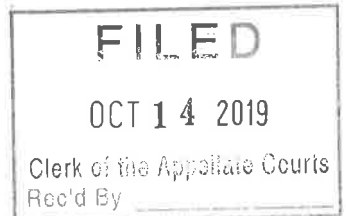


IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
August 5, 2019 Session

**BRADLEY HARLOW v. LOVE'S TRAVEL STOPS & COUNTRY
STORES, INC. ET AL.**

**Appeal from the Circuit Court for Jefferson County
No. 25011-IV Duane Slone, Judge**



No. E2018-01905-SC-R3-WC – Mailed September 12, 2019

An employer appeals a trial court's award of workers' compensation benefits, arguing that the employee failed to rebut the presumption of correctness afforded to the authorized treating physician about causation and that the trial court should have capped any permanent partial disability benefits under Tennessee Code Annotated section 50-6-241(d)(1)(A). This appeal was referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law under Tennessee Supreme Court Rule 51. After careful review, we affirm the trial court's judgment.

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

SHARON G. LEE, J., delivered the opinion of the Court, in which WILLIAM B. ACREE, SR.J., and D. KELLY THOMAS, JR., J., joined.

J. Allen Callison, Nashville, Tennessee, for the appellants, Love's Travel Stops & Country Stores, Inc. and Indemnity Insurance Company of North America.

Gary E. Brewer, Morristown, Tennessee, for the appellee, Bradley Harlow.

OPINION

I.

On August 26, 2013, Bradley Harlow was injured while working as a diesel mechanic for Love's Travel Stops & Country Stores. In January 2017, after exhausting his administrative remedies, Mr. Harlow sued Love's for workers' compensation benefits

in the Jefferson County Circuit Court. The trial court heard the case on November 14, 2017.

Trial Testimony

Mr. Harlow, age thirty-eight, dropped out of school in the tenth grade and later obtained a GED certificate. Mr. Harlow worked in construction and auto mechanics and then became a certified diesel mechanic. After working as a diesel mechanic for several years, he went to work for Love's in the spring of 2013. Mr. Harlow's job involved changing tires that weighed one hundred to one hundred and fifty pounds, crawling under trucks, putting in bearings and seals on wheels and axles, and other basic service work.

Mr. Harlow described how on August 26, 2013, he was injured while removing a tire and hub assembly from a truck. Mr. Harlow's hand slipped, his back struck a wall that was four to six feet behind him, and he twisted his body to catch himself before he fell. Mr. Harlow was in pain, but kept working.

The next day he had pain in his back, right shoulder, and right hip. Over the next three days, the pain worsened, and Mr. Harlow reported the pain to his manager, Nathan White. Love's gave Mr. Harlow a panel of physicians, and he chose to go to East Towne Urgent Care and Occupational Health for treatment.

That same day, August 29, 2013, Mr. Harlow saw Vicki Stiltner, a physician assistant at East Towne Urgent Care. Mr. Harlow told Ms. Stiltner about the accident and reported pain in his right shoulder, back, and right hip. She gave him a prescription for pain medication and placed him on light duty until his follow-up appointment five days later. Mr. Harlow testified he did not tell Ms. Stiltner that he had a previous back injury because he had not hurt his back before.

On September 3, 2013, Mr. Harlow returned to East Towne Urgent Care and saw Dr. Jay Hammett, a board-certified family physician. Mr. Harlow told Dr. Hammett that he had hurt his back, right shoulder, and right hip, but that he was doing some better because of the medicine prescribed by Ms. Stiltner. Dr. Hammett examined Mr. Harlow, diagnosed him with tendonitis, and told him to return in a week. Mr. Harlow did not return because he did not think Dr. Hammett could help him. Mr. Harlow testified that his pain worsened after seeing Dr. Hammett, and he could not fully do his job.

In January 2014, Mr. Harlow went to Dr. Kenneth Allum, his primary care doctor, with complaints of back, hip, and shoulder pain. Dr. Allum gave Mr. Harlow a Prednisone shot and ordered an MRI. In February 2014, Mr. Harlow returned to Dr. Allum to discuss the MRI findings, still complaining of pain in his right hip and right

shoulder. Dr. Allum gave Mr. Harlow an injection for the hip pain and told him that the MRI showed a herniated disc and an annular tear. Mr. Harlow said that he did not return to Dr. Allum for follow up because he had no insurance coverage.

In February 2014, Mr. Harlow quit his job at Love's. He told his supervisor, Mr. White, that he couldn't do his job any longer because of the pain. A document in Mr. Harlow's employment file suggested that Mr. Harlow had resigned his position at Love's to take another job. Mr. Harlow testified that Mr. White was the only person at Love's with whom he had discussed his resignation, and Mr. Harlow did not tell Mr. White he was leaving to take another job. In an affidavit, Mr. White disputed the statement in Mr. Harlow's employment file, stating that Mr. White was the only person at Love's to whom Mr. Harlow reported he was leaving and that Mr. Harlow told him that he was leaving because of his back pain and not because he had found another job.

In September 2014, Mr. Harlow returned to Dr. Hammett, complaining of pain in his back and radicular pain in his right leg. Mr. Harlow stated that the radicular pain began sometime after he saw Dr. Allum in January 2014. Dr. Hammett noted Mr. Harlow had a positive response to a straight-leg raising test on the right side. Dr. Hammett also recommended that Mr. Harlow see a specialist.

Love's offered Mr. Harlow a panel of specialists, and he chose to see Dr. Paul Johnson, a board-certified orthopedic surgeon at Knoxville Orthopaedic Clinic specializing in spinal surgery. In February 2015, Dr. Johnson examined Mr. Harlow, reviewed the MRI, and told Mr. Harlow that the herniated disc and annular tear shown on the MRI were unrelated to the August 2013 accident. According to Mr. Harlow, Dr. Johnson spent about ten minutes with him.

In December 2016, Mr. Harlow saw Dr. William Kennedy, a retired orthopedic surgeon and board-certified independent medical examiner in Jonesborough, Tennessee, for an independent medical examination. According to Mr. Harlow, Dr. Kennedy spent about two to three hours with him.

Mr. Harlow testified that he felt worthless after quitting his job because he "was raised up to believe that a man provided for his family." He stated that he became depressed and was on medication for depression at the time of the hearing. Mr. Harlow said he had not worked since leaving Love's. At the time of trial, Mr. Harlow's low back pain was at a "level six" on a normal day. He was taking Gabapentin and Methocarbamol (a muscle relaxant) for pain, but neither medication helped much. On a typical day, he "pretty much sit[s] around in [his] recliner because that's the only place [he] can get comfortable." Mr. Harlow used to cut the grass and take the trash out, but his son had to take over those tasks. From time to time, he is able to wash a few dishes or wash a load of

clothes. In 2015, Mr. Harlow fell three times and then began using a cane. He explained that he would take a step and not feel his foot hit the ground, his leg giving way when he put all his weight on it. Mr. Harlow testified that he had not applied for unemployment benefits because applicants have “to be able to say that you can go to work if you draw unemployment.” He said that his family had lost everything because he could not work. Mr. Harlow testified he would still be working if he was able. In July 2017, Mr. Harlow and his family moved to Florida because his wife found a full-time teaching job there.

Mr. Harlow’s wife, Miranda Harlow, testified that Mr. Harlow had no previous back injury or any complaint of back pain before getting hurt at work. After the August 2013 accident, Mr. Harlow would come home from work and go straight to bed because of pain. He also became depressed. According to Ms. Harlow, Dr. Allum had said some things that caused her and Mr. Harlow to talk about Mr. Harlow quitting Love’s to avoid ending up in a wheelchair. She said that Mr. Harlow had not worked since leaving Love’s and had applied for disability benefits.

Mr. Harlow introduced the deposition testimony of Dr. Kennedy. Love’s introduced the deposition testimony of Dr. Hammett and Dr. Johnson.

Dr. Kennedy’s Deposition

On December 19, 2016, Dr. Kennedy conducted an independent medical examination of Mr. Harlow at the request of Mr. Harlow’s attorney. According to Dr. Kennedy, Mr. Harlow said he fell “backwards into an adjacent wall striking the upper thoracic region and lower lumbar region of his back . . . and caught his moving body with his left hand on concrete, avoiding a complete fall to the floor, but in the process twisting his back.” Mr. Harlow reported that he had constant pain in his back and right hip that would often radiate with numbness and tingling to the back of his right thigh and calf and into the bottom of his right foot. When the pain radiated to his right leg, Mr. Harlow had trouble standing, walking, and maintaining balance. He started using a cane to minimize his right leg giving way.

Mr. Harlow told Dr. Kennedy he did not remember having any pain or injury to his low back before the August 2013 accident or suffering any additional back injuries after the accident. Mr. Harlow fractured his heel in 2016 while trying to climb a short fence, but Dr. Kennedy concluded this did not affect his back injury. Dr. Kennedy testified that the descriptions of the August 2013 accident in Dr. Hammett’s and Dr. Johnson’s records were not inconsistent with his understanding of the accident, but that those descriptions did not have as much detail about the mechanism of the injury as he had obtained from Mr. Harlow.

On physical examination, Dr. Kennedy noted moderate muscle spasm greater on the right side of Mr. Harlow's low back than on the left and decreased range of motion with right lateral bending. These findings accorded with Dr. Hammett's observation of greater pain on the right side and with the herniated disc. Mr. Harlow had increased pain from straight-leg raising on his right side, but not on his left side. Dr. Kennedy also found decreased sensory function at the L5 nerve root distribution, which correlated with the level and position of the disc herniation. Applying the five Waddell signs for symptom magnification, Dr. Kennedy observed only one positive sign, and agreed that it fit with Mr. Harlow's symptoms lasting more than six months and was not clinically significant for establishing symptom magnification. He also observed that Mr. Harlow used the cane in his right hand in a manner consistent with minimizing the risk of his right leg giving way. Dr. Kennedy did not find inconsistencies in Mr. Harlow's complaints when compared to objective determinations. Dr. Kennedy testified that Mr. Harlow's complaints of numbness and tingling on his right foot accorded with his herniated disc. In Dr. Kennedy's view, Mr. Harlow's complaints could be verified by the MRI findings and the abnormalities Dr. Kennedy noted in his physical examination.

Dr. Kennedy diagnosed Mr. Harlow with "displaced intervertebral disc or small disc herniation with annular tear in the right paracentral position at L4 with right L5 sensory radiculopathy." Dr. Kennedy explained that Mr. Harlow's radicular pain derived, more likely than not, from nerve root irritation caused by inflammatory products leaking from the chemical breakdown of the injured disc and not from mechanical compression. Because the breakdown occurs gradually, the pain can last many years and sometimes indefinitely. Although Dr. Kennedy acknowledged there was no diagnostic evidence of chemical irritation to the L5 nerve root, he explained that there is no test for chemical irritation. Dr. Kennedy noted that both Dr. Hammett's September 2014 report of a positive straight-leg raising test and Dr. Johnson's February 2015 notation of low back pain with radicular pain down the right leg were consistent with irritation of the nerve root at the site of the herniated disc. Dr. Kennedy explained that the negative straight-leg raising test noted by Dr. Hammett in September 2013 was not inconsistent because there had not yet been sufficient time for the disc to break down chemically and cause irritation.

Dr. Kennedy concluded that, within a reasonable degree of medical certainty, the August 2013 accident caused Mr. Harlow's annular tear with the associated disc herniation at L4 and the L5 sensory radiculopathy. Dr. Kennedy stated that the changes at L4 were consistent with post-traumatic anatomical changes rather than normal age-related changes of degenerative disc disease. He noted that his conclusion was supported by the lack of any other reported trauma to Mr. Harlow's back. Dr. Kennedy also concluded that the annular tear and disc herniation permanently aggravated and advanced age-related degenerative changes and increased the risk for acceleration of

degenerative changes and for additional injuries to Mr. Harlow's lower back. He explained that the MRI showed that the L4 disc had not reached the point of breaking down but for the injury itself, and that trauma can cause a pre-existing condition to become symptomatic. Dr. Kennedy agreed with Dr. Johnson that blunt force trauma is unlikely to cause an annular tear, but explained that the twisting mechanism of Mr. Harlow's accident caused the annular tear.

Dr. Kennedy determined that Mr. Harlow had reached maximum medical improvement by the time Mr. Harlow saw Dr. Johnson on February 13, 2015. In Dr. Kennedy's opinion, Mr. Harlow was limited by substantial work restrictions, including no bending, stooping, squatting, or working over rough terrain or in rough vehicles; no activities in which safety and stability would depend on normal, pain-free mobility and strength of the lumbar spine and on the normal sensory function of the right foot; no sitting over thirty minutes at a time without opportunity to change positions; and no lifting, carrying, pushing, or pulling more than ten pounds occasionally or five pounds frequently.

Dr. Kennedy assigned Mr. Harlow a permanent physical impairment rating of thirteen percent to the whole person based on the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides), Sixth Edition. Dr. Kennedy testified that Mr. Harlow would not be able to return to work as a diesel mechanic because of the job's physical demands, including the required twisting and reaching.

Dr. Hammett's Deposition

Dr. Hammett testified that Vicki Stiltner, a physician assistant at East Towne Urgent Care, examined Mr. Harlow on August 29, 2013. Ms. Stiltner's notes reflect that Mr. Harlow told her that he was "pulling, tugging, and pushing on a wheel dolly, which eventually gave way and he almost fell." Mr. Harlow reported having pain in his neck, lower back, and right side musculature since the accident, but no numbness or tingling. According to Ms. Stiltner, Mr. Harlow told her he had previous back problems, causing numbness in his feet. Ms. Stiltner observed that Mr. Harlow was slow to move from a sitting to a standing position and walked with a limp. She noted tenderness in Mr. Harlow's low back and neck muscles, and a limited range of motion in his right shoulder because of pain. Ms. Stiltner diagnosed Mr. Harlow with a neck strain and back pain. She gave him a steroid injection, prescribed Prednisone and Flexeril (a muscle relaxant), told him to avoid stooping or squatting and lifting more than ten to fifteen pounds, and scheduled a follow-up appointment.

On September 3, 2013, Mr. Harlow returned to East Towne Urgent Care. Dr. Hammett examined Mr. Harlow, who complained of soreness in his right hip and right shoulder. Mr. Harlow said that his low back pain had improved. Dr. Hammett conducted a straight-leg raising test to determine whether Mr. Harlow had a herniated disc. This test puts pressure across the sciatic nerve, and a person with a herniated disc usually experiences pain and discomfort during the test. Mr. Harlow's straight-leg raising test was negative. Internal rotation in flexion of Mr. Harlow's right hip showed good range of motion. Dr. Hammett diagnosed Mr. Harlow with tendonitis and improving low back, hip, and shoulder pain. Dr. Hammett told Mr. Harlow to finish the Prednisone and to do range of motion exercises and released him to regular activity.

Dr. Hammett next saw Mr. Harlow on September 29, 2014. Mr. Harlow stated on his intake sheet that day that he had previously come in for pain in his right hip, right shoulder, and back and that "it wasn't treated properly." He told Dr. Hammett that he had been sleeping in a recliner for several months. Dr. Hammett reviewed the MRI study of Mr. Harlow's lumbar region, which showed a central disc protrusion with an adjacent tear to the annulus, a spinal disc's fibrous covering that holds the nucleus pulposus within the disc space. Tests performed that day by Dr. Hammett—including straight leg raise and internal rotation of the hip in flexion—were positive on the right and negative on the left. Dr. Hammett assessed Mr. Harlow's condition as chronic back pain, chronic sacroiliac joint pain, mild abnormal MRI, and poor sleep. Dr. Hammett gave Mr. Harlow an injection of Toradol at the right sacroiliac joint and prescribed a muscle relaxant. That same date, Dr. Hammett stated in a letter to Love's insurer that Mr. Harlow had not reached maximum medical improvement.

Mr. Harlow saw Dr. Hammett again on October 13, 2014, complaining of pain in his back, right hip, and right shoulder. Dr. Hammett prescribed Naproxen (an anti-inflammatory), Tramadol for pain, and Flexeril. He ordered six sessions of physical therapy and recommended that Mr. Harlow see an orthopedic surgeon.

Dr. Hammett testified it was unlikely that Mr. Harlow's annular tear resulted "just from slipping," but conceded that trauma more often than not is the cause of an annular tear. He also stated that because a lot of time had passed between the January 2014 MRI and his examination of Mr. Harlow in September 2014, it was "pretty much impossible" to connect Mr. Harlow's back condition with his August 2013 work accident. Dr. Hammett stated that central disc protrusions rarely hit the nerve roots, but he acknowledged that something in Mr. Harlow's low back was causing radicular pain and numbness down his right leg. Dr. Hammett stated that, within a reasonable degree of medical certainty, an annular tear was present, but he could not state whether or not Mr. Harlow's lumbar condition was related to his injury.

Dr. Johnson's Deposition

Dr. Johnson testified that he examined Mr. Harlow on February 13, 2015. Mr. Harlow described pain in his back and down his right leg, which Mr. Harlow related to his accident at Love's. Mr. Harlow stated that he had fallen backwards while pulling on an object and hit his back against a wall. According to Dr. Johnson, Mr. Harlow's MRI showed a "small annular disruption or a little tear in the outer tough covering of the disc," as well as age-related degenerative changes at L5-S1. In Dr. Johnson's opinion, Mr. Harlow's work-related accident could not have caused the changes shown by the MRI or his need for treatment. Dr. Johnson agreed, however, that "rotational trauma" could cause an annular tear. After determining that Mr. Harlow was not a good candidate for surgery, Dr. Johnson discussed with Mr. Harlow treatment options including physical therapy and an epidural injection.

Dr. Johnson testified that the findings of his physical examination of Mr. Harlow fit with symptom magnification. In Dr. Johnson's opinion, Mr. Harlow was not having pain in his leg because there was no anatomic condition in his lumbar spine that would cause the leg pain that Mr. Harlow described. Dr. Johnson stated that radicular pain typically develops relatively quickly after an injury. On the other hand, radicular pain that worsens over time suggests degenerative problems rather than acute injury. He admitted, however, that he could not prove or disprove whether or not someone has radicular pain.

Dr. Johnson testified that, within a reasonable degree of medical certainty, the work-related injury described by Mr. Harlow did not cause Mr. Harlow's back condition.

Trial Court's Judgment

The trial court entered a Final Order stating its findings of fact and conclusion of law. The trial court's findings of fact included:

- On August 26, 2013, [Mr. Harlow] sustained a low back injury when his hands slipped while removing a wheel and hub assembly. He fell back and the middle of his back struck the wall; as he hit the wall, his body twisted so that he could catch himself with his left hand.
- [Mr. Harlow] was forced to resign his employment in early March 2014 because of his low back injury.¹

¹ Mr. Harlow testified that he left Love's in February 2014. Love's counsel said that the resignation date was February 16, 2014. The trial court's reference to a March 2014 date is from Mr.

- Dr. Kennedy testified that the lumbar MRI revealed an annular tear at L4, which more likely than not caused a chemical irritation from the chemical breakdown of the injured disc.
- Dr. Kennedy testified that [Mr. Harlow] reached maximum medical improvement by February 13, 2015.
- The Court accredits Dr. Kennedy's testimony that Mr. Harlow's mechanism of injury caused a disruption to the L4 disc, resulting in radicular pain, and for which a [thirteen percent] impairment rating is appropriate under the AMA Guides.
- [Mr. Harlow] remains in significant pain. He has not sought work, but due to his young age, he remains employable in some capacity and is, therefore, not permanently and totally disabled.

Based on these findings of fact, the trial court held that Mr. Harlow sustained a compensable injury as a result of his accident at work. The trial court awarded Mr. Harlow temporary total disability benefits based on forty-nine weeks from March 5, 2014, through February 13, 2015. The trial court also awarded Mr. Harlow permanent partial disability benefits based on a fifty-two percent disability rating or four times the thirteen percent impairment rating assigned by Dr. Kennedy. The trial court determined that capping Mr. Harlow's permanent partial disability benefits award to one and one-half times the impairment rating would be "unfair" because he "had no choice but to quit his job because of his ongoing low back pain." Love's timely filed this appeal.

II.

We review a trial court's findings of fact de novo with a presumption of correctness, unless the preponderance of the evidence is otherwise. *Mansell v. Bridgestone Firestone N. Am. Tire, LLC*, 417 S.W.3d 393, 399 (Tenn. 2013) (citing Tenn. Code Ann. § 50-6-225(e)(2) (2008 & Supp. 2012)). Considerable deference is given to a trial court's findings when the judge has observed in-court witness testimony. *Id.* (citing *Madden v. Holland Grp. of Tenn., Inc.*, 277 S.W.3d 896, 898 (Tenn. 2009)). We draw our own conclusions, however, about medical testimony presented by deposition. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002) (citing *Cooper v. Ins. Co. of N. Am.*, 884 S.W.2d 446, 451 (Tenn. 1994)). Similarly, we afford no presumption of

Harlow's employment file that stated Mr. Harlow's termination date was March 5, 2014. This discrepancy is immaterial to our analysis.

correctness to a trial court's conclusions of law. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009) (citing *Goodman v. HBD Indus., Inc.*, 208 S.W.3d 373, 376 (Tenn. 2006)).

Rebutting the Presumption of Correctness

An employee “must establish by expert medical evidence the causal relationship between the claimed injury and the employment activity.” *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d 638, 643 (Tenn. 2008) (citing *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991)). Absolute medical certainty is not required to establish causation, and reasonable doubt must be construed in favor of the employee. See *White v. Werthan Indus.*, 824 S.W.2d 158, 159 (Tenn. 1992) (citations omitted). For injuries occurring before July 1, 2014, courts must construe the workers' compensation law liberally in favor of an injured employee. Tenn. Code Ann. § 50-6-116 (2014) (applicable to injuries occurring before July 1, 2014); *Crew v. First Source Furniture Grp.*, 259 S.W.3d 656, 664 (Tenn. 2008).

Under Tennessee Code Annotated section 50-6-102(12)(A)(ii) (2014) (applicable to injuries occurring before July 1, 2014), the opinion of an authorized treating physician “shall be presumed correct on the issue of causation but said presumption shall be rebutted by a preponderance of the evidence[.]” Here, the authorized treating physician, Dr. Johnson, testified that the work accident did not cause Mr. Harlow's back condition. Dr. Kennedy, who conducted an independent medical examination, testified that the cause of Mr. Harlow's back problems was his work accident.

Love's asserts that the testimony of Dr. Kennedy did not rebut the statutory presumption of correctness afforded to Dr. Johnson.² The trial court made a finding of fact that it credited Dr. Kennedy's testimony but did not make a specific finding that the presumption of correctness given to authorized treating physicians under Tennessee Code Annotated section 50-6-102(12)(A)(ii) had been rebutted. We can review the deposition testimony of the medical experts and decide whether Mr. Harlow's evidence overcame the presumption by a preponderance of the evidence. See *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008) (citing *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006)).

² Love's also argues that the trial court did not consider the opinions of Dr. Hammett and Dr. Johnson. We disagree. The trial court's Final Order states that the court “considered the medical evidence, which consisted of the filed depositions of Dr. Jay Hammett, Dr. Paul Johnson, and Dr. William Kennedy.”

Drs. Hammett, Johnson, and Kennedy gave conflicting testimony about the cause of Mr. Johnson's herniated disc and annular tear. When medical testimony differs, the trier of fact must choose which expert is more credible. In making this determination, the trial court may consider, among other things, the experts' qualifications, the circumstances of their evaluations, the information available to them, and other experts' evaluation of the importance of that information. *Orman*, 803 S.W.2d at 676.

After reviewing the medical evidence, we agree with the trial court that Dr. Kennedy's testimony should be given more weight than Dr. Johnson's testimony. We also find that Mr. Harlow's evidence rebutted the presumption of correctness afforded to Dr. Johnson's opinion by a preponderance of the evidence.

Both Dr. Johnson and Dr. Kennedy were qualified to testify about the cause of Mr. Harlow's back injury. Dr. Johnson is a board-certified orthopedic surgeon and has practiced in that field for over twenty years. He has specialized training in spinal surgery. Dr. Kennedy practiced as a board-certified orthopedic surgeon for twenty-six years, before beginning to practice exclusively in 1998 as a board-certified independent medical examiner in the field of orthopedic surgery. He is also a member of the Medical Impairment Rating Registry of the State of Tennessee Department of Labor and Workforce Development.

Both Dr. Johnson and Dr. Kennedy saw Mr. Harlow one time. But Dr. Kennedy spent more time examining Mr. Harlow than did Dr. Johnson. Dr. Johnson spent only about ten minutes with Mr. Harlow while Dr. Kennedy spent about two to three hours with him.

Dr. Kennedy had more information available to him about Mr. Harlow's medical treatment and his injury than did Dr. Johnson. Dr. Johnson only had the MRI report before seeing Mr. Harlow. Dr. Kennedy had the MRI report, as well as Mr. Harlow's medical records from East Towne Urgent Care, Dr. Allum, Dr. Johnson, an express health clinic, and a podiatrist who saw Mr. Harlow after his 2016 heel fracture. Dr. Kennedy took a detailed history from Mr. Harlow about the mechanics of the injury. He learned that Mr. Harlow's back hit a wall four to six feet behind him and then twisted as he was falling to the ground. Dr. Johnson's dictated notes state that Mr. Harlow had fallen backwards and struck his back against a wall, but not that a twisting motion was involved. This difference in the medical history is important because Dr. Kennedy testified that the twisting mechanism was the cause of the annular tear. Dr. Johnson's opinion did not consider Mr. Harlow's "twisting" during his work accident, an element that was essential to Dr. Kennedy's conclusion that Mr. Harlow's annular tear had resulted from the work accident. Dr. Johnson admitted that "rotational trauma" could cause an annular tear.

One of the bases of Dr. Johnson's causation opinion was that radicular pain typically develops relatively quickly after an injury, while radicular pain that worsens over time suggests degenerative problems rather than an acute injury. On the other hand, Dr. Kennedy concluded that Mr. Harlow's radicular pain was consistent with irritation of the nerve root at the site of the herniated disc. Dr. Kennedy explained that byproducts from the gradual chemical breakdown of the injured disc leak out over time and cause inflammation at the nerve root. He also indicated that changes at L4 were consistent with post-traumatic anatomical changes and not simply attributable to age-related degenerative disease. We find Dr. Kennedy's explanation more credible.

Dr. Johnson opined that Mr. Harlow could not be having pain in his leg because there was no anatomic condition in his lumbar spine that would cause the leg pain that Mr. Harlow described. Dr. Johnson interpreted this as a sign of symptom magnification. He admitted, however, that he could not prove or disprove whether someone was experiencing radicular pain. In addition, Dr. Johnson conceded that, even though it was unlikely, Mr. Harlow "could have some chemical irritation" causing his leg pain. Dr. Kennedy did not find inconsistencies in Mr. Harlow's complaints when compared to objective determinations. He testified that Mr. Harlow showed only one of the five Waddell signs for symptom magnification, which fit with Mr. Harlow's symptoms lasting more than six months and was not clinically significant for establishing symptom magnification. Dr. Kennedy also observed that Mr. Harlow used the cane in his right hand in a manner consistent with minimizing the risk of his right leg giving way.

Dr. Kennedy's opinion about causation is consistent with the lay testimony. In establishing causation, expert medical testimony may be "supplemented by the evidence of lay witnesses." *Excel Polymers, LLC v. Broyles*, 302 S.W.3d 268, 274 (Tenn. 2009). Mr. Harlow's supervisor, Mr. White, stated that before the August 2013 work accident, he had not heard Mr. Harlow complain of back pain or observed Mr. Harlow have back problems while employed by Love's. Mr. White also stated that Mr. Harlow told him that he was resigning because he could not do his job any longer due to his back pain. Mr. Harlow and his wife testified to Mr. Harlow's lack of back pain before the accident and his back pain and limitations after the accident. There is no evidence of any other trauma to Mr. Harlow's back before or after the work-related accident to account for his back pain, other than the work-related accident.

We hold that Mr. Harlow's evidence was sufficient to overcome the statutory presumption of correctness afforded to Dr. Johnson's opinion on causation by a preponderance of the evidence. *See Hovatter v. JDAK, LLC*, No. M2015-01015-SC-R3-WC, 2015 WL 9595624, at *4-5 (Tenn. Workers' Comp. Panel Dec. 30, 2015) (holding that employee rebutted the statutory presumption of correctness in favor of the authorized

treating physician by a preponderance of the evidence where the two medical experts were equivalently competent, but the authorized treating physician had based his opinion on an incomplete history of the employee's injury); *Butler v. McKee Foods Corp.*, No. E2017-02471-SC-R3-WC, 2018 WL 6440748, at *4 (Tenn. Workers' Comp. Panel Dec. 6, 2018) (holding that employee rebutted the presumption of correctness afforded to the authorized treating physician when two other physicians opined the injury was work related and objective neurological signs of injury and lay testimony were consistent with the description of the work accident).

Statutory Cap

The trial court awarded Mr. Harlow permanent partial disability benefits based on a disability rating of fifty-two percent or four times the thirteen percent impairment rating assigned by Dr. Kennedy. Love's contends that the trial court erred in failing to apply Tennessee Code Annotated section 50-6-241(d)(1)(A) to limit Mr. Harlow's permanent partial disability benefits because Mr. Harlow voluntarily quit his job at Love's. Mr. Harlow responds that the statutory cap does not apply because lay and expert testimony established that he returned to work after the injury, but was not able to continue working because of his back and leg pain.

Tennessee Code Annotated section 50-6-241(d)(1)(A) (2014) (applicable to injuries occurring before July 1, 2014) provides that when an injured employee is eligible to receive any permanent partial disability benefits for the body as a whole or scheduled members, with some exceptions, and the pre-injury employer returns the employee to work at wages equal to or greater than the wages the employee was receiving when injured, the maximum permanent partial disability benefits the employee can receive is one and one-half times the medical impairment rating. Tenn. Code Ann. § 50-6-241(d)(1)(A). The trial court must make a factual finding concerning the employee's medical impairment rating from expert medical testimony based on the AMA Guides. *Id.* § 50-6-204(d)(3).

Thus the statutory cap applies if Mr. Harlow had a "meaningful return to work." *Howell v. Nissan N. Am., Inc.*, 346 S.W.3d 467, 472 (Tenn. 2011) (citing *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 328 & n.9 (Tenn. 2008); *Lay v. Scott Cnty. Sheriff's Dep't*, 109 S.W.3d 293, 297 (Tenn. 2003); *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 629 (Tenn. 1999)). To determine whether an injured employee had a meaningful return to work, a trial court must assess the reasonableness of the employer in returning the employee to work and that of the employee in failing to either return or remain at work. *Tryon*, 254 S.W.3d at 328 (citing *Lay*, 109 S.W.3d at 297-98; *Nelson*, 8 S.W.3d at 630). This reasonableness determination depends on the facts of each case. *Id.* (citations omitted). Courts have considered reasonable an injured employee's decision to resign or

retire after returning to work when the employee's physician advised the employee to resign, the work-related injury rendered the employee unable to perform his or her job, the employer refused to accommodate the employee's work restrictions arising from the work-related injury, or the work-related injury caused too much pain to permit the employee to continue working. *Iacono v. Saturn Corp.*, No. M2008-00139-WC-R3-WC, 2009 WL 648962, at *6 (Tenn. Workers' Comp. Panel Mar. 12, 2009) (citing *Tryon*, 254 S.W.3d at 329). On the other hand, if an injured employee leaves the job after a work-related injury for reasons unrelated to the injury, the decision is "unreasonable" and the employee had a meaningful return to work that triggers the statutory cap. *See, e.g., Eldridge v. Putnam Cnty. Bd. of Educ.*, No. M2006-02046-WC-R3-WC, 2007 WL 2333036, at *4-5 (Tenn. Workers' Comp. Panel Aug. 17, 2007) (interpersonal conflicts with co-workers); *Ralston v. Aerostructures Corp.*, No. M2005-01369-WC-R3-CV, 2007 WL 439024, at *4 (Tenn. Workers' Comp. Panel Feb. 12, 2007) (accepting early retirement in order to farm); *Lay*, 109 S.W.3d at 299 (accepting a better job offer). If the employee had a meaningful return to work, his or her benefits are capped at one and one-half times the medical impairment rating. Tenn. Code Ann. § 50-6-241(d)(1)(A). If the employee did not have a meaningful return to work, his or her benefits are capped using the larger multiplier of six times the medical impairment rating. *Id.* § 50-6-241(d)(2)(A). In awarding permanent partial disability benefits under either subsection (d)(1)(A) or (d)(2)(A), a trial court must "consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition." Tenn. Code Ann. § 50-6-241(d).

The question here is whether Mr. Harlow's decision to quit his job at Love's was reasonably related to his work-related injuries. *See Tryon*, 254 S.W.3d at 333. We find that the evidence does not preponderate against the trial court's finding that Mr. Harlow had to resign because of his injury, that he remained in significant pain, and that he did not seek employment after leaving Love's. Mr. Harlow testified he "felt he had no choice but to quit his job because of his ongoing low back pain." Mr. White confirmed that this was the reason Mr. Harlow left his job. Following his work injury, Mr. Harlow complained of back, hip, and shoulder pain to Ms. Stiltner, Dr. Hammett, and Dr. Allum. When Mr. Harlow saw Dr. Johnson and Dr. Kennedy several months later, he still complained of back pain, in addition to radicular leg pain. Mr. Harlow did not work after leaving Love's, and his wife described how their family had been adversely affected by the injury.

Our conclusion is consistent with other decisions in which an injured employee's pain resulting from a work-related injury prevented the employee from continuing employment after returning to work with the pre-injury employer. *See Young v. Cumberland Cnty. Med. Ctr.*, No. M2005-02550-WC-R3-CV, 2007 WL 439015, at *5

(Tenn. Workers' Comp. Panel Feb. 12, 2007) (concluding that the statutory cap did not apply where employee with neck and shoulder injuries returned to work but later quit because of intense pain and where employer made no meaningful offer of employment after the employee resigned); *Anderson v. Hartsville Convalescent Ctr.*, No. 01S01-9703-CH-00070, 1997 WL 807003, at *1 (Tenn. Workers' Comp. Panel Dec. 31, 1997) (concluding that employee with a ruptured disc had no meaningful return to work where the employee "gave up" her job two months after returning to work because of pain from her injury).

Love's argues that *Erdman v. Saturn Corp.*, No. M2008-00281-WC-R3-WC, 2009 WL 1607905 (Tenn. Workers' Comp. Panel June 10, 2009) and *Blair v. Wyndham Vacation Ownership, Inc.*, No. E2009-01343-WC-R3-WC, 2010 WL 2943144 (Tenn. Workers' Comp. Panel July 27, 2010) support its position. We disagree. In *Erdman*, an injured employee returned to work for a brief period. After having surgery, she decided to retire under her employer's voluntary attrition program. 2009 WL 1607905, at *1. The trial court found that the employee voluntarily left her job for reasons not related to her injury. *Id.* at *2, *5. A workers' compensation appeals panel affirmed, holding that the evidence did not preponderate against the trial court's decision to cap the employee's benefits. *Id.* at *5. Here, Mr. Harlow was injured, returned to work for about six months, and only quit after the pain from his back injury prevented him from working. In *Blair*, an authorized treating physician examined an injured worker two days after her injury and took her off work. 2010 WL 2943144, at *1. The employee received additional medical treatment after her condition worsened. *Id.* When she was released to return to work, she declined her employer's offer of work because she did not think she could do the job. *Id.* at *2. The trial court found that the employee did not have a meaningful return to work and awarded her benefits in excess of the cap. *Id.* at *3. A workers' compensation appeals panel reversed, concluding that the employee acted unreasonably when she refused to return to work. *Id.* at *6. The appeals panel reasoned that the employee did not try to return to work, thus it was speculative whether her injuries would have interfered with her ability to do her job or whether her employer would have been unable to accommodate her limitations. *Id.* Mr. Harlow worked for about six months after he was injured, eliminating any speculation as to whether he could do the job.

We hold that the evidence does not preponderate against the trial court's finding that Mr. Harlow left Love's because of his work-related injury. Mr. Harlow did not have a meaningful return to work. Thus, the trial court did not err in awarding permanent partial disability benefits in excess of the statutory cap.

III.

We affirm the trial court's award of permanent partial disability benefits and temporary total disability benefits to Bradley Harlow. We tax the costs of this appeal to Love's Travel Stops & Country Stores, Inc. and Indemnity Insurance Company of North America, for which execution may issue if necessary.

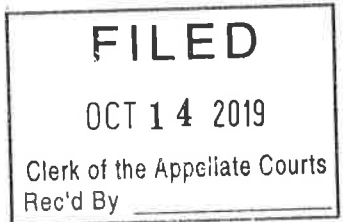
SHARON G. LEE, JUSTICE

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

BRADLEY HARLOW v. LOVE'S TRAVEL STOPS ET AL.

Circuit Court for Jefferson County
No. 25011-I

No. E2018-01905-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 Ronald Brantley, or his surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM