IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
August 26, 2013 Session

**JEFFREY L. BEELER v. DeROYAL INDUSTRIES, INC. ET AL.**

**Appeal from the Circuit Court for Knox County**
**No. C-11-142611 Dale C. Workman, Judge**

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**No. E2012-02340-WC-R3-WC-MAILED-NOVEMBER 20, 2013**
**FILED - JANUARY 14, 2014**

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An employee alleged that he sustained a gradual aggravation of a preexisting lower back condition during the eleven months he worked for his employer. The employer denied the claim, contending that the employee's condition and symptoms were merely the natural progression of an injury that he had suffered many years earlier. The trial court found for the employer and dismissed the complaint. The employee has appealed that decision, asserting that the evidence preponderates against the trial court's decision. Pursuant to Tennessee Supreme Court Rule 51, 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. We affirm the trial court's judgment.

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

J.S. "STEVE" DANIEL, SP.J., delivered the opinion of the Court, in which SHARON G. LEE, J., and LARRY H. PUCKETT, SP.J., joined.

Donald K. Vowell, Knoxville, Tennessee, for the appellant, Jeffrey L. Beeler.

Jennifer Caywood Schmidt, Knoxville, Tennessee, for the appellees, DeRoyal Industries, Inc. and Travelers Insurance Company.

## OPINION

### Factual and Procedural Background

Jeffrey Beeler ("Employee") began working as a forklift mechanic for DeRoyal Industries ("Employer") in January 2008. He had previously worked as a forklift mechanic for the Bailey Company from 1989 until 2002, at Barloworld from 2002 until 2006, and as a forklift service manager for the Lilly Company from 2006 until January 2008. In 1990, while working for the Bailey Company, he was pinned between a forklift and a stationary object, suffering a "crush injury" to his abdomen. He required surgery to repair an internal laceration. X-rays and a CT scan taken during that period revealed that he had fractures of the L2 and L3 vertebrae and a herniated disk at the right side of L5-S1. He was off work for six weeks and settled his workers' compensation claim for 30% permanent partial disability, which was approved by the trial court on August 31, 1993. The settlement left his right to future medical benefits open, naming Dr. Archer Bishop as the authorized treating physician.

Employee returned to work for the Bailey Company and remained there for thirteen years. He continued to have back pain during that time and he sought treatment through his primary care physician, rather than the Bailey Company or its insurer. His symptoms increased gradually over the years. In late 2003 and early 2004, he consulted Dr. James Killeffer, a neurosurgeon, about his back problems. At that time, Employee described his condition as having "a lot of pain and pain down my right leg, numbness in my right leg, to the point that I was considering having [back] surgery." A December 2003 MRI scan revealed that he still had a herniated disk at L5-S1 and advanced degenerative changes at L4-5.

Employee met with Dr. Killeffer on two occasions: January 26, 2004 and February 17, 2004. On both occasions, Dr. Killeffer discussed possible back surgery with Employee. In his note of February 17, 2004, Dr. Killeffer stated, "I do not think [conservative treatment] is likely to provide him anything more than temporary relief. I discussed that with him. I would be happy to proceed with surgery if he wishes for me to[.]" Employee ultimately decided not to have surgery because he "couldn't afford to take off from work. I had bills and a child in school. I just couldn't afford it."

Employee was referred to a pain management clinic, where he received treatment from 2004 until 2007. He was discharged from the program when a routine drug test revealed the absence of a prescribed medication, oxycodone, and the presence of an unprescribed medication, hydrocodone. He also failed to appear for a scheduled pill count. After that, he sought and received pain medication from his primary care physician.

Employee testified that between 1990 and 2008, he hurt his back in incidents at home and at work. He described those incidents by saying, "It could be anything. I could step off a curb the wrong way, I could bend the wrong way." He also testified that he was never pain-free after the 1990 injury. His back pain became worse over the years, and he had numbness in his feet, back pain and a burning sensation in his legs before he was hired by Employer in January 2008. In August 2006, Employee took a "desk job" as a service manager for the Lilly Company hoping it would put less stress on his back. After a time, he realized that he didn't like the job because he was used to being in the field, so he went to work for Employer.

Employee's job for Employer consisted of servicing sixty-seven or sixty-eight forklifts. His job required him to lift parts weighing forty to sixty pounds, and it was sometimes necessary for him to work in awkward positions. His last day of work for Employer was Friday, November 7, 2008. Over the following weekend, he developed flu-like symptoms that caused him to be unable to work on Monday or Tuesday. When he attempted to get out of bed on the morning of Wednesday, November 12, 2008, his right leg "just wouldn't work." He went to a nearby emergency room where he received pain medication and a steroid dose pack, and the emergency room doctor recommended that he use a cane. He also ordered an MRI of Employee's back. Employee did not return to work after that date.

Employee initially sought further treatment through the Bailey Company, basing his claim on the open medical benefits provision of his 1993 settlement. The Bailey Company denied the claim. He then filed a claim against Employer, alleging that his work there had caused a gradual advancement of his preexisting condition. That claim was also denied. Ultimately, Employer filed lawsuits against both companies. Employee made a motion to consolidate the two cases, which was denied by the trial court. Employee also filed a claim for short-term disability benefits through Employer. On that document, Employee answered "No" to the question: "Did injury occur at work?" He did not answer the question: "Is disability work related?" On the third page of the document, Employee stated that "1990" was the year his symptoms first appeared.

Employee's condition improved somewhat within two or three days of the November 12, 2008 incident. However, he never felt he was well enough to return to work. He testified that after November 12, 2008, his back pain and leg numbness became constant, rather than intermittent. He was sure that his work for Employer contributed to his condition. His employment officially ended on December 26, 2008, because he had exceeded his permissible leave. He has not worked, or sought work, since that time.

Dr. William Kennedy, an orthopedic surgeon, conducted an independent medical evaluation ("IME") on February 12, 2010, at the request of Employee's attorney. Dr. Kennedy's practice is limited to performing IMEs. Employee gave him a history of back

pain since 1990. Though the pain decreased some months after the original injury, it never completely subsided. Employee reported episodic increases over the years, with symptoms sometimes going into his right leg. His symptoms gradually increased from 2002 to 2008. Dr. Kennedy testified that an MRI taken on November 21, 2008, revealed a herniated disk at L5-S1 and advanced degenerative changes at L4-5. Comparison to a report of a December 2003 MRI showed a progression of the degenerative changes. Dr. Kennedy opined that the heavy lifting and awkward positions required by Employee's work for Employer permanently aggravated and advanced Employee's preexisting degenerative disk disease at both the L4-5 and L5-S1 levels. He further opined that the degenerative disk disease would not have advanced as quickly if Employee had been doing lighter work. Dr. Kennedy also testified that Employee retained a 9% permanent anatomical impairment to his body as a whole, according to the Sixth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment.

During cross-examination, Dr. Kennedy admitted that he had been suspended from membership in the American Academy of Orthopedic Surgeons ("AAOS") for one year. However, he explained that the suspension had been the result of a 2006 affidavit that he prepared and signed in connection with a medical malpractice case. He stated that the affidavit had contained errors, and for that reason, he had accepted the discipline proposed by AAOS.

Dr. Kennedy agreed that the L5-S1 herniated disk and nerve impingement it had caused, as well as the extensive degenerative changes at L4-5, had existed before Employee began working for Employer in 2008. He also agreed that Employee had radiculopathy for many years prior to 2008 and that all of the symptoms Employee described to Dr. Kennedy had existed before 2008 but were "present to a greater extent" after Employee began working for Employer. Dr. Kennedy conceded that the speed at which degenerative changes in the spine take place varies among individuals and that the degree of spinal degeneration could not be predicted based on whether an individual's job was heavy or sedentary.

Dr. Kennedy also noted that Dr. Gilbert Hyde had placed restrictions on Employee in 1993 that placed him in the medium work category, though Employee continued to perform heavy work after that time. He restated that the November 2008 MRI showed a complete loss of disk height at L4-5, which was a definite change from the December 2003 MRI. However, he was unable to state when that change had occurred. Dr. Kennedy agreed that all of the findings in the 2008 MRI related back to the 1990 injury.

Dr. Fred Killeffer,[1] a neurosurgeon, conducted an independent medical evaluation on November 17, 2009, at the request of Employer's attorney. Much like Dr. Kennedy, Dr.

[1] Dr. Fred Killeffer is the father of Dr. James Killeffer and is in practice with him.

Killeffer had stopped performing surgery and limited his practice to "medical/legal analysis." He stated that Employee had not been symptom-free since his 1990 injury. Employee's diagnosis before 2008 was a herniated L5-S1 disk and degenerative disk disease at L4-5. He testified that degenerative disk disease was an inevitable part of the aging process, but the timing of the process was thought to be related to genetic factors. Dr. Killeffer testified that he had reviewed the images of the 2008 MRI scan and the radiology reports of the 2003 MRI and the 1990 CT scan. The 1990 study showed a disk bulge with stenosis at L4-5 and a herniated disk at L5-S1. The stenosis had advanced when the 2003 MRI was taken. The 2008 MRI showed that the degenerative process had continued and advanced since the 2003 MRI.

Dr. Killeffer's exam revealed diminished sensation in both legs, positive straight leg raising on both sides, limited range of motion of the lower back, and decreased sensation in the right foot in a "stocking" distribution, a finding often associated with diabetes. He testified that Employee's diagnosis would have been the same in November 2008 as it had been in January 2008. He opined that it was "unlikely" that Employee's work for Employer from January to November 2008 significantly changed the anatomy of Employee's spine. He further opined that the changes in Employee's spine between 2003 and 2008 were not related to work activities, that the primary injury occurred in 1990 and subsequent anatomical changes were merely a natural progression from that injury. He stated that surgery would have benefitted Employee at least as early as 2004 when Dr. James Killeffer had discussed the subject with Employee.

During cross-examination, Dr. Killeffer conceded that he no longer had in his file all of the medical records he had received and reviewed at the time he examined Employee. He believed that the records had been disposed of because he had not been contacted concerning a deposition within two years of the examination. The records he had at the time of the deposition were duplicates, requested and received from Employer's attorney. These did not include additional records given to him by Employee on the day of the examination. Employee's counsel read some of those records to Dr. Killeffer, who stated that they were consistent with his opinion. He further stated that heavy work could cause an existing disk herniation to hurt more but was unlikely to cause an anatomical change. He also testified that a single event could cause a disk herniation, but repetitive activities would not cause a gradually-occurring herniation. He said back injuries could result from a gradual process in which activity causes "thinning" of the disk leading to a herniation, but a herniation could not occur gradually. Finally, he stated that degenerative disk disease could happen to an individual whether he engaged in heavy work or sedentary work, adding, "I don't think there's any – medical science has any scientific information to suggest that a forklift repairman is more likely to get a ruptured disk than a neurosurgeon, for example."

After this evidence was presented, the trial court issued its findings from the bench. The trial judge noted that Employee's symptoms began with the 1990 injury and

continued thereafter. He then summarized Employee's medical treatment. The court observed that there was no evidence that Employee's symptoms lessened during the period he was performing sedentary work for the Lilly Company. The court additionally considered the fact that Employee sought medical treatment through the Bailey Company before making a claim against Employer, and that he had otherwise related his lower back problems to the 1990 injury. The court reviewed the testimony of Dr. Kennedy and recounted the various medical records that showed Employee had consistently had lower back and right leg symptoms in the years following 1990. The court discussed Dr. Kennedy's testimony that he did not know when the observed changes in Employee's spine occurred. After reviewing Dr. Killeffer's testimony, the trial court chose to give his opinion greater weight than Dr. Kennedy's. Based on Dr. Killeffer's testimony and opinion, the trial court found that Employee's lower back injury had not been advanced or exacerbated by his work for Employer. In accordance with those findings, judgment was entered dismissing the complaint. Employee has appealed, contending the evidence preponderates against the trial court's decision.

**Standard of Review**

Courts reviewing an award of workers' compensation benefits must conduct an in-depth examination of the trial court's factual findings and conclusions. *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991) (citing *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 675 (Tenn. 1991). When conducting this examination, Tenn. Code Ann. § 50-6-225(e)(2) requires the reviewing court to "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of live witnesses and its assessment of the weight that should be given to their testimony. *Tryon v. Saturn Corp.*, 254 S.W.3d. 321, 327 (Tenn. 2008) (citing *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002)). However, reviewing courts need not give any deference to a trial court's findings based upon documentary evidence such as depositions, *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006); *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004), or to a trial court's conclusions of law, *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

**Analysis**

In this appeal, Employee argues that the evidence preponderates against the trial court's finding that his ten months of work for Employer did not aggravate or advance his preexisting ruptured disk and degenerative disk disease. At the outset, he suggests that the trial court applied an incorrect standard by requiring him to show that his work for Employer was more than a "contributing cause" to the gradual deterioration of his lumbar spine. *See Crew v. First Source Furniture Grp.*, 259 S.W.3d 656, 667-68 (Tenn. 2008) ("It is neither

the last employment nor the last exposure to the hazards of the disease which impose liability on an employer; rather, it is the last such exposure that is injurious to the employee. . . . [I]n order for the rule to apply, there must be some showing that the employee's condition worsened due to the working conditions at the second employer, either by *advancement or aggravation of the injury*."); *Fink v. Caudle*, 856 S.W.2d 952, 958 (Tenn. Workers' Comp. Panel 1993) (stating that "an injury is compensable, even though the claimant may have been suffering from a serious pre-existing condition or disability, if a work connected accident can be fairly said to be a contributing cause of such injury"). We disagree. The trial court correctly described the standard applicable to repetitive trauma injuries in announcing his findings:

> We've adopted a system where the last employer, where it appears the employee has a disability, and most of the time has it diagnosed, then . . . the last employer [is] responsible for paying the benefits. This is true even though a percentage of time, a lot of theories say, well, you take all the time of the years and apply a percentage to everybody else. We don't do that in workers' compensation. The last one that's there is the last one that pays. Then there are some variations from that, which we've talked about here. . . .
>
> The key thing is something was associated with the risk of the work, something they do at work has got to cause an underlying condition to exacerbate or progress. You've got to show there was a change in that underlying condition from what it was before to what it was after. That's a progression of the underlying injury caused by risk of the work, or there's an exacerbation, as we like to call it, or aggravation. It may have caused me to have pains two days a week before. I go to work with this and if you can show what you do with this employer that causes it to go to four days a week, then you've proven an aggravation, and [the employer has] to pay for all four days and that's what the law is and how the last injurious [injury] rule applies.

We find this to be an accurate statement of the law concerning gradual aggravation of preexisting conditions, as set out in *Trosper v. Armstrong Wood Products, Inc.*, 273 S.W.3d 598, 607 (Tenn. 2008):

> [T]he 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.

273 S.W.3d at 607.

In our view, Employee's primary disagreement with the trial court's decision is not the standard the trial court applied, but its decision to give greater weight to the testimony of Dr. Killeffer over that of Dr. Kennedy. In that regard, Employee takes issue with the trial court's consideration of Dr. Kennedy's suspension from AAOS and the court's interpretation of Dr. Kennedy's testimony that he could not state with certainty when the anatomical changes he found in Employee's spine occurred. Employee also asserts that Dr. Killeffer's testimony should have been discounted because he did not recall all of the medical records he had reviewed in preparing his report and had no knowledge, or at least no recollection, of Employee's job duties for Employer. In addition, Employee faults the trial court for giving weight to Employee's own statements, contained in his application for short term disability and elsewhere, that his symptoms in November 2008 began with the 1990 injury.

"When expert testimony differs, it is within the discretion of the trial judge to determine which testimony to accept." *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004) (citing *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel 1996)). "When the medical testimony differs, the trial judge must obviously choose which view to believe. In doing so, he is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts." *Orman*, 803 S.W.2d at 676.

On this point, Dr. Kennedy's opinion differs from that of Dr. Killeffer. Dr. Kennedy testified that Employee's ten months working for Employer had caused his degenerative disk disease to progress and that the condition would not have advanced as quickly if Employee had been performing sedentary work. But, Dr. Kennedy failed to articulate any mechanism of injury by which Employee's ten months of work for Employer advanced or accelerated Employee's preexisting disease. Moreover, Dr. Kennedy candidly admitted that those changes were "well on their way" before Employee's work with Employer began in January 2008. He acknowledged that the speed of the degenerative process differs among individuals for unknown reasons and that the degree of advancement cannot be predicted based on whether an individual performs heavy or sedentary work. Additionally, he testified that the November 2008 MRI showed a complete loss of disk height at the L4-5 level, but could not state with confidence when that change occurred. Further, he agreed that all of Employee's symptoms had been present before January 2008, and that Employee's diagnoses were the same before and after he worked for Employer. For these reasons, we do not find Dr. Kennedy's testimony, standing alone, to be so compelling as to require reversal of the trial

court's findings. Neither do we find any error in the trial court's decision to consider Dr. Kennedy's suspension from a professional organization. Employee does not provide any authority to support his contention that this decision was erroneous.

Employee also faults Dr. Killeffer's testimony on several grounds. He points out that Dr. Killeffer did not retain the medical records he reviewed in November 2009 until his deposition in July 2012. He requested duplicates from Employer's attorney and thus did not have complete recollection of all the records he had reviewed at the time of his report. These facts could affect the weight to be given to Dr. Killeffer's testimony. However, Employee has not shown what information was contained in the "missing" records, nor has he explained how that information would undermine Dr. Killeffer's opinions. Indeed, Dr. Killeffer's understanding and interpretation of Employee's medical history does not vary greatly from that of Dr. Kennedy.

Employee further submits that Dr. Killeffer's failure to recall the nature of Employee's work for Employer between January and November 2008 undermines Dr. Killeffer's opinion on causation. However, Dr. Killeffer explained that the progression of degenerative disk disease is the result of genetic and other factors, and is generally unrelated to the employment activities of the patient. While Employee takes issue with this assertion, Dr. Killeffer declared it to be the current state of scientific knowledge on the subject. Dr. Kennedy made no statements on that topic. It was therefore reasonable for the trial court to accept Dr. Killeffer's testimony on the subject.

We also find no error in the trial court's remarks about evidence of Employee's statements dating the onset of his problems to 1990. The trial court properly made note of this evidence. An employee's own assessment of his physical condition and resulting disabilities is competent evidence and cannot be disregarded. *Whirlpool*, 69 S.W.3d at 170 (Tenn. 2002) (citing *Uptain Constr. Co. v. McClain*, 526 S.W.2d 458, 459 (Tenn.1975)).

In our evaluation of the medical evidence, we find it worthy of note that Employee's doctors stated as early as 1992 that he would likely require surgery in the future. In fact, Dr. James Killeffer suggested that Employee undergo surgery in January 2004 and again in February 2004. In his February 2004 note, Dr. Killeffer unequivocally stated that he did "not think [conservative treatment] [wa]s likely to provide [Employee] anything more than temporary relief." We find that the need for surgery to address Employee's ongoing back problems arose no later than 2004. Based on the foregoing, we conclude that the evidence does not preponderate against the trial court's finding on the issue of causation.

## Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Jeffrey L. Beeler and his surety, for which execution may issue if necessary.

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J. S. "STEVE" DANIEL, SPECIAL JUDGE