

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

September 27, 2010 Session

**KATHLEEN EVANS v. SHAW INDUSTRIES GROUP, INC.**

**Appeal from the Chancery Court for Franklin County  
No. 18,765 Jeffrey F. Stewart, Chancellor**

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**No. M2009-02588-WC-R3-WC - Mailed - February 3, 2011  
Filed - April 13, 2011**

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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. Kathleen Evans ("Employee") alleged that she sustained an injury to her knee while at work. Her employer, Shaw Industries, ("Employer") denied the claim, contending that the injury could not have happened in the manner described by Employee. The trial court held that Employee had a compensable injury and awarded permanent partial disability ("PPD") benefits. Employer has appealed. We affirm the judgment.

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

JERRI S. BRYANT, SP. J., delivered the opinion of the Court, in which SHARON G. LEE, J., and JON KERRY BLACKWOOD, SR. J., joined.

Frederick R. Baker, Cookeville, Tennessee, for the appellant, Shaw Industries Group, Inc.

Joseph R. Ford, Winchester, Tennessee, for the appellee, Kathleen Evans.

## MEMORANDUM OPINION

### Factual and Procedural Background

Employee began working for Employer, a carpet manufacturer, on July 11, 2007. Her job required her to roll pallets of yarn down a non-motorized conveyor, then place the yarn on poles from which the yarn was eventually used to weave carpet. Employee alleged that she injured her left knee on August 8, 2007. She testified she was attempting to step over the conveyor to keep some yarn from falling when her left foot caught a part of the conveyor which caused her to twist her left knee. Her knee began to swell and became painful. Employee reported the incident to her supervisor and was sent to her supervisor's office where her knee was iced and her leg elevated.

She continued to work for several days. On August 15, 2007, she requested medical treatment. She was referred to and saw Dr. Richard Bagby, an orthopaedic surgeon in Winchester, Tennessee. Dr. Bagby's initial diagnosis was a sprain/strain of the left knee. He prescribed conservative treatment including a brace and light duty work. When Employee's condition did not improve, Dr. Bagby ordered an MRI of Employee's knee on October 4, 2007, which revealed a torn medial meniscus and some arthritic changes in the joint. Dr. Bagby recommended arthroscopic surgery to repair the meniscus and Employee underwent this surgery on October 29, 2007. After surgery, Employee's symptoms improved but she continued to have pain and swelling in the knee. After a period of physical therapy and additional conservative treatment, Dr. Bagby found Employee to be at maximum medical improvement on January 16, 2008. He assigned her a permanent anatomical impairment of 5% to the left leg due to the torn meniscus and subsequent repair. He opined that the August 2007 injury did not aggravate or accelerate the progression of her pre-existing arthritis. Dr. Bagby assigned no permanent work restrictions as a result of the meniscus tear. However, he recommended Employee engage in sedentary work due to the arthritis in the joint. Because Employer was unable to accommodate the restriction, Employee did not return to work.

Because of her continuing symptoms, Employee sought additional medical advice. She arranged for an examination by Dr. Frederick Wade, an orthopaedic surgeon practicing in Columbia, Tennessee. Dr. Wade examined Employee on March 11, 2008, and reviewed the x-rays, MRI and operative photos from Dr. Bagby's treatment. Dr. Wade ordered a "standing" x-ray of the left knee in order to determine the extent of loss of joint space due to arthritis. It was Dr. Wade's opinion that Employee had moderately severe arthritis in all three compartments of her knee and that the work injury and subsequent surgery had "hastened the progression of osteoarthritis in her knee." He did not assign any permanent impairment, but believed it was likely that Employee would require a total knee replacement in the future.

At the request of Employee's attorney, orthopaedic surgeon Dr. Richard Fishbein performed an independent medical examination in June 2008. His diagnosis was severe arthritis aggravated by the torn meniscus, necessitating a total knee replacement. Dr. Fishbein opined that both the work injury and the surgery to repair it had accelerated the underlying arthritic condition. He assigned a permanent anatomical impairment of 36% to the left lower extremity.

At the trial of this cause, the trial court reviewed the deposition testimony of Drs. Bagby, Wade, and Fishbein. Employee, her immediate supervisor, two of her co-workers, and Employer's safety director testified live at trial. Christopher Smith, Employer's safety director, testified that other persons had tripped over the conveyor in the past, but he was unaware of any instance where an employee's foot or shoe had been caught in it in the manner described by Employee. Within a few days of the original incident, Mr. Smith went to the work station with Ms. Evans and attempted to recreate the accident. They were unable to do so. Employee's immediate supervisor and two co-workers also testified that they had never seen or heard of any incidents similar to that described by Employee.

At the time of trial Employee was a fifty-nine year old high school graduate and had attended a community college for two or more years. She testified she had worked at various times as a waitress, bartender, cashier, substitute teacher and real estate agent. Employee had held a real estate agent's license in North Carolina at one time, but it had expired. She was able to use Microsoft Word and Excel computer programs. She testified that she continued to have numbness around her left knee and that her knee gave way from time to time and sometimes felt as if a "hot nerve" were running through it. Employee had not worked since being let go by Employer. She testified she had made inquiries but that many businesses were not accepting applications.

On cross-examination, Employee admitted she had made untrue statements in her job application, interrogatory responses, discovery deposition and direct testimony concerning her education, employment history, and health history. Among other things, she had falsely stated that she had a community college degree; she had claimed to work for a lawyer in California during a time she actually lived in Nevada; and she had omitted information in a health questionnaire concerning prior injuries to her arm and back.

At the close of proof, the trial court ruled that Employee had sustained a compensable injury to her knee that aggravated her pre-existing arthritic condition. Although the trial court found that Employee had made numerous misstatements concerning her background, the court also found that all of the circumstantial and direct evidence supported a finding that the injury occurred more or less as she described it. The trial court awarded 75% permanent partial disability to the left leg.

Employer appeals, contending that the trial court erred by finding that Employee sustained a compensable injury. In the alternative, Employer argues that the award is excessive.

### **Standard of Review**

The standard of review of issues of fact 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) (2008). When credibility and weight to be given testimony are involved, we afford considerable deference to the trial court's factual findings in this regard because the trial judge had the opportunity to directly observe the demeanor of the witnesses and hear in-court testimony. Madden v. Holland Grp. 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).

### **Analysis**

#### *Compensability*

In its findings, the trial court made reference to the misstatements and untruths revealed during the cross-examination of Employee. Employer argues that Employee's lack of credibility, along with the evidence that there had been no previous similar injury and that efforts to duplicate the event were unsuccessful, lead to the conclusion that Employee did not sustain an injury as described. However, as the trial court noted, the evidence directly concerning the event is consistent with a work injury occurring on August 8, 2007.

The trial court explicitly took Employee's lack of credibility into account and based its decision on other evidence in the record. That evidence provides ample support for the conclusion that Employee sustained an injury to her knee while attempting to step over a conveyor on August 8, 2007. Although Employer was unable to duplicate the event precisely as described by Employee, the Employee exhibited symptoms of a knee injury almost immediately, and the medical diagnosis was consistent with a twisting injury of the knee. Employee reported the injury on the day it occurred. She was observed to have pain and swelling in her knee at that time. There is no evidence of any previous medical treatment or examination of her left knee. Employee's torn meniscus

injury is consistent with the event described. Regardless of the weight of the pre-existing arthritis, the torn meniscus hastened or aggravated the condition of the Employee. In consideration of these factors, we conclude that the evidence does not preponderate against the trial court's finding that Employee's injury arose out of her employment and was sustained in the course of her employment on August 8, 2007.

#### *Extent of Disability*

Employer argues that any award of benefits should be limited to the impairment (5%) and restrictions (none) assigned by Dr. Bagby for the meniscal tear only, contending that Employee's more serious condition, arthritis, is a degenerative condition which pre-existed her work injury. Dr. Bagby testified the work injury did not aggravate or accelerate that condition. Employer also notes that Employee is well-educated, has computer skills, and has not sought medical treatment since being released by Dr. Bagby. In support of the trial court's use of a higher impairment rating, Employee points out that both Dr. Wade and Dr. Fishbein found that Employee's arthritis had quickly become severe after her work injury, and all three doctors placed significant restrictions upon her activities because of that arthritis. Drs. Fishbein and Wade opined that Employee would have to have knee replacement surgery in the future. When medical testimony differs, it is within the discretion of the trial court to determine which expert testimony to accept. Hinson v. Wal-Mart, Inc., 654 S.W.2d 675 (Tenn. 1983).

We note that there is no evidence in the record that Employee experienced any problems with her left knee prior to August 2007. Even though Employee's credibility is impaired, there does not appear to be any dispute that she has had significant knee pain since that date. All three physicians who examined her found moderate to severe arthritis in the injured knee and a torn meniscus. Under these circumstances, we find the evidence in the record does not preponderate against the trial court's use of an impairment rating which took Employee's underlying, previously asymptomatic, arthritic condition into account.

#### **Conclusion**

The judgment of the trial court is affirmed. Costs are taxed to Shaw Industries Group, Inc. and its surety, for which execution may issue if necessary.

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JERRI S. BRYANT, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

**KATHLEEN EVANS v. SHAW INDUSTRIES GROUP, INC.**

**Chancery Court for Franklin County  
No. 18765**

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**No. M2009-02588-SC-WCM-WC - Filed - April 13, 2011**

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**JUDGMENT ORDER**

This case is before the Court upon the motion for review filed by Shaw Industries Group, Inc., pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 to Shaw Industries Group, Inc., for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

LEE, Sharon G., J., Not Participating