

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

December 10, 2012 Session

**JOSEPH E. SMITH v. ELECTRIC RESEARCH & MANUFACTURING  
COOPERATIVE, INC. AND ACE AMERICAN INSURANCE CO.**

**Appeal from the Chancery Court for Obion County  
No. 28,967 William Michael Maloan, Chancellor**

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**No. W2012-00656-WC-R3-WC - Mailed January 17, 2013; Filed February 22, 2013**

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Joseph E. Smith (“Employee”) alleged that he injured his back in the course and scope of his employment with Electric Research & Manufacturing Cooperative, Inc. (“Employer”). Employee’s evaluation physician assigned a 12% permanent impairment rating to the body as a whole as a result of the injury. A physician selected through the Medical Impairment Registry (“MIR”) process assigned a 3% permanent impairment rating to the body as a whole. The trial court found that Employee rebutted the statutory presumption of accuracy afforded the MIR physician’s rating by clear and convincing evidence pursuant to Tennessee Code Annotated section 50-6-204(d)(5) (2008) and awarded 40% permanent partial disability to the body. Employer has appealed.<sup>1</sup> After reviewing the record as we are required to do, we affirm the trial court’s judgment.

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

TONY A. CHILDRESS, SP. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, J., and DONALD E. PARISH, SP. J., joined.

Lori J. Keen, Memphis, Tennessee, for the appellants, Electric Research & Manufacturing Cooperative, Inc., and Ace American Insurance Co.

Jeffrey A. Garrety and Charles L. Holliday, Jackson, Tennessee, for the appellee, Joseph E. Smith.

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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

Employee began working for Employer in 2007. Employee's job required him to lift coils or cores that weighed thirty to eighty pounds. On April 7, 2008, Employee was lifting a core and twisting to place it on a table when he heard a "pop" in his lower back and felt pain in his back and tingling in his buttocks. Employee reported the injury to Employer and received treatment at Urgent Care in Dyersburg.

In June of 2008, Employee was referred to Dr. Jason Hutchison. Dr. Hutchison, who testified at trial by way of deposition, stated that Employee told him that he had pain in his back, buttocks, and legs. Dr. Hutchison testified that a June 2008 magnetic resonance imaging scan ("MRI") showed retrolisthesis with a posterior bulge at L5-S1 and an annular tear in the posterolateral aspect of the L5-S1 disc. Dr. Hutchison stated that the MRI indicated the left S-1 nerve root was pinched between the left disc extrusion and left hypertrophy facet joint. According to Dr. Hutchison, retrolisthesis is a disc slippage backwards whereas spondylolisthesis is a disc slippage forward. Dr. Hutchison stated that the retrolisthesis was "most likely" a preexisting asymptomatic condition that was aggravated by what occurred on April 7, 2008. When asked whether retrolisthesis is a "form of spondylolisthesis or under the umbrella definition of spondylolisthesis," Dr. Hutchison responded, "Yes. Spondylo we typically think of as going forward, but - - retrolisthesis is going backward, but yeah, I would - - under a broad stroke, they're under the same heading." Dr. Hutchison prescribed conservative treatment and physical therapy for Employee; however, Employee's symptoms did not diminish. Dr. Hutchison imposed a permanent restriction against lifting in excess of fifty pounds. Employee was subsequently laid off by Employer.<sup>2</sup>

Dr. Apurva Dalal examined Employee in March of 2010. In his deposition testimony, Dr. Dalal stated that Employee reported ongoing pain in his lower back as well as bilateral leg pain. Dr. Dalal stated that the June 2008 MRI showed "minimal retrolisthesis" at L5-S1 "with a small broad based posterior disc bulge," as well as "[a]n annular tear in the left posterolateral aspect of the disc with a minimal left foraminal, left posterolateral, and supradiscal extrusions, which contours the left L5 dorsal root ganglion as well as the L5-S1 nerve root." Dr. Dalal opined that the "left S1 nerve root is probably pinched," and he also

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<sup>2</sup> Because Employee did not return to work for the pre-injury Employer at a wage equal to or greater than the pre-injury wage, the parties agreed that the greater statutory multiplier applied, meaning Employee's award of benefits may not exceed six times the medical impairment rating. See Tenn. Code Ann. § 50-6-241(d)(2)(A) (2008).

noted a disc bulge at L1-L2. Dr. Dalal explained that x-rays revealed Employee had “mild spondylolisthesis.” According to Dr. Dalal, Employee had ongoing radicular pain and radiculopathy. Dr. Dalal assigned a 12% impairment rating to the body as a whole based on the Sixth Edition of the American Medical Association Guides (“AMA Guides”), and he based this rating specifically on the portion of Table 17-4 located on page 571 of the AMA Guides. Dr. Dalal explained that when a medical condition may be rated under more than one section of the AMA Guides, the AMA Guides call for applying the section that provides the “higher rating.”

The parties also obtained an evaluation through the Tennessee Department of Labor MIR process and selected Dr. Alan Pechacek as the MIR physician. Dr. Pechacek examined Employee in August of 2010. Dr. Pechacek interpreted the June 2008 MRI substantially the same as Dr. Dalal. Additionally, like Dr. Dalal, Dr. Pechacek determined that Employee had ongoing pain, decreased sensation, limited leg extension, and leg pain. However, Dr. Pechacek found no muscle atrophy and opined that Employee “does not have spondylolisthesis as dictated by Dr. Dalal.” After diagnosing low back pain, Dr. Pechacek classified the injury as a sprain or a strain and assigned a 3% impairment rating to the body as a whole under the AMA Guides, based specifically on the Soft Tissue and Non Specific Conditions portion of Table 17-4 located on page 570. Dr. Pechacek’s MIR report was introduced into evidence, but Dr. Pechacek did not testify in person or by deposition.<sup>3</sup>

In his deposition, Dr. Dalal responded to Dr. Pechacek’s findings. Dr. Dalal testified that Employee’s pain, decreased sensation, limited leg extension, atrophy, and leg pain were consistent with radiculopathy. As a result, Dr. Dalal opined that Dr. Pechacek erred in treating the injury as a sprain/strain and in assigning an impairment rating under the Soft Tissue and Non Specific Conditions portion of the AMA Guides. Specifically, Dr. Dalal testified:

[A] sprain/strain kind of rating indicates that there is no other pathology rather than just ligaments. In this particular case, . . . [w]e have objective findings of spondylolisthesis. We have objective findings of a compressed nerve root on an imaging study. We have findings on physical examination of myself, Dr. Hutchison and Dr. Pechacek that this patient has evidence of radiculopathy. And because of all the doctors’ physical findings, they match with the

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<sup>3</sup> See Tenn. Code Ann. § 50-6-204(f) (2008) (stating that a physician “whose services are furnished or paid for by the employer and who treats or makes or is present at any examination of an injured employee may be required to testify as to any knowledge acquired by the physician in the course of the treatment or examination as the treatment or examination relates to the injury or disability arising therefrom”).

objective science on radiographs and on MRI. So the right thing . . . to do is assign an appropriate rating based on those exams and objective findings.

At the time of trial, Employee was thirty-two years of age, and he had experience as a roofer, a boat dock worker, and a correctional officer. Despite this experience, Employee testified that he had been unable to find full time employment following his injury. Employee testified that standing, sitting, twisting, turning, pushing, pulling, and lifting caused pain in his back and legs. Employee reluctantly admitted that he had taken some jobs as a roofer and as a hunting guide to make some money. Employee also admitted that he had been involved in sporting activities on a limited basis. Employee testified that these jobs and sporting activities had caused pain in his lower back and legs.

After considering the live testimony and the depositions, the trial court determined that Employee injured his lower back in the course and scope of his employment with Employer and suffered a 40% permanent partial disability to the body. Employer has appealed, and on appeal, Employer argues that the trial court erred in failing to apply the 3% impairment rating assigned by Dr. Pechacek's MIR report and that the award was otherwise excessive. Employee responds that the evidence in the record does not preponderate against the trial court's judgment.

### **Standard of Review**

Our standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); see also Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004). When issues of credibility of witnesses and the weight to be given their in-court testimony are before the reviewing court, considerable deference must be accorded to the factual findings of the trial court. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733 (Tenn. 2002). When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). This Court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). Questions of law are reviewed de novo with no presumption of correctness afforded to the trial court's conclusions. Gray v. Cullom Machine, Tool & Die, 152 S.W.3d 439, 443 (Tenn. 2004).

## Analysis

### 1. MIR Report

Tennessee Code Annotated section 50-6-204(d)(5) provides that the “written opinion as to the permanent impairment rating given by the independent medical examiner” selected through the MIR process “shall be presumed to be the accurate impairment rating,” unless “rebutted by clear and convincing evidence to the contrary.” Tenn. Code Ann. § 50-6-204(d)(5) (2008). Clear and convincing evidence has been defined as evidence “in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.3 (Tenn. 1992). We have observed that the presumption found in section 50-6-204(d)(5) may be rebutted by affirmative evidence that an MIR physician “used an incorrect method or an inappropriate interpretation” of the AMA Guides. Tuten v. Johnson Controls, Inc., No. W2009-1426-SC-WCM-WC, 2010 WL 3363609, at \*4 (Tenn. Worker’s Comp. Panel Aug. 25, 2010).

In awarding 40% permanent partial disability, the trial court relied on Dr. Dalal’s 12% impairment rating and found that Dr. Pechacek’s 3% impairment rating was “inconsistent with the lay and medical testimony in this case.” The trial court explained as follows:

Dr. Pechacek’s MIR report which is filed into evidence indicates that [Employee] has a 3% impairment to the whole person based upon the 6th Edition AMA Guides for a sprain/strain. Dr. Pechacek found that [Employee] had “persistent chronic back pain from the right lumbar region, with primarily muscular pain and spasm and right leg symptoms, but without objective neurological deficits.” Dr. Dalal testified to complaints of low back and bilateral leg pain. Dr. Dalal reviewed the June 12, 2008 MRI report which showed a pinched nerve at L5-S1. Dr. Dalal also found that [Employee] had spondylolisthesis which was confirmed by the MRI. Dr. Dalal reviewed Dr. Pechacek’s MRI report and disagreed with Dr. Pechacek’s evaluation that [Employee] merely had a strain based upon numerous objective findings, such as history of bilateral leg pain, positive straight leg raise test, atrophy of the right thigh, and ongoing radiculopathy.

Dr. Pechacek’s 3% impairment rating was based on his determination that Employee had no neurological deficits, radiculopathy, or spondylolisthesis. Dr. Dalal testified that these conclusions were inconsistent with Dr. Pechacek’s own observations of Employee’s leg pain, limited movement and loss of sensation and also conflicted with the results of Employee’s MRI. Dr. Pechacek’s MIR report stated that Employee “does not have

spondylolisthesis as dictated by Dr. Dalal.” Dr. Dalal stated that Dr. Pechacek erred in concluding that Employee does not have spondylolisthesis. Thus, Dr. Dalal and Dr. Pechacek disagreed, in some respects, as to the proper diagnosis of Employee’s condition.

A disagreement between medical expert witnesses as to the proper diagnosis of an employee’s condition may not, in and of itself, constitute the clear and convincing evidence needed to overcome the statutory presumption of accuracy afforded an MIR physician’s impairment rating. “When deciding whether or not an employee has rebutted the statutory presumption of correctness enjoyed by an MIR physician’s impairment rating, the focus is on the evidence offered to rebut that physician’s rating.” See Brooks v. Corr. Med. Serv., W2010-00266-WC-R3-WC, 2011 WL 684600, at \*5 (Tenn. Workers’ Comp. Panel Feb. 25, 2011).

In this case, the MIR physician did not testify in person or by way of deposition. Instead, his report was simply submitted into evidence as an exhibit. To rebut the MIR physician’s rating, Employee introduced Dr. Dalal’s deposition testimony, and Dr. Dalal stated that the Dr. Pechacek erred in concluding that Employee did not have spondylolisthesis. Dr. Dalal also testified that when a medical condition may be rated in more than one section, the AMA Guides call for applying the section that provides the “higher rating.” Dr. Dalal explained that the impairment rating he assigned pursuant to the portion of Table 17-4 located on page 571 of the AMA Guides was the higher rating. Employer did not offer any evidence that refuted Dr. Dalal’s testimony on these points. Moreover, Dr. Dalal’s testimony that Employee had spondylolisthesis is consistent with Dr. Hutchison’s testimony. Dr. Hutchison explained that Employee had retrolisthesis, that retrolisthesis is a form of spondylolisthesis, and that both conditions fall under “the same heading.”

In reaching its decision, the trial court considered the lay and expert testimony offered in the case. The trial court’s judgment does not specifically cite the “clear and convincing” evidence standard, but the trial court’s findings clearly identified the shortcomings of the rating assigned by Dr. Pechacek. The trial court’s ruling indicates that it found clear and convincing evidence rebutting the statutory presumption of accuracy afforded to Dr. Pechacek’s impairment rating. Considering the record as a whole, we are simply unable to conclude that the evidence preponderates against the trial court’s finding.

## **2. Vocational Disability**

In assessing the extent of an employee’s vocational disability, the trial court may consider the employee’s skills and training, education, age, local job opportunities, anatomical impairment rating, and her capacity to work at the kinds of employment available

in her disabled condition. Tenn. Code Ann. § 50-6-241(d)(2)(A) (2008); Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990). The Employee's own assessment of physical condition and resulting disabilities cannot be disregarded. 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). The trial court is not bound to accept physicians' opinions regarding the extent of the disability, but should consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability. Hinson, 654 S.W.2d at 677.

In this case, Employee testified that he was a high school graduate with no vocational training and "one or two" semesters of college. He had prior work experience as a roofer, a dock worker, and a corrections officer. He started working for Employer in 2007 because of the pay and benefits. Since his injury, he has had consistent pain in his lower back and both legs. He has difficulty sitting, standing, pulling, pushing, bending, squatting, twisting, and lifting. Employee had worked as a roofer and as a duck hunting guide following his injury, but he testified that these and other activities increased the pain in his low back and both legs. Employee also stated that he has "constant pain in [his] back through [his] right leg, numbness, and also [his] left leg with activities that make it hurt even more." While evidence was introduced that may have raised doubts as to Employee's truthfulness, the trial court heard Employee's testimony in-court and implicitly found him to be a credible witness. See Richards, 70 S.W.3d at 733 (recognizing that a trial court's credibility findings may be inferred from the manner in which conflicts in the testimony are resolved and the case is decided).

Although a trial court's award of workers' compensation benefits may be reversed or modified under the appropriate circumstances, Howell v. Nissan N. Am., Inc., 346 S.W.3d 467, 474 (Tenn. 2011) (citing Tryon v. Saturn Corp., 254 S.W.3d 321, 335 (Tenn. 2008)), a reviewing court may not "simply substitute its judgment for that of the trial court in assessing the employee's vocational disability." Id. While the evidence certainly does not mandate the judgment reached by the trial court on this issue, after our review of the record, we are unable to conclude that the evidence preponderates against the trial court's judgment.

### **Conclusion**

For the foregoing reasons, the trial court's judgment is affirmed. Costs are assessed to Employer, for which execution shall issue, if necessary.

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TONY A. CHILDRESS, Special Judge

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No. W2012-00656-WC-R3-WC - Filed February 22, 2013

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**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 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 on appeal are taxed to the Appellant, Electric Research & Manufacturing Cooperative, Inc., and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM