IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 16, 2015 Session

CHRIS VICTORY v. BOB DUCKWILER D/B/A CUSTOM CONCRETE DESIGN ET AL.

Appeal from the Circuit Court for Wilson County
No. 2013-CV-46 John Wootten, Judge

No. M2014-00952-SC-R3-WC – Mailed August 4, 2015
Filed September 8, 2015

The employee alleged that he sustained a compensable injury to his lower back. His employer initially accepted the claim but later denied it. The trial court found that the employee had sustained a compensable injury. It further found that the testimony of Employee's evaluating physician overcame the presumption of correctness attached to a Medical Impairment Registry ("MIR") evaluation by clear and convincing evidence. The employer has appealed. The appeal has been referred to the Special Workers' Compensation Appeals Panel pursuant to Tennesssee Supreme Court Rule 51. We conclude that the trial court erred by finding that the MIR presumption had been overcome, and we modify the judgment accordingly. The judgment is affirmed in all other respects.

Tenn. Code Ann. § 50-6-225(a) (2014) Appeal as of Right; Judgment of the Circuit Court Affirmed In Part and Modified in Part

BEN H. CANTRELL, SR. J., delivered the opinion of the court, in which JEFFREY S. BIVINS, J., and DON R. ASH, SR. J., joined.

Richard R. Clark, Jr., Nashville, Tennessee for the appellant(s), Bob Duckwiler d/b/a Custom Concrete Design and Companion Property and Casualty Group.

Neal Agee, Jr., Lebanon, Tennessee for appellee, Chris Victory.

OPINION

Chris Victory ("Employee") worked for Custom Concrete Design ("Employer") as a concrete finisher from 2001 until 2011. He testified that, on March 29, 2011, he was

standing on an embankment when the earth beneath his feet gave way, causing him to tumble several feet. He testified that the incident was witnessed by two co-workers whom he identified as "Lupe" and "Jesse." He was still lying on the ground three to five minutes later when his supervisor, Jason White, arrived at the scene. Mr. White confirmed that he arrived after Employee had apparently fallen. Employee testified that he advised Mr. White that he needed to go home for the day and left the job site. Bob Duckwiler, owner of Employer, arrived at the site after Employee left. He was informed of the incident by "Lupe." Employee returned the next day and worked "brooming" concrete. He left after about one-half day because of continuing back pain. He did not work on the following two days, which were Thursday and Friday.

Because of continuing back pain, he made an appointment to see Dr. Stephen Neely, an orthopedic surgeon, on April 4, 2011. At Dr. Neely's office, he filled out a "patient injury report." In response to the question, "Please describe how this injury occurred," Employee wrote, "Back trouble for years but got where it hurt more than normal." He answered that his injury was not related to his occupation or employment, but immediately below that notation, stated that the injury occurred at his place of work. On a second part of the intake form, Employee described his main problem as "mid-back and lower back has pain, hard to work, stand, lay down, sit." His response to the question, "What do you think caused it," elicited the response, "type of work over the years." The question, "when did it first start," was answered, "maybe 8-10 years ago, got wors[e] over the years." At trial, Employee agreed that these answers were in his handwriting. However, he denied that the responses were correct, stating that he was in so much pain that he was "delusional" at the time he completed the form.

Dr. Neely ordered an MRI which showed a disc protrusion at L5-S1. Dr. Neely made a referral to Dr. Christopher Kauffman, a spine surgeon, as a result of that study. However, at that point, Bob Duckwiler, the owner of Employer, reported the injury to his workers' compensation insurer. Employee was referred to Dr. Dan Spengler, a spine specialist at Vanderbilt Medical Center, for further evaluation in April and June 2011. Dr. Spengler concluded that Employee's problem did not require surgery and recommended physical therapy. During this time, Employee was also seen by Dr. Jesse Bible at Vanderbilt. Dr. Bible felt that Employee had a mild disc bulge. Employee was seen by Dr. Kauffman in January 2012. He concluded that Employee had a degenerative disc with nonspecific back pain. Like Dr. Spengler, Dr. Kauffman did not think surgery was required.

Employee was then referred to Dr. Jeffrey Hazlewood, a physical medicine and rehabilitation specialist, with a subspecialty in pain management. Dr. Hazlewood testified by deposition. He first saw Employee on July 6, 2012. At that time, Employee's primary complaint was low back pain. Employee also told him that he had occasional right leg pain. Dr. Hazelwood's examination revealed normal findings, normal strength, and no objective findings of radiculopathy. Employee did report

diminished sensation throughout his right leg, in a nondermatomal pattern. Dr. Hazlewood's initial diagnosis was of a herniated disc at L5-S1. He agreed with previous physicians that Employee was not a surgical candidate. He administered trigger point injections and ordered physical therapy. Employee's condition did not improve. Dr. Hazlewood declared him to be at maximum medical improvement ("MMI") on August 23, 2012. At that time, Employee had low back pain with normal neurological findings and no radiculopathy. Dr. Hazlewood said that Employee's L5-S1 disc protrusion was not causing nerve root impingement. He ultimately assigned 2% permanent impairment to the body as a whole, based on the Sixth Edition of the AMA Guides. He also placed restrictions on Employee's activities of "no pushing, pulling or lifting over fifteen pounds occasionally, change positions every thirty minutes, and no repetitive bending or twisting."

Dr. Hazlewood described Employee's presentation as "very unusual." He said Employee "always looked like he was somebody that would have just a humongous problem. He was bent over double, he never could stand up, he had a cane, which I see frequently." However, Employee's appearance and symptoms "just didn't match up with the exam findings." Dr. Hazlewood noted this in his analysis of impairment:

> He has the disc herniation, no doubt about it. But the key is, he does not fall into the intervertebral disc herniation section under motion segment lesions. Because in Class 2, to fall into that, you have to have a residual radiculopathy at the appropriate clinical level. He never had any radiculopathy. He certainly didn't have one at MMI, so that throws that out. So then you go back and say okay, does he fall into Class 1 with disc herniation. He does not because it has to be in addition to a disc herniation. It says "and," you['ve] got to have both. It's got to be either a previous radiculopathy that subsequently has resolved, that's where you got to go back and look in the records before I saw him and see did he have objective radiculopathy, or he's got a disc herniation now with no radiculopathy but he's got a disc herniation with non-verifiable radicular complaints, and that's the leg pain fitting an S1 pattern in association with the disc herniation at L5-S1. So the footnote on Page 571 says with a disc herniation, it's got to be at the clinically appropriate level when most symptomatic. And if you have radiculopathy, it's got to be consistent at the appropriate level. He never had a radiculopathy. The radicular symptoms say "at the clinically appropriate level." So at one point, he had that S1 pattern, is what he described to me, but he doesn't anymore. The pain was 95% back, it went into the hip. That's not S1, that's L1, 2, 3, in that thigh area. So, given that, he falls in back into the nonspecific back pain category even though he has a disc herniation.

Dr. Richard Fishbein, an orthopedic surgeon, examined Employee on November 6, 2012, at the request of his attorney. Dr. Fishbein also testified live at the trial. In addition to his examination, Dr. Fishbein reviewed the records of Dr. Neely, Dr. Spengler, Dr. Hazlewood, and the radiology reports of the April 2011 MRI and a January 2012 CT/myelogram. During his examination, Dr. Fishbein found that Employee had a positive straight leg raising test and "decreased sensation over the dermatological pattern of an S1 disc." The rest of his examination was "completely normal." He speculated that Employee "suffers from chronic pain syndrome, and this sometimes confuses [his] presentation . . . to the other doctors, especially if they're not listening." Dr. Fishbein opined that Employee had a right lower extremity radiculopathy at the time of the examination. He assigned 13% permanent impairment to the body as a whole based on that diagnosis. He qualified that opinion by stating, "Now, it is possible that at the time someone else saw him, he might have had a resolved, in quotes, radiculopathy. He's had this for a year. So then that would push that down five points or four, you know. So instead of being 13, it would be 8 or 9."

Dr. Fishbein disagreed with the opinions of Employee's treating physicians who had found that he was not a surgical candidate. He stated, "I believe that if this was a private patient and he went to see a neurosurgeon, they would have made a small incision and done a foraminotomy to give that nerve room to breathe. After that -- that would have taken away his leg pain." On cross-examination, he agreed that the difference between his analysis and those of Drs. Landsberg and Hazlewood was that he diagnosed an active radiculopathy but they did not. He expressed the opinion that those physicians simply "don't believe [Employee]. That's where it's at. They don't believe he has pain." Dr. Fishbein conceded that he had relied on radiologists' reports and had not viewed the actual images of the MRI and CT myelogram that he relied on to reach his conclusions. He agreed that, in order to reach an accurate diagnosis, it was necessary to correlate the findings of those tests with clinical examinations. Asked if any of the other doctors who had examined Employee had found an active radiculopathy, he seemed to suggest that one of Dr. Hazlewood's notes was consistent with a finding of radiculopathy but otherwise avoided answering the question. He elaborated:

> I felt that when I saw him, I had no trouble saying that he had radiculopathy. His sitting and supine straight leg tests were positive. He had decreased sensation in the right dermatome. He didn't embellish his symptoms. I had no problem at that time -- don't forget, we're going over a period of over a year. And so I imagine if we took his examination 365 times, you'll have at least 25 different opinions.

Dr. Robert Landsberg, an orthopaedic surgeon, was selected to conduct an impairment examination of Employee through the MIR process. See Tenn. Code Ann. § 50-6-204(d)(5) (2008 & Supp. 2013). He examined Employee on April 24, 2013. Dr. Landsberg testified by deposition, and his MIR report, duly approved by the Department of Labor and Workforce Development, was entered into evidence. Dr. Landsberg reviewed the records of all physicians who had seen Employee since March 2011. These included some providers whose records were not seen by either Dr. Fishbein or Dr. Hazlewood. He also reviewed both the reports and images of MRIs and CT scans of Employee's lumbar spine. Dr. Landsberg's diagnosis was "degenerative disc disease and low back pain." He stated his opinion that Employee retained a 3% permanent anatomical impairment due to that condition. He explained his analysis as follows:

> I felt that he had nonspecific, chronic and recurrent low back pain. I felt that there was no correlation between the MRI, physical examination and clinical studies for a true radiculopathy. Based on the physical examination and the findings, like Dr. Spengler and Dr. Kauffman . . . and Dr. Hazelwood, I didn't find a true radiculopathy.
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> [I]f you've got an MRI or a CT scan or a myelogram CT scan showing a disc pinching a nerve where you would expect it from the history and physical examination, whether there's weakness, numbness, tingling -- I mean, he had normal strength, he had reflexes, he didn't have any obvious atrophy. All the strength testing I could tell was probably normal, but he was just too hard to examine for some of it because of his pain. Based on the physical examination, I could not find classic positive straight leg raising, classic positive weakness, classic positive localized any other problem and, therefore, he didn't fit into the radiculopathy section. So the next section for non-verifiable radicular complaints is the section that I used, Table 17-4 on Page 570.

Employee was forty-one years old when the trial occurred. He is a high school graduate and had worked in concrete finishing for most of his adult life. He had no other specialized training or experience. He had not worked since March 2011 and did not believe he was capable of performing concrete work due to his symptoms. He testified:

> [I]f I stand too long, the pain level actually starts going up and my spine will actually start protruding out a little bit from the middle of the back down. Then it starts radiating down my right leg a lot more, around the ankle. So the more that I start -- I'm up walking or standing, the worse it gets. If I'm sitting too long on my

> tailbone itself, then the pain level starts rising up and it'll start making my blood pressure go up and – and things of that nature.

He described his daily routine as follows:

> Most of the time I'm laying down. A lot of times -- you know, I mean, I can get up some. You know, I'll go to the mailbox. I drive a very short distance and stuff like that. If I'm not going to the doctors, I'm usually, I would say the majority of the time, laying in the bed and turning over side to side and everything. My wife, she usually makes the meals, or she does microwave meals and stuff like that, so I can just warm a meal up or something.

In approximately March 2012, Employee fainted as a result of complications of diabetes. He injured his neck as a result of the fall and was receiving pain management therapy for that issue at the time the trial occurred. Mr. Duckwiler and Mr. White both testified that Employee was an excellent, hard-working employee prior to the March 2011 incident.

The trial court issued its ruling from the bench. It found that Employee had sustained a compensable injury to his back as alleged. It further found that Dr. Fishbein's testimony had rebutted Dr. Landsberg's impairment rating by clear and convincing evidence. However, it did not adopt Dr. Fishbein's impairment rating of 13%. Instead, it found that Employee had a 9% impairment to the body as a whole. It awarded permanent partial disability benefits of 54% to the body as a whole. It reserved ruling on Employee's request for lump sum award, pending submission of additional evidence. It later commuted the award to a lump sum.[1] Employer has appealed, contending that the evidence preponderates against the trial court's findings on causation, impairment, and disability.

Analysis

The standard of review of issues of fact in a workers' compensation case 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(a)(2) (2014). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. *Madden v. Holland*

[1]As a result of our resolution of the issue of impairment, all of Employee's modified award has accrued. It is therefore unnecessary for us to address issues pertaining to the correctness of the decision to commute the award.

Group of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Causation

Employer's first contention is that the evidence preponderates against the trial court's finding that Employee sustained a compensable injury. It relies upon the contradictions between Employee's trial testimony concerning his fall down an earthen embankment on March 29, 2011, and the statements made by him, in writing, at the time of his first medical treatment with Dr. Neely six days later on April 4.

We note that both Mr. White and Mr. Duckwiler gave testimony that supported Employee's trial testimony. Although neither man witnessed the fall, Mr. White came upon the scene within minutes and received accounts of the events from Employee and his co-workers. Mr. Duckwiler arrived somewhat later but also received information that led him to believe the event had occurred. It is undisputed that Employee was able to perform the heavy labor required to finish concrete without any difficulty before March 29. Mr. Duckwiler testified that Employee was in obvious pain during the half-day he attempted to work on March 30. Five days later, Employee was seeking treatment with an orthopedic surgeon who found it appropriate to order an MRI to determine the reason for his complaints. 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) The element of causation is satisfied where the "injury has a rational, causal connection to the work," *Braden v. Sears, Roebuck & Co.*, 833 S.W.2d 496, 498 (Tenn. 1992). Viewing the record as a whole, we are unable to conclude that the evidence preponderates against the trial court's finding on this issue.

Impairment

Tennessee Code Annotated section 50-6-204(d)(5) (2008 & Supp. 2013) provides: "The written opinion as to the permanent impairment given by the [MIR] 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." In *Mansell v. Bridgestone Firestone N. Am. Tire, LLC*, our Supreme Court stated, "whether the facts establish clear and convincing evidence to

overcome the statutory presumption of accuracy of an MIR report is a question of law that we must review de novo with no presumption of correctness." 417 S.W.3d 393 (Tenn. 2013), In *Beeler v. Lennox Hearth Products, Inc.*, we observed:

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

No. W2007-02441-SC-WCM-WC, 2009 WL 396121, at *4 (Tenn. Workers Comp. Panel Feb. 18, 2009).

In *Tuten v. Johnson Controls, Inc.*, we stated that the presumption of correctness created by section 50-6-204(d)(5) may be rebutted by "the presentation of affirmative evidence that an MIR physician had used an incorrect method or an inappropriate interpretation of the AMA Guides." No. W2009-01426-SC-WCM-WC, 2010 WL 3363609, at *4 (Tenn. Workers Comp. Panel Aug. 25, 2010), However, "[a] disagreement between medical expert witnesses as to the proper diagnosis of an employee's condition may not, in and of itself, constitute the clear and convincing evidence needed to overcome the statutory presumption of accuracy afforded an MIR physician's impairment rating." *Mansell*, 417 S.W.3d at 411 (quoting *Smith v. Elec. Research & Mfg. Coop., Inc.*, No. W2012–06560–WC–R3–WC, 2013 WL 683192, at *4 (Tenn. Workers Comp. Panel Feb. 22, 2013)).

The trial court made the following comments concerning Dr. Fishbein's testimony:

> Dr. Fishbein is an unusual man. Sometimes it's kind of

> hard to pin him down in terms of how to answer a question. Even [Employee's attorney] had to kind of direct him a couple of times. He -- Dr. Fishbein wants to kind of go off on his own a little bit. And much to [Employer's attorney's] consternation, he had to also kind of direct him back to the question.

We agree with this assessment. Having reviewed Dr. Fishbein's testimony in depth, we find that it is rambling at times and evasive at others. Often, rather than describing his own tests and observations, he chose to speculate concerning the findings of other doctors. We cite the following examples:

> Everything else said by other [doctors] is a presumption. They presume because [Employee is] walking with a cane, well, he must be not telling the truth."
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> Now, no one is saying -- when he went to see Dr. Neely on the first day, Dr. Neely's notes say this man was in terrific pain. Couldn't walk. He was really concerned about him. Period. From then on, everyone said, no, he can't be in that much pain.
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> And, again, when you're passing medical records from doctor to doctor, and let's say they're all under the same umbrella, they're seeing -- the first thing they're seeing is this man takes opiates, not as reliable as he should be. And they're all seeing that he has what they call "symptom magnification," which is a catch-all term and shouldn't be used -- you know, everyone's calling it "symptom magnification."
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> And, you know, maybe it's my approach. I don't start off adversarial with a patient. And I think that's really what really happens in a lot of cases. The doctors they go to are adversarial to start with and they never get off first base.
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> I know these doctors. I've read hundreds of their reports. And I'm not here to comment on their opinions. I'm just saying that is what they believe. . . . I'm more concentrating on the fact that they don't believe him. That's where it's at. They don't believe he has pain.

None of these statements are based on Dr. Fishbein's personal knowledge of the

examinations of Employee conducted by other physicians in the case. Further, there is no evidence that any physician took an adversarial approach to Employee. Employee did not testify concerning conflict with any of the physicians involved in his case, nor did the doctors. Dr. Hazlewood repeatedly testified that Employee's complaints seemed to be sincere. Dr. Landsberg's diagnosis included a finding of chronic pain.

Notwithstanding these unsupported statements by Dr. Fishbein, the trial court found that he had rebutted Dr. Landsberg's opinion by clear and convincing evidence. It based that finding on its observation of Employee's discomfort in the courtroom and on the fact that Dr. Fishbein testified in person at the trial. However, the critical question in this case is whether there is any evidence to support the trial court's finding.

Whether such a medical condition exists is not a matter that can be determined by observation of a party in the courtroom. It must be decided based on the medical evidence. In that regard, we are mindful of the absence of any other medical evidence consistent with the results of Dr. Fishbein's examination. Dr. Neely, Dr. Spengler, Dr. Bible, Dr. Kauffman, Dr. Hazlewood and Dr. Landsberg all failed to detect active radiculopathy during any of their examinations, which took place between April 2011 and April 2013. Dr. Fishbein's findings and resulting opinions are inconsistent with the conclusions of every other physician involved in Employee's case. Further, as previously discussed, those opinions appear to be based to at least some degree on Dr. Fishbein's personal opinions concerning some of the other doctors. With these considerations in mind, we conclude that the trial court erred by finding that Dr. Landsberg's opinion had been rebutted by clear and convincing evidence.

Therefore, based upon the written opinion given by the MIR examiner in this case, the correct anatomical impairment in this case is 3% to the body as a whole. Based on Employee's testimony concerning his present abilities and the activity restrictions assigned by Dr. Hazlewood, we conclude that a maximum award of 18% to the body as a whole is appropriate.

Conclusion

The judgment is modified to award 18% permanent partial disability to the body as a whole. Costs are taxed one-half to Chris Victory and one-half to Bob Duckwiler d/b/a Custom Concrete Design and Companion Property and Casualty Group and their surety, for which execution may issue if necessary.

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BEN H. CANTRELL, SENIOR JUDGE

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JUDGMENT

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

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

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

Costs are taxed one-half to Chris Victory and one-half to Bob Duckwiler d/b/a Custom Concrete Design and Companion and Casualty Group and their surety, for which execution may issue if necessary.

PER CURIAM