IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 24, 2017 Session

JAMES ELLIS PHILLIPS v. THE PICTSWEET COMPANY

Appeal from the Chancery Court for Crockett County
No. 9878 George R. Ellis, Chancellor

No. W2016-01704-SC-R3-WC – Mailed July 13, 2017; Filed August 28, 2017

James Phillips ("Employee") worked for The Pictsweet Company (Employer") as a truck driver and mechanic. He alleged that he sustained a compensable back injury on December 2, 2013. Employer eventually denied the claim primarily because the treating physician's opinion was that Employee's symptoms were caused by preexisting degenerative changes and were not related to his work. Although Employee received additional medical treatment through Tenncare, his condition did not improve. An IME physician opined that Employee's condition was work-related and that he retained permanent impairment. The trial court found that Employee had sustained a compensable injury and awarded permanent partial disability benefits of 72% to the body as a whole. Employer has appealed that decision. 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, modify in part, and reverse in part.

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

WILLIAM B. ACREE, JR., SR.J., delivered the opinion of the court, in which ROGER A. PAGE, J. and PAUL G. SUMMERS, SR. J., joined.

Donald R. Babineaux, Memphis, Tennessee, for the appellant, The Pictsweet Company.

Jeffrey P. Boyd, Jackson, Tennessee, for the appellee, James Ellis Phillips.

OPINION

Factual and Procedural Background

Employee was forty-four years old at the time of the trial on April 12, 2016. He is a high school graduate. Employee was an over-the-road truck driver for eighteen years before he began his employment with Employer in September 2013. Employee's primary job involved driving, but he occasionally performed maintenance on Employer's trucks.

On December 2, 2013, Employee was performing maintenance on the brakes of a truck when he noticed pain in his lower back that went down his leg. He believed he pulled a muscle in his leg because he had never experienced this type of pain. He continued working through the day.

In describing the pain, Employee testified that the pain would go down his leg, and he "felt like he was stepping on a nail on the bottom of his foot." It was also difficult to stand on concrete, and it was difficult to bend over. During the next few days, Employee continued to work, which included accompanying a co-worker to Delaware to pick up equipment. During the trip Employee complained of constant back pain. He returned from this trip on Saturday, December 14, 2013.

On Sunday night, Harold Morris, Employee's manager, called Employee at home and told him to report to work on Monday night.

According to Employee, he told Mr. Morris that it had been over twenty years since he worked the third-shift, but he would do his best to work the shift. Mr. Morris testified that Employee told him he had problems falling asleep and could not work at night. In any event, Employee presented himself to Mr. Morris' office the next day and was terminated. Mr. Morris testified that he was not aware of Employee's alleged back injury at the time of termination, and he made the decision because Employee refused to work at night.

At or near that time, Employee informed Mr. Morris that he had been injured at work on December 2, 2013. According to Employee he was not provided instructions for submitting a workers' compensation claim. Mr. Morris testified that he told Employee that the normal procedure for workers' compensation claims was for an employee to report on-the-job injuries within twenty-four hours of the occurrence. Mr. Morris asked Employee who he had told about the claim, and the employee responded that he had informed the guys in the shop. Mr. Morris said that he told the employee that he would turn the matter over to the human resources department. The record does not reflect whether he did.

Employee's testimony was corroborated, in part, by the testimony of John McKeel, a co-worker, who testified that Employee had told that him he had hurt his back. This conversation occurred after they had been working in the truck shop all week.

Employee retained an attorney and was presented with a panel of physicians. He selected Dr. Jason Hutchinson, an orthopedic surgeon, to be his treating physician. Dr. Hutchinson first examined Employee on March 12, 2014. Dr. Hutchinson, who testified by deposition, stated that Employee had a normal range of motion, no muscle spasms, normal reflexes, and an "equivocal" straight leg raising test on the left side. An x-ray showed mild arthritis of the lumbar spine. Dr. Hutchinson prescribed steroid medication and pain medication. He also ordered an MRI. After the MRI was performed, Dr. Hutchinson met with Employee again on March 26, 2014. Dr. Hutchinson testified that the MRI showed mild degenerative disc disease

without spinal stenosis at the L3 level of the spine. He found no degeneration of the discs above and below that level. Employee continued to complain of left leg pain. Dr. Hutchinson's in-office examination results were the same on March 12 and March 16, 2014.

The denial of Employee's workers' compensation claim by Employer was based in large part on the testimony of Dr. Hutchinson. Dr. Hutchinson's deposition testimony, in part, was as follows:

> Q. Doctor, he did, in fact, tell you about an acute injury on December the 2nd, 2013, that he injured his back at work working on a semi-truck changing brakes and seals on the tires?
>
> A. That's the history he gave me, yes.
>
> Q. Okay. I thought for some reason on direct you may have said that he did not report a specific injury.
>
> A. He didn't report a one-moment injury to me, but he responded that he injured himself changing the tires, that it started early in the day and got worse as the day went on. So again I guess not to – the definition of "is" is, but how do you define "acute?" I mean, it happened that day during the course of that day, but he didn't say, I was moving this tire and all at once the pain hit me. So again it depends on how you gentlemen would define "acute," I suppose.
>
> Q. That is, I guess, splitting hairs between what the definition of "acute" would be. But he did report an incident or a function he was doing at work—
>
> A. He went to work that day not hurting and left work hurting, so that is over a course of one day, but he didn't describe knowing exactly the moment that it occurred.

Q. And the left leg radiculopathy that was described as having or diagnosed by you as having, that is a physical objective complaint that he is making to you that has a physiological origin in the spine?

A. Yes. It was a – it's a subjective complaint, but there's no objective finding that prove that he has it. But for the record I believe he did have it, but I can't say that this part of the physical exam or this part of the MRI proves he had it in objective terms. It was a subjective complaint. But I would not have told him to go out and have a nerve block to see if it gets better if I did not believe that he was hurting. So I do believe he did have pain in his leg, and, furthermore, again when people are straight-out faking, most of the time they're going to complain of a lot of back pain, not a lot of leg pain. When people come in complaining of leg pain coming from the back, that's a relatively sophisticated fake if they're going to be faking it, if you know what I mean.

Q. Right. Well, I was going to ask you about that. You recommended in your second visit with him that he do have that injection?

A. Uh-huh.

Q. But you said basically the reason that he didn't get that done here through workers' comp is because of the sentence in your report that says, "in that regard, I cannot opine that this finding is directly related to his job and, therefore, may have to seek the nerve block under his private medical?"

A. Correct.

Q. Doctor, did you have any opinions with respect to whether or

> not this reported or alleged injury caused any type of exaggeration or exacerbation to Mr. Phillips' back?
>
> A. In this situation it's very hard for me to say with any reasonable degree of medical certainty whether he's telling the truth or not. That's what it boils down to. We don't have a documented, witnessed injury at all. We have an injury that was claimed two weeks after it occurred, and that's a lot of room for, you know, things that I can't comment on with any reasonable degree of medical certainty. So if he's telling the truth, then I believe it exacerbated it. If he is not, then it didn't. And so I'm not sure I can tell you with any reasonable degree of medical certainty whether he's telling the truth in this, and that's totally what it hinges upon.

Employee testified that he later underwent physical therapy and nerve blocks recommended by Dr. Hutchinson through TennCare. He testified that these treatments did not improve his condition. He did a "small dispatch" job working from his home for an unspecified time. He rode with a truck driver friend of his to see if he could return to driving. He concluded that he could not because his pain during the trip was "unbearable." However, in October 2014, he completed a form necessary to keep his commercial driving license. In his responses, he stated that he had no impairments of the leg, no spinal injury, and no chronic back pain. He also certified that he was physically able to be a commercial driver. Employee testified that he made this representation because his "family was at stake."

Approximately one month before the trial, Employee found a job as a construction site supervisor. He was able to control the amount of walking, sitting, and standing needed on the job. Employee reported he can ride a motorcycle and has done so "a couple of times" since his injury. He also performs yard work but stated that he had pain after so doing.

Dr. Apurva Dalal, an orthopedic surgeon, performed an independent

medical examination on January 21, 2015. As part of his evaluation, Dr. Dalal reviewed Dr. Hutchinson's records, the report of the MRI, and records of some of the physicians who treated Employee after Dr. Hutchinson. Dr. Dalal opined that degenerative disc disease can be present without being symptomatic, but it can be exacerbated by an injury. He stated that Employee's symptoms were consistent with an aggravation of his underlying condition. During his examination, he found muscle spasms and tenderness in Employee's lower back. Employee had a positive straight leg raising test on the left, an indication of possible radiculopathy. He opined that Employee's work injury aggravated his pre-existing arthritic changes. He assigned 12% permanent impairment to the body as a whole based on the Sixth Edition of the AMA Guides. He also suggested physical restrictions: "[Employee] should avoid lifting any weight more than fifteen pounds. He should avoid bending, pulling, pushing, lifting, and twisting."

The trial court entered its findings in a written order. It found that Employee sustained a compensable injury to his lower back on December 13, 2013, and that it arose out of and during the course of employment with Employer. He found that the permanent partial disability rating was 12% to the body as a whole pursuant to Dr. Dalal's opinion. The court further found that Employee was a credible witness and that Harold Morris was not credible. The court found that Employee's termination was unreasonable and that he was terminated for no good cause; therefore, the 1.5 times cap did not apply.

The trial court found that Dr. Dalal's testimony concerning causation and impairment were more credible than the testimony of Dr. Hutchinson, who did not have a correct understanding of Tennessee Workers' Compensation law when he opined that Employee's back pain and radiculopathy were not compensable injuries. The trial court applied a factor of six to Dr. Dalal's rating of 12% to the body as a whole and found Employee's impairment rating was 72 % to the body as a whole. Employer timely filed its notice of appeal. This appeal has been assigned to the Special Workers' Compensation Panel pursuant to Tennessee Supreme Court Rule 51.

Analysis

Our 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) (2014) (applicable to injuries occurring prior to July 1, 2014). 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., Inc., 277 S.W.3d 896, 898 (Tenn. 2009) (citation omitted). 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) (citation omitted). 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) (citations omitted).

Employer raises five issues in this appeal: (1) the trial court erred by finding that Employee sustained a compensable injury because the evidence did not establish that his gradually occurring aggravation of his pre-existing back condition arose primarily from his work activities as required by Tennessee Code Annotated section 50-6-102(12)(C)(ii); (2) the trial court erred by finding that Employee was not estopped from claiming permanent partial disability benefits because he certified on a DOT document that he had no impairment of the leg, no spinal injury or disease, no chronic low back pain, and was physically capable of working as a truck driver; (3) the trial court erred in finding that Employee's workers' compensation award was not limited to 1.5 times the medical impairment rating pursuant to

Tennessee Code Annotated section 50-6-241(d)(1)(a) because he was terminated due to his inability and/or refusal to work for reasons wholly unrelated to the alleged injury; (4) the trial court's award of 72% permanent partial disability to the body as a whole is excessive; and (5) the trial court erred in awarding past medical benefits to Employee.

Notice

As a precursor to Employer's primary argument regarding compensability, we first address whether Employee provided Employer with proper notice of his injury. In Tennessee, an injured employee is required to provide his/her employer with written notice of the injury unless the employer otherwise has actual notice of the injury. Tenn. Code Ann. § 50-6-201(a) (2008). The notice must be provided "immediately upon the occurrence of an injury" or "as soon thereafter as is reasonable and practicable." Tenn. Code Ann. § 50-6-201(a) (2008). An employee who fails to provide notice of the injury within thirty days will not be entitled to workers' compensation benefits unless there is a reasonable excuse for the failure to give notice. Tenn. Code Ann. § 50-6-201(a) (2008).

We have previously held that the notice requirement exists to provide employers the opportunity to make timely investigations of the facts and to enable employers to provide timely and proper treatment for injured employees. *Jones v. Sterling Last Corp.*, 962 S.W.2d 469, 471 (Tenn. 1998) (citation omitted).

In this case, Employee sustained a work-related injury on December 2, 2013, while performing maintenance on the brakes of a truck, and he subsequently notified Employer of his injury on December 16, 2013. Even though there was a fourteen-day delay between the time of injury and the time that notice was given to Employer, we conclude that this delay was reasonable given Employee's belief that Mr. Morris was on vacation the week of the injury and Employee's trip to Delaware with a co-worker to pick up equipment, from which he returned on Saturday, December 14, 2013. Therefore, we conclude that Employee provided notice of his injury to

Employer within a reasonable and practicable timeframe in compliance with Tennessee Code Annotated section 50-6-201(a).

Compensability

Employer contends that the trial court erred by finding that Employee sustained a compensable injury. Employer asserts that Employee's injury was "cumulative" within the meaning of Tennessee Code Annotated section 50-6-102(12)(C)(ii) and that under that subsection, Employee is not entitled to compensation because there is no medical testimony that his condition arose "primarily" from his employment. Employee contends that his injury is compensable under Tennessee Code Annotated section 50-6-102(12)(A)(i) because the injury arose from a "specific incident[] or set of incidents," thus, making the injury "accidental" under subsection (12)(A)(i).

Tennessee Code Annotated section 50-6-102(12), as it read on December 2, 2013, stated:

> (12) "Injury" and "personal injury":
>
> (A) Mean an injury by accident, arising out of and in the course of employment, that causes either disablement or death of the employee; provided, that:
>
> (i) An injury is "accidental" only if the injury is caused by a specific incident, or set of incidents, arising out of and in the course of employment, and is identifiable by time and place of occurrence; and
>
> (ii) The opinion of the physician, selected by the employee from the employer's designated panel of physicians pursuant to §§ 50-6-204(a)(4)(A) or (a)(4)(B), shall be presumed correct on the issue of causation but said presumption shall be rebutted by a preponderance of the evidence;

. . . .

(C) Do not include:

. . . .

(ii) Cumulative trauma conditions, hearing loss, carpal tunnel syndrome, or any other repetitive motion conditions unless such conditions arose primarily out of and in the course and scope of employment[.]

Tenn. Code Ann. § 50-6-102(12) (Supp. 2012).

Another workers' compensation panel discussed the effect of an employee suffering an acute, accidental injury when they have a pre-existing condition in *McKinney v. Inland Paperboard & Packaging, Inc.*, stating:

An accidental injury is one which cannot be reasonably anticipated, is unexpected and is precipitated by unusual combinations of fortuitous circumstances. It is the resulting injury which must be unexpected in order for the injury to qualify as one by accident. . . .

. . . .

The employer takes the employee as he or she is, with all preexisting defects and diseases. An injury is compensable, even though the claimant may have been suffering from a serious pre-existing condition or disability if a work connected accident can be fairly said to be a contributing cause of such injury.

The general rule recognized by Tennessee courts is that aggravation of a preexisting condition may be compensable but not if it results only in increased pain or other symptoms caused

> by the underlying condition. "The employer is liable if an accidental injury is causally related to and brings about the disability by the aggravation, actual progression or anatomical change of the preexisting condition." If the work aggravates a preexisting condition merely by increasing the pain however, there is no injury by accident.

McKinney v. Inland Paperboard & Packaging, Inc., No. E2005-2786-WC-R3-WC, 2007 WL 293037, at *2-3 (Tenn. Workers' Comp. Panel Feb. 1, 2007) (citations omitted); *see Fink v. Caudle*, 856 S.W.2d 952, 958-959 (Tenn. 1993).

In contrast, in DeGalliford v. United Cabinet Co., LLC, No. M2013-00943-SC-WCM-WC, 2014 WL 1018170 (Tenn. Workers' Comp. Panel Mar. 17, 2014), we explained the effect of an Employee suffering an aggravation of a preexisting condition when there is a gradual injury from cumulative trauma or repetitive work conditions:

> The language of § 50-6-102(12)(C)(ii) defines the law regarding aggravation of preexisting medical conditions resulting from repetitive work activity. However, by its explicit terms, it does not prohibit recovery of benefits for such conditions. The text of the statute provides that an injury does not include "cumulative trauma conditions, hearing loss, carpal tunnel syndrome, or any other repetitive motion conditions *unless such conditions arose primarily out of and in the course and scope of employment*." Tenn. Code Ann. § 50-6-102(12)(C)(ii) (emphasis added). Accordingly, the plain text of the statute clearly permits a finding of compensability when a specific repetitive work activity is the primary cause of a medical condition[.]

2014 WL 1018170, at *7.

In the current case, Employee testified to an acute injury, rather than a gradual injury, when he described the onset of his back pain on December 2,

2013. He stated:

> We was changing tires and -- well, we was doing service on the trucks and it was brakes, seals, anything that needed to be done to the trucks, and as I was – as we was doing the brakes and the seals, which I was on my knees on the ground, I noticed a bad pain in my back going down my leg, which I just thought it was maybe a pulled muscle or something – I've never experienced anything like that, so I didn't know what had happened.

He was able to state the date and the activity in which he was engaged when the injury occurred. Therefore, his description was of an acute accidental injury rather than a gradual injury from repetitive work.

The trial court found that Employee was a credible witness. It also concluded that Employee had sustained a compensable injury to his lower back on December 2, 2013, and that the injury arose out of his employment and during the course of his employment. 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, 277 S.W.3d 896 at 898 (citation omitted).

Regarding the relevant expert testimony, Dr. Dalal testified that Employee suffered from degenerative disc disease However, he opined that degenerative disc disease can be present without being symptomatic but can be exacerbated by an injury. He stated that Employee's symptoms were consistent with an aggravation of his underlying condition. During his examination, he found muscle spasms and tenderness in Employee's lower back. He opined that Employee's work injury aggravated his pre-existing arthritic changes.

Dr. Hutchinson was also asked whether he had an opinion as to whether the alleged injury caused any type of exaggeration or exacerbation to the

employee's back. The doctor responded that it was hard for him to determine with any reasonable degree of medical certainty whether Employee was telling the truth about the injury or not. Dr. Hutchinson further stated that if Employee was telling the truth, then he believed the injury had exacerbated Employee's condition. However, if Employee was not telling the truth, then the doctor did not believe the injury had been exacerbated.

> While causation and permanency of an injury must be proved by expert medical testimony, such testimony must be considered in conjunction with the lay testimony of the employee as to how the injury occurred and the employee's subsequent condition." Absolute certainty on the part of a medical expert is not necessary to support a workers' compensation award and the Court may properly predicate an award on medical testimony to the effect that a given incident could be the cause of the claimant's injury. Any reasonable doubt regarding causation is to be construed in favor of the employee.

McKinney, 2007 WL 293037, at *2-3 (citations omitted); see Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487 (Tenn. 1997).

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, 272 S.W.3d at 571 (citation omitted). Based on the testimony of Employee and the depositions of the doctors, we agree with the trial court's decision to credit the testimony of Dr. Dalal. Dr. Dalal testified that in his opinion, Employee's work-related injury aggravated Employee's preexisting condition. Furthermore, even Dr. Hutchinson stated that if the court believed Employee's account of the work-related injury, then Dr. Hutchinson's opinion would be that the injury caused an exacerbation to Employee's back.

Accordingly, we do not find that the evidence preponderates against the

trial court's determination that the Employee's injury arose out of and in the course of employment. Therefore, we conclude that Employee's injury is compensable.

Estoppel

The employer next contends that the trial court erred by finding that the employee was not estopped from claiming permanent partial disability benefits because he certified on a DOT document that he had no impairment of the leg, no spinal injury or disease, no chronic low back pain, and was physically capable of working as a truck driver.

> The doctrine of equitable estoppel requires evidence of the following elements with respect to the party against whom estoppel is asserted:
>
> (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) Intention, or at least expectation that such conduct shall be acted upon by the other party; (3) Knowledge, actual or constructive of the real facts.
>
> Consumer Credit Union v. Hite, 801 S.W.2d 822, 825 (Tenn. Ct. App. 1990) (quoting Callahan v. Town of Middleton, 41 Tenn.App. 21, 292 S.W.2d 501, 508 (1954) (citation omitted)). Equitable estoppel also requires the following elements with respect to the party asserting estoppel:
>
> (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) Reliance upon the conduct of the party estopped; and (3) Action based thereon of such a character as to change his position prejudicially. *Id.*

Osborne v. Mountain Life Ins. Co., 130 S.W.3d 769, 774 (Tenn. 2004).

In the present case, the employee made no representation to the employer. His statements were made in order to maintain his CDL in the hope that he would eventually be able to return to driving. The statement was made after the employee had been terminated, so the employer could not have relied on it for any purpose. If anything, this statement is a prior inconsistent statement which can be used for impeachment purposes. It was considered by the trial court as such and is not a bar to recovery.

Cap

The third issue presented for review is whether the trial court erred in finding that the Employee's workers' compensation award was not limited to one and one-half (1.5) times the medical impairment rating pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(a) because he was terminated due to his inability and/or refusal to work for reasons wholly unrelated to the alleged injury.

Tennessee Code Annotated section 50-6-241(d)(1)(A) states that a workers' compensation award is limited to one and one-half (1.5) times the medical impairment rating if a pre-injury employer returns the injured employee to employment at a wage equal to or greater than the wage earned by the employee at the time of the injury. Tennessee courts have held that the statutory cap of one and one-half (1.5) times the impairment rating is applicable and should limit an employee's recovery when an employee is terminated by an employer for cause and for a reason wholly unrelated to the employee's injury. Carter v. First Source Furniture Grp., 92. S.W.3d 367, 371 (Tenn. 2002).

Employer's contention is based on the testimony of Mr. Morris, Employee's supervisor, who stated that Employee was terminated because he refused to accept a night shift assignment and that the termination occurred before Employee gave notice of his injury. Employee testified that he expressed reservations about working the night shift but that he never refused the assignment. The trial court specifically found that Employee's testimony

was more credible than Mr. Morris's testimony. 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, 277 S.W.3d at 900. In light of that finding, we cannot say that the evidence preponderates against the trial court's finding that the termination was unreasonable. Therefore, the statutory cap of one and one-half (1.5) times the impairment rating is not applicable in this case.

Disability Rating

Employer next contends that the trial court's award of seventy-two percent (72%) permanent partial disability to the body as a whole is excessive. The trial court found that Employee had aggravated a preexisting condition in his back and awarded him 72% permanent partial disability to the body as a whole. The trial court arrived at the 72% disability rating by multiplying a factor of six to Dr. Dalal's 12% impairment rating. *See* Tenn. Code Ann. § 50-6-241(d)(2)(A). In making its determination, the trial court considered Employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in his disabled condition.

Tennessee Code Annotated section 50-6-241(d)(2)(A) states:

> For injuries arising on or after July 1, 2004, but before July 1, 2014, in cases in which the pre-injury employer did not return the injured employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability benefits that the employee may receive for body as a whole and schedule member injuries may not exceed six (6) times the medical impairment rating determined pursuant to § 50-6-204(d)(3). . . . In making such determinations, the court shall consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and

capacity to work at the types of employment available in claimant's disabled condition.

The relevant evidence is the current case is as follows: On January 25, 2015, Dr. Dalal performed an independent medical examination of Employee. He concluded that Employee aggravated a preexisting degenerative disc disease and assigned an impairment rating of 12% impairment to the body as a whole. Dr. Dalal also told to Employee that in the future he should avoid lifting any weight more than fifteen pounds, bending, pulling, pushing, lifting, and twisting. He advised Employee that if he continued to have pain, he should have a CT/myelogram done.

Dr. Hutchinson examined Employee on March 12, 2014, and on March 26, 2014. During the initial visit, Employee reported a low back injury with radiculopathy to the lower extremity. Dr. Hutchinson's diagnosis was lumbar spondylosis, which means arthritis or degenerative change with radiculopathy. Radiculopathy is defined as pain, numbness, tingling, or weakness in the arms or legs. With respect to impairment, Dr. Hutchinson testified that because Employee had a prior documented injury, he assigned Employee a zero percent impairment rating. Dr. Hutchinson did not testify as to any restrictions or recommendations concerning future activity. Dr. Hutchinson recommended that Employee seek a nerve block under his private medical insurance policy.[1]

The Employee, a truck driver, testified that he is unable to drive a truck. He rode with a friend on one occasion, but the pain was unbearable. He is also unable to work as a mechanic. At the time of the trial in 2016, he was a supervisor on a job site in Nashville. He testified that he walked and stood a lot but can sit down when necessary. He is able to perform some routine activities like yard work, and he is able to ride his motorcycle.

Having reviewed the evidence and conducted a de novo review of the

[1] As previously discussed herein, Dr. Hutchinson did not believe Employee's injury to be work related; therefore, Employee received no further medical treatment from him, and he did not know Employee's medical condition after the last visit on March 26, 2014.

medical testimony, we conclude that Employee is permanently, partially disabled. However, we have determined that the award of 72% permanent partial disability to the body as a whole is excessive. This case was tried on April 12, 2016; at that time, Employee was working full-time as a supervisor at a job site in Nashville. In the course of that employment, he was required to walk and stand a lot. Further, Employee testified that he is able to engage in such activities as riding a motorcycle. Considering the medical evidence in this case,[2] Employee's job opportunities and ability to work, and other pertinent factors, we conclude that the award of permanent partial disability to the body as a whole should be reduced to 36%.

Medical Benefits

The final issue presented for review is whether the trial court erred in awarding past medical benefits to Employee. Other than the treatment by Dr. Hutchinson, which was paid by Employer's insurance carrier, Employee's only other medical treatment was provided by TennCare. The trial court held that Employee had carried his burden of proof as to the medical charges he incurred and, as such, were reasonable and necessary and should be paid by Employer to the extent actually paid by TennCare.

We find no credible evidence in the record as to the medical treatment provided to Employee such as who provided the treatment, when it was performed, the cost of the medical treatment, and whether it was reasonable and necessary. In the absence of such evidence, we conclude that the trial court erred in ordering Employer to pay past medical expenses.

This finding with regard to past medical expenses does not affect Employer's obligation under the workers' compensation statute to provide future medical treatment.

[2] We give no weight to Dr. Hutchinson's rating of zero impairment. He discontinued treatment after the workers' compensation insurance company denied the claim. He recommended additional treatment but requested it be performed by another provider. Employee had not reached maximum medical improvement when Dr. Hutchinson discontinued his treatment.

Conclusion

The finding by the trial court that Employee sustained a compensable injury arising out of and during the course of his employment is affirmed, as is the trial court's finding that Employee is not estopped from claiming workers' compensation benefits. We also affirm the trial court's finding that Employee was not terminated for good cause. Therefore, the cap of one and one-half times the medical impairment rating does not apply. The trial court's finding of 72% permanent partial disability to the body as a whole is modified, and the employee is awarded permanent partial disability benefits based upon a rating of 36% permanent partial disability to the body as a whole. Finally, the trial court's award of past medical benefits to the Employee is reversed, and this claim is dismissed. Such holdings shall not affect any future medical benefits to which the employee is entitled.

The costs are taxed equally to each party for which execution may issue if necessary.

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WILLIAM B. ACREE, JR., SENIOR JUDGE

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

JAMES ELLIS PHILLIPS v. THE PICTSWEET COMPANY

Chancery Court for Crockett County
No. 9878

No. W2016-01704-SC-R3-WC – Filed August 28, 2017

JUDGMENT ORDER

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 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 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 are assessed equally to the Appellant and to the Appellee, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM