

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

August 27, 2012 Session

ERIC SUTTON v. MCKINNEY DRILLING COMPANY ET AL.

**Appeal from the Chancery Court for Shelby County
No. CH-09-1856-3 Kenny Armstrong, Chancellor**

No. W2012-00503-WC-R3-WC - Mailed December 17, 2012; Filed January 18, 2013

An employee was pinned between a large crane and a pickup truck. He suffered injuries to his ribs, shoulder, and back. He also suffered a collapsed lung and contusions on his lungs. He recovered from those injuries and was able to return to work for his employer. The trial court found the correct impairment to be 19% to the body as a whole and awarded 28.5% permanent partial disability benefits. The employer contends that the trial court erred by awarding benefits for pulmonary dysfunction. The employee contends that the award was based on an incorrect impairment rating. We affirm the judgment of the trial court.

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

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

Ashley Yarnell Baskette, Memphis, Tennessee, for the appellants, McKinney Drilling Company and Zurich Insurance Company of North America.

Stephen F. Libby, Memphis, Tennessee, for the appellee, Eric Sutton.

MEMORANDUM OPINION

Factual and Procedural Background

Eric Sutton was employed by McKinney Drilling Company ("McKinney") as a laborer. Mr. Sutton was injured on February 26, 2008, while working near a large crane. The crane moved unexpectedly, pinning him against a pickup truck and crushing his chest. He sustained fractures to his left clavicle and left scapula and additional fractures to ten ribs on his right side, one rib on his left side, and the spinous processes at T4 and T5. In addition,

Mr. Sutton had a collapsed lung and contusions on his lungs. He was taken to the Regional Medical Center at Memphis, where he was treated for one day and released. Mr. Sutton was readmitted to the Regional Medical Center one day later, however, because of breathing problems caused by his collapsed lung. He remained in the hospital until March 11, 2008, when his condition stabilized sufficiently to allow him to be discharged. He was referred to Dr. Paige Whittle, an orthopaedic surgeon, for further care.

Mr. Sutton filed a complaint for workers' compensation benefits in the Chancery Court for Shelby County on September 9, 2009. Dr. Whittle testified by deposition that she first saw Mr. Sutton on March 25, 2008, and provided conservative treatment, including medication, physical therapy, and work restrictions. While Mr. Sutton was under Dr. Whittle's care, he reported, among other symptoms, numbness and tingling in the ring and long fingers of his left hand and numbness in an area of his upper back. Dr. Whittle believed these symptoms were related to Mr. Sutton's work injury. The numbness in his fingers had subsided by August 2008. Dr. Whittle testified that Mr. Sutton had not yet reached maximum medical improvement when she last saw him on August 5, 2008.

Dr. George Wood, an orthopaedic surgeon from the same professional practice as Dr. Whittle, became Mr. Sutton's treating physician in September 2008. Dr. Wood testified by deposition. In October 2008, Dr. Wood permitted Mr. Sutton to return to full-duty work. Although x-rays showed mild arthritis in both of Mr. Sutton's shoulders, Dr. Wood noted that Mr. Sutton had "good range of motion and good strength and light touch sensibility." In November 2008, Dr. Wood released Mr. Sutton from his care. He assigned a permanent impairment of 3% to the body as a whole based on the left shoulder injury. Dr. Wood also opined that Dr. Dalal, Mr. Sutton's evaluating physician, had incorrectly applied the Sixth Edition of the AMA Guides to the Evaluation of Permanent Impairment. During cross-examination, Dr. Wood testified that trauma can cause pre-existing, non-symptomatic arthritis to become symptomatic. He denied that Mr. Sutton had clinical findings consistent with a brachial plexus injury. Dr. Wood did not address the rib or lung injuries in his impairment rating because he considered those matters to be outside his expertise.

Dr. Apurva Dalal, an orthopaedic surgeon, evaluated Mr. Sutton at the request of his attorney. Dr. Dalal testified by deposition. Dr. Dalal examined Mr. Sutton on May 8, 2009, and on May 17, 2010. After the 2009 evaluation, Dr. Dalal assigned Mr. Sutton a combined impairment of 9% to the body as a whole for diagnoses of a fractured clavicle, aggravation of pre-existing shoulder arthritis, and a possible brachial plexus injury. In 2010, Dr. Dalal increased that impairment rating to 25% to the body as a whole. The increase was the result of including additional impairments for rib fractures, pulmonary dysfunction, and diminished range of motion of the shoulder. Although he measured Mr. Sutton's range of motion in 2009, Dr. Dalal had not assigned separate impairment for range of motion at that time. He did not recommend any permanent activity restrictions.

The case was initially set for trial on August 17, 2010. At that time, the trial court apparently expressed reservation about Dr. Dalal's qualifications to assign impairment for Mr. Sutton's pulmonary injuries. The trial court continued the trial and ordered McKinney to provide Mr. Sutton with a panel of pulmonologists to provide treatment and an independent medical examination. Dr. Norman Soskel, a pulmonary physician, examined Mr. Sutton on March 9, 2011, and opined that Mr. Sutton had no permanent pulmonary dysfunction from his lung and rib injuries. However, his testing revealed the possible presence of mild asthma, which Dr. Soskel did not consider to be related to Mr. Sutton's work injury. Dr. Soskel did not determine if the results of Mr. Sutton's pulmonary function testing warranted an impairment rating according to the AMA Guides. He testified that any impairment would be "mild." On cross-examination, Dr. Soskel confirmed that he had not used the AMA Guides in his evaluation. He agreed that Mr. Sutton reported occasional dyspnea, or shortness of breath. He was unaware if Mr. Sutton had any breathing problems prior to the work injury. He stated that the primary residual symptom of a collapsed lung was chest pain that occurs when taking a deep breath. Dr. Soskel opined that Mr. Sutton's reported loss of stamina could be related to his work injury but was not likely to be caused by pulmonary dysfunction. Finally, Dr. Soskel confirmed that the technician who conducted the pulmonary testing noted that Mr. Sutton was unable to give his best effort due to chest pain.

Mr. Sutton was fifty-one years old at the time of trial. He was a high school graduate but had no additional education or specialized training. He began working for McKinney in December 2007. He previously had been employed for twenty-eight years by Windsor Door, a company that manufactured garage door parts. After being released by Dr. Wood, Mr. Sutton returned to the same job he had previously held with McKinney. He was able to perform his job duties, although he was "a bit slower" than he had been before the accident. He reported that his left shoulder was painful at times and that he had to lift objects carefully with his left arm. He experienced occasional pain in the right side of his chest, difficulty bending over, numbness in the ring and small fingers of his left hand and in his upper back.

Ned Colbert, Mr. Sutton's supervisor, testified that Mr. Sutton performed his job satisfactorily after his injury. Mr. Colbert stated that Mr. Sutton had not complained to him of pain or expressed to him an inability to carry out any aspect of the job.

The trial court found that Mr. Sutton retained a 9% permanent impairment to the body as a whole due to his shoulder injury, 6% to the body as a whole due to his rib fractures, and 6% to the body as a whole due to pulmonary dysfunction. According to the combined values chart of the Sixth Edition of the AMA Guides, the overall anatomic impairment was therefore 19% to the body as a whole. It is undisputed that the award of permanent disability benefits was limited to one and one-half times the impairment pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A) (2008). The court therefore awarded 28.5% permanent

partial disability to the body as a whole. Judgment was entered in accordance with the trial court's findings. McKinney has appealed, contending that the trial court erred by finding that Mr. Sutton retained a 19% permanent anatomic impairment. Mr. Sutton contends that the trial court erred by failing to find that he had a 25% permanent anatomic impairment. This appeal has been referred to a Special Workers' Compensation Appeals Panel for a report of findings of fact and conclusions of law. See Tenn. Sup. Ct. R. 51, § 1.

Analysis

Both parties assert that the evidence preponderates against the trial court's finding that Mr. Sutton sustained a 19% anatomical impairment as a result of his work injury. McKinney contends that the trial court erred by finding, contrary to the testimony of Dr. Soskel, that Mr. Sutton had a pulmonary impairment and also by failing to adopt the 3% impairment assigned by Dr. Wood for the left shoulder injury. Mr. Sutton contends that the trial court erred by finding his impairment to be less than the 25% assigned by Dr. Dalal after his second evaluation. We review the trial court's findings of fact de novo on the record accompanied by a presumption of correctness, unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). A trial court's conclusions of law, however, are reviewed de novo upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

In support of its position, McKinney points out that Dr. Dalal, an orthopaedic surgeon, is less qualified to express an opinion concerning the existence or extent of any pulmonary impairment than Dr. Soskel, a specialist in pulmonary medicine. In addition, Dr. Soskel ordered pulmonary function testing and Dr. Dalal did not. These are valid observations. Dr. Soskel, however, explicitly chose not to analyze the results of his testing pursuant to the relevant edition of the AMA Guides. He conceded the seriousness of Mr. Sutton's injuries and agreed that Mr. Sutton reported episodes of shortness of breath. Dr. Soskel also testified that experiencing chest pain when taking a deep breath was a potential residual symptom of a collapsed lung and that Mr. Sutton had reported that symptom to his technician. We also observe that Dr. Dalal assessed Mr. Sutton's impairment as mild, consistent with Mr. Sutton's report of intermittent symptoms.

The trial court found Mr. Sutton to be a credible witness and stated that it believed Mr. Sutton's description of his complaints. The trial court also stated that it did not believe Dr. Soskel "really listened" to Mr. Sutton and made a specific finding that Dr. Soskel's opinion was not "entitled to great weight." Live testimony may influence the trier of fact when considering medical proof contained in depositions. Cunningham v. City of Savannah, No. W2010-02411-WC-R3-WC, 2012 WL 2126015, at *6 (Tenn. Workers' Comp. Panel Feb. 28, 2012). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the

witness' demeanor and to hear in-court testimony. Madden v. Holland Grp. of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). We therefore conclude that the evidence does not preponderate against the trial court's finding that Mr. Sutton sustained an impairment of his pulmonary function.

McKinney also contends that Dr. Wood's opinion regarding the impairment caused by Mr. Sutton's left shoulder injury should have been given greater weight than that of Dr. Dalal because Dr. Wood was a treating physician. Dr. Wood, however, became Mr. Sutton's treating physician approximately seven months after the injury occurred because Dr. Whittle, the original treating physician, was on medical leave. Dr. Wood examined Mr. Sutton on three occasions, and Dr. Dalal conducted two separate examinations. Dr. Wood also expressed some uncertainty concerning the nature and extent of Mr. Sutton's injuries during his testimony.

The trial court found that Dr. Dalal was more credible than Dr. Wood. A trial court generally has the discretion to choose which expert to accredit when there is a conflict of expert opinions. Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990). Viewing each physician's testimony as whole, we are unable to conclude that Dr. Wood's opinion is more authoritative than that of Dr. Dalal. We therefore conclude that the evidence does not preponderate against the trial court's decision to give greater weight to Dr. Dalal's opinion.

Nevertheless, the trier of fact is not required to accept or reject in its entirety the testimony of any particular expert witness. See Reeves v. Olsen, 691 S.W.2d 527, 531 (Tenn. 1985). In this case, Dr. Dalal expressed two opinions concerning the correct impairment to be assigned for Mr. Sutton's left shoulder injury. The second, higher impairment rating was the result of Dr. Dalal's decision to add additional impairment based on Mr. Sutton's lost range of motion. Dr. Dalal testified, however, that Mr. Sutton's range of motion was slightly better in May 2010 than it had been a year earlier. Considering the internal conflicts in Dr. Dalal's testimony, we are unable to conclude that the evidence preponderates against the trial court's finding that the May 2009 impairment rating was more accurate.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to McKinney Drilling Company, Zurich Insurance Company, and their surety, for which execution may issue if necessary.

DONALD E. PARISH, JUDGE

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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 Appellants, McKinney Drilling Company and Zurich Insurance Company of North America, and their surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM