

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
September 19, 2011 Session

**JAMES E. SANDERS v. LODGENET INTERACTIVE CORPORATION ET  
AL.**

**Appeal from the Chancery Court for Sumner County  
No. 2010C-65 Tom E. Gray, Chancellor**

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**No. M2011-00725-WC-R3-WC - Mailed: January 10, 2012  
Filed - February 10, 2012**

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In this workers' compensation action, the employee alleged that he sustained compensable injuries to his neck and lower back as a result of a March 29, 2007 automobile accident. His employer denied that the employee had any permanent impairment or disability due to the accident. The employer sought an evaluation through the Medical Impairment Registry, but the doctor selected for the evaluation declined to assess impairment because he did not find the employee to be at maximum medical improvement. The employer sought a continuance of the previously-scheduled trial. The trial court denied that motion. The trial court ruled for the employee and awarded disability benefits. On appeal, the employer argues that the trial court erred by denying its motion to continue and by awarding permanent disability benefits.<sup>1</sup> We affirm the judgment.

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

DONALD P. HARRIS, SR. J., delivered the opinion of the Court, in which SHARON G. LEE, J., and E. RILEY ANDERSON, SP. J., joined.

William M. Billips, Nashville, Tennessee, for the appellants, Lodgenet Interactive Corporation and CNA Insurance Company.

Stanley A. Davis, Nashville, Tennessee, for the appellee, James E. Sanders.

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<sup>1</sup> 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.

## MEMORANDUM OPINION

### Factual and Procedural Background

James Sanders worked as a field service representative for Lodgenet Interactive Corporation (“Lodgenet”), a company which provides guest room movie systems to hotels. He suffered work-related injuries in November 2006 and on March 29, 2007. The first injury occurred when he slipped while carrying a television set and computer bag and fell head first into a metal rack, injuring his neck. He reported the injury to Lodgenet and was permitted to receive treatment from his personal physician, Dr. Ifeanyi Obianyoy. Dr. Obianyoy provided medication and physical therapy. An MRI of Mr. Sanders’s cervical spine was taken. He was eventually referred to Dr. Vaughn Allen, a neurosurgeon. He saw Dr. Allen on a single occasion, March 16, 2007. At that time, Dr. Allen found that he had arthritic changes in his neck, had suffered a cervical strain, did not have permanent impairment, and did not require activity restrictions.

Mr. Sanders’s second injury occurred as a result of a motor vehicle accident on March 29, 2007. He was stopped at a traffic signal when a car ran into the rear of the company-owned vehicle he was driving. Mr. Sanders sustained a cut and a knot on his head, and his “neck was hurting substantially.” He drove himself to a nearby emergency room where an MRI or CT scan of his neck was performed. Seven to ten days later, he was traveling to Memphis with another employee. During the drive, his lower back began to hurt. Mr. Sanders returned to Dr. Obianyoy for additional treatment. Disputes then arose concerning medical treatment, ultimately resulting in orders from the Department of Labor and from the trial court requiring Lodgenet to provide further treatment. Beginning in December 2008, Mr. Sanders came under the care of Dr. Benjamin Johnson, an anesthesiologist specializing in pain management. Dr. Johnson and his associate, Dr. Son Le, a physiatrist, were Mr. Sanders’s treating physicians thereafter. The treatment provided consisted of steroid injections, nerve blocks, and various medications, including muscle relaxers and narcotic pain relievers.

Mr. Sanders filed a Form C-32, Standard Form Medical Report for Industrial Injuries (“C-32”) from Dr. Johnson. Lodgenet exercised its right pursuant to Tennessee Code Annotated sections 50-6-235(c)(1) and (c)(2) to take a cross examination deposition. In his C-32, Dr. Johnson stated his opinion that Mr. Sanders had sustained a 22% permanent anatomical impairment to the body as a whole as a combined result of the neck and lower back injuries from the March 2007 motor vehicle accident. He had not assigned any restrictions, however, because a functional capacity evaluation had not been performed because by the time Dr. Johnson saw him, Mr. Sanders had returned to work and was able to perform his job. Dr. Johnson testified, at one point, that Mr. Sanders was not at maximum

medical improvement at the time the C-32 was completed because additional treatment was pending. When questioned about that statement by Mr. Sanders's attorney, however, he acknowledged that Mr. Sanders was "as good as he's going to be." He also testified that the American Medical Association ("AMA") Guides permitted permanent impairment to be assigned for a condition which had persisted for more than one year.

Dr. Johnson said that Mr. Sanders had a full range of motion in his neck and back, had a normal neurological examination, and did not have radiculopathy. He testified that he based his impairment rating of 18% for the body as a whole for Mr. Sanders's cervical spine injury upon the findings of the January 27, 2007 MRI coupled with the symptoms he began experiencing following the March 29, 2007 automobile accident. Dr. Johnson stated that, based upon the history given to him, he believed the March 2007 injury had caused a change in a pre-existing degenerative condition in Mr. Sanders's spine and was the reason that Mr. Sanders required long-term pain management. At the time of the deposition, Dr. Johnson said several medications were being prescribed to Mr. Sanders: Zanaflex, a muscle relaxant; Opana, a long-acting narcotic pain reliever; Percocet, a short-acting narcotic medication; and Neurontin, an anticonvulsant that relieves pain from nerve-type origins.

Dr. C. M. Salekin, a neurologist, examined Mr. Sanders on July 8, 2009, at the request of his attorney. Dr. Salekin opined that Mr. Sanders retained a 22% impairment to the body as a whole. Although he used the same sections of the AMA Guides to reach his conclusion, Dr. Salekin's analysis was somewhat different from Dr. Johnson's. Unlike Dr. Johnson, he found that Mr. Sanders had a cervical radiculopathy. During his examination, Dr. Salekin found that Mr. Sanders had "weak left triceps, left biceps and left deltoid muscles, as compared to the right." He also found that Mr. Sanders had decreased reflexes and diminished sensation in the left arm. He also found that Mr. Sanders had limitation of motion in the cervical spine. These findings formed the basis of his conclusion that Mr. Sanders had radiculopathy as a result of the March 2007 injury. During cross examination, Dr. Salekin testified that his comparison of the pre- and post-March 2007 MRI scans showed a progression of Mr. Sanders's underlying condition. In that regard, he disagreed with the conclusion of the radiologist who performed the second study and found no significant difference. He agreed that Dr. Allen's records showed that Mr. Sanders still had neck symptoms from his first injury shortly before the second injury occurred.

Dr. Thomas O'Brien, an orthopaedic surgeon, examined Mr. Sanders on October 27, 2009 at the request of Lodgenet's attorney. He found that Mr. Sanders had "nonradicular" neck and back pain. He also found that Mr. Sanders had normal range of motion in the neck and back and a normal neurological examination. He found no significant difference in the pre- and post-March 2007 scans of Mr. Sanders's cervical spine. Dr. O'Brien opined that Mr. Sanders had degenerative changes in his cervical and lumbar spines that were neither

related to, nor accelerated by, the motor vehicle accident. He assigned no permanent impairment and recommended no permanent restrictions. He disagreed with Dr. Salekin's opinions. Dr. O'Brien considered it unlikely that Mr. Sanders's lower back symptoms were related to the motor vehicle accident because those symptoms did not appear until seven to ten days after the event. On cross examination, he stated that he "believe[d] [Mr. Sanders] sustained a minor cervical strain . . . but not a lumbar injury" as a result of the March 2007 accident. He agreed that he had not reviewed the records or deposition of Dr. Johnson. He stated that he thought Mr. Sanders would be better off if he did not receive narcotic medication on a long-term basis.

In light of the conflicting medical opinions concerning impairment, Lodgenet requested an evaluation through the Medical Impairment Registry program. Dr. James Talmage, an orthopaedic and occupational medicine physician, was selected to conduct the examination. He saw Mr. Sanders on October 5, 2010. After learning that Mr. Sanders was "currently having a series of epidural steroid injections for his low back" and that additional cervical injections were planned, Dr. Talmage concluded that Mr. Sanders was not at maximum medical improvement and, therefore, that permanent impairment could not be assigned. Dr. Talmage found that Mr. Sanders had reduced range of motion in his neck, normal range of motion in his lower back, and a normal neurological examination.

Prior to Dr. Talmage's examination, the parties had entered into an agreed order setting the case for trial on March 9, 2011. Based upon Dr. Talmage's opinion that Mr. Sanders had not reached maximum medical improvement, on November 3, 2010, Lodgenet filed a motion to continue the trial. By order dated January 31, 2011, the trial court denied that motion, and the case proceeded to trial as scheduled.

In addition to the testimony outlined above, Mr. Sanders testified that he had returned to work for Lodgenet and continued to work in the same position he held before his injury. At that time, he had worked for Lodgenet for fourteen years. He was fifty-three years old and was a high school graduate. He had served in the Coast Guard for four years, where he had repaired electronic equipment, and had been a radioman and an aircraft navigator. He had also worked in the service department of an alarm company and as a service supervisor at a cable television company. His regular medications were Oxycontin and Opana, which are narcotic pain relievers; Tizanidine, a muscle relaxer; and Gabapentin, for tingling in his feet. He did not think that he would be able to work without the medications. His activities at work and at home were limited by the effects of his injuries. He said that he was unable to run and exercise regularly, as he had before the injury, that he sometimes required assistance with lifting at work, and that he was unable to go backpacking with his two sons as he had previously done.

The trial court issued its ruling at the conclusion of the proof. It found that Mr. Sanders had sustained a 22% anatomical impairment to the body as a whole and awarded 33% permanent partial disability to the body as a whole. Judgment was entered in accordance with that ruling. Lodgenet has appealed, contending that the trial court erred by failing to grant its motion to continue the trial. In the alternative, Lodgenet contends that the trial court erred by finding that Mr. Sanders sustained an 18% impairment from his neck injury and by finding that he had sustained a 5% impairment from his lower back injury.

### **Standard of Review**

We are statutorily required to review the trial court's factual findings "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2). Following this standard, we are further required "to examine, in depth, a trial court's factual findings and conclusions." Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)). We accord considerable deference to the trial court's findings of fact based upon its assessment of the testimony of witnesses it heard at trial, although not so with respect to depositions and other documentary evidence. Padilla v. Twin City Fire Ins. Co., 324 S.W.3d 507, 511 (Tenn. 2010); Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). We review conclusions of law de novo with no presumption of correctness. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). Although workers' compensation law must be liberally construed in favor of an injured employee, the employee must prove all elements of his or her case by a preponderance of the evidence. Crew, 259 S.W.3d at 664; Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992).

### **Analysis**

#### *Denial of Motion for Continuance*

Lodgenet's first argument on appeal is that the trial court erred by failing to grant its motion for a continuance of the trial after Dr. Talmage gave his opinion that Mr. Sanders had not reached maximum medical improvement. Lodgenet contends that the trial court's decision deprived it of its "statutory right to request the opinion of an independent physician from the Medical Impairment Rating Registry." It asserts that Dr. Talmage's opinion that a rating could not be assigned at the time of his examination on October 5, 2010 is presumptively correct and may be overcome only by clear and convincing evidence, in accordance with Tennessee Code Annotated section 50-6-204(d)(5). We disagree with that assertion.

First, section 50-6-204(d)(5) provides in pertinent part:

When a dispute as to the degree of medical impairment exists, either party may request an independent medical examiner from the commissioner's registry. . . . The written opinion *as to the permanent impairment rating given by the independent medical examiner* pursuant to this subdivision (d)(5) shall be presumed to be the accurate impairment rating; provided, however, that this presumption may be rebutted by clear and convincing evidence to the contrary.

(Emphasis supplied.)

Giving the words of the statute their usual and accepted meaning, the presumption of correctness attaches to the anatomical impairment rating assigned by the Medical Impairment Rating (“MIR”) examiner only. Indeed, the rules governing the MIR program, which were promulgated by the Department of Labor and Workforce Development pursuant to authority granted by Tennessee Code Annotated section 50-6-204(d)(6), state unequivocally, “The sole purpose of the evaluation is to establish an impairment rating and not to recommend future treatment or to provide a diagnosis or other medical advice.” Tenn. Comp. R. & Regs. 0800-2-20-10(3). The attainment of maximum medical improvement is undoubtedly intertwined with the existence and extent of permanent impairment. However, it is nonetheless a separate concept. We therefore conclude that the presumption of correctness contained in section 50-6-204(d)(5) does not attach to Dr. Talmage’s opinion on that subject.

Moreover, there is abundant expert medical evidence in the record to support a finding that Mr. Sanders had, in fact, reached maximum medical improvement prior to Dr. Talmage’s October 2010 examination. Dr. Johnson, the treating physician, was deposed on February 11, 2011. His testimony on the subject was indecisive. During his initial examination, he stated that Mr. Sanders had not yet reached maximum medical improvement. During examination by Mr. Sanders’s counsel, however, he agreed that the AMA Guides define a condition to be permanent if it has persisted for more than one year. Mr. Sanders’s injury had occurred almost five years earlier. Dr. Johnson also agreed that Mr. Sanders was “as good as he’s going to be,” although he required “ongoing treatment.” Mr. Sanders’s evaluating physician, Dr. Salekin, was deposed on December 10, 2010. He opined that Mr. Sanders was “at maximum medical improvement and he is improved as far as he can go.” Also, Lodgenet’s evaluating physician, Dr. O’Brien, was deposed on February 22, 2011. He testified that Mr. Sanders did not “require[] any further diagnostic evaluation, doesn’t need any further form of physical therapy, and . . . is not a surgical candidate.”

We also note that the reason Dr. Talmage believed Mr. Sanders had not reached maximum medical improvement was that Mr. Sanders reported to him that his treating physicians were administering a series of epidural steroid injections to his lumbar area, following which they planned to repeat a series of epidural steroid injections and a nerve block to his neck. Even after the Tennessee Department of Labor and the trial court had ordered Lodgenet to provide medical treatment, Lodgenet's insurance carrier had continued to deny or withhold approval from Mr. Sanders's doctors to provide these injections even up to the time of trial. Dr. Johnson, Dr. Salekin, and Mr. Sanders testified these injections provided only temporary relief. There is no evidence that we can find indicating the injections could have provided permanent relief. The decision whether to grant or deny a request for a continuance is a matter within the sound discretion of the trial court. Sanjines v. Ortwein & Assocs., P.C., 984 S.W.2d 907, 909 (Tenn. 1998) (citing Blake v. Plus Mark, Inc., 952 S.W.2d 413, 415 (Tenn. 1997)). We find that the trial court's decision in this case was amply supported by the evidence and did not constitute an abuse of discretion.

#### *Impairment Due to Neck Injury*

Lodgenet next contends that the trial court erred by finding that Mr. Sanders sustained an anatomical impairment of 18% to the body as a whole due to his neck injury. In support of this contention, it points out that, though Dr. Johnson and Dr. Salekin used different analyses, each relied upon the same section of the Fifth Edition of the AMA Guides, DRE Cervical Impairment Category III. That category, Lodgenet asserts, requires a finding that the patient shows "[s]ignificant signs of radiculopathy." American Medical Association, Guides to the Evaluation of Permanent Physical Impairment 392 (Linda Cocchiarella & Gunnar B.J. Andersson, eds., 5th ed. 2001). It then notes that Mr. Sanders's cervical spine symptoms are and have been limited to his neck and shoulders, that Dr. O'Brien and Dr. Talmage testified that Mr. Sanders did not have signs of radiculopathy, and that even Dr. Johnson testified that Mr. Sanders had a normal neurological examination. Although Dr. Salekin's examination revealed several findings consistent with radiculopathy, there are no similar findings in the records of any of the other physicians who treated Mr. Sanders. In addition, Lodgenet points out that Dr. Johnson's rating was based upon his analysis of an MRI of Mr. Sanders's cervical spine taken in January 2007, before the injury at issue.

Lodgenet's concerns regarding the opinions of Dr. Johnson and Dr. Salekin are appropriate. However, the opinions of Dr. O'Brien and Dr. Talmage, relied upon by Lodgenet, also present difficulties. Dr. O'Brien did not believe that Mr. Sanders had sustained a significant injury at all. All of the lay and medical evidence, however, showed that he had a dramatic increase in symptoms after the March 2007 accident, and those

symptoms did not recede with time.<sup>2</sup> Dr. Talmage opined that Mr. Sanders had not reached maximum medical improvement more than three years after the accident, but also found limitation of motion in the cervical spine, a finding consistent with the existence of permanent impairment. Moreover, Dr. O'Brien testified he had a consulting business in the State of Wisconsin where he has performed as many as ten to fifteen medical examinations in one day at the request of insurance carriers and attorneys. The trial court found him not to be a credible witness, and the evidence does not preponderate against that finding.

The trial court was presented with a wide range of medical evidence. The trial court found that Mr. Sanders had sustained cervical radiculopathy as a result of his two injuries. The trial court indicated it relied on the testimony of Dr. C. M. Salekin. Dr. Salekin is board certified in neurology and as a disability evaluating physician. He had completed a residency and a fellowship in occupational medicine at Harvard University. He testified that the existence of radiculopathy is a neurological problem. Dr. Salekin is the only neurologist who testified in this case. Dr. Salekin's testimony is supported by other evidence that was presented. As pointed out by the court, Dr. James Eby, who treated Mr. Sanders for a time during 2008, noted radicular symptoms. The records of Dr. Son D. Le indicate he diagnosed Mr. Sanders as having cervical radiculopathy. Dr. Johnson pointed to cervical nerve root displacement revealed by the January 29, 2007 MRI, which he felt became significant when Mr. Sanders exhibited a dramatic increase in symptoms following the March 29, 2007 automobile accident. Each doctor's testimony appeared to be based upon findings and assumptions different from those used by the others. 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. 1996); Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990). It appears the trial court accepted the testimony of the doctor whose testimony best explains the symptoms which have been and continue to be suffered by Mr. Sanders. In this case, the scale of the differences of opinion in the medical evidence presented a particular challenge to the trial court. Viewing the record as a whole, we are unable to conclude that the evidence preponderates against the trial court's finding on this issue.

#### *Impairment Due to Lower Back Injury*

Lodgenet's final contention is that the trial court erred by finding that Mr. Sanders sustained a 5% permanent anatomical impairment to the body as a whole due to his alleged

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<sup>2</sup> Mr. Sanders testified, without contradiction, that although Lodgenet denied him workers' compensation benefits, he was unable to work for a period of two months. The fact that he missed work for such a period of time with no compensation and, in fact, paid for his own treatment when Lodgenet refused to provide benefits, is a strong indication that he had sustained a serious injury.



lower back injury. It bases this argument on Mr. Sanders's testimony that he did not have any symptoms of a lower back injury until seven to ten days after the March 2007 accident and on the testimony of Dr. O'Brien and Dr. Talmage that symptoms of a traumatic injury to the spine normally appear within three days of the trauma itself. Dr. Johnson's C-32 form provided an impairment rating for the lower back injury and indicated that the injury more probably than not arose from the employment. He was not questioned specifically by either party during his deposition concerning causation of the lower back symptoms. Dr. Salekin stated affirmatively in the written report of his examination that Mr. Sanders had sustained a "[s]oft tissue injury, i.e., ligament sprain/muscle strain at the lumbar spine caused by the motor vehicle accident on March 29, 2007." Dr. Salekin was not questioned specifically by either party during his deposition concerning causation of the lower back symptoms. Mr. Sanders testified he did have problems with his lower back shortly after the accident but his neck was hurting so much that he did not consider his lower back as being injured until the pain became significant seven to ten days later.

As with the issues raised concerning the cervical spine, the trial court was presented with differing medical opinions concerning the lower back injury. In our view, the conclusion reached by the trial court was not mandated by the evidence in the record, but was certainly reasonable in light of it. We therefore conclude that the evidence does not preponderate against its finding on this issue.

### **Conclusion**

The judgment is affirmed. Costs are taxed to Lodgenet Interactive Corporation and CNA Insurance Company and their surety, for which execution may issue if necessary.

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DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE  
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**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 Lodgenet Interactive Corporation and CNA Insurance Company and their surety, for which execution may issue if necessary.

PER CURIAM