

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 25, 2012 Session

PHILLIP KEELE v. BATESVILLE CASKET COMPANY, INC. ET AL.

**Appeal from the Chancery Court for Coffee County
No. 09-187, Vanessa A. Jackson, Judge**

**No. M2012-00034-WC-R3-CV - Mailed September 5, 2012
Filed October 12, 2012**

In this workers' compensation case, the trial court awarded the employee, a truck driver who fell while attempting to get in his truck, 60% permanent partial disability to the body as a whole for injuries to his left knee and both shoulders. The employer has appealed, asserting that the award is excessive.¹ The employer also maintains the employee failed to prove that the injury to his right shoulder was work-related. We affirm the trial court's judgment.

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

DONALD P. HARRIS, SP. J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., J. and WALTER C. KURTZ, SR. J., joined.

B. Timothy Pirtle, McMinnville, Tennessee, for the appellants, Batesville Casket Company, Inc., and Fidelity & Guaranty Insurance Company.

Jill T. Draughon, Nashville, Tennessee, for the appellee, Phillip Keele.

¹Pursuant 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.

MEMORANDUM OPINION

Factual and Procedural Background

The employee, Phillip E. Keele, worked as a truck driver for the employer, Batesville Casket Company (Batesville),² from 1989 to 1999, and again from 2005 to 2008. He was 61 years old at the time of trial, had not completed the eleventh grade, and did not have a General Educational Development diploma. In addition to driving a truck hauling caskets for Batesville, Mr. Keele's work history includes operating heavy equipment, such as backhoes and bulldozers, driving a dump truck, and working in construction.

On February 21, 2007, Mr. Keele injured himself when he slipped and fell attempting to get into his truck at a rest stop along I-40 west of Nashville. At the time of the fall, Mr. Keele was enroute to Texas to deliver a load of caskets for Batesville. Mr. Keele testified that it was raining, and he attempted to get into his truck by putting his right foot on the bottom step of the fuel tank and his left foot on the second step while holding onto a handle with his right hand. He then grabbed the steering wheel with his left hand but, because the steps were wet, his right foot slipped off the step and he fell. He felt immediate, severe pain in his left knee, which swelled to the size of a basketball by the next morning. Mr. Keele also immediately felt pain in both shoulders, though the pain in his knee and left shoulder was worse than the pain in his right shoulder. He continued the trip to Texas and received permission from his superiors to seek medical treatment there the following day. X-rays revealed no broken bones, and Mr. Keele returned to Tennessee with another driver because he was unable to drive.

Following his return, Mr. Keele was treated for his injuries by Dr. Jeffrey Hazlewood on February 28, 2007.³ Mr. Keele described to Dr. Hazlewood how he fell as he attempted to get into his truck and complained of pain in his left knee and shoulder. Dr. Hazlewood ordered an MRI of Mr. Keele's knee and left shoulder, gave him an injection in the knee, and referred him to Dr. James Rungee, an orthopedic surgeon.

Mr. Keele informed Dr. Rungee that he had fallen on February 21, 2007, as he was getting into his truck and hurt his left knee and shoulder. Dr. Rungee diagnosed a torn tendon in Mr. Keele's left knee, which he described as a "rupture of the largest muscle in

²The record contains an order reflecting an agreement by the parties to substitute Batesville Logistics, Inc., for Batesville Casket Company as the defendant employer.

³Dr. Hazlewood did not testify, but his office note from the February 28, 2007 visit is in the record.

[one's] body, the quadriceps, which is what pulls [one's] knee up straight." He characterized Mr. Keele's knee injury as "substantial" and testified that he could feel a "hole" where the muscle used to be attached to his kneecap. Dr. Rungee also diagnosed Mr. Keele with a rotator cuff tear in his left shoulder with "easily discernible . . . grinding and popping in the shoulder." Mr. Keele had corrective surgery on his left knee on March 16, 2007, and surgery on his left shoulder on May 11, 2007.

Following the surgery to repair his knee, Mr. Keele had to use crutches, which caused the pain in both of his shoulders to intensify and, at a follow-up visit with Dr. Rungee on April 26, 2007, Mr. Keele complained of pain in his right shoulder. Dr. Rungee testified that the shoulders are not designed to be weight-bearing joints, and he believed the use of crutches had aggravated Mr. Keele's shoulder problems. Testing revealed a torn rotator cuff in Mr. Keele's right shoulder, and surgery was performed on that shoulder on June 24, 2008. Dr. Rungee testified that, in his opinion, the cause of all three injuries – the left knee and each shoulder – was Mr. Keele's fall on February 21, 2007. He assigned a 5% anatomical impairment rating to the lower extremity for the knee injury, 11% to the whole body for the left shoulder injury, and 6% to the whole body for the right shoulder injury. He permanently restricted the amount of weight Mr. Keele could lift (35 pounds from the floor to waist level, 24 pounds from the waist to shoulder level, and 14 pounds overhead), push (43 pounds), and pull (38 pounds). He further restricted Mr. Keele from repetitive overhead activities and from working at heights or on ladders due to a concern over the strength of his left leg. Dr. Rungee believed it would be "reasonable" for Mr. Keele to have problems standing, squatting multiple times, or walking long distances.

Mr. Keele was terminated in January 2008 because Batesville could not accommodate his physical restrictions. According to Mr. Keele, he would still be working for Batesville but for his injuries. Following his termination, Mr. Keele did "a little bit of dozer and backhoe work," and then bought his own truck and drove for another company for approximately one year. Once expenses were deducted, however, he made much less than what he earned driving for Batesville. At the time of trial, Mr. Keele was making a living operating heavy equipment, albeit "very little," and leasing his truck to another company. Mr. Keele drives the truck, but is not required to do any loading or unloading. By contrast, his job as a driver for Batesville involved heavy lifting, as he was required to help unload caskets weighing 150 to 350 pounds.

Mr. Keele filed suit on May 21, 2009, seeking workers' compensation benefits for his left knee and both shoulders. The parties agreed that the knee and left shoulder injuries were compensable, but disagreed on the extent of vocational disability. Batesville disputed that the injury to Mr. Keele's right shoulder was work-related. Following a trial with Mr. Keele as the only live witness, the trial court found him "very credible," determined the injury to

his right shoulder was work-related and awarded 60% permanent partial disability for all three injuries. Noting Mr. Keele's age, lack of a high school diploma, and his physical restrictions, the trial court found his job opportunities to be limited. The trial court observed that Mr. Keele had sustained a whole body anatomical impairment of 18%, could no longer engage in heavy lifting, and could not function in a job that required prolonged overhead activity, standing, walking, or squatting. Finally, the trial judge noted that although Mr. Keele eventually returned to work as a truck driver following his termination, his income was significantly less than he had been receiving from Batesville. Batesville has appealed.

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, considerable deference is given to 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 Grp. of Tenn., Inc., 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008).

Analysis

A. Compensability of right shoulder injury

The law is settled that, except in obvious cases, a workers' compensation claimant must establish by expert medical evidence the causal relationship between the alleged injury and the claimant's employment activity. Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 643 (Tenn. 2008). The element of causation is satisfied when the "injury has a rational, causal connection to the work." Braden v. Sears, Roebuck & Co., 833 S.W.2d 496, 498 (Tenn. 1992). Although causation in a workers' compensation case cannot be based upon speculative or conjectural proof, absolute certainty is not required because medical proof can rarely be certain. Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004). Thus, a court may properly award benefits based upon medical testimony that the employment could or might have been the cause of the employee's injury when there is also lay testimony supporting an inference of causation. Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 678 (Tenn. 2005). Any reasonable doubt regarding causation is resolved in favor of the employee. Phillips v. A & H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004).

In this case, Batesville contends that the trial court erred in awarding benefits for Mr. Keele's right shoulder injury because he failed to prove the injury was work-related. Batesville points out that Mr. Keele did not inform his health care providers of pain in his right shoulder until April 26, 2007, during a visit with Dr. Rungee following his knee surgery. Batesville emphasizes that Mr. Keele's medical records make no mention of right shoulder pain until that visit.

Mr. Keele testified that he did in fact tell the health care provider in Texas, along with Dr. Hazlewood, that both shoulders were hurting and that "the left one was a lot worse." As stated above, Mr. Keele was the only witness to testify live at trial, and the trial judge found him to be a "very credible witness." We note that Dr. Rungee testified the shoulders are not designed to be weight bearing joints, and he believed the use of crutches following his knee surgery had aggravated Mr. Keele's shoulder problem. Thus, it was logical for Mr. Keele to complain of pain at the time that he did, especially since the pain in his knee and left shoulder was considerably worse than the pain in his right shoulder. Moreover, an MRI revealed a torn rotator cuff in Mr. Keele's right shoulder, and corrective surgery was performed on that shoulder on June 24, 2008. Dr. Rungee, the only medical expert to testify, stated that Mr. Keele's fall on February 21, 2007, caused the injury to his right shoulder. No contrary medical evidence was presented on this issue.

In light of these circumstances, we have no difficulty concluding that the evidence does not preponderate against the trial court's finding that the right shoulder injury "has a rational, causal connection to the work." Braden, 833 S.W.2d at 498.

B. Extent of disability

Batesville also challenges the trial court's award of 60% permanent partial disability as excessive. Based upon our review of the record, we are persuaded the trial court did not err.

In assessing the extent of an employee's vocational disability, courts consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and capacity to work at the kinds of employment available in the worker's disabled condition. Tenn. Code Ann. § 50-6-241 (2008); Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990); Roberson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986). Further, the claimant's own assessment of his or her physical condition and resulting disabilities is relevant and should be considered. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975); Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn. 1972). Indeed, the trial court should consider all the evidence, both expert and lay testimony, in deciding the extent of an employee's vocational disability. Walker v. Saturn Corp., 986

S.W.2d 204, 208 (Tenn. 1998). The extent of an injured worker's disability is a question of fact. Lang v. Nissan North America, Inc., 170 S.W.3d 564, 569 (Tenn. 2005).

Here, the trial court considered Mr. Keele's age, lack of a high school diploma, and his physical restrictions, such as being unable to engage in heavy lifting or to perform a job that requires prolonged overhead activity or standing, walking, or squatting. The trial court also correctly noted that, although Mr. Keele eventually returned to work as a truck driver following his termination, his income was significantly less than he had been receiving from Batesville. The trial court had before it evidence regarding Mr. Keele's anatomical disability ratings provided by the treating physician, Dr. Rungee – 5% to the lower extremity for the knee injury, 11% to the whole body for the left shoulder injury, and 6% to the whole body for the right shoulder injury.⁴ Additionally, Mr. Keele had three surgeries, and Dr. Rungee believed he reasonably would have problems standing, squatting multiple times, or walking long distances. Further, Mr. Keele was permanently restricted in terms of the amount of weight he could lift, push, and pull, and he could not engage in repetitive overhead activities or work at heights or on ladders. Although Batesville correctly points out that Mr. Keele has operated heavy equipment and driven a truck since his injuries, the uncontraverted evidence is that he was able to operate heavy equipment “very little,” and his income driving a truck was much less than before his injuries. In short, the evidence does not preponderate against the trial court's award of 60% permanent partial disability.

Conclusion

For the foregoing reasons, we conclude that the record supports the trial court's decision to award benefits for the injury to Mr. Keele's right shoulder and, in addition, that the award of 60% permanent partial disability is not excessive. Accordingly, the trial court's

⁴Batesville attempts to undermine the anatomical impairment ratings given by Dr. Rungee by referring to a statement in the AMA Guides, Fifth Edition, that patients who have the type of surgery Mr. Keele underwent do not regain “maximum strength” for at least a year after the surgical procedure. Dr. Rungee's impairment rating for the left shoulder was based upon a 10% impairment for the surgical procedure performed on May 11, 2007 and 9% for loss of “range of motion” as measured by a functional capacity evaluation performed August 16, 2007, some three months after surgery. Dr. Rungee found that Mr. Keele reached maximum medical improvement on August 13, 2007. No reference was made by Batesville to a passage in the AMA Guides that “range of motion,” as opposed to “maximum strength,” continues to improve for one year following a surgical procedure even though Dr. Rungee testified that he would not be surprised if it did. There is no evidence that Mr. Keele's range of motion did, in fact, improve following the August 16, 2007 functional capacity evaluation. Batesville certainly could have had Mr. Keele examined and the results of that examination presented to the court. Since Batesville did not present any medical witness to contradict any aspect of Dr. Rungee's testimony, including his assessment of Mr. Keele's anatomical impairment, there is no basis for the trial court or this panel not to rely upon it.

judgment is affirmed. The costs of this appeal are taxed to Batesville and its surety, for which execution may issue if necessary.

DONALD P. HARRIS, SPECIAL JUDGE

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

PHILLIP KEELE v. BATESVILLE CASKET COMPANY, INC., ET AL.

**General Sessions Court for Coffee County
No. 09-187**

No. M2012-00034-WC-R3-WC - Filed October 12, 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 Batesville Casket Company, Inc., and its surety, for which execution may issue if necessary.

PER CURIAM