IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 24, 2012 Session

STEPHEN D. GOOD v. SUNKOTE PLASTIC COATINGS CORPORATION ET AL.

Appeal from the Circuit Court for Van Buren County
No. 1461C Larry B. Stanley, Judge

No. M2012-00700-WC-R3-WC - Mailed November 16, 2012
FILED DECEMBER 19, 2012

Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation 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. The employee sought workers' compensation benefits, alleging that he injured his back at work on September 30, 2008, and is now totally and permanently disabled. The employer denied that the employee sustained a compensable work-related injury, but alternatively argued that the employee is not totally and permanently disabled. The trial court concluded that the employee sustained a compensable work-related injury and awarded 80% permanent partial disability benefits. The employer has appealed, arguing that the evidence preponderates against the trial court's finding that the injury was compensable and that, even if the employee proved a compensable injury, the evidence preponderates against the award of 80% permanent partial disability benefits. We affirm the trial court's judgment.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court Affirmed

CORNELIA A. CLARK, J., delivered the opinion of the Court, in which DONALD P. HARRIS, and CHARLES CREED MCGINLEY, SP. JJ., joined.

Mary Dee Allen, Cookeville, Tennessee, for the appellants, Sunkote Plastic Coatings Corporation and Lemic Insurance Company.

Mandi P. Parl and Marshall H. McClarnon, Nashville, Tennessee, for the appellee, Stephen D. Good.

Joshua Davis Baker, Nashville, Tennessee, for the appellee, Abigail Hudgens, Administrator for the Second Injury Fund, Tennessee Department of Labor and Workforce Development.

MEMORANDUM OPINION

Factual and Procedural Background

Thirty-nine-year-old Stephen D. Good ("Employee"), sought permanent and total workers' compensation benefits for a back injury he allegedly sustained on September 30, 2008, while working for Sunkote Plastic Coatings Corporation ("Employer").[1] Employer claimed that Employee's back injury was not work-related but was actually sustained while Employee was away from work September 25–29, 2008, clearing trees and brush on his property so that electric service could be installed to his home.

The proof at trial focused on whether Employee sustained a compensable injury and, if so, the extent of the disability.[2] Employee and three lay witnesses testified at trial. In addition, Employee introduced the deposition of Dr. Joseph Jestus, Employee's treating physician, the Form C-32 Medical Report of Dr. David W. Gaw, who performed an independent medical evaluation of Employee, and the deposition of Dr. Julian M. Nadolsky, an expert in vocational rehabilitation. Employer called two witnesses, Mr. Linus Gosse, the former owner of Employer, and Dr. William A. Wray, a vocational expert. Both Employee and Employer introduced documentary proof, including copies of medical records, certified copies of judgments showing Employee's prior convictions, and copies of job applications Employee had previously completed.

Employee testified first and explained that he worked for Employer from December 2007 to February 2009. Employer's business consisted of a manufacturing process that coated glass bottles and metal products with plastic. Employee was hired as a line worker, and his daily duties included lifting boxes of coated bottles weighing between fifteen to fifty

[1] In addition to Employer and its workers' compensation insurance carrier, Lemic Insurance Company, Employee named in his complaint the Administrator for the Second Injury Fund of the Tennessee Department of Labor and Workforce Development ("Second Injury Fund"). However, at the conclusion of the proof, the trial court granted the Second Injury Fund's motion to dismiss, and neither party objected to the dismissal. Through counsel, the Second Injury Fund has elected not to file a brief or otherwise participate in this appeal.

[2] The parties stipulated that the only two issues for trial were whether Employee sustained a compensable injury and whether Employee is permanently and totally disabled.

pounds. Employee was subsequently promoted to line supervisor, and in that position, became responsible for keeping the line running, getting supplies to the line as needed, relieving the other line workers at breaks, adjusting the machines as needed, and completing daily production reports.

Employee was working as line supervisor when he injured his back on September 30, 2008. According to Employee, when he clocked-in at 7:00 a.m. his line was already running, but the boxes of finished bottles had not been removed from the skids, leaving no space to stack the boxes of finished bottles then coming off the line. To make space, Employee and his supervisor, Woody Mitchell, began moving the boxes already on the skids. As Employee quickly and repeatedly lifted the thirty-pound boxes,[3] twisted around, and placed them on another skid, he felt a "stinging" sensation in his lower back. The sensation persisted and worsened, so Employee reported the injury soon after it occurred, first to his supervisor and then to the owners of the company, but he was not offered medical treatment. Employee finished the day and returned to work the next day, but the following day the pain in his back and legs had worsened, so he told his Employer that he needed to go to the hospital emergency room for treatment. Employer again did not offer Employee medical treatment, and Employee continued to work with the assistance of other employees, one of whom later became his wife. Employee continued to experience pain in his back and legs, and he regularly reported his ongoing back problems to his supervisor. However, Employer did not provide a panel of physicians until after Employee hired a lawyer.[4]

From the panel of doctors Employee chose Dr. James Talmage, an occupational health specialist in Cookeville, whom Employee first visited on January 29, 2009. Dr. Talmage ordered an MRI of Employee's lower back, imposed light work restrictions, and referred Employee to Dr. Joseph Jestus, who took Employee off work on February 16, 2009, and initially prescribed conservative treatment. When Employee's condition had not improved by late March 2009, Dr. Jestus recommended spinal fusion surgery and performed the procedure on April 27, 2009.

Employee testified that since the September 30, 2008 injury he has continuously experienced pain and numbness in his lower back, legs, and toes, and frequently falls because his leg "falls out from under" him. Employee said his symptoms have actually worsened since the surgery. Employee now uses a cane to walk, is unable to bathe or dress without his wife's assistance, uses pain medication to treat his symptoms, and sees a pain-management

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[3] One of the owners of the company testified that the boxes weighed seven or eight pounds.

[4] The owners of the company were Canadian citizens and were not familiar with workers' compensation requirements.

physician once a month. Employee is no longer able to shop for groceries, fish, hunt, play sports with his children, or repair his family's automobiles. Employee said he cannot stand for more than fifteen or twenty minutes and cannot sit for very long either, because he cannot get comfortable.

At the time of trial, Employee had not worked anywhere since Dr. Jestus took him off work on February 16, 2009, and Employee testified that he is no longer able to work because his prior work experience is limited to jobs involving manual labor that he can no longer perform. Employee had previously worked as an assembly line worker at various manufacturing facilities, a deboner in a slaughtering business, a warehouse worker for a futon manufacturer, a sanitation worker at a candy production facility, a cook and dish washer at a fast-food restaurant, and an attendant at a convenience store. Employee had also previously operated a chop saw at a lumber yard, drove a skidder at a logging operation, fenced, roped cattle and horses, painted houses and barns, repaired roofs, and worked in landscaping.

Employee's previous work experience also included jobs he performed as an inmate trustee while incarcerated from 1998 to late 2005 for a conviction of aggravated sexual battery. Employee recalled cleaning the jail, doing laundry, sweeping, mopping, washing patrol cars, repairing and maintaining patrol cars, picking up garbage, painting, stripping, and waxing floors, loading and unloading trucks at a food bank, and mowing and landscaping at Van Buren County buildings.

Although Employee acknowledged having prior injuries, he denied having any physical limitations or pre-existing disabling conditions prior to the September 30, 2008 injury. Employee admitted sustaining a brain injury in a motor vehicle accident about ten years before the trial and a right-shoulder injury while working for another employer in the early 1990s, but he said neither of these injuries resulted in permanent impairment or restrictions, and he returned to work after each with no restrictions or permanent impairment rating. Employee also acknowledged seeking treatment at the emergency room of the Cookeville Regional Hospital for back pain on June 4, 1994, after being thrown from a bull at a rodeo, on November 6, 1995, after falling over a bucket at work, and on January 5, 1997, after again being thrown from a bull at a rodeo. However, Employee explained that the back pain these injuries caused resolved in two or three days, without followup treatment and with no permanent impairment or physical restrictions.

In response to cross-examination questions, Employee admitted that he had previously pleaded guilty to felony theft of property for stealing a vehicle in Marion County and misdemeanor theft under $500 for stealing a vehicle in Cookeville. Employee claimed that he failed to disclose these offenses in his responses to interrogatories because he did not

realize that convictions included guilty pleas. Employee also admitted that he falsely claimed to have completed high school on job applications, when in reality he had completed only tenth grade. Employee said he misstated his education because the jobs for which he was applying required a high school diploma. Employee also agreed that he had failed to disclose his prior work experience operating a forklift. Employee denied intentionally misrepresenting any information and said he "forgets things" but does not do so intentionally. Employee said that he had been physically fit and active, with no impairments, restrictions, or prior workers' compensation claims before the September 30, 2008 injury.

Employee acknowledged taking off work September 25–29, 2008, to prepare for the installation of electrical service on his property, but he denied injuring his back while away from work during that time. Because he had no chainsaw, Employee paid another man, Kevin Winters, to clear brush and trees from a thirty foot right-of-way and did not help Mr. Winters with the work.

Joyce Good, Employee's wife, corroborated Employee's testimony that he did not injure his back clearing brush and trees on his property. Mrs. Good had also taken off work from September 25–29, 2008, and she recalled that Employee hired Kevin Winters to clear the brush and trees and that Employee did not help Mr. Winters with the work. Mrs. Good had known and lived with Employee for six years, been married to him for a year, and previously worked under his supervision at another manufacturing facility. Mrs. Good described Employee as an excellent boss who often helped other employees with their work. Mrs. Good said that Employee had been "fine" prior to the September 30, 2008 injury, needing no assistance with everyday activities, and that he had helped her with housework, worked on their vehicles, bathed himself, walked without assistance, had no back problems, cooked, shopped for groceries, fed and cared for their chickens, dogs, and cats, and participated in football, softball, basketball, and swimming with his daughter and her children. Mrs. Good explained that Employee has been unable to care for himself since the injury and that she helps him out of bed and to the bathroom, bathes and dresses him, prepares and serves his food, dispenses his medication, and cares for their animals. Mrs. Good said that Employee is also unable to hunt, fish, or take long walks, activities he enjoyed before the injury.

Paul E. "Buddy" Cox, a field engineer for Caney Fork Electric Cooperative, testified that he met Employee on September 26, 2008, at Employee's property, and staked off a thirty-foot right-of-way from which trees and brush had to be cleared before electrical service could be installed. When Mr. Cox returned a week or two later to determine if the staked area had been cleared, Employee was having trouble "getting around" and was using a walking stick. When Mr. Cox told Employee that one other tree needed to be cut from the area before he could approve the installation of electrical service, Employee responded:

"Well, I guess I can call that guy back to come out here and take care of that for me." Feeling sorry for Employee and wishing to avoid a return trip to the property, Mr. Cox cut the tree himself with his own chainsaw and approved the area for installation of electrical service. Mr. Cox testified that Employee's electrical service was activated on October 17, 2008.

Brian Scott, who had worked as a deputy sheriff with the Van Buren County Sheriff's Department from November 15, 1999 to May 8, 2005, testified that he had supervised Employee's work as an inmate trustee. According to Mr. Scott, Employee had no physical problems during his incarceration and did not complain of back pain or problems, despite working in a variety of labor-intensive jobs, including litter pickup, mowing, landscaping, maintaining and repairing sheriff's department vehicles, cooking, and maintaining the jail. After Employee's release, Mr. Scott and Employee remained friends, and to Mr. Scott's knowledge, Employee had no physical problems when he began working for Employer. According to Mr. Scott, since the September 30, 2008 work injury, Employee walks with a cane and is no longer physically able to fish, hunt, or help others with odd jobs, activities Employee enjoyed before the injury.

Mr. Linus Gosse, the former owner of Employer, also testified and confirmed that Employee reported a back injury on September 30, 2008, not long after his shift began. Mr. Gosse explained that he did not offer Employee medical treatment until after he received a letter form Employee's lawyer because he did not understand workers' compensation requirements. Mr. Gosse testified that, about six months before the September 30, 2008 injury, he was complaining about his own back pain during a five-minute conversation with Employee, and Employee mentioned that he had suffered from occasional back pain since his bull riding days with the rodeo. Mr. Gosse conceded, however, that other than this brief conversation, Employee did not complain of back problems prior to the September 30, 2008 injury. Mr. Gosse also acknowledged that Employee had no physical restrictions prior to the September 30, 2008 injury, and he described Employee's performance prior to the injury as "excellent." According to Mr. Gosse, Employee worked without accommodations, with "no complaints," never missed time for physical limitations or injury, met production, and had no disciplinary write-ups or problems. Although Employee was still working in the same capacity when Mr. Gosse transferred ownership of the company on December 31, 2008, after the September 30, 2008 injury, Employee complained consistently of back pain and reported seeking treatment at a hospital emergency room. Mr. Gosse admitted that Employee was not offered medical care until after Employee's lawyer notified Employer of Employee's workers' compensation claim.

Employee introduced the deposition of his treating physician, Dr. Joseph Jestus, a board-certified neurosurgeon. At Employee's initial appointment on February 17, 2009, Dr.

Jestus noted that Employee appeared to be "in obvious distress" and had an abnormal, antalgic gait, meaning Employee "looked crooked." Employee gave a history of injuring his back at work on September 30, 2008, moving boxes from one skid to another. Dr. Jestus reviewed a previous and recent MRI scan of Employee's lower back, which revealed spondylosis, herniated disks at the L4-5 and the L5-S1 levels, a slip at L5-S1, and lateral recess stenosis bilaterally at L5-S1. Dr. Jestus took Employee off work immediately, but recommended conservative treatment, including physical therapy and a steroid injection. Employee was not able to tolerate the physical therapy, and the steroid injection did not alleviate Employee's symptoms. At Employee's followup visit on March 20, 2009, Dr. Jestus recommended spinal fusion surgery at L4 through S1 and performed this procedure on April 27, 2009.

When Employee was discharged from the hospital after surgery, he reported minimal back pain, no leg pain, and was walking well, but he remained on pain medication. At followup appointments in June and July, Employee reported improvement in his pre-operative symptoms, but experienced occasional back and leg pain and numbness in both legs. At Employee's July appointment, Dr. Jestus noticed that Employee's gait was abnormal and that Employee was unsteady on his feet when standing. Employee's gait remained abnormal at his August 14, 2009 appointment, even though x-rays of the surgical site were normal. Dr. Jestus started Employee in physical therapy and also prescribed pain medication; however, Employee telephoned Dr. Jestus on September 23, 2009, asking to end physical therapy. At a September 25, 2009 office visit, Employee reported that his back and leg pain and numbness had been occasional before the physical therapy but had become continuous after he began physical therapy; however, x-rays of Employee's surgical site remained normal. Dr. Jestus prescribed oral steroids and other medications. At a November 6, 2009 office visit, Employee complained of back pain, as well as pain in his left leg and big toe, and Employee complained of similar, but less severe, symptoms in his right leg. At a December 8, 2009 office visit, Employee reported continued pain in the small of his back, with the pain radiating down his left leg and to his left big toe. Employee reported similar, but less severe symptoms in his right leg. Employee reported that the physical therapy had worsened his back and leg pain. At a January 12, 2010 office visit, Employee's symptoms remained unchanged. Although Employee's leg strength was normal, Dr. Jestus again noted that Employee had an abnormal gait.

At Employee's February 16, 2010 office visit, Dr. Jestus noted that Employee's condition had remained the same for several months and that Employee had likely reached maximum medical improvement. Dr. Jestus ordered a CT scan of Employee's lumbar spine and referred Employee to Mr. Fred Bowen at the Cookeville Therapy Center for a functional capacity evaluation. The March 3, 2012 CT scan showed Employee's surgical site had "solidly fused," meaning the nerves at that level had been decompressed. On March 9, 2012,

Mr. Bowen performed the functional capacity evaluation but concluded that the results were unreliable because Employee had failed to put forth his best effort when performing the tasks.

Employee returned to Dr. Jestus on March 12, 2010, for an assessment of permanent restrictions and impairment. Using the Sixth Edition of the AMA Guides, Dr. Jestus assigned a 15% permanent partial impairment to the body as a whole and released Employee to return to work with restrictions against lifting in excess of ten pounds and bending and twisting. Dr. Jestus also imposed a requirement that Employee be allowed to change positions frequently. Dr. Jestus referred Employee back to Dr. Talmage for followup treatment, including pain management.

During his deposition Dr. Jestus opined to a reasonable degree of medical certainty that Employee's "pain that he saw me for was a direct result of his spondylosis, degenerative disk disease, and disk herniations becoming symptomatic from his work-related injury." Although Dr. Jestus testified that Employee's degenerative disk disease predated the September 30, 2008 injury, Dr. Jestus could not say whether the herniated disks predated the September 30, 2008 injury, explaining:

> What we think happens is as the disks degenerate, cracks and tears form in the outer part of those disks. And when those cracks get big enough to form a hole, if you flex and twist at the same time, then you can squirt part of the inner part of the disk out of that hole. And that flexing and twisting can occur with trivial trauma, bending over to pick up something or with coughing or straining or sneezing. Occasionally, we'll see it with high impact injuries, falls or car accidents, but most often, its trivial-type things that cause these disk herniations to occur.

Dr. David W. Gaw performed an independent medical evaluation of Employee on June 2, 2010, and completed a Form C-32 Medical Report, which Employee introduced into evidence. Dr. Gaw assigned Employee a 29% permanent partial impairment rating to the body as a whole based on Employee's multiple level disk herniations and documented signs of bilateral radiculopathy. When shown Dr. Gaw's C-32 Medical Report, Dr. Jestus stated that if Employee presented to Dr. Gaw with documented signs of bilateral radiculopathy, Dr. Gaw's impairment rating would be consistent with the ABA Guides.

In terms of permanent physical restrictions, Dr. Gaw stated that Employee "could only occasionally twist, bend, stay in awkward positions or lift more than 20-30 lbs," and that Employee "should avoid lifting more than 10 lbs frequently," and that Employee "would need to alternate sitting and standing activities on an as needed basis."

Employee also introduced the deposition of Dr. Julian M. Nadolsky, an expert in vocational rehabilitation. After reviewing Employee's medical records, evaluating Employee, and considering Employee's physical restrictions and anatomical impairment ratings, Dr. Nadolsky testified that Employee is 100% vocationally disabled.

Dr. William A. Wray, a licensed clinical psychologist and board certified professional disability consultant with thirty years experience conducting vocational evaluations, testified for Employer at trial. Dr. Wray reviewed Employee's medical records, evaluated and tested Employee, reviewed Dr. Nadolsky's evaluation, considered Employee's physical restrictions and anatomical impairment ratings, and reviewed labor market data in the area where Employee lives.[5] Dr. Wray opined that Employee's performance on an achievement test suggested that Employee was not putting forth his best effort. Dr. Wray further noted "quite a bit of difference between the restrictions the physicians have put on [Employee] versus what he tells me he can and can't do," with Employee reporting that he is "much more limited and much more restricted" than the "actual restrictions" the physicians imposed. However, Dr. Wray concluded that Employee is qualified only for sedentary work, and based on Employee's physical restrictions, education, and prior felony conviction, which causes a vocational limitation, Employee is 91% vocationally disabled. Were Employee's pain to improve and become less limiting, Dr. Wray opined that Employee would have greater access to the job market.

At the conclusion of the proof, the trial court issued findings from the bench. The trial court expressed reservations about Employee's credibility, commenting on Employee's faulty memory, failure to be forthright, and intentional misrepresentations. Nonetheless, the trial court found, based on all the evidence, that Employee suffered a work-related injury on September 30, 2008. When determining the extent of Employee's disability, the trial court credited Dr. Gaw's 27% permanent impairment rating, noting that Dr. Gaw's evaluation occurred four months after Employee's last appointment with Dr. Jestus, and emphasizing Dr. Jestus's acknowledgment that Dr. Gaw's rating was appropriate under the ABA Guides if Employee presented to Dr. Gaw with bilateral radiculopathy. Although the trial court expressed frustration with Employee's failure to put forth his best efforts on the functional capacity evaluation administered by Mr. Bowen and the achievement test administered by Dr. Wray, explaining that Employee's lack of candor hindered the determination of vocational disability, the trial court found Dr. Wray's assessment of Employee's vocational disability more accurate than that of Dr. Nadolsky. Based on all the proof, the trial court awarded Employee 80% permanent partial disability benefits.

[5] Dr. Wray reviewed labor market data for Bledsoe, Rhea, Van Buren, and White counties.

Standard of Review

We review the trial court's findings of fact de novo, accompanied by a presumption of correctness of the finding, unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial judge has seen and heard in-court testimony, reviewing courts afford considerable deference to the trial court's findings regarding the credibility and weight to be given the testimony. Lindsey v. Trinity Commc'ns, Inc., 275 S.W.3d 411, 419 (Tenn. 2009); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). However, a reviewing court may draw its own conclusions and need not defer to the trial court's determinations regarding the weight and credibility of documentary proof and expert medical testimony presented by deposition. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). Similarly, review of a trial court's conclusions of law is de novo with no presumption of correctness. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008).

Analysis

I. Compensable Injury

Employer contends that the trial court erred in awarding workers' compensation benefits because Employee failed to prove by a preponderance of the evidence that he sustained an injury in the course and scope of his employment. Employer argues specifically that: a) Employee's testimony wholly lacked credibility and cannot be the basis for a workers' compensation award; b) the trial court erred by not applying the missing witness rule and drawing a negative inference from Employee's failure to call Kevin Winters as a witness; and c) Employee's injury is merely a non-compensable exacerbation of a pre-existing condition.

a. Lack of Credibility

Employer's argument that Employee's testimony wholly lacks credibility and cannot support the trial court's judgment is without merit. The trial court carefully evaluated Employee's credibility, along with the credibility and weight of the other evidence. Although the trial court expressed concern about Employee's lack of candor, faulty memory, and intentional misrepresentations on job applications, the trial court concluded that Employee's testimony concerning the September 30, 2008 injury and his resulting disability was corroborated by the testimony of Mrs. Good, Mr. Cox, Mr. Scott, and Mr. Gosse. We need not reiterate this testimony, as the proof has already been summarized in detail. Suffice it to say that the evidence does not preponderate against the trial court's credibility determinations

or its finding that Employee injured his back at work on September 30, 2008. See Lindsey, 275 S.W.3d at 419; Nakhoneinh, 69 S.W.3d at 167.

b. Missing Witness Rule

Employer next asserts that the trial court erred by not applying the missing witness rule and drawing a negative inference from Employee's failure to call Kevin Winters to testify. Employee responds that he met his burden of proof and was not required to call Mr. Winters as another corroborating witness. Employee asserts that he subpoenaed Mr. Winters as a rebuttal witness and did not call him because Employer offered no proof showing that Employee's back injury occurred away from work. Although the record on appeal reflects that Employer mentioned the missing witness rule only in passing in the trial court, and thus could be deemed to have waived this issue, we will address this argument on its merits.

The missing witness rule entitles a party to argue and have a jury instructed[6] that, "if the other party has it peculiarly within his power to produce a witness whose testimony would naturally be favorable to him, the failure to call that witness creates an adverse inference that the testimony would not favor his contentions." Newcomb v. Kohler Co., 222 S.W.3d 368, 400 (Tenn. Ct. App. 2006). However, "[n]o such inference arises where the only object of calling such witness would be to produce corroborative, cumulative, or possibly unnecessary evidence." Dickey v. McCord, 63 S.W.3d 714, 721 (Tenn. Ct. App. 2001) (citing Stevens v. Moore, 139 S.W.2d 710, 717 (Tenn. Ct. App. 1940)).

Employee and Mrs. Good testified that Employee hired Mr. Winters to clear brush and trees from their property and that Employee did not do the work himself. Mr. Cox, a neutral witness, testified that when he told Employee another tree needed to be cut to make way for the installation of electrical service, Employee responded, "Well, I guess I can call that guy back to come out here and take care of that for me." Given this testimony, Mr. Winters would have been at most a corroborative witness. Consequently, the trial court did not err by failing to apply the missing witness rule in this case.

[6] For purposes of this opinion we will assume, without deciding, that the missing witness rule applies to bench trials. The Court of Appeals has held otherwise. See, e.g. In re Estate of Hamilton, No. M2009–01882–COA–R3–CV, 2011 WL 532296, at *6 (Tenn. Ct. App. 2011) (stating that the missing witness rule "applies to jury trials where the trial judge instructs the jury how to interpret the evidence or lack thereof").

c. Causation

Employer's argument that the September 30, 2008 injury amounts only to a non-compensable exacerbation of a pre-existing condition also is without merit. "Except in the most obvious, simple and routine cases," a claimant 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). "Although causation in a workers' compensation case 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 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).

Although an employer must take an employee as he finds him, with any pre-existing conditions and diseases, Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 488 (Tenn. 1997), an "employee does not suffer a compensable injury where the work activity aggravates the pre-existing condition merely by increasing the pain." Trosper v. Armstrong Wood Products, Inc., 273 S.W.3d 598, 607 (Tenn. 2008). "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.

Employer argues that Employee failed to establish that the September 30, 2008 injury resulted in an anatomical change or advanced the severity of his pre-existing back problems. As support for this argument, Employer relies upon Foreman v. Automatic Sys. Inc., 272 S.W.3d 560 (Tenn. 2008). In Foreman, the employee had a longstanding, pre-existing back condition. Id. at 563-66. She consulted an orthopaedic surgeon, who advised her that her treatment alternatives were either surgery or continued use of medication for pain and muscle stiffness. Id. at 565. A short time later, she experienced increased pain as a result of an incident at work. Id. The trial court denied benefits, and the Supreme Court affirmed, noting that the surgeon, who examined her before and after the alleged work injury and reviewed the results of MRIs taken before and after the work incident, was unable to discern an anatomical change or advancement of her condition. Id. at 575.

This case differs markedly from Foreman. Before the September 30, 2008 injury, Employee had an asymptomatic degenerative condition that remained undiagnosed, required no treatment, and imposed no physical restrictions on Employee's work or daily activities. Although Employee had complained of back pain when seeking treatment on three prior

occasions at an emergency room, these temporary complaints resolved in two or three days, required no followup treatment, and occurred more than ten years prior to the work injury on September 30, 2008. Dr. Jestus opined to a reasonable degree of medical certainty that Employee's "pain that he saw me for was a direct result of his spondylosis, degenerative disk disease, and disk herniations becoming symptomatic from his work-related injury." Employee, Mrs. Good, Mr. Scott, and Mr. Gosse testified that, prior to the September 30, 2008 injury, Employee had no physical restrictions or limitations, did not complain of back pain or problems, and performed well in labor- intensive jobs. The evidence established that the September 30, 2008 work injury advanced the severity of Employee's pre-existing degenerative condition and is therefore compensable.

II.Extent of Permanent Disability

Employer's alternative argument is that the evidence preponderates against the trial court's award of 80% permanent partial disability benefits. In determining the extent of vocational disability, a trial court must consider the anatomical impairment ratings, lay and expert testimony, and pertinent factors, such as "the employee's skills and training, education, age, local job opportunities, and his capacity to work at the types of employment available to him in his disabled condition." Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 458-59 (Tenn. 1988) (internal quotation marks omitted).

Employee, age thirty-nine, has worked in a variety of jobs, all of which involved manual labor. Employee has a tenth grade education, and has previously been convicted of a felony offense that requires him to register as a sex offender. Dr. Jestus assigned Employee a 15% anatomical impairment rating and imposed restrictions against lifting in excess of ten pounds and against frequent bending and twisting and a requirement that Employee be allowed to change positions frequently. Dr. Gaw assigned Employee a 27% anatomical impairment rating and stated that Employee "should avoid lifting more than 10 lbs. frequently" and "in order to control his pain," Employee should "only occasionally twist, bend, stay in awkward positions or lift more than 20-30 lbs." Employee continues to use pain medication and sees a pain management physician monthly. Dr. Wray assessed Employee's vocational disability at 91%, while Dr. Nadolsky, assessed Employee's vocational disability at 100%.

The trial court thoughtfully and carefully considered all the proof, weighed its relative credibility, and found Dr. Gaw's and Dr. Wray's testimony more persuasive and helpful than that of Dr. Jestus and Dr. Nadolsky. In determining Employee's vocational disability, the trial court properly considered Employee's lack of candor and failure to put forth his best efforts in completing the functional capacity evaluation and achievement test. The evidence

supports and does not preponderate against the trial court's judgment awarding 80% permanent partial disability benefits.

Conclusion

The judgment is affirmed. Costs are taxed to Sunkote Plastic Coatings Corporation and Lemic Insurance Company, and their sureties, for which execution may issue if necessary.

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CORNELIA A. CLARK, JUSTICE

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

STEPHEN D. GOOD v. SUNKOTE PLASTIC COATINGS CORPORATION ET AL.

Circuit Court for Van Buren County
No. 1461C

No. M2012-00700-WC-R3-WC - FILED DECEMBER 19, 2012

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 by Sunkote Plastic Coatings Corporation and Lemic Insurance Company, and their sureties, for which execution may issue if necessary.

PER CURIAM