IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 20, 2020 Session

FREDERICK PERRY v. THYSSENKRUPP ELEVATOR CORPORATION

Appeal from the Chancery Court for Hardeman County
No. 18764 Martha B. Brasfield, Chancellor

No. W2019-01549-SC-R3-WC – Mailed August 14, 2020; Filed September 16, 2020

Frederick Perry ("Employee") worked for Thyssenkrupp Elevator Corporation ("Employer") at a variety of jobs beginning in 1988. On February 22, 2013, Employee was working on a cutting machine cutting steel elevator panels. While attempting to move a large steel panel from the work table to a pallet with a jib crane, Employee slipped and fell. Employee was determined to have suffered a torn labrum in his right hip and a torn meniscus in his right knee, which were surgically repaired. Employee's treating orthopedic surgeon, Dr. Adam Smith, placed Employee at maximum medical improvement ("MMI") on June 13, 2014. He assigned Employee anatomical impairment ratings of 3% to the lower right extremity for the right hip injury and 3% to the lower right extremity for the right knee injury, for a combined anatomical impairment rating of 6% to the lower right extremity or 2% to the body as a whole. Dr. Smith placed certain restrictions on Employee. Employer returned Employee to work at another job accommodating his restrictions and providing a higher rate of pay. On March 3, 2015, Employee underwent an independent medical examination by physical medicine and rehab physician, Dr. Samuel Jae Jin Chung, on referral from his attorney. Dr. Chung diagnosed Employee as suffering "[r]esidual from right knee injury requiring extensive surgical intervention with ongoing symptoms of right patellofemoral arthritis" and "[r]esidual from right hip injury secondary to fall with status post surgical intervention with ongoing symptomatology." Dr. Chung assigned Employee anatomical impairment ratings of 15% to the right lower extremity for the right knee injury and 22% to the right lower extremity for the right hip injury, for a combined anatomical impairment rating of 34% to the lower right extremity or 13% to the body as a whole. Dr. Chung placed certain restrictions on Employee and suggested the possibility of need for a future right knee replacement. A Benefit Review Conference was held on December 2, 2015, resulting in an impasse. The parties were unable to resolve the extent of Employee's anatomical impairment or his vocational impairment. Employee brought suit. The parties

stipulated or agreed that Employee had received all the temporary total disability benefits to which he was entitled, Employer had paid all authorized medical expenses, and the 1.5 multiplier cap applied. The trial court rejected the anatomical impairment ratings of both Dr. Smith and Dr. Chung and adopted its own modified anatomical impairment ratings of 18% to the lower right extremity for the right hip injury and 14% to the lower right extremity for the right knee injury, for a combined anatomical impairment rating of 29% to the lower right extremity or 12% to the body as a whole. The trial court awarded Employee permanent partial disability benefits based upon a vocational impairment of 18% to the body as a whole. Employer has appealed and 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 in part and reverse in part the judgment of the trial 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 Chancery Court Affirmed in Part and Reversed in Part

KYLE C. ATKINS, J., delivered the opinion of the court, in which Roger A. Page, J. and Arnold B. Goldin, J., joined.

Hailey H. David, Jackson, Tennessee, for the appellant, ThyssenKrupp Elevator Corporation

Christopher L. Taylor, Memphis Tennessee, for the appellee, Frederick Perry

OPINION

Factual and Procedural Background

A Benefit Review Conference was held on December 2, 2015, resulting in an impasse. The parties were unable to reach agreement with respect to the extent of Employee's anatomical impairment or his vocational impairment. Employee filed this workers' compensation action, and a trial was held in the Chancery Court for Hardeman County on June 26, 2019.

Stipulations

The parties stipulated to the compensability of the claim, the application of the 1.5 multiplier cap in Tenn. Code Ann. § 50-6-241(d)(1)(A) (applicable to injuries occurring between July 1, 2004 and July 1, 2014), and the weekly compensation rate of $670.40. The parties also agreed that all of Employee's authorized medical expenses had been paid and that Employee had been paid all temporary total disability benefits to which he was entitled.

Testimony of Employee

At the time of trial, Employee was 50 years old, had been married for 29 years, and had three sons. He had completed high school and had additional vocational training in drafting blueprints and in maintenance, as well as some seminary training. Employee had worked for National Spray-On carrying hoses and ladders and for Master Slack, a garment factory. Employee began working for Employer in 1988, holding a series of different jobs.

On February 22, 2013, Employee was working on a plastic cutter used to cut large sheets of metal for elevator panels. Employee testified that as he was attempting to move a large piece of finished metal from the table to a pallet with a jib crane, he slipped and fell. Employee described his fall as follows:

> So when I stepped down off those steps and stepped down, I didn't realize he had a metal skid sitting right there with a piece of cardboard in it, and when I stepped off pulling that jib crane, 'cause I was watching that big plate that was dangling on there, when I stepped off, my right leg first, it kicked that cardboard and I done the splits. I mean, I hit the floor, hit the metal skid. Inside of that metal skid is where I landed, and that plate, I had to let it go because I was pulling it. So as I let it go, I was afraid it was gonna come over me, so I hurried up and twisted and got up out of the way, and the lift driver jumped off to come over as well. So when I got up, I mean, it felt like somebody had hit me in my male area. I mean, it was a bad feeling. So he said, "Are you all right," and he helped me get to the bathroom, and I told him, I said, "man, I just need some time." I was trying to gather myself. That's how I done it.

Employee testified that he did not, to his knowledge, hit his knee on the ground when he fell on February 22, 2013. Employee reported his injury but did not immediately seek medical attention because he thought the pain would pass.

Employee, however, experienced persistent pain on the inside of his right leg in the groin area, so he subsequently sought medical treatment. Employee was referred by

Employer to Dr. Edwards. According to Employee, Dr. Edwards did not find anything wrong with the groin area and so referred Employee to the Bone & Joint Clinic, where Employee saw Dr. Michael Cobb, an orthopedic surgeon. Employee testified that Dr. Cobb took x-rays and gave him a shot, but could not find anything. Consequently, after 4 months and no change in his symptoms, Employee again contacted Employer and selected Dr. Adam Smith, an orthopedic surgeon, as his authorized treating physician.

Employee testified that Dr. Smith reviewed his x-rays and determined that Employee had suffered a torn labrum in his right hip. Dr. Smith performed surgery to repair the hip. According to Employee, he was doing well after surgery and engaging in physical therapy and using crutches when he began to notice pain in his right knee. Employee had not realized that he had suffered a knee injury until this time. Employee testified that Dr. Smith took an x-ray and determined that Employee had suffered a torn meniscus in his right knee, which Dr. Smith also surgically repaired. Employee acknowledged that he had prior problems with his left knee which were not work-related, but denied any prior problems with his right knee and further denied any injury to his right knee subsequent to his February 22, 2013 fall. He testified that the treatment to his right knee has been continuous since the problem was diagnosed by Dr. Smith.

Employee underwent physical therapy for his hip and knee and then returned to work with Employer. Employee testified that his right knee was still hurting. According to Employee, he saw Dr. Smith for the pain in his right knee and received a cortisone injection in his knee. Dr. Smith then referred Employee to Dr. David Pearce, an orthopedic surgeon, for his knee. Dr. Pearce provided Employee a series of injections in his knee, which helped, but only for a time. Employee testified that he still experiences pain and swelling in his right knee and that he sees Dr. Deneka for the pain.

Employee testified that after his return to full duty, he was assigned a job with less bending and lower body movement and more upper body demands and that he is able to perform this job and earns a higher wage. According to Employee, although he is back at work, his hip and knee have impacted his hobbies, his sleep, and his sexual relations with his wife, and have made such things as climbing the stairs in his home difficult. Employee takes a prescription anti-inflammatory drug and ibuprofen daily. Employee testified that prior to these injuries, he had experienced no problems with either his right hip or his right knee and that he had no prior treatment for either.

Testimony of Dr. Samuel Jae Jin Chung

Dr. Chung testified by deposition. Dr. Chung is a Tennessee licensed physician,

board certified in physical medicine, rehab, and independent medical evaluation. He saw Employee one time, on March 3, 2015, on referral from Employee's attorney for an independent medical examination. Dr. Chung reviewed Employee's prior medical records and prior diagnostic imaging and took a history. Dr. Chung testified that an accurate history was critical and could affect his causation and impairment opinions. With respect to Employee's fall on February 22, 2013, Dr. Chung's history indicated, in part, that Employee had hit his right knee on the floor when he slipped and did the splits, and that Employee had twisted his right knee when he attempted to stand after his fall.

Dr. Chung further testified regarding his review of Employee's prior medical treatment and Employee's post-surgical history. With respect to Employee's prior medical treatment, Dr. Chung testified that an MRI of Employee's right hip ordered by Dr. Cobb prior to Employee's treatment and surgery by Dr. Smith "showed that there was a tear in the anterior and superior and lateral acetabular aspect of the hip joint. And then there was also narrowing." Dr. Chung further testified that an MRI of Employee's right knee ordered by Dr. Smith prior to surgery "revealed mild chondromalacia along with the medial meniscus tear." With respect to Employee's post-surgical history, Dr. Chung testified that after Employee's surgeries, physical therapy, and return to work, Employee continued to experience persistent right leg pain mainly in the right knee with activity involving squatting, transferring, and going up and down the steps. In addition, at times, Employee's knee tends to lock up and he has difficulty moving. According to Dr. Chung, due to worsening pain, Employee returned to see Dr. Smith, who recommended a second opinion. Dr. David Pearce took over Employee's care in December of 2014. After the assessment, Dr. Pearce diagnosed Employee with patellofemoral chondromalacia with degenerative joint disease along with pes planus, and Employee was provided with cortisone injection for symptomatic relief. Unfortunately, the patient's symptoms continued to worsen. He was provided with three rounds of viscosupplementation injection in his right knee. Dr. Chung described this as a "last ditch" effort at conservative treatment. Dr. Chung testified that even after receiving this series of injections, Employee continued to experience right knee pain, mainly in the prepatellar area and had difficulty flexing and extending his right knee. Further, according to Dr. Chung, Employee additionally had difficulty engaging stairs or squatting and noticed some degree of weakness in his right quadriceps strength.

Dr. Chung testified extensively about his physical examination of Employee. With respect to Employee's right hip, Dr. Chung testified that on testing, Employee exhibited some sensory loss on the outside part of his right upper thigh, which might be a result of the surgical repair of his right hip. He testified that Employee's right hip flexion and extension were both normal, his internal rotation was normal, and his external rotation was essentially normal. Employee's right hip adduction was normal and there was a mild

degree of loss of abduction. Employee also exhibited some moderate tenderness of the right inguinal area on adduction. Muscle strength was normal on both right hip flexors. With respect to Employee's right knee, Dr. Chung testified that Employee's Lachman test and anterior drawer test were both negative. There was a moderate degree of pain in between the knee joint and a mild degree of pain on the inside of the knee, medial side, medial joint line; Employee still had a mild degree of tenderness. However, there was no evidence of tenderness in the right lateral joint line with palpation. He further testified that right knee flexion elicited a moderate degree of crepitus in the right knee and there was a moderate degree of grinding of the knee. As Dr. Chung explained: "More like an arthritis, basically without any cartilage and so now you've got a lot of, like, basically grinding feeling, meaning you're basically on a bone-to-bone contact. And that's causing that kind of grinding sensation and sound." Dr. Chung testified that right knee flexion, extension, and muscle strength were normal.

Dr. Chung also had Employee undergo a standing AP x-ray of the right lower extremity and reviewed it prior to his examination. He then measured between the measurement of the patellofemoral joint line and measured 1mm of the cartilage interval. According to Dr. Chung, this indicated a small narrow joint between the patellofemoral joint line so there is hardly any cartilage space that is in between the patellar and femoral bone.

Dr. Chung diagnosed Employee as suffering "[r]esidual from right knee injury requiring extensive surgical intervention with ongoing symptoms of right patellofemoral arthritis," and "[r]esidual from right hip injury secondary to fall with status post surgical intervention with ongoing symptomatology." Dr. Chung attributed 90% of Employee's conditions to his February 22, 2013 fall. Dr. Chung explained causation of Employee's injuries generally as follows:

> The causation is 90 due to the event on 2/22/2013, when he slipped and fell and did a split. I believe that's where he hurt his right groin and then causing the femoral acetabular and the labral tear of the hip. That and I think when he twisted his knee on the floor. And then, of course, he hit the knee on the ground as well. So hitting and then twisting at the same similar time caused the medial meniscus tear and then subsequent arthritic changes from the trauma itself. So that brought on all of the problems they (sic) he had after the injury.

Dr. Chung opined that Employee's hip and knee conditions were permanent. He assigned Employee a 15% anatomical impairment to the right lower extremity for his right knee injury and a 22% anatomical impairment to the right lower extremity for his right hip

injury, resulting in a combined lower extremity rating of 34% and a whole body impairment rating of 13%.

Dr. Chung testified that his rating for Employee's knee injury was under the category for patellofemoral arthritis and that this was based, at least in part, on the x-ray Dr. Chung had performed and reviewed for purposes of performing the measurement of the patellofemoral joint line. He further testified specifically regarding the aggravation of arthritis in Employee's right knee. Dr. Chung explained:

> Q. And Doctor, what affect would hitting the knee and twisting the knee have on any underlying arthritis that may have existed prior to that time?
>
> A. Well the trauma itself would accelerate any type of arthritic condition if there was any premorbid affects [sic] on his knee. And then, of course, the twisting causing the meniscus tear would also have a significant problem because in order to correct that condition they have to do a surgery to shave off the cartilage itself to round it off and then take away more cartilage on top of that. Then you would produce more of a less joint line, meaning you have less cartilage to protect the patella from the femoral bone. Then it causes more joint damage and causes more arthritis. So that has a direct effect on the patient's overall condition after the affects [sic] of the surgery.

Dr. Chung also testified specifically regarding his rating for Employee's hip injury. According to Dr. Chung, that rating was under the femoral osteotomy category. According to Dr. Chung, even though Employee did not undergo a femoral osteotomy, this was the closest applicable category.

Dr. Chung placed the following restrictions on Employee: "avoid prolonged walking, standing, stooping, squatting, bending, climbing, excessive flexion and extension and rotation of his right lower extremity." Dr. Chung also suggested the possibility that Employee might ultimately require a total right knee replacement.

Testimony of Dr. Adam Smith

Dr. Smith testified by deposition. Dr. Smith is a board certified orthopedic surgeon and was Employee's authorized treating physician. Dr. Smith first saw Employee on August 9, 2013, with a primary complaint of right hip pain after a fall approximately 6 months earlier and prior conservative treatment. Based on his history, review of diagnostic studies, and examination, Dr. Smith's impression was a labral tear in the right hip. Dr.

Smith tried some additional conservative treatment, but on Employee's next visit on August 23, 2013, Employee opted to proceed with hip surgery. On September 10, 2013, Dr. Smith performed a right hip femoroplasty, acetabuloplasty, removal of OS acetabuli, and labral repair. He did not perform a femoral osteotomy. Dr. Smith explained the difference between the femoroplasty, which he did perform, and a femoral osteotomy, which he did not perform. The former is shaving parts of the bone off; whereas, the latter is cutting the bone in two. According to Dr. Smith, only the labral repair was necessitated by Employee's February 22, 2013 fall; the remaining procedures were the result of Employee's chronic arthritic conditions.

Dr. Smith testified that in October 2013, Employee's right knee continued to be symptomatic after his hip surgery and rehabilitation, so Dr. Smith obtained an MRI of the knee in November 2013. According to Dr. Smith, the MRI revealed cystic changes around the ACL and a small joint effusion. On January 7, 2014, Dr. Smith performed a partial medial meniscectomy and a chondroplasty or shaving of the cartilage on the inside and outside of Employee's right knee. He additionally performed a trochlear chondroplasty on the patellofemoral joint, as well as excision of the anterior cruciate ligament cyst. Dr. Smith opined that Employee's meniscal tear in his right knee was the result of his February 22, 2013 fall, but that the remainder of Employee's knee condition was the result of wear-and-tear arthritis, not the fall. Dr. Smith rejected Dr. Chung's suggestion that a possible future right knee replacement would be attributable to Employee's fall.

Dr. Smith placed Employee at MMI on June 13, 2014 and placed restrictions on Employee with respect to bending, stooping, twisting or squatting, climbing or crawling; he did not place any weight limits on Employee. These restrictions were permanent.

Dr. Smith testified that he rated Employee for his hip injury in June or July 2014. He assigned Employee an anatomical impairment rating of 3% to the lower right extremity based on the acetabular labrum tear and an upped classification from C to E due to Employee's continued pain and symptoms. Dr. Smith opined that Dr. Chung's rating with respect to Employee's hip was inappropriate in that it used the classification for an osteotomy, a surgical procedure which Dr. Smith had not performed.

Dr. Smith testified that he rated Employee for his right knee injury on July 3, 2014. Dr. Smith assigned Employee an anatomical impairment rating of 3% to the lower right extremity for his right knee injury. He based this on the meniscal injury with partial meniscectomy, again elevating from grade C to E due to Employee's continued symptoms and examination findings. Dr. Smith rejected Dr. Chung's rating because it was premised on an arthritic condition in the patellofemoral joint and based on measurements from an x-

ray view that failed to capture that joint.

Dr. Smith assigned Employee a combined anatomical impairment rating of 6% to the lower right extremity or 2% to the body as a whole.

Decision of the Trial Court

The judgment of the trial court was entered on August 8, 2019.[1] The trial court found that Employee had sustained a work-related injury to his right hip and right knee as a result

[1] Throughout its brief, Employer cites and relies on the oral ruling of the trial court from the bench. Neither the trial court's oral ruling from the bench nor the transcript, however, was incorporated into or referenced in the trial court's August 8, 2019 judgment, which itself sets forth the court's findings and conclusions.

It appears that on or after the filing of the trial transcript on October 18, 2019, the trial judge did write the following on the transcript's front cover: "This Court hereby incorporates by reference the Oral Ruling beginning on page 36 & ending on page 50 into the written order previously filed." The trial judge's signature appears at the end of this notation and at the beginning and end of the referenced pages. The trial judge provided no authority for this procedure, however, and we find none.

Pursuant to Rule 59.05 of the Tennessee Rules of Civil Procedure, a trial court may alter or amend its judgment on its own initiative within thirty (30) days of the entry of the judgment. Pursuant to Rule 60.01 of the Tennessee Rules of Civil Procedure, a trial court may correct errors in its judgment resulting from oversight or omission at any time. Once an appeal has been docketed, however, the trial court first must obtain leave of the appellate court.

In this case the trial judge's notation and signatures were not made on the trial transcript until more than sixty (60) days after entry of the trial court's August 8, 2019 judgment, and more than forty-five days after the filing of Employer's notice of appeal with the Clerk of the Appellate Courts and the docketing of this appeal pursuant to Rule 5(c) of the Tennessee Rules of Appellate Procedure. The trial court, therefore, could not have timely altered or amended its judgment pursuant to Rule 59.05. Further, having failed to seek or obtain the leave of this Court after the docketing of the appeal, the trial court could not have timely corrected any omission from its judgment pursuant to Rule 60.01. The trial court's notation on the front cover of the trial transcript failed to effectively incorporate the court's oral rulings into its previously entered and appealed judgment.

"It is well-settled that a trial court speaks through its written orders—not through oral statements contained in the transcripts—and that the appellate court reviews the trial court's written orders." Williams v. Burns, 465 S.W.3d 96, 119 (Tenn. 2015) (citations omitted). Accordingly, our review is limited to the findings and conclusions of the trial court as reflected in its August 8, 2019 judgment. That being said, we note that Employee has not objected to Employer's references to the trial court's oral ruling and our review of the same indicates that were we to consider that ruling, it would in no way alter our resolution of this appeal.

of his fall on February 22, 2013. The trial court further found that Employee had reached maximum medical improvement ("MMI") on June 13, 2014.

With respect to causation and the anatomical impairment ratings assigned by Dr. Smith and Dr. Chung, the trial court found as follows:

> Dr. Smith opined that the plaintiff had sustained a 3% impairment to the lower extremity for the labral tear in the hip and 3% to the lower extremity for the meniscus tear in the knee, which converts and combines to 2% impairment to the body based on the Sixth Edition of the AMA Guidelines. Dr. Chung opined that the plaintiff had a 22% to the lower extremity for the hip and 15% to the lower extremity for the arthritis in knee, which converts and combines to 13% impairment to the body. The difference in the knee ratings was that Dr. Smith based his rating solely on the meniscus surgery. Dr. Smith did not take into consideration the arthritis that had been aggravated by the fall, and Dr. Chung based his rating of the knee on the arthritis that he found on xray. The Court finds that Dr. Smith's opinion does not fully account for the injury that the plaintiff has suffered. The Court has problems with the rating of Dr. Chung because it is based on a standing x-ray that does not show the patellofemoral area. Therefore, the Court adopts its own anatomical rating of 18% to the lower extremity for the hip and 14% to the lower extremity for the knee. This converts and combines to 29% impairment to the leg or 12% impairment to the body.

With respect to Employee's vocational impairment rating, the trial court found as follows:

> That the plaintiff is credible.
>
> That the plaintiff has returned to work following the injury. Therefore, the one and one half (11/2) times multipliers apply.
>
> That the plaintiff has sustained permanent partial disability of 18% to the body as a whole as a result of his injuries of February 22, 2013.

Analysis

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. See Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2013). 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). 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). For injuries occurring prior to July 1, 2014, the workers' compensation law "is remedial in nature and must be given a liberal and equitable construction in favor of the employee." Cantrell v. Carrier Corp., 193 S.W.3d 467, 472 (Tenn. 2006); Tenn. Code Ann. § 50-6-116 (2008).

Anatomical Impairment Rating

"It is well settled in Tennessee that a plaintiff in a worker's compensation suit has the burden of proving every element of the case by a preponderance of the evidence. In order to meet this burden, this Court has consistently held that causation and permanency of a work-related injury must be shown in most cases by expert medical evidence." Kilburn v. Granite State Ins. Co., 522 S.W.3d 384, 389 (Tenn. 2017) (internal quotations and citations omitted). In providing expert medical testimony necessary to meet these burdens with respect to the degree of anatomical impairment, the Workers' Compensation Law, as in effect at the relevant time, provided:

> (3)(A) To provide uniformity and fairness for all parties in determining the degree of anatomical impairment sustained by the employee, a physician, chiropractor or medical practitioner who is permitted to give expert testimony in a Tennessee court of law and who has provided medical treatment to an employee or who has examined or evaluated an employee seeking workers' compensation benefits shall utilize the applicable edition of the AMA Guides as established in § 50-6-102 or, in cases not covered by the AMA Guides, an impairment rating by any appropriate method used and accepted by the medical community.

Tenn. Code Ann. § 50-6-2014(d)(3)(A) (2012). Employer contends that the trial court improperly determined an anatomical impairment rating for Employee wholly independent of the ratings established by the competing expert medical testimony of Dr. Smith and Dr. Chung.

As noted, Dr. Chung performed an IME on Employee and assigned him anatomical impairment ratings of 22% to the lower right extremity for his right hip injury and 15% to the lower right extremity for his right knee injury, for a combined lower extremity rating of 34% and a whole body anatomical impairment rating of 13%. In contrast, Dr. Smith was Employee's authorized treating orthopedic surgeon and assigned Employee anatomical impairment ratings of 3% to the lower right extremity for his hip injury and 3% to the lower right extremity for his knee injury, for a combined anatomical impairment rating of 6% to the lower right extremity or 2% to the body as a whole. The trial court, however, "adopt[ed] its own anatomical rating of 18% to the lower extremity for the hip and 14% to the lower extremity for the knee. This converts and combines to 29% impairment to the leg or 12% impairment to the body."

The trial court's judgment reflects that the court took issue with the anatomical impairment ratings of both physicians. With respect to Dr. Smith's ratings, the trial court stated: "The difference in the knee ratings was that Dr. Smith based his rating solely on the meniscus surgery. Dr. Smith did not take into consideration the arthritis that had been aggravated by the fall …. The Court finds that Dr. Smith's opinion does not fully account for the injury that the plaintiff has suffered." With respect to Dr. Chung's ratings, the trial court stated: "The Court has problems with the rating of Dr. Chung because it is based on a standing x-ray that does not show the patellofemoral area." Both the meniscus surgery performed by Dr. Smith and the standing x-ray performed by Dr. Chung pertain solely to Employee's knee injury. The trial court's judgment, thus, specifically references only the difference in the ratings assigned by Dr. Smith and Dr. Chung based on Employee's knee injury. The trial court ultimately adopts its own anatomical impairment ratings for both the hip and the knee injuries, though, indicating that the court took issue with both physicians' ratings as to both injuries.

Employer argues that the trial court impermissibly determined its own anatomical impairment ratings without regard to the ratings of either testifying physician and that this violated the intent of Tenn. Code Ann. § 50-6-204(d)(3)(A). Employer cites the case of Kirby v. Memphis Jewish Nursing Home, No. W2010-02261-WC-R3-WC 2011 WL 12854976 (Tenn. Workers' Comp. App. Panel 2011), in support of its contention that a trial court may not independently assign an anatomical impairment rating not assigned by one of the testifying physicians. Our review of Kirby leads us to conclude that what a trial court may not do is apply the AMA Guides to the physical findings and diagnostic studies of the testifying physicians in order to independently arrive at an anatomical impairment rating. A trial court, however, may properly adopt an anatomical impairment rating which is a modification of a rating assigned by a testifying physician, as long as the evidence in

the record supports that modification. See Kirby, 2011 WL 12854976 at *5; see also Short v. Dietz, No. M1999-01460-WC-R3-CV 2001 WL 370317 *1 (Tenn. Workers' Comp. App. Panel 2001) (Panel affirms "the trial judge's right to determine an impairment rating somewhere between the highest and the lowest rating but not exactly the rating of any one doctor"); Johnson v. Pasminco Zinc, Inc., No. M2005-02309-WC-R3-CV 2007 WL 789522 *5 (Tenn. Workers' Comp. App. Panel 2007) ("The trial court has the discretion to modify the impairment ratings assigned by the testifying experts. The exercise of this discretion does not constitute an improper application of the AMA Guidelines by the trial court.")

In its judgment, the trial court provides no express explanation of how it arrived at its anatomical impairment ratings or how those ratings relate to the ratings assigned by either Dr. Smith or Dr. Chung. As a result, it is difficult to determine whether the court (a) independently applied the AMA Guides to the physical findings and diagnostic studies of one or the other of those physicians, or (b) modified the ratings assigned by one or the other of the physicians. Based on our review of the trial court's judgment as a whole, we conclude that the court modified the anatomical impairment ratings of Dr. Chung in arriving at the ratings which it ultimately adopted. As such, the trial court did not act improperly in adopting its own modified anatomical impairment ratings, unless the evidence in the record fails to support those ratings.

The question which remains, then, is whether the evidence in this record supports the modified anatomical impairment ratings adopted by the trial court. This dovetails into Employer's second issue regarding aggravation of Employee's pre-existing arthritic conditions in his right hip and right knee. Absent evidence of aggravation of the pre-existing arthritic conditions in Employee's right hip or his right knee as a result of his February 22, 2013 work-related fall, there is insufficient evidentiary support for the trial court's respective modified anatomical impairment ratings.

Aggravation

Employer contends that the trial court erred in finding that Employee's February 22, 2013 fall not only caused the labral tear in his hip and the meniscal tear in his knee, but also aggravated pre-existing arthritic conditions in both. Employer argues that the trial court erred in its assessment of the testimony of Drs. Smith and Chung with respect to the question of aggravation.

The injury, treatment, and MMI in this case all occurred between February 22, 2013 and June 13, 2014. The relevant version of the Workers' Compensation Law in effect

during that time period provided for a rebuttable presumption in favor of the authorized treating physician's causation opinion. Tenn. Code Ann. § 50-6-102(12)(A)(2)(2012) ("The opinion of the physician, selected by the employee from the employer's designated panel of physicians pursuant to §§ 50-6-204(a)(4)(A) or (a)(4)(B), shall be presumed correct on the issue of causation but said presumption shall be rebutted by a preponderance of the evidence.")[2] This presumption applies to medical opinions regarding aggravation. See, e.g., Thysavathdy v. Bridgestone Americas Tire Operations, No. M2017-01575-SC-R3-WC, 2018 WL 2937896 (Tenn. Workers' Comp. App. Panel 2018), (adopting as its own the decision of the Workers' Comp. App. Bd., No. 2014-05-0026, 2017 WL 2952939, at **6-7 (Tenn. Workers' Comp. App. Bd. July 6, 2017)). The question on this appeal, therefore, is whether the evidence in the record is sufficient to rebut the presumption afforded the opinions of Dr. Smith with respect to the absence of any aggravation of Employee's pre-existing arthritis in his right hip or right knee.

The Supreme Court has set out the framework to be used when compensation is sought for an alleged aggravation of a pre-existing condition, here Employee's arthritis. In Trosper v. Armstrong Wood Products, Inc., 273 S.W.3d 598, 607 (Tenn. 2008), the Court "reiterate[d] that the employee does not suffer a compensable injury where the work activity aggravates the pre-existing condition merely by increasing the pain. However, if the work injury advances the severity of the pre-existing condition, or if, as a result of the pre-existing condition, the employee suffers a new, distinct injury other than increased pain, then the work injury is compensable."

Employer contends that there is no expert medical evidence to support a finding of any aggravation of the pre-existing arthritis in Employee's right hip. Dr. Smith testified that only the labral repair to Employee's right hip was necessitated by Employee's February 22, 2013 fall. Dr. Smith further testified that the remaining procedures he performed on Employee's right hip were the result of chronic arthritic conditions. Dr. Chung offered no testimony regarding aggravation of arthritis in Employee's right hip and Dr. Chung's diagnosis did not include arthritis in the hip. Similarly, Dr. Chung's anatomical impairment rating for Employee's right hip did not include aggravation of arthritis.

We find the evidence in this record insufficient to rebut the presumption afforded

[2] Subsequent versions of the statute continued this rebuttable presumption. See Tenn. Code Ann. § 50-6-102(14)(E)(2017).

Dr. Smith's opinion with respect to the absence of aggravation of arthritis in Employee's right hip as a result of the February 22, 2013 fall. Accordingly, we conclude that the trial court erred in rejecting Dr. Smith's anatomical impairment rating of 3% to the lower right extremity and instead adopting its own modified anatomical impairment rating of 18% to the lower right extremity for Employee's right hip injury.

Employer likewise contends that the record is devoid of valid expert medical evidence to support a finding by the trial court of any aggravation of the pre-existing arthritis in Employee's right knee and the court's adoption of its own anatomical impairment rating on that basis. Dr. Smith testified that Employee's meniscal tear in his knee was the result of his fall at work on February 22, 2013, but that the remainder of his knee condition was the result of wear-and-tear arthritis. Dr. Smith further testified that "to me it looked chronic." He conceded, however, that he did not have pre-fall and post-fall x-rays to compare to determine whether there was, in fact, an aggravation of the pre-existing arthritis in Employee's right knee. In contrast, Dr. Chung testified that the February 22, 2013 fall resulted in an aggravation of Employee's pre-existing arthritic condition in his right knee. Employer is correct that Dr. Chung based his opinion as to aggravation of arthritis in Employee's right knee, in part, on an x-ray that apparently failed to visualize the relevant area and a measurement taken from that x-ray. The x-ray and resulting measurement, however, were not the only basis for Dr. Chung's finding of an aggravation of the pre-existing arthritis in Employee's right knee. Dr. Chung explained that in addition to the x-ray and resulting measurement, his finding of an aggravation of Employee's pre-existing arthritis in his right knee was based on "the whole history and then the subsequent surgery itself as well. And then the clinical symptoms he developed even afterward with an extensive rehab." Consistent with this, Employee testified that prior to his February 22, 2013 fall, he had experienced no problems with or treatment related to his right knee. Employee further testified regarding his pain in and treatment for his right knee prior and subsequent to Dr. Smith's surgery and continuing through the date of trial, and Dr. Chung's history reflects this as well.

We find the evidence in the record sufficient to rebut the presumption afforded Dr. Smith's opinion with respect to the aggravation of pre-existing arthritis in Employee's right knee. Accordingly, the trial court did not err in rejecting Dr. Smith's anatomical impairment rating of 3% to the lower right extremity and instead adopting its own modified anatomical impairment rating of 15% to the lower right extremity for Employee's right knee injury.

Conclusion

We conclude that Employee is entitled to an award of permanent partial disability benefits based upon anatomical impairment ratings of 3% to the right lower extremity for his right hip injury and 15% to the right lower extremity for his right knee injury, which combine for an anatomical impairment of 18% to the right lower extremity. Guides to the Evaluation of Permanent Impairment (Sixth Addition), Appendix A (Combined Value Chart). This converts to a whole body anatomical impairment of 7%. Guides to the Evaluation of Permanent Impairment (Sixth Addition), Table 16-10.

The judgment of the trial court is affirmed in part and reversed in part. The case is remanded to the trial court to modify the award of permanent partial disability benefits to one-and-one-half times the 7% rating and for any necessary further proceedings consistent with this opinion. Costs are taxed equally to Frederick Perry and Thyssenkrupp Elevator Corporation, for which execution may issue if necessary.

_____

KYLE C. ATKINS, JUDGE

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

FREDERICK PERRY v. THYSSENKRUPP ELEVATOR CORPORATION

Chancery Court for Hardeman County
No. 18764

No. W2019-01549-SC-R3-WC – Filed September 16, 2020

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 equally to Frederick Perry and Thyssenkrupp Elevator Corporation, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM