IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
April 22, 2013 Session

PAUL E. ARNETT v. MCMINN COUNTY GOVERNMENT ET AL.

Appeal from the Chancery Court for McMinn County
No. 2011CV61 Jerri S. Bryant, Chancellor

No. E2012-01356-WC-R3-WC-MAILED-JUNE 6, 2013 / FILED-JULY 9, 2013

The employee, a truck driver for McMinn County, suffered injuries in a job-related accident. Later, he filed a claim for workers' compensation benefits claiming that he had been permanently and totally disabled as a result of his injuries. The employer acknowledged that the employee's shoulder and leg injuries were compensable but argued that his spinal injuries were not work related. Because a physician who performed two spinal surgeries on the employee was not listed on the employer's panel of medical providers, the employer denied responsibility for the associated medical costs. While ordering that all of the employee's injuries were compensable and granting permanent total disability benefits, the trial court did not require the employer to pay the medical costs incident to the second surgery. In this appeal, the employer maintains that the trial court erred by holding that the employee was entitled to recover either benefits or the cost of medical treatment for his spinal injuries. In response, the employee argues that the trial court erred by failing to award payment of the medical costs incident to the second surgery. The appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of facts and conclusions of law pursuant to Tennessee Supreme Court Rule 51. The judgment is affirmed, but modified to require the employer to pay the medical costs incident to the second surgery. The cause is remanded for an assessment of the medical expenses related to the second surgery.

Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2012) Appeal as of Right; Judgment of the Trial Court Affirmed as Modified; Case Remanded

GARY R. WADE, C.J., delivered the opinion of the Court, in which E. RILEY ANDERSON, SP. J., and JON KERRY BLACKWOOD, SR. J., joined.

Stuart Fawcett James, Chattanooga, Tennessee, for the appellants, McMinn County Government and Tennessee Risk Management Trust.

Charles C. Guinn, Jr. and H. Chris Trew, Athens, Tennessee, for the appellee, Paul E. Arnett.

OPINION

I. Facts and Procedural Background

Paul Arnett (the "Employee") worked for the McMinn County Government (the "Employer") as a dump truck driver. On September 15, 2009, the Employee was spreading gravel on a rural road when the ground beneath the truck gave way. The Employee opened the door and unfastened his seatbelt in an effort to jump out of the vehicle before it rolled over. When the momentum of the truck prevented his escape, he was tossed about the cab and knocked unconscious. The Employee was removed from the truck, and even though he had cuts from the broken glass, he soon regained consciousness and was able to drive to his residence after the accident. Although he complained of pain in his back, neck, head, shoulder, and ankle, the Employee reported to work the next morning. When he backed into another truck because he was unable to turn his head, his supervisor took him to the emergency room at a hospital in Athens, where he was diagnosed with herniated discs in his neck and back, a concussion, a torn rotator cuff, and a broken ankle. The Employee received care from a number of physicians and underwent several procedures, including a scheduled shoulder surgery that was aborted due to an anesthesiological mishap and that culminated in two spinal surgeries—the first of which consisted of back surgery on the thoracic portion of his spine and the second of which involved neck surgery on the cervical portion of his spine.

After a waiver of the benefit review conference the Employee filed suit, seeking medical costs, temporary total disability benefits, and an award of permanent disability. In response, the Employer admitted that the Employee had suffered work-related injuries to his shoulder and ankle, but denied that the injuries to the thoracic and cervical areas of the spine were related to the accident. The Employer also denied responsibility for the medical cost of the surgeries, contending that the Employee had elected to be treated by a physician without proper authorization.

At trial, Andrew Ray Moss, the general foreman of the McMinn County Highway Department, testified that the Employee had been employed by his department for five years prior to the accident. He acknowledged that the Employee had never missed a day of work and, prior to his accident, had never complained of dizziness, shoulder, ankle, back, or neck problems, or any other physical limitation. Moss described the Employee as "an excellent employee," who in addition to driving a truck sometimes performed "a little manual work," such as cleaning ditches or trimming trees.

The Employee, born in 1950 and sixty-one years of age at the time of trial, testified that after his secondary education, he completed a seminary program at Southwestern Theological Seminary. He stated that afterward, he served as a director of music and a

replacement pastor, but eventually accepted employment with an oil company owned by his father-in-law. He worked there for thirty-seven years. During the course of his employment, he delivered oil and gas, hauled fuel in an eighteen-wheeler, performed maintenance on all equipment, and, for a short period of time, operated a convenience store. The Employee testified that he worked principally as a dump truck driver for the Employer, occasionally performing chores with a shovel or a chainsaw. He estimated that the truck he drove weighed approximately 26,000 pounds when loaded with gravel. The Employee described himself as physically active prior to the accident, walking during his lunch break, hiking in the mountains, putting up hay, feeding cattle, mowing lawns, and picking up aluminum cans for recycling purposes. He related that he also regularly rode a motorcycle as a member of a Christian organization.

The Employee testified that on the date of his injury he was spreading gravel on a narrow road when the ground underneath began to give away. He recalled that when he looked into the side view mirror and saw "the chipper," who operated the tailgate in the back, jump off the truck, he opened the door, unbuckled his seatbelt, and was attempting to leap from the cab when the door slammed back on him and the truck tumbled to its side some ten feet below the roadway. The Employee testified that when he regained consciousness, his pants and shirt were torn off and he had cuts from the broken glass. He recalled that he was able to drive home and bathe, but that on the following morning he had back pain, his ankle was swollen, and his shoulder hurt "real bad." Although he could not turn his neck, he reported for work. When he backed into another truck, however, his foreman, Sherman Williams, decided to take him to the local emergency room, where he was diagnosed with several herniated discs, a concussion, a torn rotator cuff, and a broken ankle.

The Employee chose Dr. Michael Casey, an orthopedic surgeon, from a panel of five physicians offered by his Employer, and he was treated for his ankle and shoulder injuries. He testified that he stayed in a boot for twelve weeks but was unable to use crutches because of his shoulder injury. The Employee stated that Dr. Casey first referred him to a physical therapist, who indicated that he needed shoulder surgery, not therapy, and so Dr. Casey, some three months after the accident, scheduled the surgery. The Employee recalled complaining about his neck and back to his nurse case manager, Cindy Crumley, who eventually sent him to Dr. Bruce LeForce for an examination. Dr. LeForce determined that the Employee had five herniated discs, but made no recommendation for back or neck surgery, and referred him back to Dr. Casey, who again recommended shoulder surgery. The Employee stated that he was conscious when, prior to the shoulder surgery, the nerve block anesthesia was mistakenly injected in the wrong area, causing paralysis. He was unable to breathe, lost consciousness, and was intubated and placed on a ventilator. The Employee testified that neither Dr. Casey nor the anesthesiologist talked to him after the mishap and that a different physician was called in to explain what had occurred. He testified that after the aborted shoulder surgery

he suffered from persistent dizziness, back and neck pain, lack of mobility, and loss of control over both his bladder and bowels. The shoulder surgery was never rescheduled. He was then referred by Nurse Crumley to Dr. Chiles, a urologist, who removed a tumor from his bladder, which was not related to the accident, but was unable to resolve the incontinence. According to the Employee, Dr. Chiles referred him to Dr. Todd Abel, a neurosurgeon with Neurosurgical Associates, P.C., in Knoxville. Dr. Abel ordered magnetic resonance imaging, discovered a compression in the thoracic area of the Employee's spine, and, concerned about the possibility of paralysis, recommended surgery as soon as possible.

The Employee admitted that some eleven days prior to the surgery, he learned that the Employer had elected not to include Dr. Abel among the list of authorized physicians and had offered an alternative panel of providers, which included orthopedic surgeons but no neurosurgeons. The Employee explained that because his surgery had already been scheduled, because he feared delaying the surgery any longer, and because the Employer had not included a neurosurgeon on the panel, he chose to proceed over the Employer's objection. According to the Employee, the thoracic surgery by Dr. Abel completely resolved his bladder and bowel incontinence and relieved some of the numbness in his legs, but he continued to have pain, dizziness, and other symptoms related to his spinal condition. By that time, he regularly used a wheelchair. The Employee stated that Dr. Abel then scheduled a second surgery on the cervical area, which the Employer also refused to approve.[1] After the second surgery, which took place some three months after the first, the Employee felt less pain in his neck but continued to experience a limited range of motion and other symptoms. Following the second surgery, the Employee continued under the care of Dr. Abel.

Tricia Ann Arnett, who had been married to the Employee for forty-two years at the time of trial, testified that prior to his accident he was physically active and never complained about any pain in his neck or back. She stated that since the mistaken injection by the anesthesiologist, the Employee, who is right-handed, had to eat with his left hand and required assistance when he bathed and moved about their residence. Ms. Arnett also testified that the Employee had never before had any problems with his bladder or his bowels. She stated that he began to use a wheelchair when he broke his ankle because his shoulder injury precluded the use of crutches.

Dr. Chris Maynard, an internal medicine specialist, testified by deposition. Dr. Maynard, who had served as the Employee's primary care physician since March of 2004, stated that he examined the Employee two days after the 2009 accident. He recalled that later, when the Employee complained of severe dizziness and incontinence and reported pain,

[1] The Employee's heath insurance company, BlueCross BlueShield of Tennessee, Inc., approved both the first and second surgeries performed by Dr. Abel.

numbness, and loss of function in his right upper extremity, he recommended another orthopedic and neurological evaluation. Dr. Maynard remarked that he suspected a spinal cord compression, which would require immediate attention. Dr. Maynard, who was aware of the aborted shoulder surgery, confirmed that "the anesthetic agent . . . injected into the cerebral spinal fluid . . . caused paralysis, including respiratory depression," and that Dr. Chiles, the urologist, had eventually referred the Employee to Dr. Abel. Based on his review of all the Employee's medical records prior to his testimony, Dr. Maynard confirmed that his persistence in seeking another evaluation was helpful in that Dr. Abel diagnosed the spinal cord compression when other physicians had not. Dr. Maynard specifically recalled that in August of 2010, the Employee, unable to walk, began to use a wheelchair, and he testified that he believed that the wheelchair was necessary. In Dr. Maynard's opinion, all of the Employee's symptoms were consistent with spinal cord compression. Because he also detected a change in the Employee's emotional state during the course of his treatment, he referred him to a psychiatrist for treatment. It was his further opinion that any delay in the thoracic spinal surgery could have resulted in "complete paralysis." He concluded that all of the Employee's medical issues, aside from the bladder tumor removed by Dr. Chiles, were related to the September 15, 2009 accident. When asked whether the Employee qualified as a malingerer or made up any of the symptoms, Dr. Maynard answered, "Absolutely not."

Dr. Abel also testified by deposition. He found the Employee's most pressing issue to be a disc herniation in the lower thoracic spine, which had caused a pinching of the spinal cord. He believed that absent surgery, the condition would have eventually caused partial paralysis from the waist down. It was his opinion that surgery in the thoracic area, while not a "true emergency," needed to take place as soon as possible. Dr. Abel testified that after the surgery in September of 2010, the Employee received complete relief from his incontinence, but continued to experience weakness, numbness, and tingling in the arms and legs and degeneration in the neck. He testified that he performed a second surgery on the cervical portion of the spine in December of 2010, removing the four lowest discs in the neck and placing a titanium mesh spacer in their place. Dr. Abel recalled that he also removed all of the bone spurs which had pinched the nerves of the Employee's spinal column. Dr. Abel stated that, with a "reasonable degree of medical certainty," he had concluded that "the accident aggravated a pre-existing condition of overall degenerative disease in the spine and directly led to the two surgical interventions." He testified that the Employee had reached maximum medical improvement in September of 2011, but believed the Employee would continue to have significant difficulties such as numbness in his arms and hands. Using the American Medical Association Guidelines, Sixth Edition, Dr. Abel concluded that the Employee had a 35% disability for multiple cervical levels with radiculopathy, 29% thoracic disc herniation with a residual disc herniation of 9%, and another 5% due to continuing bladder, bowel, and sexual dysfunction, or a whole person impairment of 64%.

Dr. Timothy Strait, a Chattanooga physician specializing in neurological surgery, performed an independent medical evaluation of the Employee on behalf of the Employer. Dr. Strait, who also testified by deposition, confirmed that he had reviewed the medical records of the Employee and examined him, focusing his attention on the neck and lower back, in December of 2011. Dr. Strait stated that the Employee, who arrived in a wheelchair, was able to walk without any "glaringly abnormal" difficulties and exhibited normal strength in his arms and legs.[2] While acknowledging that a four-level fusion would naturally have a "significant impact" on the Employee, Dr. Strait stated that he could not find any evidence of a pinched nerve or spinal cord compression and inferred that the back and neck surgeries were for pain. It was his belief that the condition of the Employee's spinal column was "the result of wear and tear." When asked whether his examination indicated any risk of paralysis, Dr. Strait conceded that the Employee did have some narrowing in the thoracic area, "which certainly had the potential of causing cord compression . . . [a]t some point"; however, he expressed the view that the truck accident did not contribute to the Employee's spinal conditions.

On cross-examination, Dr. Strait acknowledged that the Employee had disc protrusion and confessed his unfamiliarity with his medical history, such as his complaints of numbness and pain in his extremities, which would indicate pinched nerves or pressure on the spinal column. He also acknowledged that the surgery on the cervical spine may have been necessary and described the thoracic spinal surgery as "not unnecessary." Dr. Strait further testified as follows:

> Someone has that pre-existing distortion of their anatomy from wear and tear and then they have an injury. And then after the injury they have an examination that indicates that they've got neurological involvement[, t]hen I think that is clearly a situation where an accident has exacerbated a pre-existing condition. But just when someone has pain, you're making a big leap saying, well, then it's got to be from the [spinal conditions].

Dr. Strait continued, "I can't offhand recall what the [Employee] was telling Dr. Abel at that time," but conceded that if the Employee was asymptomatic before the accident and afterward experienced incontinence and problems with his legs, it would appear that the accident had aggravated a preexisting condition. He conceded that the Employee would naturally have permanent impairment as a result of the spinal surgical procedures.

Dr. Edward Workman, a psychiatrist, had also examined the Employee at the

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[2] Both the Employee and his wife emphatically denied Dr. Strait's assertion that the Employee was able to get out of his wheelchair during the examination.

Employer's behest, and his office notes were made an exhibit at trial. Dr. Workman diagnosed the Employee with an adjustment disorder with mixed symptoms and expressed the belief that the Employee had exaggerated his pain and other symptoms. He described the Employee as having minimal skill in coping with the effects of his injuries. It was his opinion that the Employee experienced symptoms of depression and had limited stress tolerance skills and, therefore, was a poor candidate for pain management or a full recovery. Dr. Workman recommended that the Employee, who, he said, had exhibited "a history of hostility to some of his health providers," be referred to a local mental health center for treatment and a "primary care physician with whom he had a good relationship."

After specifically accrediting the testimony of the Employee and his wife, the trial court found that the Employee was "a good employee" who "enjoyed working" and "want[ed] to continue work." The trial court attributed "much more weight" to the testimony of Dr. Abel than Dr. Strait and found that the spinal injuries were work related. The trial court found that the initial thoracic spinal surgery was urgent and, therefore, the responsibility of the Employer, but ruled that the second surgery on the cervical area of the spine was not compensable because the Employer had timely offered an alternative panel of physicians. After determining that the "wreck caused [the Employee's] previous degenerative [spinal] disc issues to become symptomatic," and caused a rotator cuff tear and a broken ankle, the trial court found the Employee to be permanently and totally disabled and awarded benefits accordingly, including future medical benefits.[3] In making that assessment, the trial court emphasized in particular the spinal surgical procedures and the complications caused when "[the anesthetic agent] was [mistakenly] injected in his spinal canal aborting the [shoulder] surgery."

In this appeal, the Employer argues that the trial court erred by holding that the Employee's spinal injuries were compensable under the Tennessee Workers' Compensation Law, particularly because the Employee did not receive authorization for either procedure. The Employer further contends that the Employee is not entitled to permanent and total disability benefits. In response, the Employee submits that the trial court properly found that the dump truck accident aggravated preexisting conditions to his cervical and thoracic spine,

[3] In a detailed opinion, the trial court awarded a judgment of $118,709.76, representing 328 weeks of workers' compensation benefits at the rate of $361.92 per week through December 9, 2016, the date that the Employee becomes eligible for the Old Age Insurance Benefit Program under the Social Security Act. Pursuant to Tennessee Code Annotated section 50-6-207(4)(A)(ii) (2008), the trial court ordered 100 weeks of permanent total disability, computed to a lump sum in the amount of $36,192, and an additional ninety-one weeks of permanent total disability, computed to a lump sum in the amount of $32,934.72, representing the Employee's accrued benefits from the date of the last payment of temporary total benefits on August 17, 2010 through the date of the judgment. The trial court also awarded discretionary costs in the sum of $1,597.30, representing medical proof deposition fees and court reporter expenses.

thereby warranting the award of workers' compensation benefits. The Employee further argues, however, that the trial court erred by denying expenses related to his second spinal surgery.

II. 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. Tenn. Code Ann. § 50-6-225(e)(2) (2008 & Supp. 2012). "This standard of review requires us to examine, in depth, a trial court's factual 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 judge has had the opportunity to observe the witness' demeanor and to hear in-court testimony, considerable deference must be afforded any credibility or factual determinations. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008) (citing Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002)). A reviewing court may, however, draw its own conclusions about the weight and credibility to be given to expert medical testimony that is presented by deposition. Crew v. First Source Furniture Grp., 259 S.W.3d 656, 665 (Tenn. 2008). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007) (citing Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003)).

III. Analysis

A. Spinal Injuries

As indicated, the Employer maintains that the evidence preponderates against the trial court's finding that the Employee's spinal injuries were compensable and further argues that the accident did not cause a permanent, total disability. In response, the Employee asserts that the evidence clearly establishes that the accident advanced the severity of his preexisting back and neck condition and that the trial court properly concluded that he is permanently and totally disabled.

An injury must both "arise out of" and occur "in the course of" employment in order to qualify as a compensable workers' compensation claim. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). Our supreme court has explained these requirements as follows:

> The phrase "in the course of" refers to time, place, and circumstances, and "arising out of" refers to cause or origin. [A]n injury by accident to an employee is in the course of employment if it occurred while he was performing a duty he was employed to do; and it is an injury arising out of employment if caused by a hazard incident to such employment. Generally,

> an injury arises out of and is in the course and scope of employment if it has a rational connection to the work and occurs while the employee is engaged in the duties of his employment.

Id. (alteration in original) (citations and internal quotation marks omitted). "Except in the most obvious, simple and routine cases," a claimant must establish by expert medical evidence the causal relationship between the claimed injury and the employment activity. Id. That relationship must be established by the preponderance of the expert medical testimony, as supplemented by the lay evidence. Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 643 (Tenn. 2008). "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 . . . ." Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004); see also Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 354 (Tenn. 2006). All reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. Phillips v. A&H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004).

Further, an employer takes an employee "as is" and assumes the responsibility for any work-related injury which might not affect an otherwise healthy person, but which aggravates a preexisting injury. Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 488 (Tenn. 1997). In consequence, an employer is "liable for disability resulting from injuries sustained by an employee arising out of and in the course of his employment even though it aggravates a previous condition with resulting disability far greater than otherwise would have been the case." Baxter v. Smith, 364 S.W.2d 936, 942-43 (Tenn. 1962).

When there is conflicting medical testimony, the trial judge must choose which view to accredit. In Orman, the supreme court provided several factors for trial courts to consider in making this determination, including "the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts." 803 S.W.2d at 676.

In Trosper v. Armstrong Wood Products, 273 S.W.3d 598 (Tenn. 2008), our supreme court addressed the issue of whether the medical testimony established the aggravation of an employee's preexisting condition. Trosper began working for Armstrong, a manufacturer of flooring products, in 1993. Id. at 600-01. In 1997 and 1998, he sorted and stacked heavy pieces of lumber. Id. at 601. During this time, he developed pain in both of his hands and was referred to a physician. Id. In 2000 or 2001, he moved to a job that involved repeatedly lifting heavy wire-handled buckets of chemicals to shoulder level. Id. In 2004, Trosper was diagnosed with bilateral carpometacarpal osteoarthritis, he had two fusions in his hands, and retired after the second surgery. Id. Because there was medical testimony that his work

permanently aggravated and advanced the preexisting osteoarthritic condition in both of his thumbs, which ultimately required the surgery, the trial court awarded disability benefits. Id. at 603. On appeal, the supreme court affirmed the award of benefits based on its adoption of the following rule:

> [T]he employee does not suffer a compensable injury where the work activity aggravates the pre-existing condition merely by increasing the pain. However, if the 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.

Id. at 607.

In this instance, the Employee's primary care physician, Dr. Maynard, continued to see the Employee throughout the course of treatment by Dr. Casey, Dr. Chiles, and other physicians. Dr. Maynard suspected spinal cord compression as a result of the accident and insisted upon further evaluation when the symptoms did not improve. Upon learning that the Employee was in considerable pain and so dizzy that he "was falling everywhere," Dr. Maynard recommended that the Employee use a wheelchair. Dr. Maynard believed that the thoracic spinal surgery performed by Dr. Abel was urgent, and that without the procedure the Employee faced a significant risk of paralysis. He further believed that both the thoracic and cervical surgeries were a direct result of the accident and necessary for the best possible recovery. Aware of the complications due to the mishandled anesthesia, he diagnosed organic brain injury and an aggravation of the Employee's back and neck condition as consequences of the mishap. Dr. Maynard detected a deterioration of the Employee's emotional state after the accident and suggested psychiatric treatment, but he categorically denied that the Employee was a malingerer.

The trial court, of course, observed the demeanor of the Employee and his wife first hand, heard their testimony, and accepted as true their account of the accident, the injuries he sustained, and the course of medical treatment. It is noteworthy that the Employee's foreman, Andrew Ray Moss, testified that the Employee had neither missed a day of work nor complained of neck or back problems prior to the accident and was an "excellent employee." Moreover, after reviewing the medical depositions, office notes, and other records pertaining to the treatment of the Employee, we agree that the greater weight of the testimony established that the work injury advanced the severity of his preexisting condition. In our view, Dr. Maynard and Dr. Abel provided far more insight regarding the medical condition of the Employee than Dr. Strait, Dr. Workman, or any of the other treating physicians authorized by the Employer. Because the testimony of Dr. Maynard and Dr. Abel established that the accident aggravated the preexisting neck and back condition of the

Employee, which had been asymptomatic beforehand, and served as the root cause of his other injuries, it is our further view that the trial court properly held the vocational disability to be permanent and total. The Employee, who was physically active before the accident, had reached maximum recovery by the time of trial and had continued to use a wheelchair at the time of trial. His right shoulder injury requires him to use his left hand for eating, and he needs assistance when bathing. No corrective shoulder surgery has taken place. Now in his sixties, the Employee is an unlikely candidate for future employment.

A recent decision addressing permanent total disability is Hubble v. Dyer Nursing Home, in which our supreme court made the following observations:

> The determination of permanent total disability is to be based on a variety of factors such that a complete picture of an individual's ability to return to gainful employment is presented to the [c]ourt. Such factors include 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. Though this assessment is most often made and presented at trial by a vocational expert, it is well settled that despite the existence or absence of expert testimony, an employee's own assessment of his or her overall physical condition, including the ability or inability to return to gainful employment, is competent testimony that should be considered.

188 S.W.3d 525, 535-36 (Tenn. 2006) (citations and internal quotation marks omitted). By these guidelines and by virtue of the compensability of the spinal injuries, the evidence supports the trial court's finding that the Employee qualified as permanently and totally disabled.

B. The Costs of the Spinal Surgeries

A second issue is whether the Employer should have been required to pay for the surgeries to the Employee's neck and back. The statutory guidelines pertinent to this issue provide as follows:

> (A) . . . [T]he employer shall designate a group of three (3) or more reputable physicians or surgeons not associated together in practice, if available in that community, from which the injured employee shall have the privilege of selecting the operating surgeon and the attending physician; and provided, further, that the liability of the employer for the services rendered the employee shall be limited to the charges that are established in the applicable medical fee schedule adopted pursuant to this section.

. . . .

(C) If the injury or illness requires the treatment of a physician or surgeon who practices orthopedic or neuroscience medicine, then the employer may appoint a panel of physicians or surgeons practicing orthopedic or neuroscience medicine required to be designated pursuant to subdivision (a)(4)(A) consisting of five (5) physicians, with no more than four (4) physicians affiliated in practice.

(D) In circumstances where an employee is offered a treating panel as described in subdivision (a)(4)(C), the injured employee shall be entitled to have a second opinion on the issue of surgery, impairment, and a diagnosis from that same panel of physicians selected by the employer.

(E) The employer shall provide the applicable panel of physicians to the employee in writing on a form prescribed by the division, and the employee shall document in writing the physician the employee has selected and the employee shall sign and date the prescribed form.

Tenn. Code Ann. § 50-6-204(a)(4).

As a general rule, an employee should not incur medical expenses without first giving the employer a reasonable opportunity to furnish the services; otherwise, the employee is responsible for the costs. 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 94.02[3] (2009) [hereinafter Larson's]. An arbitrary change of physicians without the consent of the employer is not permissible. Id. The record here indicates that the Employee received a panel of physicians from his Employer, from which he selected Dr. Casey. Dr. Casey did not suggest surgery to the back or neck, and it appears that a second opinion from Dr. LeForce supported his view. The symptoms of the Employee did not improve, however, and instead got worse, especially after the aborted shoulder surgery. Dr. Casey eventually referred the Employee to Dr. Chiles, who, following an unsuccessful attempt to alleviate the Employee's incontinence, referred the Employee to Dr. Abel, who performed the two surgeries on the Employee's spine.

As indicated, the trial court directed the Employer to pay for the first surgery, which related to the thoracic spine, because of its urgency, but denied the claim for the costs of the second surgery, which related to the cervical spine, because the Employer had offered alternative physicians. While the Employer has argued that neither the thoracic nor the cervical spinal surgery was related to the accident and that it should not be held responsible for the associated medical costs, the Employee argues that the trial court erred by failing to

require the Employer to pay for the second surgery as well as the first, relying on the holding in Goodman v. Oliver Springs Mining Co., 595 S.W.2d 805 (Tenn. 1980).

In Goodman, the employee went to his family physician because he believed that he had "a bad case of the flu." Id. at 808. After an examination of the employee, his treating physician made a diagnosis of pneumoconiosis, a work-related condition. Id. at 807-08. While the employer declined to authorize continued treatment by the physician who made the diagnosis, it offered a panel of three other physicians; however, none of the physicians on the panel "were ready, able and willing to afford appropriate treatment." Id. at 807. Our supreme court held that despite the statutory requirement for the employee to select among the panel of physicians offered by the employer, "under some circumstances an employee is justified in engaging his own physician without consulting his employer." Id. (citing Harris v. Kroger Co., 567 S.W.2d 162 (Tenn. 1978); Rice Bottling Co. v. Humphreys, 372 S.W.2d 170 (Tenn. 1963)). While acknowledging that the employee typically had the duty to consult with one of the designated physicians and, if dissatisfied with the initial selection, had to either seek court approval or bear his own expenses, the court allowed recovery. Id. at 808-09. Although Goodman is distinguishable on the facts in that none of the three physicians on the panel in that case were readily available to treat the employee, language appearing in the opinion, which quoted a prior version of the Larson's treatise, is helpful to our analysis: "[I]f the employee has once justifiably engaged a doctor of his own initiative, a belated attempt by the employer to offer a doctor chosen by the employer will not cut off the right of the employee to continue with the employee's doctor." Id. at 808. The court further pointed out in Goodman that the employer had "asserted no basis for their desire that the [employee] change physicians other than their contention that it is their statutory privilege. In fact, a change in physicians would only cause the [employer] to suffer unnecessary expense and cause the [employee] to suffer additional hardship." Id. at 808-09.

The Employer relies upon the holding in Greenlee v. Care Inn of Jefferson City, 644 S.W.2d 679 (Tenn. 1983). In that instance, the employee sought the payment of additional medical expenses related to a prior compensable injury at work. Id. at 679. The court held that because the employee failed to prove that the additional medical charges were reasonable or to produce medical testimony linking treatment to the previous injury, there could be no recovery. Id. at 680. In dicta, the court observed that the employee had also failed to notify her employer about the necessity of additional medical treatment and noted that "the better rule is that the employer be given an opportunity to provide for the treatment each time the employee reasonably requires additional treatment," but recognized that "there may be circumstances, such as in an emergency, which would relieve the employee of the duty to give notice before seeking treatment of an occupational injury." Id. (citing Pickett v. Chattanooga Convalescent & Nursing Home, Inc., 627 S.W.2d 941, 944 (Tenn. 1982) (holding that "[t]he liability of the employer turns on the issue of whether, under the

circumstances, the employee was justified in obtaining further medical service, without first consulting the employer," and finding that because the employer offered no treatment, the employee was entitled to go to a doctor who "would do something for her")). The court concluded that absent evidence of circumstances that might relieve the employee of the duty, the employee was not entitled to the additional medical expenses. Id.

As indicated, the trial court here ruled that the Employee was entitled to the medical costs associated with the initial surgery on the thoracic area of the spine. Describing the surgery as "urgent" in order to avoid the possibility of paralysis, the trial court deemed Dr. Abel as authorized, implicitly holding that the circumstances warranted his treatment and care, but denied the medical costs for the second surgery on the cervical area of the spine. The question of whether the circumstances justified the Employee's decision to reject the panel offered by the Employer and to continue under the care of Dr. Abel was not specifically addressed.

The current version of Larson's provides that if an employee has "justifiably engaged a doctor on his or her own initiative," subsequent efforts by the employer to offer a doctor will not prevent the employee from continuing under the care of his doctor. Larson's § 94.02. This principle was applied in Lambert v. Famous Hospitality, 947 S.W.2d 852, 853 (Tenn. 1997), in which an employee who was injured on the job selected a physician listed in her employer's group medical insurance handbook. When the employee did not respond to conservative treatment, the physician made a referral to an orthopedic group, which also provided conservative treatment. Id. She demonstrated no signs of improvement, and the group referred her to an orthopedic surgeon, who performed corrective surgery on the employee's shoulder, performed a second surgery to remove scar tissue, and then released the employee for physical therapy. Id. The employer paid all associated costs. Id. When, however, the employee continued to experience problems with her shoulder, arm, and hand, she sought treatment by a specialist in chronic shoulder disorders, who recommended a series of tests. Id. The employer refused to approve payment, and the employee chose to submit to the tests anyway. Id. After determining that the work injury had caused a "compression of the nerves and arteries from the neck leading to the shoulder," the specialist referred the employee to a cardiovascular and thoracic surgeon for additional surgical procedures. Id. Afterward, the employee developed more complications that affected her nervous system. Id. While citing the statutory language giving the right to the employer to select a panel of approved physicians, our supreme court concluded that the employee had justifiably engaged a doctor on her own initiative and ruled that the employee had the right to continue with her physician. Id. at 854. Relying on Goodman, the court found that the employee had a reasonable basis to seek treatment by the specialist and the surgeon and ordered the employer to pay the costs of their treatment. Id. "Requiring her to change doctors after a lengthy and intensive treatment," the court reasoned, was not warranted under the circumstances. Id.

While not precisely on point, the Lambert case provides guidance here. Dr. Casey was unable to perform the shoulder surgery. The mistake in the anesthesia created a life-threatening emergency and caused a deterioration of the Employee's condition. Conservative treatment by other physicians did not relieve his symptoms. The proof indicates that Dr. Casey referred the Employee to Dr. Chiles, who then referred the Employee to Dr. Abel for an evaluation. Meanwhile, Dr. Maynard, the Employee's family physician, had encouraged the Employee to get an additional opinion because he feared that the accident had caused "compression of his spine" and that the physicians provided by the Employer had not taken sufficient remedial measures.

Whereas Dr. Casey's aborted shoulder surgery turned out badly for the Employee, Dr. Abel's first spinal surgery successfully resolved the Employee's incontinence and averted the possibility of paralysis. The Employee, having gained relief under the care of Dr. Abel and exhibiting little confidence in either Dr. Casey or the other physicians who had found no compression of the spinal cord, naturally preferred to remain under Dr. Abel's care. While the Employer had every right to contest the compensability of the Employee's spinal surgeries and object to any responsibility for the costs of surgery by Dr. Abel, the circumstances here warrant payment for not only the initial, "urgent" surgery by Dr. Abel, but also the second surgery. Once the Employee had justifiably engaged Dr. Abel, the subsequent efforts by the Employer to arrange for a different physician did not preclude the Employee from continuing under his care. See Lambert, 947 S.W.2d at 853; Goodman, 595 S.W.2d at 808. In this regard, the evidence preponderates against the trial court's refusal to require the Employer to pay the associated medical costs.

IV. Conclusion

Accordingly, the judgment is affirmed, but modified to require the Employer to pay the medical costs associated with the second spinal surgery performed by Dr. Abel. The cause is remanded to the trial court for a determination of these expenses. Costs are adjudged against the Employer, for which execution may issue if necessary.

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GARY R. WADE, CHIEF JUSTICE