IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
May 20, 2013 Session

LARRY KEITH BRAGG v. BEACH OIL COMPANY, INC., ET AL.

Appeal from the Chancery Court for Humphreys County
No. 2010-CV-184 George Sexton, Judge

No. M2012-02256-WC-R3-WC - Mailed July 18, 2013
FILED AUGUST 21, 2013

An employee sustained an injury to his back in the course of his employment on January 1, 2010. After a period of conservative treatment, the employee's treating physician recommended surgery. The employer's utilization review provider declined to approve the surgery, and the Medical Director of the Tennessee Department of Labor and Workforce Development affirmed the denial. The employee did not return to work for the employer. On September 1, 2010, the employee went to the emergency room complaining of severe back pain. An MRI revealed a herniated disc in the area of the employee's spine for which his treating physician had previously recommended surgery. The following day, the employee's treating physician performed the previously recommended surgery and opined that the herniated disc and surgery were causally related to the employee's January 1, 2010 work injury. The employer denied that the work injury caused the herniated disc and surgery. The employee filed a workers' compensation claim in the Chancery Court for Humphreys County. The primary disputed issues at trial were causation and the extent of the employee's disability. The trial court ruled that the herniated disc was causally connected to the work injury and awarded permanent partial disability benefits of 36% to the body as a whole, as well as medical expenses. The employer appealed. This 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. We affirm the trial court's finding that Employee's September 1, 2010 herniated disc, and the fusion surgery performed as a result of it, were causally related to his January 1, 2010 work injury. We also affirm the trial court's finding that Employee is not totally and permanently disabled. Because the trial court failed to make the findings required by statute when awarding permanent partial disability benefits of six times the medical impairment rating, we vacate the award of disability benefits and remand to the trial court for additional consideration and appropriate findings on this issue.

Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2012) Appeal as of Right; Judgment of the Chancery Court Affirmed in Part; Reversed in Part; and Remanded

CORNELIA A. CLARK, delivered the opinion of the Court, in which BEN H. CANTRELL, SR.J., and E. RILEY ANDERSON, SP. J., joined.

D. Brett Burrow, Nashville, Tennessee, for the appellants, Beach Oil Company, Inc. and Federated Mutual Insurance Company.

Tim L. Bowden, Goodlettsville, Tennessee, for the appellee, Larry Keith Bragg.

OPINION

Factual and Procedural Background

Larry Keith Bragg ("Employee") has sustained two injuries to his back at work. This appeal involves the second injury. The first injury occurred on January 3, 2000, while Employee was lifting a box of iron while working at Wabash Alloys. Employee developed a herniated disc at L5-S1. In June 2001, Dr. Harold Smith performed a laminectomy. Employee attained maximum medical improvement on January 24, 2002, and Dr. Smith assigned a permanent fifty-pound lifting restriction. Dr. Smith also noted that Employee had a limited range of motion in his back and an absent achilles reflex on the right, which was permanent. On August 2, 2002, Employee settled this workers' compensation claim, receiving benefits equal to 50.175% permanent partial disability to the body as a whole. Following the settlement, Employee was able to pass the physical necessary to retain his commercial driver's license, and he worked the next nine years driving trucks for various companies.

At the time of the second back injury, the injury at issue in this appeal, Employee was working as a fuel tanker truck driver for Beach Oil Company ("Employer") delivering gasoline to convenience stores. On January 1, 2010, Employee was attempting to dislodge a hose that had become stuck in a tank. After "about fifteen minutes of wrestling" with the hose, Employee "gave it a jerk" and his "lower back popped." Employee immediately felt severe pain, which he described as "knock[ing] [his] right leg out from under [him]." Employee reported the injury immediately to Employer's representative and was referred to Premier Medical Group, where he was seen by Dr. Donald Huffman on January 4, 2010 for treatment. Dr. Huffman ordered x-rays and took Employee off work for several days. Employee's condition did not improve, and Employer provided him a panel of neurosurgeons and orthopaedic surgeons for further treatment.

Employee selected Dr. Scott Standard, a neurosurgeon, as his treating physician. Following the examination at Employee's first visit on March 3, 2010, Dr. Standard noted that Employee had decreased sensation in the S1 dermatome and decreased reflexes in his right leg. Dr. Standard opined that these findings were consistent with Dr. Smith's findings after the 2001 surgery regarding Employee's absent right achilles reflex and limited range of motion and agreed these conditions were unlikely to improve over time. Dr. Standard also reviewed a January 18, 2010 MRI, which showed post-laminectomy changes at L5-S1, as well as a mild disc bulge at L4-5, but no significant neural compression. Dr. Standard ordered a myelogram, which was performed on April 14, 2010. Like the MRI, the myleogram showed "some deformity" at the L4-5 and L5-S1 levels, but only a mild degree of neural impingement. Based on the MRI, the myelogram, Employee's previous surgery and recovery, and Employee's complaints of pain, Dr. Standard opined that Employee had "discogenic syndrome." According to Dr. Standard, patients with this condition develop a painful disc structure at one or more levels and experience pain from the disc structure itself. Dr. Standard diagnosed Employee as suffering from discogenic syndrome because Employee "had pain symptoms that were out of proportion" to the MRI and myelogram findings of mild neural impingement, leading to the conclusion that the pain was caused by "a weakness of the disc structure itself." Dr. Standard opined that the January 1, 2010 injury caused the condition to become symptomatic and require medical treatment. To rule out other causes of Employee's pain, Dr. Standard prescribed conservative treatment, including epidural injections and physical therapy. Dr. Standard testified that 80% to 90% of patients who suffer the type of injury Employee sustained respond to conservative treatment options. Employee's condition did not improve with conservative treatment, however. The lack of improvement, Dr. Standard testified, further corroborated his opinion that Employee suffered from discogenic syndrome.

On May 21, 2010, Dr. Standard recommended a decompressive lumbar laminectomy and fusion from the L4 to S1 vertebrae. Employer's utilization review provider declined to approve the proposed surgery. This denial was appealed to the Medical Director of the Department of Labor and Workforce Development, who affirmed the decision to disapprove the proposed surgery.

The surgery did not proceed. By a letter dated June 25, 2010, Dr. Standard opined that, without the surgery, Employee reached maximum medical improvement on May 21, 2010, but could not work for the foreseeable future. Dr. Standard restricted Employee's work activities to no standing for more than ten minutes, no sitting for more than thirty minutes, no climbing, squatting, twisting and bending at the waist, and no lifting over five pounds.

On September 1, 2010, Employee contacted Dr. Standard's office, complaining of increased back pain. Dr. Standard directed Employee to an emergency room, where an MRI was performed and showed a disc herniation at L4-5. Employee also reported new symptoms, including diminished sensation in his right leg and diminished ankle reflex. Dr. Standard, who described Employee as in "horrendous pain," determined that immediate surgery was appropriate. The following day, Dr. Standard performed the surgical procedure he had recommended on May 21, 2010—decompressive lumbar laminectomy and fusion from the L4-S1 vertebrae. Employee remained under Dr. Standard's care until May 27, 2011. Dr. Standard released Employee, and assigned an impairment rating of 13% to the body as a whole for the January 2010 injury.

The primary disputed issues at the trial of this matter on June 28, 2012, were causation and the extent of Employee's vocational disability. Employee presented the deposition testimony of his treating physician, Dr. Standard, who is board certified in neurosurgery. Dr. Standard opined that Employee's January 1, 2010 work injury caused his discogenic syndrome to become symptomatic, which in turn caused "the weakening of the disc that ultimately led to the disc rupture" in September 2010. Although Dr. Standard agreed that the L4-5 disc rupture was not present on imaging studies performed before September 1, 2010, he opined that the January 1, 2010 work injury was causally connected to the rupture. Dr. Standard explained his reasoning as follows:

> [I] think that this disc was probably destined to rupture. I think that this was brewing the whole time. That's why he had the discogenic syndrome and the pain was sort of out of proportion to what we saw on the original MRI and the myelogram, so this kind of confirmed my idea that the disc was just weak and lacked a lot of structural integrity so it ultimately ruptured.
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> Well, I believe that the [January 1, 2010] injury causing the intractable pain caused the weakening of the disc that ultimately led to the disc rupture, so the disc rupture is causally related to the initial -- to the work-related injury that I saw him for and then had recommended the surgery for. The acute disc rupture was a new find clearly, but was a progression of this disc pathology at the 4-5 level.

Dr. Standard stated that "[t]he pain generators were the discs at the L4-5 and L5-S1 area and the MRI scan and myelogram, I felt, supported that." Dr. Standard explained that the fusion surgery would have increased the stability of the "lower spine at L4-5 and L5-S1."

Dr. Standard agreed that MRI imaging of Employee's spine in 2001, and in 2006 showed abnormalities and degenerative changes at the L4-5 level, although Dr. Standard thought the 2006 MRI showed that the disc "had healed to some degree." Dr. Standard also agreed that the symptoms Employee reported in 2006 were similar to those Dr. Standard observed before the September 2010 surgery. Furthermore, Dr. Standard stated that it is "impossible to tell if a disc is going to rupture beforehand" and added that a degenerated disc can rupture "with relatively trivial things such as coughing, sneezing" or bending over to pick up a piece of paper, or even spontaneously. Nevertheless, Dr. Standard opined that Employee's herniated disc was causally related to his January 2010 work injury.

Dr. Standard did not agree that the degenerative changes reflected on Employee's pre-2010 MRI imaging predisposed him to suffering a herniated disc, even if he had not sustained the January 1, 2010 injury. Dr. Standard explained:

> Most patients with degenerative disc disease do not suffer a ruptured disc over their lifetime. In fact, the vast majority of patients would not ultimately develop a ruptured disc due to degenerative disc disease at those two levels. So the fact that he had those changes on prior MRI scans, most patients in that situation would not ultimately suffer a ruptured disc based on those previous MRI scans . . . .

He also opined that the 2001 surgery did not predispose Employee to having a herniated disc and explained that "the risk of having adjacent or same level disc rupture at either of those levels is somewhere between two and eight percent."

Dr. Standard explained that he arrived at the 13% anatomical impairment rating by subtracting the impairment rating assigned by Dr. Smith after the 2001 surgery[1] from the 25% impairment rating Employee retained as a result of both surgeries. Dr. Standard testified that he had received training in the use of the AMA Guides but had no certifications and was not a member of the Department of Labor's Medical Impairment Registry. At the time of Employee's release, Dr. Standard imposed a "medium demand work rating of 25 pounds lifting with no sitting greater than four hours." However, on June 22, 2011, Dr. Standard completed a C-32 form in which he restricted Employee to sedentary or light duty work and imposed a ten-pound lifting restriction. Dr. Standard testified that he changed his opinion on Employee's restrictions "based on the information from some phone calls with the patient's attorney in terms of his ability to work." When asked whether he typically

[1] Dr. Standard mistakenly subtracted 12%, rather than the 13% impairment rating Dr. Smith assigned after Employee's 2001 surgery.

changed his opinion based on information received during a phone call from an attorney or a patient, Dr. Standard responded: "I'm not sure exactly what – why that changed."

Dr. Robert Dimick, an orthopaedic surgeon, performed an independent medical evaluation at the request of Employer's attorney. Dr. Dimick reviewed Employee's medical records and examined Employee on September 15, 2011. Dr. Dimick testified that the medical records revealed "a pattern of ongoing complaints of both lower back pain and right leg pain" after the 2001 surgery. Dr. Dimick interpreted Employee's medical records as documenting complaints of and treatment for lower back pain in 2007, 2008 and 2009. Dr. Dimick further stated that Employee's prescription records showed "ongoing long-term chronic use of high-level pain medications[,]" which "fits [Employee's] complaints of ongoing lower back pain."

Dr. Dimick also pointed to notes in the medical records of Dr. Huffman, the first physician to treat Employee after the January 1, 2010 injury, as indicating that Employee complained of right thoracolumbar pain on January 4th and 8th, an area above the L4-5 disc treated by Dr. Standard. Dr. Dimick, who testified that a disc injury "usually expresses itself fairly quickly," stated that, according to Dr. Huffman's records, Employee's lumbar and right leg symptoms appeared some time after he returned to work on January 12. Dr. Dimick also pointed to physical therapy notes, which described Employee "as standing with a flexed bent forward posture." According to Dr. Dimick, this posture places extra stress on the spinal discs and causes pain if a disc is herniated. Because Employee was able to stand in the flexed forward posture, Dr. Dimick believed Employee's discs were likely not the source of his pain.

Dr. Dimick agreed with Dr. Standard's assessment that the ruptured disc shown on the September 2010 MRI was not present on earlier imaging studies. Dr. Dimick ultimately opined that the September 1, 2010 herniated disc was not caused by the January 1, 2010 work injury and was not a "natural progression" of that injury. Dr. Dimick disagreed with Dr. Standard's theory that the January injury set in motion a process that led to the September injury. He also disagreed with Dr. Standard's May 2010 recommendation of a spinal fusion and opined that a laminectomy would have been the more appropriate procedure to treat the September 1, 2010 herniated disc. However, Dr. Dimick agreed that a fusion surgery is the preferred procedure for a patient with chronic discogenic pain. In the event the trial court agreed with Dr. Standard as to causation, Dr. Dimick, who had extensive training in applying the AMA Guidelines and who was a member of the Department of Labor's Medical Impairment Registry, opined that Employee retained a 6% impairment to the body as a whole as a result of the fusion surgery.

Dr. Ken Salhany, Employee's primary care physician since 2008, testified as a witness at trial. Dr. Salhany stated that the primary conditions for which he had treated Employee and for which he had prescribed narcotic pain medications were "migraine headache syndrome, neck pain and C3-4 stenosis." Although Dr. Salhany's medical records for Employee included references to back pain, Dr. Salhany related these references to the primary diagnoses of neck pain and C3-4 stenosis. Dr. Salhany agreed that a September 8, 2008 note explicitly mentioned sciatica, a condition originating in the lower back, and he also agreed that Employee suffered from episodes of low back pain prior to the January 2010 work injury. However, Dr. Salhany explained that the treatment he provided, both before and after the January 2010 work injury, focused on Employee's neck. Dr. Salhany agreed that he prescribed pain medication, including hydrocodone, for Employee both before and after the January 2010 injury.

Larry Hankins, General Manager of Employer, testified that Employee did not disclose the fifty-pound lifting restriction Dr. Smith had imposed following the 2001 surgery. Mr. Hankins testified that Employee's job involved some activities outside the 2001 restrictions, but that Employee had performed all his duties prior to the 2010 injury. Mr. Hankins, who was acquainted with Employee only in the workplace, generally considered Employee to be a trustworthy person. Nevertheless, Mr. Hankins emphasized that Employee had not disclosed to him, or to any other official of Employer, his regular use of prescription narcotic pain medication. Mr. Hankins testified that he first became aware of Employee's use of narcotic pain medications during the trial, when Dr. Salhany testified. Mr. Hankins testified that Employer has a policy in its "company policy book" that employees are supposed to report any medications they take to their supervisors. Mr. Hankins agreed, however, that Employer's application for employment did not include a question regarding an applicant's use of prescription pain medications. Although Mr. Hankins believed that driving a fuel truck under the influence of narcotics poses a safety hazard, he testified that Employee had never been written up or disciplined for poor driving. Mr. Hankins further testified that, from the time of Employee's hiring until the January 2010 injury, Employer had been unaware of Employee having any physical problems. According to Mr. Hankins, Employee performed his job adequately prior to the January 2010 injury.

Employee also called friends and co-workers to testify on his behalf. Anthony Dale Littleton testified that he had known Employee for twenty years. Mr. Littleton considered Employee a friend, and Employee also had driven trucks for Mr. Littleton. According to Mr. Littleton, Employee never complained of low back pain until after his injury at work in January 2010. Mr. Littleton described Employee as "pretty much normal" after the 2001 surgery.

Aaron Nelson, who had known Employee for five years, testified that he and Employee were friends and worked on motorcycles and cars together as a hobby. Mr. Nelson stated that, to his knowledge, Employee had no physical problems or limitations prior to the 2010 injury. According to Mr. Nelson, Employee has been unable to work on cars and motorcycles since the 2010 injury.

Michael Eden, who had previously worked fifteen years for Employer, also testified at trial. Mr. Eden had worked three years as a tanker truck driver for Employer and had been Employee's direct supervisor on January 1, 2010. Mr. Eden testified that tanker truck drivers must be able to twist, turn, and lift over fifty pounds. Mr. Eden was unaware of Employee's 2000 workers' compensation injury, 2001 surgery, and fifty-pound lifting restriction. Mr. Eden said Employee got along well with his co-workers and was honest and trustworthy.

Charlie Cotton, a co-worker and friend of Employee, also testified at trial. Mr. Cotton stated that Employee was able to perform the duties required of him as a tanker truck driver prior to the 2010 injury. Mr. Cotton described Employee as a good worker and an honest person. According to Mr. Cotton, Employee had told him of his prior back injury, the 2001 surgery, and his use of pain medication to relieve pain.

Employee, forty-three years old at the time of trial, testified in his own behalf. Employee had graduated high school, but had not attended college and had no additional specialized training. Employee had previously worked as a tire and auto parts salesman, an assistant manager at an auto parts store, a concrete mixer driver, a dump truck operator, an over-the-road truck driver, and a crane operator. Employee described his 2000 back injury, 2001 surgery, and his recovery from the injury and surgery. Employee stated that he returned to truck driving after the surgery and was able to pass the physical examinations necessary to maintain his commercial driver's license. Employee testified that, in 2005, he passed a "stress test" that required him to complete thirty pushups in forty-five seconds and thirty sit-ups in forty-five seconds. Employee denied experiencing problems with his lower back between 2001 and 2010. Employee agreed that he had complained of lower back pain occasionally between 2001 and 2010, but he stated that this pain was caused by prostatitis a condition that causes inflammation and infection of the prostate. Employee stated that he was treated for this condition in 2006 by a urologist. Employee testified that the prostatitis caused excruciating pain, similar to the pain he had suffered following his 2000 back injury. Employee stated that the pain medication Dr. Salhany prescribed for him, beginning in 2008, was for problems and pain in his neck. Employee stated that he was unaware of any governmental or corporate policy against the use of narcotic pain medication. Employee testified that he did not miss work as a result of back problems from 2001 until the injury in 2010.

Employee testified that, on September 1, 2010, he sat down to eat a sandwich and urinated on himself. He immediately contacted Dr. Standard's office and was directed to the emergency department of St. Thomas Hospital. Employee underwent surgery the next day. Employee said the surgery relieved much of his pain. After Dr. Standard released him, Employee applied for jobs at auto parts stores, although he was unsure whether he would be able to perform those jobs. Employee did not believe he would be able to pass the physical necessary to maintain his commercial driver's license. Employee doubted whether he could perform any of the non-truck driving jobs he had held prior to the January 2010 injury. Employee further stated that he no longer works on cars or motorcycles and cannot perform maintenance work on his own vehicles. Although Employee had previously owned a motorcycle, which he rode about twenty times after the 2010 surgery, but themotorcycle had since been stolen. On cross-examination, Employee admitted that since the 2010 surgery, he has picked up brush and debris from his yard caused by a storm, changed the oil in his car a couple of times, and worked some on a motorcycle.

The trial court took the case under advisement and issued a written memorandum and order on September 18, 2012. The trial court found that the September 1, 2010 L4-5 disc rupture and ensuing surgery were work-related, stating:

> This is a fairly typical disputed workers' compensation case. One doctor, [Dr.] Standard, finds the worker's injury to be work[-]related, while another doctor, [Dr.] Dimick, opines the injury is non-work related. Since Dr. Standard is the treating physician, and by statute is presumed to be correct, the court finds the testimony of Dr. Standard is not sufficiently rebutted by the testimony of Dr. Dimick to be disregarded. Therefore, the court finds the worker's injury to be a work[-]related injury.

As to the extent of Employee's vocational disability, the trial court "was impressed with Dr. Dimick's demonstrated knowledge and ability regarding application of the AMA Guidelines" and accepted Dr. Dimick's testimony that Employee retained a 6% anatomical impairment to the body as a whole as a result of the 2010 injury. The trial court awarded Employee 36% permanent partial disability benefits to the body as a whole and also directed Employer to pay Employee's medical expenses "based on the state established medical fee schedule[.]" Employer has appealed.

Standard of Review

Appellate review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2008 & Supp. 2012), which provides that appellate courts must "[r]eview . . . the trial court's findings of fact . . . de novo upon the

record of the trial court, accompanied by a presumption of the correctness of the finding[s], unless the preponderance of the evidence is otherwise." As the Supreme Court has observed many times, reviewing courts must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). The extent of an injured worker's disability is a question of fact. *Lang v. Nissan North Am.*, 170 S.W.3d 564, 569 (Tenn. 2005). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court's findings based upon documentary evidence, such as depositions. *Glisson v. Mohon Int'l, Inc./Campbell Ray*, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Employer raises four issues in this appeal: (1) whether the evidence preponderates against the trial court's finding of compensability; (2) whether the trial court improperly applied a presumption of correctness to Dr. Standard's testimony; (3) whether the trial court erred by awarding six times the anatomical impairment when the award is not supported by specific findings, as required by Tennessee Code Annotated section 50-6-241(d)(2)(B); and (4) whether the trial court erred by excluding the testimony of an expert witness, Dr. Chad Calendine. Employee raises two additional issues: (1) whether the trial court erred by limiting the award of medical expenses to the statutory fee schedule, Tennessee Code Annotated section 50-6-204(a)(4)(A); and (2) whether the trial court erred by failing to find Employee permanently and totally disabled.

Causation and Presumption of Correctness

In its finding, the trial court stated that as the authorized treating physician, Dr. Standard's testimony "by statute is presumed to be correct[.]" We deduce that this statement refers to Tennessee Code Annotated section 50-6-102(12)(A)(ii) (Supp. 2012), although the trial court provided no statutory citation. As Employer points out, this statute was enacted in 2011, and is inapplicable to injuries occurring before June 6, 2011. See 2011 Tenn. Pub. Acts 416. Because this statute does not apply to Employee's injury, we conclude that the trial court erroneously applied a presumption of correctness to Dr. Standard's testimony.

Rather, Employee was required to prove causation, and each element of his workers' compensation claim, by a preponderance of the evidence, without the benefit of a presumption of correctness. *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 543 (Tenn. 1992). "Except in the most obvious, simple and routine cases," an employee in a workers'

compensation case must establish a causal relationship between the claimed injury and the employment activity by a preponderance of the expert medical testimony, as supplemented by the lay evidence. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991). While causation must be proven by medical evidence and cannot be based upon speculative or conjectural proof, absolute certainty is not required. *Clark v. Nashville Mach. Elevator Co.*, 129 S.W.3d 42, 47 (Tenn. 2004); *see also Glisson*, 185 S.W.3d at 354. "Benefits may properly be awarded [based] upon medical testimony that shows the employment 'could or might have been the cause' of the employee's injury when there is lay testimony from which causation reasonably can be inferred." *Fritts v. Saftey Nat'l Cas. Corp.*, 163 S.W.3d 673, 678 (Tenn. 2005) (quoting *Clark*, 129 S.W.3d at 47). Any reasonable doubt "concerning the cause of the injury should be resolved in favor of the employee." *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 168 (Tenn. 2002). Where, as here, the medical proof relevant to causation is presented by deposition, a reviewing court may draw its own conclusions about the weight and credibility that should be afforded the evidence. *Glisson*, 185 S.W.3d at 353. Applying these standards we conclude that the evidence does not preponderate against the trial court's finding that Employee's September 1, 2010 herniated disc and subsequent surgery were causally related to the January 1, 2010 injury Employee sustained while working for Employer.

Both of the well-qualified medical experts agree that Employee had degenerative disc disease at the L4-5 level before his January 1, 2010 work injury. They also agree that imaging studies did not reveal a herniated disc at the L4-5 level until September 1, 2010. Based on the symptoms he observed beginning in March 2010, Dr. Standard opined that the January 2010 injury caused Employee's discogenic syndrome to become symptomatic, resulted in the pain and symptoms Employee's experienced after the January injury, further weakened the disc, and ultimately caused the September 1, 2010 herniated disc. Dr. Dimick, on the other hand, stated that medical records showed that Employee's pain in the weeks immediately following the January 2010 injury was several levels above the L4-5 discs. In addition, Dr. Dimick implied that there was no scientific basis for Dr. Standard's opinion that the January 2010 injury could cause the herniated disc nine months later.

The medical evidence of causation in this case is not overwhelming. Nonetheless, having carefully and thoroughly examined all the proof in the record, we conclude that, even without attaching a presumption of correctness to Dr. Standard's testimony, the evidence does not preponderate against the trial court's finding of causation. Dr. Standard began treating Employee soon after the January 2010 work injury, and he saw Employee on multiple occasions in the months preceding the September 2010 herniated disc. Early on, Dr. Standards identified the L4-5 discs, the level where the rupture ultimately occurred, as the source of Employee's symptoms. Dr. Standard explained the basis of his opinion that the original injury progressed and resulted in herniated disc. Although Dr. Dimick disagreed

with Dr. Standard's assessment, he examined Employee on a single occasion more than a year after Employee had undergone surgery to treat the September 2010 herniated disc.

Furthermore, Dr. Dimick's disagreement with Dr. Standard was based, in part, on his interpretation of Employee's medical records as establishing that Employee had suffered problems with his lower back since the 2001 surgery. Dr. Dimick's interpretation of these medical records was undercut by other testimony, however. For example, Dr. Salhany testified that the complaints of back pain noted in his medical records for Employee were related to C3-4 stenosis and neck pain. Furthermore, Employee testified that his complaints of back pain occurred when he was suffering from prostatitis, a condition unrelated to spinal problems. Furthermore, both Dr. Salhany and Employee testified that he used narcotic pain medication to treat neck pain. Finally, all the lay witnesses testified that Employee had been able to perform his job and participate in his hobby of motorcycle and auto repair prior to the January 2010 injury. The proof in the record, considered as a whole and without a presumption of correctness afforded Dr. Standard's testimony, does not preponderate against the trial court's finding on the issue of causation.

Specific Findings in Support of Permanent Disability Award

The trial court adopted the 6% permanent impairment rating assigned by Dr. Dimick and then awarded permanent partial disability benefits of six times that impairment, the maximum award permitted by Tennessee Code Annotated section 50-6-241(d)(2)(A). Tennessee Code Annotated section 50-6-241(d)(2)(B) provides: "[I]f the court awards a permanent partial disability percentage that equals or exceeds five (5) times the medical impairment rating, the court will include specific findings of fact in the order that detail the reasons for awarding the maximum permanent partial disability." Employee concedes that the trial court's order does not contain the findings required by this statute. Employee argues, however, that the trial court erred by adopting Dr. Dimick's impairment rating over that of Dr. Standard.

A trial court has the discretion to accept the opinion of one medical expert over that of another medical expert. *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d 638, 644 (Tenn. 2008). When making this determination, a trial court may consider, among other things, 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. *Id.* We conclude that the trial court did not abuse its discretion by accepting Dr. Dimick's opinion as to Employee's anatomical impairment rating following the September 2010 surgery. Dr. Dimick had been trained in applying the AMA Guidelines and was listed on the Department of Labor's Medical Impairment Registry. Dr. Standard had less familiarity with the AMA Guidelines and was not listed on the Medical Impairment Registry. However, as

Employee concedes, the trial court's order does not comply with the requirements of section 50-6-241(d)(2)(B). We therefore vacate the award of 36% permanent partial disability benefits and remand this matter to the trial court to consider whether the record supports an award of six times the anatomical impairment rating, and if so, for entry of an order consistent with the statutory requirements.

Exclusion of Dr. Calendine Testimony

Dr. Chad Calendine, a radiologist who reviewed MRIs and X-rays of Employee's spine at the request of Employer's attorney, issued a report containing his opinions on June 3, 2012. However, Employer had failed to disclose Dr. Calendine as a potential expert witness in its earlier responses to Employee's interrogatories. Employee filed a motion in limine to exclude Dr. Calendine's testimony. As grounds for the motion, Employee pointed out that trial was set for June 28, 2012, and had been set by an agreed order entered February 6, 2012. Employee asserted that the disclosure of a new expert witness only three weeks prior to trial was untimely, that there would not be time to depose the expert prior to trial, and that permitting the expert to testify would therefore be unfairly prejudicial. After hearing arguments of counsel on the motion in a June 13, 2012 conference call, the trial court granted Employee's motion and entered an order excluding Dr. Calendine's testimony, but allowing Employer to include his report as an offer of proof. On the day of trial, Employer asked the trial court to reconsider its ruling, but the trial court denied the request.

Employer argues that the trial court erred by excluding Dr. Calendine's report and testimony, pointing out that no scheduling order had been entered in the case. Employer contends that the trial court could have held the record open and allowed Employee to depose Dr. Calendine after the June 28, 2012 trial.

It is well-settled that a trial court's decisions concerning the admission or exclusion of expert testimony will not be reversed absent an abuse of discretion. *Excel Polymers, LLC v. Broyles*, 302 S.W.3d 268, 272 (Tenn. 2009). An abuse of discretion occurs when the trial court "applies incorrect legal standards, reaches an illogical conclusion, bases its ruling on a clearly erroneous assessment of the proof, or applies reasoning that causes an injustice to the complaining party." *State v. Phelps*, 329 S.W.3d 436, 443 (Tenn. 2010). Here, the trial court excluded Dr. Calendine's testimony because: (1) Employer had the films Dr. Calendine reviewed for almost two years prior to trial; (2) Employer stated that Dr. Calendine's testimony would not be substantially different from other testimony that would be presented; (3) Employee would have been unable to depose Dr. Calendine prior to trial; and (4) admission of Dr. Calendine's testimony would have unduly delayed the trial. Upon review of the record and the ruling, we conclude that the trial court did not abuse its discretion by granting Employee's motion to exclude Dr. Calendine's testimony.

Medical Fee Schedule

In its final order the trial court stated, "[t]he employer/carrier is responsible for medical treatment including surgery based on the state established medical fee schedule." Employee contends on appeal that the trial court erred by limiting Employer's liability to the amount provided by the Medical Fee Schedule established by Tennessee Code Annotated section 50-6-204(I). Employee's brief does not indicate where in the record this question was raised as a disputed issue at trial. Issues not raised in the trial court cannot be raised for the first time on appeal. *Simpson v. Frontier Comm. Credit Union*, 810 S.W.2d 147, 153 (Tenn. 1991). Indeed, as Employer argues, the parties stipulated as to the resolution of this issue at the beginning of trial. Employer's counsel stated as follows:

> We have agreed - - there's been some motions about medical fees - - medical bills and fee schedules. Obviously, we don't agree on whether or not those are compensable, but if the Court were to find that this is a compensable claim as it pertains to the surgery and resultant anatomical impairment rating, we're agreed that those bills, - - basically a hold harmless - - those would be paid under the fee schedule. And if the fee schedule didn't apply, my client [Employer] would be responsible to hold his client harmless on those medical bills.

The trial court's order is consistent with the parties' stipulation, and the judgment of the trial court on this issue is affirmed.

Permanent Total Disability

Finally, Employee contends that the trial court erred by failing to find that he was permanently and totally disabled. The extent of an injured worker's permanent disability is a question of fact. *Lang v. Nissan N. Am., Inc.*, 170 S.W.3d 564, 569 (Tenn. 2005)(citing *Jaske v. Murray Ohio Mfg. Co., Inc.*, 750 S.W.2d 150, 151 (Tenn. 1988)). Employee asserts that the medical restrictions contained in Dr. Standard's C-32 form and Employee's own testimony concerning his physical abilities and limitations support a finding of permanent total disability. We disagree.

In late May 2011, Dr. Standard expressed the opinion that Employee was capable of medium-level work with a lifting restriction of twenty-five pounds. About three weeks later, in June 2011, Dr. Standard revised that opinion, stating that Employee was capable of only sedentary to light work, with a lifting restriction of ten pounds. Dr. Standard changed his opinion not because of any additional examination or testing of Employee but as a result of conversations with Employee's attorney. When pressed on his change of opinion, Dr.

Standard himself expressed uncertainty as to the basis of the change. The proof in this record does not establish that Employee is incapacitated "from working at an occupation that brings [him] an income.[2] The evidence does not preponderate against the trial court's finding that Employee was not permanently and totally disabled.

Conclusion

We affirm the trial court's finding that Employee's September 1, 2010 herniated disc and fusion surgery were causally related to the January 1, 2010 work injury. We also affirm the trial court's finding that Employee is not permanently and totally disabled. Because the trial court failed to make the findings required by Tennessee Code Annotated 50-6-241(d)(1)(B), we vacate the award of permanent partial disability benefits and remand this case to the trial court to make the required statutory findings if the trial court concludes on remand that an award equaling or exceeding five times the anatomical impairment rating is appropriate. The judgment of the trial court is affirmed in all other respects. Costs are taxed one-half to Beach Oil Company, Inc., Federated Mutual Insurance Company, and their surety, and one-half to Larry Bragg, for which execution may issue if necessary.

_____
CORNELIA A. CLARK, JUSTICE

[2] Tenn. Code Ann. § 50-6-207(4) (2008).

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

LARRY KEITH BRAGG v. BEACH OIL COMPANY, INC., ET AL.

Chancery Court for Humphreys County
No. 2010-CV-184

No. M2012-02256-WC-R3-WC - Filed August 21, 2013

JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

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

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

Costs will be paid one-half by Beach Oil Company, Inc., Federated Mutual Insurance Company, and their surety, and one-half by Larry Bragg, for which execution may issue if necessary.

PER CURIAM