IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
August 25, 2008 Session

WILLIAM KEVIN BEELER v. LENNOX HEARTH PRODUCTS, INC. ET AL.

Direct Appeal from the Chancery Court for Obion County
No. 26566 William Michael Maloan, Chancellor

No. W2007-02441-SC-WCM-WC - Mailed December 4, 2008; Filed February 18, 2009

Employee sustained a compensable injury to his left knee. After surgery and recovery, his treating physician assigned 2% impairment to the left leg. At Employee's request, an IME was conducted with the evaluating physician assigning 7% impairment. To resolve the disparity, the parties selected a neutral physician from the Medical Impairment Registry ("MIR") to conduct an examination pursuant to Tennessee Code Annotated section 50-6-204(d)(5) (2005). That physician assigned 3% impairment to the leg. Employee obtained a second medical evaluation from a fourth physician, who assigned 13% impairment. The trial court, affording the statutory presumption of correctness to the MIR physician's rating, concluded that 3% was "the accurate impairment rating" and that this rating had not been rebutted by clear and convincing evidence. Applying the 3% impairment rating in conjunction with the statutory cap of 1½ times the anatomical impairment, the trial court awarded 4.5% permanent partial disability to the leg. On appeal, Employee contends that he successfully rebutted the statutory presumption. After review, the judgment of the trial court is affirmed.[1]

Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right;
Judgment of the Chancery Court Affirmed

DAVID G. HAYES, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, C. J., and DONALD P. HARRIS, SR. J., joined.

Jeffrey A. Garrety and Michael J. Cash, Jackson, Tennessee, for the appellant, William Kevin Beeler.

R. Dale Thomas and Jesse D. Nelson, Jackson, Tennessee, for the appellees, Lennox Hearth Products, Inc., and Ace American Insurance Company.

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[1]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 a hearing and a report of findings of fact and conclusions of law.

MEMORANDUM OPINION

Factual and Procedural Background

William Kevin Beeler ("Employee") was employed in the shipping and receiving department of Lennox Heart Products ("Employer"). Employee's duties included the driving of tractor-trailers from the plant to a local distribution center. After exiting the cab of a tractor-trailer on December 7, 2005, Employee's left boot became "stuck" in the step of the truck causing his left knee to twist. Employee testified that there was no impact to the knee and that he was able to break his fall by grabbing the door of the truck. It is not disputed that the injury was compensable.

Employee was ultimately referred to Dr. David Johnson, an orthopaedic surgeon. Dr. Johnson testified by deposition. Based upon his examination, which included an MRI study, Dr. Johnson's initial diagnosis was a tear of the lateral meniscus. Arthroscopic surgery was recommended and carried out on February 23, 2006. During that procedure, Dr. Johnson determined that most of Employee's lateral meniscus had been removed during a prior surgery in 1995. Dr. Johnson concluded that, as a result of the December 2005 accident, Employee had damaged the smooth cartilage covering the upper end of the femur, a condition known as chondromalacia. The damaged cartilage was surgically removed. Dr. Johnson also noted the presence of irregularities in the trochlear groove, the area behind the kneecap, and the presence of "spurring" on the kneecap itself. Dr. Johnson opined that the irregularities were caused by a previous injury and that the "spurring" was the result of an ongoing degenerative process.

Dr. Johnson released Employee from his care on April 7, 2006. At that time, Employee reported minimal pain and good mobility. Dr. Johnson released Employee with no restrictions upon his future activities and assigned a permanent impairment of 2% to the left leg. Dr. Johnson testified that the Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment ("AMA Guides"), which was applicable in this case, did not specifically address chondromalacia. In view of this fact, Dr. Johnson based his impairment rating upon the guideline for a menisectomy which he opined was analogous to the Employee's injury and resulting surgery. He did not assign impairment for the irregularities in the trochlear groove or the bone spurring because he did not consider these conditions to be related to the work injury of December 2005.

Employee obtained an IME from Dr. Samuel Chung. Dr. Chung prepared a C-32, which was placed into the record. Dr. Chung assigned a total impairment of 7% to the left leg, 2% of this amount being based upon the same section of the AMA Guides used by Dr. Johnson. Dr. Chung assigned an additional 5% impairment for aggravation of the pre-existing conditions of the patella and femur. This portion of the rating was based upon a footnote to table 17-31 of the Fifth Edition of the AMA Guides.[2]

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[2] "In an individual with a history of direct trauma, a complaint of patellofemoral pain, and crepitation on physical examination, but without joint space narrowing on x-rays, a 2% whole person or 5% lower extremity impairment is given." American Medical Association, *Guides to the Evaluation of Permanent Impairment* 544, tbl. 17-31 (Linda

Due to the disagreement over the extent of impairment, the parties utilized the Medical Impairment Registry procedure established by the Department of Labor and Workforce Development pursuant to Tennessee Code Annotated section 50-6-204(d)(5). Using that procedure, Dr. Peter Lund was selected to conduct an evaluation of Employee. Following a physical examination and a review of the Employee's medical records, Dr. Lund issued a report that assigned an impairment of 3% to the left leg. This impairment rating was based upon atrophy of the left thigh. Measurements taken by Dr. Lund showed the left leg to be one centimeter less in circumference than the right leg.

Employee took Dr. Lund's deposition for the apparent purpose of conducting cross-examination. Dr. Lund testified that the Fifth Edition of the AMA Guides did not assign an impairment rating for chondromalacia, although the Third Edition had done so. He also stated that he did not assign impairment for cartilage changes that pre-existed the injury. In response to questions from Employer's attorney, Dr. Lund stated that he based his impairment rating upon measured atrophy of the muscles above the knee because that atrophy "may be a reflection of symptomatic problems with that knee, which again, we will assume is coming from this cartilage change in his joint."

Employee arranged for an additional evaluation by Dr. Claiborne Christian, an orthopaedic surgeon. Dr. Christian opined that Employee retained a total impairment of 13% to the leg. Dr. Christian's rating included three components: 5% for patellofemoral complaints; 4% for loss of joint space on the lateral side of the knee; and 4% for muscular atrophy below the knee. Like Dr. Chung, he also based the patellofemoral portion of his rating upon the footnote to table 17-31 of the AMA Guides. On cross-examination, however, he agreed that the footnote contained the requirement of "direct trauma," before any anatomical rating could be assigned. Nonetheless, he testified that he thought the impairment was appropriately assigned "regardless of the mechanism of the injury." Dr. Christian also stated that he assigned less than the maximum impairment (7%) for loss of joint space because of the prior surgical removal of most of Employee's lateral meniscus.

Employee returned to work for Employer in his pre-injury job, earning a greater wage than on the date of injury. It is not disputed that compensation benefits were "capped" at one and one-half times the anatomical impairment pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A) (2005).

The trial court issued a written decision in the form of a letter to counsel. In that letter, the court stated: "The Court cannot say that Dr. Lund's opinion has been rebutted by clear and convincing evidence." Therefore, the court awarded one and one-half times the 3% impairment assigned by Dr. Lund representing an award of 4.5% permanent partial disability to the leg. Employee has appealed, contending that the trial court erred by finding that he did not rebut, by clear and convincing evidence, the statutory presumption that the impairment rating of Dr. Lund was correct.

Cocchiarella & Gunnar B.J. Andersson eds., 5th ed. 2001).

Standard of Review

The standard of review of findings 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. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2006). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315, 315 (Tenn. 1987). A reviewing 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); Landers v. Fireman's Fund Ins. Co., 775 S.W.2d 355, 356 (Tenn. 1989). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

In 2004, our General Assembly enacted the Medical Impairment Rating (MIR) Registry Program. 2004 Tenn. Pub. Acts ch. 962, sec. 24; see also Tenn. Code Ann. § 50-6-204(d)(5) (2005). This statute provides, in pertinent part:

> When a dispute as to the degree of medical impairment exists, either party may request an independent medical examiner from the commissioner's registry. . . . The written opinion as to the permanent impairment rating given by the independent medical examiner pursuant to this subdivision (d)(5) shall be presumed to be the accurate impairment rating; provided, however, that this presumption may be rebutted by clear and convincing evidence to the contrary.

Tenn. Code Ann. § 50-6-204(d)(5). The stated purpose of the MIR program is to provide an efficient means of resolving disputes surrounding an employee's medical impairment. Tenn. Comp. R. & Regs. 0800-2-20-.02 (2008). The legislature has delegated to the Department of Labor and Workforce Development the authority to promulgate rules and regulations governing, among other things, the appointment of physicians to the registry, physician training requirements, and the scope of the evaluation. See id. at .04-.17. In order to perform MIR evaluations, physicians must successfully complete a training course dedicated to the proper use and application of the AMA Guides. Id. at .04(1)(c). To ensure consistency and thoroughness, and to further the statute's stated purpose of achieving "uniformity and fairness," Tenn. Code Ann. § 50-6-204(d)(3)(A) (2007), the Department of Labor reviews each MIR report for completeness and for compliance with the AMA guidelines. Id. at .12.

Employee contends that he successfully rebutted Dr. Lund's impairment rating. The gravamen of his position is that Dr. Lund's impairment rating is incorrect because it was based solely upon muscle atrophy and did not include any amount attributable to either the degenerative changes of the patella or femoral cartilage damage diagnosed by Dr. Johnson. Employer contends that Dr.

Lund's impairment was correct because Employee's position is inconsistent, in that he criticizes Dr. Lund's use of the atrophy method for assigning impairment, although Dr. Christian used, in part, the same method in arriving at his impairment rating.

Based upon the testimony of Dr. Johnson, the work injury sustained by Employee resulted in acute damage to the articular cartilage of the knee. All of the doctors who testified agreed that the AMA Guides do not contain a method for evaluating that condition. It was therefore necessary for each doctor to determine impairment by using an analogous portion of the Guides. Dr. Johnson used the guideline for a menisectomy. Dr. Chung and Dr. Christian used the same section and arrived at similar assessments. Dr. Lund based his impairment upon the existence of atrophy in the muscles above the knee, with the explanation that he believed this method best reflected the disuse caused by Employee's symptoms. The actual impairment which Dr. Lund derived from that method was similar to that of Dr. Johnson and to the "cartilage" component of the other two doctors' ratings.

Neither Dr. Lund nor Dr. Johnson added any additional impairment for the pre-existing degenerative conditions in Employee's knee. Dr. Chung and Dr. Christian added an additional amount for degenerative changes behind the patella. However, the section which Dr. Chung and Dr. Christian used explicitly refers to direct trauma, which did not occur in this case. Dr. Christian also used muscle atrophy, the method used by Dr. Lund, as an additional element of impairment.

Tennessee Code Annotated section 50-6-204(d)(5) does not define "clear and convincing evidence." However, the standard by which this proof is measured was articulated by our Supreme Court in Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.3 (Tenn. 1992), which held: "Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." It is clear that the AMA Guides provide the evaluating physician with multiple methods of assessing medical impairment. Nonetheless, by operation of Tennessee Code Annotated section 50-6-204(d), the MIR evaluation is presumed the accurate rating – absent clear and convincing evidence to the contrary. That is, if no evidence has been admitted which raises a "serious or substantial doubt" about the evaluation's correctness, the MIR evaluation is the accurate impairment rating. Simply because one or more evaluating physicians disagree with a properly founded MIR evaluation does not permit a finding that proof to the contrary has been established. Based upon the record, we cannot conclude that the evidence demonstrates that the method for rating impairment, as utilized by Dr. Lund, was incorrect. Indeed, Dr. Christian, upon whose testimony Employee relies, utilized the same method, albeit in conjunction with other methods.

Having concluded that Employee has not produced clear and convincing evidence that the method used by Dr. Lund was incorrect, we next consider whether Employee produced clear and convincing evidence that Dr. Lund's opinion was incorrect because he did not use additional methods to assign impairment for pre-existing damage to the knee. In that regard, we note that Dr. Christian used both atrophy and menisectomy to calculate impairment. None of the other three doctors used this combination of methods. Both Dr. Christian and Dr. Chung considered degenerative changes in the patella as a basis of impairment.

The wording of the pertinent section of the AMA Guides, which all doctors relied upon, specifically provides that this section applies only in the event of direct trauma to the knee, which did not occur in this case. Dr. Christian testified that he considered the damage to Employee's patellofemoral area to be similar to that which typically occurs after direct trauma, and, therefore, determined that it was appropriate to use that method "regardless of the mechanism of injury." Dr. Chung's report provided no explanation for his decision to apply table 17-31. Dr. Johnson and Dr. Lund each indicated that they did not assign impairment for the condition because of the absence of direct trauma and because the cartilage in question was damaged prior to the work injury.

Employee was examined by four physicians. Each of these physicians agreed that the AMA Guides did not directly address his work injury. Each sought to apply an analogous portion of the Guides to assign impairment. In doing so, they reached four different conclusions concerning the amount of that impairment. Each of the three doctors who testified provided a plausible explanation for the method of assigning impairment. Considering the entire record, we cannot conclude that the evidence preponderates against the trial court's conclusion that Employee did not rebut the statutory presumption by clear and convincing evidence.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to William Kevin Beeler and his surety, for which execution may issue if necessary.

DAVID G. HAYES, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

WILLIAM KEVIN BEELER v. LENNOX HEARTH PRODUCTS, INC. ET AL

Chancery Court for Obion County
No. 26566

No. W2007-02441-SC-WCM-WC - Filed February 18, 2009

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by William Kevin Beeler, pursuant to Tenn. Code Ann. § 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 William Kevin Beeler, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holder, Janice M., C.J., Not Participating