

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON  
April 23, 2018 Session

**WESLEY DAVID FLY v. MR. BULT'S INC. ET AL.**

**Appeal from the Circuit Court for Benton County  
No. 16-CV-4 Charles C. McGinley, Judge**

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**No. W2017-00828-SC-R3-WC – Mailed June 22, 2018; Filed July 25, 2018**

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Employee, Wesley David Fly, was injured in the course of his employment, and the parties agree that Employee is permanently and totally disabled. The circuit court found that Employee was not capable of gainful employment and awarded benefits for permanent total disability. On appeal, Employer, Mr. Bult's, Inc., argues that non-work-related factors acting independently of Employee's work injury contributed to his disability. 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. We affirm the judgment of the circuit court.

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

ROGER A. PAGE, J., delivered the opinion of the court, in which WILLIAM B. ACREE, SR.J. and DON R. ASH, SR.J., joined.

David Terence Hooper, Brentwood, Tennessee, for the appellant, Mr. Bult's, Inc., and Freestone Insurance Company.

Charles Larry Hicks, Camden, Tennessee, for the appellee, Wesley David Fly.

William Derek Green, Nashville, Tennessee, for the appellee, Tennessee Department of Labor/Second Injury Fund.

## OPINION

### Factual and Procedural Background

This cause was heard by the trial court in February 2017. The parties entered a stipulation in which they agreed that Employee was injured while at work and that he reached maximum medical improvement on August 6, 2013. At trial, Employee and a vocational expert testified, and Drs. Michael Schlosser and Richard E. Fishbein testified by deposition.

Employee, Wesley David Fly, was born in 1961 and has a sixth-grade education. He previously worked in restaurants, grocery stores, a rock quarry, a lumber mill, as a welder, and as a factory maintenance mechanic. Most recently, he worked as a truck driver, and it was in that capacity that he began working for Employer, Mr. Bult's, Inc. He drove locally for Employer, but when Employer decided to open a new terminal in Maine, it assigned Employee to the Maine location to assist with the opening. On October 27, 2011, Employee was injured while installing a tarpaulin on a trailer. He explained that he was holding the rolled-up tarpaulin while other employees were running a rod through it. The rod hit a seam, and the other employees tried to ram the rod through the tarpaulin, which caused Employee to fall to his knees. Employee testified that he felt something pop. He tried to continue working, but the next day, he had difficulty getting out of bed. After visiting a doctor in Maine, he flew back to Tennessee.

Employee saw a doctor in Tennessee who prescribed conservative treatment, including physical therapy, and Employee worked on light duty for several months. He tried to drive his truck a couple of times, but he experienced back pain and headaches severe enough to cause him to pull over. He returned to his physician, who ordered him to stop working. In February 2012, Employee saw Dr. Michael Schlosser, a neurosurgeon who originally prescribed conservative treatment (epidural steroid injections and physical therapy) for a bulging disc at the L4-5 level with stenosis. Dr. Schlosser also diagnosed Employee with degenerative disc disease and spondylosis. When the conservative treatment only helped but did not resolve Employee's symptoms, Dr. Schlosser performed a bilateral hemilaminectomy at L4-5, decompressing both sides of the L4-5.

Employee's post-surgery recovery was "slow and protracted." He tried physical therapy and various medications, but his symptoms did not resolve. Dr. Schlosser ordered a sitting MRI, which showed that Employee had bulging discs at the level where he had surgery as well as levels above and below. In mid-2013, Dr. Schlosser "recommended ongoing medical management of his pain with a referral to a pain management physician" and then ordered "a functional capacity evaluation to determine

what, if any, ability he would have to return to work.”

When he received the results of the functional capacity evaluation, Dr. Schlosser adopted the suggested restrictions, which he set forth as follows:

He was only able to stand for 9 minutes at a time, which did not meet the demand minimum functional capacity requirement. He was only able to sit for 11 minutes at a time . . . . In addition, his walking was extremely limited. He was only able to walk less than 1/10 of a mile . . . . He was able to lift 34 pounds and [lift] 24 pounds from shoulder to overhead with an occasional lifting capacity of 24 pounds and a carrying capacity of 30 pounds.

Dr. Schlosser noted that Employee made a “good effort” during the evaluation. Based on the limitations of the evaluation, Dr. Schlosser set Employee’s work restrictions and assigned a twelve percent whole body impairment rating. Dr. Schlosser particularly stated that Employee’s inability to sit or stand for long periods of time contributed to the restrictions and the impairment rating. Dr. Schlosser opined that Employee would never be able to return to work.

When questioned about the connection between Employee’s injury at work, his degenerative disc disease, and his current condition, Dr. Schlosser stated, “[B]ased on the history he provided me, which was that he was relatively symptom free and working prior to the incident in October and that the symptoms all kind of followed that incident, . . . I would relate the disability and all the work that had to be done to treat him” to the work injury. On cross-examination, Dr. Schlosser said,

“[T]he question really is if he had never had that injury at work, would, in the middle of 2013, would he have developed this significant pain that he was having related to his underlying degenerative condition or would he not have. And I think that’s a question that I don’t have the . . . information to answer, so, yes, I would agree that clearly there was significant underlying degenerative changes in his spine . . . . In the setting of that significantly degenerated spine, he also had an injury at work that he says dramatically increased his symptoms. So to me it’s hard to be able to say . . . is the former or the latter the primary cause of his problem in June of 2013. I think based on the evidence that I see, which was he seemed to be living with that degenerated spine up until October, and it seems like the events of October were the ones that sort of kind of undone [sic] things for him, I would err on the side of saying it was . . . the degenerative changes, and being honest, the surgery that I did to try to address them, . . . that were

more . . . causal than the underlying problem. But, . . . where would he have been in June of 2013 if all those things hadn't happened? It's impossible to predict."

At the time of trial, Employee had been under the care of a pain clinic and was taking oxycodone, and Baclofen.<sup>1</sup> He was unable to perform almost any household task beyond microwaving food, and he only drove once a week for five to six miles. He could stand ten to fifteen minutes, sit for twenty minutes, and walk 125 feet. He could not carry more than ten pounds and could not bend or crouch. Employee also stated that his medication made him foggy but that he could not "get out of bed" without the medication. Employee testified he had low back pain that radiated into his right leg and numbness above his right knee. He stated he did not have those symptoms prior to October 2011, nor any other "disabilities that affected [his] ability to work."

Dr. Fishbein, who performed the independent medical examination, corroborated Dr. Schlosser's opinions, assigned a thirteen-percent whole body impairment rating, and determined that Employee "was unable to return to work." In his deposition, Dr. Fishbein reviewed Employee's medical history, which included "an episode of back pain in 2000" and the injury in this case. His opinion was that the impairment rating and work restrictions "arose as a result of his injuries on October the 27th, 2011." Dr. Fishbein expressed particular concern that Employee not operate heavy machinery or even walk up a ladder while on the medication he was taking. The vocational consultant, Michelle McBroom Weiss, opined that Employee was not employable because of his severe restrictions, along with his lack of education and the paucity of employment opportunities in the rural community in which he lived.

The trial court, by order filed March 23, 2017, found that Employee was permanently and totally disabled as a result of his October 27, 2011 injury and that Employee should receive permanent total disability benefits from the date of his maximum medical improvement (August 6, 2013) until he reached the age of sixty-seven (February 9, 2028) at the rate of \$533.10 per week, for a total of \$403,556.70. *See* Tenn. Code Ann. § 50-6-207(4). The court ordered that the amount accrued August 6, 2013, through the trial date (February 21, 2017) be commuted to a lump sum and that the Employer was to pay the balance of the accrued lump sum less the weekly payments that it made between August 2013 and February 2015. Finally, the court ordered that Employer was to pay all of Employee's unpaid medical expenses and future medical expenses. Employer has appealed from the trial court's order.

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<sup>1</sup> Employee had not taken any medication the day of his testimony. Also, because Employer stopped paying for his medication, he could not afford a third prescription: OxyContin.

## Analysis

Appellate review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2008), which provides that "[r]eview of the trial court's findings of fact shall be de novo upon the record of the trial, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." As our Supreme Court has observed many times, reviewing courts must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007) (citations omitted). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008) (citations omitted). 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). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Employer concedes that Employee was injured at work but argues that Employee's present disability is significantly attributable to his degenerative disc disease, which "acted independently of the work-related injury and contributed to both his permanent restrictions and the resulting determination that he is permanently and totally disabled." The workers' compensation statutes in effect at the time of Employee's work injury defined injury as one "arising out of and in the course of employment." Tenn. Code Ann. § 50-6-102(12)(A) (2011). The Tennessee Supreme Court, in *Dixon v. Travelers Indemnity Company*, explained that "[t]he phrase 'arising out of' refers to a causal connection between the conditions under which the work is required to be performed and the resulting injury. The event causing the injury must have its origin in a risk connected with the employment." 336 S.W.3d 532, 537 (Tenn. 2011) (citations omitted). Here, it is clear that the acute injury suffered by Employee on October 27, 2011, arose out of his employment: He was injured while installing a tarpaulin on a trailer at Employer's terminal. There is also no question that Employee had degenerative disc disease that was not discovered until after the injury. Employer argues that Employee would not be permanently and totally disabled now but for the pre-existing degenerative disc disease rather than the acute injury.

However, an "employer takes the employee as he is, that is, with his defects and pre-existing afflictions." *Rogers v. Shaw*, 813 S.W.2d 397, 399 (Tenn. 1991) (citations omitted). For example, "an employee's death or disability resulting from a heart attack casually [sic] related to his employment is compensable, even though the employee suffered from heart disease." *Id.* (citing *Flowers v. South Central Bell Telephone Co.*,

672 S.W.2d 769, 770-71 (Tenn. 1984)). This is true whether the compensable injury “hastens or accelerates the death or disability of an employee who has a pre-existing illness” or whether the “death or disability [was] due to a poor result of treatment, or complications of treatment.” *Id.*

In this case, both Dr. Schlosser and Dr. Fishbein testified that in their opinions, the impairment ratings and restrictions were a direct causal result of the work injury, although Dr. Schlosser was more equivocal during cross-examination. Employer points to Dr. Schlosser’s uncertainty as to the exact origin of the ongoing pain that Employee experiences as proof that Employee’s present disability is not related to his work injury. Dr. Schlosser also stated that he could not say whether the injury caused the degenerative disc disease to progress. However, as Dr. Schlosser stated, Employee had no symptoms, i.e. no back pain, that hindered his ability to work prior to his acute injury. He also suggested that the failed treatment might have contributed to the disability. Employee’s own testimony also reflects that he had no symptoms prior to the back injury suffered in October 2011 but that he was never able to return to work fully thereafter.

Until the General Assembly changed the standard of proof regarding causation in workers’ compensation cases, the law regarding causation and medical proof was as follows:

Except in the most obvious and routine cases, the claimant in a workers’ compensation action must establish causation by expert medical evidence. [*Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991).] Although causation cannot be based upon speculative or conjectural proof, absolute medical certainty is not required and reasonable doubt is to be construed in favor of the employee. *White v. Werthan Indus.*, 824 S.W.2d 158, 159 (Tenn. 1992). It is entirely appropriate for a trial judge to predicate an award on medical testimony to the effect that a given incident “could be” the cause of the employee’s injury, when the trial judge also has heard lay testimony from which it may reasonably be inferred that the incident was in fact the cause of the injury. *Orman*, 803 S.W.2d at 676.

*Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483, 487 (Tenn. 1997).

In this case, the uncertainty is not whether Employee suffered an injury but whether the resulting disability flowed from the injury or from the pre-existing condition. “All reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee.” *Cloyd v. Hartco Flooring*

*Co.*, 274 S.W.3d 638, 643 (Tenn. 2008) (citing *Phillips v. A&H Constr. Co.*, 134 S.W.3d 145, 150 (Tenn. 2004)).<sup>2</sup> Thus, while there is some uncertainty about the extent to which Employee's disability is contributable to his acute injury, Dr. Schlosser also clearly testified that the work restrictions and impairment rating assigned by him to Employee were directly related to the work injury. In summary, Employee showed that his injury arose out of his employment and that he was totally and permanently disabled.

### **Conclusion**

The judgment of the trial court is affirmed. Costs are taxed to the Employer, Mr. Bult's Inc., and its surety, for which execution may issue if necessary.

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ROGER A. PAGE, JUSTICE

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<sup>2</sup> Employee was injured prior to the 2014 change in the statutes. The current statute disallows recovery for aggravation of injuries unless the aggravation can be shown to *primarily* arise out of employment. Tenn. Code Ann. § 50-6-102(14)(A) (2014 & West 2018).

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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 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 are assessed to the employer, Mr. Bult's, Inc., and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM