

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS=COMPENSATION APPEALS PANEL  
AT NASHVILLE

March 24, 2005 Session

**WAED H. ALASSAADI v. DAVIDSON TRANSIT ORGANIZATION**

**Direct Appeal from the Circuit Court for Davidson County  
No. 02C1922 Hamilton Gayden, Circuit Judge**

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**No. M2004-00983-WC-R3-CV - Mailed July 25, 2005; Filed August 24, 2005**

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This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel 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. In this appeal, the employee asserts that the trial court erred in finding he was not entitled to reimbursement for medical expenses for unauthorized physicians and in finding he sustained only a 5% permanent partial disability to the whole person as the result of an injury occurring during the course of the appellant's employment with the Davidson Transit Organization. We conclude that the evidence presented supports the findings of the trial judge and, in accordance with Tennessee Code Annotated section 50-6-225(e)(2), affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Trial Court  
Affirmed**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, J., and ROBERT E. CORLEW, III, SP. J., joined.

Stanley A. Davis, Nashville, Tennessee, for the appellant, Waed Alassaadi.

Terry L. Hill, Nashville, Tennessee, for the appellee, Davidson Transit Organization.

**MEMORANDUM OPINION**

**I. FACTUAL BACKGROUND.**

Mr. Waed Alassaadi is married with four children, two boys and two girls. He was born in Sadr City, Iraq in 1959. He completed high school in Iraq and moved to Kuwait in 1976. He lived in a refuge camp in Lebanon for seven years before coming to the United States on

September 15, 2000. Mr. Alassaadi was forty-four years old at the time of the trial and had worked for the Davidson Transit Organization for one year cleaning buses and trolleys. When he came to the United States he attempted to get disability benefits. He suffered from multiple gunshot and shrapnel injuries, had undergone a partial gastrectomy in 1990, and had an unspecified follow up gastric procedure in Lebanon in 1999. According to a letter from the doctor who saw him at the time he came to the United States, he had “highly complex and inter-related set of medical, emotional, and social problems, and that [he] would greatly benefit from an alternative source of income until those issues can be further clarified.”

On June 15, 2002, Mr. Alassaadi was cleaning a trolley in preparation for a wedding ceremony. He testified he was mopping the floor of the trolley when he fell and lost consciousness. He believes his head hit a piece of metal on the seat of the trolley. The next thing he remembered, he had an oxygen mask on his face and he was in an ambulance being taken to the emergency room at Vanderbilt University Medical Center. There, he was placed in a cervical collar and was instructed not to allow anyone other than a specialist to remove it.

After he returned home, Mr. Alassaadi telephoned Bob Baulsir, who was later identified as the director of maintenance, and told him he was experiencing pain and requested he be sent to a doctor. He was given a list of medical facilities and chose Concentra. At the clinic a nurse practitioner named Terry Wheeler attempted to examine him and remove the cervical collar. Mr. Alassaadi refused to allow it because she was not a doctor. She gave Mr. Alassaadi a document indicating he should return to work on light duty, with no heavy lifting, and no pushing or pulling more than five pounds.

Mr. Alassaadi stated that when he returned home, he phoned Bob Baulsir and complained that he had been promised a doctor. He testified he phoned Mr. Baulsir a total of four times asking that he be sent to a physician. On one of those occasions, Mr. Baulsir indicated he had the document providing that the employee return to work and warned that if he did not return, he would be fired. Laura Baulsir, director of human resources for the Davidson Transit Organization, testified that Mr. Alassaadi never expressed to her in any way that he was dissatisfied with whom he had seen for medical treatment. Mr. Alassaadi was fired because he failed to return to work.

Mr. Alassaadi turned to Dr. Fawwaz Alkayyali, his personal physician. Dr. Alkayyali ordered an MRI and after reviewing the results, sent him to Dr. Neal Garrett Powell, Jr. Mr. Alassaadi saw Dr. Powell as a TennCare patient and was prescribed physical therapy and a pain management program. After one month, he returned to Dr. Powell, but Dr. Powell had discontinued accepting TennCare insurance. The employer has not paid any medical expenses nor any temporary total disability.

Mr. Alassaadi testified that before this injury he had passed a physical exam given by the company and had never had a back or neck injury. Now, according to Mr. Alassaadi, his neck hurts, he is in poor condition, he cannot move or walk without pain and he cannot sleep because of pain. He has difficulty sitting or standing for long periods of time. Mr. Alassaadi has been prescribed a lot of narcotic pain medication by his various doctors. He is taking hydrocodone

and neurontin and has been prescribed morphine in the past. He has tried to work since his injury, but when potential employers observe his condition they refuse to hire him. Moreover, he cannot read or write English.

Linda McCrary, a senior claims representative with Brentwood Services, testified for the defendant. Dr. Alassaadi's file was assigned to her around June 14, 2002. She stated Mr. Alassaadi was given a panel of treatment facilities. He chose Concentra. Concentra referred him to physical therapy, but he did not attend. She attempted to telephone Mr. Alassaadi on two occasions but the child who answered said he was sleeping and would not wake him. On both occasions she stated her purpose in calling and left her number, but Mr. Alassaadi did not return her calls. Ms. McCrary filed a notice of denial with the Department of Labor for non-compliance. According to Ms. McCrary, he missed two appointments with the authorized physician and refused to cooperate. Brentwood Services paid Terry Wheeler, the nurse practitioner who saw Mr. Alassaadi at Concentra. The emergency room bill was not paid because the claim was denied and the employer had requested that he go to Baptist.

## II. MEDICAL EVIDENCE.

Dr. Neal Garrett Powell, Jr., a board-certified physician in neurological surgery, testified by deposition. He first saw Mr. Alassaadi on September 17, 2002, on a referral from Dr. Alkayyali. Mr. Alassaadi complained of neck and back pain lasting for several months and radiating into both lower extremities, more severely on the left. He did not relate to Dr. Powell an incident that may have caused the pain. Dr. Powell recommended a pain management program.

Dr. Powell next saw Mr. Alassaadi on February 4, 2003, for an independent medical examination. On this second visit, Mr. Alassaadi reported that on June 5, 2002, he was cleaning a bus when he slipped on a wet floor and fell and struck the left side of his head. He stated that he had sustained a loss of consciousness and was taken to the Vanderbilt Emergency Room.

A physical examination revealed that Mr. Alassaadi had a loss of range of motion in his cervical region. He had some weakness in his left arm and left leg that appeared to be related to the pain. Dr. Powell found some sensory changes in the left side of his body. Mr. Alassaadi's reflexes were essentially normal. When he walked, he did not put his full weight on his left leg. Dr. Powell also found that when he raised his left leg, it would cause pain in the leg.

As a part of his examination, Dr. Powell reviewed medical records from Dr. Lloyd Walwyn, Vanderbilt Emergency Room, and Concentra Medical Center. Additionally, he reviewed an MRI scan of Mr. Alassaadi's neck taken on June 25, 2002, and an MRI scan of lumbar scan of his spine done on June 27, 2002. There was no evidence of any acute injuries in any of the imaging studies that Dr. Powell reviewed. Dr. Powell had an EMG nerve conduction study done of the left arm and of the left leg which were normal. He also had a brain MRI which was normal. The MRI scan done on June 25, 2002, did show a shallow disc herniation at C4/5. Dr. Powell agreed that the presence of abnormalities on imaging studies does not necessarily mean that an individual has an impairment due to an injury. A person can have structural

problems with the spine such as Dr. Powell found in the lower spine of Mr. Alassaadi simply as a result of the aging process. Dr. Powell felt that he had cervical pain, low back pain, left arm pain and left leg pain that developed as a result of an injury that occurred at work. He felt that he had myofascial pain and some depression related to his chronic pain. Dr. Powell acknowledged that his diagnosis of Mr. Alassaadi is basically that he has pain. The information upon which such a diagnosis is made is information that would be given subjectively by the patient. Dr. Powell recommended that he be seen in a pain management program.

Dr. Powell also saw Mr. Alassaadi on August 26, 2003. At that time he had the same complaints of headache, cervical pain, low back pain, left arm pain, and left leg pain. Dr. Powell reviewed the results of a MRI done on January 9, 2003, and noted that the scan appeared normal for Mr. Alassaadi's age. Dr. Powell believes that Mr. Alassaadi reached maximum medical improvement in August 2003. He believes he will need future treatment in the form of analgesic treatment. Dr. Powell testified that Mr. Alassaadi would retain a permanent impairment, according to the AMA Guides, 5<sup>th</sup> Edition, in the amount of 8% for the lumbar spine and 6% for the cervical spine or a combined 13% to the body as a whole. He admitted, however, that he had not established an impairment rating until the day of his deposition and basically formed his opinion based upon a report from Dr. Walwyn. Dr. Powell would impose limitations of no lifting greater than twenty pounds, no frequent lifting of greater than ten pounds, no standing for more than six hours a day, the ability to change positions frequently, no crawling, no stooping, and no kneeling at work. He could push and pull, but Dr. Powell would limit it to no more than twenty pounds of force.

Dr. Lloyd Walwyn, a board certified orthopaedic surgeon, testified by deposition. He examined Waed Alassaadi on August 5, 2002, upon a referral from Mr. Alassaadi's attorney for an independent medical evaluation. Mr. Alassaadi told Dr. Walwyn that he was experiencing pain in his neck, left leg, back and both shoulders, left more than the right. At times, the left side of his neck, his left eye and left ear felt numb or painful. He walked with a cane, very slowly and somewhat stooped. He took hydrocodone two to four times a day. He was able to sleep only with the aid of the medication. Mr. Alassaadi reported that he could not walk as he used to, drive, sit down, or sleep because of his pain. He appeared to be in pain at rest as well as when he engaged in routine, casual movements.

Upon physical examination Mr. Alassaadi's neck had a limited range of motion. The neck muscles had guarding, tenderness and pain. His left shoulder had limited range of motion. His back had limited flexion of ten degrees. The paralumbar muscles had pain extending all the way to his left toe as well as tenderness and guarding. His left foot was tingling and cold. His left straight leg raise test caused sciatica at eighty degrees, and the right straight leg raise test caused back pain at eighty degrees.

Mr. Alassaadi reported to Dr. Walwyn that he was at work on June 5, 2002, when he slipped and fell against the seat and passed out. Dr. Walwyn reviewed a magnetic resonance imaging (MRI) study of the lumbar spine which showed minimal diffuse bulging at the L5/S1 with degenerated disc manifested decreased signal. An MRI of the cervical spine revealed diffuse bulges of the C4/5 level with bilateral nerve foraminal narrowing. Dr. Walwyn indicated

that upon physical examination of the neck he observed guarding, which is a kind of spasm, as well as pain. Dr. Walwyn's examination of the neck, however, did not show any neurological problems, and his diagnosis with regard to the neck was cervical strain. The objective findings on the MRI studies were consistent with the findings on physical examination and consistent with the history given by Mr. Alassaadi. The findings of the MRI of the low back were findings that could have existed simply as age-related problems. There was no evidence of any acute injuries in any of the imaging studies.

Dr. Walwyn believed Mr. Alassaadi's injuries were caused by his fall at work. He also believed that Mr. Alassaadi will retain impairment in accordance with the AMA Guides, 5<sup>th</sup> Edition, in the amount of 6% of the left upper extremity due to his left shoulder which corresponds to a 4% whole person impairment. His only basis for rating with regard to the left shoulder was a loss of range of motion. Dr. Walwyn found 8% whole person impairment for injury to the lumbar spine and 6% whole person impairment for the injury to the cervical spine. When combined, these injuries amount to a 17% impairment to the whole body. Dr. Walwyn would impose restrictions of not lifting more than twenty pounds or lifting more than ten pounds frequently. Mr. Alassaadi should stand or sit less than about six hours per day and pushing or pulling should be severely limited. He should never climb, balance, stoop, kneel, crouch, crawl or twist. He also should avoid heights and avoid rapidly moving machinery.

Dr. Roy Terry, a board certified orthopaedic surgeon testified by deposition. Dr. Terry performed an evaluation of Mr. Alassaadi on September 12, 2003. As part of his evaluation, he took a history from Mr. Alassaadi and reviewed the medical records. Mr. Alassaadi reported the fall on the bus he was cleaning for M.T.A. in Davidson County. He reported losing consciousness, but that statement was inconsistent with the emergency room evaluation of June 5, 2002, which stated "No loss of consciousness at that time." Mr. Alassaadi reported that he had numbness in his left hand, difficulty with trying to walk and difficulty getting around. He complained of numbness from his head to his foot on the left side. He was taking effexor, an anti-depressant, and hydrocodone, a narcotic pain medication. He had previously been prescribed morphine.

A physical examination did not show evidence of atrophy which is a wasting away of muscles by comparing side to side and did not show evidence of any kind of cranial nerve deficits. There was nothing during the examination to indicate a significant head injury which would have affected his left side. Dr. Terry did not observe any drooling or similar effects such as drooping of the face that one would expect to observe in someone who had a cranial nerve injury. He was able to close his eyes tightly. There was no difference from side to side which would indicate a cranial nerve weakness. He had equal muscle size measurements on each side. According to Dr. Terry, if Mr. Alassaadi's muscles had actually been injured and were weak because he had not been using them because either they did not have nerve supply to them or there had been pressure on a nerve from his neck or anywhere else along the course of it, you would expect the person after more than two years of this difficulty to have his muscles waste away. There was no difference in the leg muscles from each side nor the thigh muscles from each side. Had he not been using his left side, his left side muscles would have atrophied. Dr. Terry found no evidence of that. There was no evidence of atrophy in one side of his buttocks

and no evidence of any reflex difference from each side which would be expected had there been significant problems.

Mr. Alassaadi could not flex or extend his neck without discomfort. However, he did have good sternocleidomastoid muscles. He exhibited good strength turning his head to the right and poor strength turning his head to the left. When you turn your head to the left side, the right sternocleidomastoid muscle is used and when turning the head to the right, the left sternocleidomastoid muscle is used. The left side appeared to be strong when turning right and the right side appeared to be weak when turning left which contradicts his having a totally left sided problem. There was no atrophy in the neck muscles on the left and right sides.

A purely one-sided problem can only be caused by some kind of nerve problem, spinal cord injury or intra-cranial problem. Since the examination, a brain MRI and an EMG test were performed. There was no evidence of any neurologic damage on the EMG studies and no evidence of any intra cranial abnormalities on the MRI scan of the brain.

Dr. Terry performed strength testing which revealed reduced strength on the left side. Dr. Terry noted that strength testing is difficult since the doctor must rely on the patient's effort. There may be a lack of effort or there may be pain or something of that nature such that the person may not be able to give a good effort. In view of the elapsed time between the injury and the examination, the lack of strength on the left side should have resulted in atrophy to the muscles in the forearms, thighs and legs. Since there was no atrophy, Dr. Terry was concerned that there may have been a lack of effort given during the examination.

Additionally, the weakness on the left side was inconsistent with the EMG study that was performed. The EMG study revealed that the nerves appeared to have full function and full capacity to transmit a signal from their starting point to the muscle innervation site.

Mr. Alassaadi's reflexes appeared to be equal and normal in the upper extremities and equal and normal in the lower extremities. Equal and normal reflexes indicate a lack of neurologic abnormality. If there is an abnormality, when you stimulate the tendon, the reflex doesn't go to the brain, it goes to the spinal cord and comes back.

Mr. Alassaadi had full passive range of motion in both the left and right shoulders. He did not have full active range of motion in his left shoulder. Dr. Terry reviewed an MRI scan that was done at the time of Mr. Alassaadi's injury which revealed a degenerated disc with bulging at C4/5 with neural foraminal narrowing. According to Dr. Terry, degenerative disc disease is a chronic, ongoing condition that results from wear and tear on the disc over time. Dr. Terry was of the opinion that the slip and fall did not cause the degenerative disc. A degenerated disc happens over time. It is not a one-time, single event. According to the report of Dr. Greg Smith who reviewed the MRI, it showed bilateral neural foraminal narrowing at this level which would not indicate one side was worse than the other. The reviewing physician also did not indicate there was significant impingement on the nerves on one side or the other. Moreover, the EMG study was normal, which does not indicate any evidence of compression of the nerve at the level of the cervical spine. Dr. Terry reviewed the MRI done on June 27, 2002. The scan was read as a minimal, diffuse, central disc bulge at L5/S1, with degenerated disc

manifesting by decreased signal. No impingement on the nerve roots was noted. Dr. Terry's opinion was that this was not caused by trauma related to this accident but was caused by changes in the disc related to time.

Dr. Terry indicated that the reports of Mr. Alassaadi about his difficulty in walking and complaints of facial numbness, drooping, slurred speech, and drooling were not supported by the physical examination. None of the complaints of Mr. Alassaadi were supported by physical examination and the diagnostic tests. Dr. Terry did not find any permanent condition that resulted from his fall based upon the AMA Guides, 5<sup>th</sup> Edition. Similarly he found no reason from a medical standpoint that this gentleman should not be able to return to the same type of employment. He did not feel any work restrictions were needed.

### III. RULING OF THE TRIAL COURT.

The trial court found Mr. Alassaadi suffered myofascial pain as a result of the accident and found his permanent partial disability to be 5% based upon an anatomical impairment of 2%. The trial court denied temporary total disability due to Mr. Alassaadi's refusal to return to work on light duty and denied past medical expenses because Mr. Alassaadi failed to take the necessary steps to involve his employer in the selection of physicians. Future medical expenses were awarded but were limited to pain management.

### IV. STANDARD OF REVIEW.

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Lollar v. Wal-Mart Stores, Inc., 767 S.W.2d 143, 149 (Tenn. 1989); Tenn. Code Ann. § 50-6-225(e)(2). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be afforded those circumstances on review since the trial court had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Industries, Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672 at 676 (Tenn. 1991).

### V. ANALYSIS

The appellant, Mr. Alassaadi, raises three issues in this appeal: (1) whether providing a physician's assistant to Mr. Alassaadi complied with Tennessee Code Annotated section 50-6-204(a)(4); (2) whether the trial court should have held the employer responsible for Mr. Alassaadi's medical expenses; and (3) whether the trial court erred in assigning a 5% permanent partial disability in this case. We find no error.

The first two issues relate to the trial court's finding that Mr. Alassaadi was not entitled to be reimbursed for his medical expenses. The trial court made no finding as to whether providing a physician's assistant satisfies the provisions of Tennessee Code Annotated section 50-6-204(a)(4). Determination of that issue was apparently not necessary to the trial court's finding that Mr. Alassaadi was not entitled to his past medical expenses. The trial court found that Mr. Alassaadi unreasonably failed to involve the employer when he sought an unauthorized physician to provide for his medical care.

Tennessee Code Annotated section 50-6- 204(d)(7) provides:

If the injured employee refuses to comply with any reasonable request for examination or to accept the medical or specialized medical services which the employer is required to furnish under the provisions of this law, such injured employee's right to compensation shall be suspended and no compensation shall be due and payable while such employee continues such refusal.

This provision has been construed to require an employee to consult with the employer before engaging an unauthorized physician. Procter & Gamble Defense Corp. v. West, 203 Tenn. 138, 310 S.W.2d 175 (1975). Where an employee incurs medical expenses on his own, the employer is not liable for payment of the expenses absent a showing by the employee that he had a reasonable excuse for not consulting with his employer before incurring such expense. Harris v. Kroger Co., Inc., 567 S.W.2d 161, 163-4 (Tenn. 1978). The initial inquiry for the court is whether Mr. Alassaadi had a valid excuse for engaging the services of Dr. Alkayyali, Dr. Powell, and the other physicians without first consulting with Davidson Transit Organization. The trial court held he did not. While Mr. Alassaadi testified he complained to the director of maintenance that he had not seen a physician, he never related that complaint to the director of human resources. Moreover, there is evidence he refused to speak with and to return the telephone calls from the person handling his workers' compensation claim. The trial court apparently felt that if Mr. Alassaadi was not satisfied with the medical treatment he was receiving, he should have related that fact to one of these two individuals. He did not. The evidence does not preponderate against the finding of the trial court with regard to this issue.

The final issue presented for review by the appellant is, as we understand it, whether the trial court erred in limiting its award to Mr. Alassaadi for permanent partial disability to 5% of the body as a whole. We have independently evaluated the medical evidence in this case. We agree with the trial court that if Mr. Alassaadi sustained a permanent disability from this work injury, it is solely related to the pain he says he has experienced. The trial court expressly found that the problems revealed by the magnetic resonance imaging studies were more probably related to the aging process than an injury. We agree. The trial court personally observed Mr. Alassaadi's testimony and we must give deference to its evaluation of that testimony. The trial court apparently believed that Mr. Alassaadi experienced pain to the back, neck or shoulder and the onset of that pain resulted from the work related injury. The trial court obviously felt the extent of disability caused by the pain was minimal. Based primarily on the testimony of Dr. Roy Terry related to the lack of any evidence of atrophy, we do not find that the evidence preponderates against the trial court's finding as to the extent of Mr. Alassaadi's disability.



## VI. CONCLUSION.

Because we do not find the evidence preponderates against the trial judge's findings, the judgment of the trial court is affirmed. The costs of this cause are taxed to the appellant, Waed Alassaadi.

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DONALD P. HARRIS, SR. J.

IN THE SUPREME COURT OF TENNESSEE  
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**No. M2004-00983-WC-R3-CV - Filed August 24, 2005**

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**JUDGMENT ORDER**

This case is before the Court upon 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, which are incorporated herein by reference;

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed to the Appellant, Waed Alassaadi, for which execution may issue if necessary.

**IT IS SO ORDERED.**

**PER CURIAM**