

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

October 28, 2013 Session

**JOHANN G. MERX v. DURO STANDARD PRODUCTS CO., INC.**

**Appeal from the Chancery Court for Madison County  
No. 66910 James F. Butler, Chancellor**

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**No. W2013-00666-SC-WCM-WC - Mailed February 28, 2014; Filed May 15, 2014**

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An employee sustained a work-related injury after a mechanical loading dock malfunctioned and a dock plate struck him in the knee. His employer denied the claim, contending that the event could not have occurred in the manner described by the employee. The trial court ruled in favor of the employer and dismissed the employee's complaint. The trial court also entered alternative findings if causation were proven, limiting the employee's recovery to 1.5% vocational disability. The employee has appealed. We reverse and remand the case for entry of a judgment consistent with the trial court's alternative findings.

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

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

Mitchell G. Tollison, Jackson, Tennessee, for the appellant, Johann G. Merx.

James H. Tucker, Nashville, Tennessee, for the appellee, Duro Standard Products Company, Inc.

**OPINION**

**Factual and Procedural Background**

Johann Merx is a utility worker in the shipping department for Duro Standard Products Company ("Duro"), where he primarily loads pallets and assists a forklift driver in loading pallets onto trucks. His job requires him to operate a dock plate, which is a metal ramp that bridges the height differences between a loading dock and the truck being loaded. The plate is operated by pulling a chain, which causes the dock to rise a small distance. The

operator then steps onto the plate, using his or her body weight to lower the plate into the truck.

Mr. Merx allegedly injured his left knee on April 17, 2009, while operating the dock plate in preparation for loading a truck. Mr. Merx immediately reported his injury and was taken to Dr. Kenneth Warren, a primary care physician, for treatment. Mr. Merx, however, continued to experience pain in his left knee and did not return to work for the next two work days. Sheila Bell, Duro's safety supervisor, scheduled an appointment with Dr. Misty Allen, who examined Mr. Merx and concluded that he could safely return to work. Accordingly, Duro did not offer further medical treatment. Mr. Merx, however, subsequently sought medical treatment for his knee injury through his private health insurance with Dr. Michael Smigielski, an orthopaedic surgeon. On June 3, 2009, Mr. Merx filed a Request for Assistance with the Department of Labor and Workforce Development, which the department denied on July 8, 2009. Dr. Smigielski performed arthroscopic surgery on July 9, 2009, and released Mr. Merx to return to work without restrictions on September 9, 2009. Mr. Merx filed the present action in the Chancery Court for Madison County on March 30, 2010, and a trial was held on June 19, 2012.

At trial, Mr. Merx testified that he acted in accordance with Duro's standard procedures on the morning of his injury. He said that he had bent over and was moving forward to pull up on the chain on the dock plate. When he pulled the chain, the plate came up faster and farther than usual, striking him on the right hand and left knee.

Mr. Merx testified that he was forty-two years old and had completed the eighth grade, obtained a GED, and attended Jackson State Community College for one and one-half years, majoring in business administration. Mr. Merx further testified that he held certifications as an industrial painter, forklift operator, and high-rider (stand-up forklift) operator. Mr. Merx stated that he had worked as a forklift operator for Glidden Paint in California for two years, as a machinist at Quality Tool & Die in Henderson, Tennessee, for four or five years, and as an assembly line worker at Premier Manufacturing. He began working for International Paper in 1997, which eventually became Duro Products in 2005. After he was released by Dr. Smigielski, he returned to work in the same position that he held prior to his injury. Mr. Merx also said that his injury caused him to limp, that he experienced leg pain when climbing stairs or operating the brake on a forklift, and that he had difficulty squatting or bending down.

Larry Theus, a co-worker of Mr. Merx, testified at trial concerning Mr. Merx's accident. Mr. Theus testified that he was sweeping inside the trailer of the truck that was to be loaded. He was at the end of the trailer farthest from Mr. Merx, and his back was turned when the incident occurred. He heard Mr. Merx make a noise as if he had been hit. When he turned to see what had happened, he noticed that the dock plate was at a higher level than

normal. Mr. Theus described it as being nearly “chest high.” Mr. Theus also testified that the dock plate had malfunctioned on a prior occasion and that he had witnessed a similar incident involving another employee, Robert Brice. Mr. Theus stated that Mr. Merx limped after the April 17, 2009 incident and that he did not recall ever seeing Mr. Merx limp before that date.

Robert Brice, another co-worker of Mr. Merx, testified at trial. Mr. Brice did not witness the incident. He testified that he saw Mr. Merx afterward, sitting on a bench and rubbing his knee and that the dock plate was up at an unusual angle. Mr. Brice confirmed that a spring on the dock plate had broken when he was operating it and that the plate had come close to hitting him “in the face.” He recalled the plate was repaired after the April 2009 incident. Mr. Brice also confirmed that Mr. Merx did not limp prior to the incident.

Dr. Smigielski testified by deposition and by a Standard Form Medical Report for Industrial Injuries (“C-32”). In the C-32, he opined that Mr. Merx’s injury was more likely than not caused by the April 17, 2009 work accident. Dr. Smigielski also testified that Mr. Merx had a good result from the surgery and that Mr. Merx’s leg had normal range of motion, normal strength, and a normal gait. Based on these findings, Dr. Smigielski assigned no permanent work restrictions and determined that Mr. Merx sustained a 17% permanent anatomical impairment of the left leg, based on Tables 16-3 and 16-10 of the Sixth Edition of the AMA Guides (“AMA Guides”).

Dr. Riley Jones, an orthopaedic surgeon, also testified by deposition. Dr. Jones examined Mr. Merx on March 8, 2011, at Duro’s request. Prior to the examination, Dr. Jones viewed a video of a mechanical test of the dock plate. He also reviewed the records of Dr. Smigielski and other physicians who had treated Mr. Merx. Dr. Jones noted that the records reported no swelling and that Mr. Merx had a good range of motion in his leg immediately after the injury. Dr. Jones testified that a blow of the magnitude necessary to cause a chondral defect should have caused swelling or “edema,” which would have been apparent on an MRI. He noted that Mr. Merx had a large piece of fibrous tissue known as a plica in his knee, which according to Dr. Jones, can cause a chondral defect. Dr. Jones opined that Mr. Merx’s condition was degenerative and assigned a 1% permanent anatomical impairment to the leg, based on Tables 16-3 through 16-9 of the AMA Guides. In his testimony, Dr. Jones explained how he applied the AMA Guides—using the functional history modifier, the grade modifier, the physical examination modifier, and the clinical studies modifier—to arrive at his conclusion.

David Paul, a forensic engineer who inspected and tested the dock plate at Duro’s request, testified at trial, and a written report of his findings was admitted into evidence. Mr. Paul reviewed a video reenactment made on the day of the incident, the accident report, a report from the manufacturer of the dock plate, and photographs of the plate. Mr. Paul

personally inspected and tested the dock plate and viewed a photo of the broken spring, known as a “snubber” spring. Mr. Paul subsequently tested the operation of the plate—first with the spring attached in place, then with the spring detached—to simulate its failure on April 17, 2009. As set out in his report, he found that the plate rose from horizontal to a ten-degree angle when the snubber spring was properly attached. When the spring was removed, however, the plate moved more quickly and rose to forty-three degrees. Mr. Paul’s examination of the underside of the plate revealed that the location of metal components made it impossible for the plate to move past fifty degrees with or without the snubber spring. For that reason, Mr. Paul opined that it was impossible for the dock plate to strike or nearly strike the face of a standing employee, as described by Mr. Theus and Mr. Brice.

Mr. Paul testified that he attempted to operate the dock plate from a squatting position with the snubber spring detached, but he was unable to pull the release chain with enough force to open it while in that position. Mr. Paul testified, however, that the plate did strike his knee when he squatted next to it while another person operated the chain. He testified that he could easily pull the chain and release the plate while bending over from a standing position, but he could not cause the plate to hit his knee by that method.

During cross-examination, Mr. Paul agreed that he examined the dock plate more than two years after the accident. He observed several welds on the underside of the plate, but he testified that these welds were located in areas that would not affect the plate’s motion. Mr. Paul could not state how much force was necessary to release the plate but repeated that he was unable to do so from a squatting position. Although he listened to the testimony of Mr. Merx and his co-workers concerning the leg positions used when releasing the plate, Mr. Paul did not attempt to duplicate those positions. He instead insisted that he used a “much worse case scenario” by squatting at the edge of the plate while releasing it.

Mr. Paul made a video recording of the tests he performed. Mr. Paul operated the dock plate three times with the snubber spring attached, and the results were consistent with his report and testimony. He operated the plate five times with the spring removed. Mr. Paul’s first such effort was made from a standing position. He bent over at the waist and pulled the release chain with both hands. The plate rose very quickly to approximately forty-five degrees. The plate did not strike Mr. Paul’s knee. Mr. Paul’s second effort was made from a squatting position, with his knee over the plate itself. He pulled the chain, but the plate only partially released, rising to approximately ten degrees. A second pull caused the plate to rise to forty-five degrees again. On this occasion, however, the plate appeared to strike Mr. Paul’s right knee.

Mr. Paul’s third test was also made from a squatting position. He pulled the release chain twice, but the plate again only partially released to a ten-degree angle. In both the fourth and fifth tests, Mr. Paul squatted with his knee over the plate, while a second person

pulled the release chain. During the fourth test, the plate struck Mr. Paul on the knee. His knee was not visible in the fifth test.

The trial court took the case under advisement and later issued its ruling in the form of a letter to counsel. The trial court found that Mr. Merx had failed to meet his burden of proof on the issue of causation, stating:

While the lay testimony indicates that [Mr. Merx] was injured at work by the dock plate striking his knee, the expert testimony on [his] side is weak. The expert testimony on [Duro's] side is much stronger and employs not only the opinion of the expert, but the laws of physics. It appears that the undisputed testimony is that the dock plate cannot, under any circumstances, rise more than a 50 degree angle from its horizontal level. From the testimony, it appears that unless [Mr. Merx] is falling down at the time of his injury, and falls into the dock plate, that it is physically impossible for the dock plate to come up far enough to strike his knee. Based upon that, the Court must find that [Mr. Merx] has been unable to carry his burden of proving causation by a preponderance of the evidence using expert testimony. Liberal bias written into the statute is not strong enough to overcome the physical evidence. Therefore, the Court finds [Mr. Merx] has failed to prove causation and is not entitled to recover.

The trial court made an alternative ruling that, if causation had been proven, Dr. Jones' testimony concerning permanent impairment was more persuasive than Dr. Smigielski's, stating:

In reviewing Dr. Smigielski's deposition, he relied upon Table 16-3, the knee regional grid. While he did not say, his rating indicates he placed [Mr. Merx] in Class 2, which indicates a moderate problem. Dr. Jones also used Table 16-3, but placed [Mr. Merx] in a Class 1 category with a mild problem. It is not unusual for doctors to have different opinions about ratings and impairments, but they must justify those ratings by the use of the Guides. In this case, Dr. Smigielski did not complete his rating by applying the grids that are required in order to come up with an accurate rating. The statute requires compliance with the Guides. To use the Guides properly, you have to go through the grid and use the functional history modifier, the grade modifier, the physical examination modifier and the clinical studies modifier. Dr. Jones did this. As a result, Dr. Jones' rating is more in line with the Guides than Dr. Smigielski's. Based upon that, the Court will accept Dr. Jones' rating.

The trial court therefore adopted Dr. Jones' impairment rating of 1% to the leg. As a result, it would have awarded 1.5% permanent partial disability to the leg. Mr. Merx has appealed, contending that the evidence preponderates against the trial court's finding on causation and also against its alternative finding regarding impairment. This 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. See Tenn. Sup. Ct. R. 51, § 1.

### **Analysis**

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) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' 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 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). 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).

### *Causation*

Mr. Merx contends that the evidence preponderates against the trial court's finding that he failed to prove causation. Specifically, Mr. Merx argues that the trial court's reliance on Mr. Paul's testimony was misplaced, because Mr. Paul did not attempt to duplicate his position and movement at the time of the alleged injury—moving his left leg forward while pulling the release chain with his right hand.<sup>1</sup> We agree.

Proof of causation in workers' compensation cases does not require absolute certainty. Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004). Furthermore, all reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. Phillips v. A & H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004). It is well settled that “[b]enefits may properly be awarded upon medical testimony that shows the employment ‘could or might have been the cause’ of

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<sup>1</sup> We note that the video recording of Mr. Paul's investigation shows that on at least one occasion—the second test with the snubber spring removed—Mr. Paul was able to cause the dock plate to strike, or nearly strike, his knee while pulling the release chain by himself.

the employee's injury when there is lay testimony from which causation reasonably can be inferred." Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 678 (Tenn. 2005) (quoting Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn.2004)). We find the evidence in this case to fall squarely within that framework.

Although he did not see the event occur, Mr. Theus heard the dock plate being released. Mr. Theus also heard Mr. Merx "making some noise like he was injured." He later heard Employee state that "he hurt his knee" and saw Mr. Merx limping after the incident. No one disputes that Mr. Merx reported the incident immediately and was taken by Ms. Bell to a physician who examined his left knee. Similarly, no one disputes that Dr. Smigielski found a chondral defect in Mr. Merx's left knee two months after the accident. Dr. Smigielski opined that injury was caused by the April 17, 2009 incident. Dr. Jones disagreed with this conclusion, but he conceded that trauma can cause a chondral defect. Moreover, Dr. Jones based his opinion in part on the video recording of Mr. Paul's testing, which did not replicate the accident as described by Mr. Merx. Instead, Mr. Paul's testing clearly shows that it was possible for the plate to strike the knee of a person operating the release chain by himself.

Mr. Merx had a chondral defect in his left knee, and both Dr. Smigielski and Dr. Jones agreed that chondral defects can be caused by trauma. The parties agree that the dock plate malfunctioned on April 17, 2009. Mr. Merx's testimony that the plate struck his left knee, and his version of the events surrounding his injury is corroborated by the testimony of his coworkers. We therefore conclude that the evidence preponderates against the trial court's finding that Mr. Merx did not sustain his burden of proof on the issue of causation.

### *Impairment*

Mr. Merx also contends that the evidence preponderates against the trial court's alternative finding that he sustained a 1% permanent anatomical impairment. Mr. Merx argues that Dr. Smigielski's impairment rating of 17% should be given greater weight because Dr. Smigielski was his treating physician. Mr. Merx also submits that Dr. Jones never saw the intraoperative pictures of Mr. Merx's knee and that Dr. Jones' report of March 8, 2011, clearly states that "[a]s far as the rating is concerned, that will have to wait until I can see the intraoperative pictures to make a determination of the size of [the chondral defect]."

A trial court generally has the discretion to choose which expert to accredit when there is a conflict of expert opinions. Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel 1996); Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990). Dr. Jones' explanation of his method was more expansive and detailed than Dr. Smigielski's. The trial court also had the opportunity to observe Mr. Merx in person, to

evaluate his description of the effects of his injury, and to compare the doctors' opinions in light of those observations. Based on the record as a whole, we are unable to conclude that the evidence preponderates against the trial court's alternative finding on this issue.

### **Conclusion**

The trial court's judgment with respect to causation is reversed, and the alternative result reached by the trial court is adopted. The case is remanded to the trial court for entry of a judgment consistent with this opinion. Costs are taxed to Duro Standard Products Company, Inc. and its surety, for which execution may issue if necessary.

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DONALD E. PARISH, JUDGE



IN THE SUPREME COURT OF TENNESSEE  
AT JACKSON

**JOHANN G. MERX v. DURO STANDARD PRODUCTS CO., INC.**

**Chancery Court for Madison County  
No. 66910**

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**No. W2013-00666-SC-WCM-WC - Filed May 15, 2014**

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**JUDGMENT ORDER**

This case is before the Court upon the motion for review filed by Duro Standard Products Co., 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 Duro Standard Products Co., Inc., for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

HOLDER, Janice M., J., Not Participating