IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 29, 2012 Session

# BOBBY JOE WILLIAMS, JR. v. CBT MANUFACTURING CO., INC. ET AL.

**Appeal from the Chancery Court for Hamilton County**
**No. 100716 Jeffrey M. Atherton, Chancellor**

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**No. E2011-01898-WC-R3-WC-MAILED AUG. 1, 2012 / FILED SEPT. 4, 2012**

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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. The employee filed suit for benefits, alleging that he aggravated a back injury while performing his job responsibilities. His employer contended that the incident resulted only in an increase in pain from a pre-existing injury and was not, therefore, compensable. At the conclusion of the evidence, the trial court found in favor of the employee and, using an eight percent medical impairment rating and a multiplier of one and one-half times the medical impairment rating, awarded permanent partial disability benefits. The employer appealed, contending that the evidence preponderates against the trial court's finding that a compensable injury occurred and, alternatively, that the evidence preponderates against the trial court's finding that the employee was entitled to an eight percent medical impairment rating. Because the evidence does not preponderate against the findings of the trial court, the judgment is affirmed.

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

GARY R. WADE, J., delivered the opinion of the court, in which JERRI S. BRYANT, SP. J., and E. RILEY ANDERSON, SP. J., joined.

Kimberly Ann Greuter and Kent T. Jones, Chattanooga, Tennessee, for the appellant, CBT Manufacturing Co., Inc.

Flossie Weill, Chattanooga, Tennessee, for the appellee, Bobby Joe Williams, Jr.

## MEMORANDUM OPINION

### I. Facts and Procedural History

In November of 2003, Bobby Joe Williams, Jr. (the "Employee") injured his lower back while working for Chattanooga Boiler and Tank Manufacturing Co., Inc. (the "Employer"). In 2005, Dr. Todd Bonvallet performed a surgical fusion of the lumbar 5 (L5) vertebrae with the sacral 1 vertebrae (S1). When the Employee reached maximum medical improvement for this injury in 2006, Dr. Bonvallet calculated an anatomical impairment rating of nine percent to the body as a whole pursuant to the Fifth Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment ("AMA Guides"). The Employee was permitted to return to work without any restrictions. Several months after reaching maximum medical improvement for the 2003 injury, the Employee was referred to Dr. Steven Dreskin, a pain management specialist. Dr. Dreskin treated the Employee from May of 2006 until February of 2009 with various medications, including Lortab, Lyrica, and Mobic.

On November 10, 2008, the Employee was unloading gasoline containers from a truck when he felt a severe pain in his lower back and left leg. He immediately reported the injury to his supervisor, who directed another employee to transport the Employee to a medical clinic for an examination. After three weeks of conservative treatment, the Employee was referred to Dr. Bonvallet, who initially prescribed physical therapy. When the therapy did not provide relief, Dr. Bonvallet performed a second surgery, extending upward the previous fusion of the L5 and S1 vertebrae by fusing the L3-4 and L4-5 vertebrae. In April of 2009, in response to an inquiry by the Employer's insurer, Dr. Bonvallet wrote that while the Employee had "some underlying lumbar spondylosis at the L3-4 and L4-5 levels," he was asymptomatic following the 2005 surgery—indicating that the Employee had a "new injury" unrelated to the 2003 injury. On July 30, 2009, Dr. Bonvallet performed discograms on several levels of his spine,[1] indicating positive results for pain at the L3-4 and L4-5 levels. In January of 2010, Dr. Steven Musick, a physician specializing in pain management, prescribed hydrocodone, Lortab, Robaxin, and other medications. On February 17, 2010, Dr. Bonvallet released the Employee to full duty work; however, the Employee continued under Dr. Musick's care for another nine months.

On August 10, 2010, after reaching an impasse at the Benefit Review Conference with the Department of Labor, the Employee filed suit against the Employer, seeking to recover disability benefits and medical and hospital expenses. Although the Second Injury Fund for

[1] Dr. Bonvallet explained that a discogram is a test in which a needle is inserted into a vertebral disc, which is then pressurized with saline solution and contrast dye to determine if the particular disc is a source of the patient's back pain.

the Department of Labor was added as a defendant, the Employer agreed to a dismissal with prejudice in advance of trial.

At trial, the Employee, thirty-eight years old at the time, testified that he held a high school diploma. His work history included mowing yards as a child, a short period as a bag boy at a grocery, and time as a bale press operator at Shaw Industries before becoming a boilermaker for the Employer, where he had worked for nineteen years. In addition, he drove a delivery truck on a part-time basis for the Employer, but did so as an independent contractor. The Employee testified that as he was removing five gallon gas cans from a truck, he "stretched out" for a can and experienced "a severe pain in [his] lower back and . . . left leg." He estimated the weight of the can at forty-five to fifty pounds. The Employee testified that prior to this incident, he had been able to stand for nearly eight hours per day while working, operating saws about seventy-five percent of the time, and spending about twenty-five percent of his workday operating "machines," which required standing for extended periods and pulling and pushing material. Since his return to work after the second surgery, he was unable to stand for eight hours and spent ninety-five percent of his workday operating a saw and a minimal amount of time unloading trucks or operating an inside machine because he was neither able to pull and push material nor stand for the period of time required. After the second incident, he had to stop playing softball, spent less time hunting and fishing, and was unable to coach his son's baseball team.

Angela Nicole Williams, the Employee's wife of fourteen years, confirmed that until the 2008 injury, the Employee's ability to function at home physically was "basically normal." She stated that he experienced pain only when "he did anything to the extreme," but that the new injury had limited his physical activities significantly. She further testified that as a result of his frequent cramps and the increase in pain associated with the second injury, their sexual relationship had suffered.

Dr. Bonvallet gave conflicting statements in his deposition testimony as to whether the Employee had suffered a new injury or simply incurred an increase in pain from his pre-existing condition. When asked whether the latest surgery was the result of the natural progression of the 2003 injury, he replied, "I believe his original work injury was treated and he got better and then he started getting worse again over time . . . . So I think he had a back at risk and his back lost the fight . . . . So I feel he had an additional injury." He did not detect any anatomical change after comparing the MRI studies taken before and after the November 2008 injury and commented that "the only thing that changed was the pain." When asked whether the incident in November of 2008 necessitated the additional surgery, Dr. Bonvallet answered, "Possibly, yes," despite his earlier comparison of the MRIs. He described the Employee's back as "stiffer" after the second surgery than it was previously. While confirming that the Employee's complaints were "subjective," he viewed the

Employee as a "very, very, very good man and a very honest man." Dr. Bonvallet, who found there to be a nine percent impairment to the body as a whole for the 2003 injury under the Fifth Edition of the AMA Guides, did not calculate an impairment rating for the 2008 injury, describing "the requirements of the [now] Sixth Edition [as] . . . completely impossible."

Dr. Steven Musick, who treated the Employee for some ten months, testified by deposition that the Employee had sustained a new injury to his lower back in November of 2008. He reasoned that "[b]y [the Employee's] history of lifting incident[s] at work worsening and maybe some new pain symptoms[,] . . . [i]t all adds up to . . . a new incident occurring." Dr. Musick stated specifically that the Employee's pain in his leg was caused by the 2008 injury if it was a "newer symptom." He testified that the Employee would have difficulty in the future with prolonged sitting or standing and would have increased back pain with frequent stooping or bending. When asked whether the November 2008 incident aggravated the Employee's pre-existing condition, Dr. Musick answered in the affirmative, explaining that "this was an event that caused new or different pain or worse pain . . . [after a specific] incident or an event." Because "the symptoms persisted" and "did not return back to baseline," Dr. Musick considered the second injury to be an aggravation of the first. He assigned an impairment rating for the second injury of eight percent to the body as a whole based upon the Sixth Edition of the AMA Guides. Dr. Musick testified that Dr. Bonvallet had incorrectly used the "range of motion" method from the Fifth Edition of the AMA Guides in his rating of the Employee's impairment following the 2003 injury. He believed that Dr. Bonvallet should have used the "diagnosis related estimate" method, which would have resulted in a twenty to twenty-three percent impairment to the body as a whole for the first injury. Dr. Musick, who was familiar with the apportionment method under the AMA Guides, believed that it was impractical to use that method because the Fifth and Sixth Editions contain different methods for calculating disabilities for spinal injuries.[2]

Dr. McKinley Lundy, an occupational medicine specialist, evaluated the Employee

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[2] Dr. McKinley Lundy, who testified for the Employer, described the concept of apportionment in his testimony:

> [T]hey give an example of looking at the total impairment [in the Sixth Edition of the AMA Guides], looking at the baseline or impairment for the preexisting condition, baseline being B and the total impairment being A; and then subtracting A from B to get C, which would be the final rating . . . . And they talk about the different editions of the guides [that] have been used. The physician must assess their similarity.

Both the Fifth and Sixth Editions of the AMA Guides discuss apportionment.

on two occasions and testified by deposition on behalf of the Employer. In April of 2009, he diagnosed the Employee with lumbar spondylosis at the L3-4 and L4-5 levels, central disc bulge and protrusion, and lower back pain. This confirmed Dr. Bonvallet's diagnoses after the first injury. Observing that the Employee had complained of increased pain since the November 2008 incident, he recommended a continuation of pain management treatment. In April of 2010, Dr. Lundy evaluated the Employee in an effort to determine whether he had suffered an impairment from the incident in 2008. While pointing out that the methodology for determining spinal impairments had changed between the Fifth and Sixth Editions of the AMA Guides, he testified that he also believed Dr. Bonvallet's impairment rating after the 2005 surgery was based on an incorrect use of the "range of motion" method, explaining that "range of motion" is only one of three factors in a "diagnosis based impairment" evaluation. He stated that the Sixth Edition of the AMA Guides did not recognize the "range of motion methodology." While expressing the belief that the "diagnosis based impairment" method should have been used by Dr. Bonvallet to determine impairment for the 2003 injury, Dr. Lundy, who also would have found a twenty to twenty-three percent impairment for the 2003 injury, testified that the diagnosis portion of the Fifth Edition's range of motion method was similar to the method used to determine spinal impairments in the Sixth Edition. Because of the similarities in the Fifth and Sixth Editions, Dr. Lundy believed that the impairment rating assigned by Dr. Bonvallet following the 2003 injury should be subjected to the apportionment analysis to determine the impairment rating for the new injury. In that regard, he disagreed with Dr. Musick. Dr. Lundy assigned the Employee an impairment rating of eight percent to the body as a whole for the new injury. Because the eight percent was less than the nine percent determined by Dr. Bonvallet for the first injury, "there would not be any new impairment [for the second injury] when one utilizes th[e apportionment] concept."

At the conclusion of the proof, the trial court, after making reference to Dr. Bonvallet's assessment of the Employee as "a very . . . good and very honest man," unequivocally accredited the testimony of the Employee. The trial court further found that the Employee had experienced a new injury and that the applicable impairment rating was eight percent to the body as a whole. While taking note of the conflicting medical testimony, the trial court adopted Dr. Musick's impairment rating "based upon the most recent edition of the AMA Guide[s]." Because Dr. Lundy testified that the Employee's back would not be any stiffer after having two additional fused vertebrae, the trial court discredited the value of his impairment rating of eight percent reduced to zero by virtue of the apportionment analysis. It was undisputed that the Employee had a meaningful return to work and, therefore, the award of permanent disability was limited to one and one-half times the eight percent impairment for twelve percent to the body as whole. Tenn. Code Ann. § 50-6-241(d)(1)(A) (2008).

In this appeal, the Employer contends first that the trial court erred by finding that the

Employee sustained a compensable injury in November of 2008. In the alternative, the Employer argues that the trial court erred by basing the amount of the award on Dr. Musick's impairment rating.

## II. Standard of Review

We review the judgment of the trial court in workers' compensation cases "de novo upon the record . . . 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) (2008). In such cases, the reviewing court must conduct an in-depth examination of the trial court's factual findings and conclusions. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded any factual determinations. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). The same deference need not be afforded findings based upon documentary evidence, such as depositions. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). Indeed, where medical testimony is presented by deposition, this Panel may independently assess the medical proof to determine where the preponderance of the evidence lies. Crew v. First Source Furniture Grp., 259 S.W.3d 656, 665 (Tenn. 2008). Reviewing courts afford no presumption of correctness to any conclusions of law. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003). Nevertheless, the testimony of expert witnesses must be considered in conjunction with the testimony of an employee as a lay witness. Thomas v. Aetna Life & Gas Co., 812 S.W.2d 278, 283 (Tenn. 1991).

## III. Analysis

### *A. Compensability of the 2008 Injury*

The Employer first contends that because the evidence established that the incident on November 10, 2008 caused only an increase in pain without any anatomical change or advancement of the underlying condition, the Employee was not entitled to a recovery. The Employer further argues that the trial court should have adopted Dr. Lundy's assessment of the Employee. The Employer relies upon Dr. Bonvallet's testimony that MRI studies from before and after the 2008 incident did not reveal any anatomical change and argues that Dr. Musick's unwillingness to state whether the discograms ordered by Dr. Bonvallet evidenced a change in the Employee's previous condition supports its position.

In response, the Employee asserts that he had completely recovered from his previous injury and did not require physical therapy or any additional surgery until after his "new" injury in 2008, which resulted in the fusion of two additional levels of his lumbar spine.

In Trosper v. Armstrong Wood Prods., Inc., 273 S.W.3d 598, 607-09 (Tenn. 2008), the Tennessee Supreme Court addressed when an employee may be compensated for work-related injuries that aggravate pre-existing conditions. The employee in that case sought

benefits for an aggravation of a pre-existing arthritic condition in his hands, both of which required surgery. Id. at 600. He did not have surgery until 2004 and 2005; following the second surgery, however, he informed one of his doctors that he had experienced pain in his hands as early as 1997. Id. at 601-02. One doctor testified that the physical labor demanded by the employee's profession activated his dormant osteoarthritis and permanently impaired the use of his hands, necessitating surgery. Id. at 602. A second doctor concurred in the diagnosis of osteoarthritis and acknowledged that work activity could worsen the condition "to the point of needing some treatment." Id. at 602-03. A third doctor, who evaluated but did not treat the Employee, opined that the cause of the osteoarthritis was unknown. Id. at 603. The trial court awarded benefits. Id. The Supreme Court affirmed, establishing the following standard:

> [An] employee does not suffer a compensable injury where the work activity aggravates the pre-existing condition merely by increasing the pain. However, if the work injury advances the severity of the pre-existing condition, or if, as a result of the pre-existing condition, the employee suffers a new, distinct injury other than increased pain, then the work injury is compensable.

Id. at 607.

In Morgan v. Goodyear Tire & Rubber Co, No. W2009-02604-WC-R3-WC, 2011 WL 900623, at *1 (Tenn. Workers' Comp. Panel Mar. 11, 2011), the employee sought compensation for an aggravation of a pre-existing back condition, alleging that he suffered the injury while pushing a loaded trailer at work. On November 21, 2006, five months prior to his injury, the employee had received treatment for lower back and right thigh pain. Id. The medical evidence in Morgan consisted of the deposition testimony of three physicians. Id. at *1-3. One physician identified a herniation at the L5-S1 level during his treatment of the patient five months before the incident giving rise to the claim. Id. at *1. The employee was prescribed pain medication, but surgery was not recommended. Id. After the incident in April of 2007, a second physician confirmed the prior diagnosis of a herniation and performed a microdiscectomy at the L4-5 level, but was unwilling to state whether the incident advanced the employee's pre-existing condition or caused an anatomical change. Id. at *2. A third physician testified that an anatomical change had occurred as a result of the April 2007 incident, which necessitated the subsequent surgery. Id. The trial court found that the employee sustained a compensable aggravation of his pre-existing injury. Id. at *3. The Panel affirmed, holding that the evidence did not preponderate against the trial court's conclusion that the April 2007 injury caused an actual advancement of the condition requiring surgical treatment. Id. at *4.

It is undisputed that the Employee had an injury to his lumbar spine in 2003. The work injury required surgery in 2005. Afterward, the Employee successfully returned to and performed the functions of the job he had held before the injury. The testimony established that he maintained his quality of life at work and at home during the period between the original surgery and the incident in November of 2008. After stretching to lift the gas container, the Employee suffered such pain that he was unable to work for over one year. This incident led to a more extensive surgical procedure in August of 2009. Dr. Bonvallet, the Employee's treating physician, testified that a new injury had occurred in 2008 and, while later equivocating his opinion in his deposition, did not altogether abandon his original assessment. Dr. Musick expressed the view that the new injury had aggravated the Employee's prior condition. The evidence in the record is consistent with the conclusion that the surgery in August of 2009 was necessitated by the incident in November of 2008. Similar to the facts in Morgan, there is evidence that the Employee suffered a work-related injury that required further surgery, which extended a single fusion to include two more vertebrae, thus demonstrating an advancement or aggravation of a pre-existing condition. The trial court, having seen and heard the Employee's testimony first-hand, concluded that the Employee was absolutely credible in his testimony as to the nature and circumstances of the 2008 injury and the resulting limitations on his activities. That assessment is entitled to considerable weight. As stated in Trosper,

> [a]bsolute certainty is not required in a workers' compensation claim; benefits may be awarded where the medical evidence suggests that the employment may have been the cause of injury and there is also lay testimony, particularly if it is corroborative of a medical opinion rendered by deposition, from which causation may be inferred.

273 S.W.3d at 608. Viewing the record as a whole, and considering the facts described previously, we are unable to conclude that the evidence preponderates against the trial court's finding.

*B. The Impairment Rating for the New Injury*

Alternatively, the Employer contends that the trial court erred by adopting Dr. Musick's impairment rating of eight percent to the body as a whole when awarding disability benefits. The Employer argues that Dr. Lundy is more qualified to assign an impairment rating by virtue of having had extensive training in the use of the AMA Guides and that he properly followed the instructions of the AMA Guides by apportioning the impairment between the 2003 and 2008 injuries, whereas Dr. Musick did not.

The Employee's 2003 injury required an impairment rating based on the Fifth Edition of the AMA Guides. The Sixth Edition, however, serves as guidance for the 2008 injury.

See Tenn. Code Ann. § 50-6-102(2) (2008) (stating that "[t]he edition [of the AMA Guides] that is in effect on the date the employee is injured is the edition that shall be applicable to the claim"). All three doctors testified that the Sixth Edition of the AMA Guides was markedly different than the Fifth Edition in its method of evaluating spinal impairment. Dr. Lundy concluded that the Employee's impairment was either slightly decreased or unchanged after the fusion of two additional segments of his lumbar spine. As did the trial court, we view that assessment with skepticism. A comparison of the two impairments, by virtue of each being based on a different method of calculation, presented a difficult question. The conclusion by both Dr. Musick and Dr. Lundy that Dr. Bonvallet had used the wrong assessment from the Fifth Edition compounded the difficulty involved in making a proper assessment.

In Schwamb v. Bridgestone Americas Tire Operations, LLC., No. M2010-01643-WC-R3-WC, 2011 WL 3477178, at *3-4 (Tenn. Workers' Comp. Panel Aug. 9, 2011), a Panel faced a similar issue regarding whether to compare and apportion similar injuries with impairment ratings based on different editions of the AMA Guides. In that case, the employee suffered an injury twelve years prior to receiving a similar injury. Id. at *1. The two injuries had impairment ratings based on the Fourth Edition and Sixth Edition of the AMA Guides, respectively. Id. Two physicians offered conflicting opinions. One testified that the injuries' impairment ratings should be apportioned and concluded that because the prior injury had a fifteen percent rating and the new injury resulted in a nineteen percent rating, the new injury should be limited to the difference of four percent. Id. at *2. The second physician opined that the impairment rating was thirteen percent to the body as a whole, and that the injury should not be apportioned by a comparison with the previous injury. Id. The trial court adopted the second physician's impairment rating of thirteen percent. Id. at *3. The Panel affirmed, reasoning that "this case presented the trial court with a choice about which expert testimony to credit where the experts were offering different interpretations of a medical treatise . . . [and] it is within a trial court's discretion to choose which expert to accredit when there is a conflict of expert opinions." Id. at *4; see also Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990); Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel 1996).

The same rationale applies here. The trial court, faced with conflicting testimony, chose to accredit the testimony of Dr. Musick. Both Dr. Musick and Dr. Lundy calculated an eight percent impairment rating. The trial court chose not to use Dr. Lundy's apportionment analysis. We have reviewed the content of the medical depositions and conclude that the trial court ruled properly.

## IV. Conclusion

The judgment is affirmed. Costs are taxed to CBT Manufacturing Company, Inc. and

its surety, for which execution may issue if necessary.

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GARY R. WADE, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
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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 appeals 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 of this appeal are taxed to CBT Manufacturing Company, Inc. and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM