IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
October 30, 2017 Session

PAUL GRAY v. WINGFOOT COMMERCIAL TIRE SYSTEMS ET AL.

Appeal from the Circuit Court for Shelby County
No. CT-000517-13 Jerry Stokes, Judge

No. W2017-00380-SC-WCM-WC - Mailed February 16, 2018; Filed May 21, 2018

Paul Gray ("Employee") was injured in the course of his employment with Wingfoot Commercial Tire Systems ("Employer"). Several physicians—authorized and unauthorized—examined and treated Employee. After a Benefit Review Conference was completed and suit filed, an unauthorized physician performed surgery. The trial court considered numerous issues including subject matter jurisdiction, payment of unauthorized medical expenses, impairment, and disability. It ruled in favor of Employee and awarded 50% permanent partial disability benefits. Employer appeals. The appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. We affirm in part, reverse in part, and remand to the trial court.

Tenn. Code Ann. § 50-6-225(e) (2014) (applicable to injuries occurring prior to July 1, 2014) Appeal as of Right;
Judgment of the Circuit Court Affirmed in Part, Reversed in Part, and Remanded

DON R. ASH, SR.J., delivered the opinion of the court, in which ROGER A. PAGE, J. and WILLIAM B. ACREE, SR.J., joined.

R. Scott Vincent, Memphis, Tennessee, for the appellants, Wingfoot Commercial Tire Systems, and Liberty Mutual Insurance Company (Indianapolis).

Steve Taylor, Memphis, Tennessee, for the appellee, Paul Gray.

OPINION

Background

Procedural

This case concerns a 2010 workplace injury. Employee was examined and/or treated by multiple doctors over a period of years. To provide context for our discussion of the facts, we begin with this timeline of relevant events:

Apr. 16, 2010:	Date of injury
June 11, 2010:	Dr. Harriman declares Maximum Medical Improvement ("MMI")
July 15, 2010:	Employee requests another panel, selects Dr. Radican
Sept. 30, 2010:	Last appointment with Dr. Radican
Dec. 10, 2010:	Employer files notice of controversy regarding unauthorized medical
Aug. 2, 2011:	Employee files request for assistance with Department of Labor
Oct. 2011:	Employer provides another panel, Employee selects Dr. Feild
Nov. 7, 2011:	Dr. Feild releases Employee
Dec. 23, 2011:	Employee resigns from Employer
Jan. 13, 2012:	Employee begins treatment with Dr. Rizk
Jan. 16, 2012:	First Independent Medical Examination ("IME") by Dr. Dalal
Feb. 2012:	Employee begins working at Lowe's
May 15, 2012:	Medical Impairment Registry ("MIR") evaluation by Dr. Randolph
Feb. 7, 2013:	Benefit Review Conference occurs, impasse declared, Employee files civil action
Mar. 8, 2013:	Dr. Rizk refers Employee to Dr. Crosby
Apr. 15, 2013:	Dr. Crosby refers Employee to Dr. Green for pain management and

	consideration of spinal cord stimulator
July 15, 2013:	Stimulator implanted
Jan. 13, 2014:	Final office visit with Dr. Crosby
Jan. 29, 2014:	2nd IME by Dr. Dalal
July 22, 2014:	Employer files motion for summary judgment based on lack of subject matter jurisdiction
Jan. 16, 2015:	Employer's motion denied
Mar. 20, 2015:	Dr. Varner issues report on medical record review
Dec. 16, 2015:	Trial
Dec. 21, 2016:	Trial court enters findings and conclusions
Jan. 13, 2017:	Employee files motion to alter or amend
Jan. 19, 2017:	Employer files notice of appeal
Mar. 27, 2017:	Record transmitted to appellate court clerk
Apr. 7, 2017:	Trial court enters order granting motions by Employee

Factual

Employee was fifty-one years old at trial. He left high school in the twelfth grade but obtained his diploma while serving in the Marine Corps. He attended college for one and one-half years in California. His work history included operating a small computer business with his wife where he repaired computers and installed software. Employee previously worked as a group leader for Excel Goodyear where he developed (with another employee) an inventory tracking program. He had also worked as a division supervisor at Siemens where he also developed an inventory management program.

Employee was injured on April 6, 2010 when he was struck in the back of his right leg with a truck tire rolled by a coworker, causing him to fall backwards. He reported the incident immediately and was referred to a walk-in clinic where he received treatment until April 28. He was then referred to Dr. Mark Harriman, an orthopedic surgeon.

Dr. Harriman first examined Employee on May 7, 2010. He diagnosed a lumbar strain and right thigh pain and ordered additional physical therapy and work conditioning. Employee's symptoms persisted, and on May 17, 2010, Dr. Harriman ordered an MRI. The results of the MRI study were within normal limits.

Employee visited Dr. Harriman again on June 7, 2010. Dr. Harriman found Employee had good range of motion. He performed trigger point injections and released Employee to full-duty work.

Employee again visited Dr. Harriman on June 11, 2010, reporting he had awoken with increased pain in the right lower abdomen. However, Dr. Harriman did not consider the pain to be related to the work injury. He determined Employee had reached MMI, released Employee from his care, and assigned 0% impairment for the work injury.

Dissatisfied with the results of Dr. Harriman's treatment, Employee requested an additional panel of physicians; Employee selected Dr. Russell Radican, a chiropractor, who treated employee from July 22, 2010 to September 30, 2010. Dr. Radican administered chiropractic manipulation and other modalities. He noted Employee's symptoms had returned to pre-injury status.

After his release from Dr. Harriman in June 2010, Employee testified he requested additional medical treatment from Ms. Wheeler in Employer's Human Resources Department and from Mr. Vernon Baldridge,[1] Employer's Risk Management manager. Employee stated his requests were denied and Mr. Baldridge advised him to seek additional treatment through his health insurer. However, Mr. Baldridge could not recall any such conversation and testified, in the normal course, he would not advise an employee to seek care for a work injury through health insurance.

In December 2010, Employee used his insurance to see Dr. Robert Segal for a neurological evaluation. He ordered a new MRI, additional physical therapy, and an EMG study.

In August 2011, Employee filed a Request for Assistance ("RFA") with the Tennessee Department of Labor. Employer responded, in October 2011, by providing another panel of physicians from which Employee selected Dr. James Feild, a neurosurgeon.

Dr. Feild first saw Employee on October 10, 2011. Employee chiefly complained of right leg pain and reported a prior chiropractic determination of an "out of joint" hip. Dr. Feild examined Employee and reviewed his medical record and initially diagnosed lumbar disc

[1] Mr. Baldridge is referred to as "Mr. Vernon" throughout Employee's testimony. For clarity, we use the title "Mr. Baldridge" in this opinion.

syndrome. He also ordered a new MRI scan, which was performed on November 3, 2011. Dr. Feild testified the second MRI showed no new findings when compared to the June 2010 study. Specifically, he found no evidence of acute injury or nerve impingement. In November 2011, he released Employee from his care with 0% impairment.

Referred by his attorney, Employee next saw Dr. Tewfik Rizk who provided care from January 2012 to March 2013. Dr. Rizk referred Employee to Dr. Glenn Crosby, a neurosurgeon, whom Employee visited on March 18, 2013. Dr. Crosby ordered a myelogram and post-myelogram CT scan. He testified the studies showed no evidence of foraminal stenosis; however, the studies revealed retrolisthesis at the L5-S1 level. In April 2013, Dr. Crosby referred Employee to Dr. Phillip Green for consideration of placement of a spinal cord stimulator. Dr. Green performed the procedure on July 15, 2013.

Meanwhile, Employee resigned from Employer on December 23, 2011, and began working for Lowe's in February 2012. As part of the Lowe's application process, Employee signed a job description stating he was capable of moving objects weighing up to 200 pounds with assistance. The job description set out additional requirements, including the ability "to stand, bend, stoop, kneel, reach, twist, lift, push, pull, climb, balance, crouch, handle and move items weighing up to 50 pounds without assistance." Employee, however, testified he was not capable of performing those tasks and his supervisor had orally agreed to make accommodations. At Lowe's, Employee first worked assembling grills and lawn chairs. Later, he was assigned to clean floors with a stand-on scrubbing machine; he held this position at trial.

Employee presented expert medical testimony via deposition from Dr. Apurva Dalal, who performed two independent medical examinations, and from Dr. Crosby. He also introduced medical records from Dr. Tewfik Rizk and Dr. Russell Radican. Employer introduced the depositions of Drs. Harriman, Feild, and Randolph—selected from the medical impairment registry to perform independent examinations—and of Dr. John Varner, who conducted a medical record review at Employer's request.

Dr. Dalal first examined Employee on January 6, 2012. He diagnosed nerve impingement caused by neural foraminal stenosis. He opined Dr. Meekins' EMG study verified the existence of radiculopathy, and he opined Employee retained a 12% impairment to the body as a whole as a result of the condition. He recommended Employee "should not lift more than 10 pounds. He should avoid pulling, pushing, lifting, bending, squatting, [and] kneeling completely should be avoided."

Dr. Dalal conducted a second examination after the spinal stimulator had been implanted, and he assigned an additional 9% impairment to the body as a whole due to the implant. He testified he arrived at the impairment using Table 17-4, located at page 570-71 of the Guides; however, he conceded the Sixth Edition of the AMA Guides does not specifically address spinal cord stimulators.

Dr. Dalal testified, despite the spinal cord stimulator, Employee continued to experience "significant problems"—specifically, "back pain" and "pain going down his leg." He stated the stimulator "didn't work that great, but the patient is happy so that's good." He agreed the CT/myelogram report showed no neural foraminal stenosis, but he explained stenosis necessarily accompanies multi-level degenerative disc disease.

Dr. Crosby testified Dr. Meekins' EMG study confirmed an L5 or S1 radiculopathy. The CT/Myelogram ordered by Dr. Crosby showed no impingement at the L5-S1 level, but it did show "some alignment problems" at that level. After the stimulator was implanted, Employee returned to Dr. Crosby and reported the procedure had "help[ed] dramatically."

Dr. Crosby did not provide an impairment rating or set any physical restrictions. However, he agreed with Dr. Dalal's opinions on those subjects. He acknowledged the Sixth Edition of the AMA Guides does not provide an impairment rating for placement of a spinal cord stimulator. Dr. Crosby found no evidence of neural foraminal stenosis in the various diagnostic tests, but stated the CT/myelogram did show retrolisthesis, which he opined was aggravated by Employee's work injury. He considered the EMG to be the "most definitive" evidence to support a diagnosis of radiculopathy.

Dr. Harriman testified he found some right paraspinal muscle spasm during his initial examination on May 7, 2010. However, he reported normal MRI findings and found, as of June 7, 2010, Employee had good range of motion in his lower back. As stated above, Dr. Harriman found Employee's June 11, 2010 symptoms consistent with an abdominal problem; he opined Employee's acute symptoms "did not make any sense" with a two-month old work injury. He noted Employee had complained of right leg pain but found no physical findings to support a diagnosis of radiculopathy, and he indicated leg pain commonly occurs with a back strain. During his course with Employee, Dr. Harriman found no evidence of permanent injury, and he opined Employee retained 0% permanent impairment.

Dr. Harriman testified he considered an MRI a more accurate tool for assessing back injuries than an EMG. He stated a conflict between an MRI and an EMG would merit a discussion with the testing physicians.

As set out above, Dr. Feild was Employee's authorized physician in October and November of 2011. He personally reviewed the images of the May 2010 and November 2011 MRIs. He testified he found no changes between the two studies, nor did he find any cause for Employee's continuing complaints of leg pain. He assigned 0% impairment because, in his opinion, there was no physical, discoverable basis for Employee's complaints. Dr. Feild found Dr. Meekins' EMG study inconclusive. It "reported some changes in muscles up and down the spine[,]" but according to Dr. Feild, the findings were not consistent with right leg pain. He stated the "EMG is not diagnostic and it's not sufficient [] upon which [to] reach a scientific

conclusion."

Dr. Feild opined Employee was not an appropriate candidate for a spinal cord stimulator because he did not suffer from intractable pain and had no evidence of nerve/spinal cord damage; Employee exhibited normal reflexes, normal motor function, and normal sensation on examination. Accordingly, in Employee's case, he considered the spinal cord stimulator unreasonable.

Dr. Bruce Randolph, an occupational medicine physician, was selected by the parties through the Department of Labor's MIR program to evaluate Employee. After reviewing all relevant medical records and examining Employee on May 15, 2012, Dr. Randolph initially diagnosed chronic back pain due to a strain of the sacroiliac joint. He assigned 3% permanent impairment to the body as a whole due to the work injury. After issuing his report, he received Dr. Meekins' EMG report, but he stated the subsequent report did not change Employee's impairment. Dr. Randolph stated a positive EMG is a "grade 2 modifier" under the Sixth Edition's protocol for rating back injuries. However, applying this modifier would still result in a net modifier of two, leaving the full impairment at 3%. He found no objective evidence to link Employee's right radicular symptoms with the work injury, and he disagreed with Dr. Dalal's impairment rating because the MRIs showed no spinal stenosis.

Dr. John Varner, an orthopedic surgeon, conducted a medical record review at the request of Employer's attorney and issued his report on March 30, 2015. He did not examine or treat Employee. He reviewed the images of the 2010 and 2011 MRIs and the CT/myelogram ordered by Dr. Crosby. He explained MRIs are used to determine the presence of disc herniations, fractures, and slippage of vertebrae; he found no evidence of these conditions in the studies he reviewed. Further, he found neither evidence of disc or nerve pathology, nor any findings attributable to trauma. According to Dr. Varner, the studies showed only mild degenerative changes in the facet joints, which did not correlate with Employee ongoing symptoms.

Dr. Varner testified, pursuant to the Sixth Edition, a patient must suffer a ruptured disc before he or she can be placed in Class 2 of the impairment scale set out in Table 17-4. Because Employee did not have a ruptured disc, he disagreed with Dr. Dalal's decision to place Employee in Class 2. Instead, he considered Dr. Randolph's impairment rating more appropriate.

Dr. David Strauser, a vocational consultant who interviewed Employee on January 25, 2012, testified on behalf of Employee. He administered a portion of the Wide Range Achievement Test, which scored Employee at a 12th grade level. He described Employee's vocational history as primarily manual but with supervisory and management components. Based solely upon Dr. Dalal's suggested limitations, Dr. Strauser opined Employee had a 92% vocational impairment. However, on cross-examination, he conceded he was unaware

Employee was working full-time at Lowe's at the time of his evaluation. He opined Employee possessed transferrable job skills, and he noted the high error rate associated with the computer program he used to calculate Employee's vocational loss.

Michael Galloway, also a vocational consultant, testified on behalf of Employer. He interviewed Employee on September 23, 2013 and administered the full Wide Range Achievement Test. He scored Employee's word reading at the 9th grade level, his sentence comprehension at the 12th grade level, and his math skills at an 8th grade level. Mr. Galloway considered Employee's vocational background to be broad, and he found Employee retained marketable skills. Based on the information available to him, he opined Employee was capable of work at the light to medium level. Considering the opinions of Drs. Harriman, Feild, Randolph and Varner, he opined Employee had a 0% impairment. Mr. Galloway questioned Dr. Dalal's assessment because Dr. Dalal categorized as "heavy" a ten-pound lifting limit, which is inconsistent with the term's use in the vocational consulting field. Using Dr. Dalal's first report, which restricted Employee from heavy lifting, Mr. Galloway assigned a 35% vocational impairment. Based on Dr. Dalal's deposition testimony, he estimated vocational impairment at 70%.

After hearing this evidence, the trial court took the case under advisement and entered its findings of fact and conclusions of law on December 21, 2016. In summary, the court found: Employee had sustained a compensable injury; he had overcome the impairment opinion of Dr. Randolph by clear and convincing evidence; he had sustained a permanent impairment of 20% to the body as a whole; he was entitled to recover all unauthorized medical expenses incurred; and he had sustained a 50% permanent partial disability. Employee filed a timely motion to alter or amend the judgment. An amended judgment was entered, and Employer appealed. This appeal was transferred to this Panel in accordance with Tennessee Supreme Court Rule 51.

Analysis

Employer raises numerous issues on appeal: Subject matter jurisdiction; liability for unauthorized medical expenses; admissibility and weight of Dr. Dalal's testimony on certain subjects; whether the MIR impairment rating was overcome by clear and convincing evidence; whether the statutory cap of one and one-half times the impairment should have been applied; discretionary costs; and application of the statutory set-off for certain disability payments.

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(e)(2) (2014) (applicable to injuries occurring prior to July 1, 2014). When the issues involve the credibility and weight to be given to testimony, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness's demeanor and to hear in-court

testimony. Madden v. Holland Group of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony 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).

Jurisdiction

Employer's first two issues concern subject matter jurisdiction. First, it argues the February 7, 2013 benefit review conference was invalid because Employee had not yet reached Maximum Medical Improvement ("MMI"). Alternatively, it argues the spinal cord stimulator issue was not properly before the trial court because it was never the subject of a benefit review conference.

Regarding MMI, Employer cites Tenn. Comp. R. & Regs. 0800-2-5-.07(3)(a), which states a benefit review conference "shall not be scheduled until Maximum Medical Improvement is reached, except upon request by a party and determination by a Workers' Compensation Specialist that extraordinary circumstances require otherwise." Employer asserts Employee had not yet reached maximum medical improvement at the February 7, 2013 benefit review conference because he was receiving ongoing treatment from Dr. Rizk and, after the benefit review conference, was treated by Drs. Rizk, Crosby, and Green.

Prior to the February 7, 2013 benefit review conference, Drs. Harriman, Radican, Feild and Dalal declared Employee had reached MMI. After the benefit review conference, Dr. Rizk ultimately referred Employee to Dr. Crosby, who referred Employee to Dr. Green for consideration of a spinal cord stimulator implant; however, Employer has presented no evidence to indicate, at the time of the benefit review conference, Employee, or anyone else involved, possessed knowledge of any impending referral or surgery. Accordingly, we conclude the benefit review conference was not held prior to MMI in contravention of Tenn. Comp. R. & Regs. 0800-2-5-.07(3)(a), and therefore, the trial court had jurisdiction over Employee's claim regarding his April 6, 2010 injury.

In challenging the trial court's jurisdiction over spinal cord stimulator implant benefits, Employer cites Gray v. Zanini Tenn., Inc., No. M2013-00762-WC-R3-WC, 2014 WL 1311896 (Tenn. Workers Comp. Panel April 1, 2014). In Gray, the employee made claims for two distinct gradual injuries: carpal tunnel syndrome and a shoulder injury. Id. at *1. The employer accepted the carpal tunnel injury as compensable but denied liability for the shoulder injury. Id. Employee requested a benefit review conference, listing only the carpal tunnel claim. Id. However, in its response to the employee's request, the employer specifically

denied liability for the shoulder injury. Id. The impasse report issued by the Department of Labor did not reference the alleged shoulder injury. Id. The parties subsequently settled the carpal tunnel claim and Employee filed suit concerning her shoulder injury. Id. at *2. This Panel affirmed the trial court's dismissal for lack of jurisdiction over the shoulder claim because such claim had not been part of the benefit review conference process. Id. at *3.

This panel finds Gray readily distinguishable from the instant case. Unlike Gray, the instant case arises from a single injury. A benefit review conference was held and a civil action filed before the spinal cord stimulator issue arose. The reasonableness and necessity of the implant procedure was inextricably tied to the unresolved issues before the trial court. We can conceive no rational basis for requiring the parties to submit the sub-issue to mediation while the claim was already the subject of a pending lawsuit. In sum, we conclude the trial court possessed subject matter jurisdiction over all aspects of the claim.

Unauthorized Medical Expenses

Employer next contends the trial court erred by ordering it to pay Employee's unauthorized medical expenses—namely, treatment by Drs. Rizk and Crosby and surgical implantation by Dr. Green—citing the familiar rule that an employee may be liable for unauthorized medical expenses if he fails to consult with his employer before incurring them. See Buchanan v. Mission Ins. Co., 713 S.W.2d 654, 658 (Tenn. 1986).

Tennessee's workers' compensation law does not impose liability upon the employer for unauthorized medical treatment unless the employee proves: "(1) justification, i.e, a 'reasonable excuse,' for not consulting with h[is] employer before incurring medical expenses, and (2) the 'necessity and reasonableness' of the unauthorized medical care." Taylor v. Airgas Mid-S., Inc., No. W2012-00621-WC-R3-WC, 2013 WL 704095, at *4 (Tenn. Workers Comp. Panel Feb. 26, 2013) (internal citations omitted).

Referred by his attorney, Employee saw Dr. Rizk from January through March 2012. He filed suit against Employer in February 2013. Dr. Rizk referred Employee to Dr. Crosby in March 2013. The following month, April 2013, Dr. Crosby referred Employee to Dr. Green, who ultimately performed the implant surgery in July 2013.

Employee testified, after he was released by Dr. Feild in November 2011, Mr. Baldridge again advised him to seek additional care through his health insurance; the trial court accredited this testimony. This Panel questions the reasonableness of Employee's decision to undergo the significant implant procedure without consulting either Employer or the trial court. Nonetheless, given Employer's continued refusal to provide requested medical treatment, we find Employee has provided a "reasonable excuse" for failing to consult with Employer regarding treatment from Drs. Rizk, Crosby and Green.

Having found justification for non-consultation, we next consider the necessity and reasonableness of treatment—beginning with Drs. Rizk and Crosby. At the pertinent time, Employer had properly provided three authorized physicians to Employee; all three found he had reached maximum medical improvement and was able to return to work. Accordingly, Employee has failed to sustain his burden of proof to demonstrate the treatment by Dr. Rizk and Dr. Crosby was reasonable and necessary to impose liability for such upon Employer.

Moreover, regarding surgery with Dr. Green neurosurgeon Dr. Feild testified Employee was not an appropriate candidate for a spinal cord stimulator because he lacks "any evidence of nerve damage" and he stated implantation was "[u]nreasonable." Dr. Varner deferred to Dr. Feild regarding appropriateness for spinal cord stimulator insertion. Asserting reasonableness and necessity, Employee relies upon Dr. Dalal; however, Dr. Dalal testified the implantation surgery "did not result in any benefit[,]" and he increased Employee's permanent impairment rating following implantation. Dr. Green did not testify. Under these circumstances, we cannot conclude Employee has met his burden to prove treatment by Dr. Green was necessary. Accordingly, we reverse the trial court's decision to hold Employer liable for the expenses associated with the implant procedure.

Employee's Credibility

Employer next asserts the trial court erred in overlooking alleged inconsistencies in Employee's testimony and conduct. Specifically, Employer cites Employee's resignation due to pain and his subsequent work at Lowe's under a strenuous job description. It further questions, as illogical, Employee's excuse for failing to notify Employer prior to unauthorized treatment—that Employer advised him to use private insurance—because, when the unauthorized treatment was administered, Employee no longer worked for, or had health insurance through, Employer.

In its Amended Findings of Fact and Conclusions of Law, the trial court specifically accredited Employee's "assessment of his condition and ability to work" and it further found Employee "advised [Employer] he was not satisfied with the medical providers submitted by the workers compensation carrier but was advised by [Employer] to use his own health insurance to obtain additional medical treatment[.]"

"[W]hen the resolution of the issues in a case depends upon the truthfulness of witnesses, the trial judge who has the opportunity to observe the witnesses in their manner and demeanor while testifying is in a far better position than [a reviewing court] to decide those issues." Mid-Century Ins. Co. v. Williams, 174 S.W.3d 230, 236 (Tenn. Ct. App. 2005) (citations omitted). "[A]n assessment of credibility will not be overturned on appeal absent clear and convincing evidence to the contrary." Hughes v. Metro. Gov't of Nashville and Davidson Cty., 340 S.W.3d 352, 360 (Tenn. 2011) (citations omitted). Additionally, a "trial court's findings with respect to credibility and the weight of the evidence . . . generally may be

inferred from the manner in which the trial court resolves conflicts in the testimony and decides the case." Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733-34 (Tenn. 2002) (citation omitted). Our review of the record indicates the trial court properly confronted and resolved the alleged inconsistencies cited above. Employer has failed to submit clear and convincing evidence to overturn the trial court's accreditation of Employee's testimony.

Impairment

Employer asserts the trial court erred in utilizing the impairment rating of Dr. Dalal rather than of MIR physician, Dr. Randolph. We agree.

As outlined above, Dr. Dalal conducted two independent evaluations of Employee. On January 16, 2012, he diagnosed "[r]ight lower extremity radiculopathy from impingement of the nerve due to neural foraminal stenosis[,]" and he assigned a 12% impairment rating to the body as a whole. He opined, to a reasonable degree of medical certainty, Employee's injuries were caused by the April 6, 2010 work injury. Dr. Dalal testified his neural foraminal stenosis diagnosis was based upon "[m]edical records, evaluation, clinical exam, all of it." However, he acknowledged an April 13, 2013 CT scan, and Dr. Crosby's interpretation thereof, found no evidence of neural foraminal stenosis. He explained, notwithstanding the negative CT results, Employee suffered from multi-level degenerative disc disease, which always causes neural foraminal stenosis.

Following spinal stimulator implantation, Dr. Dalal re-evaluated Employee on January 29, 2014. Based upon Table 17-4 of the Sixth Edition of the AMA Guides, Dr. Dalal assigned an additional 9% impairment to the body as a whole from implantation. However, in his deposition, Dr. Dalal conceded the Guides do not specifically address spinal cord stimulator implantation.

In May 2012, Dr. Randolph, selected from the MIR, physically examined Employee and reviewed three separate MRI reports. He stated the three MRI reports did not show any form of stenosis or nerve impingement. He diagnosed chronic back pain due to lumbar strain in SI joint dysfunction and assigned a 3% whole person impairment. He later reviewed the EMG findings but concluded the overall rating remained unchanged. When confronted with Dr. Dalal's rating, Dr. Randolph stated the MRI findings do not verify foraminal stenosis, and therefore, an impairment rating could not be based on stenosis.

Tennessee Code Annotated section 50-6-204(d)(5) provides the impairment rating of an MIR physician is "presumed to be the accurate impairment rating; provided, however, that this presumption may be rebutted by clear and convincing evidence to the contrary."

> 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.

Beeler v. Lennox Hearth Prod., Inc., No. W2007-02441-SC-WCM-WC, 2009 WL 396121, at *4 (Tenn. Workers Comp. Panel Feb. 18, 2009). Mere disagreement between medical experts concerning the correct diagnosis is not sufficient, in and of itself, to overcome the presumption of correctness of an MIR physician's impairment rating. Mansell v. Bridgestone Firestone N. Am. Tire, LLC, 417 S.W.3d 393, 411 (Tenn. 2013). However, "the presentation of affirmative evidence that an MIR physician [] used an incorrect method or an inappropriate interpretation of the AMA Guides" can overcome the statutory presumption. Tuten v. Johnson Controls, Inc., No. W2009-1426-SC-WCM-WC, 2010 WL 3363609, at *4 (Tenn. Workers Comp. Panel Aug. 25, 2010).

As noted above, Dr. Dalal based his supplemental impairment rating upon the Guides, which do not expressly address spinal cord stimulator implantation. Such reliance is not necessarily fatal as Tennessee Code Annotated section 50-6-204(d)(3) (2014) (applicable to injuries occurring prior to July 1, 2014) states:

> To provide uniformity and fairness for all parties in determining the degree of anatomical impairment sustained by the employee, a physician, chiropractor or medical practitioner who is permitted to give expert testimony in a Tennessee court of law and who has provided medical treatment to an employee or who has examined or evaluated an employee seeking workers' compensation benefits shall utilize the applicable edition of the AMA Guides as established in § 50-6-102 or, in cases not covered by the AMA Guides, an impairment rating by any appropriate method used and accepted by the medical community.

See also Lambdin v. Goodyear Tire & Rubber Co., 468 S.W.3d 1, 13 (Tenn. 2015). However, in this case, Dr. Dalal did not testify he arrived at his impairment rating through a method "used and accepted by the medical community." In fact, he wholly failed to explain his methodology. He referenced Table 17-4 but did not discuss how he used it to arrive at a 9% impairment. Furthermore, he vacillated regarding the existence of any impairment from implantation. We conclude this evidence is insufficient to establish an impairment rating pursuant to section 50-6-204(d)(3).

` In sum, this Panel finds Employee has failed to present clear and convincing evidence to overcome the presumed accuracy of Dr. Randolph's rating. Therefore, the correct impairment

for the original injury is 3% to the body as a whole.

Restrictions

Finding foraminal stenosis with radiculopathy—and a resulting 12% impairment to the body as a whole—Dr. Dalal restricted Employee from lifting more than ten pounds and from pulling, pushing, lifting, bending, squatting, and kneeling completely.[2] In contrast, Drs. Harriman, Radican, Feild, and Randolph placed no restrictions upon Employee. Employer contends, citing the greater number of physicians recommending no restrictions and Employee's subsequent work history, the trial court erred in utilizing Dr. Dalal's restrictions to determine permanent disability.

As outlined above, this Panel has adopted Dr. Randolph's lower impairment rating assigned after finding no foraminal stenosis. Having essentially rejected Dr. Dalal's diagnosis, we cannot utilize his restrictions based on such. Accordingly, we likewise adopt Dr. Randolph's finding of no restrictions.

Application of Cap/Voluntary Resignation

The trial court found Employee sustained 20% permanent impairment to the body as a whole and 50% vocational impairment—2.5 times his impairment rating. Employer submits the trial court erred in failing to impose the 1.5 times statutory cap on Employee's impairment rating because he voluntarily resigned from his job in December 2011. See Lay v. Scott Cty. Sheriff's Dep't, 109 S.W.3d 293, 299 (Tenn. 2003). Employee, however, maintains he was forced to resign because he could no longer perform his job duties.

"Employees who sustain a permanent partial disability as the result of a workplace injury are entitled to receive permanent partial disability benefits in accordance with Tenn. Code Ann. § 50-6-241." Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). "The maximum amount of benefits that an employee may receive depends on whether the employee returns to work with the pre-injury employer." Id. "The permanent partial disability benefits of employees who have had a meaningful return to work are capped using the small multiplier in Tenn. Code Ann. § 50-6-241(a)(1)." Id. at 328. "On the other hand, the permanent partial disability benefits of employees who have not had a meaningful return to work are capped using the larger multiplier in Tenn. Code Ann. § 50-6-241(b)." Id.

> When determining whether a particular employee had a meaningful return to work, the courts must assess the reasonableness of the employer in attempting to

[2] In a March 25, 2014 letter, Dr. Crosby stated: "Concerning work restrictions, this is not a normal part of my practice but I believe the restrictions recommended by Dr. Dalal of no lifting over 10 pounds together with the avoidances of activities involving pulling, pushing and lifting and complete avoidance of activities requiring bending, squatting and kneeling appear to be appropriate."

> return the employee to work and the reasonableness of the employee in failing to either return to or remain at work. The determination of the reasonableness of the actions of the employer and the employee depends on the facts of each case.

Id. (citations omitted).

The appellate courts of this State have found an

> employee who later resigned or retired did not have a meaningful return to work when (1) the employee's workplace injury rendered the employee unable to perform his or her job, (2) the employer refused to accommodate the employee's work restrictions arising from the workplace injury, and (3) the employee's workplace injury caused too much pain to permit the employee to continue working.

Id. at 329 (footnotes omitted).

On December 23, 2011, Employee submitted his resignation to Employer, which stated,

> As you know, I got hurt on the job at Wingfoot on 04/06/2010. I have been seen by several physicians, but I continue to be in extreme pain. I enjoyed my time of employment at Wingfoot, but I feel due to my work injuries, I am no longer able to work for your firm and must resign.

At trial, Employee testified he "resign[ed] due to [his] inability to do the job. . . . [he] couldn't do it due to [his] injuries." When questioned regarding problems with daily activities, he stated:

> Standing for long periods of time causes problems. Lifting or bending. Sitting for any length of time without the spinal implant on causes problems. And I have problems with sleeping due to [] my pain.

Having thoroughly examined the record, we conclude the evidence does not preponderate against the trial court's finding Employee did not have a meaningful return to work. Accordingly, we find no error in the trial court's use of a 2.5 times multiplier. Applying the 2.5 times multiplier to our 3% permanent impairment to the body as a whole rating, this Panel finds Employee sustained 7.5% vocational impairment.

Discretionary Costs

Next, Employer contends the trial court abused its discretion in awarding Employee his discretionary costs—namely, court reporter fees for the depositions of Employee and Drs.

Crosby, Harriman, Varner, Randolph, and Feild.

> Tennessee Rule of Civil Procedure 54.04 provides in part:
> Costs not included in the bill of costs prepared by the clerk are allowable only in the court's discretion. Discretionary costs allowable are: reasonable and necessary court reporter expenses for depositions or trials [and] reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials[.]

Tenn. R. Civ. P. 54.04(2).

> As the Court of Appeals has explained:
>
> > Tenn. R. Civ. P. 54.04(2) permits prevailing parties in civil actions to recover "discretionary costs." The purpose of this provision is not to punish the losing party but rather to help make the prevailing party whole. The particular equities of the case may influence a trial court's decision to award discretionary costs, and, therefore, parties are not entitled to discretionary costs simply because they prevail.
> >
> > The party seeking discretionary costs has the burden of convincing the trial court that it is entitled to these costs. As a general matter, a party seeking discretionary costs can carry its burden by filing a timely and properly supported motion demonstrating (1) that it is the prevailing party, (2) that the costs being sought are included in Tenn. R. Civ. P. 54.04(2), (3) that the costs are necessary and reasonable, and (4) that it has not engaged in conduct during the litigation that would justify depriving it of the costs it is requesting.

Duran v. Hyundai Motor Am., Inc., 271 S.W.3d 178, 214-15 (Tenn. Ct. App. 2008). "[C]ourts generally award discretionary costs if they are reasonable and if the prevailing party has filed a timely, properly supported motion." Scholz v. S.B. Intern., Inc., 40 S.W.3d 78, 84 (Tenn. Ct. App. 2000) (citations omitted).

"Pursuant to rule 54.04, trial courts are vested with wide discretion in awarding discretionary costs, and [appellate courts] will not interfere with such an award except upon an affirmative showing that the trial court abused its discretion." Sanders v. Gray, 989 S.W.2d 343, 345 (Tenn. Ct. App. 1998) (citations omitted). "The party who takes issue on appeal with a trial court's decision regarding discretionary costs has the burden of showing how the trial court abused its discretion." Massachusetts Mut. Life Ins. Co. v. Jefferson, 104 S.W.3d 13, 36 (Tenn. Ct. App. 2002) (citation omitted). Employer has failed to do so; the trial court properly awarded discretionary costs following Employee's submission of a timely and properly supported motion demonstrating he is entitled to such.

Admission of Post-Trial Evidence

In its Amended Findings of Fact and Conclusions of Law, the trial court found reasonable the following medical bills: Dr. Green $4,619.94, East Memphis Anesthesia, $1,760.00, St. Francis Hospital $25,476.87, and St. Francis Hospital $100,756.43. The Court ordered Employer to pay $46,649.90 representing "the amount paid on the medicals by [Employee's] health insurance carrier less a fee of twenty percent (20%) of the net amount paid on the subrogation medicals which are $46,649.60 since these were contested at trial[.]"

Employer argues the trial court erred in admitting post-trial evidence—a February 24, 2017 Optum Med Pay Summary and a letter regarding such— concerning these allegedly unauthorized medical expenses.[3] It argues the evidence should have been introduced at trial and, alternatively, is impermissible hearsay under Tennessee Rules of Evidence 801 and 802. Additionally, it states the new evidence demonstrates a billed amount of $135,698.11, whereas the amount of $132,883.24 was introduced at trial.

"We review the trial court's decision to admit or exclude evidence by an abuse of discretion standard." Biscan v. Brown, 160 S.W.3d 462, 468 (Tenn. 2005). The transcript from the March 10, 2017 post-trial hearing indicates there existed confusion at trial regarding the subrogation amount and amounts paid versus amounts billed. Accordingly, Employee's counsel sought additional information and obtained a medical payment summary—created on February 24, 2017—from Optum, a company hired by Lowe's to pursue a recovery for medical benefits paid. The summary indicated Lowe's had paid $46,649.60 in medical bills arising from the April 6, 2010 injury. A letter signed by an Optum representative was attached to the summary.

We find the documents are admissible as exceptions to the hearsay rule as a data compilation kept in the course of business. See Tenn. R. Evid. 803(6). Therefore, the trial court did not abuse its discretion in admitting the subject records.

As stated above, this Panel finds Employee failed to sustain his burden of proof to demonstrate the treatment by Drs. Rizk, Crosby and Green was reasonable and necessary. This Panel cannot determine what portion of the $46,649.60 amount, if any, is attributable to treatment from these doctors.[4] Accordingly, this Panel remands to the trial court for further findings consistent with this opinion.

[3] In the body of his brief, Employee argues the trial court should have awarded him "the $7,200 in out of pocket costs for what health insurance did not cover." We decline to address this argument as Employee failed to list it as an issue for review and it is unclear whether it was raised in the trial court.

[4] The trial court found reasonable Dr. Green's $4,619.94 bill; however, it is unclear how much of this bill, if any, was included in the trial court's $46,649.90 award.

Credit for Disability Payments

Finally, Employer asserts the trial court erred in failing to credit it for $1,000.00 paid in short-term disability benefits. Employee concedes Employer is entitled to this credit. The order shall be modified to reflect a credit in the amount of $1,000.00.

Conclusion

The portions of the judgment pertaining to the medical fees of Drs. Rizk, Crosby and Green, the amount of anatomical impairment and vocational disability, and the credit for short-term disability benefits paid are reversed. The issue of subrogation is remanded. The remaining portions of the judgment are affirmed. Costs are taxed to Wingfoot Commercial Tire Systems, Liberty Mutual Insurance Company (Indianapolis), and their surety, for which execution may issue if necessary. The case is remanded to the trial court for entry of an order consistent with this opinion.

_____

DON R. ASH, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

PAUL GRAY v. WINGFOOT COMMERCIAL TIRE SYSTEMS ET AL.

Circuit Court for Shelby County
No. CT-000517-13

No. W2017-00380-SC-WCM-WC – Filed May 21, 2018

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Paul Gray pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well taken and is, therefore, denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Wingfoot Commercial Tire Systems, Liberty Mutual Insurance Company (Indianapolis), and their surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Page, Roger A., J., not participating