IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
August 22, 2017 Session

# TOMMY B. WYATT v. MUELLER COMPANY

**Appeal from the Chancery Court for Hamilton County**
**No. 15-0299 Pamela A. Fleenor, Chancellor**

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**No. E2016-02360-SC-R3-WC – FILED – JANUARY 22, 2018**

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Mueller Company ("Employer") manufactures cast iron valves and related objects. Tommy Wyatt ("Employee") worked for Employer for nineteen years, primarily in the cleaning room where flawed cast iron parts are chipped and ground. The job required moving and manipulating heavy objects. After suffering from low back pain for approximately three years, Employee underwent surgery in 2006. He returned to his regular job without restrictions. However, his symptoms persisted, and he underwent spinal fusion surgery in July 2013. In March 2014, he notified Employer he was seeking benefits for an alleged gradual injury. After investigation, Employer denied the claim contending Employee's condition was caused by preexisting degenerative disease in his spine and further asserting Employee had failed to give timely notice. The trial court ruled in favor of Employee and awarded permanent total disability benefits. Employer appeals. 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 the judgment.

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

DON R. ASH, SR.J., delivered the opinion of the court, in which SHARON G. LEE, J., and THOMAS R. FRIERSON, II, J., joined.

Joseph R. White and Cassie C. Rieder, Chattanooga, Tennessee, for the appellant, Mueller Company.

Flossie Weill, Chattanooga, Tennessee, for the appellee, Tommy B. Wyatt.

## OPINION

### Factual and Procedural Background

At trial, Tommy Wyatt ("Employee") was fifty-nine years old. He graduated from a vocational high school where he studied brick masonry. After high school, Employee joined the U.S. Army where he served six years and received an honorable discharge. Employee began working for Mueller Company ("Employer") in 1994. Before and during his tenure with Employer, he worked a number of jobs, including dish washing and cooking at restaurants, stocking at a retail store, delivering meals at a hospital, and working at a foundry.

Employer manufactures cast iron valves and housings used in fire hydrants. The castings range in weight from approximately three pounds to three hundred seventy pounds. Employee worked primarily in the cleaning room where cast iron flaws are removed using chipping hammers, grinders, and chisels.

In September 2005, Employee sought treatment for low back pain and pain in both legs from Dr. David Lowry, a physiatrist associated with Spine Surgery Associates. Employee reported "progressive lower back pain for about three years" managed with anti-inflammatories, pain medication, and an epidural steroid injection. An MRI was performed. Dr. Lowry diagnosed Employee with "degenerative disc disease, L5-S1; herniated nucleus pulposus, central, L5-S1; low back pain; radiculitis; [and] leg pain, left leg greater than right." He prescribed conservative treatment. Employee returned to Spine Surgery Associates in November 2005 with continued complaints of sharp, constant low back pain that worsened "going from a reclining to sitting position; sleeping, standing."

Ultimately, on April 25, 2006, Jay Jolley, M.D., an orthopaedic surgeon, performed a laminectomy at the L4-5 and L5-S1 levels. Employee did not seek workers' compensation benefits and returned to work in June 2006 without restrictions. Employee described his back as "feeling pretty good" after the laminectomy. However, he gradually began to experience leg stiffness for which he took prescription pain medication as needed.

From 2006 to 2010, Employee reported improvement, but not resolution, of his back issues. In June 2011, with gradually progressing symptoms, Employee returned to Spine Surgery Associates where he was treated by Derrick Cason, M.D., an orthopaedic surgeon. Dr. Cason resigned from the practice shortly thereafter, and Richard Pearce, M.D., also an orthopaedic surgeon, became Employee's treating physician. Their first meeting took place on November 8, 2011. Dr. Pearce reviewed a May 28, 2010 MRI, which he testified showed severe stenosis of the spinal canal at L4-5, mild stenosis at L2-3 and L3-4, and severe neuroforaminal encroachment with bilateral nerve root

compression at L4-5 and L5-S1. He found the MRI findings described progressive degenerative changes of the spine. Employee did not indicate to him any relationship between his symptoms and his work. A second MRI, performed on June 14, 2011, "again showed degenerative changes at multiple levels," with levels L4-5 and L5-S1 "with the most severe compression."

At a follow-up appointment with Dr. Pearce in December 2011, Employee described the same symptoms. Lumbar surgery was discussed, but Employee was hesitant to proceed. Dr. Pearce prescribed pain medication.

At some point between April and August 2012, Dr. Lowry administered an epidural steroid injection, which provided only temporary relief. Dr. Pearce once again discussed surgery with Employee in February 2013. After another MRI, Dr. Pearce scheduled the surgery for June 2013, but it did not occur.

Employee sought a second opinion and consulted with Florence Barnett, M.D., a neurological surgeon, on June 18, 2013. Employee reported suffering from back pain for approximately eight years. He described worsening symptoms since his 2006 surgery, stating he "was not functioning well in his job and his home life and was seeking some treatment that would allow him to return to a more normal life." According to Dr. Barnett, the March 2013 MRI depicted "severe narrowing of spine, with a forward slippage of L4 on L5. And then where [Employee] had his previous surgery, this [disc] is completely collapsed and slipping backward." She stated such degeneration is "completely abnormal" for Employee's age. On July 19, 2013, Dr. Barnett performed a laminectomy and fusion of the L4, L5, and S1 vertebrae. She recommended Employee remain off the job "a minimum of 6 months postoperatively."

On March 27, 2014, Employee stated in a letter to Employer, "my back condition may be the result of my job duties at [Employer] and I may be unable to continue to work my normal job at [Employer]." On May 12, 2014, Dr. Barnett completed a cumulative trauma form stating Employee was permanently impaired, and the aggravation of his degenerative condition was primarily due to his work-related activities. Employee requested a benefit review conference on May 30, 2014.

Ultimately, litigation ensued. The trial court concluded Employee had provided timely notice by filing a request for Benefit Review Conference on May 30, 2014; he had successfully demonstrated his back condition was primarily caused by his work; and he was permanently and totally disabled as a result of the injury. Employer appeals.

## Standard of Review

In workers' compensation cases, issues of fact are reviewed de novo upon the record with a presumption of correctness unless the preponderance of evidence is

otherwise. Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2013). When the trial court had the opportunity to hear in-court testimony and to observe witness demeanor, its credibility determinations and assessments of the weight to be given to testimony are afforded considerable deference. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008) (citation omitted). "However, no similar deference need be afforded to a trial court's findings based upon documentary evidence such as depositions." Id. (citations 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).

## Analysis

On appeal, Employer claims the trial court erred in determining: (1) Employee provided legally sufficient notice of his injury; (2) Employee's injury arose primarily out of and in the course and scope of his employment with Employer; and (3) Employee is permanently and totally disabled. We address these claims in turn.

### *Notice*

Employer contends Employee failed to provide timely notice of his injury, as required by Tennessee Code Annotated section 50-6-201, which on the date of Employee's injury, stated in pertinent part:

> (b) In those cases where the injuries occur as the result of gradual or cumulative events or trauma, then the injured employee or the injured employee's representative shall provide notice of the injury to the employer within thirty (30) days after the employee:
>
> (1) Knows or reasonably should know that the employee has suffered a work-related injury that has resulted in permanent physical impairment; or
>
> (2) Is rendered unable to continue to perform the employee's normal work activities as the result of the work-related injury and the employee knows or reasonably should know that the injury was caused by work-related activities.

Tenn. Code Ann. § 50-6-201 (2008).[1]

[1] The parties stipulated Employee suffered a gradual injury.

On appeal, Employer contends Employee believed as early as 2011 he had suffered a work-related, permanent injury, and, therefore, his March 27, 2014 written notice is untimely. Employee, however, contends the thirty-day notice period should commence to run from May 12, 2014, when he first received a medical diagnosis of the permanent, work-related nature of his injury.[2]

As recited above, Tennessee Code Annotated section 50-6-201(b) "requires an employee to notify his or her employer of the injury within thirty days after the employee knows or reasonably should know that he or she has suffered a work-related injury." Hill v. Whirlpool Corp., No. M2011-01291-WC-R3-WC, 2012 WL 1655768, at *3 (Tenn. Workers' Comp. Panel May 10, 2012). The "notice requirement 'exists so that an employer will have an opportunity to make a timely investigation of the facts while still readily accessible, and to enable the employer to provide timely and proper treatment for an injured employee.'" Id. (quoting Jones v. Sterling Last Corp., 962 S.W.2d 469, 471 (Tenn. 1998)). An employee who fails to provide timely notice "forfeits the right to workers' compensation benefits unless the employer has actual notice of the injury or unless the employee's failure to notify the employer was reasonable." Id. (citing Tenn. Code Ann. § 55-6-201(a)). However, the "statutory notice requirement is not inflexible." Id. at *4. For example, our Supreme Court has held "'an employee who sustains a gradually-occurring injury may be unsure of the cause of his or her injury, and therefore relieved of the notice requirement, until the diagnosis is confirmed by a physician.'" Id. (citations omitted). In sum, "employees may be relieved from the notice requirement until they know or reasonably should know that the injury was caused by their work and that the injury has either impaired them permanently or has prevented them from performing normal work activities." Id. (citing Banks v. United Parcel Serv., Inc., 170 S.W.2d 556, 561 (Tenn. 2005)).

Here, Employee testified, when he first began experiencing back pain, he "might have had a hunch" the problems were work related, but he "just thought it might be something that would go away." By 2011, he "might have . . . had a suspicion" his back issues were work related, but he "couldn't make that call" because "he wasn't no professional [sic]." He stated he was first informed on May 12, 2014, through Dr. Barnett's letter, he had suffered a work-related injury that resulted in permanent impairment. The trial court accredited this testimony and concluded Employee rendered

[2] Alternatively, Employee claims Employer possessed actual knowledge of his injury, thus alleviating the need for written notice. Employee testified he notified plant foreman Eric Birdwell and plant superintendent Dwayne Campbell of his upcoming July 2013 laminectomy and indicated to them his job "wore [his] back out" and "wore [him] down." Mr. Birdwell, however, did not recall Employee indicating the surgery was work related. The trial court accredited Mr. Birdwell's testimony as "more likely to be the more complete version [of the conversation]" and found Employer did not have actual knowledge of the injury on July 12, 2013. Giving due deference to the trial court, see Tryon, 254 S.W.3d at 327, we find no error in its conclusion Employer lacked actual knowledge as of July 12, 2013.

timely notice. We find the evidence presented does not preponderate against this conclusion.

*Compensability*

Cumulative trauma conditions and other repetitive motion conditions are not compensable workers' compensation injuries "unless such conditions arose primarily out of and in the course and scope of employment." Tenn. Code Ann. § 50-6-102(12)(C)(ii) (Supp. 2011).[3] "Except in the most obvious cases, injured workers seeking workers' compensation benefits must establish the causal connection between their work and their injury." Hill, 2012 WL 1655768, at *5 (citations omitted). "The connection must be established by the preponderance of the expert medical testimony and lay evidence, if any." Id. (citation omitted). "All reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee." Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 643 (Tenn. 2008) (citing Phillips v. A&H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004)).

"[A]n employer takes an employee 'as is' and assumes the responsibility for any work-related injury which might not affect an otherwise healthy person, but which aggravates a preexisting injury." Id. (citing Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 488 (Tenn. 1997)). Accordingly, "an employer is 'liable for disability resulting from injuries sustained by an employee arising out of and in the course of his employment even though it aggravates a previous condition with resulting disability far greater than otherwise would have been the case.'" Id. (quoting Baxter v. Smith, 364 S.W.2d 936, 942–43 (1962)). In Tennessee, "a worker may sustain a compensable gradual injury as the result of continual exposure to the conditions of employment. . . . [and] there is no requirement . . . the injury be traceable to a definite moment in time or triggering event in order to be compensable." Id. at 643–44 (citing Cent. Motor Express, Inc. v. Burney, 377 S.W.2d 947, 948–50 (1964)).

"When there is conflicting medical testimony, the trial judge must choose which view to accredit." Id. at 644. Relevant factors include "'the qualifications of the experts, the circumstances of their examination, the information available to them, and the

[3] The 2011 amendment did not define the phrase "unless such conditions arose primarily out of and in the course and scope of employment." See Memphis Light Gas & Water v. Evans, No. W2015-01541-SC-WCM-WC, 2016 WL 4414646, at *6 n.4 (Tenn. Workers' Comp. Panel Aug. 19, 2016). The statute was amended in 2014 to reflect an injury "arises primarily out of and in the course and scope of employment only if it has been shown by a preponderance of the evidence that the employment contributed more than fifty percent (50%) in causing the injury, considering all causes." Id. (quoting Tenn. Code Ann. § 50-6-102(14)(B) (Supp. 2015)). In Evans, the Court declined the employer's request to apply the amendment requiring fifty percent causation, noting the injury occurred prior to the effective date of the amendment—July 1, 2014. Evans, 2016 WL 4414646, at *6 n.4.

evaluation of the importance of that information by other experts.'" Id. (citation omitted).

Employer argues the trial court incorrectly concluded Employee demonstrated the gradual aggravation of his degenerative disc disease was primarily caused by work activities, as required by Tennessee Code Annotated 50-6-102(12)(C)(ii) (Supp. 2012). In support of this argument, Employer first cites the allegedly-wavering testimony of Dr. Barnett. On the cumulative trauma form, completed May 12, 2014, Dr. Barnett opined, based on Employee's description of his job duties, Employee, "[m]ore likely than not, . . . sustain[ed] a cumulative trauma condition or repetitive motion condition due to work." She further opined the condition "[m]ore likely than not . . . ar[o]se 'primarily' from [Employee's] work-related activity." She noted "[m]ore likely than not," the acceleration of Employee's degenerative condition was "due primarily to [his] work-related activity." Finally, she found "[m]ore likely than not," his "cumulative trauma injury result[ed] in permanent impairment[,]" but she acknowledged his "disc degeneration [was] in part age related." She assigned 20–23% permanent impairment to the body and placed various restrictions on Employee's activities, including a twenty-five pound lift limit, a ten pound carry limit, and instructions to limit climbing, stooping, kneeling, crouching and standing or sitting longer than three hours.[4]

In her deposition, however, Dr. Barnett acknowledged the impossibility of distinguishing between age-related and non-age-related degeneration. But, she insisted Employee did not suffer from "routine degeneration" and explained "[s]omething was contributing to that, and the only thing that is known about him is that he was doing that heavy work, it's my opinion that that added to the problem. Not a 100 percent of the problem, but it certainly added to the problem over those years."

During her deposition, Dr. Barnett was questioned regarding causation as follows:

> Q Do you have an opinion based upon a medical reasonable certainty that's more likely than not as to [Employee's] returning to work as a cell grinder resulted in his back condition that was operated on, first, in 2006, whether or not it resulted in his back condition getting worse?
>
> A My opinion is that it was an exacerbating feature.
>
> . . .

[4] Some restrictions are included in Dr. Barnett's Functional Capacity Assessment following a January 6, 2016 exam.

Q Do you have an opinion based on a reasonable medical certainty that it is more likely than not as to whether his previous back condition which required surgery in 2006 was truly advanced or accelerated due primarily to heavy lifting and twisting at work?

A Based on this job description and the patient's description of his work, it is my opinion that this type of work did contribute to acceleration of his lower-back degeneration out of context with what you would see with simple aging.

. . .

Q Doctor, more likely than not, did the cumulative trauma of this man's work as previously described—was it a primary factor in the need for the fusion surgery that you performed in 2013?

A I'm not sure if you can say primary, but certainly it did contribute to it. That's my opinion.

. . .

Q More likely than not, was this gentleman's continuing to work as a cell grinder in the factory, lifting weights, and twisting with weights sometimes up to 300 pounds, in your opinion, Doctor, more likely than not a primary factor in his disability?

A It was a considerable factor in his continuing disability.

Q . . . [W]ould you agree those conditions arose primarily out of the—in the course of and scope of his employment, as opposed to the natural progression of aging or some other event?

A His work significantly added to this. But the word "primarily" that is underlined here and highlighted—more likely than not, this work requirement did add to his rapid degeneration.

. . .

A "Significantly" is a better term than "primarily."

. . .

> A Based on the objective finding of the MRI and his objective finding of neurologic injury, I agree with the [job] contributing 50 percent or more.

Employer also challenges Dr. Cason's testimony, claiming his "opinions seemed to be more influenced by his personal animosity towards Dr. Pearce and his group than objective medical findings."

Dr. Cason treated Employee in 2011 and then again January through July 2016. Additionally, Dr. Cason reviewed the medical records of physicians who treated Employee from 2011 to 2016. In his deposition, Dr. Cason stated, under typical circumstances, an isolated laminectomy does not necessitate a later spinal fusion. However, he opined a laminectomy coupled with "excessive repetitive forces to the spine" can necessitate fusion surgery. Based on his review of Employee's MRIs, Dr. Cason described Employee's spinal changes between 2005 and 2010 as "pretty rapid" and he opined, with a reasonable degree of medical certainty, such changes arose primarily out of Employee's strenuous work with Employer.

During cross-examination, Dr. Cason agreed no acute event precipitated Employee's symptoms, and he acknowledged degenerative disc disease can progress without any relation to pushing, pulling, lifting, or their work. He further confirmed he resigned from Spine Surgery Associates in 2013 due to perceived ethical issues with the practice, and he was not yet board-certified because he had not handled the requisite number of cases.

In support of its causation challenge, Employer cites the testimony of Dr. Pearce. As set out above, Dr. Pearce became Employee's treating physician in 2011, after Dr. Cason left Spine Surgery Associates. After examinations and tests, he concluded Employee's symptoms were caused by degenerative changes in the facet joints and discs and spinal stenosis. Dr. Pearce stated the fusion surgery addressed instability, which "probably [stemmed from] a combination of" degeneration and the 2006 laminectomy, which removed some supportive tissues. He stated he did not know of any relationship between Employee's condition and his employment because the Employee did not indicate he was injured at work.

On cross-examination, Dr. Pearce stated he found no reference to spinal instability prior to 2010. However, a 2013 MRI clearly depicted increased instability. The instability, "severe narrowing" of the nerve root space and complaints of weakness in the legs and increased pain in the legs and lumbar area led Dr. Pearce to recommend surgery. He acknowledged he had "no idea" of the lifting and twisting requirements of a cell grinder, but he agreed "lifting can put stress on a back that already has preexisting degenerative changes, and the more weight that's lifted the more stress that can be imposed."

In its thorough Memorandum Opinion and Judgment, the trial court first determined Employee suffered a "condition"—advancement of the stenosis and spondylolisthesis—as used in Tennessee Code Annotated section 50-6-102(12)(C)(ii).[5] Next, the trial court considered whether Employee's work primarily caused his back to reach a condition necessitating surgery. Faced with conflicting causation testimony, the trial court examined the experts and found all qualified, but accepted the opinions of Drs. Cason and Barnett, noting Dr. Pearce "was unaware of the physical demands of [Employee's] work."

Because understanding the physical demands of a job is key in assessing work-related causation, we agree with the trial court's decision to accredit the testimony of Drs. Cason and Barnett. Dr. Cason unequivocally opined Employee's work primarily caused his injury. In her deposition, although Dr. Barnett hesitated to use the term "primarily," she described Employee's work as a "significant"—at least fifty percent—contributor to his injury. Based upon the testimony of Drs. Cason and Barnett, we do not find the evidence preponderates against the trial court's determination Employee's injury arose primarily out of and in the course of employment.

*Permanent Total Disability*

An employee is permanently and totally disabled when his injury "totally incapacitates the employee from working at an occupation that brings the employee an income." Tenn. Code Ann. § 50-6-207(4)(B) (2008 & Supp. 2013). "'[T]he assessment of permanent total disability is based on numerous factors, including the employee's skills and training, education, age, local job opportunities, and his [or her] capacity to work at the kinds of employment available in his [or her] disabled condition.'" Cleek v. Wal-Mart Stores, Inc., 19 S.W. 3d 770, 774 (Tenn. 2000) (quoting Roberson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986)). "In addition, the employee's 'own assessment of [his] physical condition and resulting disability is competent testimony that should be considered[.]'" Id. (quoting McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn. 1999)).

Employee, age fifty-nine at trial, has not worked in any capacity since July 12, 2013. He graduated from a vocational high school where he studied brick masonry. His work history consists primarily of unskilled or semi-skilled labor, often accompanied by heavy physical exertion. He testified he suffers from stiffness, back pain, and nerve pain in his thighs. He experiences numbness, cramping, and stinging in his right foot and cannot walk normally because his right foot "walks out." These ailments prevent him from sleeping well at night. Employee can drive a car for limited periods, but his legs

[5] Employer does not dispute this finding.

stiffen after approximately one hour. Employee relies on his granddaughter to perform housework. He is able to carry out certain tasks such as dish washing and ironing, but "depending on when [his] back starts acting up," he may require breaks. At trial, Employee reported taking two medications daily: oxycodone and gabapentin, which he stated "clouds [his] head sometimes."

Dr. William Wray, a professional disability consultant, performed a post-injury vocational access determination. Among other things, he reviewed medical records from Dr. Barnett and a job description from Employer. He administered academic tests to Employee which scored his IQ at 75 and rated his math and reading skills at a fourth to fifth grade level. Based on the activity restrictions assigned by Dr. Barnett, Dr. Wray could find no jobs Employee could reasonably access in the local job market.

On appeal, Employer contends the trial court erred in finding Employee permanently and totally disabled. It cites Employee's testimony indicating he bathes himself, drives, performs some household chores, and previously "tried to walk for exercise" and "occasionally" rode a bicycle. Additionally, Employer challenges Dr. Wray's opinion, contending he was unaware Employee could climb stairs, and he failed to consider potential *part-time* employment. Finally, Employer claims Employee's use of pain medication should not render him disabled, as he previously drove and worked while taking such.

We hold the above-cited evidence overwhelmingly supports the trial court's finding of permanent and total disability.

## Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Mueller Company, and its surety, for which execution may issue if necessary.

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DON R. ASH, SENIOR JUDGE

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## JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Mueller Company pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), 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.

It appears to the Court that the motion for review is not well taken and is, therefore, denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Mueller Company, and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Sharon G. Lee, J., not participating