

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT KNOXVILLE

February 26, 2007 Session

**WESLEY BRIAN MCKEEHAN v. ACE AMERICAN INSURANCE  
COMPANY**

**Direct Appeal from the Circuit Court for Cocke County  
No. 28,824-I Ben Hooper, Judge**

**Filed June 12, 2007**

**No. E2006-01031-WC-R3-CV - Mailed April 27, 2007**

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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. In this appeal the employer asserts that the trial court erred in rejecting the opinion of the treating physician in awarding the employee benefits based upon a finding of 32.5 percent permanent partial disability to the body as a whole. We agree with the findings of the trial court 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**

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the court, in which WILLIAM M. BARKER, C.J. and J. S. (STEVE) DANIEL, SR. J., joined.

Deborah F. Roberts, Greeneville, Tennessee, for Appellant, ACE American Insurance Company.

George R. Garrison, Sevierville, Tennessee for Appellee, Wesley Brian McKeehan.

**MEMORANDUM OPINION**

**Factual Background**

The employee, age 24 at the time of trial, was employed by Rotech Healthcare, Inc. Rotech

is an in-home patient care center.<sup>1</sup> ACE Insurance Company is Rotech's workers' compensation insurance carrier. At the time of the employee's injury, he was a delivery driver. On January 13, 2004, the employee was lifting a liquid oxygen vessel when he "felt a major pull in his low back" and pain across his lower back and down his right leg. He took a minute to catch his breath before completing his delivery. The employee testified that the oxygen vessel weighed approximately 230 pounds. The employee completed his work but continued to feel pain.

In March 2004 the employee saw Dr. Paul Johnson, an orthopedic surgeon, at the Knoxville Orthopedic Clinic. Dr. Johnson did not testify, but completed a C-32 form and attached his office notes to the form, all of which are part of the record. According to his notes, Dr. Johnson reviewed the MRI performed by Healthstar Physician Facility on February 13, 2004, which he noted indicated a central disc protrusion at the L4-5 level which effaces the central thecal sac. Dr. Johnson prescribed physical therapy and imposed temporary lifting restrictions of 25 pounds. The employee testified that Dr. Johnson told him that he needed some injections; that Dr. Johnson did "very little"; and, that he felt that Dr. Johnson was indifferent to his condition.

On April 26, 2004, the employee once again saw Dr. Johnson. The employee reported to Dr. Johnson that he had been in physical therapy but that the therapy did not help. Dr. Johnson assessed no permanent impairment and considered him at maximum medical improvement. Dr. Johnson's notes indicate he released the employee to return to work "without restrictions at [employee's] request". The employee testified that Dr. Johnson released him without restrictions after a discussion that if he sent him back to work with restrictions he [the employee] would likely be terminated.

The employee then visited his family physician, Dr. Maurice Robinson, who did not testify and whose notes were not introduced into evidence. The employee testified that Dr. Robinson prescribed pain medication and muscle relaxants.

On December 13, 2005, the employee was seen for an independent medical examination by Dr. Alan L. Whiton, an orthopedic surgeon. Dr. Whiton testified by deposition that when he saw the employee, he was complaining of low back pain which radiated down into his legs. Dr. Whiton stated he reviewed the notes of Dr. Johnson and the MRI of February 13, 2004 reportedly showing a ruptured disc and revealing a disc protrusion abutting the right L5 nerve root putting pressure on the nerve root. Dr. Whiton opined that the pinching of the nerve was causing employee's pain to run down his leg. Dr. Whiton performed a physical examination which he testified revealed symptoms consistent with a ruptured disc pressing on a nerve. Dr. Whiton also reviewed a MRI done on July 23, 2003, prior to the injury of January 13, 2004, and found that the earlier MRI did not reveal a nerve impingement. Dr. Whiton opined that the employee had suffered a new injury as a result of the January 13, 2004 incident because disc material was impinging or pressing on a nerve and this

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<sup>1</sup>The complaint identifies the employer as Rotech Healthcare, Inc. However, the employee in his testimony and appellant in their appeal pleadings identify the employer as American Oxygen. This discrepancy has no bearing on the outcome of the case.

impingement was not present when the earlier MRI was performed. Dr. Whiton further opined that the employee had suffered 10 to 13 percent whole person impairment.

The employee had previously injured his back approximately eight month's prior to the January 13 injury. He injured his back on that occasion by lifting oxygen bottles. He did not file a workers' compensation claim because he was afraid he would lose his job. The employee further testified that he continues to suffer from "dull throbbing" to severe pain in his lower back that radiates down his right leg from the January 13 injury and that sitting, standing and bending increases the pain. He stated he cannot perform chores around the house, cannot engage in hobbies and has trouble sleeping.

When the employee returned to his job at Rotech, he was suspended for several days because of unauthorized use of a computer. Rather than return to Rotech, the employee found employment at Colboch Harley-Davidson as a "parts person." The employee stayed at that job for six months before becoming employed as parts manager at Smoky Mountain Motor Sports, where he was employed at the time of trial.

#### Ruling of the Trial Court

The trial court accepted the opinion of Dr. Whiton and the employee and found that the employee had suffered a 32.5 percent permanent partial disability to the body as a whole. From these findings, ACE Insurance Company has appealed asserting that the trial court erred in rejecting the opinion of the treating physician, Dr. Paul Johnson, and accepting the impairment rating of Dr. Whiton.

#### Standard of Review

The standard of review in workers' compensation is de novo on the record, with a presumption of the correctness of the trial court's ruling, unless the preponderance of the evidence is contrary. Tenn. Code Ann. § 225(e)(2)(2005); Mahoney v. NationsBank of Tenn., N.A., 158 S.W.3d 340, 343 (Tenn. 2005). When the trial court has seen the witnesses and heard their testimony, especially where issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's factual findings. Mahoney, 158 S.W.3d at 343; Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315, 315 (Tenn. 1987). As to documentary evidence such as records and depositions of expert witnesses, appellate courts may make an independent assessment of the credibility of the documentary proof it reviews without affording deference to the trial courts findings. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991).

#### Analysis

When the medical proof differs, as it often does, the trial judge must obviously choose among the competing assessments. In doing so, the trial judge may consider the qualifications of the

experts, the circumstances of their examination and treatment, the information available to them and the evolution of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d at 676. In some instances, the physician having greater contact with the injured worker “would have the advantage and opportunity to provide a more in depth opinion, if not a more accurate one.” Carter v. First Source Furniture Group, 92 S.W.3d 367, 373 (Tenn. 2002) (quoting Orman, 803 S.W.2d at 677). The general rule, however, is that the trial court has the discretion to accept the opinion of another medical expert. Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990); Dorris v. INA Ins. Co., 764 S.W.2d 538, 542 (Tenn. 1989); Hixson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). Further, the claimant’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. 1995); Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 778 (Tenn. 1972).

Dr. Whiton’s opinion was based upon his physical examination of the employee and two MRIs, one before the injury that he opined did not show nerve root impingement, and the MRI after the injury that he opined showed nerve root impingement. Dr. Whiton testified that the employee had suffered a new injury as a result of the January 13, 2004 incident that was consistent with his physical symptoms. In contrast Dr. Johnson did not testify. His findings were included in a C-32 form that was introduced as an exhibit. Further, the exhibit made no mention of the comparison of the two MRIs.

The employee testified to his limitations after the injury and his pain. He testified that he has trouble sleeping, difficulties with lifting any object over 25 pounds and the inability to mow the yard. He further testified about his difficulties bending and squatting. The trial court found that the employee was a credible witness.

### Conclusion

Having conducted an independent examination of the record, we conclude that the evidence supports the trial court’s determination that the employee suffered a 32.5 percent permanent partial disability to the body as a whole from his work-related injury. Accordingly, we affirm the judgment of the trial court with costs assessed against the appellant, ACE Insurance Company.

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JON KERRY BLACKWOOD, SENIOR JUDGE

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**JUDGMENT**

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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellant, ACE Insurance Company, for which execution may issue if necessary.