however, acted within its discretion in apparently concluding the simplification of the verdict form for this jury outweighed any detriment to some interest in a theoretical, future claim.

Further, even if the court erred in structuring the verdict sheet, the error did not prejudice Lennar in this case. Questions 6 and 7 on the verdict sheet in effect asked if conditions precedent to the liability of the Fund for an allocation of the pre-existing disability had been met. The jury found that they had not been met. Consequently, the

entire compensation obligation remained with Lennar. *See Anchor Motor Freight, Inc. v. Subsequent Injury Fund*, 278 Md. 320 (1976). The finding that there was no allocation to the Fund renders immaterial to the judgment all of the components of the pre-existing condition.

IV

In an action for judicial review of a Commission award, "the party challenging the decision has the burden of proof." LE § 9-745(b)(2). "Where the employer prevails before the Commission and the claimant elects to appeal employing an essentially *de novo* trial method, 'the provision, as a practical matter, is largely meaningless' because the parties retain their initial burdens of proof and persuasion." *Baltimore County v. Kelly*, 391 Md. 64, 75 (2006) (citation omitted). Here, Lennar asserts that "[t]he Claimant's testimony at the jury trial and the relevant medical evidence submitted as evidentiary exhibits were substantively identical to the testimony and relevant evidence records submitted to the Commission[.]" The result under LE § 9-745(b)(2), Lennar concludes, is that Snellings failed to "meet his burden of proof" and the court erred in denying Lennar's motions for judgment. We hold that Snellings met both the burden of production and the burden of persuasion.

In the argument of Lennar's issues discussed under Parts I and II hereof, appellants complained that the vocational rehabilitation testimony would have permitted finding 100% permanent disability, which Lennar equated with permanent total disability. There was sufficient evidence to sustain the jury's finding of ninety-three percent total industrial

loss of the claimant's body. The jury's change in the apportionment of the total loss between the pre-existing condition and the subject accident is a matter of persuasion that does not impact the motions for judgment, even if the evidence on that aspect of the case was substantially the same before the Commission and the jury.

> "[W]here the Commission has considered conflicting evidence of essential facts, and has drawn one of two different permissible inferences, there may be imposed upon the party attacking the decision of the Commission merely a burden of persuasion, and not necessarily a burden of additional proof. He may rely upon identically the same evidence that was presented before the Commission. The provision of the Act placing the burden of proof upon the appellant means only that he must prove in the trial [c]ourt what he asserts. His burden is to convince the [c]ourt or the jury that the Commission decided incorrectly in interpreting the facts, or deducing the inference from the facts, or construing the law applicable to the facts."

Williams Constr. Co. v. Bohlen, 189 Md. 576, 580 (1948) (citations omitted), *quoted in Ackerhalt v. Hanline Bros., Inc.*, 253 Md. 13, 21 (1969); *Blake Constr. Co. v. Wells*, 245 Md. 282, 287 (1967).

For all the foregoing reasons, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED.

COSTS TO BE PAID BY LENNAR CORP. AND OLD REPUBLIC INSURANCE COMPANY.