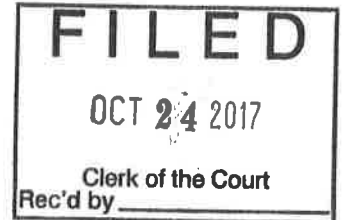


IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
August 22, 2017 Session

JAMES ESTEL JEFFERS v. ARMSTRONG WOOD PRODUCTS ET AL.

**Appeal from the Circuit Court of Scott County
No. 2011-CV-8240 John D. McAfee, Judge**

No. E2017-00499-SC-R3-WC



An employee filed a claim for workers' compensation benefits, alleging that he injured his back in the course and scope of his employment. His employer denied the claim. The trial court ruled the employee was permanently and totally disabled and apportioned liability fifty-two percent to the employer and forty-eight percent to the Second Injury Fund. The employer appealed,¹ arguing the trial court erred in finding the employee established a work-related injury and in apportioning the liability for the award. After careful review, we affirm the trial court's judgment.

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

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

Lynn C. Peterson, Knoxville, Tennessee, for the appellants, Armstrong Wood Products, Inc., and AIG Casualty Company.

C. Patrick Sexton, Oneida, Tennessee, for the appellee, James Estel Jeffers.

Herbert H. Slatery III, Attorney General and Reporter; Brian A. Pierce and Alexander S. Rieger, Assistant Attorneys General, for the appellee, Tennessee Department of Labor and Workforce Development, Second Injury Fund.

¹ The appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51.

OPINION

I.

James Estel Jeffers left school in the eighth grade when he was sixteen years old. He went to work at a produce plant and later held various jobs with other companies performing manual labor. In 1986, he began working at Hartco, a predecessor to Armstrong Wood Products (“Armstrong”). He worked on the assembly line, operated machinery, drove trucks, did cleanup, and filled in when other employees were on vacation.

In August 1991, Mr. Jeffers ruptured the L5/S1 disc in his lower back. After surgery on his back, he returned to work for Armstrong and worked forty to fifty hours per week with some lifting and bending restrictions. In November 2001, Mr. Jeffers suffered a herniated disc at C5/6 and C6/7 and had surgery on his neck and right shoulder. He returned to work but could not perform some of his job duties and overhead tasks. In 2007, Mr. Jeffers had surgery on his shoulder to repair a torn bicep. He returned to Armstrong and worked forty to fifty hours per week as a forklift operator.

In 2008, Armstrong fired Mr. Jeffers for reasons unrelated to an injury; Mr. Jeffers filed a grievance, was reinstated, and returned to work on September 21, 2009. He was offered three positions and chose the position of “nester.” As a nester, he lifted boards that weighed four to six pounds, stacked them onto a large metal cart, and pushed the cart. Although he was sore after returning to work, he worked forty to fifty hours per week and did not have any severe pain.

On October 11, 2009, Mr. Jeffers bent over while stacking wood and could not stand up for several minutes. He needed to grab a cart to keep from falling. After reporting that his back had “locked up,” Mr. Jeffers was told to go home. When he got home, he had spasms in his back and pain in his left leg. On October 12, 2009, Mr. Jeffers went to his family doctor, Dr. Timothy Smith, who administered an anti-inflammatory injection and prescribed medications. After missing three days of work, Mr. Jeffers returned to work but avoided lifting or twisting. He then took one week of vacation for additional recovery time. When he returned from vacation, he worked for a day and a half before he was suspended. Mr. Jeffers was terminated on November 5, 2009, and has not worked since.

In December 2010, Mr. Jeffers filed a Request for Benefit Review Conference. The parties were unable to resolve the case at the conference. In November 2011, Mr. Jeffers filed a complaint for workers’ compensation benefits in the Circuit Court for Scott

County against Armstrong, its workers' compensation insurer, and the Tennessee Department of Labor and Workforce Development, Second Injury Fund.

At trial on October 26, 2016, Mr. Jeffers testified that before being injured on October 11, 2009, he could perform his job as a nester and engaged in all his usual activities, except for riding a four-wheeler. He admitted that when he went to physical therapy on October 13, 2009, he had been having lower back pain for about two weeks; however, he explained that he had been referring to soreness and not the type of pain he experienced on October 11, 2009. Since leaving Armstrong, Mr. Jeffers is no longer able to work due to the pain in his back and hips. His activities are limited, and he is unable to drive long distances. He has a constant "dull ache" in his back, and his back "locks up" when he does too much.

Dr. Smith, a board-certified family physician, testified for Mr. Jeffers by deposition that he examined Mr. Jeffers on October 12, 2009, the day after Mr. Jeffers' injury. Mr. Jeffers had a decreased range of motion and tenderness of his spine at L4-L5. Dr. Smith administered an anti-inflammatory injection, prescribed medications, and recommended physical therapy. On October 22, 2009, Mr. Jeffers reported to Dr. Smith that although his back had improved, he was having shoulder and hip pain and numbness and tingling in his hands and feet. Dr. Smith ordered x-rays of Mr. Jeffers' cervical and lumbar spine. On October 29, 2009, Dr. Smith noted that Mr. Jeffers had limited movement in his neck and tenderness in his lumbar spine. In March 2010, an MRI revealed a broad-based central disc protrusion at L5-S1 and an asymmetric left-sided disc bulge at L4-L5. Dr. Smith referred Mr. Jeffers for surgery and imposed limits on lifting, sitting, kneeling, crawling, and working at heights. Dr. Smith testified that Mr. Jeffers could not be gainfully employed in a physical capacity due to his injuries.

Dr. Smith further testified that he had treated Mr. Jeffers for his neck, shoulder, and back injuries for several years. In 2004, he ordered an MRI after Mr. Jeffers complained of numbness in his legs. In August 2008, he treated Mr. Jeffers for back pain that he described as a ten on a pain scale of one to ten. However, Dr. Smith did not recommend physical therapy or impose work restrictions at that time.

Dr. James Killeffer, a board-certified neurosurgeon who was on the panel of physicians provided by Armstrong, testified for Mr. Jeffers by deposition that he examined Mr. Jeffers on April 6, 2010. Mr. Jeffers indicated that his back had improved to some degree but that he still had back spasms and tingling in his left leg. Mr. Jeffers had a limited range of motion of his lumbar spine secondary to discomfort. According to Dr. Killeffer, the MRI taken in March 2010 demonstrated degenerative changes primarily at L5-S1 and evidence of previous surgery at that level, as well as degenerative changes at the L4-L5 level. He determined that Mr. Jeffers had aggravated existing lumbar

degenerative and post-operative changes and prescribed anti-inflammatory medicine and physical therapy. On May 6 and June 22, 2010, Mr. Jeffers reported ongoing back and leg pain, particularly when he tried to be active. Dr. Killeffer elected to stop physical therapy pending a functional capacity evaluation and assigned an impairment rating of seven percent to the body as a whole as a result of the October 2009 injury. He adopted the work restrictions recommended in the functional capacity evaluation, which allowed Mr. Jeffers to work at a medium physical capacity level.

In Dr. Killeffer's opinion, Mr. Jeffers' underlying degenerative and previous operative changes were aggravated by his October 2009 work injury and caused his underlying condition to be more symptomatic. Dr. Killeffer did not compare the MRI taken in 2010 with the MRI taken in 2004; however, he explained that an imaging comparison is not the only way to determine if anatomical change has occurred and that he also considered a patient's worsening pain. Dr. Killeffer testified that because Mr. Jeffers was not symptomatic enough to be out of work before the injury, the injury created symptoms and an anatomical change. Further, he explained that the incident caused injury to some soft tissue or supporting structure that decreases mobility at the degenerative level and causes aggravation of his pain—or it causes pain because of aggravation of the injury—and this decrease in mobility is difficult to detect on an imaging study.

Dr. William Kennedy, a board-certified orthopedic surgeon, testified for Mr. Jeffers by deposition that he performed an independent medical examination on Mr. Jeffers on January 24, 2011. Dr. Kennedy stated that Mr. Jeffers had a moderate paraspinous muscle spasm in the lumbar region of his back and a fifty percent normal range of motion. Dr. Kennedy did not detect any nerve root irritation. In Dr. Kennedy's opinion, the October 2009 incident caused a sprain to Mr. Jeffers' lumbar spine and permanently aggravated and advanced his preexisting, underlying, multi-level degenerative disc disease, increasing the severity of that condition. Dr. Kennedy also stated that the October 22, 2009 x-rays of Mr. Jeffers' lumbar spine showed advanced degenerative changes in his lumbar spine at each of the levels of L3, L4, and L5. Dr. Kennedy explained that Mr. Jeffers' degenerative disc disease was permanently made worse by the work-related incident of October 11, 2009. He imposed restrictions on bending, stooping, or squatting; working over rough terrain or in rough vehicles; working with his hands over his shoulders; climbing ladders or working at heights; crawling; vibrations; and lifting, carrying, or pushing and pulling over twenty pounds occasionally and ten pounds frequently. Dr. Kennedy stated that Mr. Jeffers has a nine percent impairment to the body as a whole attributable to the October 2009 injury.

Dr. Kennedy acknowledged that Mr. Jeffers' medical history included complaints of back pain prior to 2009 and that Dr. Smith had ordered an MRI in 2004 after Mr.

Jeffers complained of numbness in his legs. He did not find any anatomical changes in Mr. Jeffers' lumbar spine in the diagnostic image studies made November 14, 2004, and March 26, 2010. Dr. Kennedy concluded, however, that Mr. Jeffers had been capable of moderate work before being injured on October 11, 2009, and that he was now restricted to light work.

A. Bentley Hankins, a certified vocational evaluation specialist, testified for Mr. Jeffers by deposition that he completed a vocational evaluation report for Mr. Jeffers in February 2011. He met with Mr. Jeffers and reviewed his medical and employment histories. Based on the restrictions imposed by Dr. Kennedy and the recommendation that Mr. Jeffers be limited to light work, Mr. Hankins determined that Mr. Jeffers sustained a vocational disability of approximately eighty percent because of the October 2009 injury. He admitted that the vocational disability would be lower if based on Dr. Killeffer's recommendation that Mr. Jeffers be limited to medium work.

Mike Galloway, a vocational consultant in the vocational rehabilitation field, certified rehabilitation counselor, and board-certified disability analyst, testified for Armstrong at trial that he had reviewed the medical records and depositions. He noted that Mr. Jeffers had a commercial driver's license and a seventh grade education. Mr. Galloway stated that Mr. Jeffers' work history included unskilled and semi-skilled positions with primarily a medium physical demand. He testified that Mr. Jeffers could perform his job duties before being injured in October 2009. Based on the restrictions imposed by Dr. Killeffer and the functional capacity evaluation, Mr. Galloway determined that Mr. Jeffers had a thirty percent vocational disability because of the October 2009 injury. However, when considering the restrictions imposed by Dr. Kennedy, Mr. Galloway agreed that the October 2009 injury was responsible for seventy to seventy-five percent of Mr. Jeffers' vocational disability.

The trial court found that Mr. Jeffers, age fifty-two at the time of trial, established a work-related injury and was permanently and totally disabled under Tennessee Code Annotated section 50-6-207(4)(A)(i) (2008). The trial court determined that Armstrong was liable for fifty-two percent of the permanent total disability award and that the Second Injury Fund was responsible for forty-eight percent of the award. Armstrong appealed, arguing the trial court erred in finding that Mr. Jeffers suffered a compensable injury and in its apportionment of liability.

II.

Our 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 the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann.

§ 50-6-225(e)(2) (2008); *Kilburn v. Granite State Ins. Co.*, No. M2015-01782-SC-R3-WC, 2017 WL 1316266, at *4 (Tenn. Apr. 10, 2017). When the credibility of witnesses and the weight of their in-court testimony are at issue in a case, we afford considerable deference to the trial judge, who “had the opportunity to observe the witness’ demeanor and to hear in-court testimony.” *Mitchell v. Fayetteville Pub. Utils.*, 368 S.W.3d 442, 447–48 (Tenn. 2012) (citing *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002)). The trial judge has discretion to accept one expert’s testimony over another’s when medical testimony differs. *Fritts v. Safety Nat’l Cas. Corp.*, 163 S.W.3d 673, 679 (Tenn. 2005) (citing *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675, 676–77 (Tenn. 1983)). However, this Court draws its own conclusions about the weight and credibility of expert testimony when all medical proof is by deposition. *Id.* (citing *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 to the trial court’s conclusions. *Kilburn*, 2017 WL 1316266, at *4 (citing *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009)).

Armstrong argues that the trial court erred in finding Mr. Jeffers suffered a compensable injury because the October 11, 2009 incident caused an increase in pain but produced no anatomical change in Mr. Jeffers’ preexisting condition. Mr. Jeffers maintains the evidence does not preponderate against the trial court’s decision.

Mr. Jeffers was required to demonstrate a causal relationship between his claimed injury and his employment through expert medical evidence. *Lambdin v. Goodyear Tire & Rubber Co.*, 468 S.W.3d 1, 9 (Tenn. 2015) (quoting *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991)). Mr. Jeffers was also required to establish causation by the preponderance of the expert medical testimony, as supplemented by lay witness evidence. *Id.* (citing *Trosper v. Armstrong Wood Prods., Inc.*, 273 S.W.3d 598, 604, 609 (Tenn. 2008)). Absolute certainty in causation in workers’ compensation cases is not required, since medical proof is rarely certain, but causation cannot be based on speculative or conjectural proof. *Id.* (quoting *Clark v. Nashville Mach. Elevator Co.*, 129 S.W.3d 42, 47 (Tenn. 2004)).

An employee does not suffer a compensable injury when the work activity aggravates a preexisting condition only by increasing the pain. *Trosper*, 273 S.W.3d at 607. However, the work injury is compensable if it advances the severity of a preexisting condition, or if, as a result of the preexisting condition, the employee suffers a new, distinct injury other than increased pain. *Id.*; see also *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d 638, 645–46 (Tenn. 2008).

The Tennessee Supreme Court was presented with a similar set of facts in *Cloyd*, where an employee working as a nester at Hartco reported that his wrist “went out” on

him and “knotted up.” *Cloyd*, 274 S.W.3d at 641. He was diagnosed with osteoarthritis. *Id.* At trial, Dr. Kennedy testified that, although arthritis is a degenerative injury, trauma can speed the progression of arthritis and that the work incident “tipped the scale” of the employee’s condition or “was the straw that broke the camel’s back.” *Id.* at 641–42. The trial court ruled for the employee. *Id.* at 642. On appeal, the Tennessee Supreme Court held that although an increase in the level of pain alone is not sufficient to make an injury compensable, there was evidence that the work incident actually triggered the onset of pain and swelling in the employee’s hand. *Id.* at 646. The Tennessee Supreme Court affirmed the trial court, concluding that the employee suffered a work injury that advanced the severity of his preexisting arthritic condition. *Id.*

Here, the evidence does not preponderate against the trial court’s finding that Mr. Jeffers suffered a compensable injury to his lower back on October 11, 2009. Dr. Kennedy testified that, although he did not find any anatomical changes in Mr. Jeffers’ lumbar spine in the November 14, 2004 and March 26, 2010 diagnostic image studies, he concluded the October 2009 incident caused the sprain to Mr. Jeffers’ lumbar spine and permanently aggravated and advanced the preexisting, underlying, multiple-level degenerative disc disease, increasing the severity of that condition. Similarly, Dr. Killeffer testified Mr. Jeffers’ underlying degenerative and previous operative changes were aggravated by his work injury and caused his underlying condition to be more symptomatic. Although Dr. Killeffer did not review the MRI taken in 2004, he surmised that the injury created symptoms and that an anatomical change did occur. Although Armstrong insists that Mr. Jeffers suffered only an increase in pain, the trial court accredited Mr. Jeffers’ testimony that he had been able to perform his job responsibilities before the October 2009 injury and could not engage in his usual activities after the injury. We hold that the evidence does not preponderate against the trial court’s judgment that Mr. Jeffers suffered a compensable injury on October 11, 2009.

Next, Armstrong argues that the trial court erred in determining that it was liable for fifty-two percent of Mr. Jeffers’ permanent and total disability. Armstrong contends that Mr. Jeffers had a history of back problems and had been working for only three weeks before sustaining a back sprain. Mr. Jeffers and the Second Injury Fund argue that the evidence supports the trial court’s apportionment.

Tennessee Code Annotated section 50-6-208(a)(1) provides:

If an employee has previously sustained a permanent physical disability from any cause or origin and becomes permanently and totally disabled through a subsequent injury, the employee shall be entitled to compensation from the employee’s employer . . . only for the disability that would have resulted from the subsequent injury, and the previous injury shall not be

considered in estimating the compensation to which the employee may be entitled . . . from the employer . . . ; provided, that in addition to the compensation for a subsequent injury, and after completion of the payments for the subsequent injury, then the employee shall be paid the remainder of the compensation that would be due for the permanent total disability out of a special fund to be known as the second injury fund.

Tenn. Code Ann. § 50-6-208(a)(1) (2008).

The Tennessee Supreme Court has explained that to receive benefits under subsection (a), the employee must have sustained a permanent physical disability from any cause or origin, whether compensable or non-compensable, and became permanently and totally disabled through a subsequent injury. *Allen v. City of Gatlinburg*, 36 S.W.3d 73, 76 (Tenn. 2001) (citing Tenn. Code Ann. § 50-6-208(a)(1) (1999)). Liability may be apportioned to the Second Injury Fund only if the employer had actual knowledge of the preexisting injury before the subsequent injury occurred. *Id.* The trial court must determine the extent of disability resulting from the subsequent injury without consideration of the prior injury. *Id.* at 77. In doing so, the trial court must find what disability a person in the same position as the plaintiff with no preexisting disabilities would have sustained only because of the second injury and not the first injury. *Id.*

Here, the evidence does not preponderate against the trial court's apportionment of liability to Armstrong of fifty-two percent of Mr. Jeffers' award. The evidence established that Mr. Jeffers had sustained previous injuries in 1991, 2001, and 2007. He performed all of his job duties from September 21, 2009, until he was injured on October 11, 2009. Mr. Jeffers had muscle soreness but no severe pain until the October 2009 injury. Although Mr. Jeffers admitted that he had been previously treated for back problems, he could perform his job duties and engage in his usual activities before the injury. Dr. Killeffer determined Mr. Jeffers had a seven percent impairment rating because of the October 2009 injury. Similarly, Dr. Kennedy concluded he had a nine percent impairment rating due to the injury. In Mr. Hankins' opinion, Mr. Jeffers had an eighty percent vocational impairment because of the injury based on restrictions imposed by Dr. Kennedy. Mr. Galloway testified that Mr. Jeffers had a thirty percent vocational impairment due to the injury based on Dr. Killeffer's testimony; however, he admitted that the vocational impairment was seventy to seventy-five percent when based on Dr. Kennedy's testimony.

We conclude that the trial court did not err in assigning fifty-two percent of the liability for the award to Armstrong and the balance to the Second Injury Fund.

III.

The trial court's judgment is affirmed. Costs are assessed to Armstrong Wood Products, Inc., and its surety, for which execution shall issue if necessary.

SHARON G. LEE, JUSTICE