

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT MEMPHIS
March 25, 2015 Session

RALPH ALEXANDER v. A&A EXPRESS, LLC

Appeal from the Chancery Court for Chester County
No. 2012-CV-603 James F. Butler, Chancellor

No. W2014-01643-SC-R3-WC – Mailed August 4, 2015; Filed September 10, 2015

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. Employee, Ralph Alexander, suffered an injury to his right shoulder during the course and scope of his employment with employer, A&A Express, LLC ("A&A"). He was ultimately treated surgically. Mr. Alexander was released from treatment with a permanent partial anatomical impairment but no permanent restrictions. He was initially returned to work at A&A, but later laid off due to lack of work. Mr. Alexander has not returned to work at A&A or been employed since then. Mr. Alexander claimed at trial that he was permanently totally disabled, which A&A denied. The trial court found that Mr. Alexander was not permanently totally disabled. The court found that Mr. Alexander had a vocational disability of 84% to the body as a whole, but limited his award to 42% permanent partial disability to the body as a whole pursuant to Tenn. Code Ann. § 50-6-241. The trial court also awarded Mr. Alexander \$525.66 in unpaid medical mileage. Mr. Alexander appeals, contending that the trial court erred in failing to find him permanently totally disabled. Mr. Alexander contends, alternatively, that the Special Workers' Compensation Appeals Panel should find that the statutory cap of six times the anatomical impairment does not apply pursuant to Tenn. Code Ann. § 50-6-242, or that the Panel should remand the case to the trial court for such a determination. Finally, Mr. Alexander contends that the trial court should not have accorded a presumption of correctness to the medical impairment rating which resulted from the Medical Impairment Review evaluation pursuant to Tenn. Code Ann. § 50-6-204(d)(5). Having carefully reviewed the record, we affirm the trial court's determination.

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

CHANCELLOR MARTHA B. BRASFIELD delivered the opinion of the Court, in which JUSTICE HOLLY KIRBY and JUDGE BEN H. CANTRELL joined.

Ricky L. Boren, Memphis, Tennessee, for the appellant, Ralph Alexander

Jeffrey G. Foster, Jackson, Tennessee, for the appellee, A & A Express, LLC

**OPINION
Procedural Background**

Plaintiff, employee Ralph Alexander, injured his right shoulder on February 19, 2010, and re-injured it on July 16, 2010, while employed by Defendant, employer A&A. Following his release from treatment on August 2, 2011, Mr. Alexander continued working for A&A until December 15, 2011, at which time he was laid off due to lack of work.

The parties were unable to reach a resolution at a Benefit Review Conference. On April 12, 2012, Mr. Alexander filed a complaint for workers' compensation benefits in the Chancery Court for Chester County. The case was tried in the Chancery Court for Chester County on May 28, 2014. At the beginning of the trial, the parties stipulated to compensability, the date of injury, notice, Mr. Alexander's weekly compensation rate, the date of maximum medical improvement, the payment of temporary total and temporary partial benefits, Mr. Alexander's age and educational level, and to the inapplicability of the 1.5 statutory cap. Also at the beginning of the trial, Mr. Alexander sought and was permitted to amend his complaint to seek an award of permanent total disability benefits.

Factual Background and Testimony

Mr. Alexander was 61 years old at the time of trial. Mr. Alexander completed the fifth grade and a portion of the sixth grade. He obtained a Commercial Driver's License and, beginning in 1978, he worked as a truck driver for Cole Trucking. In 2001, Mr. Alexander went to work for Cole's successor, Shippers Choice. At Shippers Choice, Mr. Alexander worked in the shop as a mechanic, and then as a supervisor. In approximately 2007 or 2008, Mr. Alexander went to work for A&A as a local truck driver. This work included hooking and unhooking trailers, and strapping down and covering loads with a tarp.

On February 19, 2010, Mr. Alexander injured his right shoulder. Mr. Alexander testified that he was strapping down a load when the injury occurred. According to Mr.

Alexander, his shoulder just acted “funny.” After seeing his primary care physician, Mr. Alexander continued working until July 16, 2010. On that date, Mr. Alexander re-injured his right shoulder while strapping down and covering a load with a tarp.

Mr. Alexander sought treatment from orthopaedic surgeon, Dr. David A. Pearce. Dr. Pearce testified by deposition. Dr. Pearce first saw Mr. Alexander for complaints of right shoulder pain on August 24, 2010. Dr. Pearce initially treated Mr. Alexander conservatively. Dr. Pearce ordered diagnostic imaging and anti-inflammatory medication. Following review of the diagnostic imaging, Dr. Pearce diagnosed Mr. Alexander with a leading edge supraspinatus full thickness tear with some AC joint arthrosis and biceps tendinosis. He recommended surgery. On December 2, 2010, Dr. Pearce performed a rotator cuff repair, a distal clavicle resection, and a biceps tenodesis. Following surgery, Dr. Pearce prescribed physical therapy for Mr. Alexander and continued to follow him periodically. According to Dr. Pearce, Mr. Alexander did very well with the physical therapy and achieved near full range of motion and full strength.

Mr. Alexander testified that he progressed following surgery, that a lot of his pain went away, and that Dr. Pearce first released him to light duty work. At that time, Mr. Alexander went back to work for A&A in the shop, doing cleaning and running errands, but no heavy work.

On May 25, 2011, Dr. Pearce indicated that he would like to have Mr. Alexander undergo a functional capacity evaluation before he rated him and released him. On June 2, 2011, Mr. Alexander underwent a functional capacity evaluation (“FCE”) performed by David Brick. The FCE concluded that Mr. Alexander was functioning in the medium heavy range of work, and capable of lifting 75 pounds occasionally.

Dr. Pearce testified that he performed a physical examination of Mr. Alexander on August 2, 2011. According to Dr. Pearce, the findings of his examination were consistent in terms of overall motion and function with the results of the FCE. Dr. Pearce found that Mr. Alexander had achieved near full range of motion and full strength. Dr. Pearce placed Mr. Alexander at maximum medical improvement. Pursuant to the AMA Guides Sixth Edition, Dr. Pearce assigned Mr. Alexander an anatomical impairment rating of 10% to the upper right extremity, or 6% to the body as a whole, based upon the distal clavicle resection, and released him to full duty with no restrictions. Dr. Pearce testified that the absence of restrictions was consistent with both his own examination of Mr. Alexander on August 2, 2011, and with the FCE, and that he relied upon both because the two were consistent. Dr. Pearce further testified that even absent the FCE, he was of the opinion, based upon his own examination, that Mr. Alexander had achieved full function with no restrictions. Dr. Pearce also testified that his anatomical impairment rating of 10% to the upper extremity, or 6% to

the body as a whole, was appropriate even separate and apart from any reservations he had about the method for rating an injury such as Mr. Alexander's required under the AMA Guides Sixth Edition.

Following his August 2, 2011 release by Dr. Pearce, Mr. Alexander continued working for A&A in the shop, where he performed mechanic work, cleaned the shop, and ran errands. He also worked for A&A on a family farm, where he performed bush hogging with a tractor, hauling brush in a dump truck, clearing land with a back hoe, and running cattle, all without difficulty. Mr. Alexander was laid off by A&A effective December 15, 2011, due to a lack of work. Although A&A indicated at the time that the lay-off was temporary, Mr. Alexander testified at trial that he had not returned to work for A&A, and that he had not been employed since that time.

On January 9, 2012, Mr. Alexander underwent an independent medical examination ("IME") by orthopaedic surgeon Dr. Apurva Dalal, at the request of his attorney. Dr. Dalal testified by deposition. Dr. Dalal saw Mr. Alexander on only one occasion and provided him no treatment. Dr. Dalal performed a physical examination of Mr. Alexander. Dr. Dalal testified that Mr. Alexander exhibited moderate to severe atrophy of the muscles in his right shoulder, leading to a loss of strength. Dr. Dalal further testified that Mr. Alexander exhibited significant loss of motion, especially in internal and external rotation. Dr. Dalal testified that under the AMA Guides Sixth Edition, he was permitted to rate Mr. Alexander on the basis of his loss of motion; this resulted in a higher anatomical impairment rating than had he rated him on the basis of the distal clavicle resection, as had Dr. Pearce. Dr. Dalal assigned Mr. Alexander an anatomical impairment rating of 19% to the upper extremity, or 11% to the body as a whole, based upon loss of range of motion. Had he rated Mr. Alexander on the basis of the distal clavicle resection, Dr. Dalal would have assigned him an anatomical impairment rating of 12% to the upper extremity, which would have equated to 7% to the body as a whole. Dr. Dalal recommended that Mr. Alexander not do any manual labor with his right upper extremity, not lift more than ten pounds with his right upper extremity, not do any overhead work or work away from the body, pulling, pushing and lifting. He recommended no manual or repetitive work. Dr. Dalal agreed that his recommendation of no lifting greater than ten pounds was not a restriction, but rather was a recommendation.

On July 16, 2012, Mr. Alexander underwent a Medical Impairment Rating ("MIR") evaluation by orthopaedic surgeon Dr. James G. Warmbrod, Jr., pursuant to Tenn. Code Ann. § 50-6-204(d)(5). Dr. Warmbrod testified by deposition. Dr. Warmbrod was furnished and reviewed the records of Mr. Alexander's primary care physician who had treated him after his initial injury, the records of Dr. Pearce, the FCE, and Dr. Dalal's IME. Dr. Warmbrod performed his own physical examination of Mr. Alexander. Contrary to Dr. Dalal, Dr.

Warmbrod noted no atrophy of the musculature of the upper right extremity. He conducted active and passive range of motion measurements. Also contrary to Dr. Dalal, Dr. Warmbrod found Mr. Alexander to have good external and internal rotation. Pursuant to the AMA Guides Sixth Edition, Dr. Warmbrod assigned Mr. Alexander an anatomical impairment rating of 12% to the upper extremity, or 7% to the body as a whole, based upon the distal clavicle resection. Dr. Warmbrod testified that, based upon his own examination, he agreed with the FCE performed on Mr. Alexander indicating that he was capable of functioning in a medium to heavy work range of 75 pounds. However, he also stated that Mr. Alexander should not engage in repetitive activity above shoulder height.

On August 16, 2012, Mr. Alexander underwent an "All Systems Examination" by Dr. Steven Weaver for purposes of a Social Security Disability claim. According to Dr. Weaver's report, Mr. Alexander presented for evaluation of allegations regarding a bulging disk in his back, right shoulder surgery, bilateral knee pain, and hearing loss. Dr. Weaver took a history and performed a physical examination. Based upon his medical findings and diagnosis and medical documentation received, Dr. Weaver found that Mr. Alexander had certain limitations on lifting up to 10 pounds, carrying up to ten pounds, standing and walking, stooping, kneeling, and climbing stairs. However, these limitations were all due to a combination of Mr. Alexander's low back, knees and right shoulder. Mr. Alexander testified at trial that he has been found to be disabled by the Social Security Administration.

Mr. Alexander testified that as of the date of the trial, his shoulder did not hurt too much and that he lives with it; the only real problem is that he cannot move it like he could before the injury. He further testified that he has a small, constant pain that is not too bad, and that he occasionally takes Tylenol; he has not taken prescription pain medication since August of 2011. Mr. Alexander has not seen a physician for treatment of his shoulder since Dr. Pearce discharged him in August 2011.

Mr. Alexander testified that he no longer hunts because he cannot climb into or out of a deer stand. He does still ride his motorcycle. Mr. Alexander also testified that he can mow his yard and use a trimmer. He performs maintenance on his vehicles, including changing the oil. He has no problem operating his personal vehicle.

Mr. Alexander renewed his CDL in August 2012, and still held it at the time of trial. Mr. Alexander testified, however, that he does not believe he could return to work as a truck driver. According to Mr. Alexander, he cannot put his right hand over his head, he could not place a tarp on a truck or strap a load, and he could not change a tire. Mr. Alexander is unsure whether or not he could climb in and out of a truck. Although there are certain aspects of the job he could perform with his left hand, there are others that he does not believe he could do with his left hand. Mr. Alexander testified that he could run parts like

he did when on light duty at A&A. He also acknowledged that after he was released by Dr. Pearce in August 2011, he was able to drive a dump truck and to operate a backhoe.

On February 4, 2013, Mr. Alexander underwent a vocational/psychological evaluation by Robert W. Kennon, Ph.D., at the request of his attorney. Dr. Kennon testified live at trial. Dr. Kennon reviewed Mr. Alexander's prior medical records and the FCE, the IME by Dr. Dalal, the MIR evaluation by Dr. Warmbrod, and the evaluation by Dr. Weaver. Dr. Kennon performed a clinical interview which included the taking of an educational, medical and mental health, and occupational history. He also performed a mental status examination and performed testing of intellectual and academic abilities. Dr. Kennon then performed a transferrable skills analysis utilizing the types of work previously performed by Mr. Alexander and the physical restrictions imposed by his physicians. Dr. Kennon actually performed four separate transferrable skills analyses based upon the differing restrictions of the four physicians involved in this case. Based upon Dr. Pearce's assignment of no physical restrictions, Dr. Kennon determined that Mr. Alexander had no loss of transferrable skills and had no vocational impairment. Based upon Dr. Warmbrod's and the FCE's determination that Mr. Alexander was capable of lifting 75 pounds, Dr. Kennon determined that Mr. Alexander had lost 84.21% of highly transferrable job skills. Based upon Dr. Dalal's recommendations, Dr. Kennon determined that Mr. Alexander had lost 100% of highly transferrable job skills. Dr. Kennon reached this same determination based upon Dr. Weaver's lifting restriction. Consistent with his transferrable job skills analyses, Dr. Kennon testified that based upon Dr. Pearce, Mr. Alexander had no vocational impairment; based upon Dr. Dalal and Dr. Weaver, he had a 100% vocational impairment; and, based on Dr. Warmbrod, he had an 84.21% vocational impairment.

On January 6, 2014, Mr. Alexander underwent a vocational evaluation by Michelle McBroom Weiss, a certified vocational rehabilitation counselor, at the request of A&A's attorney. Ms. Weiss reviewed a variety of records, including Mr. Alexander's medical records, the FCE, Dr. Dalal's IME, Dr. Warmbrod's MIR, Dr. Weaver's evaluation, Dr. Kennon's report, and the depositions of Mr. Alexander, Dr. Pearce, Dr. Dalal, and Dr. Warmbrod. She obtained a family/social history and an educational/vocational history. Ms. Weiss also performed vocational testing and a transferrable skills analysis. According to Ms. Weiss, Mr. Alexander's most significant transferable skill was driving, including driving trucks, tractor-trailers, and dump trucks. Other transferable skills included those of a parts clerk, welder, tire changer, oil changer, and lubrication servicer. Ms. Weiss concluded that based upon Dr. Pearce's determination of no restrictions, Mr. Alexander had no loss of access to jobs. Based upon Dr. Warmbrod's restrictions, Mr. Alexander had a 19% loss of access to jobs. According to Ms. Weiss, considering either Dr. Pearce's or Dr. Warmbrod's determination with respect to restrictions, Mr. Alexander would experience no wage loss. Finally, Ms. Weiss determined that considering Dr. Pearce's determination with respect to

restrictions, Mr. Alexander had no vocational disability; considering the FCE, he had a 5% vocational disability; and, considering Dr. Warmbrod's restrictions, he had a 10% vocational disability. Ms. Weiss did not consider Dr. Dalal's recommended lifting limitation because it was a recommendation and not a restriction, and because the recommendation was only with respect to one arm and was vague. Ms. Weiss also did not consider Dr. Weaver's evaluation because his lifting and carrying restrictions were not clearly bilateral, and because they included non-work-related conditions, such that further clarification was needed.

Trial Court Findings

The trial court took the case under advisement and issued a letter ruling on June 20, 2014. The trial court stated the issues before it as follows:

1. Correct anatomical rating.
2. Whether or not Plaintiff is permanently and totally disabled.
3. Whether Plaintiff is entitled to medical mileage expense.
4. Nature and extent of vocational disability.

The trial court found that there was not clear and convincing evidence sufficient to rebut the presumption of correctness accorded to Dr. Warmbrod's anatomical impairment rating as required by Tenn. Code Ann. § 50-6-204(d)(5), and so adopted his impairment rating of 12% to the right upper extremity, or 7% to the body as a whole. The trial court found that Mr. Alexander was not permanently totally disabled. The trial court was persuaded by Dr. Kennon's testimony with respect to Mr. Alexander's vocational disability based upon Dr. Warmbrod's restrictions. The court determined, however, that it was limited to Dr. Warmbrod's anatomical impairment rating and by the statutory cap of six times that rating under Tenn. Code Ann. § 50-6-241. The trial court found that Mr. Alexander had an anatomical impairment of 7% to the body as a whole and a vocational disability of 84% to the body as a whole, but that his award was limited to 42% permanent partial disability to the body as a whole based upon the statute. The court also awarded Mr. Alexander \$525.66 in unpaid medical mileage.

Mr. Alexander appealed the trial court's decision, contending that the trial court erred in failing to find Mr. Alexander permanently totally disabled; that, alternatively, Mr. Alexander is entitled to receive permanent partial disability benefits beyond the six times cap because three of the four criteria of Tenn. Code Ann. § 50-6-242(b) are met; and, that the trial court erred in according a presumption of correctness to the MIR rating because the AMA Guides Sixth Edition, upon which the MIR rating was based, is medically incorrect as applied to Mr. Alexander's injury. The appeal has been referred to the Special Workers' Compensation Appeals Panel. See Tenn. Sup. Ct. R. 51, § 1.

Standard of Review

In Tennessee workers' compensation cases, this Court reviews the trial court's findings of fact *de novo*, accompanied by a presumption of correctness of the findings, unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008 & Supp. 2013); Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). "This standard of review requires us to examine, in depth, a 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)). We give considerable deference in reviewing the trial court's findings of credibility and assessment of the weight to be given to that testimony, when the trial court has heard in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). No similar deference need be afforded the trial court's findings based upon documentary evidence such as depositions. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). On questions of law, our standard of review is *de novo* with no presumption of correctness. Wilhelm, 235 S.W.3d at 126. The extent of vocational disability is a question of fact to be decided by the trial judge. Johnson v. Lojac Materials, 100 S.W.3d 201, 202 (Tenn. Workers' Comp. Panel 2001).

Analysis

1. Permanent Total Disability

Mr. Alexander contends that the trial court erred in finding that he was not permanently totally disabled. Specifically, he contends that the trial court should have adopted Dr. Kennon's vocational disability rating based upon the restrictions or recommendations of Dr. Dalal and Dr. Weaver, rather than those of Dr. Warmbrod who performed the MIR. According to Mr. Alexander, Dr. Warmbrod's restrictions were premised upon the suspect FCE performed by David Brick. We find that the evidence does not preponderate against the trial court's finding that Mr. Alexander was not permanently totally disabled.

Tennessee Code Annotated, section 50-6-207(4)(B) provides in pertinent part:

When an injury not otherwise specifically provided for in this chapter totally incapacitates the employee from working at an occupation that brings the employee an income, the employee shall be considered totally disabled.

As the Supreme Court has explained:

Any award of permanent total disability must be in compliance with the statutory definition of total disability contained in Tennessee Code Annotated section 50-6-207(4) (2005). The test as to whether an employee is permanently and totally disabled requires us to determine if the employee is “totally incapacitate [d] . . . from working at an occupation that brings the employee an income”

The determination of permanent total disability is to be based on a variety of factors such that a complete picture of an individual's ability to return to gainful employment is presented to the Court. Such factors include the employee's skills, training, education, age, job opportunities in the immediate and surrounding communities, and the availability of work suited for an individual with that particular disability. Though this assessment is most often made and presented at trial by a vocational expert, “it is well settled that despite the existence or absence of expert testimony, an employee's own assessment of his or her overall physical condition, including the ability or inability to return to gainful employment, is ‘competent testimony that should be considered.’ ”

Hubble v. Dyer Nursing Home, 188 S.W.3d 525, 535-36 (Tenn., 2006) (citations omitted).

The trial court adopted the vocational disability rating of Mr. Alexander's expert, Dr. Kennon, but as based upon the restrictions of MIR physician Dr. Warmbrod, rather than as based upon the recommendations or restrictions of Dr. Dalal or Dr. Weaver. This resulted in a vocational disability rating of 84% rather than 100%. Contrary to Mr. Alexander, the trial court did not err in adopting this vocational disability rating.

As conceded by Mr. Alexander, see Brief of Appellant, p.7, Dr. Warmbrod was properly permitted to opine as to restrictions, though his opinion in this regard was not entitled to the same statutory presumption of correctness as was his anatomical impairment rating. See Courier Printing Company v. Sims, 2011 WL 2936350 at *6 (Tenn. Workers Comp. Panel 2011). Contrary to the contention of Mr. Alexander, we do not find the restrictions of Dr. Warmbrod to have been tainted by the aspersions which Mr. Alexander casts upon the veracity of Mr. Brick, who performed the FCE. In the first instance, the

restrictions of Dr. Warmbrod actually exceeded those of both Mr. Alexander's treating physician, Dr. Pearce, and of the FCE, even though Dr. Warmbrod's findings on his own examination and his anatomical impairment rating were essentially consistent with those of Dr. Pearce. In the second instance, Dr. Warmbrod relied upon his own examination. He testified that based upon that examination, he determined that Mr. Alexander's shoulder had healed well and he agreed with the objective findings of the FCE, although he added that he did not believe Mr. Alexander should engage in any repetitive activity above shoulder height. Dr. Warmbrod testified that the matter raised by Mr. Alexander with respect to Mr. Brick did not impact Dr. Warmbrod's opinion regarding Mr. Alexander's work restrictions.

We find no error in the trial court's decision not to rely upon Dr. Kennon's vocational disability rating based upon the recommendations or restrictions of Dr. Dalal or Dr. Weaver. Dr. Dalal's findings on examination and his anatomical impairment rating were inconsistent with those of Dr. Pearce and Dr. Warmbrod. Moreover, Dr. Dalal testified that his was a recommendation with respect to lifting, not a restriction. Dr. Weaver's restrictions were based upon several non-work-related conditions, in addition to Mr. Alexander's shoulder injury.

Finally we find that Mr. Alexander's testimony supports the trial court's finding that he was not permanently totally disabled. Mr. Alexander's testimony evidences an ability after his release by Dr. Pearce to continue to engage in "an occupation that brings the employee an income." Mr. Alexander testified as to a number of occupational tasks that he was capable of performing after his release, and in fact he performed significant tasks for A&A after his release and prior to his layoff. This coupled with the testimony of his own vocational expert, Dr. Kennon, supports the trial court's finding, and the evidence do not preponderate against that finding.

2. Six Times Cap

Mr. Alexander asserts that he was entitled to receive an award of permanent partial disability benefits in excess of the statutory six times cap, Tenn. Code Ann. § 50-6-241. According to Mr. Alexander he met at least three of the four criteria for such an award. Tenn. Code Ann. § 50-6-242(b).¹ Mr. Alexander concedes that "[t]his case was not tried on

¹This provision permits an employee to receive an award of benefits in excess of six times the medical impairment rating where the court makes "specific documented findings, supported by clear and convincing evidence, that as of the date of the award ... , at least three of the following facts concerning the employee are true:

- (1) The employee lacks a high school diploma or general equivalency diploma or the employee cannot read or write on a grade eight (8) level;

this alternative theory of recovery.” Mr. Alexander contends, however, that the stipulations and proof at trial established three such criteria² by clear and convincing evidence, such that we may render this finding and award him benefits in excess of six times his anatomical impairment rating. Mr. Alexander alternatively contends that we could remand the case to the trial court to make such a finding. We do not find either contention to have merit.

The determination of whether the criteria for exceeding the statutory six times cap were established by clear and convincing evidence in a case is one for the trial court, not for this Panel. See, Leab v. S & H Mining Company, 76 S.W.3d 344, 351 (Tenn. 2002). As noted, Mr. Alexander did not present the issue of whether he was entitled to an award of permanent partial disability benefits in excess of the statutory six times cap to the trial court. See Brief of Appellant, pp.9,11. In fact, at the outset of the trial, Mr. Alexander sought and was granted leave to amend his complaint to allege that he was permanently totally disabled. Mr. Alexander was permitted and elected to proceed solely on that theory at trial. Indeed, in his opening statement, counsel for Mr. Alexander appears to have conceded that if the trial court were to determine that Mr. Alexander was not permanently totally disabled, then the six times cap would apply. See TR. Vol.2, p.9. The trial court, thus, was not asked to nor did it undertake to determine whether the criteria for exceeding the statutory six times cap were established by clear and convincing evidence in this case.

An issue not raised in the trial court may not be raised for the first time on appeal. In re Estate of Smallman, 398 S.W.3d 134, 148 (Tenn. 2013); In re Taylor B.W., 397 S.W.3d 105, 114 (Tenn. 2013); Dog House Investments, LLC v. Teal Properties, Inc., 448 S.W.3d 905 (Tenn. Ct. App. 2014), perm. app. denied (Tenn. July 11, 2014). Such an issue is waived. In re Estate of Smallman, 398 S.W.3d at 148. We, therefore, decline to determine this issue the first instance.³ We further decline to remand the case to the trial court to

(2) The employee is fifty-five (55) years of age or older;

(3) The employee has no reasonably transferable job skills from prior vocational background and training; and

(4) The employee has no reasonable employment opportunities available locally considering the employee's permanent medical condition.”

²The parties stipulated to Mr. Alexander’s educational level and age, satisfying criteria (1) and (2). According to Mr. Alexander, the proof at trial also satisfied criteria (3), the absence of transferable job skills.

³We would note, without deciding, that our review of the evidence in this case casts strong doubt upon whether there was clear and convincing evidence of an absence of reasonably transferable job skills as asserted by Mr. Alexander.

require that it consider this issue.⁴

3. *The AMA Guides*

Mr. Alexander contends that the trial court erred in according a presumption of correctness to the anatomical impairment rating of MIR physician Dr. Warmbrod because the AMA Guides Sixth Edition, upon which he based his rating, is medically incorrect as applied to Mr. Alexander's injury. We reject this contention.

The purpose and operation of the MIR procedure have been explained as follows:

The MIR report procedure in Tenn. Code Ann. § 50-6-204(d)(5) provides a process for obtaining a definitive medical examination by an independent medical examiner regarding the extent of an injured employee's impairment. As required by Tenn. Code Ann. § 50-6-204(d)(6), the Commissioner of the Department of Labor and Workforce Development has promulgated a comprehensive set of rules (1) establishing the qualifications for physicians to be included on the registry, (2) providing procedures for requesting an MIR evaluation, (3) defining the requirements for conducting the evaluations, (4) prescribing the form in which the recommendations must be submitted, (5) establishing the time within which the actions required by the statute must be taken, (6) setting the physicians' fees for the evaluations, and (7) prescribing the procedures for the review, acceptance, and distribution of the MIR reports by the Commissioner.

As a general matter, written reports of medical evaluations conducted for the purpose of workers' compensation litigation are hearsay. Thus, in accordance with Tenn. R. Evid. 802, they are not admissible unless as provided by the Tennessee Rules of Evidence or by law. While an MIR report prepared in accordance with Tenn. Code Ann. § 50-6-204(d)(5) does not qualify as an exception to the hearsay rule as a record of a regularly conducted activity under Tenn. R. Evid. 803(6), we

⁴In contrast to this case, in Leab the trial court was presented with this issue and found that the criteria necessary for an award in excess of the statutory six times cap had been met, but the court failed to document that it had made the requisite finding by clear and convincing evidence. The case was remanded to the trial court for that purpose. 76 S.W.3d at 350-51. Leab, therefore, does not support remand in this case.

have determined that these reports are admissible as a matter of law in the same way that reports of court-appointed neutral physicians and statements of a physician's opinion on Form C-32 are admissible.

The statutes and rules governing MIR reports reflect that the General Assembly's purpose was to provide an efficient method for presenting neutral, objective opinions regarding an employee's impairment to aid trial courts when the parties disagree regarding the extent of the impairment. If the requirements in Tenn. Code Ann. § 50-6-405(d)(5) and the regulations promulgated thereto are met, the report becomes a self-authenticating official document certified by the Department of Labor and Workforce Development. The document itself gives rise to a rebuttable presumption that the impairment rating in the document is "the accurate impairment rating." Tenn. Code Ann. § 50-60-204(d)(5). Accordingly, properly prepared and certified MIR reports should not be excluded as hearsay because their admissibility is otherwise provided by law.

Williams v. United Parcel Service, 328 S.W.3d 497, 502 (Tenn. Workers Comp. Panel 2010) (footnotes and citations omitted).

The presumption of accuracy of MIR reports and ratings has been consistently afforded. As the Supreme Court recently noted:

In the eight years since the MIR program was established, the presumption of accuracy given an MIR report has consistently been applied in the trial courts. We have been unable to find any decision of this Court, or of any Special Workers' Compensation Appeals Panel, in which the MIR process was held to be limited to the administrative proceedings in the DOL. Instead, trial courts have consistently accepted MIR reports, which have consistently been afforded a presumption of accuracy on the issue of medical impairment. See, e.g., Bean v. Teepro, Inc., No. M2010-00264-WC-R3-WC, 2011 WL 686449, at *8 (Tenn. Workers Comp. Panel Feb. 28, 2011) (modifying award of compensation to adopt impairment rating by MIR physician, which should have received a presumption of accuracy in the trial court); Tuten v. Johnson Controls, Inc., No. W2009-01426-SC-WCM-WC, 2010 WL 3363609, at *4

(Tenn. Workers Comp. Panel Aug. 25, 2010) (rejecting employee's claim that trial court erred by adopting impairment rating of MIR physician); Transp. Serv., LLC v. Allen, No. E2009-01268-WC-R3-WC, 2010 WL 2943147, at *8 (Tenn. Workers Comp. Panel July 26, 2010) (same).

Mansell v. Bridgestone Firestone North American Tire, LLC, 417 S.W.3d 393, 401 n.3 (Tenn. 2013).

Mr. Alexander offers no compelling reason to change course in this case.

Mr. Alexander challenges the underpinning of Dr. Warmbrod's MIR rating, the AMA Guides Sixth Edition. His challenge is premised on the suggestion that in this case the Guides were medically incorrect. Mr. Alexander supports this suggestion with testimony from Dr. Pearce and Dr. Dalal, both of whom offered misgivings about the Guides in certain cases. However, Dr. Pearce testified that his anatomical impairment rating of 10% to the upper extremity, 6% to the body as a whole, was appropriate even separate and apart from any reservations he had about the method for rating an injury such as Mr. Alexander's required under the AMA Guides. Dr. Pearce's rating was consistent, though actually slightly lower, than that of Dr. Warmbrod, who expressed no such reservations about the Guides. Dr. Dalal similarly was able to arrive at what he believed to be an appropriate rating utilizing the Guides.

Moreover, regardless of any particular physician's personal misgivings about the AMA Guides, the Tennessee General Assembly has expressed its clear intent that the Guides generally are to be used. The relevant provision of the Workers' Compensation Law provides in pertinent part:

(A) To provide uniformity and fairness for all parties in determining the degree of anatomical impairment sustained by the employee, a physician, chiropractor or medical practitioner who is permitted to give expert testimony in a Tennessee court of law and who has provided medical treatment to an employee or who has examined or evaluated an employee seeking workers' compensation benefits *shall utilize* the applicable edition of the AMA Guides as established in § 50-6-102 or, in cases not covered by the AMA Guides, an impairment rating by any appropriate method used and accepted by the medical community.

(B) *No anatomical impairment or impairment rating*, whether contained in a medical record, medical report, including a

medical report pursuant to § 50-6-235(c), deposition or oral expert opinion testimony *shall be accepted* during a benefit review conference *or be admissible into evidence* at the trial of a workers' compensation matter *unless the impairment is based on the applicable edition of the AMA Guides* or, in cases not covered by the AMA Guides, an impairment rating by any appropriate method used and accepted by the medical community.

Tenn. Code Ann. § 50-6-204(d)(3)(A) and (B) (emphasis added).

Mr. Alexander notes that the Guides have been held not to be the equivalent of law. See Dotson v. Rice-Chrysler-Plymouth-Dodge, Inc., 160 S.W.3d 495, 501 (Tenn. 2005). While this is true, and while under certain circumstances the failure to properly follow the Guides may be excused, there is no authority for the proposition that following the Guides as statutorily directed somehow renders a physician's determination based thereon invalid. We decline to so hold in this case.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed. The costs of this appeal are taxed to Ralph Alexander, and his surety, for which execution may issue if necessary.

MARTHA B. BRASFIELD,
CHANCELLOR

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

RALPH ALEXANDER v. A & A EXPRESS LLC

**Chancery Court for Chester County
No. 2012CV603**

No. W2014-01643-SC-R3-WC – Filed September 10, 2015

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 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 Appellant, Ralph Alexander, and his surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM