

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

January 27, 2015 Session

SAMANTHA ADKINS v. STUDSVIK, INC., ET AL.

**Appeal from the Chancery Court for Carter County
No. 28598 John C. Rambo, Chancellor**

**No. E2014-00444-SC-R3-WC – MAILED APRIL 30, 2015
FILED JULY 21, 2015**

This action involves a dispute regarding workers' compensation benefits. In July 2009, the plaintiff employee fell from a ladder in the course of her employment. Her employer initially provided medical care but denied that the employee sustained a compensable injury or permanent impairment. The employee filed this action on October 9, 2013. Upon a trial on the merits, the trial court found that (1) the employee did sustain a compensable, work-related injury and (2) the employee was permanently and totally disabled. The employer has appealed that ruling. On appeal, the employee also contends that the trial court erred by failing to award her the cost of unauthorized medical treatment. The appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. Discerning no error, we affirm the judgment of the trial court.

**Tenn. Code Ann. 50-6-225(e) (Supp. 2013) Appeal as of Right;
Judgment of the Chancery Court Affirmed**

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which GARY R. WADE, J., and D. KELLY THOMAS, J., joined.

Charles E. Pierce, Knoxville, Tennessee, for the appellants, Studsvik, Inc. and AIG Claim Services.

Aleania Smith, Johnson City, Tennessee, for the appellee, Samantha Adkins.

OPINION

I. Factual and Procedural Background¹

Samantha Adkins (“Employee”) was hired by Studsvik, Inc. (“Employer”) as a control room operator on August 23, 2007. While working for Employer, Employee was responsible for periodic maintenance, which included filter changes, decontaminating high-integrity containers before they left the Employer’s facility, and dusting equipment throughout the plant to remove radiation particles. These duties required Employee to frequently ascend and descend ladders. On July 6, 2009, Employee worked the night shift, which began at 6:00 in the evening and ended at 6:30 the next morning. Near the end of her shift, Employee was descending a ladder that was affixed to a wall when she missed a rung and fell to the floor. She landed on her right hip and hit her right arm on a trash can. During the accident, her hard hat fell from her head. Employee testified that she informed her direct supervisor that she had fallen from a ladder while working. Notwithstanding pain in her arm, leg, and back, she was able to complete her shift.

The next day, Employee experienced difficulty getting out of bed due to sharp pain in her lower back. She went into work that evening and asked her supervisor for time off to see and consult her doctor. Employee testified that her supervisor declined her request because there was no one available to perform her duties for that shift. On her next regularly scheduled day off, she went to meet with her primary care physician, Dr. Jeffrey Hopland at Medical Care Clinic in Elizabethton, Tennessee. Following an examination, Dr. Hopland prescribed Ultram and a pain reliever for mild or moderate pain, placed Employee on light duty, and encouraged her to schedule an appointment for a consultation with an orthopedist. Employee’s symptoms thereafter continued to worsen.

Employer referred Employee to Dr. Linden C. Fernando, who agreed with Dr. Hopland’s prescribed course of medication and light duty restrictions. Dr. Fernando performed an x-ray of Employee’s lower back, which revealed no fracture. Based on Dr. Hopland’s recommendation that she consult an orthopedist, Employee thereafter made an appointment with Dr. Richard Duncan, one of the orthopedic surgeons designated by Employer. Employee was familiar with Dr. Duncan because he had treated her on at

¹ The parties participated in a Benefit Review Conference on February 25, 2011, but were unable to resolve their differences regarding the issues of compensability, compensation rate, temporary total disability, past medical expenses, and nature and extent of permanent partial disability. The appellee filed a civil action in the Chancery Court for Carter County on March 22, 2011. The action was nonsuited and refiled in the Circuit Court for Carter County on October 9, 2013.

least two previous occasions. In 1997, she sustained a serious horseback riding injury to her pelvis as a result of having been thrown from a horse. Dr. Duncan surgically repaired the injury by placing screws into her pelvis and fusing her sacroiliac (“SI”) joint. Also, Dr. Duncan treated her for a work injury in 2006, which required a fusion of her fifth and sixth cervical vertebrae.

Dr. Duncan saw Employee regarding her present injury on August 14, 2009. At the time of her evaluation, she was complaining of back and bilateral leg pain. Dr. Duncan’s examination of Employee revealed mild tenderness in the low back and normal sensation and reflexes in both legs. He initially diagnosed disc degeneration of the low back. Dr. Duncan ordered a magnetic resonance imaging test (“MRI”) to rule out disc herniation. As Dr. Duncan testified, the quality of the MRI image was somewhat affected by the previously placed metal screws in Employee’s lower back area, which created “artifact and scatter,” or black spots, on the image. Based on the MRI images, Dr. Duncan concluded that there were degenerative changes at the fifth lumbar-first sacrum vertebrae (“L5-S1”) level. According to Dr. Duncan, he found no disc herniation or other evidence of an acute injury. He also found that the screws from the 1997 surgery were in place and that the SI joint fusion “looked good.” Thus, Dr. Duncan did not assign any long-term restrictions for Employee, determining that she was able to return to work.

Employee was next referred to Dr. Travis Burt, a neurosurgeon in Bristol, Tennessee, for a second opinion regarding the continuation of her lower back pain. Following his examination of Employee on October 27, 2009, Dr. Burt concluded that there was no deformity of her lumbar spine. He further concluded that she was at maximum medical improvement, had no permanent impairment, and required no work restrictions.

Despite the medical consultations with these physicians, Employee felt that her condition was not improving. Employee related that her assigned workers’ compensation nurse told her she would receive no further referrals, such that her only option was to see her primary care physician. Consequently, Employee returned to her primary care physician, who referred her to Dr. Timothy Fullagar, a neurosurgeon. Dr. Fullagar examined Employee on February 25, 2010, and ordered a computerized tomography (“CT”) scan of the right SI joint. He preliminarily diagnosed SI joint pain and right-sided radiculopathy. Dr. Fullagar ordered a discogram, however, to determine if Employee’s pain was “discogenic.” The respective test revealed an annular tear in the L5-S1 disc. Dr. Fullagar recommended surgical anterior fusion of the L5-S1 vertebrae and removal of the affected disc. He performed the procedure on August 13, 2010.

Three months following the surgery, Employee reported to Dr. Fullagar that her right leg pain had subsided and that her back pain had been reduced by seventy percent. Dr. Fullagar testified that it was difficult to relate Employee's symptoms to her work injury because no imaging studies had been performed prior to her fall. However, based upon her history of being relatively pain-free prior to July 2009, Dr. Fullagar opined that the work-related injury had caused her subsequent physical problems. He referred Employee to a pain management clinic in 2011. Dr. Fullagar testified that he last examined Employee in August 2011, placing no restrictions on her work activities at that time.

Based on Employee's reports of continuing hip pain, however, Dr. Fullagar did refer Employee to an orthopedic surgeon regarding the removal of the previously placed screws in her hip. Dr. Robert Harris performed a subsequent surgery on Employee, successfully removing the old screws from the SI joint.² Dr. Harris also removed an inflamed bursa and repaired a tear in the fascia.

On July 13, 2013, Dr. Fred Knickerbocker, an orthopedic surgeon, was selected by the parties to evaluate Employee's permanent impairment through the Medical Impairment Registry ("MIR"). See Tenn. Code Ann. §50-6-204(d)(5)-(6). He accordingly reviewed the records of Drs. Burt, Duncan, Fullagar, Kennedy, and others. Dr. Knickerbocker ultimately concluded that Employee retained a nine-percent permanent anatomical impairment to the body as a whole pursuant to the Sixth Edition of the American Medical Association Guides.

At the request of Employee's attorney, Dr. William Kennedy performed an independent medical evaluation on April 3, 2013. He also reviewed the records of Employee's previous physicians. Dr. Kennedy opined that Employee had sustained an anatomical impairment of seventeen percent to the body as a whole, which was attributable to the work-related fall of July 2009. His opinion was based upon the lumbar fusion surgery, his diagnosis of radiculopathy, and an additional finding of injury to the SI joint that required the removal of the previously placed screws. Dr. Kennedy further determined that Dr. Knickerbocker's previous impairment rating of nine percent was incorrect because it did not include a finding of radiculopathy and did not include the SI joint injury as an additional impairment, which resulted in Employee being placed in the incorrect impairment category.

² Dr. Harris's records were offered into evidence at trial by Employee, but the trial court sustained Employer's objection because they were not properly authenticated. Subsequently, the trial court permitted Dr. William Kennedy to read a portion of those records as evidence over Employer's objection. Otherwise inadmissible evidence relied upon by an expert may be admitted to assist the trier of fact in understanding the expert's opinion, but it is not substantive evidence. See *Holder v. Westgate Resorts Ltd.*, 356 S.W.3d 373, 379 (Tenn. 2011).

Dr. Kennedy elucidated that because the area of Employee's body affected by her fall would have a low blood supply, the inflammatory response and resultant pain would be delayed, explaining why Employee was able to return to work initially before her symptoms worsened. Regarding the early tests and imaging studies, Dr. Kennedy determined that the injury to Employee's SI joint was a sprain with microscopic tearing, which would not necessarily be visible on an x-ray or CT scan. Likewise, an annular tear, as later diagnosed by the discogram, is often not detected by a MRI or CT scan. Dr. Kennedy opined that the MRI images were also inconclusive due to the appearance of "scatter" from the screws. Therefore, according to Dr. Kennedy, the misdiagnosis of Employee's injury by earlier physicians was understandable. Dr. Kennedy further explained that while the scar tissue from Employee's previous injury to the SI joint had been stabilizing that joint, the scar tissue was torn by her fall.

Dr. Kennedy concluded that Employee experienced anatomical changes and exacerbation of her preexisting condition as a result of the work-related injury. According to Dr. Kennedy, Employee may require future surgery to further decrease her pain and improve her function. He recommended that Employee's activities of daily living and/or employment not require the repeated movements of bending, stooping, climbing ladders, crawling, or any other activity that would be dependent upon having pain-free mobility and a strong lumbar spine.

Employee was forty-three years old at the time the trial was conducted. Employee testified that she had dropped out of high school but later earned a General Educational Development ("GED") certificate. She had also completed a few community college classes at Northeast State in Elizabethton and Blountville. Prior to working for Employer, she had limited restaurant-related employment experience, but a significant portion of her work history included construction and maintenance positions.

Employee's job duties for Employer included a substantial amount of walking, climbing, crawling, and lifting. She testified that prior to her July 2009 injury, she performed these activities without complaint. Employee also enjoyed horseback riding, hiking, camping, fishing, swimming, traveling, and gardening. Following the injury, Employee was no longer capable of participating in those activities or performing her general household chores. Despite the medical treatment that she had undergone, Employee continued to receive pain management treatment at the time of trial. She regularly took hydrocodone, which interfered with her ability to drive. Employee related that she attempted to return to her position with Employer but was discharged because she opted to take medication for her injury at work. Employee had not worked or applied for employment since being discharged by Employer. Employee's family members corroborated her testimony regarding her limitations following the work-related injury.

Although Employee paid for her medical expenses by utilizing her husband's medical insurance, she remains responsible for all attendant co-payments. Currently, Employee receives \$770 per month in Social Security Disability Benefits. Neither Employer nor Employer's workers' compensation insurance has paid for Employee's medical treatments since February 2010, when she was treated by Dr. Burt.

Following the presentation of proof, the trial court issued its ruling from the bench. The court, *inter alia*, concluded that Employee sustained a compensable work-related injury during her fall. The court further determined that Employee was permanently and totally disabled as a result of her work-related injury. The court also attributed "high credibility" to Dr. Kennedy and found that he had rebutted Dr. Knickerbocker's impairment rating by clear and convincing evidence. The court declined to award Employee payment of her unauthorized medical expenses, however, finding that she had failed to sustain her burden of proof on that issue. The court subsequently entered a judgment in accordance with its findings.

Employer has appealed, asserting that the evidence preponderates against the trial court's finding that Employee sustained a compensable injury. In the alternative, Employer argues that the evidence preponderates against the finding of permanent total disability. Employee contends that the trial court erred by declining to award her unauthorized medical expenses and asks for monetary damages based on a frivolous appeal.

II. Issues Presented

The following issues have been presented for our review:

1. Whether the trial court erred in its determination that Employee suffered a compensable work injury.
2. Whether the trial court erred in finding Employee to be permanently and totally disabled from working at an occupation that brings her income.
3. Whether the trial court erred in finding that the independent medical examiner's medical impairment rating was rebutted by clear and convincing evidence to the contrary.
4. Whether the trial court erred in denying payment of expenses relating to Employee's unauthorized medical treatment.

5. Whether the appeal from the trial court's decision was frivolous.

III. Standard of Review

In Tennessee workers' compensation cases, this Court reviews the trial court's findings of fact *de novo*, accompanied by a presumption of correctness, unless the evidence preponderates otherwise. *See* Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2013)³; *see also* *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2006). "This standard of review requires us to examine, in depth, a trial court's findings and conclusions." *Williamson v. Baptist Hosp. of Cocke Cnty., Inc.*, 361 S.W.3d 483, 487 (Tenn. 2012) (quoting *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991)). When the trial court has heard in-court testimony, considerable deference is accorded to the trial court's findings of credibility and assessment of the weight to be given that testimony. *See Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). Indeed, where medical expert testimony is presented by deposition, we may independently assess the content of that proof in order to determine where the preponderance of the evidence lies. *See Williamson*, 361 S.W.3d at 487 (quoting *Trosper v. Armstrong Wood Prods., Inc.*, 273 S.W.3d 598, 604 (Tenn. 2008)). On questions of law, our standard of review is *de novo* with no presumption of correctness. *See Wilhelm*, 235 S.W.3d at 126. The extent of vocational disability is a question of fact to be decided by the trial judge. *See Crew v. First Source Furniture Grp.*, 259 S.W.3d 656, 664 (Tenn. 2008) ("Although workers' compensation law must be construed liberally in favor of an injured employee, it is the employee's burden to prove causation by a preponderance of the evidence.").

IV. Causation

Employer argues that the trial court erred by determining that Employee sustained a compensable work injury. In order to be eligible for workers' compensation benefits, an employee must suffer an "injury by accident . . . arising primarily out of and in the course and scope of employment" that causes the death or disablement of the employee. *See* Tenn. Code Ann. § 50-6-102(12) (Supp. 2013). Employer argues that the evidence fails to establish that Employee experienced an injury arising out of her employment. Rather, Employer argues that Employee's symptoms were the result of a preexisting degenerative disc disease. Employer's argument relies upon the testimony of Dr. Duncan, who treated Employee both before and after her work injury. His evaluation was that Employee had no permanent impairment and did not require any permanent

³ The Workers' Compensation Law was amended effective July 1, 2014, to be controlling for any claim arising from an injury occurring on or after July 1, 2014. Because Employee's injury occurred prior to July 1, 2014, the previous version of the Workers' Compensation Law controls our analysis. *See* Tenn. Code Ann. § 50-6-101 (2014).

activity restrictions as a result of her fall from the ladder. Her symptoms were, in his opinion, solely the result of her degenerative disc disease. Dr. Duncan's opinion is supported by the testimony of Dr. Burt, who reached the same conclusion after physically examining Employee and reviewing diagnostic results.

Employee relies upon the testimony of Dr. Kennedy in positing that she sustained acute injuries as a result of her fall at work. According to Employee, the acute injuries included a tear in the fascia of the bursa of her SI joint, a sprain in the SI joint, annular tear in her L5 disc, and damage to the nerves in her low back and SI joint.

In general, the causal relationship between the Employee's employment and the injury must be established by a preponderance of the expert opinions, supplemented by the lay evidence. *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d 638, 643 (Tenn. 2008). The trial court has discretion, however, to accept the opinion of one medical expert over that of another medical expert. *See 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). As this Court has previously explained in *Clark v. Nashville Mach. Elevator Co. Inc.*, 129 S.W.3d 42, 47 (Tenn. 2004):

The statutory requirements that the injury "arise out of" and occur "in the course of" the employment are not synonymous. *Sandlin v. Gentry*, 201 Tenn. 509, 300 S.W.2d 897, 901 (1957). An injury occurs "in the course of" employment if it takes place while the employee was performing a duty he or she was employed to perform. *Fink v. Caudle*, 856 S.W.2d 952, 958 (Tenn. 1993). Thus, the course of employment requirement focuses on the time, place, and circumstances of the injury. *Hill v. Eagle Bend Mfg. Inc.*, 942 S.W.2d 483, 487 (Tenn. 1997).

In contrast, "arising out of" employment refers to causation. *Id.*; *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997). An injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. *Fink*, 856 S.W.2d at 958. The mere presence of the employee at the place of injury because of the employment is not sufficient, as the injury must result from a danger or hazard peculiar to the work or be caused by a risk inherent in the nature of the work. *Thornton v. RCA Serv. Co.*, 188 Tenn. 644, 221 S.W.2d 954, 955 (1949). Thus, "an injury purely coincidental, or contemporaneous, or collateral, with the

employment . . . will not cause the injury . . . to be considered as arising out of the employment.” *Jackson v. Clark & Fay, Inc.*, 197 Tenn. 135, 270 S.W.2d 389, 390 (1954). Although causation in a workers’ compensation case cannot be based upon speculative or conjectural proof, absolute certainty is not required because medical proof can rarely be certain, and any reasonable doubt in this regard is to be construed in favor of the employee. *Hill*, 942 S.W.2d at 487. Our courts have thus consistently held that an award of benefits may properly be based upon medical testimony to the effect that the employment could or might have been the cause of the worker’s injury when, from other evidence, it can reasonably be inferred that the employment was the cause of the injury. *Id.*

In the case at bar, the evidence preponderates in favor of a determination that Employee’s job duties were physically strenuous and that she was able to perform her duties without physical problems prior to July 6, 2009. It is not disputed by either party that she fell from a ladder near the end of her work shift on that date. Likewise, there is no question that she experienced pain immediately after the fall and suffered worsening pain in the days and weeks that followed. All of Employee’s doctors agreed that she presented degenerative disc disease at the L5-S1 level of the spine, which was the cause of some of her symptoms. Although Drs. Duncan and Burt opined that there was no evidence of an acute injury, each testified that a fall could cause damage to an intervertebral disc. Dr. Fullagar, who performed surgery on Employee’s spine, opined that the fall at work caused injury to her L5-S1 disc, requiring fusion and discectomy.

It is well settled that “[a]n employer takes the employee with all pre-existing conditions and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability far greater than if she had not had the pre-existing conditions.” *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. 1996) (citing *Rogers v. Shaw* 813 S.W.2d 397, 399 (Tenn. 1991)). An employer assumes the responsibility that an employee’s preexisting condition may be aggravated by a work-related injury, which may not affect the average person. *See Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483, 488 (Tenn. 1997). As this Court has held: “There is no doubt that pain is considered a disabling injury, compensable when occurring as the result of a work-related injury.” *See Talley v. Virginia Ins. Reciprocal*, 775 S.W.2d 587, 592 (Tenn. 1989). Furthermore, when a work injury “advances the severity of the pre-existing condition, or if as a result of the pre-existing condition, the employee suffers a new, distinct injury other than increased pain, then the work injury is compensable.” *See Cloyd*, 274 S.W.3d at 645 (citing *Trosper v. Armstrong Wood Prods., Inc.*, 273 S.W.3d 598, 607 (Tenn. 2008)).

In this case, the evidence demonstrates that Employee was able to perform her job responsibilities prior to July 6, 2009. Following her fall, she was unable to perform these job duties. She was also unable to engage in social activities or household chores that she had been capable of performing prior to the fall. By reason of the injury, Employee has undergone multiple medical procedures, still needs daily pain management to address the effects of her fall, and may require further surgery in the future. Also, as a result of her work-related injury, she has been unable to obtain employment due to her inability to engage in activities that prove to be physically demanding.

Furthermore, the medical proof established that Employee suffered an aggravation of her prior pelvic fracture as a result of her fall at work. The exacerbation of her preexisting condition was not limited to increased pain; Employee actually suffered a new, distinct injury to her SI joint. Dr. Kennedy opined that both Employee's complaints of pain and the objective test findings demonstrated that Employee suffered a sprain to her SI joint as a result of the fall, as well as tearing of her scar tissue, an annular tear, inflamed bursa, and loosening of the screws from her prior pelvic repair. Upon our thorough review of the record, we conclude that the evidence does not preponderate against the trial court's finding that Employee sustained a compensable work-related injury.

V. Permanent Total Disability

In the alternative, Employer argues that the evidence preponderates against the trial court's finding that Employee was permanently and totally disabled as a result of her work-related injury. In support of this argument, Employer notes that Employee did not present evidence from a vocational consultant regarding her intellectual abilities and transferable work skills that might enable her to locate an employment opportunity within the local job market.

The inquiry as to whether an employee is permanently and totally disabled is based upon the employee's ability to return to gainful employment. *See Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000); *Davis v. Reagan*, 951 S.W.2d 766, 767 (Tenn. 1997). The determination of a permanent total disability may be based upon a variety of factors, including the "employee's skills, training, education, age, job opportunities in the immediate and surrounding communities, and the availability of work suited for an individual with that particular disability." *See Hubble v. Dyer Nursing Home*, 188 S.W.3d 525, 535-36 (Tenn. 2006); *see also Cleek*, 19 S.W.3d at 774. Furthermore, the testimony of a vocational expert is not determinative of vocational ability, but an employee's own assessment of his or her overall condition is "competent testimony and must be considered." *See Fritts v. Safety Nat. Cas. Corp.*, 163 S.W.3d

673, 680 (Tenn. 2005) (citing *Walker v. Saturn Corp.*, 986 S.W.2d 204, 208 (Tenn. 1998)); *see also Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 629 (Tenn. 1999).

In the instant action, neither Dr. Duncan, Dr. Burt, nor Dr. Fullagar assigned Employee any work-related restrictions. However, Dr. Kennedy recommended such restrictions, concluding that the other physicians “did not recognize the internal disruption of the L5 disc, and they did not recognize the matter of the pain coming from the right sacroiliac joint” Dr. Kennedy concluded that Employee suffered a seventeen-percent permanent physical impairment to the whole person that was attributable to the work-related fall from the ladder in July 2009. The trial court found Dr. Kennedy’s testimony to be “high[ly]” credible.

Moreover, Employee testified as to the change in her physical abilities following the work-related injury, which testimony was corroborated by her family members. While Employee had earned her GED and had completed several courses of study at local community colleges, her work history primarily included tasks that required strenuous physical labor within the construction and maintenance industries. Further, Dr. Fullagar referred her for pain management, and she continued to receive such treatment at the time of trial. This pain management required the use of medications that impeded Employee’s ability to drive and perform other tasks.

An employee is permanently and totally disabled when her work injury “totally incapacitates the employee from working at an occupation that brings the employee an income.” Tenn. Code Ann. § 50-6-207(4)(B) (Supp. 2013); *see also Cleek*, 19 S.W.3d at 774. In the case at bar, the trial court credited Employee’s testimony that she was unable to perform the types of jobs she had maintained prior to the work injury of July 2009. Employee further testified that the most mundane activities, such as sitting to watch television, had become physically uncomfortable. Further, as the trial court noted, Employee had no job skills related to sedentary employment. Employee’s use of daily pain medication also limited her ability to drive and caused her to experience mental frustration and lack of focus. We conclude that the evidence does not preponderate against the trial court’s finding that Employee is permanently and totally disabled.

Employer contends that the trial court’s failure to consider Employee’s ability to obtain other gainful employment precluded the court’s determination of permanent and total disability. This contention is based upon Employer’s interpretation that the trial court evaluated Employee’s disability solely on her ability to return to physical labor and did not consider more sedentary employment. As the trial court found, however, Employee possessed no marketable skills related to sedentary employment. The trial court stated:

She has limited sedentary work-type skills. She testified that she is not a proficient typist. She does not have a work history of doing secretarial-type work. She does not have a work history of having skills in particular professions other than manual labor.

An employee's ability to return to gainful employment is based upon a variety of factors, including the "employee's skills, training, education, age, job opportunities in the immediate and surrounding communities, and the availability of work suited for an individual with that particular disability." *See Hubble*, 188 S.W.3d at 535-36. We conclude that the trial court properly considered the applicable factors.

Finally, Employer contends that Employee is not entitled to receive permanent total disability benefits because she made a meaningful return to work. This contention appears to be based on Employee's initial, unsuccessful attempt to return to light duty work shortly after her injury and her later attempt to return to work that resulted with her termination. It is well settled that an employee does not experience a meaningful return to work if she returns but later resigns for reasons related to her injury. *See Tryon v. Saturn Corp.*, 254 S.W.3d 321, 329 (Tenn. 2008). The factors for determining a meaningful return to work are: (1) whether the injury rendered the employee unable to perform her job duties; (2) whether the employer refused to accommodate work restrictions; and (3) whether the injury caused too much pain to permit the employee to continue to work. *Id.* Clearly, in the case at bar, Employee was unable to perform the duties of her job following her injury. She also required the use of pain medication, which Employer refused to allow her to take during work hours. Upon our careful review of the record, we conclude that Employee did not experience a meaningful return to work.

VI. Medical Impairment Rating

As previously stated, the parties requested an independent medical examiner to determine the degree of Employee's medical impairment pursuant to Tennessee Code Annotated § 50-6-204(d)(5). Dr. Knickerbocker performed this examination, rating Employee's degree of impairment at nine percent. Employer asserts that the trial court erred by finding that Dr. Knickerbocker's impairment rating of nine percent had been rebutted by clear and convincing evidence and by adopting Dr. Kennedy's impairment rating of seventeen percent.

Tennessee Code Annotated § 50-6-204(d)(5) provides that 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.” Clear and convincing evidence has been defined as “evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *See Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992). Further, as this Court has previously explained, “A straightforward interpretation of this standard favors, or even requires, the presentation of affirmative evidence that an MIR physician had used an incorrect method or an inappropriate interpretation of the AMA Guides to overcome the statutory presumption.” *See Tuten v. Johnson Controls, Inc.*, No. W2009-01426-SC-WCM-WC, 2010 WL 3363609 at *4 (Tenn. Workers Comp. Panel Aug. 25, 2010).

In this case, Dr. Kennedy testified that he disagreed with Dr. Knickerbocker’s impairment rating because Dr. Knickerbocker did not consider or include any injury to Employee’s right SI joint. Further, Dr. Knickerbocker did not include an allowance for Employee’s radiculopathy. According to Dr. Kennedy, Dr. Knickerbocker thus placed Employee in the wrong class or category, resulting in a misapplication of the AMA Guides. With regard to this issue, the trial court stated as follows:

Dr. Kennedy evaluated the employee on April 3, 2013. He is very familiar with lumbar and pelvis injuries. He’s an orthopedic, has been practicing since 1970. He considered the 1997 injury, the pain that she reported in 2012 and 2003 (sic), the neck injury, fusion that occurred in 2006. The records, essentially all the medical records, MRIs, CT scans, discograms, all imaging, medical reports or computer-generated images of those tests related to the 2009 claims of injury.

* * *

Dr. Kennedy and Dr. Knickerbocker were similar in their take on what type of injury and that she suffered an injury. The court finds that Dr. Kennedy was correct, though, that the category used under the 6th Edition of the Guides to Permanent Impairment by Dr. Knickerbocker were incorrect, that in light of what we know, that Dr. Kennedy found of the symptoms with the right SI joint, that these indicated that the wrong category was applied. The court is convinced, by clear and convincing evidence, that Dr. Kennedy’s evaluation of the medical impairment is superior and it corrects the shortcomings of Dr. Knickerbocker’s.

Following a thorough review of the evidence in this case, we conclude that the trial court’s respective findings were correct. Dr. Kennedy, whom the trial court found highly credible, testified that Dr. Knickerbocker did not consider all of Employee’s injuries when assigning her impairment rating. As a result, Dr.

Knickerbocker incorrectly utilized an improper category from the AMA Guides. As previously stated, this affirmative evidence that “an MIR physician had used an incorrect method or an inappropriate interpretation of the AMA Guides” is sufficient to overcome the statutory presumption. *See Tuten*, 2010 WL 3363609 at *4. We therefore affirm the trial court’s adoption of Dr. Kennedy’s seventeen-percent impairment rating.

VII. Unauthorized Medical Treatment

Employee asserts that the trial court erred in failing to award her payment of her “unauthorized” medical expenses. Tennessee Code Annotated § 50-6-204 requires an employee to consult her employer before incurring medical expenses if she expects the employer to be liable for those expenses. *See Dorris*, 764 S.W.2d at 541. We have held that an employer may be liable for an injured employee’s unauthorized medical expenses when the employee demonstrates that the treatment was reasonable and medically necessary. *See Moore v. Town of Collierville*, 124 S.W.3d 93, 98 (Tenn. 2004).

Here, the trial court declined to order Employer to pay for the unauthorized treatment provided by Drs. Fullagar and Harris. The court stated in pertinent part:

The court has to look at the total circumstances surrounding the actions to determine whether the employee’s actions were justified. The burden is on the employee to give the court the reasons why she did what she did. Number one, the record is silent that she sought help from the Tennessee Department of Labor to obtain medical benefits. The court file in Chancery Court reflects she filed no pleadings seeking relief from this court to order medical treatment. The only evidence that the court heard was a general expression with a dissatisfaction of the outcome of her treating physician’s medical care that was expressed to the nurse. That’s it. The employee has simply failed to convince the court, under the totality of the circumstances, that she made a significant effort to get the employer to provide those. The record is just silent. Therefore, she is not entitled to recover her unauthorized medical expenses.

Employee testified that she spoke with her nurse case manager and also to an unidentified person associated with Employer’s workers’ compensation insurer “about wanting more medical treatment.” Employee further testified that she was informed that if pain persisted, she should contact her primary care physician. Employee contends that she made the necessary effort to consult her Employer before seeking treatment from Dr. Fullagar. The trial court, however, chose not to credit Employee’s testimony regarding

additional treatment, stating that it was not convinced that Employee sought authorization for further treatment from Employer. As previously noted, considerable deference is accorded to the trial court's findings of credibility and assessment of the weight to be given to a witness's testimony. *See Whirlpool Corp.*, 69 S.W.3d at 167. We conclude that the evidence does not preponderate against the trial court's denial of an award of unauthorized medical expenses.

VIII. Frivolous Appeal

Finally, Employee asserts that Employer's appeal is frivolous and seeks an award of liquidated damages pursuant to Tennessee Code Annotated § 50-6-225(h) (Supp. 2013). Tennessee Code Annotated § 50-6-225(h) provides that when "the appeal of an employer or insurer is frivolous, or taken for purposes of delay, a penalty may be assessed by the court, without remand, against the appellant for a liquidated amount."

A frivolous appeal is one that is "devoid of merit such that it had no reasonable chance of succeeding." *See Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 341 (Tenn. 2010) (citing *Clark*, 129 S.W.3d at 50 n.4 (Tenn. 2004)). Of course, "care must be taken by the courts to avoid discouraging legitimate appeals." *Id.* at 342. Thus, "imposing a penalty for a frivolous appeal is a remedy which is to be used only in obvious cases of frivolity and should not be asserted lightly or granted unless clearly applicable." *See id.* We find that this appeal is not frivolous and therefore decline Employee's request for an award of damages.

IX. Conclusion

For the reasons stated above, the judgment of the trial court is affirmed. Costs on appeal are taxed to Appellants, Studsvik, Inc., and AIG Claim Services. This case is remanded to the trial court for enforcement of the trial court's judgment and collection of costs assessed below.

THOMAS R. FRIERSON II, JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

SAMANTHA ADKINS v. STUDSVIK, INC., ET AL.

**Chancery Court for Carter County
No. 28598**

No. E2014-00444-SC-WCM-WC – Filed July 21, 2015

Judgment Order

This case is before the Court upon the motion for review filed by Studsvik, Inc., and AIG Claim Services pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), 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 Studsvik, Inc., and AIG Claim Services, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM
Gary R. Wade, J., not participating