

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON  
March 26, 2012 Session

**RICKY SULLIVAN v. BEHLEN MANUFACTURING COMPANY, INC.**

**Appeal from the Circuit Court for Carroll County  
No. 10CV60 Donald E. Parish, Judge**

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**No. W2011-01677-WC-R3-WC - Mailed June 19, 2012; Filed July 19, 2012**

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In this workers' compensation case, the employee suffered a compensable back injury. The trial court awarded 80% permanent partial disability to the body as a whole. His employer appealed, asserting that the trial court erred by basing its award on the impairment rating of the employee's evaluating physician, by accepting the employee's testimony concerning his limitations in light of questions concerning his credibility, and by making an excessive award. We affirm the judgment.

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

DONALD P. HARRIS, SP. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J. and TONY A. CHILDRESS, SP. J., joined.

Catheryne L. Grant, Nashville, Tennessee, for the appellant, Behlen Manufacturing Company, Inc.

R. Dale Thomas and Joshua B. Dougan, Jackson, Tennessee, for the appellee, Ricky Sullivan.

**MEMORANDUM OPINION**

**Factual and Procedural Background**

Ricky Sullivan worked as a welder for Behlen Manufacturing Company, Inc. ("Behlen"), a manufacturer of metal gates. He injured his lower back on July 8, 2008, while he and a co-worker were lifting two gates that weighed approximately 150 pounds each. Mr.

Sullivan reported the injury to his employer and was referred to Dr. Michael Calfee. Dr. Calfee ordered an MRI and provided conservative treatment. Dr. Calfee eventually referred Mr. Sullivan to Dr. Wendy Cran-Carty, a pain management specialist. Dr. Cran-Carty referred Mr. Sullivan to Dr. Jacob Schwartz, a neurosurgeon, for further evaluation and treatment.

Dr. Schwartz first examined Mr. Sullivan on August 6, 2009. Dr. Calfee had diagnosed Mr. Sullivan with a herniated disc at the L5-S1 level, and Dr. Schwartz's examination confirmed that diagnosis. Dr. Schwartz recommended surgery because Mr. Sullivan's symptoms of back pain and left leg pain had not improved in the thirteen months since his injury.

Dr. Schwartz performed the surgery on November 17, 2009. Dr. Schwartz removed disc material and calcifications from Mr. Sullivan's spine and fused the L5 and S1 vertebrae, using a bone graft, rods, and screws. He testified that the procedure successfully decompressed the nerve roots in the area. After the operation, Mr. Sullivan's symptoms of back and leg pain improved somewhat. In May 2010, Dr. Schwartz ordered a functional capacity evaluation. Based upon the results of that evaluation, he imposed permanent restrictions on Mr. Sullivan's activities, including a twenty-two pound lifting limit, and limitations on walking, sitting, standing, and bending. Dr. Schwartz opined that Mr. Sullivan retained a 7% permanent anatomical impairment as a result of his injury.

Mr. Sullivan continued to receive pain management treatment from Dr. Cran-Carty after he was referred to Dr. Schwartz. Mr. Sullivan was discharged from Dr. Cran-Carty's care, however, after a drug screen revealed the presence of illegal drugs. Dr. Schwartz referred Mr. Sullivan to another pain management physician, Dr. Walker.<sup>1</sup> Mr. Sullivan was informed that Dr. Walker's course of treatment included injections only, and he declined to see Dr. Walker for that reason. Eventually, Mr. Sullivan was referred to a third pain management physician, Dr. Frank Jordan.

Mr. Sullivan filed a complaint for workers' compensation benefits in the Circuit Court for Carroll County, Tennessee, on September 21, 2010. A trial was held on June 23, 2011.

Mr. Sullivan testified that he had never had back problems prior to the July 2008 work injury and that his symptoms improved after the surgery performed by Dr. Schwartz. After his surgery, he did not return to work for Behlen and had not worked since his surgery. He spoke to managers at a local Wal-Mart and Lowe's but did not make a formal application to either store. He also made a call concerning a job delivering newspapers but did not receive

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<sup>1</sup> The record does not reflect Dr. Walker's first name.

a response. He did not consider himself capable of working at any of his former jobs. He was able to operate his riding lawn mower for about thirty minutes at a time before being required to stop and rest. He was able to walk only short distances.

On cross-examination, Mr. Sullivan admitted that he had obtained prescriptions for pain medication from both Dr. Cran-Carty and Dr. Schwartz at the same time and that he had filled the prescriptions at different pharmacies. Mr. Sullivan suggested that his positive drug screen while under the care of Dr. Cran-Carty resulted from his paperwork being incorrectly attached to another patient's urine sample. At the time of trial, Mr. Sullivan was regularly taking Gabapentin, morphine, and Tizanidine, a muscle relaxer.

Mr. Sullivan also admitted that he had stated on his job application for Behlen that he had never been discharged although he had been fired from a previous job. He testified that he had misunderstood the question. Mr. Sullivan also admitted that he had been convicted of burglary and theft in the past but had failed to disclose other convictions during his discovery deposition.

Dr. Apurva Dalal, an orthopaedic surgeon, examined Mr. Sullivan in August 2010 at the request of Mr. Sullivan's attorney. Dr. Dalal opined that Mr. Sullivan retained an anatomical impairment of 19% to the body as a whole from his injury. Dr. Dalal based this rating on the same section of the Sixth Edition of the AMA Guides used by Dr. Schwartz. Dr. Dalal explained that the difference between his rating and the rating given by Dr. Schwartz was due to the presence of degenerative disc disease at several levels of Mr. Sullivan's spine. Dr. Dalal testified that, in his opinion, the work injury had permanently aggravated that condition. Dr. Dalal believed that Mr. Sullivan's condition limited him to sedentary work.

Mr. Sullivan was forty years old at the time of trial. He had completed the tenth grade and later obtained a GED. He later completed a two-year program in auto mechanics at a vocational school and had worked for several years in an auto body shop with his father. His primary work experience was in construction. He had operated heavy equipment and had done framing and form carpentry. He also had worked as a press operator and assembler in two factories and as a machine operator in a steel mill.

The trial court issued its findings from the bench. It adopted Dr. Dalal's impairment rating and awarded permanent partial disability benefits of 80% to the body as a whole. Judgment was entered in accord with the trial court's findings. Behlen appealed. The appeal was referred to a Special Workers' Compensation Appeals Panel. Tenn. Sup. Ct. R. 51 § 1.

## Standard of Review

The 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) (2005); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). 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 Mach., Tool & Die, 152 S.W.3d 439, 443 (Tenn. 2004).

## Analysis

Behlen argues that the trial court erred by adopting Dr. Dalal's impairment rating rather than that of Dr. Schwartz and by accepting Mr. Sullivan's testimony concerning his limitations in light of questions concerning his credibility. Behlen also alleges the trial court's award is excessive.

### *Impairment Rating*

In its findings, the trial court stated:

The Court has compared the testimony of Dr. Dalal and Dr. Schwarz to table 17-4 of the [AMA] Guides. While Dr. Schwarz is a well-qualified treating doctor, the Court notes that he is not Board certified as a medical examiner, has had no special training as a medical examiner and is not on the Medical Impairment Registry in this state. In contrast, Dr. Dalal is an experienced, Board certified medical examiner, has obvious training in the interpretation of the AMA Guides and is an MIR panel physician. Both physicians had access to essentially the same information at the time of their evaluations. The permanent physical restrictions and apparent symptoms which are retained by Mr. Sullivan are more in accord with the opinion of the anatomic impairment assigned by Dr. Dalal than Dr. Schwarz. Therefore, the

Court accepts the opinion of Dr. Dalal as to the degree of anatomic impairment, which is noted to be the midpoint of its class in this instance, and fixes the anatomic impairment at 19 percent to the whole person.

Behlen offers several reasons in support of its argument that the trial court erred by choosing Dr. Dalal's impairment rating. It argues that Dr. Schwartz's qualifications were superior to Dr. Dalal's because Dr. Schwartz was a neurosurgeon, had been an instructor of neurosurgery, had research experience, had authored publications, and was Mr. Sullivan's treating physician. Behlen asserts that Dr. Dalal's training in the AMA Guides, mentioned by the trial court, is of limited relevance because both doctors used the same section of the AMA Guides to arrive at their opinions. This Panel has examined the backgrounds of both doctors, as set out in their depositions. Both doctors are board-certified in their respective specialties, and both appear competent to testify concerning medical matters, including medical impairment. Dr. Schwartz's resume may be more impressive in some respects, but Dr. Dalal has had specific training concerning the AMA Guides. A trial court generally has the discretion to choose which expert to accredit when there is a conflict of expert opinions, and we cannot say that the trial court was incorrect in giving more weight to Dr. Dalal's opinion concerning Mr. Sullivan's impairment. Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel 1996).

Behlen also argues that Dr. Dalal's use of the AMA Guides was flawed, contending that he assigned a larger impairment by including in his rating pre-existing degenerative conditions unrelated to the work injury. Dr. Dalal testified that the larger rating was appropriate because he found that Mr. Sullivan's work injury had permanently aggravated the underlying condition. Behlen offers no evidence to support its argument that Dr. Dalal's use of the Guides or his opinion concerning the effect of the work injury on the pre-existing degenerative changes in Mr. Sullivan's spine was incorrect.

The medical records support Dr. Dalal's assessment. A Radiology Report prepared by Dr. Trent Wade Borders at Baptist Memorial Hospital, Huntingdon, Tennessee, indicates that the MRI, performed on July 21, 2008, revealed: a posterior herniation and spondylitic ridging at L5-S1 resulting in moderate central canal stenosis and bilateral neuroforaminal narrowing; disc bulging and posterior osteophitic ridging at L4-L5, resulting in mild central canal stenosis; and a small central disc protrusion at L3-L4. A Radiology Consultation Report from Dr. Glenn Barnett indicates a CT myelogram performed February 12, 2009, resulted in the following findings:

Moderate congenital AP narrowing in the lower lumbar spine at L3 through S1 with superimposed degenerative changes which are somewhat prominent for age. There are multifocal areas of neural compromise throughout the region,

which at point appear only mild to moderate. The findings are however quite remarkable for the patient's relatively young age. Given the degree of congenital canal narrowing, these will almost certainly eventually become clinically significant.

Although Dr. Barnett describes Mr. Sullivan's canal narrowing as congenital, Dr. Barnett's belief that his findings are "quite remarkable for the patient's relatively young age" lends support to Dr. Dalal's opinion that the pre-existing condition in Mr. Sullivan's lumbar spine was aggravated by the workplace injury at multiple levels.

Dr. Schwarz was not asked about these reports, even though a letter dated August 6, 2009, from Dr. Schwarz to Dr. Cran-Carty stated that Dr. Schwartz had reviewed them. Despite the Dr. Schwarz's review of these reports, he testified that there was nothing in Mr. Sullivan's CT scans or x-rays that would explain his continued complaints of pain. No other medical doctor testified concerning Mr. Sullivan's diagnosis or the application of the AMA Guides to it. The parties did not elect to use the Medical Impairment Registry created by the legislature to resolve differences of opinion concerning impairment. See Tenn. Code. Ann. § 50-6-204(d)(5) (2008). We are, therefore, unable to find that the evidence preponderates against the trial court's decision to adopt Dr. Dalal's impairment rating.

#### *Mr. Sullivan's Credibility*

Behlen also contends that Mr. Sullivan was not credible and that the trial court erred by accepting Mr. Sullivan's testimony concerning his symptoms and limitations. In support of this contention, Behlen points to evidence which, it asserts, shows that Mr. Sullivan is a "drug seeker," that he made misstatements concerning his employment history on his job application, and that he gave incomplete or false answers in his discovery deposition to questions concerning his criminal history. The trial court directly addressed these issues in its findings:

The Court has considered the testimony of Mr. Sullivan concerning his present symptoms and his limitations. Mr. Sullivan has testified that he experiences daily back and leg pain and symptoms which are exacerbated by his activity. The Court finds him to be credible in that regard.

The employee did make some misrepresentations about his work history and prior arrest history, and the Court does not condone those. But neither does the Court find them to be particularly significant in this case except as to the issue of his general credibility. In this regard, the Court has actually observed the appearance of the employee in the open courtroom. I would note

at this point that this trial has been underway, exclusive of breaks, for approximately three hours, and that the employee was on the witness stand for about two hours. The Court notes that the employee walks in an antalgic manner, grimaces and holds or moves his body in a way that plainly exhibits a man who is suffering from back pain. Oxycodone, Hydrocodone and Soma have been prescribed in the past and have provided incomplete relief. The employee continues to take prescribed pain medication at this time. The Court notes that the employer suggests that Mr. Sullivan may have abused certain drugs. The record is not adequate for the Court to so find. In any event, it is clear that there is a real anatomic basis for his pain and that his pain is genuine.

We are, of course, required to give considerable deference to the trial court's findings concerning the credibility of witnesses who testified in person before it. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d at 733. Moreover, a trier of fact is not required to accept or reject the testimony of any witness in its entirety. Rather, it may accredit as much or as little of that evidence as it finds appropriate. See State v. Bolin, 922 S.W.2d 870, 875 (Tenn. 1996). It is apparent from the trial court's remarks here that it carefully considered the credibility of Mr. Sullivan's testimony in reaching its decision concerning the nature and extent of his limitations. Behlen offered no evidence contradicting Mr. Sullivan's testimony. His testimony, in large part, was corroborated by the testimony of his wife, Nancy Sullivan. We find no basis to disturb the trial court's finding that Mr. Sullivan's testimony about his symptoms and limitations was credible.

#### *Excessive Award*

Behlen's final contention is that the award of 80% permanent partial disability is excessive. Behlen states that Mr. Sullivan is a "relatively young man" at age forty, that he has a GED, and has had experience as a mechanic and in all phases of construction. It also notes that he made only limited attempts to find employment after reaching maximum medical improvement. The extent of vocational disability is a question of fact to be decided by the trial judge. Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008). We note that the medical evidence, including the testimony of Dr. Schwarz, is that Mr. Sullivan is limited to sedentary or relatively light work. Throughout his working life, he primarily has had jobs that required substantial strength and effort, such as construction, operating heavy equipment, automobile body work, and welding. The limitations caused by his work injury preclude him from returning to any of those occupations. He is able to read and write, but there is no evidence concerning his potential to benefit from retraining or additional education. Based on the record before us, we are unable to conclude that the evidence preponderates against the trial court's assessment of his permanent partial disability.

### **Conclusion**

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

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DONALD P. HARRIS, SPECIAL JUDGE



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

**RICKY SULLIVAN v. BEHLEN MANUFACTURING COMPANY, INC.**

**Circuit Court for Carroll County  
No. 10CV60**

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**No. W2011-01677-WC-R3-WC - Filed July 19, 2012**

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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, Behlen Manufacturing Company, Inc., and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM