

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 27, 2012 Session

BILLY HILL v. HUTCHERSON METALS, INC. ET AL.

**Appeal from the Chancery Court for Dyer County
No. 10-CV-160 Tony A. Childress, Chancellor**

No. W2011-01834-SC-WCM-WC - Mailed January 3, 2013; Filed March 5, 2013

A crane struck a large metal container, pushing a door on the container into an employee and causing an injury to the employee's back. The employee filed a claim for workers' compensation benefits. The trial court entered a judgment finding that the employee's inability to work and depression were caused by a preexisting condition that was unrelated to his work-related injury and that the employee sustained a 21% permanent partial disability for the injuries to his lumbar spine. The employee has appealed, contending that the trial court erred by finding that his pre-existing condition was not aggravated by his work injury. The employer contends that the trial court erred by finding that the employee is permanently disabled as a result of his injury.

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

BEN H. CANTRELL, SR. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J., and DONALD E. PARISH, SP. J., joined.

Steve Taylor, Memphis, Tennessee, for the appellant, Billy Hill.

Ronald L. Harper and M. Dean Norris, Memphis, Tennessee, for the appellees, Hutcherson Metals, Inc. and Wausau Underwriters Insurance Company.

Robert E. Cooper, Jr., Attorney General & Reporter; William E. Young, Solicitor General; Alexander S. Rieger, Assistant Attorney General, for the appellee, Tennessee Department of Labor and Workforce Development, Second Injury Fund.

MEMORANDUM OPINION

Factual and Procedural Background

Hutcherson Metals, Inc. (“Hutcherson”) employed Billy Hill as a truck driver. On March 24, 2008, Mr. Hill was attempting to close a door on a large metal container. A crane stuck the container, causing the door to push Mr. Hill into a “car hauler.” Mr. Hill immediately felt pain in his left leg and numbness through the lower half of his body. He reported the incident and was taken to a physician by a co-worker. He received treatment and went home for the day. When his wife later returned to the home, she discovered that Mr. Hill had unknowingly urinated while sitting in the kitchen. She took him to a local emergency room for additional treatment. Mr. Hill filed a complaint for workers’ compensation benefits in the Chancery Court for Dyer County, Tennessee, on April 15, 2010, and a trial was conducted on June 7, 2011.

In January 2008, prior to his work injury, Dr. Blumenfeld, a rheumatologist, determined that Mr. Hill was suffering from rheumatoid arthritis (“RA”), an autoimmune disorder affecting the joints. After the March 24, 2008 injury, Mr. Hill was treated by Dr. Carl Huff, an orthopaedic surgeon, for treatment related to that event.

At the time of trial, Dr. Huff had moved his practice to Oklahoma and was unable to testify. The parties introduced his medical records into evidence by stipulation. The records reflect that Dr. Huff ordered MRI scans of Mr. Hill’s right shoulder, lumbar spine, and cervical spine, as well as a nerve conduction study of Mr. Hill’s legs. These tests revealed the presence of radiculopathy at L5-S1 on the right side. Dr. Huff prescribed physical therapy and medication. On July 1, 2008, Dr. Huff released Mr. Hill from his care. His note of that date states:

From an orthopedic standpoint, the patient is able to return to work; however, he is having severe joint pains in his shoulder, his lower back, and both hips. . . . I am discharging him from my care with no specific indication that his orthopedic condition is now active; however, the systemic arthritis aggravation may be the basis for his continued severe pain and inability to return to work.

Dr. Huff’s final diagnoses were traumatic injury to Mr. Hill’s shoulder and lower back, lumbar radiculitis, and aggravation of systemic arthritis from the work accident. Dr. Huff directed Mr. Hill to return to Dr. Blumenfeld for evaluation.

Dr. Blumenfeld testified by deposition. He testified that Mr. Hill presented in January 2008 with swelling and intermittent pain in his knees, ankles, shoulders, fingers, and wrists. After conducting a physical examination and blood tests, he concluded that Mr. Hill had RA. His initial diagnosis was severe polyarthritis of a “very progressive” nature. He prescribed pain medication and also various medications used to treat RA, including methotrexate and Humira. Because of the effects of these medications, Dr. Blumenfeld restricted Mr. Hill from driving a vehicle on public roads.

Dr. Blumenfeld testified that Mr. Hill had severe RA before his work injury, but that his symptoms showed some improvement in the weeks prior to his work injury. He observed that Mr. Hill’s condition worsened since his work injury in spite of the therapy provided. Dr. Blumenfeld testified that Mr. Hill was already receiving the “top medication” for RA and that his course of treatment was no different after the work injury than it had been before. He opined that the work injury had exacerbated the condition and referred to “Hollander’s textbook of Rheumatology” in support of his opinion.

Dr. Tewfik Rizk, a specialist in physical medicine and rheumatology, also testified by deposition on behalf of Mr. Hill. His background included an appointment as an assistant professor of medicine at the University of Tennessee College of Medicine. Dr. Rizk began seeing Mr. Hill in August 2008 at the request of Mr. Hill’s attorney. Dr. Rizk saw Mr. Hill occasionally thereafter, usually when he was having difficulty obtaining RA medication because of cost and insurance issues. In approximately April 2010, Dr. Blumenfeld retired, and Dr. Rizk became directly involved in providing care for Mr. Hill’s RA. Initially, he suggested a series of gold injections; however, he ultimately continued Dr. Blumenfeld’s course of treatment. Test results in February 2011 revealed that Mr. Hill had a rheumatoid factor of 3,022. Dr. Rizk stated “normal is 14.” Mr. Hill’s sedimentation rate¹ was also elevated, at seventy-four.

Based on Dr. Rizk’s review of records of other physicians and his examination and treatment of Mr. Hill, Dr. Rizk concluded Mr. Hill had RA and an L5-S1 radiculopathy. Dr. Rizk opined that the radiculopathy was caused by the March 2008 work injury, and the pre-existing RA had been worsened by it. In support of his opinion that trauma can exacerbate pre-existing RA, he referred to a textbook, “Arthritis and Allied Conditions,” by Daniel and McCarty, ninth edition. He agreed with the analysis of Dr. Dalal, whose testimony is discussed below, that Mr. Hill retained an overall impairment of 29% to the body as a whole. For the radiculopathy only, he agreed that Mr. Hill retained a 14% impairment to the body

¹ The testimony and medical records refer to Mr. Hill’s “sed rate.” It is clear that the medical experts are discussing Mr. Hill’s sedimentation rate.

as a whole, should avoid repetitive bending and twisting and should limit lifting to no more than twenty pounds.

On cross-examination, Dr. Rizk agreed that the medical records of Dr. Blumenthal showed that Mr. Hill's RA symptoms tended to improve when he was receiving medications, but tended to worsen when he was not. Dr. Rizk also agreed that Mr. Hill had severe and aggressive RA prior to the work injury and conceded that Dr. Blumenthal's records stated that Mr. Hill's RA symptoms improved during the first months following the injury.

Dr. Apurva Dalal, an orthopaedic surgeon, performed an independent medical examination of Mr. Hill in July 2009 at the request of Mr. Hill's attorney. Dr. Dalal testified by deposition. Based on his review of the records of other physicians and his examination of Mr. Hill, Dr. Dalal stated that Mr. Hill retained a 29% impairment to the body as a whole for his RA, of which 5% was attributable to a permanent aggravation caused by the March 2008 work injury. Dr. Dalal opined that the L5-S1 radiculopathy revealed by Dr. Huff's nerve conduction study was caused by Mr. Hill's work injury and that the work injury had permanently aggravated the pre-existing RA. On cross-examination, Dr. Dalal testified that he had reviewed only post-March 2008 medical records for his evaluation and that his professional involvement with RA patients consisted primarily of performing joint replacement surgery. He agreed that RA is an autoimmune disorder and is not caused by trauma.

Dr. Thomas Zizic, a rheumatologist, performed an independent medical examination of Mr. Hill in September 2010 at the request of Hutcherson's attorney and testified at trial. In addition to his private practice, Dr. Zizic was a part-time member of the faculty of Johns Hopkins Medical School. He had previously been a full-time faculty member at Johns Hopkins Medical School for almost twenty years. Dr. Zizic testified at length concerning the causes of and treatments for RA. He stated that current research indicated that the disease was related to a combination of genetic predisposition and autoimmune factors. He also testified that cigarette smoking was thought to increase the severity of the disorder. In support of his statement that there was "no scientifically credible evidence that trauma can produce rheumatoid arthritis or aggravate pre[-]existence of the disease," he pointed out that there had been no scientifically credible studies of a causal relationship between trauma and RA in the preceding thirty years. Moreover, the texts and articles cited by Dr. Blumenfeld and Dr. Rizk were thirty or more years old.

Based on the records of Dr. Blumenfeld, Dr. Zizic estimated that Mr. Hill's RA had been active for at least a year before January 2008. The onset of Mr. Hill's RA was significant because treatment of the disease starting more than three months after onset was less likely to be effective than treatment commenced earlier. He also testified that

approximately 20% of all RA patients went into remission with treatment; 60% of RA patients had fluctuating symptoms that gradually worsened even with treatment; and 20% of RA patients had increasing symptoms regardless of the type of treatment they received. During cross-examination, Dr. Zizic testified that Mr. Hill's RA had progressed since 2008. Dr. Zizic agreed that he had testified in about twenty-five cases in the four years preceding the trial of this case, and he estimated that his total fees for this case would be approximately \$23,000.

Dr. Stephen Waggoner, an orthopaedic surgeon, conducted an independent medical evaluation of Mr. Hill in March 2011 at the request of Hutcherson's attorney. He testified by deposition. Dr. Waggoner found that Mr. Hill had a normal neurological examination of the spine and upper extremities, with normal sensation, strength, and reflexes in his lower extremities. Dr. Waggoner testified that he found no signs or symptoms of radiculopathy during his examination. He therefore assigned no permanent impairment for the L5-S1 radiculopathy shown on Dr. Huff's April 2008 nerve conduction study. On cross-examination, he conceded that he only examined Mr. Hill on a single occasion. He testified that Mr. Hill was incapable of working due to the effects of RA. He stated that he considered the claim to be an abuse of the workers' compensation system.

Dr. David Shraberg, a psychiatrist, examined Mr. Hill on July 31, 2010, at the request of Hutcherson and testified via deposition. He observed that the medications prescribed for Mr. Hill prior to his work injury were "big guns," indicating a serious, progressive illness. He noted that Xanax was being prescribed to help Mr. Hill sleep, and that sleep disturbance is often one of the first signs of depression. Dr. Shraberg diagnosed Mr. Hill with depression. Dr. Shraberg testified that the disorder was "attributable to his active crippling painful [RA] and the limitation that's imposed upon him as well as the medication effects." Regarding the latter, he stated that the medications prescribed for RA cause "significant neuropsychiatric symptoms." He also testified that it was common for patients recently diagnosed with serious diseases such as RA, lupus, or multiple sclerosis to become depressed. On cross-examination, Dr. Shraberg stated that he saw Mr. Hill on one occasion only and that he had performed approximately two dozen evaluations for the law firm representing Hutcherson during the previous two years.

Dr. Randall Moskovitz, a psychiatrist, examined Mr. Hill on several occasions in 2008, 2009, and 2010 at the request of Mr. Hill's attorney. Dr. Moskovitz diagnosed Mr. Hill with major depression. In his opinion, this condition was directly related to Mr. Hill's March 24, 2008 work injury. Dr. Moskovitz also stated that Mr. Hill had a 20% permanent psychiatric impairment pursuant to the Sixth Edition of the AMA Guides to the Evaluation of Permanent Impairment and that Mr. Hill had a poor prognosis to engage in work-related activities in the future. Dr. Moskovitz agreed with Dr. Shraberg's diagnosis of depression

but disagreed with Dr. Shraberg's opinion concerning causation. Dr. Moskowitz did not consider Dr. Shraberg competent to state an opinion about the aggravation of Mr. Hill's underlying RA by his work injury because Dr. Shraberg practiced as a psychiatrist. Dr. Moskowitz stated that he did not provide separate impairment ratings for Mr. Hill's underlying RA and work injury because to do so would be outside of his area of expertise.

During cross-examination, Dr. Moskowitz stated that he understood that Mr. Hill did not suffer from chronic pain before the March 2008 injury. His opinion on causation was based in part on the timing of the onset of Mr. Hill's depression, which occurred after the work injury. He conceded that Dr. Blumenfeld's records indicated that Mr. Hill reported pain for one year prior to January 2008. Dr. Moskowitz interpreted these remarks to mean that Mr. Hill had episodes of "some pain" prior to March 2008. He also agreed that Dr. Huff's records suggested that Mr. Hill had taken antidepressant medication prior to March 2008 but noted that such medications are often given to treat conditions other than depression.

Mr. Hill testified that he had attended school into the fifth or sixth grade. He had worked for Hutcherson for four years prior to March 2008. He was first diagnosed with RA by his physician, Dr. McKee, in late 2007. Dr. McKee referred him to Dr. Blumenfeld. Mr. Hill testified that he had worked only one day after the March 2008 accident. He was receiving social security disability benefits at the time of trial. He had continued to hunt, fish, and ride all-terrain vehicles after his RA diagnosis, but he had been unable to engage in those activities after his work injury. He described a "good day" in his current condition as one in which he was able to move about his house without a walker.

On cross-examination, Mr. Hill was uncertain about the date on which he discontinued his hunting and fishing activities. He initially repeated that he had continued those activities until March 2008 but later revised the cessation of his hunting and fishing activities to the fall of 2007. He agreed that his job application for Hutcherson incorrectly stated that he had a GED but said that his wife had filled out the application for him. He also agreed that an application for social security disability benefits had been submitted on his behalf in approximately March or April of 2007 and that he had signed that document. However, he was unsure if he, or someone else, had filled in the body of the document. He conceded that the document stated that his symptoms began in July 2006 and that he had stopped hunting and fishing around that time.

Donna Hill, Mr. Hill's wife, testified that he had problems with his right leg, swelling of his hands and feet, depression, and difficulty sleeping since the work injury. She admitted that she had completed her husband's job application for Hutcherson and that she had lied about his education. On cross-examination, she stated that she had completed a questionnaire

concerning social security disability at Dr. Blumenfeld's office around March 14, 2008, prior to Mr. Hill's work injury.

Dr. David Strausser, a vocational specialist, evaluated Mr. Hill at the request of Mr. Hill's attorney and testified by deposition. His tests revealed that Mr. Hill was able to read and perform arithmetic at only a first-grade level and described him as "functionally illiterate." Dr. Strausser opined that Mr. Hill was 100% vocationally disabled due to RA. Using only Dr. Rizk's restrictions for Mr. Hill's radiculopathy, Dr. Strausser opined that Mr. Hill was 65% vocationally disabled.

Michael Galloway, also a vocational specialist, evaluated Mr. Hill at the request of Hutcherson's attorney and testified by deposition. He opined that if the workplace accident had exacerbated Mr. Hill's RA, Mr. Hill had a 100% vocational disability. However, based only on Dr. Rizk's restrictions for Mr. Hill's radiculopathy, Mr. Galloway opined that Mr. Hill's vocational disability was 40%. Based solely on the opinions of Drs. Huff, Zizic, and Shraberg, Mr. Galloway opined Mr. Hill had a 0% vocational impairment due to his work injury.

The trial court took the case under advisement and issued written findings of fact and conclusions of law. The court concluded the work injury of March 24, 2008, did not cause or worsen Mr. Hill's pre-existing RA, finding the testimony of Dr. Zizic to be persuasive on that issue. The court further found (1) that Mr. Hill was unable to work due to RA, and that he would have been unable to work without regard to the March 24, 2008 injury; (2) that Mr. Hill's depression was caused by RA and his inability to work and was therefore not compensable; and (3) that Mr. Hill had sustained an injury to his lumbar spine as a result of the March 24 incident, causing a 14% anatomical impairment. It awarded 21% permanent partial disability benefits to the body as a whole for that injury. Judgment was entered in accordance with the trial court's findings.² Mr. Hill has appealed, contending that the trial court erred by finding that his pre-existing RA was not aggravated by his work injury. Hutcherson asserts that the trial court erred by finding that Mr. Hill suffered a permanent impairment and disability from his back injury. Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to a Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law.

Standard of Review

² The trial court also properly made alternative findings as to the extent of Mr. Hill's disability in the event that the Panel held that Mr. Hill's RA was aggravated by his workplace injury. See Gerdau Ameristeel, Inc. v. Ratliff, 368 S.W.3d 503, 509 (Tenn. 2012).

Our review of the trial court's factual findings in a workers' compensation case is de novo with a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). When issues of credibility of witnesses and the weight to be given their in-court testimony are before the reviewing court, considerable deference must be accorded to the factual findings of the trial court. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733 (Tenn. 2002). A trial court's conclusions of law are reviewed de novo on the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Compensability of Rheumatoid Arthritis

Mr. Hill asserts that the trial court erred by finding that he did not suffer a compensable aggravation of his pre-existing RA as a result of the March 25, 2008 work injury. He argues that the testimony of Drs. Blumenfeld, Rizk, and Dalal that his RA was worsened by the trauma of his work injury is more persuasive than Dr. Zizic's testimony that there is no scientific evidence that RA can be either caused or worsened by physical trauma. At the outset, we point out that when expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983).

All of the medical evidence in this record supports the conclusion that Mr. Hill had severe, progressive RA prior to March 2008. He had received a tentative diagnosis in December 2007, which was confirmed by Dr. Blumenfeld in January 2008. The medical evidence concerning the onset of his symptoms is not precise. However, it is clear that his symptoms began at least several months prior to December 2007, and they may have started in 2006. On confirming the diagnosis in January 2008, Dr. Blumenfeld immediately began to treat Mr. Hill with the most advanced medications available. He testified that the same regimen would have continued without regard to the work injury. His opinion that the work injury exacerbated the underlying condition was based on his perception that Mr. Hill's symptoms worsened thereafter.

Both Dr. Blumenfeld and Dr. Rizk testified that it was generally accepted by rheumatologists that physical trauma could cause existing RA to worsen. Each cited an article from a textbook in support of his opinion. Dr. Zizic testified in court and without contradiction that the textbooks and articles on which Drs. Blumenfeld and Rizk relied were thirty years old and that more recent research had found no relationship between physical trauma and RA. Dr. Zizic's resume and testimony demonstrate that he had been actively

engaged in research concerning the causes of, and treatments for, RA for many years. He had also authored or coauthored dozens of articles on these subjects. In light of these considerations, we are unable to conclude that the trial court erred by accepting Dr. Zizic's opinion over those of the physicians who testified on Mr. Hill's behalf and finding that Mr. Hill's work injury did not aggravate his RA.

Award of Benefits for Radiculopathy

Although the trial court did not find that Mr. Hill's work injury aggravated his pre-existing RA, the trial court did determine that Mr. Hill suffered an injury to his lumbar spine as a result of the March 24 incident. Hutcherson asserts that the trial court erred by finding that Mr. Hill had sustained a permanent L5-S1 radiculopathy as a result of his work injury and by adopting Dr. Rizk's impairment of 14% to the body as a whole due to the injury. Hutcherson submits that the opinions of Dr. Rizk and Dr. Dalal concerning the existence of, and impairment resulting from the radiculopathy are not credible because their records do not reflect that they made any clinical findings of radiculopathy during their examinations of Mr. Hill. Hutcherson argues that the opinion of Dr. Waggoner is more credible, largely because he explicitly addressed radiculopathy in his examination of Mr. Hill, and Dr. Waggoner conducted his examination of Mr. Hill after the examinations of Dr. Rizk and Dr. Dalal.

We review the trial court's assessment of the expert testimony of Mr. Hill's radiculopathy with the same abuse of discretion standard we applied in our analysis of Mr. Hill's RA claim. Hinson, 654 S.W.2d at 676-77. Both Dr. Rizk and Dr. Dalal reviewed the records of Dr. Huff, and both relied in large part on the results of the nerve conduction study that he performed in the weeks following Mr. Hill's accident. Dr. Rizk testified that the nerve conduction study alone demonstrated a permanent impairment. Dr. Waggoner disagreed, stating that the results of the clinical examination were the critical factor in determining permanency. Dr. Huff's final note concerning Mr. Hill stated that he continued to have right leg symptoms.

Viewing the record as a whole, we are unable to conclude that the evidence preponderates against the trial court's finding on this issue. Rather, that finding was, in our view, one of several possible conclusions permitted by the evidence. We therefore affirm the trial court's finding that Mr. Hill sustained a work injury that caused radiculopathy. The evidence does not preponderate against the trial court's finding that Mr. Hill's work injury has resulted in a 14% permanent anatomical impairment to the body as a whole and that Mr. Hill is entitled to an award of 21% permanent partial disability.

Conclusion

We affirm the judgment of the trial court that Mr. Hill's RA was not aggravated by his work injury but that the work injury caused a radiculopathy and resulted in a 21% permanent partial disability to the body as a whole. Because we affirm the trial court's finding that Mr. Hill did not sustain a permanent total disability as a result of this accident, the Second Injury Fund is dismissed. Costs are taxed one-half to Billy Hall and his surety, and one-half to Hutcherson Metals, Inc. and Wausau Underwriters Insurance Company, for which execution may issue if necessary.

BEN H. CANTRELL, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

BILLY HILL v. HUTCHERSON METALS, INC. ET AL.

**Chancery Court for Dyer County
No. 10-CV-160**

No. W2011-01834-SC-WCM-WC - Filed March 5, 2013

ORDER

This case is before the court upon the motion for review filed on behalf of Billy Hill pursuant to Tenn. Code Ann. § 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 Memorandum 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 one-half to Billy Hill and his surety, and one-half to Hutcherson Metals, Inc. and Wausau Underwriters Insurance Company, for which execution may issue, if necessary.

PER CURIAM

JANICE M. HOLDER, J., not participating.