

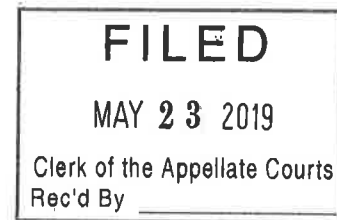
IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE

February 25, 2019 Session

**KENNETH M. WRIGHT v. NATIONAL STRATEGIC PROTECTIVE
SERVICES, LLC ET AL.**

**Appeal from the Court of Workers' Compensation Claims
No. 2016-03-0663 Lisa A. Lowe, Judge**

No. E2018-01019-SC-R3-WC – Mailed April 15, 2019



Kenneth M. Wright was employed by National Strategic Protective Services, LLC, as a security officer at the Department of Energy, Oak Ridge facility. While participating in a training exercise, he injured his neck, which required surgery. The trial court found Mr. Wright was entitled to increased permanent partial disability benefits pursuant to Tennessee Code Annotated section 50-6-207(3)(B) and then awarded extraordinary benefits pursuant to Tennessee Code Annotated section 50-6-242(a)(2). The employer has appealed the award of extraordinary benefits. 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.

**Tenn. Code Ann. § 50-6-225(a) (2014) Appeal as of Right;
Judgment of the Court of Workers' Compensation Claims Affirmed**

ROBERT E. LEE DAVIES, SR.J., delivered the opinion of the court, in which SHARON G. LEE, J., and DON R. ASH, SR.J., joined.

Alex B. Morrison and Garrett P. Franklyn, Knoxville, Tennessee, for the appellant, National Strategic Protective Services, LLC.

John D. Agee, Clinton, Tennessee, for the appellee, Kenneth M. Wright.

OPINION

Factual and Procedural Background

Kenneth M. Wright began working in 1987 for a series of contractors who provided security for the Department of Energy's facilities at Oak Ridge, Tennessee. His last employment was with National Strategic Protective Services, LLC ("Employer"). During his time working for the various contractors, Mr. Wright held several positions, first as a Security Police Officer ("SPO"), then as a Central Alarm Station Operator ("CAS Operator"), and lastly as a Shift Captain. As Shift Captain, Mr. Wright supervised all SPO's and the CAS Operator on his shift.

As a security employee serving the Department of Energy, Mr. Wright was required to undergo yearly fitness assessments, such as a timed forty-yard dash and a mile run. He also was required to complete weapons qualifications throughout the year with various types of firearms. During this twenty-nine-year period with the Department of Energy, Mr. Wright had never had any problems meeting the physical requirements as a security officer.

In September 2014, Mr. Wright was participating in the annual refresher training where he was required to shoot while moving, using various positions and different types of weapons. It was during this training exercise that Mr. Wright noticed an intense pain in the back of his neck. At the particular time he noticed the pain, Mr. Wright was waiting to begin another training exercise and had hooked his fingers on both hands in his body armor vest, which caused the vest to push down on his neck. He completed the exercise and went home. The next morning, he woke up with intense pain in his right arm and had lost most of the strength in that arm. Mr. Wright contacted his personal physician and received a steroid injection; however, within one day, after experiencing no relief, he notified Employer. Employer then provided a panel from which Mr. Wright selected a chiropractor, Dr. David Roberts. Although Mr. Wright regained some strength after treating with Dr. Roberts, he also developed different neurological symptoms, including an electrical shock sensation, leaking urine, and rib pain.

Mr. Wright then selected and Employer approved Dr. David Hauge, a neurosurgeon, to treat the neck injury. Dr. Hauge first examined Mr. Wright in early March 2015. At that initial visit, Dr. Hauge determined Mr. Wright had multiple disk herniations in the neck area. He ordered that Mr. Wright remain off work and recommended surgery, which he performed later in the month. Some, but not all, of Mr. Wright's symptoms improved after surgery.

On July 1, 2016, Mr. Wright filed a petition for determination of workers' compensation benefits with the Tennessee Bureau of Workers' Compensation. The parties were unable to resolve their dispute, and the case was set for trial on April 18, 2018, before the Court of Workers' Compensation Claims at Knoxville. The parties stipulated Mr. Wright sustained a work-related injury on September 19, 2014. The issues for trial were: 1) the appropriate permanent impairment rating; and 2) whether Mr. Wright was entitled to the original award, increased benefits, extraordinary relief, or permanent total disability benefits.

Mr. Wright testified that he felt his surgery went well and that most of his neck pain resolved. However, soon after surgery, he began to experience head jerking whenever he turned his head or looked up or down. Mr. Wright indicated his head jerking never completely resolved, and as a result, he tries not to move his head from side to side. He also described an electrical shock feeling if anything presses on the thoracic part of his back. He further testified that he suffers from pain in his right arm, degraded motor skills, a loss of feeling in the ends of his fingers, and pain from his shoulder to his triceps area on his left side. He has difficulty walking and with balance. Finally, he testified to "cogwheeling" which he agreed could be described as difficulty moving his arms in a smooth, as opposed to a ratcheting, motion.

After surgery, Mr. Wright returned to light duty, sedentary work with Employer. This consisted of answering the phone and just "hanging out." After Dr. Hauge found Mr. Wright to be at maximum medical improvement ("MMI") and released him to return to work with restrictions, Employer medically disqualified him and sent him home as it had no job to offer. Since being disqualified from working for Employer, Mr. Wright had not made any efforts to return to any type of employment.

Barry Collins was the Chief of the Oak Ridge Protective Force, employed by Employer. He has worked with Mr. Wright for approximately thirty years. Chief Collins described Mr. Wright as a great Shift Captain, a great CAS Operator, and one of the most experienced employees at the Oak Ridge facility. According to Chief Collins, Mr. Wright could have performed Chief Collins' job or that of a CAS Operator, both of which were unarmed positions; however, there were no unarmed positions available at the time Dr. Hauge released Mr. Wright to return to work.

Both parties employed vocational experts, who testified at trial. Mr. Wright hired Dr. Craig Colvin. Dr. Colvin interviewed Mr. Wright and reviewed his deposition, depositions of various treating and evaluating physicians, and a functional capacity evaluation ("FCE") ordered by Dr. Hauge. Dr. Colvin did not perform any testing or consult any database. Instead, he relied on his fifty years of experience and education. Dr. Colvin concluded that based upon Dr. Hauge's limitation of Mr. Wright to sedentary

duty, Mr. Wright was ninety percent vocationally disabled. However, Dr. Colvin ultimately found Mr. Wright was one hundred percent vocationally disabled due to the drastic effect of Mr. Wright's injury and restrictions on his activities of daily living. Dr. Colvin conceded if Mr. Wright were limited only to medium duty, his vocational disability would be reduced to between thirty-five and forty percent. Although Dr. Colvin acknowledged no physician had attributed the cogwheeling to the September 2014 work injury, he suggested that, to the extent Mr. Wright's gait issues were work related, Mr. Wright still would not be able to work at a medium level.

Employer presented Patsy Bramlett as its vocational expert. Ms. Bramlett conducted a diagnostic interview and reviewed the same medical records as Dr. Colvin. Additionally, she reviewed Department of Labor data on occupational employment statistics and performed an analysis as to what jobs were available to Mr. Wright post-injury. Based on her assessment and the FCE recommendation of medium duty, Ms. Bramlett opined that Mr. Wright suffered a thirty-seven percent vocational disability. However, Ms. Bramlett conceded if she were to rely on Dr. Hauge's sedentary duty restrictions, Mr. Wright was eighty to ninety percent vocationally disabled.

Medical Deposition Testimony

Dr. Hauge was Mr. Wright's treating neurosurgeon. He first saw Mr. Wright on March 3, 2015. After reviewing recent MRI scans and comparing them to 2012 scans, Dr. Hauge determined Mr. Wright had suffered a large right-sided C5-6 disk herniation and had undergone a significant progression of a previously documented disk herniation at C6-7. According to Dr. Hauge, these disk extrusions were associated more than fifty percent with the September 2014 work injury.

On March 18, 2015, Dr. Hauge performed a C5-6 and C6-7 anterior cervical discectomy and fusion. The surgery was successful and resolved the disk herniation at C5-6 and the disk protrusion at C6-7. However, when Mr. Wright returned to Dr. Hauge on June 30, 2015, Mr. Wright was experiencing neck pain and arm discomfort. In addition, Mr. Wright described a jerking movement in his neck whenever he moved it suddenly. Dr. Hauge ordered an FCE and continued Mr. Wright at sedentary level work. When Mr. Wright returned on August 17, 2015, his neck pain and arm pain had resolved; however, he still experienced some jerking with neck extension or tilting. The FCE indicated Mr. Wright was at a medium physical demand level. With regard to the jerking or jumping, Dr. Hauge suspected a spinal cord problem and ordered additional diagnostic testing, including an EMG/nerve conduction study to evaluate Mr. Wright's spinal cord function. On October 12, 2015, Mr. Wright returned with the same jerking symptoms in his neck. Review of the nerve conduction study revealed "a chronic right C6 and C7 radiculopathy which would have been associated with [Mr. Wright's] work injury." Dr.

Hauge testified that clinically, based upon the history and the consistent complaints, “there has probably been an occult injury to [Mr. Wright’s] spinal cord.”

Mr. Wright returned to see Dr. Hauge on April 6, 2016. At that time, Mr. Wright continued to experience jerking episodes whenever he turned his head. It was at this point that Dr. Hauge observed that Mr. Wright was having cogwheeling of the upper extremities which can be a sign of Parkinson’s disease. Cogwheeling is not related to a spine injury and would not be work related. On April 25, 2016, Dr. Hauge found any pre-surgery radiculopathy had resolved and placed Mr. Wright at MMI, assigning him a twenty-four percent whole body impairment. This impairment rating was based on a two-level fusion and the nerve conduction findings which suggested radiculitis. Dr. Hauge went on to opine if the jerking symptoms were secondary to the spinal cord compression which Mr. Wright had before surgery and those symptoms continued to persist, then they were related to the work injury. The cogwheeling in Mr. Wright’s arms was a completely different issue than the neck jerking, which Dr. Hauge believed was most likely caused by the work-related injury in September 2014. Although the FCE placed Mr. Wright at a medium work level, Dr. Hauge placed him at a sedentary work level due to the cogwheeling, which Dr. Hauge acknowledged was a symptom of Parkinson’s disease and not work related.

Mr. Wright saw Dr. David Wiles, also a neurosurgeon, on January 11, 2016, for a second opinion. Mr. Wright reported to Dr. Wiles that he was still experiencing pain between his shoulder blades and abnormal movements affecting his head, which included shocking sensations. After reviewing the post-operative MRI, Dr. Wiles could find no evidence of spinal cord compression, and his myelogram revealed no cause for Mr. Wright’s symptoms. Dr. Wiles did observe a rhythmic movement of the head, not something randomly occurring with certain body movements. Dr. Wiles did not attempt to determine whether Mr. Wright’s symptoms were related to his 2014 work injury; however, he agreed the intrascapular pain was work related. He did not believe that Mr. Wright’s head or neck jerking was related to the work injury and opined that this was usually of a brain etiology. Although Dr. Wiles did not perform an impairment rating, he indicated absent residual radiculopathy, the rating would be between nine and fourteen percent to the whole body. Although Dr. Wiles did not believe Mr. Wright had a documented residual radiculopathy, he admitted the intrascapular pain made it “kind of close.” However, Dr. Wiles did not disagree with Dr. Hauge’s rating of twenty-four percent because Dr. Hauge may have felt there was objective evidence of residual radiculopathy.

Mr. Wright was seen by a neurologist, Dr. Jack Scariano, in August of 2016 for evaluation of a possible movement disorder. Dr. Scariano reviewed the records and deposition testimony of Dr. Hauge. Dr. Scariano opined that the nerve conduction study

after surgery indicated Mr. Wright still was having signs of a pinched nerve caused by the disk herniations and protrusions. He agreed that the twenty-four percent impairment rating given by Dr. Hauge was appropriate and believed that the shocking sensation described by Mr. Wright was a sign that he still had pressure, not only on the nerve roots, but also on the spinal cord itself. Dr. Scariano also evaluated Mr. Wright for movement disorder and believed he had early signs of Parkinson's disease. However, Dr. Scariano testified that the EMG, history and physical examination, including a positive Lhermitte's sign, all indicated post-operative radiculopathy, which was permanent in nature and related to the work injury in 2014. With respect to Mr. Wright's involuntary head jerking, Dr. Scariano found that the most likely cause was the work-related neck injury in 2014.

Dr. Patrick Bolt, an orthopedic surgeon, performed an independent medical examination on Mr. Wright at the request of Employer. Dr. Bolt examined Mr. Wright on June 14, 2017. Dr. Bolt agreed the thoracic pain was related to the work injury; however, he could not answer whether the leg pain was related or not. According to Dr. Bolt, any problems with the low lumbar spine were not related to the work injury. Dr. Bolt agreed with Dr. Scariano that the cogwheeling symptom was a classic symptom for Parkinson's disease. On examination, Mr. Wright demonstrated difficulty walking, difficulty with heel and toe walk, and walking in a straight line. He had some limitation in neck range of motion. Although there was full strength in his arms, Mr. Wright still complained of tingling in his left hand. Reviewing Dr. Hauge's gait observations, Dr. Bolt believed it was likely that Mr. Wright's gait problems were related to his cervical spine in at least a fifty percent capacity, which was attributable to the work-related injury. Likewise, the shocking pain into the arms and legs was typical of a problem with the spinal cord that could have been caused by the disk herniation. However, Dr. Bolt believed the jerking movements Mr. Wright experienced were more related to Parkinson's disease rather than the work-related injury. Dr. Bolt described the difference between radiculitis and radiculopathy as radiculitis being inflammation of a nerve root while radiculopathy is pathology to a nerve root. Dr. Bolt testified Mr. Wright did not have active denervation or ongoing radiculopathy, and he agreed with the medium level of duty at which the FCE placed Mr. Wright. However, Dr. Bolt conceded if one took into account Mr. Wright's neurologic issues, there would be completely different restrictions for his stooping, balance and walking. Dr. Bolt gave Mr. Wright a fifteen percent whole body impairment.

On May 4, 2018, the Court of Workers' Compensation Claims issued a written opinion finding Mr. Wright had an impairment rating of twenty-four percent to the body as a whole and that Mr. Wright was entitled to extraordinary relief. On June 1, 2018, Employer properly effected its appeal.

Standard of Review

Review of factual issues is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(a)(2) (2014). Considerable deference is afforded to the trial court's findings with respect to the credibility of witnesses and the weight to be given their in-court testimony. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 732 (Tenn. 2002). When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676–77 (Tenn. 1983). The reviewing court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when, as in this case, all of the medical proof is by deposition. 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. Gray v. Cullom Mach., Tool & Die, 152 S.W.3d 439, 443 (Tenn. 2004).

Analysis

Employer raises four issues on appeal. Initially, Employer challenges the trial court's determination regarding Mr. Wright's impairment rating. Employer then asserts that the trial court erred by awarding Mr. Wright extraordinary relief¹ by placing Mr. Wright at medium to sedentary level work restrictions and by admitting into evidence the physician certification form filed by Mr. Wright.

Impairment Rating

In this case, Mr. Wright was seen by four doctors: Hauge, Wiles, Bolt, and Scariano. The trial court had conflicting medical opinions from Dr. Hauge and Dr. Bolt on the degree of permanent impairment that was attributable to the injury in September 2014. There was no disagreement between the physicians that Mr. Wright had a large disk herniation at C5-6 that was caused by the work injury. Dr. Bolt also agreed that the nerve conduction study revealed chronic C6 and C7 radiculopathy that was in connection with the large disk herniation at C5-6 causing nerve damage. However, because it was chronic, Dr. Bolt found there were no signs of active denervation or ongoing radiculopathy.

¹ Employer at the end of its brief also asserts that the trial court erred by awarding Mr. Wright discretionary costs for the fees of his vocational expert, Dr. Colvin, and by not awarding it certain of the fees of its vocational expert, Ms. Bramlett. Employer failed to identify this as an issue in its brief. The issue, therefore, is waived. See Hodge v. Craig, 382 S.W.3d 325, 334–35 (Tenn. 2012).

There is also no dispute that the cogwheeling experienced by Mr. Wright was a completely separate issue that was not related to his neck injury in 2014. What do appear to be in dispute are the jerking symptoms and electric shock sensations related to movement of Mr. Wright's head. Although Dr. Hauge was unable to determine the exact cause of the jumping symptoms, he believed the most likely cause was that they were secondary to compression of the nerve roots into the spinal cord prior to surgery, and since those symptoms persisted, they were related to the work injury. Although Dr. Bolt believed the jerking movements were more related to Parkinson's disease, he did agree that the gait problems observed by Dr. Hauge were related to the cervical spine in at least a fifty percent capacity, which he would attribute to the work-related injury. Although Dr. Wiles did not find Mr. Wright had a documented residual radiculopathy, he admitted the intrascapular pain made it "kind of close." When pressed, Dr. Wiles also refused to disagree with Dr. Hauge's rating of twenty-four percent. Dr. Scariano also agreed with Dr. Hauge and attributed the shocking sensation described by Mr. Wright as a sign that he still had pressure on the spinal cord itself. He, too, concluded Mr. Wright's involuntary head jerking was more likely caused by the work-related neck injury in 2014.

The trial court credited Dr. Hauge's opinion on this issue. Dr. Hauge was the treating physician and had seen Mr. Wright on multiple occasions for over a year. The trial court also found that the testimony of Dr. Wiles and Dr. Scariano supported the impairment rating given by Dr. Hauge. "When medical testimony differs, it is within the discretion of the trial judge to determine which expert testimony to accept." Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. 1996) (citing Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675 (Tenn. 1983)). After reviewing the testimony of all of the physicians in this case, we cannot conclude that the evidence preponderates against the trial court's finding of a twenty-four percent whole body impairment.

Award of Extraordinary Relief

Employer contends the trial court erred by awarding Mr. Wright extraordinary relief. Initially, the trial court considered Mr. Wright's request for a finding of permanent and total disability but rejected it, finding that:

[W]hile his employment options are significantly limited, they are not totally limited. The Court holds Mr. Wright did not establish by a preponderance of the evidence that his neck injury *totally* incapacitated him from working at *any* job that brings an income. Thus, the Court denies Mr. Wright's claim for permanent total disability benefits. (Original emphasis by trial court).

The trial court then turned to making its first assessment of Mr. Wright's permanent partial disability ("PPD") benefits and gave him an original award of \$91,584.²

The trial court then made a second assessment of PPD benefits and noted that the initial compensation period expired on May 21, 2018. See Tenn. Code Ann. § 50-6-207(3)(B) (2014). The award set forth in Tennessee Code Annotated section 50-6-207(3)(B) is known as the resulting award and is provided for if the employee has not returned to work with any employer or has returned to work and is receiving wages or a salary that is less than one hundred percent of his pre-injury income with employer. Employer did not put on evidence to refute Mr. Wright's claim that he was unable to return to work at the time of the hearing and would remain unable to do so when the initial compensation period expired on May 21, 2018.

Instead of accepting benefits pursuant to Tennessee Code Annotated section 50-6-207(3)(B), Mr. Wright requested extraordinary relief pursuant to Tennessee Code Annotated section 50-6-242(a). The trial court found Mr. Wright met the requirements for extraordinary relief and awarded benefits pursuant to the statute. Employer contends the trial court erred in finding that Mr. Wright established by clear and convincing evidence that limiting his recovery would be inequitable in light of the totality of the circumstances. Specifically, Employer argues the trial court erred by placing Mr. Wright at medium to sedentary work restrictions by considering medical conditions that were unrelated to his work injury. We respectfully disagree.

The trial court acknowledged that Dr. Hauge assigned sedentary duty, but in doing so, considered the non-work related cogwheeling in his assessment. The trial court also noted Dr. Bolt's adoption of the medium level restrictions but noted Dr. Bolt admitted Mr. Wright would not do as well on a subsequent FCE because of his balance and walking difficulties. Significantly, Dr. Bolt did not address the impact Mr. Wright's work-related gait issues would have on his ability to perform medium-duty work. The trial court also questioned Mr. Wright's ability to stand for six to eight hours as required for medium level work. The trial court chose not to adopt any of the physicians' opinions and instead found Mr. Wright's work capacity fell between medium and sedentary.

The trial court considered the testimony from each vocational expert which ranged from thirty-seven to one hundred percent vocational disability; however, the trial court

² Using the date of MMI and Dr. Hauge's impairment rating of twenty-four percent, the trial court calculated an original award of 108 weeks and credited Employer with 103 weeks of the original award, or \$87,344.

elected not to adopt either expert's opinion. Instead, the trial court found Mr. Wright's vocational disability to be between sixty and sixty-five percent.

Finally, there was the testimony of Mr. Wright who complained of continued pain in his right arm, the lack of feeling in the ends of his fingers, numbness in his throat when lifting weight, and difficulty in walking. Mr. Wright believed after his injury that he could no longer perform as a security officer and that there were no other types of jobs that he could do on a regular basis. Although Mr. Wright stated he could drive a vehicle, he still had issues turning his head. An employee's own assessment of his physical condition and resulting disability is competent testimony that should be considered. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000) (citing McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn. 1999)).

Here, there was conflicting testimony by all four physicians. There was agreement by several doctors on certain issues but disagreements on other issues. A trial court is not required to accept or reject in its entirety the testimony of any particular expert. Reeves v. Olsen, 691 S.W.2d 527, 531 (Tenn. 1985); Sutton v. McKinney Drilling Co., 2013 WL 209152, at *5 (Tenn. Workers' Comp. Panel Jan. 18, 2013). A trial court has the discretion to make an independent examination of the evidence and is not bound to accept any expert's opinion regarding vocational disability. Williams v. Tecumseh Prods. Co., 978 S.W.2d 932, 936 (Tenn. 1998).

After considering Mr. Wright's work-related conditions, the trial court found his work capabilities fell between the medium and sedentary levels. The trial court then considered the fact that limiting Mr. Wright to the benefits provided under Tennessee Code Annotated section 50-6-207(3)(B)³ would be significantly less than the trial court's assessment of Mr. Wright's vocational disability of sixty to sixty-five percent.

In sum, the trial court made specific findings that Mr. Wright established by clear and convincing evidence that limiting his recovery would be inequitable in light of the totality of the circumstances. The trial court considered the restrictions articulated by both Dr. Hauge and Dr. Bolt. It acknowledged that cogwheeling was not related to the work injury. It considered both vocational experts' opinions and adopted a vocational disability between the two. Finally, it considered the testimony of Mr. Wright as to how his injury affected him. The trial court concluded in light of the totality of the circumstances that Mr. Wright had provided clear and convincing evidence that limiting his recovery to benefits under Tennessee Code Annotated section 50-6-207(3)(B) was inequitable. We conclude the evidence does not preponderate against the trial court's determination on this issue.

³ This results in 38.9 percent of PPD benefits.

The trial court then addressed the additional factors found in Tennessee Code Annotated section 50-6-242(a)(2), which required the trial court to make specific findings that as of the date of the award, three facts concerning the employee were true:

(A) The employee has been assigned an impairment rating of at least ten percent (10%) to the body as whole, that has been determined according to the AMA guides as defined by § 50-6-102, by the authorized treating physician;

(B) The authorized treating physician has certified on a form provided by the division that due to the permanent restrictions on activity the employee has suffered as a result of the injury the employee no longer has the ability to perform the employee's pre-injury occupation. The authorized treating physician's certification pursuant to this subdivision (a)(2)(B) shall have a presumption of correctness that may be overcome by the presentation of contrary clear and convincing evidence; and

(C) The employee is not earning an average weekly wage or salary that is greater than or equal to seventy percent (70%) of the employee's pre-injury average weekly wage or salary.

Tenn. Code Ann. § 50-6-242(a)(2)(A)-(C) (2014).

Concerning the impairment rating factor, both Dr. Hauge and Dr. Bolt assigned Mr. Wright an impairment rating greater than ten percent to the body as a whole. As to the third factor—earning less than seventy percent of pre-injury average weekly wage—the trial court expressly found that Employer failed to rebut Mr. Wright's testimony that he had not been employed since being released to work by Dr. Hauge. In addition, the trial court discredited Chief Collins' testimony that Mr. Wright could perform his job as Chief or as a CAS Operator. Likewise, the trial court noted Ms. Bramlett's testimony that Mr. Wright could perform medium duty work, but she failed to consider his gait difficulty or his head jerking.⁴ It is the trial court who has the opportunity to observe the witnesses and their manner and demeanor while testifying and therefore is in a far better position than an appellate court to decide issues of fact. Mach. Sales Co. v. Diamondcut Forestry Prods., LLC, 102 S.W.3d 638, 643 (Tenn. Ct. App. 2002). "The weight, faith, and credit to be given to any witness's testimony lies in the first instance with the trier of fact, and the credibility accorded will be given great weight by the appellate court." Id.

⁴ It is important to note that Mr. Wright's problems with walking and his head jerking are unrelated to the cogwheeling which all of the medical experts related to Parkinson's disease.

Admissibility of the Physician Certification Form

The remaining factor concerns the authorized treating physician certification that due to the permanent restrictions on activity the employee has suffered as a result of the injury, he no longer has the ability to perform the employee's pre-injury occupation.

Although Mr. Wright provided the required form, Employer objected to its admissibility on the basis of authentication and hearsay. Before we consider the substantive issue regarding the admissibility of the physician certification form, we believe it is important to note the procedural history which led up to the trial court's order. The trial of this case originally was set to be heard on December 8, 2017. On December 5, 2017, Mr. Wright filed the physician certification form signed by Dr. Hauge on December 4, 2017. On December 6, 2017, Employer filed a motion to strike and exclude based upon the timeliness of the filing of the physician certification form and its inability to marshal proof to rebut the certification. On December 11, 2017, the trial court granted a continuance, acknowledging Employer's argument that it had been deprived of the opportunity to obtain evidence to rebut the certification. On February 9, 2018, Employer filed a motion to exclude the physician certification form based upon hearsay and lack of authentication. On March 1, 2018, the trial court entered an order denying Employer's motion to exclude and set forth the reasons for admitting the document into evidence. The trial took place on April 18, 2018.

Employer contends the trial court erred by admitting the physician certification form under the business records exception found at Tennessee Rule of Evidence 803(6). Decisions by trial courts regarding the admission or exclusion of evidence are discretionary. State v. Lewis, 235 S.W.3d 136, 141 (Tenn. 2007). Accordingly, we must determine whether the admission of the physician certification form was an abuse of discretion. Id.

As a general matter, written reports containing medical evaluations conducted for the purpose of workers' compensation litigation are hearsay. Tenn. R. Evid. 801, 802. Our courts have explained that Rule 803(6) includes the following five criteria that must be satisfied for a document to be admissible under the business records exception:

1. The document must be made at or near the time of the event recorded;
2. The person providing the information in the document must have firsthand knowledge of the recorded events or facts;
3. The person providing the information in the document must be under a business duty to record or transmit the information;

4. The business involved must have a regular practice of making such documents; and
5. The manner in which the information was provided or the document was prepared must not indicate that the document lacks trustworthiness.

Arias v. Duro Standard Prods. Co., 303 S.W.3d 256, 263 (Tenn. 2010) (citing Alexander v. Inman, 903 S.W. 2d 686, 700 (Tenn. Ct. App. 1995)).

Here, we do not believe Dr. Hauge had a regular practice of making this type of document. Indeed, by its very nature, this form would only be used in exceptional circumstances. Accordingly, we find the physician certification form does not qualify as a business record under Tennessee Rule of Evidence 803(6). See Williams v. United Parcel Serv., 328 S.W.3d 497, 502 (Tenn. Workers' Comp. Panel 2010).

We next consider whether the physician certification form is admissible as a matter of law under the workers' compensation statute. Hearsay may be admissible pursuant to the Tennessee Rules of Evidence or "otherwise by law." Tenn. R. Evid. 802. As an alternative ruling, the trial court admitted the physician certification form pursuant to Tennessee Code Annotated section 50-6-242(a)(2)(B). Our Supreme Court has held that the Rules of Evidence and the workers' compensation statutes provide alternative means of introducing medical evidence in workers' compensation cases. Arias, 303 S.W.3d at 261. "The prerequisites for admission under the statute differ from those provided in the evidentiary rule, but neither the statute nor the rule is the exclusive method of admissibility." Id.

Our review of Tennessee Code Annotated section 50-6-242(a)(2)(B) leads us to conclude that the General Assembly intended to provide an efficient method for presenting the opinion of the authorized treating physician as to whether the injury suffered by an employee at work prevented the employee from performing the employee's pre-injury occupation. The form on its face indicates it was produced by the Tennessee Bureau of Workers' Compensation (formerly known as the Division of Workers' Compensation) and signed by Dr. Hauge as the authorized treating physician pursuant to Tennessee Code Annotated section 50-6-242(a)(2)(B).

The requirements for admissibility under Tennessee Code Annotated section 50-6-242 (a)(2)(B) are that:

1. the authorized treating physician certifies on a form provided by the division;

2. due to the permanent restrictions on activity the employee has suffered as a result of the injury;
3. the employee no longer has the ability to perform the employee's pre-injury occupation.

We find the requirements of Tennessee Code Annotated section 50-6-242(a)(2)(B) have been met, and the report becomes a self-authenticating official document certified by the Department of Labor and Workforce Development. Therefore, it should not be excluded as hearsay because its admissibility is otherwise provided by law. Williams, 328 S.W.3d at 502.

Pursuant to the statute, once the authorized treating physician has filed the appropriate certification, a presumption of correctness is created that may be overcome by the presentation of contrary clear and convincing evidence. Tenn. Code Ann. § 50-6-242(a)(2)(B). We note that the trial court provided Employer with more than ample time to present evidence to rebut the presumption that due to the permanent restrictions Mr. Wright had suffered as a result of his injury, he no longer had the ability to perform his pre-injury occupation. This was Dr. Hauge's opinion as of December 4, 2017. Employer chose not to redepose Dr. Hauge on this issue and failed to put on any other proof rebutting Dr. Hauge's opinion. Instead, Employer elected to stand on its objection that the form was not admissible.

Conclusion

We agree the trial court was confronted with a complicated case that had a significant amount of conflicting medical testimony. In fact, it appears none of the physicians were certain about all of the issues they were asked to determine. The trial court followed the proper procedure and exercised its judgment, and after a thorough review of the record, we find the evidence in the record does not preponderate against the trial court's judgment.

The judgment of the Court of Workers' Compensation Claims is affirmed. Costs are taxed to Employer, National Strategic Protective Services, LLC, and its surety, for which execution may issue if necessary.

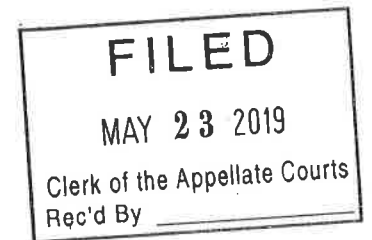
ROBERT E. LEE DAVIES, SENIOR JUDGE

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

**KENNETH M WRIGHT v. NATIONAL STRATEGIC PROTECTIVE
SERVICES LLC ET AL.**

**Court of Worker's Compensation Claims
No. 2016-03-0663**

No. E2018-01019-SC-R3-WC



JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs are assessed to Employer, National Strategic Protective Services, LLC, and it's surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM